A STUDY OF LITIGATION RELATED TO MANAGEMENT OF FOREST SERVICE ADMINISTERED LANDS AND ITS EFFECT ON POLICY DECISIONS PART TWO: A COMPARISON OF FOUR CASES

Thesis for the Degree of Ph. D.
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ABSTRACT

A STUDY OF LITIGATION RELATED TO MANAGEMENT OF FOREST SERVICE ADMINISTERED LANDS AND ITS EFFECT ON POLICY DECISIONS

PART TWO: A COMPARISON OF FOUR CASES

By

Malcolm Rupert Cutler

This study was designed to determine if a connection existed between an absence of opportunities for public involvement in agency decision-making and the presence of litigation initiated by citizens' groups to obtain judicial review of agency decisions. In the four lawsuits studied, involving the Forest Service, U.S. Department of Agriculture, as defendant and private conservation organizations as plaintiffs, public involvement shortcomings were identified. The impact of this litigation on Forest Service projects and policies is described.

This litigation became possible because of the response of the federal court system to an aroused public interest in the preservation of environmental anemities. Federal courts have opened their doors to citizens' group plaintiffs seeking court orders to halt irreversible

alterations of biological communities and landscapes until more permanent protection of the threatened areas can be obtained through Acts of Congress.

A series of court decisions since 1965 have liberalized the law of standing and clarified opportunities for judicial review of administrative decisions. The impact of this almost-total demise of the standing and sovereign immunity defenses on federal land management and construction agencies has been to subject many administrative decisions on the part of the agencies' field officers to judicial scrutiny. In the cases studied, citizens' groups, alleging that particular administrative decisions constituted an abuse of discretion or an act beyond the officer's statutory authority, asked the courts to find forest officers guilty of a breach of duty under one or more specific federal statutes. The citizens' group plaintiffs were not always successful, but all cases represented delay, expense, and an inadequacy of administrative remedies.

Through the use of interviews and the study of transaction evidence, the histories of four conflicts which became the subjects of federal court hearings were reconstructed. One chapter is devoted to each of the four conflicts, which arose over Forest Service management decisions in regard to the Sylvania Recreation Area, Michigan; the East Meadow Creek drainage, Colorado; Mineral King Valley, California; and the Boundary Waters Canoe Area, Minnesota.

A chapter comparing the four cases is then provided which describes the differences and similarities between the cases and demonstrates that, although the legal bases for the suits differed somewhat, the conflicts had many characteristics in common: The plaintiffs represented wilderness users untrained in natural resources management; the Forest Service had several months' notice of the plaintiffs' intention to fight; the plaintiffs' requests for public hearings were denied; irreversible alterations of natural features were planned; and litigation was begun as a last resort.

The following changes in Forest Service procedures are recommended: personnel recruitment and in-service training directed toward excellence in multidisciplinary planning and improved two-way communication with clientele groups; involvement of representatives of all user groups early in the planning process; the use of independent hearing officers and semi-independent citizens' committees; the presentation of alternative plans for public comment; and provision of enough time for comment on proposed actions to enable citizens' groups to conduct thorough "adversary analyses." The conversion of the agency's Division of Information and Education to a Division of Public Information and Involvement is suggested.

Part One of the study, a detailed description of the Sylvania Recreation Area controversy, served as the author's M.S. thesis.[1]

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[1]Malcolm Rupert Cutler, "A Study of Litigation Related to Management of Forest Service Administered Lands and Its Effect on Policy Decisions--Part One: The Gandt v. Hardin Case" (unpublished M.S. thesis, Michigan State University, 1971).

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The enthusiasm of my academic advisor, Professor Milton H. Steinmueller, for the project provided much-appreciated encouragement. The helpful criticisms offered by my thesis advisor, Professor Leighton L. Leighty, were directed toward keeping the reporting and analysis objective and scholarly. Graphics Specialist J. Paul Schneider contributed the maps which brighten the text.

I am especially indebted to participants on both sides of the controversies here described for their complete cooperation, both in agreeing to be interviewed and in providing me with copies of relevant correspondence, internal memoranda, press clippings, and legal briefs and pleadings. These people include Ralph Kizer, former Forest Supervisor, Ottawa National Forest; Clayton B. Pierce, Multiple Use Coordinator, Rocky Mountain Region, Forest Service; and Peter J. Wyckoff, Mineral King Staff Specialist, Sequoia National Forest. They include E. J. Curtis and

Russell J. Mays, who head the Department of Agriculture Office of General Counsel's regional offices in Milwaukee and San Francisco. And on the plaintiff's side they include Dr. Jerome O. Gandt, Dr. Robert Ditton, and Fred Reiter of Green Bay; Denver area citizen group leaders H. Anthony Ruckel, Roger P. Hansen, and Clifton R. Merritt; J. Michael McCloskey and numerous other Sierra Club leaders in the San Francisco Bay area; and Raymond A. Haik of Minneapolis.

Henry W. DeBruin, former Director, Division of Information and Education, Forest Service, obtained Forest Service funding for this project. Dr. Howard A. Tanner, Director of Natural Resources, Michigan State University, provided both financial assistance and office space and equipment. My wife, Gladys, agreed to go back to work and accept a lower standard of living for three years to enable me to pursue graduate study. The help of these three people was indispensable to the initiation and completion of this research project.

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CHAPTER ONE

INTRODUCTION AND BACKGROUND

The Advent of Environmental Litigation

Private conservation organizations traditionally have sought remedies for environmental problems only through the legislative and executive branches of government. Their tax-exempt status notwithstanding, they have won adoption of many statutes authorizing new environmental-protection programs and appropriating funds for program implementation. They have met face to face with administrators at headquarters offices and in the field to encourage prompt translation of the statutes' words into action on the ground. Their powers of persuasion have wrought great change in the United States Code and the Code of Federal Regulations. In these areas of statutory law and administrative law, they can point with pride to much success.

But achieving change through law--utilizing the judicial branch of government--traditionally has not been attempted. Conservation organizations which tried to gain access to the courts to modify government agency projects usually were advised--because they could not show

individualized, economic injury--that they lacked "standing" as proper parties to obtain redress. And because such groups found it difficult to hurdle this threshold defense, trials on the merits of a natural resource-conservation issue were rare.

New ground was broken with the so-called Scenic Hudson decision in 1965. In this landmark opinion by a federal circuit court, which the Supreme Court declined to review,[1] an unincorporated association of local conservation organizations sought and obtained the temporary setting aside of licenses granted by the Federal Power Commission to the Consolidated Edison Company for the construction of a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. The circuit court ruled that the ad hoc Scenic Hudson Preservation Conference did have standing to sue:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under Section 313(b) [of the Federal Power Act]. We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.[2]

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[1] Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2nd Cir. 1965), cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

[2] 354 F.2d 608, at 616.

A series of cases since this decision--the "Sons of Scenic Hudson"[3]--have helped to clarify the once-fuzzy ground rules under which conservation group-plaintiffs can come into court and obtain judicial review of their sovereign's actions. The climax in this series of cases is Sierra Club v. Morton[4] in which the Supreme Court, in 1972, laid down an explicit test for standing that will be used by lower courts as their yardstick for some time to come. This test includes a requirement that the party seeking judicial review be able to show that he himself has suffered or will suffer injury, whether economic or otherwise.[5]

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[3]Including federal district court decisions (Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 [1967], Powelton Civic Home Owners Association v. HUD, 284 F.Supp. 809 [1968], Gandt v. Hardin [Civil Action No. 1334, U.S.D.C., W.D. Mich., Dec. 11, 1969], Walton v. St. Clair, 313 F.Supp. 1312 [1970]), appellate court decisions (Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 [1966], Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 [1967, cert.den. 88 S.Ct. 857, 1968], Utility Users League v. FPC, 394 F.2d 16 [1968], Norwalk Core v. Norwalk Development Agency, 395 F.2d 920 [1968], Parker v. U.S., 448 F.2d 793 [1971, cert. den. 92 S.Ct. 1252, 1972]), and U.S. Supreme Court decisions setting major precedents for the lower courts to follow (Abbott Laboratories v. Gardner, 387 U.S. 136 [1967], Flast v. Cohen, 392 U.S. 83 [1968], Jenkins v. McKiethen, 395 U.S. 411 [1969], Data Processing v. Camp, 397 U.S. 150 [1970], Barlow v. Collins, 397 U.S. 159 [1970], Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 [1971], and Sierra Club v. Morton, 92 S.Ct. 1361 [1972]).

[4]92 S.Ct. 1361, 405 U.S. 727 (1972). See Chapter Five, infra., for a discussion of this case.

[5]"Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that

Given these explicit requirements, counsel for conservation organization plaintiffs can draft their complaints accordingly and expect to win their "standing to sue" arguments with increasing frequency. This evolution of the standing concept seems to have reached the point where judicial review of an agency action will be provided by a federal district court at the request of a conservation organization-plaintiff if the plaintiff can show that denial of judicial review may result in injury to the special interests of certain of the organization's members, whether that injury is economic or not.

Not surprisingly, this liberalization of the standing rule has led to the filing of many legal actions in recent years by conservation organizations to try to resolve environmental disputes or at least win, through preliminary injunctions, time in which to seek more permanent political solutions.[6] Several of these actions have involved the Forest Service of the U.S. Department of Agriculture.

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particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Sierra Club v. Morton, 92 S.Ct. 1361, at 1366.

[6]See, James W. Moorman, Sierra Club Legal Defense Fund, Sierra Club Bulletin, Jan. 1972, p. 2: "Over seventy lawsuits to protect the environment have been brought by

The Problem

The use of the courts by wilderness-conservation organizations and other groups with specialized interests to contest Forest Service administrative decisions has upset the time schedules of Forest Service timber-management and recreational-development programs, delaying particular projects for substantial periods of time. Supervisory personnel of the Forest Service at national forest headquarters, regional office, and Washington office levels

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the Sierra Club in the past two years. Enough victories have been won to demonstrate that the law suit is a useful device to achieve conservation goals. . . . [But in] my opinion no law suit will, ultimately, win any conservation issue. Ultimate victory requires political victory. To win conservation fights it is necessary to use political action in one form or another. The law suit can win temporary victories, but in the long run the politicians will act on the basis of 'political realities' and the courts will not thwart their will. Law suits, of course, are very useful and often are decisive. The law suit can buy the time necessary to rally support. Secondly, the courtroom can provide a forum in which the facts can be obtained and aired in public. Third, a favorable decision often creates a major obstacle for our opponents by giving them the burden of having to obtain passage of a bill by Congress if they still want to prevail. A review of the [Sierra] Club's litigation, however, reveals that little that is conclusive has been won by law suits alone."

One example of the use of the preliminary injunction to win time for a political solution: Defenders of Florissant v. Park Land Co., No. C-1539, U.S. Dist. Ct., Colo. (1969). A restraining order from the U.S. Court of Appeals (Tenth Circuit) prevented the destruction of the Florissant fossil beds near Colorado Springs by a real estate developer until Congress could act to make the area a National Monument (Public Law 91-60, Aug. 20, 1969). See, Joseph L. Sax, Defending the Environment (New York: Knopf, 1971), pp. 206-208.

have been taken off regular duty assignments and "thrown into the breach" created by this litigation. Forest officers have spent thousands of man-days[7] assisting federal attorneys from the Department of Agriculture's Office of General Counsel and from the Justice Department in the preparation of the government's cases. And they have found themselves handling an increased volume of correspondence from concerned citizens stemming from the publicity generated by the litigation.

Most of these concerned citizens are members of one conservation group or another, and many of them are college-trained scientists or highly qualified professionals in other fields. They share a common determination to do something personally to help ameliorate the "environmental crisis." Politically sophisticated and relatively well-to-do as a group, the members of this activist core in the conservation organizations not only are willing to serve as field investigators, volunteer consultants, and expert witnesses at legislative and judicial hearings, but also seem to have no hesitation about encouraging the executive staffs of their organizations to take the government to

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[7] E.g., Ralph Kizer, Forest Supervisor, Ottawa National Forest, Ironwood, Mich., personal interview, East Lansing, Mich., Dec. 2, 1970: "I and my assistants worked until midnight for three weeks to assemble data on the [Gandt v. Hardin] case for U.S. Attorney Nelson Grubbe."

court, when an irreversible step of what they consider to be an environmentally degrading nature appears to demand it.

The Forest Service has not been singled out by conservationists for attack, but is only one of many public and private bureaucratic institutions being buffeted by the winds of change, represented by complaints filed in court to overcome agency and corporate reluctance to move in new directions in tune with changing public values.[8] Citizens' groups have found their use of the

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[8]See, H. Anthony Ruckel, "The Legal Dilemma of the Forest Service," The Case for a Blue Ribbon Commission on Timber Management in the National Forests (Denver: published jointly by the Rocky Mountain Chapter of the Sierra Club and the Western Regional Office of The Wilderness Society, n.d. [1970]), pp. 41-42: "[T]he Forest Service in recent years has increasingly exhibited an inability to . . . adapt its philosophy and policy [to the increasing use of the national forests as recreation areas] and an alarming reliance on tradition rather than innovation. . . . Forest Service failure to recognize and justly interpret recent laws of Congress governing Forest Service land management [the Multiple Use Act and the Wilderness Act] is a significant source of this condition; . . . this failure is rooted in the basic attitudes and policies of Forest Service land management; and . . . courts of law will increasingly delimit Service activities if it does not very soon adjust to the rapidly changing situation it faces. The philosophy and conduct of the Service remain in too great a degree based upon the . . . attitudes of the nineteenth century." See also, James E. Moorman, "A Brief Look at Environmental Causes of Action," The Practical Lawyer, Jan. 1972, reprinted at pp. E 3086-87 of the March 27, 1972, Congressional Record: "Importance of citizen suits. There are probably several reasons why this type of suit has been so prominent recently. In the first place, the common law causes of action have not been adequate. Second, suits under the new statutory causes of

courts--as well as traditional administrative remedies and just-as-traditional political pressure--not only possible, as a new source of countervailing power vis-a-vis the government, but they have found litigation to be in vogue, as a new source of publicity which helps to generate financial contributions and new members. Competition between conservation organizations for public recognition as "large," "powerful," and "vocal" is real. As a result, there are few environmental groups today without a legal defense fund or at least a legal committee.

The situation chosen for investigation here meets the minimal conditions for the existence of a problem amenable to problem-focused research: (1) The Chief and staff of the Forest Service--the decisionmakers in this instance--have found that the current flood of litigation has many of their people in court and is delaying the implementation of administrative decisions. This evidence of public dissatisfaction with the agency's decisions not only weakens its posture within the Federal "establishment"--it becomes more susceptible to budget-cuts and

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action have not yet ripened. Third, the Government has been slower lately than the citizen groups to attack environmental problems. . . ."

See also, John W. Giorgio, "Parklands and Federally Funded Highway Projects: The Impact of Conservation Society v. Texas," Environmental Affairs, Vol. 1, No. 4, March 1972, pp. 882-901.

reorganization schemes--but also contributes to frustration (and, perhaps, lowered morale) among Forest Service personnel. (2) An outcome (objective or goal) is desired by these decisionmakers, namely the reduction in the friction between the agency and its clientele groups, to hold such litigation to a minimum in the future. (This outcome also could be stated as "satisfied recreationists," "satisfied user groups," or "keeping the natives quiet.") An "early warning system" to identify and resolve conflicts before they escalate into litigation also might be sought. (3) These decisionmakers have two unequally efficient courses of action to choose from: they can hire more lawyers to handle more lawsuits, or they can change their hiring and public information practices to provide multi-value system planning and public involvement early in the decisionmaking process to reduce the user-group frustration which results in law suits. (4) Uncertainty can be imagined to exist as to which alternative course of action to take. (5) An environment, or context, of the problem exists, consisting of uncontrolled variables such as the actions of other decisionmakers, reactions or counter-reactions, previous commitments, and recreationists' preferences.

Objectives of the Study

Administrators of the National Forest System would like to know how best to cope with those expressions of

dissatisfaction with their decisions which emanate from their various clientele groups in order to avoid expensive and time-consuming administrative and judicial reviews. They would prefer to "get on with the job at hand." The question is: Can they formulate "administrative remedies" that will keep initially small disagreements from becoming large law suits?

The agency's theoretical objective, albeit an impossible one, is to keep all of its clientele groups happy all of the time. One of these groups consists of several million recreationist-users of national forest wilderness areas and other undeveloped back-country areas, whose organizations, typified by the Sierra Club, have been responsible for much of the recent litigation involving the Forest Service as defendant. User-group dissatisfaction cannot simply be ignored and fought in the courts; long-range political ramifications of such an attitude, ranging from budget-cuts to the implementation of reorganization schemes, argue against following this route.

The conservation groups who have sued the Forest Service share with the Service, to some extent at any rate, a distaste for this conflict-resolution route if only because litigation is so expensive. The groups' lawyers pursue these suits enthusiastically, but no conservation organization has the resources to take very many law suits to the appellate court level when each such suit may cost

the plaintiff-organization twenty or thirty thousand dollars for legal fees and related expenses.[9] And so it would be to the advantage of all concerned--the Forest Service, the conservation organizations, and the overburdened courts--to keep further litigation of the sort recently in the courts involving the Forest Service to a minimum in the future, given the provision of satisfactory administrative remedies.

At the heart of this investigation has been the detailed reconstruction, through the use of interviews and the study of documentary transaction evidence, of the histories of four Forest Service-conservation group conflicts which have been the subject of federal court hearings. The information thus obtained, plus information on public involvement and conflict-minimization procedures used elsewhere in society, was consolidated to serve as the basis of recommendations to the Forest Service regarding the manner in which it conducts business with its clientele groups.

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[9]Michael McCloskey, Executive Director, Sierra Club, private interview, San Francisco, Calif., Aug. 14, 1970. See, Richard M. Harnett, "Sierra Club Goes Defensive as Drop-Out Rate Soars," UPI, The State Journal, Lansing, Mich., July 18, 1972, p. A-8: "The Sierra Club, vanguard of the environmental boom, is now losing members and faces other new roadblocks. . . . Last summer the club was growing at the rate of 30 per cent a year. . . . By February, the growth rate had dropped to 8 per cent. . . . Staff was cut from 100 to 80. Several offices were closed and some projects cut back. . . ."

The report has been presented in two parts. The first segment, the in-depth investigation of a single case (the Gandt v. Hardin controversy over the management of the Sylvania Recreation Area in Michigan), was submitted as the author's M.S. thesis in 1971. This second segment contains the comparison and analysis of four cases and recommendations for action.

Review of Relevant Literature

The investigation combines the techniques of legal research with those of historical documentation, utilizing the investigative and descriptive style of a relatively new field known as sociology of law to demonstrate how the law really is administered. A census of the individuals (interviewing the responsible leadership) on both sides of each of the four cases was chosen as the most practical way to obtain the needed sociological data, and legal briefs and court opinions were analyzed and compared to arrive at a summary of the legal issues involved in each case--some legal issues being common to all four cases. The interviews and the transaction evidence (copies of exchanges of correspondence, newspaper clippings and so forth) shed revealing light on the discussions of the legal issues because, at least in certain instances, more such information has been made available to the investigator than was available to the courts at the time they

arrived at their decisions. In other words, on the basis of evidence not "in the record" and from the perspective of a "Monday morning quarterback," the investigator--and the reader--are afforded the luxury of second-guessing the federal judges and speculating "what if" certain evidence had been introduced, "what if" the sequence in which the cases were decided had been reversed, or "what if" the forest officers involved had "accorded a reasonable opportunity to be heard" to the plaintiffs-to-be.

Leading practitioners of this genre of investigation and reporting include Charles A. Reich,[10] Joseph L. Sax,[11] Victor J. Yannacone,[12] and Norman J. Landau and Paul D. Rheingold.[13] Other writers in the field, to provide only an incomplete list of an expanding group, are: Robert Broughton,[14] Bernie S. Cohen,[15] John

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[10] E.g., "The Public and the Nation's Forests," California Law Review, Vol. 50, No. 3, Aug. 1962, pp. 381-407; and, Bureaucracy and the Forests (Santa Barbara, Calif.: Center for the Study of Democratic Institutions, 1962).

[11] E.g., Defending the Environment: A Strategy for Citizen Action (New York: Alfred A. Knopf, 1971).

[12] E.g., "Sue the Bastards," Earth Day--The Beginning (New York: Bantam Books, Inc., 1970); and, "People Need Advocates," American Forests, April 1970, pp. 21-23, 59-62.

[13] The Environmental Law Handbook (New York: Ballantine, 1971).

[14] "Aesthetics and Environmental Law: Decisions and Values," Land and Water Law Review, Vol. VII, No. 2, 1972, pp. 451-500.

[15] "The Constitution, Public Trust Doctrine, and the Environment," Utah Law Review, June 1970.

Esposito,[16] Raymond A. Haik,[17] Eva H. Hanks,[18] Leighton L. Leighty,[19] Robert R. Lohrmann,[20] Michael McCloskey,[21] Frederick S. Richards,[22] Laurie R. Rockett,[23] James P. Rogers,[24] and David Sive.[25] Casebooks and conference proceedings on the subject of environmental law have been edited by Malcolm F. Baldwin and James K. Page,[26] Frank P. Grad,[27] and Oscar S. Gray.[28] And popularizers of the subject, whose articles describing the action have been

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[16]"What To Do While Waiting for Washington," Harvard Civil Rights and Civil Liberties Law Review, Jan. 1970.

[17]"The Law: Enforcing Quality," No Deposit--No Return (Reading, Mass.: Addison-Wesley Publishing Co., 1970).

[18]"Environmental Bill of Rights," Rutgers Law Review, June 1970; and, "The Right to a Habitable Environment," The Rights of Americans (New York: Pantheon Books [Random House], 1970).

[19]"Aesthetics as a Legal Basis for Environmental Control," Wayne Law Review, Vol. 17, No. 5, Nov.-Dec. 1971, pp. 1347-1396.

[20]"The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution," Wayne Law Review, XVI (Summer 1970), pp. 1085-1135.

[21]"A Bill of Environmental Rights," No Deposit--No Return (Reading, Mass.: Addison-Wesley, 1970).

[22]"Walton v. St. Clair: The Standing Question," Natural Resources Lawyer, Vol. IV, No. 1, Jan. 1971.

[23]"Environmental Litigation--Where the Action Is?", Natural Resources Journal, Vol. 10, No. 4, Oct. 1970, pp. 742-762.

published in mass-circulation magazines, include Russell D. Butcher,[29] Frederic R. Fisher,[30] Mike Frome,[31] John T. Keane,[32] and H. Byron Mock.[33]

The anthology, Law and the Behavioral Sciences, by Professors Lawrence Friedman and Stewart Macauley[34] provides excerpts from a number of studies in the area of sociology

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[24]"The Need for Meaningful Control in the Management of Federally Owned Timberlands," Land and Water Law Review, Vol. IV, No. 1, 1969, pp. 121-143; and, "Isaiahs at the Bar: Environmentalists and the Judicial Processes," Land and Water Law Review, Vol. VII, No. 1, 1972.

[25]"Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law," Columbia Law Review, Vol. 70, No. 4, Apr. 1970, pp. 612-651.

[26]Law and the Environment (New York: Walker Press, 1970).

[27]Environmental Law Sources and Problems (New York: Matthew Bender, 1970).

[28]Cases and Materials on Environmental Law (Washington: The Bureau of National Affairs, Inc., 1970).

[29]"Conservationists Go To Court," American Forests, June 1970, pp. 33-35, 55-57 (part one), and July 1971, pp. 32-35 (part two).

[30]"Environmental Law," Sierra Club Bulletin, Jan. 1971, pp. 24-29.

[31]"Mike Frome" (column), American Forests, Oct. 1970, pp. 3, 70-71: "The United States Forest Service is being sued from hell to breakfast these days. . . ."

[32]"Conservation Comes to Court," Journal of Forestry, Apr. 1971, pp. 206-209.

[33]"Forest Management and Litigation," Journal of Forestry, Apr. 1971, pp. 200-205.

[34](Indianapolis: The Bobbs-Merrill Company, 1969).

of law. The Bureau of National Affairs, Inc. (BNA) in Washington, D.C. publishes a law reporter (Environment Reporter) in the specialized field of environmental law. Law school journals provide a steady stream of current information on the procedural aspects of environmental litigation, while the house organs of the national conservation groups (particularly the Sierra Club's Bulletin and the American Forestry Association's American Forests) provide continuing coverage of the environmental law suit phenomenon from these groups' points of view. Congressional documents such as the hearings before the Subcommittee on Energy, Natural Resources, and the Environment of the Senate Committee on Commerce on S. 3575, "The Environmental Protection Act of 1970," the hearings before the Subcommittee on Fisheries and Wildlife of the House Committee on Merchant Marine and Fisheries on "Environmental Citizen Action" legislation, published in 1972, and insertions on this subject by Members of Congress in the Congressional Record[35] reveal the changing context of public opinion and awareness within which the field of environmental law is evolving and developing.

Books and journal articles on the subjects of public administration and the sociology of large formal

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[35]See Bibliography, infra., for citations.

organizations[36] and official documents and statements emanating from the offices of the Secretary of Agriculture and the Chief of the Forest Service are helpful in understanding, as well as keeping abreast of, changes within the Forest Service in response to what is happening in the courts. That the field of environmental law is in a state of flux and turmoil is indicated by this heated comment by James P. Rogers of Portland, Oregon, whose law firm represents forest products industry clients, in a recent issue of the Land and Water Law Review:

> It is [my] thesis . . . that the judicial processes, particularly of the federal courts, have been used and abused in the name of "ecology" or "environmental degredation" to the extent that those processes themselves, the national health and welfare, and the division of our government into legislative, executive, and judicial confines, are all in danger.[37]

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[36] See Bibliography, infra., for citations. See especially: Kaufman, The Forest Ranger: A Study in Administrative Behavior (Johns Hopkins, 1960); Frome, Whose Woods These Are: The Story of the National Forests (Doubleday, 1962); Reich, The Greening of America (Random House, 1970); Toffler, Future Shock (Random House, 1970); Woll, American Bureaucracy (Norton, 1963); Etzioni, Modern Organizations (Prentice Hall, 1964); Mosher, Democracy and the Public Service (Oxford, 1968); Blau and Scott, Formal Organizations (Chandler, 1962); Bennis, Changing Organizations (McGraw-Hill, 1966); and Rourke, Bureaucracy, Politics, and Public Policy (Little Brown, 1969).

[37] Rogers, "Isaiahs at the Bar: Environmentalists and the Judicial Process," Land and Water Law Review, Vol. VII, No. 1, 1972, at pp. 63-64. Concludes Rogers, at p. 72: "Allowing the environmental Isaiahs into the courtroom has simply opened a Pandora's box which only the Congress can now close, obviously." Cf., Moorman, at footnote 6, supra. Both believe important action lies ahead in the legislatures.

Definitions

In this thesis the terms "conservation group," "environmental group," and "citizen (or citizens') group" are used synonymously and interchangeably to refer to such private, not-for-profit, individual membership dues-financed organizations as the American Forestry Association, Defenders of Wildlife, Federation of Western Outdoor Clubs, Friends of the Earth, Izaak Walton League of America, National Audubon Society, National Parks Association, National Wildlife Federation, Sierra Club, Trout Unlimited, and The Wilderness Society, their state and local affiliates, and independent, local, ad hoc associations with similar objectives. The terms as used here are not intended to include either professional societies or organizations financed primarily by contributions from foundations or industrial corporations.

Repeated references are made to units of the federal court system, which Professor Green has described as having these characteristics:

> Article III of the Constitution vests the judicial power of the United States in "one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Under this grant of power Congress has created a simple three-deck hierarchy which, in the order of ascendancy, consists of the District Courts, the Courts of Appeals, and the Supreme Court. . . .
>
> Congress has divided [the United States] into districts and has established a District Court for each of them. It seemed desirable to follow state

> lines as far as possible; hence approximately half of the states are defined as federal districts with but one District Court. . . . However, some states are so populous and have such a volume of judicial business that one court could not handle it. In such cases the state has been divided into two, three, or even four districts with a corresponding number of District Courts. . . . [T]he District Courts are the only trial courts in the system. In the vast majority of cases, a trial in a District Court is presided over by a single judge. . . .
>
> The principal appellate courts in the federal system are the Courts of Appeals. There is one such court for each of eleven judicial circuits into which the country is divided. Each of the Courts of Appeals is the proper appellate tribunal to review the actions of the District Courts which are located within that circuit. . . .
>
> The highest court in the federal system is the Supreme Court. . . . Most of the work of the court is devoted to reviewing the action of lower courts in the federal system and the highest courts in the state systems. . . . In [most] cases, even though federal questions are involved, the Supreme Court may exercise its discretion in taking or rejecting the case. As a matter of practice, if four of the nine justices vote to take a case the Court will "grant certiorari" and the case will be set down for argument. . . .[38]

Readers unfamiliar with legal citations are referred to A Uniform System of Citations, a pocket-sized reference work reprinted at least annually and distributed by the Harvard Law Review Association, Gannett House, Cambridge, Massachusetts 02138. Standard abbreviations for case reports (series of books found in law libraries) include:

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[38]Milton D. Green, "The Business of the Trial Courts," The Courts, the Public, and the Law Explosion, Harry W. Jones, ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1965), pp. 9-11. See also, Henry J. Abraham, The Judicial Process (New York: Oxford University Press, 1962), pp. 142-153.

Federal Reporter, Second Series	F.2d
Federal Supplement	F.Supp.
Supreme Court Reporter	S. Ct.
United States Supreme Court Reports	U.S.

For matters of style not regulated by the above booklet, the recommendations of Kate L. Turabian[39] have been followed.

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[39] In A Manual for Writers of Term Papers, Theses, and Dissertations (Chicago: The University of Chicago Press, 1967).

CHAPTER TWO

PROJECT DESIGN

Preface

The investigator has had a strong personal interest in pursuing this study. As a graduate of a forestry-wildlife management undergraduate curriculum at the University of Michigan, as a former seasonal employee of the Forest Service, as a former state wildlife agency division chief, and as an agency consultant (to the Office of Environment and Urban Systems of the U.S. Department of Transportation and to the Michigan Department of Natural Resources), he is appreciative of the problems faced by government administrators in carrying out their statutory missions with efficiency and dispatch. As a former executive staff officer of both the National Wildlife Federation and The Wilderness Society and as an elected member of the executive committee of the Sierra Club's Mackinac Chapter, he knows the frustrations experienced by private citizen group leaders, both paid and volunteer, who seek to influence executive branch agency policies on behalf of the interests of their groups' members. So he has been closely associated with parties on both sides of the law suits studied.

Research Methods

The following four law suits and their backgrounds have been examined in detail:

1. Dr. Jerry Gandt v. Clifford Hardin, Civil Action No. 1334, U.S. District Court for the Western District of Michigan, Northern Division, December 11, 1969, unreported (application for injunction denied, complaint dismissed). (Sylvania Recreation Area development, Michigan.)

2. Robert W. Parker v. United States, Clifford Hardin, Civil Action No. 1368, U.S. District Court for the District of Colorado, 307 F.Supp. 685 (1969; motion for summary judgment denied), 309 F.Supp. 593 (1970; judgment for plaintiffs), 448 F.2d 793 (1971; affirmed by the U.S. Court of Appeals for the Tenth Circuit), 92 S.Ct. 1252 (1972; request for Supreme Court review [certiorari] denied). (East Meadow Creek timber sale near Gore Range-Eagles Nest Primitive Area, Colorado.)

3. Sierra Club v. Walter J. Hickel, Civil Action No. 51464, U.S. District Court for the Northern District of California, July 23, 1969, unreported (motion for preliminary injunction granted), 433 F.2d 24 (1970; order vacated and cause remanded with directions), 92 S.Ct. 1361 (1972; affirmed, that plaintiff lacked standing to maintain action). (Mineral King Valley resort development near Sequoia National Park, California.)

4. Izaak Walton League of America v. George W. St. Clair, Thomas Yawkey, Clifford Hardin, No. 5-69 Civ. 70, U.S. District Court for the District of Minnesota, 313 F.Supp. 1312 (1970; federal defendants' motion for dismissal denied). (Boundary Waters Canoe Area mineral exploration permit, Minnesota.)

The purpose of this study is to explore and document the following aspects of the above-mentioned cases:

(1) What were the legal bases for the suits?

(2) Do these bases conform to traditional legal approaches?

(3) Do these suits and other forms of conflict have any common denominators--in terms of the kinds of groups involved, the actions of the Forest Service, and the legal bases employed?

(4) Are the current approaches likely to have increased legitimacy in the future?

(5) What are the legal ramifications of these suits--the impact of law on society, and the impact of society on the law?

(6) Specifically, what is the possible extent of the impact that may be expected on Forest Service policies and programs?

(7) Were these law suits and other actions conceived as "last resort" efforts by the citizen groups who initiated them? What other courses of action--avenues of communication, conciliation or compromise with the Forest Service--were open to these groups? Were these avenues of communication used before the law suits were decided upon as a necessary course of action? Were adequate means of public involvement in Forest Service decisionmaking available and in use at the time these conflicts escalated? Have such means been adopted since that time? If not, what additional steps should be taken?

Analysis of the cases listed above has involved a combination of the traditional legal research techniques utilizing plaintiffs' and defendants' briefs and pleadings

and the court proceedings and opinions, plus data-gathering by means of interviewing primary participants and acquiring copies of written documents related to the cases. Each of the succeeding four chapters consists of a summary sketch of a particular case. Each chapter begins with a brief description and simplified map of the particular piece of federal landscape involved, to orient the reader geographically. The natural values at stake in each situation are listed, together with the possible alternative uses of the area from different points of view. An attempt is made to make explicit the tradeoffs implicit in each of the controversial projects. Answers to the questions enumerated above surface during the discussions of the legal issues, one by one, in each case, and are brought into sharper focus in Chapter Seven, a synthesis of the legal-issue discussions in each of the four case-history chapters. Because this report is simply a description, comparison, and analysis of case studies, the literary cognitive style, a verbal research model, and a nominal scale of measurement are used.

Conceptual Foundations

From the standpoint of a scientific investigation, neither legal research nor historical documentation appear to be regarded as bona fide applications of the scientific

method.[1] If a qualitative, verbal model suffices, however, we should be able to demonstrate the truth or falsity of this hypothesis: Increased public involvement in agency decisionmaking results in "better" decisions (based on more information available to the decisionmaker)--"better-ness" being related to societal goals.[2]

Elements of commonality will be shown to exist between a wide range of cases of broad applicability, effectively rebutting the view that no element of commonality exists and that each case is an abberation unique unto itself. Those conditions common to all four suits, which are likely to recur and lead to more law suits, will be identified, and solutions--e.g., manual and policy changes--to reduce the frequency of occurrence of these causal conditions will be suggested (see Chapter Eight, infra.). This is based on the assumption that the organization wants to provide goods and services that the general

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[1] According to Gordon Tullock, The Organization of Inquiry (Durham: Duke University Press: 1966), p. 59.

[2] "'Some' litigation results in better decisions" may be another way to view the situation; improved "multiple-use planning" appears to have been the result of litigation based on a requirement of the Multiple Use Act that "due consideration shall be given to the relative values of the various resources in particular areas." Title 16, U.S. Code, Sec. 529, emphasis added. "More public involvement results in less litigation" is another possibility; reduction of litigation is a prime maxim in the law, and perhaps "better" decisions will result in less litigation.

public wants, recognizing that basic conflicts between various clients of the agency exist.

It can be speculated that, of the three branches of government (executive, legislative, and judicial), at least one branch must be responsive to the public that is frustrated by lack of response from the other branches. Today, perhaps because the executive branch seems slow to respond to the public[3] and the legislative branch has not been creative enough, relying almost entirely upon the executive branch to draft its legislation, the public is turning to the courts for relief, where it can deal as an "equal" with the agency and require it to justify its actions.

Answers to these pertinent questions will be at least tentatively provided: Regarding the "law in action," are people complying with the "law"? What structures exist for the resolution of conflicts? What is the relevant formal law, the legal basis for the suit, the legitimacy of the approach? Did all the plaintiffs experience "exhaustion and frustration" before finally deciding to go to court? And where is the "crunch"--the impact of society on the law, the impact of the conservation groups on Forest Service policy (which is an informal part of the formal law)? Do we find ourselves today in a new social

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[3]See footnote 8, Chapter One, supra.

environment, where land-use decisions are no longer made unilaterally but where compromises are possible?[4] Can an analogy be drawn between the emerging acceptance of the public's "environmental rights"[5] and the acceptance by society a generation ago of the rights of labor to workmen's compensation and collective bargaining?

The concern with which the Forest Service views this litigation "problem" in general is indicated in part by the fact that it entered into a cooperative agreement with Michigan State University (Contract No. 12-11-009-22423, Supplement No. 20, dated March 23, 1970) through which it provided the funds for the investigator's travel and data-collection activities and legitimized his requests for special cooperation from Forest Service sources.

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[4]Compromises have their pitfalls. See, e.g., the Parker appellate court opinion, 448 F.2d 793, at 796: "The preservation of a 'bumper' area [between the primitive area boundary and the timber sale] does not probe the basic question presented, merely serves to lessen the impact of the agency action, and does not justify such action if otherwise prohibited."

[5]See, Henry M. Jackson, U.S. Senator, address before the Seattle King County Bar Association, Seattle, Wash., Apr. 8, 1969, p. 9: "The legal profession has a wonderful opportunity to become actively involved in the development of a body of law on man's 'environmental rights.'" See also, Michael McCloskey, "A Bill of Environmental Rights," No Deposit--No Return (Huey D. Johnson, ed.) (Reading, Mass.: Addison-Wesley Publishing Company, 1970), pp. 269-271; and, Eva H. Hanks, "Environmental Bill of Rights," Rutgers Law Review, June 1970.

Interviews in the Field

During the summer months of 1970, the investigator traveled to the following field locations to visit and photograph the areas in controversy, obtain relevant documents, and interview participants in the cases, making detailed and precise notes during all interviews:

Gandt v. Hardin:

Milwaukee, Wisconsin: Regional Forester; Director, Information and Education Division, Forest Service, Washington, D.C.; USDA Office of General Counsel Regional Attorney; Assistant Director, Recreation Division, Eastern Region, Forest Service; Assistant Director, Information and Education Division, Eastern Region, Forest Service.

Ironwood and Watersmeet, Michigan: Forest Supervisor, Ottawa National Forest; Deputy Forest Supervisor; District Ranger, Watersmeet District.

Green Bay, Wisconsin: Leaders of the Save Our Sylvania Action Committee including its Scientific Information Director, its Public Information Director, and its attorney.

Parker v. United States:

Denver, Colorado: Regional Forester and staff, including Multiple Use Coordinator; Executive Director, Rocky Mountain Center on Environment (former Executive

Director, Colorado Open Space Coordinating Council); Director of Field Services, The Wilderness Society; attorneys for the plaintiffs.

Sierra Club v. Hickel:

San Francisco, California: Director, Recreation Division, California Region, Forest Service; USDA Office of General Counsel Regional Attorney; Executive Director, Sierra Club; attorneys for the plaintiff.

Porterville, California: Forest Supervisor, Sequoia National Forest; Mineral King Staff Specialist, Sequoia National Forest.

Walton v. St. Clair:

Milwaukee, Wisconsin: see Gandt listing above.

Duluth, Minnesota: Recreation Staff Specialist, Superior National Forest.

Ely, Minnesota: Izaak Walton League of America Wilderness Consultant Sigurd F. Olson.

Minneapolis, Minnesota: plaintiff's attorney.

Legal documents filed with the courts in each of the four cases up to that time were obtained while in the field, also.

Research Approach Summarized

Assuming that science can include qualitative scales and that "untestable" systems exist in social

science, the scientific method has been applied to this study through the use of a plan which included:

(1) impartial gathering of data (regarding the variables in the system--area, organization, opportunities for public involvement, etc.) by observation of a system;

(2) making preliminary generalizations from the data by inductive reasoning;

(3) testing the validity of the generalization and the deductive conclusions that logically flow from the theory (by making more observations); and

(4) arriving at a verified hypothesis, or theory.

It is recognized that the usefulness of the interview is limited by two elements of subjectivity: the reports of the respondent or subject, and the reports made about the respondent by the interviewer or observer. Additionally, it is recognized that probing--"a secondary, spontaneous, purposeful, supplementary comment or question used to add to both the completeness and accuracy of response and to further the cooperation and motivation of the respondent"--creates a bias problem. Yet these are the only tools we have at hand to find out what is going on in this dynamic and important social area.

Kaplan's comment, "Careful observation and shrewd even if unformalized inference have by no means outlived

their day,"[6] is reassuring. Hopefully, the verbal model will explain the behavior of some aspects of the system, as an expression of the researcher's view of the system based upon his experience, his knowledge of past work, and the data which, through the assistance of many cooperators, have been made available to him.

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[6]Abraham Kaplan, The Conduct of Inquiry (San Francisco: Chandler Publishing Company, 1964), p. 283.

CHAPTER THREE

GANDT V. HARDIN[1]

The Sylvania Recreation Area

Location and Description

Since its purchase by the Federal Government from private owners for five-and-three-quarter million dollars in 1966, the 21,000-acre Sylvania Recreation Area at the west end of Michigan's Upper Peninsula has been administered as a special area within the Ottawa National Forest. Because it had been protected since 1902 as a private hunting and fishing preserve, Sylvania's old-growth northern hardwood-hemlock forest still shelters much of the region's native fauna including black bear, white-tailed deer, coyote, beaver, otter, mink, and successfully reproducing bald eagles. Over 4,000 of the area's 21,000 acres are water surface--water of extraordinarily high

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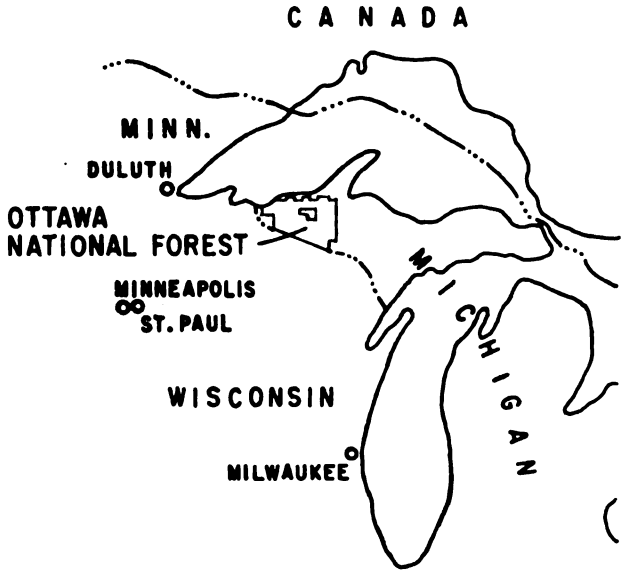
[1]For a more detailed account of this case, see: Malcolm Rupert Cutler, "A Study of Litigation Related to Management of Forest Service Administered Lands and Its Effect on Policy Decisions--Part One: The Gandt v. Hardin Case" (unpublished M.S. thesis, Michigan State University, 1971).



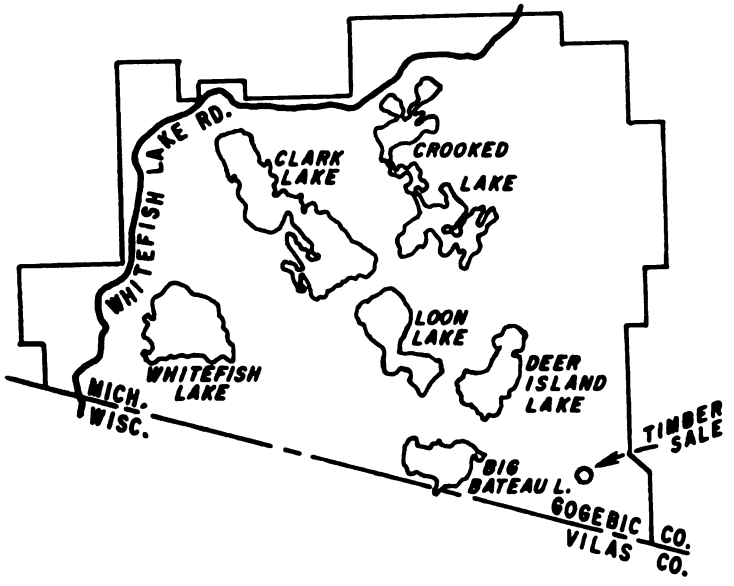


Figure 1. Sylvania Recreation Area, Michigan

quality, if cold and infertile--and trophy-sized gamefish inhabit its seventy undeveloped lakes and ponds.

The Forest Service has proceeded cautiously with development of the Sylvania tract. The interior of the area is less "civilized" now than it was a decade ago. All interior roads have been closed, and practically all of the Sylvania Club's lodges, guardhouses, docks and other structures have been dismantled and removed. In their place, on the shores of most of the major lakes, ninety water-access campsites have been provided. Every site includes a wooden table, an iron fire ring-cooking grill, and a cleared space for a tent. Each group of three sites shares a sealed-vault privy, set well back from the lakeshore and out of sight from the water. Developments of a more intensive type have been contained within a peripheral zone of about 1,000 yards from the area's exterior boundaries. Here, a new road, boat landings, a swimming beach and bathhouse, and an auto campground are to be constructed, and closely supervised selective logging will be permitted.[2]

A certain amount of development of the area was inevitable. The needed local political support for the

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[2]Ottawa National Forest press release, Sept. 6, 1969: "[O]nly 4% of the total land area of Sylvania is actually slated for development. . . . [O]f Sylvania's 66 miles of shoreline, about 1/2 mile--less than one percent --will actually be developed . . . for picnicking and swimming."

acquisition appropriation[3] would not have been forthcoming in the absence of Forest Service statements pledging management of the area to produce "sawtimber and veneer needed to sustain the local timber economy" and "tourists in great numbers" to create jobs in economically depressed Gogebic County.[4] However, after the area's acquisition, wilderness preservation groups asked that protection of its natural values be given high priority.[5]

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[3]Federal purchase of Sylvania, it was understood by the Forest Service, hinged on endorsement of the project by the county in which the purchase unit was located. Not only did the National Forest Reservation Commission require that the consent of the county board of supervisors be obtained before the Forest Service could negotiate to buy private lands, but Department of the Interior and Related Agencies Appropriations Acts had included specific language to the same effect. For example, the 1966 Act (P.L. 89-53, June 28, 1965, under "Administrative Provisions, Forest Service") stated: "Funds appropriated under this Act shall not be used for the acquisition of forest lands . . . without approval of the local government concerned." The Department of the Interior and Related Agencies Appropriation Act for 1967 (P.L. 89-435, May 31, 1966) did not include such language, however. The forest products industry, regionally, was opposed to Sylvania's acquisition by the Forest Service. See, Gordon R. Connor, "Wisconsin Industries' Forest Land Use Problems," Proceedings of the Governor's Conference on Forestry and Forest Recreation Land Use, Madison, Wis., May 13-14, 1965, at p. 48: "[I]t is an abuse of our democratic ideals for any agency of our federal government to be promoting the idea that everyone is better off with government ownership of the land. This attitude . . . was expounded by the Forest Service in a very expensive propaganda booklet recently published [with private funds] in their attempts to grab the Sylvania timber from private enterprise, in Michigan. . . . [The Forest Service] disregard[s] entirely the fact that under private ownership, the development of summer homes in the area would add at least 20 million dollars to the tax base of that community. . . . [T]here was never a public hearing held on the proposed acquisition [emphasis

Alternative Uses of the Area

The Forest Service's management strategy for Sylvania went through two visible stages. Prior to the area's purchase, and partially to fill the need for a document with which to convince the public and the Congress of the need for federal acquisition of the area, a preliminary study proposal was drawn up at the Ironwood, Michigan headquarters of the Ottawa Forest and published by the Regional Office in Milwaukee.[6] It suggested that a

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added]. Industry was given no opportunity to present its views prior to the movement of the government propaganda machine. . . ."

[4]See, Gogebic County Board of Supervisors resolution, June 15, 1966; U.S., Congress, Senate, Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, Hearings before a subcommittee of the Committee on Appropriations, Senate, on H.R. 6767, 89th Cong., 1st sess., 1965, p. 316; and U.S., Congress, House, Committee on Appropriations, Department of the Interior Appropriations for 1966, Hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 1st sess., 1965, pp. 1546-48.

[5]E.g., Mrs. Lyndon B. Johnson, "Sylvania Recreation Area," The Living Wilderness, Vol. 32, No. 101 (Spring 1968), footnote by Editor Michael Nadel, p. 3: "Hopefully, recreational development [in Sylvania] will be thoughtfully discriminate, and make possible a day-use type wilderness which could eventually enter the National Wilderness Preservation System." See also, "Policy on Sylvania Recreation Area," Conservation Committee, Mackinac (Michigan) Chapter, Sierra Club, Nov. 4, 1969.

[6]U.S., Department of Agriculture, Forest Service, A Study of Proposed Federal Purchase and Forest Service Management of the Lands and Waters of the Sylvania Tract located within Ottawa National Forest, Michigan (Waukesha, Wis. [Milwaukee]: Delzer Lithograph Company, 1964 [1965]).

multi-million-dollar intensive development program--trailer camp facilities for 2,000 families, a network of scenic roads, a commercial service center, a lakeshore amphitheatre, organization camps, and demonstrations of intensive forestry and wildlife management techniques--would be appropriate for this relatively undisturbed "north woods" tract. Post-acquisition studies by the agency's own scientists and by outside consultants indicated that the high qualify of Sylvania's waters and the regional significance of its almost-undisturbed mature forest ecosystem required sensitive management to retain their intrinsic value.

As a result, when the first official management plan for the area was adopted,[7] it provided that more than 10,000 acres in the interior of Sylvania would be left undisturbed except for the water-access campsites, where the modest facilities described above would be installed and where trees judged to be hazardous to campers would be felled and lakeshore landing points would be protected from erosion by the installation of "brow logs." Selective, over-the-snow logging, wildlife habitat improvements and other developments "compatible with the maintenance of the scenic and sylvan environment" still were to be permitted,

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[7]U.S., Department of Agriculture, Forest Service, Sylvania Recreation Area Management Plan, Ottawa National Forest (n.p. [Milwaukee]: 1968).

but only in the peripheral "general forest zone"--not in the area's extensive and administratively protected "botanical," "pioneer," "water-influence," or "travel-influence" zones.

The plan drew fire from two directions. Local government officials feared its preservation emphasis would not help their community's economy sufficiently to make up for lost property tax income. On the other hand, some wilderness conservationists in the region felt it called for too much development. It was applauded, however, by the State of Michigan's Commission on Natural Resources, by the Michigan and Wisconsin affiliates of the National Wildlife Federation, by influential members of Michigan's congressional delegation, and by other groups and individuals.[8]

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[8]E.g., Harold C. Nygren, Deputy Regional Forester, Milwaukee, draft press release dated Sept. 23, 1968 describing Sept. 20-21, 1968 ad hoc meeting on Sylvania, Houghton, Mich.: "With minor exceptions, those participating were in general agreement with the plan. Miss Genevieve Gillette, President of the Michigan Parks Association, . . . felt that more wilderness will be needed in the future. . . . C. A. Samuelson of Iron Mountain and Supervisor Frank Basso of Watersmeet Township . . . cautioned that the needs of the local government for an adequate tax base and the need of the local economy for payrolls cannot be ignored." P. J. Wipperman, Chairman, John Muir Chapter, Sierra Club, Middleton, Wis., letter to President Richard M. Nixon, March 27, 1969: "[We] hope that you will use your influence to insure that the pristine qualities of Sylvania will be preserved forever." Cf., Senator Philip A. Hart, in U.S., Congress, Senate, Committee on Appropriations, Department of the Interior and Related Agencies, Hearings before a subcommittee of

The Legal Issues

The Forest Service's 1968 management plan for the Sylvania Recreation Area was tested in court on December 9 and 10, 1969.[9] While the citizen group plaintiffs were granted standing to sue, the Honorable W. Wallace Kent, Chief Judge, U.S. District Court, Western District of Michigan, concluded after a day and a half of hearings in the Court's Northern Division courtroom at Marquette that the plaintiffs had been unable to show that the agency's actions, in adopting and implementing its Sylvania management plan, had been arbitrary or capricious.

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the Committee on Appropriations, Senate, 91st Cong., 1st sess., 1969, at p. 3179: "[I]n connection with the effort to persuade local communities to assist us in moving this land into the Forest Service, [I] gave my explicit assurance that it would not be treated as wilderness." "Resolution by the Commission on Natural Resources of the State of Michigan regarding the development of the Sylvania Recreation Area," March 12, 1970: "The Commission . . . hereby expresses its confidence in the management of the Sylvania Recreation Area by the [Forest] Service and, further, commends the Service for its excellent administration of the area." The Board of Directors of the Michigan United Conservation Clubs, Michigan's National Wildlife Federation affiliate, concurred in the Natural Resources Commission's resolution on April 12, 1970. News and Views, Wisconsin Wildlife Federation newsletter, Oct. 1969: "The new [Sylvania] plans are even better than the old ones and [the Wisconsin Wildlife Federation's Resources Committee] supports them wholly." Representative Philip E. Ruppe, Member of Congress from Michigan's Eleventh District, draft magazine article intended for publication in Michigan Out-of-Doors and mailed to the Michigan United Conservation Clubs on Dec. 31, 1969: "[The 1968 management plan provides] an excellent balance between the need to develop the tourist potential while at the same time protecting the natural scenic qualities of the area." Contrasting somewhat with the position of the Sierra Club's

The motion for a temporary restraining order filed for Green Bay dentist Jerry Gandt and his ad hoc Save Our Sylvania Action Committee (SOSAC) by DePere, Wisconsin attorneys Fred A. Reiter and Bernard U. Roels with the U.S. District Court at Kalamazoo, Michigan on November 12, 1969, sought to bring logging, road-building and "any other similar activity which would be destructive to the wilderness character of . . . Sylvania" to a halt. In response to Judge Kent's November 24 order to show cause

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John Muir (Wisconsin) Chapter, above, was the policy statement adopted by the Conservation Committee of the Club's Mackinac (Michigan) Chapter on Nov. 4, 1969: "[T]he Forest Service is, in general, to be commended for attempting to maintain the unique qualities of the Sylvania Tract. . . . However, planning for Sylvania should include a survey of areas such as those designated as Botanical and Pioneer Zones for possible designation under the Wilderness Act."

[9]"Dr. Jerry Gandt, 961 West Mason Street, Green Bay, Wisconsin; SOSAC, Inc., 961 West Mason Street, Green Bay, Wisconsin; Dr. B. C. Prentice, 704 7th Avenue West, Ashland, Wisconsin; Michigan Audubon Society, 7000 N. Westnedge, Kalamazoo, Michigan; Robert Francis Briskie, 1009 Vaughn Avenue, Ashland, Wisconsin; Mary Alice Briskie, 1009 Vaughn Avenue, Ashland, Wisconsin; Donald L. Hurt, 1117 Downer Drive, Green Bay, Wisconsin; Jack C. London, 436 Comstock Boulevard, N.E., Grand Rapids, Michigan; Wisconsin Resource Conservation Council, Box 707, Mellen, Wisconsin; Wisconsin Ecological Society, Inc., P.O. Box 514, Green Bay, Wisconsin; Donald G. Schimpff, P.O. Box 35, Powers Lake, Wisconsin; Wm. H. Magie, 3515 E. 4th Street, Deluth [sic], Minnesota; Dr. Thomas B. Mowbray, 1003 Cornelious Drive, Green Bay, Wisconsin; Dr. Ronald Starkey, 1405 Emilie Street, Green Bay, Wisconsin; Dr. Paul E. Seger, 2201 Hillside Lane, Green Bay, Wisconsin; Dr. Michael D. Morgan, 2249 Hillside Lane, Green Bay, Wisconsin; Richard J. Thorpe, 3460 Wescott Hills Drive, St. Paul, Minnesota; Dennis L. Bryan, 3779 Cornelius Court, Green Bay, Wisconsin; Dr. Dean W. O'Brien, 1434 Marhill

as to why such an injunction should not be issued, the federal defendants filed a brief contending that Dr. Gandt and SOSAC had no standing to sue, that the Forest Service was cloaked in sovereign immunity, that there was no chance that the plaintiffs would prevail "on the merits," and that the plaintiffs would suffer no damage if the injunction was not issued. Each legal issue is discussed separately below:

Standing to Sue[10]

In this case Judge Kent came to the conclusion that, "based upon the authorities which have been

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Road, Green Bay, Wisconsin; Robert W. Moody, 608 N. Barstow, Waukesha, Wisconsin; Dr. Robert Ditton, 1567 Deckner, Green Bay, Wisconsin; and Donald F. Quinn, P.O. Box 587, Escanaba, Michigan, Plaintiffs, vs. Clifford Hardin, individually and as Secretary of Agriculture of the United States; Edward P. Cliff, individually and as Chief, United States Forest Service; Ralph Kizer, individually and as Sueprvisor of Ottawa National Forest; Marsh Lefler, individually and as District Supervisor [sic] of Watersmeet, Michigan, District of Ottawa National Forest, Defendants. Cite as: Gandt v. Hardin, Civil Action No. 1334 (U.S. Dist. Ct., W.D. Mich., Dec. 11, 1969, Judge W. Wallace Kent).

[10]A definition of standing, from Kenneth Culp Davis, Administrative Law Text (St. Paul: West Publishing Co., 1959), sec. 22.01: "The five major questions about judicial review of administrative action are whether, when, for whom, how, and how much judicial review should be provided. The question of who may challenge administrative action--the third of the five major questions--is customarily discussed by courts in terms of 'standing' to challenge. The problem of standing merges with and often seems to overlap the problems of whether and when administrative action may be reviewed. For instance, when a

reviewed,[11] . . . these parties plaintiff have standing in this court."[12] The plaintiffs had described themselves, in their complaint, as interested parties of four kinds: (1) individuals "who reside within week-end commuting distance of Sylvania and who are interested in this action as individuals who frequent the area and who are vitally interested in the protection and perpetuation of its wilderness character for themselves and for the benefit of the public, both present and future"; (2) individuals who,

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party who challenges administrative action has better standing than any other party, a holding that the challenging party lacks standing is the equivalent of a holding of unreviewability. . . . The overlap of the problem of standing with the problem of when administrative action may be challenged--the problems of ripeness and of exhaustion of administrative remedies--is even more common. The same case often involves a single problem which is made up of elements of 'standing and ripeness'--elements involving both the qualifications of the plaintiff and the timing of the challenge. . . ."

[11]U.S. Constitution, Art. III, Sec. 2; Flast v. Cohen, 392 U.S. 83; Jenkins v. McKeithen, 395 U.S. 411; Utility Users League v. FPC, 394 F.2d 16, at 19; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, at 616; Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 661. Judge Kent quoted Judge McLean in Road Review League, a 1967 decision in the Southern District of New York, as saying "I have based my decision [as to the plaintiffs' standing] upon the implications, rather than the exact holding, of the recent decision of the Court of Appeals in Scenic Hudson. . . . The Administrative Procedure Act (5 U.S.C. sec. 702) entitles a person who is 'aggrieved by agency action within the meaning of a relevant statute' to obtain judicial review of that action. . . . I have concluded that these provisions are sufficient, under the principle of Scenic Hudson, to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests. I

in addition to reason (1), are interested because of "their special academic training and experience"; (3) individuals who, in addition to reason (1), are interested "due to their connection with various conservation groups" including the Michigan Division of the Izaak Walton League of America, Friends of the Wilderness, and the North Star (Minnesota) Chapter of the Sierra Club (but these organizations were not parties to the suit); and (4) plaintiffs "who are interested in this action because of their special interests, concerns and purposes as organizations" including SOSAC (Save Our Sylvania Action Committee), the Wisconsin Resource Conservation Council, the Michigan Audubon Society, and the Wisconsin Ecological Society. The plaintiffs' complaint asserted that the implementation of the Sylvania management plan constituted a violation of the "public interest"[13] and that the plaintiffs did have standing to represent that public interest.

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see no reason why the word 'aggrieved' should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act." Stated Judge Kent: "And we agree with Judge McLean in that respect." Gandt v. Hardin, Opinion of the Court, Dec. 11, 1969, pp. 18-19. See also, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Data Processing v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[12] Gandt v. Hardin, Opinion of the Court, p. 19.

[13] I.e., the public interest in wilderness preservation, one of many "public interests" served by the administration of the national forests for "many uses."

The brief which may have saved the "standing" issue for the Gandt plaintiffs consisted of a twenty-nine-page document in support of plaintiffs' motion for injunction. Filed with the court on December 2, 1969, by Kalamazoo, Michigan attorney Michael O'H. Barron, this exhaustive exploration of the concept of standing had been drafted by Denver, Colorado attorney H. Anthony Ruckel for use by the plaintiffs (as their June 12, 1969 memorandum brief in opposition to defendants' motions to dismiss) in the somewhat similar Colorado case of Parker v. U.S.[14] which, while initiated earlier than Gandt, was not decided at the trial court level until after the Michigan case. The Parker brief by Ruckel, amended to fit the Gandt situation, brought to the court's attention six recent law review articles on the matter of standing[15] and then

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[14] 309 F.Supp. 593 (1970) (judgment for plaintiffs), 448 F.2d 793 (1971) (affirmed), 92 S.Ct. 1252 (1972) (cert. denied). This case is discussed in detail in Chapter Four, infra.

[15] "Rogers, 'The Need for Meaningful Control in the Management of Federally Owned Timberlands,' 4 Land and Water Law Review 121 (1969); Jaffe, 'The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,' 116 University of Pennsylvania Law Review 1033 (1968) . . . ; Reich, 'The Law of the Planned Society,' 75 Yale Law Journal 1227 (1966); and Comment, 'The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier,' 41 Colorado Law Review 96 (1969). Two articles by Professor Jaffe, 'Standing to Secure Judicial Review: Public Actions,' 75 Harvard Law Review 1265 (1961), and 'Standing to Secure Judicial Review: Private Actions,' 75 Harvard Law Review 255 (1961), have had a great effect on many of the decisions discussed in the following pages."

traced the historical evolution of the concept from two standpoints. It dealt first with the identification of complainants who have standing[16] and then with "the 'nexus' [or link] between the status asserted by the complainants and the claim sought to be adjudicated"--the machinery which enables the plaintiffs to seek judicial review. In this case, that "machinery," plaintiffs asserted, was Section 10 of the Administrative Procedure Act (APA).[17]

Noting that sovereign immunity is waived in suits where the APA applies,[18] Ruckel then cited two recent

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[16]Citing Flast v. Cohen, 392 U.S. 83 (1968); Poe v. Ullman, 367 U.S. 497 (1961); the "demise" of Frothingham v. Mellon, 262 U.S. 447 (1923) by later cases including Flast, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965), cert. denied, 384 U.S. 941 (1966); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (1966); and Nashville I-40 Steering Committee, 387 F.2d 179 (1967), cert. denied, 88 S.Ct. 857 (1968).

[17]Title 5, U.S. Code, Section 701 ff., esp. 702 and 704. Sec. 702: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Sec. 704: "Agency action made reviewable by statute and final agency action for which there is no other remedy in a court are subject to judicial review."

[18]"Estrada v. Brown [Freeman v. Brown], 342 F.2d 205 (5th Cir. 1965), is authority for the application of the APA to the Department of Agriculture and its divisions." In this class action against the Secretary of Agriculture for refusal to treat a certain kind of tobacco as a separate kind of tobacco in arriving at marketing quotas on which acreage allotments were based, the appellate panel concluded that "judicial review of the Secretary's determination not to treat Type 14 as a separate kind of tobacco is not precluded by statute, nor is the determination committed by law to the Secretary's unfettered discretion. Furthermore, the decision of the Secretary constituted

decisions--Norwalk Core and Road Review League[19]--to underscore the point that persons "aggrieved by agency action within the meaning of a relevant statute" are entitled to obtain judicial review of that action even though there were no review provisions in the particular statutes concerned. One "particular statute concerned" in this case, he indicated, was the Multiple Use-Sustained Yield Act of 1960.[20] The legislative history of this statute includes a letter of Acting Secretary of Agriculture E. L. Peterson, dated February 5, 1960,[21] which "shows a Congressional intent to protect and sustain the interests of recreation and recreationalists, thus [Ruckel observed] the present case falls squarely within the Norwalk Core holding." He cited the 1968 Powelton opinion[22] which "gives standing under the APA, notes the strong

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final agency action for which there is no other adequate remedy in any court. See 5 U.S.C.A., Sec. 1009(c). We therefore hold that the District Court had jurisdiction to review the action of the Secretary under the Administrative Procedure Act." 342 F.2d 205, at 212-213.

[19] Norwalk Core v. Norwalk Development Agency, 395 F.2d 920 (1968); Road Review League, Town of Bedford, et al. v. Boyd, 270 F.Supp. 650 (1967).

[20] 16 U.S.C. 528-531.

[21] 1960 U.S. Code Congressional and Administrative News 2379, at 2381: "Many millions of people seek the national forests each year for rest, relaxation, and spiritual uplift. Recreationwise, the national forests are increasing in importance because of more leisure time, greater mobility of the average family, increased accessibility of the national forests, and the relatively low

presumption in favor of judicial review under the APA, pursuant to Abbott Laboratories,[23] and finally strikes a new path allowing 'private attorneys general' actions per se." Ruckel's review of the standing concept in both the Gandt and Parker briefs concludes:

> Sec. 10 of the APA begins by stating . . . "Except so far as (a) [s]tatutes preclude judicial review . . . ," judicial review should be allowed. Abbott Laboratories follows this, stating "a survey of our cases shows that judicial review of a final action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140. No such persuasive intent can be found in the case at bar.

The government's memorandum of points and authorities in opporition to a preliminary injunction, filed by Justice Department attorney Nelson H. Grubbe, contended that Dr. Gandt et al. should not be allowed to bring their case into court because "[n]one of the plaintiffs have a property or economic interest in the management of the national forests":

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cost of a national forest vacation. . . . The draft bill, if enacted, would be major legislation insofar as the objectives and purposes of the national forests are concerned. The bill would do the following significant things: . . . (3) Authorize cooperation with other groups in national forest development."

[22] Powelton Civic Home Owners' Association v. Department of Housing and Urban Development, 284 F.Supp. 809 (E.D. Pa., 1968).

[23] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), at 140-141.

> The plaintiffs . . . have only a general interest in the management of the national forest, which interest is no different than the interest of the general public. This is not a sufficient "legally protected interest" to support an injunction against the federal defendants.

The government cited a pair of opinions--Perkins v. Lukins Steel Co. (1939) and Jenkins v. McKeithen (1969) --to reinforce its position that "[t]he plaintiffs' interest in the conservation and preservation of the natural resources located on the national forests is not 'legally protected.'"[24]

Who, in fact, were the Gandt plaintiffs? The "Number One and apparently principal plaintiff," as Judge Kent described him,[25] was Dr. Jerome O. Gandt, a Green Bay, Wisconsin dentist. Dr. Gandt's lengthy court hearing testimony[26] indicated that he had visited Sylvania

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[24]"In the case of Perkins v. Lukins Steel Co., 310 U.S. 113 (1939), the plaintiffs, a group of steel companies, sought to enjoin the Secretary of Labor from enforcing the maximum wage law (49 Stat. 2036). The court held: "We are of the opinion that no legal rights of respondents (plaintiffs) were shown to have been invaded or threatened * * *. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public interest in the administration of the law. [Page 125.]" In the recent case of Jenkins v. McKeithen, 395 U.S. 411 (1969), the court again noted the requirement for standing: "We hold that appellants' (plaintiffs) complaint contains sufficient allegations of direct and substantial injury to his own legally protected interests to accord him standing to challenge the constitutionality of act No. 2. [Page 425.]"

[25]At page 23 of the Dec. 11, 1969 Opinion of the Court.

[26]Gandt v. Hardin, Transcript of Proceedings, Dec. 9-10, 1969, pp. 9-82.

frequently since its purchase by the Forest Service; that he was opposed to timber sales, road construction, trailer campgrounds and any other use of the area incompatible with the preservation of the entire Recreation Area as wilderness; and that, at least from an economic standpoint, he had no "special interest" in Sylvania. His first communication in connection with this issue had been directed to Secretary of Agriculture Clifford Hardin on February 27, 1969; he had accused the government of "basic dishonesty" because it was in the process of altering the wilderness qualities of Sylvania which it had "promise[d] to safeguard."[27]

The organization called SOSAC was Jerry Gandt's brainchild. He and a few of his friends formed this ad hoc

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[27]See also, Dr. Jerome O. Gandt, personal letter to U.S. Senator Gaylord Nelson, March 29, 1969: "When Sylvania was put up for sale, I was in correspondence with a private group which sought to exploit this area. I thereupon supported the government's purchase based on the statement that the wilderness aspects would be carefully evaluated and preserved." Dr. Gandt may have been misled by Forest Service and Forest Service-cooperator statements and publications issued prior to public acquisition of Sylvania which, in a rather ambiguous way, extolled the "wilderness atmosphere" of Sylvania (Forest Service, Study of Proposed Federal Purchase of Sylvania, p. 38) while recommending development of part of the tract. (See also, Sylvania [Ann Arbor: University of Michigan, School of Natural Resources, in cooperation with the Forest Service, 1965]: "Sylvania is unique. There is no area like it nor will there be, giving in one compact area a vignette of virgin northwoods and primitive lakes. . . .") Dr. Gandt's March 29, 1969 letter places the date of the initiation of his personal efforts to preserve Sylvania's natural values as prior to the date of the area's acquisition by the Forest Service.

citizens' committee in July 1969. It was not incorporated until a few days before the December 1969 court hearing.[28]

Dr. B. Culver Prentice, an Ashland, Wisconsin physician and a member of the Northern Great Lakes Resource Development Committee, had been a dissatisfied participant in the September 1968 ad hoc meeting arranged by the Forest Service to determine public reaction to its draft Sylvania management plan. His adverse reaction to portions of the plan had been filed with Regional Forester George James in Milwaukee, Wisconsin on September 30, 1968.

The balance of the co-plaintiffs in the Gandt case --among them, several scientists from the faculty of the University of Wisconsin at Green Bay--joined the action "out of curiosity"[29] and in response to Dr. Gandt's persuasive appeals. Few of the individual plaintiffs other than Gandt and Prentice were personally very familiar with the area.

If a law suit to enjoin road-building and logging in Sylvania was going to be filed, only an ad hoc group from outside the immediate area, such as SOSAC, was going to do it. As noted earlier, nationally affiliated

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[28] SOSAC attorney Fred Reiter, personal interview, Green Bay, Wis., July 28, 1970.

[29] Dr. Robert Ditton, Assistant Professor of Leisure Sciences, University of Wisconsin at Green Bay, personal interview, Green Bay, Wis., July 21, 1970.

conservation associations in the region either approved of the agency's multiple-use-type plan[30] or felt they could win modification of it in some way short of litigation.[31] By contrast, potential "local" plaintiffs were people who would like to have sued the Forest Service for failing to proceed with intensive development to produce large volumes of timber and tourists.[32]

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[30]The position of the Michigan United Conservation Clubs was influenced by, among other things, these facts: its Executive Director, James L. Rouman, was a native of Escanaba, Michigan and in favor of "recreational development in the western Upper Peninsula" (Rouman, letter to the Michigan congressional delegation, Apr. 30, 1970); Dr. Paul A. Herbert, former Professor of Forestry at Michigan State University and an MUCC consultant, was "positive in my own mind that the interests of an extremely small segment of the people of the area, region, and the United States would benefit from the proposed use [of Sylvania] by [SOSAC]" (Herbert, memorandum to Rouman, Sept. 22, 1969); and MUCC's Upper Peninsula member clubs shared Gogebic County's interest in regional economic development.

[31]The Sierra Club's position, as far as its Mackinac [Michigan] Chapter was concerned, was influenced by "the political situation"; the Chapter was "walking a tightrope" with Upper Peninsula Congressman Philip E. Ruppe, seeking his support for several park and wilderness bills and therefore wishing to avoid offending his constituents over Sylvania. Chapter Conservation Committee Chairman Douglas W. Scott's statement to the club's Apr. 19, 1969 Midwest Regional Conservation Conference stipulated: ". . . From a practical point of view, pressures for immediate wilderness designation of Sylvania or portions of the tract must carefully be evaluated. A number of very important and timely conservation issues face us in Michigan's Upper Peninsula--including pending development plans for the Pictured Rocks National Lakeshore and wilderness designation plans for four areas including Isle Royale National Park. The U.P.'s representative is now a member of the key House Committee on Interior and Insular Affairs. . . . [A]n aggressive campaign for wilderness designation of Sylvania at this time would place him in a

The Gandt plaintiffs would appear to meet the liberal Road Review League test for standing: "[C]onservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests." This was a district judge's interpretation of the implications of Scenic Hudson. However, Judge Kent's uncritical assessment of the Gandt plaintiffs' stake in the Sylvania controversy contrasts with tests suggested by more recent decisions in similar cases including Walton v. St. Clair and Sierra Club v. Morton. In Walton, Judge Neville observed that plaintiff Izaak Walton League

> . . . is not a "johnny-come-lately" or ad hoc organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an "aesthetic, conservational and recreational" interest to protect. This gives it standing and meets the second requirement of Association of Data Processing.[33]

SOSAC, unlike the IWLA with its long history of activity in conservation matters, was in fact a "johnny-come-lately," an ad hoc organization. Because of its ad hoc

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very difficult position and jeopardize our long-term interests. . . . [T]he political situation involved, which also directly affects other Upper Peninsula projects as well as Apostle Islands and Sleeping Bear Dunes [National Lakeshore bills before Congress], argues persuasively for caution and circumspection now."

[32]According to Andrew Bednar, Gogebic County Extension Director, personal interview, East Lansing, Mich., Oct. 28, 1970.

[33]313 F.Supp. 1312 (1970), at 1317.

nature and its limited financial base,[34] SOSAC could not afford to arrange for the taking of depositions, the employment of expert witnesses, and so forth, and was only marginally able to present its case in "an adversary context."[35] And neither the plaintiffs' briefs nor the testimony of the Gandt plaintiffs in court clearly alleged "individualized injury" as required by a majority of the Supreme Court in the 1972 Sierra Club v. Morton decision:

> The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any [way] that would be significantly affected by the proposed action of the respondents [Forest Service].
>
> The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public." This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.[36]

Then the Supreme Court opinion delivered by Justice Stewart moved to a discussion which appears to be directly applicable to SOSAC-type plaintiffs:

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[34] Dr. Gandt's personal savings and contributions to SOSAC.

[35] Data Processing, 90 S.Ct. at 829.

[36] 92 S.Ct. 1361, at 1366-1367.

> [A] mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. . . . [I]f a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why an individual citizen with the same bona fide special interest would not also be entitled to do so.[37]

It seems likely that the majority of the members of the U.S. Supreme Court would reverse Judge Kent's decision regarding the standing of the Gandt plaintiffs, despite Justice Douglas' dissent in Sierra Club v. Morton. Douglas, a well-known wilderness-preservation advocate, maintained in this dissent that

> [t]he critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.[38]

But we will never know for sure, because the trial court decision was not appealed; the Gandt plaintiffs could not afford to appeal.

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[37] Ibid., at 1368.

[38] Ibid., at 1369.

Waiver of Sovereign Immunity and Authorization of Judicial Review

Judge Kent found that, "in view of the fact that the [Multiple Use-Sustained Yield] Act is mandatory instead of permissive, it seems clear to this Court that the Secretary [of Agriculture]'s actions, when they seem to be in contravention of the Act, are subject to judicial review. . . ."[39] The Gandt plaintiffs' pleadings had alleged that the federal defendants had acted without authority, unreasonably, in an arbitrary and capricious manner, and without sufficient study in preparing and implementing the Sylvania management plan in violation of

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[39]Opinion of the Court, p. 12. Judge Kent arrived at this conclusion by these steps: (1) this suit in reality is against the government of the United States; (2) there is no specific waiver of sovereign immunity in the Multiple Use-Sustained Yield Act; (3) the plaintiffs rely upon Section 10 of the Administrative Procedure Act, the "statutory provisions [of which] demonstrate . . . the desire on the part of the Congress to make final agency action reviewable in the federal courts unless otherwise provided" (see Abbott Industries v. Gardner, 387 U.S. 136, at 141); (4) the question of when agency action is committed to agency discretion by law is discussed in Knight Newspapers, Inc. v. U.S., 395 F.2d 353 (1968) "where it is said at Page 358: 'A court may not review a decision committed to the discretion of an agency pursuant to a permissive type statute, but may do so where the decision was made pursuant to a mandatory type statute, even though the latter decision involves some degree of discretion'" (see also, Freeman v. Brown, 342 F.2d 205 [1965]); (5) portions of the Multiple Use Act indicate that Congress intended to make certain actions on the part of the Secretary of Agriculture mandatory in determining proper management of national forests.

the Multiple Use-Sustained Yield Act.[40] Plaintiffs again cited Powelton, which in turn quoted a Senate document entitled Administrative Procedure in Government Agencies[41] as stipulating:

> While the Government enjoys sovereign immunity from suit, its officers do not share in that immunity. They are answerable, as private individuals, for wrongs committed even in the course of their official work. . . . To be sure, the officer may justify his conduct by referring to the law under which he is acting, but that raises precisely the issue whether the law does indeed authorize his conduct under the circumstances--the typical issue for judicial determination.

The Gandt plaintiffs described their position as paralleling that of the Powelton plaintiffs, who alleged

> that the Secretary, in granting federal funds to the project before giving the plaintiffs the procedural relief requested, has failed to comply with the implicit procedural requirements of the Housing Act and has thus exceeded the scope of his authority. . . . The doctrine of sovereign immunity is simply not applicable to this kind of law suit.

The procedural requirements mentioned in Powelton (in Gandt, under the Multiple Use-Sustained Yield Act and the Wilderness Act which require studies and weighing of

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[40] 16 U.S.C. 528 ff. Plaintiffs also maintained, in their complaint, that the Forest Service had violated the Wilderness Act of 1964, 16 U.S.C. 1131 ff. Later, they maintained that the agency also had violated the Endangered Species Act, 16 U.S.C. 668. Claims under the Wilderness Act and the Endangered Species Act were dropped during the court hearing.

[41] S. Doc. No. 8, 77th Cong., 1st sess. (1941), pp. 80-82.

relative values) formed the basis of the Gandt plaintiffs' complaint. The Gandt plaintiffs then quoted Larson v. Domestic and Foreign Commerce Corp.[42] for support:

> [W]here the officer's powers are limited by statute, his actions beyond these limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief.

The legislative histories of the Multiple Use-Sustained Yield and Wilderness Acts,[43] the Gandt plaintiffs contended, "clearly indicate the mandatory nature of the duties of the administrators involved":

> It is manifest that the studies and positive weighing of relative values required by these acts are essential to the realization of the Congressional purpose behind their enactment. It is the law that provisions relating to the essence of the things to be done, that is, to matters of substance, are mandatory.[44] Plaintiffs' case is reinforced by the frequent use of the word "shall" in the statutes which is ordinarily construed as mandatory, operating to impose a duty which may be enforced.[45]

Concluded the Gandt plaintiffs on the matter of judicial review:

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[42] 337 U.S. 682, at 689 (1949). See also, Harmon v. Brucker, 355 U.S. 579; Dugan v. Rank, 372 U.S. 609.

[43] 1960 U.S. Code Cong. and Adm. News 2379, 1964 U.S. Code Cong. and Admin. News 3615.

[44] John C. Winston Co. v. Vaughan, 11 F.Supp. 954, aff., Vaughan v. John C. Winston Co., 83 F.2d 370 (1936).

[45] See, Escoe v. Zerbst, 295 U.S. 490 (1935).

> We seek the consideration, study, and weighing of the relative values of recreation and wilderness. We argue that these "procedural" steps, if you will, must be taken prior to the sale of timber, cutting of roads, and further implementation of the Management Plan. The discretion of the Forest Service may then be exercised. We believe that this is the type of relief this Court can justifiably grant in this case; it can require Defendants United States and its officials to collect and reveal the full record, the necessary studies and judgments, which in the last analysis is the only relief assuring consideration of Plaintiffs' valid interests in this case.[46]

The federal defendants had cited Larson in their defense, too, comparing the Larson plaintiffs' attempt to enjoin the Administrator of the War Assets Administration from selling certain coal to anyone other than the plaintiff with the Gandt plaintiffs' "seek[ing] to enjoin the selling and delivery of trees that are the property of the United States."[47] Basically, the defendants contended that Congress had delegated the management of the National Forests to the Secretary of Agriculture and had left the method of management and development of any particular area to the discretion of the Secretary, with judicial

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[46]Brief in Support of Plaintiffs' Motion for Injunction, Dec. 2, 1969, p. 29.

[47]"The Government, as representatives of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." Larson v. Domestic and Foreign Corp., 337 U.S. at 704. Also cited by the government in this connection: Dugan v. Rank, 372 U.S. 609 (1963), and Malone v. Bowdoin, 369 U.S. 643 (1962).

review of his actions sharply restricted.[48] Judge Kent disagreed; sovereign immunity was ruled an unsuccessful defense.

Exhaustion of Administrative Remedies and the Timeliness of the Filing of Plaintiffs' Action

The attorneys for the Gandt plaintiffs successfully negotiated their frail case past the hazards of "no standing" and "sovereign immunity" only to see it founder because of a legal technicality called "laches." Judge Kent observed that the plaintiffs were "in rather dire shape" with respect to the timeliness of the filing of their action, and concluded, on this legal issue, that

> if there ever was anybody who was guilty of laches, it was the plaintiffs in this case, and particularly the Number One and apparently principal plaintiff, Dr. Jerry Gandt. He had a copy of [the 1968 management plan] almost as soon as it was printed. He had access to the personnel of the Forestry Service [sic], he had access to the area, he knew from the plan, as would anybody else, what use was anticipated to be made of the area. It would appear obvious, or certainly the information was readily available to him, that there would be some contracting done for cutting of timber and for clearing of areas for road construction. It

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[48] Citing Panama Canal Co. v. Grace Line Inc., 356 U.S. 309 (1958), at p. 318, and Knight Newspapers, Inc. v. United States, 395 F.2d 353 (1968), at p. 359--a quotation which could be interpreted as being as helpful to the plaintiffs as to the defendants: "It is well established that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion a Court will overturn his determination only in a case of abuse of discretion or where his determination is clearly wrong."

> appears right in the plan that that was contemplated. It was incumbent upon him, then, to seek the information as to when it was going to be done.
>
> And there is nothing in this record to show that any defendant or anybody working under the defendants has ever withheld any information from the plaintiff. . . .
>
> To permit the government to enter into these contracts for the cutting of certain areas of timber, to permit the government to enter into contracts for and commence upon the construction of roads pursuant to the plan without in any way challenging, so far as this record shows, the actions, it appears to the Court to be laches as described in every case which this Court has ever read. . . .
>
> So the plaintiff has been guilty of laches, in the opinion of this Court.[49]

Attorneys for the plaintiffs failed to build record, before Judge Kent, regarding the great lengths to which Dr. Gandt and his associates had gone to obtain information and win administrative relief for their complaints prior to litigation. The judge's idea of what had transpired in this regard probably was based on one exchange before the court, during which Regional Forester George James stipulated that his office had sent Gandt a copy of the plan in "April or May of this year" but that Gandt had not attempted to discuss the plan with him until

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[49]Opinion of the Court, pp. 23-25. See, Penn Mutual Life Insurance Co. v. Austin, 168 U.S. 685, at 696: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept on his rights and shows no excuse for his laches in asserting them. . . ."

"very recently . . . within the last month."[50] U.S. Attorney Nelson Grubbe exploited this apparent weakness in the plaintiffs' case:

> The Plan was in Dr. Gandt's hands early in 1969. He waited and watched the road being built. . . . His complaint at this time is very untimely. . . . [I]f he had any rights whatsoever from an equitable standpoint when he got this [plan] and a reasonable time thereafter, at least by mid-summer, I think if he is going to bring an equity proceeding that would have been the time to do it, not now when we have contracts outstanding. . . .[51]

The plaintiffs' rebuttal was eloquent but ineffective; in his concluding remarks before the court on December 10, 1969, plaintiffs' chief counsel H. Anthony Ruckel described the subtleties involved in the matter of the timeliness of the complaint:

> [I]t is extremely difficult for the citizen or the person affected to know when the irreversible . . . decision is made. It is usually the evidence on the ground rather than the evidence of events in an administrative hierarchy that triggers the response of the citizen and makes him question whether the laws of his government have been properly applied in the given situation. . . . [T]o hold . . . that the citizens have to hit that exact moment [just before an irreversible decision is made] is to hold that they would never be able to come into court. . . . [D]uring this ten-months time the plaintiffs consistently and continuously contacted various members of the Forest Service.[52]

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[50]Transcript of Proceedings, p. 252.

[51]Ibid., p. 254.

[52]Ibid., p. 268.

At this point Judge Kent observed that evidence of such contacts was not in the record--that it had not been brought to the court's attention earlier in the hearing, and documented--and plaintiffs' counsel had to admit that this was true. One can speculate that Judge Kent would not have concluded that Jerry Gandt was guilty of laches had he been informed through a full record. The submission of copies of exchanges of correspondence, sworn affidavits and depositions, and other documentation of the plaintiffs' activities during the months just prior to the filing of the complaint would have provided a foundation for a more complete judicial review. The transaction evidence potentially available to the court would have indicated a relatively long history of earnest attempts to win changes in the Sylvania management plan through "jawboning" with federal officials and members of Congress. This history in brief is related below:

Two of the plaintiffs, Dr. B. Culver Prentice and Donald Quinn, attended the ad hoc meeting to review the draft management plan for Sylvania at Houghton, Michigan on September 20 and 21, 1968, during which they asked (1) that additional restrictions be placed on snowmobile use of the area, (2) that the proposed access road to Big Bateau Lake be eliminated from the plan, and (3) that all development take place outside the Sylvania area proper. (The Forest Service agreed to the first two of these

requests,[53] but not to the third, prior to adopting the revised plan on December 5, 1968.) To "make record" with respect to his objections to portions of the plan, Dr. Prentice put his comments in a letter to Regional Forester James dated September 30, 1968:

> [T]he highest use for this tract would be for it to remain as wilderness. . . . "[T]imber management, vegetative cover management, salvage of unsightly blow-downs, limited timber harvest operations, and timber cultural operations" . . . would appear to me to be totally out of place [in Sylvania]. . . . I am loathe to see expansion of [the Clark Lake picnic area] into more picnic areas and particularly into campgrounds down the shore of Clark Lake. . . . [A] road should not be extended to [Whitefish Lake] for a [canoe] carrydown. . . . The concept of the "General Forest Zone" seems to be a bit . . . tenuous. Except for the extreme periphery of the tract, [it would be better] to adhere to the idea that this is a wilderness and not a timber management area. . . .

Immediately after the approved plan had been given public distribution (January 29, 1969) and its contents had become known, the plaintiffs-to-be initiated a loosely coordinated campaign to win further pro-wilderness changes in it. Plaintiff Wisconsin Resource Conservation Council resolved on February 1, 1969, that there be a moratorium on development of Sylvania pending further study and that the area be included in the National Wilderness Preservation System; copies of the resolution were forwarded to Regional Forester James and Chief Cliff and their receipt

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[53]Harold C. Nygren, Deputy Regional Forester, memorandum to file, Sept. 23, 1968.

was acknowledged. On March 4, 1969, this plaintiff, through Congressman Henry S. Reuss, asked Chief Cliff to hold a public hearing on the Sylvania management plan and was told to see the local Forest Supervisor instead. The Forest Service response:

> "No public hearings are proposed; however, any persons interested in the management of this area are always welcome to make their views known to the Supervisor of the Ottawa National Forest at Ironwood, Michigan."[54]

Plaintiff Dr. Jerry Gandt, as was mentioned above, mailed to Agriculture Secretary Hardin on February 27, 1969, the first of some twenty letters and telegrams he was to send to various officials including the President over the ten-month period preceding litigation, describing his dissatisfaction with the Sylvania plan and requesting "a halt to this program until further review of this area can be made by calling in experts. . . ."[55] He expressed his views directly to Ottawa National Forest Supervisor Ralph Kizer on June 21, 1969 (during a tour of Sylvania with Dr. George Selke, Kizer, and District Ranger Marsh Lefler) and on October 10-12, 1969 (during a trip to the Boundary Waters Canoe Area in Minnesota with Kizer at Forest Service expense).

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[54]Reuss, letter to Martin Hanson, Secretary, Wisconsin Resource Conservation Council, Apr. 27, 1969, quoting letter from Forest Service Deputy Chief M. M. Nelson to Congressman Reuss.

[55]Gandt, letter to Secretary Hardin, May 9, 1969.

Individual plaintiff Richard J. Thorpe was--and is --a Sierra Club leader from Minneapolis, active in that organization's North Star Chapter and personally acquainted with the Sylvania area. The Sierra Club's involvement in the Sylvania controversy came hesitantly, but ultimately included paying the expenses of the plaintiffs' chief counsel, Tony Ruckel, who was flown in from Denver to represent Gandt et al. at the Marquette hearing.[56] The John Muir (Wisconsin) Chapter of the Sierra Club was an early advocate of wilderness status for Sylvania (March 27, 1969); Thorpe's own personal involvement included a November 8, 1969 presentation in Milwaukee to representatives of the Club's Midwestern chapters. In this report he acknowledged the Forest Service's "sincere effort to prepare a plan which would develop Sylvania by making it available to large numbers of people without overuse of this unique fragment of wild country" but observed that "there are aspects of the plan and ensuing facility construction which bear review and reconsideration. . . ." He noted that the appointment of an independent review

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[56]Ruckel, chief counsel for the plaintiffs in the Parker v. U.S. case in Denver, was asked to take the Gandt case by the Sierra Club after SOSAC had filed its complaint in order to "cut the losses," particularly with respect to the standing issue and the Wilderness and Endangered Species Acts. Ruckel, personal interview, Denver, Colo., Aug. 20, 1970. See also, footnote 31, supra.

panel to hold a series of public hearings on the Sylvania plan throughout the region had been recommended but that "attempts to obtain such a moratorium had been pursued without success." The policy adopted by the Sierra Club's Midwest Regional Conservation Committee on November 8, 1969, stated that the club's Midwestern chapters:

> support[ed] the concept of limited development for recreational purposes of the Sylvania Recreation Area [but] strongly urge[d] an immediate moratorium on present development [and] the appointment of an independent review panel . . . to recommend revisions in the management plan [on the basis of] the advice of experts and concerned citizens [obtained] through a series of hearings. . . .[57]

Individual plaintiff Jack C. London was the president of the Michigan Division of the Izaak Walton League of America. The Brown County, Wisconsin, Chapter of the IWLA had registered its opposition to the development of the Sylvania area with the Forest Service in September 1969, probably because Dr. Gandt was a member of that chapter's board of directors. The League, as a national organization, did not take an official position on the issue.

Plaintiff SOSAC, Inc. was organized in July 1969[58] and incorporated in November 1969. Its chairman was

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[57]Minutes, MRCC meeting, Milwaukee, Wis., Nov. 8, 1969.

[58]SOSAC's original letterhead: "SOSAC/Save Our Sylvania ACTION Committee/961 West Mason Street, Green Bay,

Dr. Jerry Gandt and its mailing address was Dr. Gandt's address. SOSAC's efforts to seek an "administrative remedy" during the period August-November 1969 included appealing to President Nixon to intercede with Secretary Hardin on behalf of SOSAC's requests for a moratorium (on August 17); distributing releases to the press describing SOSAC's objectives; touring Sylvania (on August 17 and August 23) to photograph "non-conforming" uses of the area; sending Regional Forester James (on August 29) a detailed account of their findings (water-access campsite overdevelopment and erosion, use of portaging wheels, litter, vandalism); distributing a "White Paper on Sylvania" (on September 6) charging that the management plan was "an utter failure"; and sponsoring a "Walk to Whitefish" protest march along the route of the new access road under construction just within the northwestern boundary of the Sylvania tract, in which some 200 citizens participated (on October 25).

So the plaintiffs had not merely "watched and waited." Forest Service Chief Ed Cliff was well aware of

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Wis. 54303/Phone (414) 432-7544." Officers listed: Dr. Jerry Gandt, Green Bay, Wis., Chairman; Robert Estabrook, Marquette, Mich., Co-chairman, Michigan Section; E. F. Cusick, Jr., Birmingham, Ala., Co-chairman, Eastern United States; Dr. Robert Matlack, Santa Cruz, Calif., Co-chairman, Western United States; Mrs. Lois Olson, Green Bay, Wis., Executive Secretary; Miss Judy Polich, Madison, Wis., Vice Chairman, Student Information. "SOSAC, Inc." became "Wilderness Watch, Inc." on December 1, 1970.

their dissatisfaction with the Sylvania management plan as early as March 7, 1969, as documented by this exchange between Cliff and U.S. Senator Gaylord Nelson of Wisconsin during a Senate Interior Committee hearing on that date in Washington, D.C.:

> Senator Nelson: I am sure that you are aware that a number of the more thoughtful of our conservationists in the Midwest, and in my State, and those who know this wilderness [Sylvania], are very concerned about intrusions into it. Have you talked with them about it?
>
> Mr. Cliff: I haven't talked to them personally, Senator, but I have had correspondence with them. . . .[59]

Ten months of intensive effort on the part of the plaintiffs to find something in the nature of an administrative remedy for their complaints had yielded, as they saw it, few results. They had sought, as the transaction evidence potentially available to the court could have proven, the following remedies: a temporary moratorium on Sylvania's development; a conference with Secretary Hardin; the Secretary's appointment of an expert, non-government review panel; the employment by the Forest Service of wilderness and recreation consultants; the scheduling of public

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[59]U.S., Congress, Senate, Committee on Interior and Insular Affairs, Lincoln Back Country Wilderness, Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, Senate, on S. 412, 91st Cong., 1st sess., 1969, p. 21.

hearings on the plan in locations throughout the region; the creation of a permanent citizens' advisory committee on Sylvania; and the revision of the management plan to further protect the area's natural values. When in October of 1969 they saw that a swath was about to be cut through virgin forest for a new road of over two miles in length and understood that tree-cutting in connection with a timber sale within Sylvania was about to begin, they sought a court order to enjoin the cutting.

True, the road-construction and timber-sale contracts were well under way, but had the plaintiffs "slept on their rights"? In a similar case in Pennsylvania in 1970, the federal district court judge ruled that the plaintiffs had not:

> Laches is determined in the light of all the existing circumstances and requires that the delay be unreasonable and cause prejudice to the adversary. Sobosle v. United States Steel Corp., 359 F.2d 7 (3rd Cir. 1966). The mere lapse of time is not sufficient to constitute laches. Ritter v. Rohm & Haas Co., 271 F.Supp. 313 (S.D.N.Y. 1967). In the circumstances of this case, I cannot find with absolute certainty that the plaintiffs knowingly slept on their rights. Granted that the suit was not begun by plaintiffs until ninety days after the awarding of the construction contracts, but this is not the kind of deliberate delay with which we are normally confronted in laches situations. Here, the Pennsylvania Environmental Council, Inc. was not incorporated as a non-profit corporation until January 30, 1970, and had its first organizational meeting on March 14, 1970. The present suit was instituted on March 31, 1970. Under these circumstances, there was no unreasonable delay on the part of the

> Pennsylvania Environmental Council, Inc., in bringing suit.[60]

It is also true that the Gandt plaintiffs could have pursued another avenue open to them short of litigation under the "Secretary's appeal regulation"[61]--a Department of Agriculture administrative appeal procedure--but this route was unlikely to provide the plaintiffs either with a temporary halt to the cutting or with ultimate success, because the plaintiffs would be directing their appeal to the Chief of the Forest Service, who had already made up his mind on the issue. As Professor Davis has observed:

> Inadequacy of administrative remedies is often held to be a sufficient reason for dispensing with the exhaustion requirement. Futility of recourse to administrative remedy because of certainty of an adverse decision is sometimes a reason for dispensing with the exhaustion requirement.[62]

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[60] Pennsylvania Environmental Council v. Bartlett, 315 F.Supp. 238 (1970), at 246. Emphasis added.

[61] "The appeal regulation of the Secretary of Agriculture, published in the Federal Register on May 6, 1965 (36 CFR 211.20-211.37), provides an appeal procedure for persons who, in transacting certain kinds of business with the Forest Service, believe that a decision of a Forest Service officer was in error." U.S., Department of Agriculture, Forest Service, The Appeal Regulation--What it is, How to Use it (Washington, D.C.: U.S. Government Printing Office, 1965), p. 2.

[62] Kenneth Culp Davis, Administrative Law Text (St. Paul, Minn.: West Publishing Co., 1959), p. 371.

In fairness to the Forest Service defendants, it must be recognized that three successive Ottawa National Forest Supervisors and their staffs conducted intensive campaigns to tell the public what they had in mind for Sylvania. In this process, public reaction to the evolving management plan was absorbed. The feedback loop was closed to the extent that the informal comments heard were borne in mind during the planning process. The result, as was noted early in this chapter, was the toning-down to a considerable degree by 1968 of the development emphasis which permeated the agency's 1964 proposal.

The Federal defendants' public information efforts, had they been made part of the record of the December 9-10, 1969 hearing, also could have impressed the court. They began with Ottawa National Forest Supervisor John O. Wernham's discussions with local and state government officials and interest-group representatives in 1963 and 1964; with the widespread distribution early in 1965 of one thousand copies of the 1964 Study of Proposed Federal Purchase document which described in detail the agency's tentative, intensive development plans; and with testimony before Senate and House Appropriations Subcommittees by Forest Service Deputy Chief M. M. Nelson in February and March of 1965, emphasizing the agency's intentions with regard to recreational development and timber cutting.[63]

These efforts included Ottawa National Forest Supervisor Michael Kageorge's attempts, between 1966 and early 1969, to communicate with the public by making over forty speeches to interested groups and arranging for thirty-two groups and eighteen individual newspaper outdoor writers to take tours of the Sylvania area.[64] The draft management plan for Sylvania was discussed with the Secretary of Agriculture's Advisory Committee on Multiple Use of the National Forests (July 17, 1968, at Land O' Lakes, Wisconsin) and with an ad hoc committee of private citizens representing a variety of interests. (Fifty persons were sent copies of the draft management plan on May 24, 1968, with an invitation to attend a meeting in Houghton, Michigan on September 20-21, 1968, at which an opportunity was provided to comment on the draft plan.[65])

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[63]See, U.S., Congress, Senate, Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, Hearings, before a subcommittee of the Committee on Appropriations, Senate, on H.R. 6767, 89th Cong., 1st sess., 1965, p. 316; and, U.S., Congress, House, Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1966, Hearings, before a subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 1st sess., 1965, pp. 1546-1548. No conservation group opposition to the Forest Service's plans was expressed at this time. Congress made Land and Water Conservation Fund money available for Sylvania's purchase, under the authority of the Weeks Act of 1911, on June 28, 1965. Transfers of title took place one year later.

[64]"Sylvania Recreation Area--Public Involvement," Forest Service, 10 pp.

[65]"The Regional Forester was very disappointed that only 17 attended": Ralph Kizer, personal letter, Aug. 1, 1972.

These Forest Service public information efforts also included Ottawa National Forest Supervisor Ralph Kizer's personally escorting Dr. Jerry Gandt through both the Sylvania area (June 21, 1969) and the Boundary Waters Canoe Area (October 10-12, 1969) to show some of the wilderness management problems.[66] Thus it appears obvious that the defendants' intentions had been clear for five years. The plaintiffs' position was seen by the Forest Service as a minority position with which the agency could not agree without offending other, larger segments of the public--public hearing or no public hearing.

The "Merits" of the Plaintiffs' Allegation of Abuse of Discretion

Judge Kent, in his December 11, 1969, opinion, summarized the Gandt plaintiffs' claim: "The defendants have acted arbitrarily and capriciously by adopting a plan without full and proper consideration of all the factors required." He noted that

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[66]"The circumstances that really triggered the wrath of Jerry Gandt started with a conversation he and I had on a light airplane returning from our trip into the BWCA. He asked me, over the roar of the engines, when we would build 'the road to Whitefish Lake.' I yelled, 'Do you mean the road and parking lot going near the lake itself?' He said yes. I said we didn't have the money and I didn't know when we would begin. Then, on the day of his protest march, he found the construction of the road down the west edge of Sylvania had already begun. That was not the road I thought he was talking about. It was right after that he decided to resort to litigation." Ralph Kizer, personal letter, Apr. 26, 1972.

> the unreasonableness and unlawfulness of agency action must be clearly established by the evidence, and it must appear that the action of the agency was in effect malicious and illegal, and the principal of arbitrary action is not applicable if the action was a rational action resulting from a consideration of the factors involved.

He observed that the plaintiffs

> [had] not carried out the burden of proof [that the Forest Service had not complied with the Multiple Use-Sustained Yield Act], and it is axiomatic the burden of proof in connection with an action such as this is completely upon the plaintiffs.

He found that the plaintiffs had failed to establish by clear and convincing proof that the action of the defendant was arbitrary and capricious and not in accordance with law. He therefore denied the application for an injunction and dismissed the complaint.[67]

This must not have surprised the plaintiffs' chief counsel, Tony Ruckel. Ruckel had been called in to the case just hours before the hearing, only to find no

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[67]Opinion of the Court, pp. 3, 4, 22, 25. Added the judge: "The evidence is not only not clear and convincing, there just plain isn't any evidence of any failure on the part of the defendants to consider all of the factors. . . . [The plaintiffs] have not even established by any evidence that this Court would consider would require [sic] the defense to go to their proofs, that there was any fault on the part of the defendants in the action taken. . . . [T]o permit the case to go on and substitute this Court's judgment for the judgment of the Forestry Service [sic], would be a clear case of arbitrary action and abuse of discretion on the part of the Court." Opinion, pp. 23, 25.

"discovery" accomplished,[68] few expert witnesses on hand, and only one "exhibit" ready (the 1968 Sylvania Management Plan itself), and then he had seen his expert witnesses disqualified or their testimony cut short in the courtroom. But perhaps the most surprising element of the case for Ruckel was to find himself arguing the merits of the plaintiffs' case on December 9 and 10, 1969, and not just arguing for a preliminary injunction. Incredibly, the plaintiffs' representative in Kalamazoo, Michigan, Michael Barron--who had been present in Judge Kent's chambers on November 24, 1969, when the judge had signed an order stipulating that "the Plaintiffs' Motion for a Preliminary Injunction shall be set down for a hearing on the merits and final disposition [emphasis added] on the 9th day of December, 1969"--had failed to pass along word of this development to his co-counsel in Green Bay, Fred Reiter, who was Ruckel's source of information. Judge Kent's admonition, well into the hearing, that "You are here on a hearing on the merits"[69] left Ruckel almost at a loss for words.

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[68] In contrast to the efforts of the plaintiffs in Parker v. U.S., in which Forest Service files had been subpoened and indexed, sworn depositions had been taken over a seven-day period from twenty-one persons including key Forest Service personnel, and sworn affidavits had been obtained from other "experts"--all in order to "define the issues." Tony Ruckel, personal interview, Denver, Colo., Aug. 20, 1970.

[69] Transcript of Proceedings, p. 125.

In their original complaint (filed November 12, 1969) the plaintiffs had alleged that the Sylvania tract was "of such character as to qualify as wilderness under the 1964 Wilderness Act, 16 U.S.C., Section 1131(c)," that it had been purchased "primarily because of its unique and rare character as a wilderness area," and that implementation of the 1968 management plan would be "contrary to the intent of Congress as expressed in the 1964 Wilderness Act." They had also alleged that the defendants had acted without authority, unreasonably and in an arbitrary manner in violation of the Multiple Use-Sustained Yield Act, 16 U.S.C., Section 528--that they had made insufficient studies of (1) the recreational and wilderness qualities of Sylvania, (2) the adverse effects on these values which would result from implementation of the management plan, and (3) alternative uses of the area. In short, the plaintiffs contended that the decision to adopt the 1968 management plan had been made "without due consideration of the relative values of various resources" as required by the Multiple Use Act. The complaint sought to enjoin development of Sylvania "until such time as the wilderness status of the area has been studied and determined by the Congress of the United States."

In a supplemental brief filed just before the hearing, the plaintiffs added another charge: that the Forest Service was acting arbitrarily, capriciously,

abusing its discretion, and exceeding its authority by developing Sylvania--"the most important remaining Bald Eagle nesting site in the Great Lakes area"--in the face of the requirement in the 1966 Endangered Species Act, 16 U.S.C., Section 668, that federal agencies "preserve the habitats of such threatened species on lands under their jurisdiction" and in view of the inclusion of the Southern Bald Eagle on the official list of "endangered species" (Federal Register, March 8, 1969, pp. 5034-35). Plaintiffs implied that, even though the bald eagle of the Great Lakes was not classified as a "true southern" bald eagle, it was endangered nevertheless, and that Sylvania's development might hasten the demise of the bird in that region.

As the case developed in court, it became apparent that the plaintiffs had not come prepared to identify in specific detail the scientific and procedural defects in the allegedly "arbitrary and capricious" management plan. Dr. Gandt could not qualify as an expert witness, and his opinions regarding the potentially adverse effect of the management plan on the natural values of the area and on the desirability of a public hearing were given little weight by the court. (Plaintiffs did not maintain that a hearing was required by statute.) Criticisms of the plan by Dr. Thomas B. Mowbray, a plant ecologist, were described by the judge as applying to "fine technical decisions

which the Court should not engage in weighing."[70] (Mowbray had contended, inter alia, that "a complete quantitative vegetative study [should be made] of Sylvania because without this firm basis we cannot show what changes have been made in the composition [of the plant life as a result of the implementation of the plan].") The opinion of Dr. Robert B. Ditton, a water resource specialist and leisure sciences professor, that "the area is best suited to wilderness use" was rejected by Judge Kent, who described it as a "broad statement without foundation [which] mean[s] absolutely nothing to this Court." And when counsel for the plaintiffs attempted to qualify Sergej Postupalsky of the University of Wisconsin's Department of Wildlife Ecology as an expert witness on bald eagles to document the plan's shortcomings with respect to the Endangered Species Act, they failed, the judge rather arbitrarily announcing that, "[b]ecause [Postupalsky] stated he was studying environmental effects on eagles [for his doctoral dissertation] and necessarily still being involved in the program, [he] might well have a tendency to change his opinions."[71]

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[70]Transcript of Proceedings, p. 120.

[71]Ibid., pp. 279-280. A person need not have a college degree to qualify as an expert witness. See, Charles T. McCormick, Handbook of the Law of Evidence (St. Paul: West Publishing Co., 1954), pp. 28-29: "Expert Witnesses: Qualifications. An observer is qualified to

The one witness for the plaintiffs whose testimony was accepted as that of a qualified expert on recreation area management plans was Charles H. Stoddard of Minong, Wisconsin. Stoddard, former director of both the U.S. Department of the Interior's planning staff and its Bureau of Land Management under Secretary Stewart Udall, testified that he saw "serious gaps and deficiencies" in the Sylvania plan.[72] Implementation of the plan, said Stoddard, "may result in such heavy overdevelopment that the area will no longer have its magnetic attraction to people in the future."

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testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. [Example cited: Bebont v. Kurn, 348 Mo. 501, 154 S.W.2d 120, syl. 5 (1941) (one with long experience in railroad work as brakeman and otherwise could testify as to distance required for stopping train, though he had never been engineer).] The knowledge may in some fields be derived from reading alone, in some from practice along, or as is more commonly the case, from both. . . . The practice, however, in respect to experts' qualifications has not for the most part crystallized in specific rules, but is recognized as a matter for the trial judge's discretion reviewable only for abuse." Postupalsky had served as the National Audubon Society's bald eagle census coordinator for the Great Lakes Region for several years prior to pursuing graduate studies at Madison.

[72] Ibid., pp. 151-208.

Judge Kent heard Stoddard out but took the position that "the preparation of a plan of this nature is a matter of judgment and discretion on which there can be differences of opinion."[73]

While the case made by the plaintiffs was so weak that the defendants were not required to go to their proofs, one witness for the defendants was heard out of order on the first day of the hearing with the permission of plaintiffs' counsel: the Honorable Philip E. Ruppe, Member of the U.S. House of Representatives from the Eleventh Congressional District of Michigan which includes the Upper Peninsula. Judge Kent apparently considered the local Congressman qualified on the question of whether or not the plan was "contrary to the intent of Congress as expressed in the 1964 Wilderness Act" because, as he observed in dialog with Stoddard, "if the Congressman from the area is not in accord with its becoming a wilderness area . . . the chances of putting it through the Congress are almost nonexistent."[74] And the Congressman was not in accord with Sylvania's becoming a wilderness area:

> I think it is incumbent upon the Federal Government, and particularly the Forest Service, to carry

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[73] Ibid., p. 186.

[74] Ibid., pp. 178-179. This point remains valid only as long as this Congressman is re-elected; a successor might hold the opposite view.

> through with the Plan that they have, or through with the intent as originally outlined to these [local] people. . . .[75]

When plaintiffs' counsel called Regional Forester George S. James to the witness stand, the Regional Forester said he was not in a position to explain the various environmental impact studies that had been conducted in connection with the plan:

> Not all the reports of studies were examined by me. We have a Deputy Regional Forester who is responsible for coordinating the design and tying all of the studies together into a composite plan.

Judge Kent reprimanded counsel for the plaintiffs with the observation, "I think you got the wrong witness."[76] No one was surprised when, in response to U.S. Attorney Nelson Grubbe's question, "Did you in the development of this Sylvania Plan give careful consideration to all the relative values of the natural resources on and near the Sylvania area?", the Regional Forester said, "We did."

Despite Congressman Ruppe's testimony, which tended to reinforce the federal defendants' assertion that "[t]he Wilderness Act . . . has no application to the facts in this case,"[77] some evidence in the form of

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[75] Ibid.; see pp. 83-113. Congressman Ruppe's testimony may have been irrelevant or prejudicial, but the point is moot because plaintiffs voluntarily relinquished this part of their argument.

[76] Ibid., p. 229.

[77] Memorandum of Points and Authorities in Opposition to Preliminary Injunction, p. 7.

exhibits and affidavits could have been presented with respect to the possible application of the 1964 Wilderness Act to the Sylvania area.[78] Instead, midway through the first day of testimony, the plaintiffs chose to withdraw their allegations under the Wilderness Act.[79] And at the conclusion of the presentation of the plaintiffs' case, Tony Ruckel withdrew any claim under the Endangered Species Act,[80] leaving only the mandate of the Multiple Use Act that "due consideration be given to the relative values of the various resources in particular areas" as the basis of his clients' complaint.

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[78]Undisturbed old-growth northern hardwood stands are "valuable far beyond their timber value for many purposes, including comparisons between managed and unmanaged woodlands for the particular forest type" (G. Schneider, A 20-Year Investigation in a Sugar Maple-Beech Stand in Southern Michigan [East Lansing: Michigan State University, Agricultural Experiment Station, Research Bulletin 15, 1966], p. 1). The fact that the Wilderness Act requires the Forest Service to study and make wilderness-suitability recommendations only with respect to "primitive areas" (16 U.S.C., Sec. 1132[b]) does not preclude Congress from designating other national forest lands as wilderness ("It is widely recognized . . . that other areas beyond those specified for study by the parent [wilderness] act may warrant and, for wisest stewardship, require similar legal designation. I refer to those areas--particularly in our national forests--which, although not yet protected as wilderness by law, nevertheless exhibit natural values, wildness, and solitude of great national significance. We should not neglect nor delay the identification and proper conservation of these areas --which our constituents call de facto wilderness--simply because, unlike others being reviewed, they may not have been administratively protected prior to passage of the Wilderness Act. It is clear that the Wilderness Act, although it does not require that these areas of de facto wilderness be reviewed, makes possible their placement in

"Professionally there were omissions in this [plan] which should have been in there," Ruckel concluded. However, Judge Kent ruled that the plaintiffs had failed to produce sufficient evidence to sustain their allegations.[81]

Res Judicata--the Matter has been Decided

One danger in going to court, to have an agency's actions declared unlawful, without having the issue well-defined and the incriminating evidence in hand, is that

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the national wilderness preservation system. And we would surely fail in our duty to conserve them wisely for their highest values if we did not use the procedures and strong preservation policies of the Wilderness Act to protect them." [Rep. John P. Saylor, "Saving the American Wilderness," Congressional Record, Oct. 14, 1970, p. H 10203, remarks made in connection with the introduction of H.R. 6496 to add eleven "non-primitive" areas on national forests in eight states to the wilderness system.] See also, remarks made by Senator Henry M. Jackson in connection with the introduction of S. 3792, Congressional Record, June 30, 1972: "[W]e have sadly neglected the significant wilderness resources to be found in our national forests beyond those areas specifically required to be reviewed by the original Wilderness Act. There are such areas in all regions of the country, but there is a special need to grasp this opportunity in the eastern sections of the country.") Legislation has been introduced in Congress to establish wilderness areas on national forest land outside existing primitive areas, in Montana (see, U.S., Congress, Senate, Establishing the Lincoln Back Country as Wilderness Area, Report No. 91-207, Committee on Interior and Insular Affairs, Senate, 91st Cong., 1st sess., May 29, 1969; U.S., Congress, House of Representatives, Authorizing and Directing the Secretary of Agriculture to Classify as Wilderness the . . . Lincoln Back Country, Report No. 92-1226, Committee on Interior and Insular Affairs, House, 92nd Cong., 2nd sess., July 19, 1972; "Classifying as Wilderness the National Forest Lands Known as the Lincoln Back Country," Congressional Record, Aug. 7, 1972, pp. H 7221-23 [House floor debate on and passage of H.R. 7295 (S. 484) during which Interior Committee Chairman Wayne N.

> a cause of action once finally determined between parties by a competent tribunal cannot afterwards be litigated between parties or their privies in a new proceeding.[82]

Or, as SOSAC attorney Fred Reiter phrased it,

> [t]he only way we can go back [to court] is if [the Forest Service] substantially alter[s] their plan, or substantially depart[s] from the plan in execution. If they follow the plan, there's nothing we can do.[83]

Aspinwall stated: "This area was not a part of an existing Forest Service primitive area (but) does . . . meet all the criteria for wilderness designation."] and Public Law 92-395, signed by the President on Aug. 20, 1972), Wyoming (Gros Ventre, H.R. 4420, 92nd Cong., and Laramie Peak, H.R. 1551, 92nd Cong.), Colorado (Indian Peaks, S. 1198 and H.R. 6523, 92nd Cong.), Utah (Lone Peak, S. 3466, 92nd Cong.), Washington (Mt. Aix, H.R. 12361, 92nd Cong.), California (Lopez Canyon, S. 3027, 92nd Cong.; Snow Mountain, H.R. 13728, 92nd Cong.; San Joaquin, H.R. 4270 and H.R. 6857, 92nd Cong.; and Senator John V. Tunney's "Omnibus California Wilderness Act of 1972," S. 3618), and, in the East, Alabama (Sipsey, S. 1608 and H.R. 8739, 92nd Cong.) and West Virginia (Cranberry, Otter Creek, Dolly Sods, H.R. 13036 and H.R. 13092, 92nd Cong.). Congressman Ruppe himself, testifying before the House Interior Committee in Washington on July 15, 1969, had gone on record as being in favor of wilderness system status for two Upper Peninsula areas, the Huron Islands National Wildlife Refuge and a portion of the Seney National Wildlife Refuge which had been logged, ditched, drained and, after having been reacquired by the Federal Government, allowed to revegetate (see, U.S., Congress, House of Representatives, Designation of Wilderness Areas, Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, House, 91st Cong., 1969 and 1970, pp. 221-228, and, Public Law 91-504 "To designate certain lands as wilderness [including the Huron Islands and Seney refuges areas]). The Multiple Use Act, at Sec. 529 of Title 16, U.S. Code, stipulates that "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of section 528-531 of this title."

[79]Transcript of Proceedings, p. 180.

[80]Because Judge Kent had refused to accept his only witness on this subject as an "expert" and because the bald eagles in Sylvania did not strictly qualify as

U.S. Attorney E. J. Curtis, of the USDA Office of General Counsel's Milwaukee regional staff, took a firm position on the impact on the Sylvania plan of Judge Kent's December 11, 1969 opinion, at a meeting of Forest Service and SOSAC representatives in Milwaukee on February 26, 1970:

> The inadequacy of the plan . . . was a matter that had been decided by a court. . . . I can't see [the Forest Service] continuing to spend taxpayers' money to conduct extended research on matters that have been taken to court, have been tried, a conclusion has been

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"endangered" under the regulations adopted to implement this Act.

[81]Cf., Robert Broughton, "Aesthetics and Environmental Law: Decisions and Values," Land and Water Law Review, Vol. VII, No. 2, at p. 487: "Two cases have arisen interpreting [the] language [of the Multiple Use Act], Dorothy Thomas Foundation v. Hardin [317 F.Supp. 1072 (W.D.N.C. 1970)], involving a timber sale in a national forest in North Carolina, and Sierra Club v. Hardin [325 F.Supp. 99 (D. Alaska 1971)], involving a timber sale in Tongass National Forest in Alaska. In both cases the plaintiffs claimed that the forests were not in fact being managed for multiple uses; in neither case did the plaintiffs succeed. The courts in both instances held that, absent a showing that the administrative decisions were arbitrary or capricious, the possibility that the administrator's balancing of the enumerated values is extremely biased does not mean that his decision was arbitrary or capricious. Such a statutory provision ["It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C., Sec. 530 (1970)] does not, therefore, really mean much to a party objecting to an administrative decision." See also, Mike Miller, "The Fight for the Trees in the Tongass," American Forests, July 1971, pp. 17-19.

[82]"Res judicata," Words and Phrases (St. Paul: West Publishing Co., 1950), pp. 613-822.

[83]Personal interview, Green Bay, Wis., July 28, 1970.

> reached [and it] was not appealed. . . . [T]here is no further recourse by SOSAC to the courts with relation to Sylvania, insofar as the adequacy of the management plan. . . . I have saved from that the way the management plan is carried out.[84]

"The way the management plan is carried out" indeed was subject to amendment,[85] probably in response to a number of pressures including Judge Kent's anti-snowmobile-and-motorboat dicta,[86] the requests of environmental groups,[87] and the agency's own requirements regarding the periodic up-dating of management plans.[88] But the

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[84]Ex-plaintiff Robert Ditton disagreed: "Gandt v. Hardin . . . did not judicially determine the adequacy of the Sylvania Management Plan. . . . Our failure to prove arbitrary and capricious activity on the part of the Forest Service can hardly be construed by your agency as a decision that the plan is adequate or a good one. . . ." (Personal letter to Jack Heintzelman, Regional Personnel Officer, Forest Service, Milwaukee, Feb. 11, 1970); "The court only said SOSAC didn't have the guns to prove that it was a lousy plan." (Personal interview, East Lansing, Mich., Oct. 21, 1970). See, "Transcript of Meeting on Sylvania, SOSAC-U.S. Forest Service, February 26, 1970," Forest Service, Milwaukee, Wis., 100 pp.

[85](1) In mid-February 1970 Supervisor Kizer announced the closure of Sylvania to snowmobiles after March 1 "to protect the bald eagles which begin nesting activities soon after March 1 and to prevent the harrassment of undernourished deer." ("Sylvania Bans Snowmobiles to Protect Eagles," Green Bay Press-Gazette, Feb. 22, 1970). In late November 1970 Kizer announced that Sylvania would be open to snowmobiles only from after the end of deer-hunting season until the beginning of the eagle-nesting season, thus limiting snowmobile use in Sylvania to the period Dec. 6, 1970-Mar. 1, 1971. ("Sylvania Not Open to Sleds," The State Journal, Lansing, Mich., Nov. 28, 1970, p. C-3). (2) The Muskrat water-access campsite on Crooked Lake was closed to avoid disturbing the bald eagles at a nearby active nest. (3) Painted metal garbage cans were removed from several water access campsites; instead, campers were given plastic bags and asked to pack out what they packed in. (4) The Forest Service is working with

legal harrassment of the Forest Service by SOSAC over the Sylvania Management Plan had been curtailed by the doctrine of res judicata.

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the State and with Watersmeet Township to achieve, over time, total elimination of motorboat use in Sylvania. (5) The forest supervisor "has pledged in writing not to offer any more timber sales [in Sylvania] unless he's satisfied that the Kimberly-Clark sale hasn't hurt the environment." (Sierra Club leader Virginia Prentice, Ann Arbor, Mich., personal interview, East Lansing, Mich., Oct. 21, 1970.) (6) The water access campsite facilities on the shores of Deer Island Lake, within the "Botanical Zone," have been removed, and there is to be no overnight use in this zone. (District Ranger Marsh Lefler, personal interview, Watersmeet, Mich., July 23, 1970.) (7) Plans to construct a spur road to a parking lot within a quarter-mile of Whitefish Lake have been abandoned. (Lefler, July 23, 1970) (8) The "design mistake" which resulted in the siltation of bogs during the construction of County Route 535 northeast of Clark Lake "will not be repeated." (Lefler, July 23, 1970.)

[86]Opinion of the Court, Dec. 11, 1969, p. 5: "If this Court were faced with the decision as to the use which was to be made of this tract, and have the authority to promulgate a plan, there are numerous aspects of the adopted plan which the Court would not like, one being the use of motors on the lakes in an area such as this. Another would be the possibility--and it doesn't appear from the plan whether it is possible or impossible--of the use of what are called snowmobiles, or any other mechanical devices, creating such noise as is created by outboard motorboats and other similar devices, snowmobiles included. But that is a personal opinion."

[87]E.g., "We took the Sierra Club's advice [on substituting plastic bags for garbage cans, and it has been] a big success." Richard Guth, Assistant Forest Supervisor, Ottawa National Forest, Supervisor, personal interview, East Lansing, Mich., Oct. 6, 1970.

[88]See, U.S., Department of Agriculture, Forest Service, Forest Service Handbook, FSH 2309.13, Sections 212 ("Necessity for Plan or Alternatives") and 500 ("Plan Review and Monitoring"), Oct. 28, 1969.

CHAPTER FOUR

PARKER V. UNITED STATES[1]

East Meadow Creek

Location and Description

Exemplifying the kind of unclassified[2] but still essentially undeveloped national forest back country some conservation groups call "de facto wilderness,"[3] the East Meadow Creek drainage of the White River National Forest in north-central Colorado owes its special, publicized

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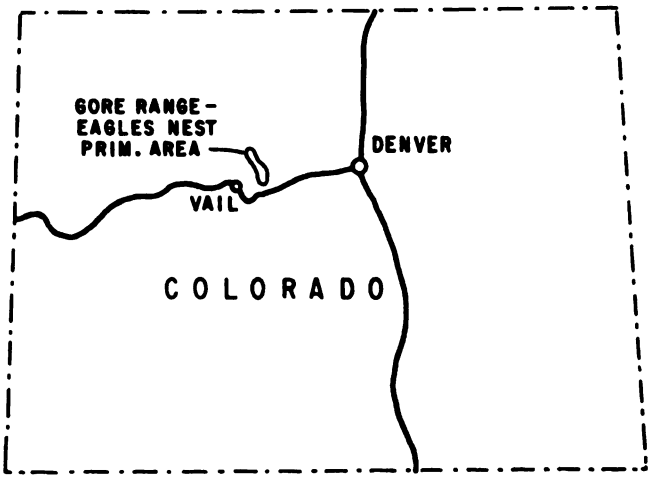
[1] 307 F.Supp. 685 (1969) (motion for summary judgment denied), 309 F.Supp. 593 (1970) (judgment for plaintiffs), 448 F.2d 793 (1971) (affirmed), 92 S.Ct. 1252 (1972) (cert. denied).

[2] I.e., neither withdrawn from development by order of the Secretary of Agriculture nor part of the National Wilderness Preservation System established by Congress.

[3] E.g., Stewart M. Brandborg, Executive Director, The Wilderness Society, Washington, D.C., memorandum to cooperators, Nov. 27, 1970: "Many of you have inquired recently as to the status of de facto wilderness proposals in your areas. You will be pleased to know, therefore, that on October 14, Rep. John P. Saylor . . . introduced H.R. 19784, the Omnibus De Facto Wilderness Bill. . . ." See also, James W. Moorman, Sierra Club Legal Defense Fund, San Francisco, "Preserving De Facto Wilderness," an address before the Twelfth Biennial Sierra Club Wilderness Conference, Washington, D.C., Sept. 25, 1971.



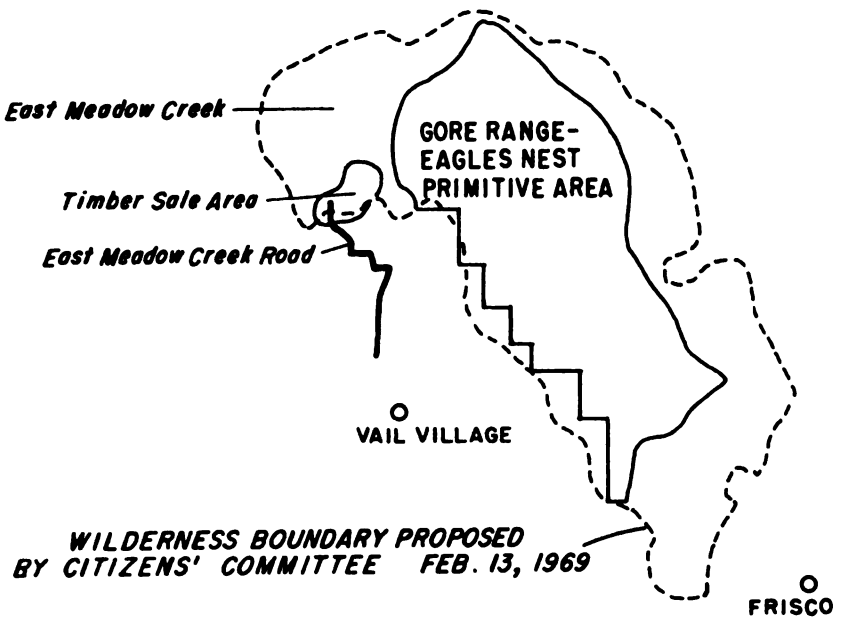


Figure 2. East Meadow Creek Area, Colorado

status principally to these facts: It lies adjacent to the western boundary of the spectacular, 62,000-acre Gore Range-Eagles Nest Primitive Area, and it functions as the gateway to that popular backpacking, horseback-packtrip, and big game hunting area for wilderness travelers who begin their trips at the ski resort town of Vail. The East Meadow Creek drainage is rolling, timbered high country at a 9,200-to-10,500-foot elevation. Small meadows and park-like stands of old-growth Englemann spruce, lodgepole pine and fir contrast there with dense thickets of young lodgepole pine and fir, the aftermath of fire.[4] The area's claim to importance as a fish and wildlife habitat is based in part on its role as an elk migration route and nursing ground.[5]

The adjacent primitive area, set aside by administrative actions of the Secretary of Agriculture in 1932 and 1933,[6] contains some of the most inaccessible country

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[4]Donald E. Price, District Ranger, Eagle District, memoranda to Forest Supervisor, White River National Forest, Nov. 20, 1967 and Apr. 3, 1968.

[5]Paul Gilbert, Area Supervisor, Colorado Game, Fish and Parks Division, Hot Sulphur Springs, Colo., district court hearing testimony, Reporter's Transcript, U.S.D.C., D. Colo., C.A. No. C-1368, Jan. 26-29, 1970, p. 238.

[6]Applications of Secretary's Regulation L-20, on June 19, 1932 and Feb. 28, 1933. Between 1924 and 1964 the Forest Service administratively designated as primitive, wild, and wilderness areas "about 14-1/2 million National Forest acres in 87 separate areas . . . plus Minnesota's

in Colorado--thirty miles of the Gore Range, a mass of sharp-pointed peaks, crests, and ridges, including seventeen peaks with elevations in excess of 13,000 feet.[7] It is scheduled to be reviewed soon by Congress for possible addition to the National Wilderness Preservation System.[8] Congress often expands primitive areas, adding "untrammeled" contiguous acreage, in response to agency and

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incomparable Boundary Waters Canoe Area" (see, Richard J. Costley, "An Enduring Resource," American Forests, June 1972, pp. 8-11, 54-56). The Wilderness Act of 1964 (16 U.S.C., Secs. 1131-1136) immediately placed the "9.1 million acres of national forest land then denominated as wilderness and wild areas in some fifty-four separate units . . . in the National Wilderness Preservation System" and also provided that "[a]nother 5.5 million acres of national forest land, in some thirty-four units known as primitive areas [including the Gore Range-Eagles Nest Primitive Area]," were to be "reviewed in the ten years following the act's passage to determine which units should be permanently protected as wilderness and which need boundary adjustments. . . . By succeeding acts of Congress, the primitive areas . . . that the studies show should be protected as wilderness can be added to the National Wilderness Preservation System" (see, Michael McCloskey, "The Wilderness Act of 1964: Its Background and Meaning," Oregon Law Review, Vol. 45, June 1966, pp. 288-321).

[7]309 F.Supp. 593, at 595.

[8]Under the 1964 Wilderness Act's review requirements, at Section 1132(b) of Title 16, U.S. Code. See, U.S., Department of Agriculture, Forest Service, A Proposal: Eagles Nest Wilderness, Arapaho and White River National Forests, Colorado (Washington, D.C.: Government Printing Office, 1971), p. 4: "The proposed 87,755 acre Eagles Nest Wilderness includes 58,650 acres of the Gore Range-Eagles Nest Primitive Area, plus 29,105 acres of adjacent National Forests lands in thirteen areas which are suitable and available for Wilderness. Thirteen areas totaling 3,292 acres formerly included in the Primitive Area are recommended for declassification."

interest group recommendations in the process of designating them, by statute, wilderness system units.[9] The Forest Service, recognizing the possibility that the Gore Range-Eagles Nest Primitive Area ultimately might serve only as the core of a larger Wilderness, assigned a specialist from its Denver Regional Office, Gaillard Weidenhaft, to evaluate expansion possibilities along the periphery of this primitive area.

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[9]Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment, Parker v. U.S., pp. 11-13: "The Court is referred to [the] Message from the President of the United States, 5th Annual Report on the Status of the National Wilderness Preservation System, Jan. 23, 1969. This document indicates that since the Wilderness Act went into effect, the Forest Service has reviewed twelve primitive areas and their contiguous lands and in each instance has recommended wilderness classifications for lands both within and without existing primitive area boundaries. For nine of the twelve areas, the total contiguous acreage added to the existing primitive area has outweighed deletions from the primitive area acreage by an average of 32,000 acres. . . . Congress itself [at the request of conservation groups] increased the [Mt. Jefferson Primitive A]rea by 3,000 acres over the [Forest Service's] post hearing recommendation by Public Law 90-548, 82 Stat. 936." The primitive area review process includes an agency study and preliminary boundary proposal; an administrative field hearing on this proposal at which counter-proposals may be placed in the record by citizen groups; submission of the agency's final proposal through the Secretary and the President to Congress; Congressional committee hearings on bills embodying the agency's proposal and counter-proposals of citizen groups, at which witnesses from both the agency and the citizen groups are heard; and Congressional passage of an act which sets final boundaries for the new Wilderness which may reflect the agency's recommendation, the citizen groups' recommendation, or some compromise between the two proposals.

An access road had been constructed into the East Meadow Creek drainage in 1964 and 1965. A low-standard truck trail (called the "bug road") had been built there during a bark beetle-control project in the early 1950s. Two timber harvests had been made on nearby lands. Privately owned inholdings and unpatented mining claims there complicated Forest Service administration. The drainage fell outside the ridgetop hydrographic divide, a recognizable natural feature chosen to serve as the wilderness boundary for ease of identification and administration. For these reasons, Weidenhaft had recommended East Meadow Creek's exclusion from the agency's Eagles Nest Wilderness proposal.[10]

Alternative Uses of the Area

Weidenhaft's wilderness-boundary recommendation served to reinforce the contention of the District Ranger of the Eagle District, Donald E. Price, that East Meadow Creek--rather than being "locked up" as wilderness[11]--be logged in 1969 as envisioned in the Holy Cross Working Circle Ten-Year Timber Management Plan adopted in

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[10]See, Weidenhaft's district court hearing testimony, Reporter's Transcript, pp. 467-476.

[11]Price, memorandum to James O. Folkestad, Forest Supervisor, White River National Forest, Glenwood Springs, Colo., Apr. 3, 1968.

1962[12] on the basis of data collected by the District Ranger during the period 1956-1958.[13] Price saw the timber in the East Meadow Creek drainage as "unravelling [deteriorating] due to age and . . . a potential source for [an] insect epidemic."[14] His concern that "sufficient timber [be provided] for established sawmill operators"[15] was shared by Forest Supervisor James O. Folkestad.

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[12]Approved by Forest Service Acting Chief Clare Hendee on Apr. 16, 1962.

[13]Deposition of Donald E. Price, Sept. 5, 1969, p. 55.

[14]Memorandum to Folkestad, Apr. 3, 1968. In this memorandum, Ranger Price expressed his "considered opinion" that "the Meadow Creek area should not be added to the wilderness area" and that "[p]roximity of a classified area should not limit our multiple use management of a contiguous area."

[15]James O. Folkestad, memorandum to Regional Forester Nordwall, June 3, 1968. At stake also was the future of "the Forest Service dream road connecting Vail and Kremmling through the Sheep Horn Station" (H. Anthony Ruckel, personal letter to the author, Nov. 29, 1971); this was made clear in Regional Forester Nordwall's June 14, 1968 memorandum to Supervisor Folkestad: "We agree that you will need as much volume as possible to amortize the planned specified road [emphasis added]." See also, Boyd O. Fisher, Regional Engineer, memorandum to Multiple Use Coordinator, Feb. 21, 1968: "The Road Inventory shows the Meadow Creek Road No. 15410.2 planned for design class SN-16. The Sheephorn Road No. 15401, however, is planned for design class DN-26, with no plans future extension [sic]. The plan does not show the intention to connect these two roads to become a through route [emphasis added]. The Transportation Plan for this area should be studied to provide for the ultimate all-purpose needs. If a through route is to be the ultimate goal, then both roads must be constructed to the same standard and in the proper location to serve all needs in the area."

A different concern weighed heavily with some Regional Office staff members. In February of 1968 two of Regional Forester David S. Nordwall's assistants submitted memoranda questioning the timing of the proposed East Meadow Creek timber sale.[16] Public hearings were about to be held[17] with respect to the agency's wilderness proposal for the Gore Range-Eagles Nest Primitive Area. The assistant regional foresters predicted that conservationists would accuse the Forest Service of "trying to control wilderness classification by timber harvesting,"[18] if this sale on the edge of the primitive area preceded the resolution of the wilderness area boundary question by Congress. The Regional Office staff, seeking a way out of this dilemma, asked White River National Forest Supervisor James O. Folkestad on March 27, 1968, to consider "the possibility of substituting other areas in your Forest's

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[16]Henry A. Harrison, Assistant Regional Forester, memorandum to Nordwall, Feb. 12, 1968: "There could be some repercussions on the timing of the sale from the wilderness group since the Primitive Area is under study and hearings have not been held." George Lafferty, Assistant Regional Forester, memorandum to Regional Office Multiple Use Coordinator Clayton Pierce, Feb. 26, 1968: "I would oppose advertising this sale until public hearings for a wilderness proposal [are] held. . . . Doesn't the White River [Forest] have timber sale opportunities in more appropriate (from a timing standpoint) areas?"

[17]On Oct. 8-9, 1970 in Frisco, Colo. and on Oct. 12-13, 1970 in Denver, Colo.

[18]Lafferty, memorandum to Pierce, Feb. 26, 1968.

timber sale program."[19] Folkestad on June 3, 1968, suggested a compromise: "Since we are in need of as much sell volume as possible from this unit in F.Y. 1969," the East Meadow Creek sale should not be cancelled but be revised to exclude from the fourteen blocks of timber originally scheduled for cutting the five blocks closest to the primitive area boundary.[20] Regional Forester Nordwall's final decision, he informed Supervisor Folkestad on June 14, 1968, was more conservative. Nordwall approved a sale in the East Meadow Creek drainage, but it included only six of the proposed fourteen cutting blocks:

> We feel strongly that to cut blocks 4, 5, and 13 at this time would be a mistake. As you know, all of this proposed sale, except for block 1 and part of block 2, lies within an area proposed [by the Colorado Open Space Council's Wilderness Workshop; see below] for addition to the Gore Range-Eagles Nest Primitive Area. Until such time as this boundary issue is permanently resolved, we should exercise restraint in harvesting all timber close to the boundary.
>
> Accordingly, we will approve a sale to include blocks 1, 2, 3, 6, 12, and 14 at this time. Blocks 4, 5, and 13 should be held for sale at a later date, dependent upon the final location of the Primitive Area boundary.

Once having made this "sell" decision--the product of an internal decisionmaking process involving a conscious effort to balance the needs for timber by local sawmills

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[19]Ernest J. Grambo, Assistant Regional Forester, memorandum to Folkestad, March 27, 1968.

[20]Folkestad, memorandum to Nordwall, June 3, 1968.

and lumber by the housing industry[21] with the requirement implicit in the Wilderness Act[22] that the agency not preempt the role of the United States Congress in setting wilderness boundaries--Regional Forester Nordwall defended it with vigor:

> As an area eligible under the laws and regulations for timber cutting, the East Meadow Creek sale proposal would ultimately materialize in proper sequence. It was scheduled for early cutting because the stands of timber were over-mature and stagnated timber was long past due for harvesting. Another contributing factor in the selection of this area was the need to supply timber to the local sawmill industry which was and is entirely dependent upon the National Forest for its timber supply. At the time the sale plans for this area were formulated and approved, it had long been planned by the Forest Service and was generally understood by local sawmill operators in or near the communities of Vail, Minturn, and Eagle, Colorado, that construction of the Red Sandstone access road by the Forest Service was projected to gain access to timber in the Meadow Creek, East Meadow Creek and other tributary areas.[23]

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[21]See, e.g., James P. Rogers, amicus curiae brief, Parker v. U.S., July 25, 1969: "It is apparent that in today's world national forest management has many objectives, and many conflicting interests press upon the Forest Service. Even the National Housing Act of 1968, and its goals, are factors the Forest Service must weigh in its many important decisions. The ghetto's child has as much of a stake in this Court's decision as has the Sierra Club, the Forest Service, or Kaibab Lumber Co. All of a sudden we see the interrelationship between the national forests and the fires that burned in Detroit, Newark, and Watts. . . ."

[22]"Each recommendation of the President for designation as 'wilderness' shall become effective only if so provided by an Act of Congress." 16 U.S.C., Section 1132(b); also, Section 1132(c).

[23]Nordwall, memorandum to the Chief of the Forest Service, July 23, 1969.

On March 6, 1969, the East Meadow Creek timber sale appeared as a legal notice in the Eagle Valley Enterprise.[24] Invitations to bid were mailed to six prospective purchasers. Only one bid on the East Meadow Creek timber was received, from Kaibab Industries' mill at Eagle, Colorado.

Depending upon "the eye of the beholder," East Meadow Creek's highest and best use varied from intensive management for timber and water production to extensive management for wildlife habitat and wilderness-type recreation. For example, the Denver Water Board and District Ranger Price seemed to be in agreement that "the long range multiple use aspect of the Meadow Creek drainage [should be] oriented to water production."[25] The water board saw Meadow Creek as another possible source of water to keep the lawns of Denver green and had considered the possibility of building a dam in the drainage but had not concluded its plans in this regard.[26] At the same time,

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[24]"Sealed bids will be received by the Forest Supervisor, U.S. Forest Service, Glenwood Springs, Colorado, at 2:00 P.M., M.S.T., on April 7, 1969 to be followed immediately by oral bidding for an estimated 4,300 thousand board feet of timber marked or designated for cutting. The minimum acceptable bid per M board feet is: Englemann spruce, lodgepole pine, true fir and other species--$33.39." The minimum bid multiplies out to a total of $143,577 for the sale.

[25]Price, memorandum to Folkestad, Apr. 3, 1968.

[26]309 F.Supp. 593, at 595.

others saw East Meadow Creek as a not-too-challenging kind of wilderness, inviting to backpacking beginners, easily accessible from Vail and therefore of special value as a destination for weekend family outings and short ski-touring trips. It also was valued as an attractively forested jumping off place for seasoned wilderness travelers about to embark for a week or two on expeditions into the rocky, top-of-the-world wilderness area to the east of this pleasant valley. Its defenders praised the area in these words:

> A lush woodland eight miles north of the world-famed ski mecca of Vail, sparkling East Meadow Creek long [has been] a haven for riders, hikers, anglers and hunters.[27]
>
> [East Meadow Creek is] presently in a state of de facto wilderness.[28]
>
> [It] is one of the main access routes of the thousands of persons who visit the Primitive Area each year. It provides many excellent wilderness campsites [and] serves as summer range and cover for an important elk herd.[29]

Those with a special interest in the economic success of the resort town of Vail equated the preservation of East

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[27]Senator Gale McGee, "Your Forest, Their Timber," Colorado, July/August 1970, p. 109.

[28]Peter I. Kain, "The Battle for East Meadow Creek," American Forests, Oct. 1969, p. 39.

[29]"COSC Wilderness Group Urges Delay in Timber Sale," news release issued by the Wilderness Workshop of the Colorado Open Space Coordinating Council, Denver, Colo., Apr. 8, 1969.

Meadow Creek with any other bona fide project to help achieve that objective:

> The establishment of Vail has contributed to quite an extent to the use of the [East Meadow Creek] area. The use of the area as wilderness by people to walk, ride horseback and hunt is increasing.[30]

> A diminishment of the wilderness values of this area would damage the character of Vail. It is more important to Vail to have an environment which allows the most varied recreational use possible during all seasons. The timber road that has been built into the East Meadow Creek area would be a logical starting point [for ski touring trips out of Vail].[31]

Two potentially important "pressure groups"--those interested in the utilization of the area's forage resource and its mineral resources--remained neutral during

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[30]Summary of the Deposition of William Bird Mounsey, Aug. 20, 1969, p. 3.

[31]Summary of the Deposition of Robert W. Parker, Sept. 11, 1969, pp. 2-3. Governmental units at all levels, as well as private entrepreneurs, have a stake in the economic success of the Vail development, as pointed out in a Dec. 27, 1966, memorandum from Forest Supervisor Folkestad to Regional Forester Nordwall:

"At the present time less than 1% (15,960 acres) of the total White River National Forest net area is under permit for ski areas yet it returned 19% (nearly $32,000.00) of the total collections for F.Y. 1966 and we're only starting to see the use. . . . Vail paid us $13,261.77 for the '65-'66 season or at an average of $2.00 per acre for the current permitted area of 6,470 acres. 20,000 acres at the same fee would amount to 66¢ per acre as compared to only 4¢ per acre for the 1966 grazing fees (total of $790.00) received for the four grazing allotments that cover practically the same country and area (21,862 allotment acres). We think that public benefits and enjoyment have to be considered and that Vail is also paying substantial amounts for income and property taxes. . . ."

this controversy. The privileges of the domestic livestock grazing permittee whose allotment included East Meadow Creek would be essentially unaffected by the classification of the area as wilderness.[32] And the area contains no mines or evidence of potentially valuable mineral deposits.[33]

Once again, however, the Forest Service was caught in the crossfire between two potent interest groups. Both groups claimed that the Forest Service was usurping the prerogative of Congress to establish wilderness boundaries. Wilderness proponents saw implementation of any part of the timber sale as effectively reducing the size of the area which could be recommended to Congress for Wilderness Act protection.[34] On the other hand, the forest products industry saw the Regional Forester's decision to postpone

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[32]See, Wilderness Regulations of the Department of Agriculture, Title 36, Code of Federal Regulations, Sec. 251.76(a).

[33]U.S., Department of the Interior, Geological Survey and Bureau of Mines, Mineral Resources of the Gore Range-Eagles Nest Primitive Area and Vicinity (Washington, D.C.: Government Printing Office, 1970).

[34]Complaint, Parker v. U.S., Apr. 4, 1969, p. 5: "Unless this court enjoins the opening of the bids for said timber sale, the sale and the cutting and harvesting of said timber: (a) the wilderness character of the sale area and an indeterminate area of the surrounding land will be needlessly, substantially and irreparably damaged, and the right of the public to have such areas considered for wilderness status by the Congress of the United States will be needlessly, substantially and irreparably compromised. . . ."

the sale of eight of the fourteen cutting blocks in the East Meadow Creek unit as an unauthorized expansion of the primitive area's boundaries prior to any action by Congress sanctioning the closure of this national forest land to logging.[35]

The Legal Issues

The Forest Service's 1968 decision to sell 4.3 million board feet of timber in the East Meadow Creek drainage adjacent to the Gore Range-Eagles Nest Primitive Area in the White River National Forest prior to final Congressional action on the agency's Eagles Nest Wilderness proposal was tested in federal district court, in Denver, in 1969 and 1970 and in the U.S. Court of Appeals for the Tenth Circuit in 1971. The U.S. Supreme Court denied certiorari (refused to review the lower court's decision--a neutral reflection on the merits of the case) on March 20, 1972.

The Honorable William E. Doyle, Judge of the U.S. District Court for the District of Colorado, and the Tenth

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[35]Supplemental Brief in Support of Motion of Intervenor Western Wood Products Association for Summary Judgment, Sept. 26, 1969, p. 4: "[W]e are far from convinced that when, in response to the plaintiffs' outcry, the Forest Service created the 'buffer zone' around this primitive area which cut the proposed sale nearly in half, it was not acting in excess of its authority under the 1897 and 1964 Acts, since what it did there was to enlarge the primitive area, in effect, by executive fiat."

Circuit Court appellate panel of Judges Lewis, Pickett and Adams agreed that "East Meadow Creek is of wilderness value,"[36] that "a study of the [East Meadow Creek] area [must be included] in the mandated report to the President [on the suitability for preservation as wilderness of the Gore Range-Eagles Nest Primitive Area and contiguous lands],"[37] and that "it thwarts the purpose and spirit of the [Wilderness] Act to allow the Forest Service to take abortive action [i.e., the sale of the East Meadow Creek timber] which effectively prevents a Presidential and Congressional decision."[38] The district court enjoined the East Meadow Creek timber sale

> indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagles Nest or that it should not be.[39]

The appellate court affirmed this judgment for the plaintiffs, and the Supreme Court refused to review the case.[40] Judge Doyle's decision is in force, the implications of which have required the Forest Service to adopt a go-slow

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[36] 448 F.2d 793, at 796.

[37] Ibid., at 797.

[38] 309 F.Supp. 593, at 599.

[39] Ibid., at 601.

[40] 92 S.Ct. 1252.

attitude toward timber sales in roadless areas throughout the West.[41]

The motion for "a declaratory judgment adjudging unlawful, and to enjoin the proposed sale, the sale [sic], the cutting and harvesting of timber resources in the East Meadow Creek Unit"[42] was filed for twelve residents of Vail ("the Vail 12"[43]), for wilderness outfitter William B. Mounsey, and for the Sierra Club and the Eagles Nest Wilderness Committee by Denver attorney H. Anthony Ruckel

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[41]Readers interested in pursuing the connection between the Parker decision and the Forest Service's current "Roadless Area Review and Evaluation" program are referred to the following Forest Service internal memoranda: Edward P. Cliff, Chief, memo to Regional Foresters, Feb. 25, 1971 ("[W]e must get on with our efforts to bring the multidisciplinary team approach into our basic land management decisions, especially those involving still undeveloped areas. One important aspect of this is the need to identify those areas which still should be studied for potential wilderness classification. . . . The longer these decisions are delayed the greater is the danger that the areas which should be added to the Wilderness System may be inadvertently compromised. . . . Areas which are identified for wilderness study must be protected to preserve their wilderness potential during the study period and until a final determination is made. . . ."); W. J. Lucas, Regional Forester, Denver, Colo., memo to Forest Supervisors, June 14, 1971 ("Our accelerated review of Multiple Use Plans is obviously triggered by a June 30, 1972 requirement to identify areas that might be candidates for Wilderness classification. . . . There is an obvious need . . . for an improved inventory of and further review of plans for administrative units which contain unroaded areas that are otherwise generally undeveloped, regardless of whether or not they appear to warrant review for potential Wilderness classification."); "Multiple Use Management Review of Undeveloped National Forest Areas in the Rocky Mountain Region," Questions and Answers Concerning a Current National Forest Issue, Forest Service, Denver, Jan. 1972 ("The Forest Service is reviewing multiple use management alternatives for about 5.6 million acres of

with the U.S. District Court at Denver on April 4, 1969.[44] Judge Doyle denied the defendants' motions for summary judgment (to dismiss the case) on December 24, 1969, and after hearing four days of testimony (January 26-29, 1970) decided on February 17, 1970 in favor of the Vail and conservation group plaintiffs. The appellate court opinion, handed down on October 1, 1971, affirmed the district court decision. The legal issues are discussed below.

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undeveloped National Forest areas in the Rocky Mountain Region. . . . As a part of this multiple use evaluation, candidate areas will be selected for further study to determine their suitability and availability for inclusion in the National Wilderness Preservation System. The undeveloped areas that have been identified do not represent wilderness proposals. Wilderness will be but one of the resources considered during the review. . . . Public comments can help us make better land management decisions, and we welcome the participation of all who are interested."); John R. McGuire, Chief, memo to Regional Foresters, May 22, 1972 ("The following are our directions in making the Roadless Area analysis: . . ."); John R. McGuire, Chief, memo to Regional Foresters, May 30, 1972 ("[T]he recommendations that you will develop by June 30 should not be disclosed until there has been an opportunity for evaluation in this office and a Servicewide list of proposed New Wilderness Study Areas is prepared. . . ."); John R. McGuire, Chief, memo to Regional Foresters, July 11, 1972 ("I am now requesting some additional data required to complete the Washington Office analysis [of the Roadless Area information]. . . . The time schedule is very tight, and I ask that you give this data request a high priority. The results of the analysis will be provided to you before the proposed [Regional Foresters'] meeting in December.").

[42]Complaint, Parker v. U.S., p. 1.

[43]"The Sounding Board," American Forests, June 1970, p. 38.

[44]"Robert W. Parker, Ellsworth P. Boyd, Roger C. Brown, Josef Staufer, William James Cunningham, John F.

Standing to Sue

Judge Doyle had no difficulty finding that the Parker plaintiffs had the requisite "standing" to sue:

> We conclude that [the Administrative Procedure Act, the Multiple Use Act and the Wilderness Act[45]] confer on groups and individuals such as the plaintiffs the status of "aggrieved persons" when the Secretary of Agriculture or the Forest Service fails to comply with the mandatory requirements of the Acts.[46]

His December 1969 conclusion in this regard not only was affirmed by the Court of Appeals for the Tenth Circuit in October 1971,[47] but was cited with approval by Judge Trask

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Donovan, Philip F. Krichbaum, Albert G. White, L. Steve Ruder, Richard Earl Peterson and William B. Mounsey, individually; Bruce Sheldon Batting, individually and as Chairman, Eagles Nest Wilderness Committee; James Edmond Kemp, individually and as Vice Chairman, Eagles Nest Wilderness Committee; and Sierra Club and Eagles Nest Wilderness Committee, Plaintiffs, vs. United States of America; Clifford Hardin, individually and as Secretary of Agriculture of the United States; Edward P. Cliff, individually and as Chief, United States Forest Service; David S. Nordwall, individually and as Regional Forester; and James O. Folkestad, individually and as Supervisor, White River National Forest." Complaint, p. 1. The Colorado Open Space Coordinating Council, the Town of Vail, and Colorado Magazine joined the action as parties plaintiff later.

[45] 5 U.S.C., Sec. 702; 16 U.S.C., Sec. 528; 16 U.S.C., Sec. 1131.

[46] 307 F.Supp. 685, at 687. Judge Doyle cited for support Scenic Hudson Preserv. Conf. v. FPC, 354 F.2d 608 (2nd Cir. 1965), cert. denied, 384 U.S. 941 (1966); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); and Sierra Club v. Hickel, No. 51464 (N.D. Cal., July 23, 1969).

[47] 488 F.2d 793.

of the Court of Appeals for the Ninth Circuit in that court's September 1970 opinion on the Mineral King case, Sierra Club v. Hickel:

> In [Parker] the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action.[48]

The Parker plaintiffs included the Sierra Club, organized in 1892,[49] now a large, national organization, and without question a plaintiff having a "continuing, basic and deep . . . interest in the wilderness movement" and "an 'aesthetic, conservational and recreational' interest to protect."[50] They included these institutional plaintiffs: the Eagles Nest Wilderness Committee,[51] the Colorado Open Space Coordinating Committee, Colorado Magazine, and the Town of Vail, whose members, subscribers

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[48] 433 F.2d 24, at 33.

[49] See, Sierra Club Handbook, 1969, pp. 6-7.

[50] Walton v. St. Clair, 313 F.Supp. 1312, at 1317: "This gives it standing and meets the second requirement of Association of Data Processing [279 F.Supp. 675 (1968), aff'd 406 F.2d 837 (8th Cir. 1969)]."

[51] Which could be viewed as "a 'johnny-come-lately,' ad hoc organization," Walton v. St. Clair, 313 F.Supp. 1312, at 1317. But see, Pennsylvania Environmental Council v. Bartlett, 315 F.Supp. 238 (1970), wherein a plaintiff organized two weeks prior to filing its complaint was found to have standing.

and residents were "users of the area affected by the administrative action."[52] And they included twelve "residents, employees, or property owners in and about the town of Vail," including Robert W. Parker, and also a guide and outfitter from Denver, William B. Mounsey, who, "as part of his living, conducts wilderness trips for financial remuneration."[53] These thirteen individuals were, in effect, alleged to have

> such a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186 . . ., as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101. . . .[54]

So this broad spectrum of plaintiffs satisfactorily met the fairly stringent Sierra Club v. Morton "standing" test which was to be handed down on April 19, 1972,[55] and which was to clarify a legal concept, the interpretation of which had been very much in a state of flux since Scenic Hudson in 1965.[56]

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[52] Sierra Club v. Hickel, 433 F.2d 24, at 33.

[53] Complaint, p. 2.

[54] Sierra Club v. Morton, 92 S.Ct. 1361 (1972), at 1364.

[55] 92 S.Ct. 1361 (1972).

[56] 354 F.2d 608 (2nd Cir. 1965), cert. denied, 384 U.S. 941. See, Frederick S. Richards, "Walton v. St. Clair: The Standing Question," Natural Resources Lawyer, Vol. IV, No. 1, Jan. 1971, pp. 52-56: "In the lower federal courts, the landmark case of Scenic Hudson Preservation

The "apparently principal plaintiff"[57] was William B. Mounsey of Evergreen, Colorado, a Denver suburb. Bill Mounsey, in effect, played three different but overlapping roles in connection with the evolution of the East Meadow Creek controversy. As a wilderness guide and outfitter, he had taken seven groups of paying guests on backpacking trips through this drainage on their way into the nearby primitive area during the summers of 1967-1969.[58] As a volunteer conservationist he had participated in the

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Conference v. Federal Power Commission primarily is responsible for opening the vistas by which imaginative and interested private citizens may bring into focus the action or inaction of government officials in fulfilling the charge bestowed on them by statute or regulation. . . . The effect of Scenic Hudson was that 'the "case" or "controversy" requirement of Article III, Section 2, of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest.' Rather, the Court sought evidence indicating plaintiff's direct personal interest in the 'case' or 'controversy.' . . . In cases such as Parker v. United States, the Court upheld the standing of such plaintiffs as the Town of Vail, the Colorado Magazine, the Sierra Club, and the Colorado Open Space Coordinating Council to restrain the role of certain alleged wilderness areas until proper review by all governmental officials and agencies, involving the President and Congress, had been completed. . . . A plaintiff must still show where he has a personal stake or some special interest in seeking judicial review. . . . [W]ith the Supreme Court's decision in Data Processing Service v. Camp [397 U.S. 150 (1970); see also, Barlow v. Collins, 397 U.S. 159 (1970)], the traditional test of personal economic damage or loss as the touchstone to standing has presumably been laid to rest. The criterion of Scenic Hudson, United Church of Christ, and Parker now serve as the base from which legitimate and well-founded concern for our environment may manifest itself into positive action in the form of judicial inquiry and review of heretofore mainly unchallenged actions or inactions of our government officials and agencies." Other reactions to the March 3, 1970, Data Processing (ADAPSO) and Barlow decisions: Louis M.

organization of two groups involved here, the Wilderness Workshop of the Colorado Open Space Coordinating Committee (COSC), in 1964,[59] and the Eagles Nest Wilderness Committee, in 1967.[60] He also had served as a paid consultant to The Wilderness Society, reporting to that national group's Director of Field Services, stationed in Denver, Clifton R. Merritt. Just as Jerry Gandt had been the leading plaintiff in Gandt v. Hardin, Bill Mounsey's efforts were primarily responsible for the Parker litigation.[61]

Kohlmeier, "High Court Gives Individuals and Concerns Standing to Sue Federal Administrators," The Wall Street Journal, Mar. 4, 1970, p. 6: "Courts have great leeway in fixing doctrine on the matter of standing, because Congress has failed in many regulatory statutes to specify who may go to court to challenge rulings of Government officials who administer laws and programs enacted by Congress. . . . [T]he position the Supreme Court adopted in [Data Processing] was urged by the Sierra Club, a highly vocal conservation group, which frankly said it wanted the right to challenge Government officials on matters such as the location of dams and highways and their impact on conservation values." "Standing to Sue," Land and Natural Resources Division Journal (U.S. Department of Justice), Vol. 8, No. 4, Apr. 1970, pp. 81-83: "Neither [ADAPSO nor Barlow] is any help in defining what constitutes 'injury in fact' or 'personal stake' when noneconomic interests are concerned. Mere disagreement with discretionary managerial decisions by federal officers cannot be deemed an injury in fact or provide such a personal stake. No plaintiff should be able to enlist the court to substitute his judgment for that of the federal officers charged by Congress with administration of statutorily created programs. . . . [T]he standing hurdle must continue to be placed in the path of plaintiffs so that the courts may have the opportunity to more clearly define their concepts of standing to sue. It cannot yet be said that the Supreme Court has opened the door of the courts to all persons or groups who have strong feelings about a public issue." See also, "Environmental Litigation Involving Forest Service Lands," Natural Resources Law Newsletter, Vol. 4, No. 2, Jan. 1971, p. 4: "Not only are we uncertain what constitutes standing in this field, but if the Sierra Club

As the U.S. Department of Justice author who wrote the April 1970 Land and Natural Resources Division Journal report on "standing to sue" noted (at p. 81), "interested persons or groups often differ among themselves in supporting or opposing an official managerial decision." There was evidence of this in the Gandt case (Chapter III, supra.) and the situation with regard to the Parker plaintiffs also was fraught with inter- and intra-organizational tension. The Wilderness Society, invited to become a party

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or similar organizations have standing because of their peculiar interest in the application of the Multiple-Use Sustained-Yield Act of 1960 and the Wilderness Act of 1964, can they also raise such collateral issues as, for example, the price at which the Forest Service appraises, and the competitive bid price for which it sells timber?"

[57]To borrow Judge Kent's description of Jerry Gandt in Gandt v. Hardin (Opinion, p. 23).

[58]Reporter's Transcript, U.S.D.C., D. Colo., C.A. No. C-1368, p. 271.

[59]See, ibid., p. 257, Mounsey's description of how the Wilderness Workshop had been organized in the fall of 1964 to develop answers to the questions, "How could citizens best assist in the carrying out of the provisions of the Wilderness Act? What steps could they take; what steps did the Act sort of put on the citizen conservationists in taking part in the carrying out of the Act?" When the Colorado Open Space Coordinating Council was organized in 1965, the Wilderness Workshop joined COSC and became, in effect, COSC's statewide wilderness survey committee.

[60]The Eagles Nest Wilderness Committee, based in Vail, had been organized initially to fight the proposed "Red Buffalo" route for Interstate Highway 70 which would have bisected the Gore Range-Eagles Nest Primitive Area. Reporter's Transcript, James E. Kemp, p. 93. Secretary of Agriculture Orville L. Freeman denied the 1968 request of the Colorado Department of Highways for permission to route I-70 over this route, which would have "destroy[ed]

plaintiff, demurred, although its chief field representative was to become the plaintiffs' star expert witness.[62] More importantly, the Colorado Open Space Coordinating Council--a loosely-knit, umbrella-type of information clearinghouse service for some thirty-five local and statewide conservation groups having different primary interests--was rent with dissention and permanently weakened after its board of directors felt they had been unfairly used by Mounsey and his Wilderness Workshop when "pressured"

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or seriously erode[d] the wilderness resource on about 5,300 acres of land suitable for addition to the National Wilderness Preservation System [and] destroy[ed] another 4,800 acres also suitable for Wilderness preservation by cutting it off and isolating it from the main body of the present primitive area." Statement by Secretary Freeman, Washington, D.C., May 17, 1968.

[61]As the "principal plaintiff," Mounsey's activities were scrutinized closely by the federal defendants, who not only obtained copies of his income tax returns (Exhibit H-16, Pre-trial Order, Sept. 26, 1969, p. 15) but sent agents to photograph his new home (Tony Ruckel, personal interview, Washington, D.C., Sept. 25, 1971). According to Clayton Pierce, Multiple Use Coordinator, Rocky Mountain Region, Forest Service, Denver, Colo. (personal letter, Aug. 11, 1972), "[t]he picture-taking episode came about as a result of Mounsey's recent sale of his 'rock' home and purchase of one largely made of wood. Photographers were directed to take their pictures openly and deliberately so as not to cause alarm to anyone. The possibility of showing the Court that there was an inconsistency between Mounsey's recognition of the Nation's need for lumber (represented by his new home) and his opposition to timber management activities in East Meadow Creek, was being considered [but the photos were not used in court]."

[62]See, Deposition of Clifton Merritt, Sept. 4, 1969, 74 pp., and Reporter's Transcript, Jan. 26, 1970, pp. 162-221.

a month after the legal action had been initiated to join in the suit. Many of COSC's member clubs felt the suit was wrong and improper. The Colorado Wildlife Federation dropped its affiliation with COSC because it disagreed with these actions of COSC's board and Wilderness Workshop.[63] The Forest Service managed to document this dissention by "interrogat[ing] members of COSC member groups to see if these members really supported COSC's position."[64] Letters of inquiry to COSC member groups[65] elicited this kind of response:

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[63]Roger Hansen, former Executive Director, COSC, personal interview, Denver, Colo., Aug. 20, 1970. The Parker Complaint was filed by Denver attorneys Richard Lamm, Tom Lamm, and H. Anthony Ruckel on Apr. 4, 1969, while the COSC board passed its resolution authorizing the group's participation as a party plaintiff in the Parker litigation on June 2, 1969. The Colorado Wildlife Federation's disaffiliation with COSC came not only as a result of the Parker action, with which it disagreed, but also as a result of pressure from the National Wildlife Federation, of which the CWF was the Colorado affiliate, to shed all other organizational ties. The belatedly authorized Parker action provided the excuse to sever the COSC-CWF relationship as suggested by the NWF.

[64]Clayton Pierce, personal interview, Denver, Colo., Aug. 21, 1970.

[65]E.g., D. S. Nordwall, Regional Forester, Denver, Colo., letter to Vern True, State President, Men's Garden Club of Colorado, Wheat Ridge, Colo., Sept. 16, 1969: ". . . Mr. Eugene R. Weiner of Denver, Colorado, in connection with this case has stated under oath that your organization has affirmed, adopted and authorized Colorado Open Space Council, Inc. to participate in this litigation. . . . Did your organization advise COSC to become a party plaintiff in this case on your behalf? . . ."

> The Men's Garden Clubs of Colorado wishes to make it absolutely clear that it does not now, and never has, desired to become a party plaintiff in any action against the Government.[66]

Another example:

> Thorne Ecological Foundation did not advise COSC to become a party plaintiff in the civil action case No. C-1368 in our behalf. We were advised orally, via Dr. Willard's attendance at a board meeting of COSC, of the case and were aware of it, but we did not approve (nor were we asked) to have our name on the complaint.[67]

These efforts, described by the Forest Service as attempts to "discover for the record whose motives were actually being served by the complaint,"[68] were characterized as "disreputable attempts at intimidation of COSC members by threats of damage suits and 'knocks-at-the-door-in-dead-of-night' techniques, with the intent of persuading COSC to withdraw as a party plaintiff" by COSC's chief executive officer, Roger Hansen, who is an attorney.[69]

The leading plaintiffs in Parker, it became evident, consisted of a wilderness-trip guide with an alleged

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[66]Reply to letter cited at footnote 64, from True to Nordwall, Sept. 18, 1969.

[67]Oakleigh Thorne, II, President, Thorne Ecological Foundation, Boulder, Colo., letter to Nordwall, Sept. 16, 1969.

[68]Clayton Pierce, personal letter, Aug. 11, 1972. Added Pierce: "The results of the inquiries, as entered in testimony and revealed in Hansen's memorandum of October 1, 1969 [see below], to COSC organization presidents and Board representatives, confirmed the suspicions, admirably."

[69]Hansen, memorandum to "COSC Organization Presidents and Board Representatives," Oct. 1, 1969. Hansen's

economic stake in the administration of the East Meadow Creek drainage as an undeveloped hiking area, a dozen of his friends from the nearby resort town of Vail who agreed with him that this drainage would serve Vail's economic interests best as an undeveloped hiking, hunting and ski-touring area, and the Sierra Club, whose litigation-minded leaders saw, with the plaintiffs' counsel in Colorado, an opportunity to win in court an important new interpretation of the 1964 Wilderness Act.

On June 12, 1969--after the federal defendants and defendant Kaibab Industries had filed their motions to dismiss, together with supporting briefs--the Parker plaintiffs filed a thirty-page brief "in opposition to defendants' motions to dismiss" which exhaustively rebutted the Government's contention that the plaintiffs had "no

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memorandum appeared to allege unethical conduct on the part of defense counsel. See, e.g., "Code of Professional Responsibility and Canons, Michigan Court Rules (St. Paul: West Publishing Co., 1969), 1972 Pocket Part, pp. 218-219: "Disciplinary Rule 7-102 (A) (1) In his representation of a client, a lawyer shall not . . . conduct a defense . . . or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." "DR 7-104 (A) (1) During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

standing to enjoin the management of the National Forest." This document, also used as the basis of a brief in support of the plaintiffs' motion for injunction filed on December 2, 1969, in the Gandt v. Hardin case in Michigan,[70] invoked the liberal holdings regarding the identification of complainants who have standing in Flast v. Cohen (392 U.S. 83, at 105, 106), Scenic Hudson (354 F.2d 608, at 616), and Office of Communication of United Church of Christ (359 F.2d 994, at 1005) on the plaintiffs' behalf.

The Government's defense, with respect to the standing question, was couched in this language:

> To be entitled to the equitable powers of the court, a plaintiff must be threatened with injury or harm that constitutes an actionable wrong. Unless the plaintiffs' legal rights are in jeopardy, they do not have standing to sue. In this case, the plaintiffs do not have a legal right to have all trees within the national forests remain in their natural state.[71]

The Justice Department brief written by James R. Richards then noted that the three statutes on which the plaintiffs' case was based[72] "have no provision for judicial remedies":

> Congress has not granted to the private citizen a specific right of review for the purpose of weighing

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[70] And described in more detail at pp. 44-47, Chapter III, supra.

[71] Memorandum Brief in Support of Motion to Dismiss, p. 3.

[72] 16 U.S.C., Sec. 476; the Multiple Use Act, 16 U.S.C., Sec. 528; the Wilderness Act, 16 U.S.C. 1131.

> the administrative decisions made by the government officials in carrying out these requirements. Unless the plaintiff can show a probable injury based upon contract, common law or an act of Congress, the plaintiff has no standing and the complaint should be dismissed.[73]

The Government's brief concluded, after the recitation of a string of supposedly supportive but pre-World War II cases,[74] that a "citizen's whim" should not be allowed to "frustrate" an executive agency project:

> The public purpose to be served by good administration of the nation's natural resources would not be accomplished by this review. If the plaintiffs have standing to have the court review the judgment of the foresters to cut or not cut public timber, the next step would be a review of the employment practices, procurement procedure, the location of offices and finally what segment of the public is to be favored. The right to file a complaint and cause the administrative machinery to stop should not be afforded lightly. Projects planned by the executive branch and funded by the legislative branch relating to public lands should not be frustrated by the judicial branch at the whim of any citizen who disagrees with the justification of such projects.[75]

Even the Sierra Club's opponents on the merits--in Parker, counsel for the Western Wood Products Association,

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[73]Memorandum Brief in Support of Motion to Dismiss, p. 4. R.E.A. v. No. States Power Co., 373 F.2d 686 (8th Cir. 1967) was cited.

[74]Fairchild v. Hughes, 258 U.S. 126 (1922); Mass. v. Mellon, 262 U.S. 447 (1923); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939); L. Singer & Sons v. Union Pacific Railway Co., 311 U.S. 295 (1940); Perkins v. Lukins Steel Co., 311 U.S. 295 (1940).

[75]Memorandum Brief in Support of Motion to Dismiss, p. 5.

and in Sierra Club v. Hickel, Walt Disney Productions' Mineral King project manager--disagree with the Government on this point. James P. Rogers of Portland, Oregon, who entered the Parker case in the role of amicus curiae and later became the legal representative of intervenor Western Wood Products Association, vigorously denied the Forest Service's legal "invincibility":

> Before this Court is the question whether the Forest Service is completely immune from judicial review, however arbitrary and capricious its actions may be. It seems inconceivable that any federal agency is to be considered out of bounds to the exercise of the federal judicial power, yet that is the thrust of the Department of Justice's brief. Somewhere there is a breaking point beyond which executive discretion cannot be allowed to go. The plaintiffs should explain some tests to determine where that line may be set.
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> From the 1911 cases of U.S. v. Grimaud, 220 U.S. 506, and Light v. U.S., 220 U.S. 523, through Little Valley Lumber Co. v. Benson, U.S.D.C., D.C. Dist., Civil No. 2947-58, filed Nov. 21, 1958, decision-making by the Forest Service, however awesome its implications to the nation, has had an aura of legal invincibility.
>
> My interest is, entirely, to observe to the Court that there are cases where the Forest Service's acts or inactions ought to be successfully judicially challenged. . . . It seems to me there is a community of interest here, in which the Sierra Club and the forest products industry can join. I think organized interested groups should be allowed to challenge, in federal court, something the Forest Service has unlawfully done, on the basis that they have "standing" to do it. . . .[76]

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[76]Memorandum of Law of James P. Rogers as Amicus Curiae, July 25, 1969, pp. 1-8, condensed from the original statement.

Moving from his role as amicus to his role as counsel for the industrial association intervenor, Rogers hit on this point again:

> We do not wholly acquiesce . . . in the theory advanced by the United States . . . that, as we understand the Government's position, the various acts of the Congress since 1905 relating to the national forests and their administration give the Forest Service carte blanche immunity from judicial restraint. That argument ranges, to us, too wide.[77]

As indicated in Chapter V, Robert B. Hicks, project manager for the proposed Walt Disney Productions resort at Mineral King delayed by the Sierra Club v. Hickel litigation, felt moved to observe, on January 15, 1970, that "the Sierra Club is doing a lot of people a favor" by winning clarification of the "standing" question:

> [I cannot object to the new "standing" rule or to the weakening of the "sovereign immunity" defense because] citizens should have a place to go to test arbitrary and capricious agency action. The judiciary thus affords a safety valve which in my judgment is pretty vital to the preservation of this tripartite system of government. This is not all bad, even on my side of the fence. The Sierra Club is doing a lot of people a favor, since these streets must run both ways.[78]

As we have noted, Judge Doyle found that the Parker plaintiffs were "advancing the public interest" in

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[77]Brief in Support of Motion of Intervenor Western Wood Products Association for Summary Judgment, p. 10.

[78]Hicks, speech to the California State Chamber of Commerce, Los Angeles, Calif., Jan. 15, 1970.

the preservation of the scenic and recreational aspects of certain public lands, that they had a "special interest" in the values which Congress sought to protect by enacting the Multiple Use Act and the Wilderness Act, and that they were "aggrieved persons" entitled to standing to sue the Forest Service and Kaibab Industries.[79]

Waiver of Sovereign Immunity and Authorization of Judicial Review

The Parker defendants argued that the complaint constituted an unconsented suit against the government which was barred by the doctrine of sovereign immunity. Judge Doyle's logic in disposing of this second "threshold" defense ran as follows:

> The plaintiffs claim that the various named government officials have acted outside of and in excess of any statutory authority conferred upon them. Such a claim clearly takes this action outside the scope of sovereign immunity, for if the plaintiffs' claim proves true, the actions of the defendants must be considered individual rather than sovereign acts.[80]

Just as Judge Kent had concluded in Gandt (Chapter III, supra.), Judge Doyle found that the Multiple Use-Sustained Yield Act, 16 U.S.C., Section 529, contains a mandatory review requirement, and that

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[79] Memorandum Opinion and Order, Parker v. U.S., Dec. 24, 1969 (307 F.Supp. 685, at 687).

[80] Ibid.

> the first [issue of fact to be tried] is whether the Secretary has given due consideration to the relative values of the various resources in particular areas as required by the statute. . . . Agency action taken without fulfilling this mandate would be arbitrary and capricious, and, accordingly, reviewable [by this court] under 5 U.S.C., Section 706 [the Administrative Procedure Act].[81]

Not that the Forest Service does not have discretion with regard to its decisions as to where and when to sell timber. But "due consideration to the relative values of the various resources" must be given before making any such decision, "and there is no compromise with this requirement."[82] Further,

> another issue of fact is whether the area here in question falls clearly within the definition of wilderness under the standards of 16 U.S.C., Section 1131(c) [the Wilderness Act], and also whether it is ecologically interrelated with the primitive area.

Hitting again at the mandatory nature of the Wilderness Act's review requirements, Judge Doyle concluded:

> If [East Meadow Creek] does satisfy these standards, the Secretary would have no discretion but would have to report to the President as to the suitability of these contiguous areas for wilderness classification. Accordingly, this case cannot be disposed of without furnishing to the plaintiffs an opportunity to establish that the areas in question are so clearly wilderness in character as to require action by the Secretary in respect to them.[83]

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[81] Ibid., at 687-688.

[82] Ibid., at 688.

[83] Ibid.

Finally, Judge Doyle, in his order dismissing the defendants' motion for summary judgment, observed that

> if the timber is sold the question would suddenly become moot. The trees can, of course, always be cut down, but they cannot be restored if they have already been cut.[84]

In his analysis of this legal issue, Judge Doyle essentially concurred with counsel for the Parker plaintiffs who, in their June 12, 1969, brief in opposition to defendants' motion to dismiss, had described the "machinery which enables them to seek judicial review" as having been provided by Section 10 of the Administrative Procedure Act (APA), Title 5, U.S. Code, Sections 701 et seq. "In suits where the APA applies [the brief noted] sovereign immunity is held to be waived." The application of the APA's provision of judicial review for persons "aggrieved by agency action" and having "no other adequate remedy in a court" has been described in both the Gandt and Parker cases. Specifically, the Parker plaintiffs alleged that they were "aggrieved recreationalists,"[85] pointing especially to Bill Mounsey's "very special economic interest in the continued pristine quality" of the East Meadow Creek region but contending also that all the plaintiffs "should be

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[84] Ibid.

[85] Memorandum Brief in Opposition to Defendants' Motions to Dismiss, p. 20.

able to defend their special interest and deep concern with the use of our natural environment."[86]

As Judge Doyle had noted, the plaintiffs alleged that "Defendants, agents of the United States, acted beyond the scope of their authority in selling the East Meadow Creek timber"[87] and that "acts outside the administrative authority . . . do not fall within the administrator's discretion."[88] The judge agreed with the plaintiffs that certain "'procedural' steps . . . must be taken prior to the sale of the timber" and that the court "can require Defendants United States and its officials to . . . reveal the full record, the necessary studies and judgments, which in the last analysis is the only relief assuring consideration of Plaintiffs' valid interests in this case."[89]

Thus the defendants' contentions that the "Administrative Procedure Act does not give consent to such a suit"[90] and that Parker, as an unconsented suit against

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[86] Ibid., p. 22.

[87] Ibid., p. 23.

[88] Ibid., p. 26.

[89] Ibid., p. 28.

[90] Memorandum Brief in Support of Motion to Dismiss, p. 2, citing Louisiana v. McAdoo, 234 U.S. 627 (1914), Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949), and Ferris v. Wilbur, 27 F.2d 262 (4th Cir. 1928). But see, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, at 410, as quoted by the Parker appellate panel at 448 F.2d 793, at 795.

the United States, should be dismissed,[91] were overruled, as were the defendants' points for denying judicial review which included this "parade of horribles":[92]

> [The plaintiffs] ask for a path to be opened to them which is fraught with peril. For, if successful, they can block a grazing permit, a mining location, a range experimentation program, a recreational site, a ski area, or any such type of activity and thus emasculate multiple use and a balancing of the public interest in the use and enjoyment of the public lands.[93]

The federal defendants also had cited the holding in Terry v. Udall,[94] involving the rejection of bids on the sale of public lands by the Secretary of the Interior, wherein

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[91]Memorandum Brief in Support of Motion to Dismiss, p. 2.

[92]John Roche, Brandeis University, as quoted in the Congressional Record, Aug. 17, 1972, at p. S 13860: "In my judgment, the attorney general was unwise to move against the New York Times [for publishing the Pentagon Papers]: inevitably, in the courtroom the parade of horribles began and before long the logical escalator put one in the position of either denying or affirming the right of the government to impose any sort of official secrecy. . . ." Emphasis added.

[93]Memorandum Brief in Support of Motion to Dismiss, p. 9. Emphasis added. Plaintiffs' answer, from Brief in Opposition to Defendants' Motions to Dismiss, at p. 29: "The Government has raised the spectre of inundation of the courts by litigants seeking to halt a variety of uses made of Forest Service land. This contention is without merit as indicated by Scenic Hudson: 'We see no justification for the Commission's fear that our determination will encourage "literally thousands" to intervene and seek review in future proceedings. . . . [N]o such horrendous possibilities exist [citations omitted]. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.' 354 F.2d at 617."

[94]336 F.2d 706 (9th Cir. 1964), cert. den. 381 U.S. 904 (1965).

> the plaintiffs clearly come under the doctrine that the letting of a timber contract is committed to agency discretion and thus is not judicially reviewable.[95]

And they had tried to emphasize that,

> even assuming this Court were to enjoin and award the plaintiffs the declaratory judgment they seek, it would not and surely could not direct Congress to pass a law to classify the East Meadow Creek area as wilderness under the Wilderness Act[,][96]

contending that what the plaintiffs needed was a "political decision"[97]--and that they were not entitled to judicial review.

Kaibab Industries' brief in support of the motion to dismiss the Parker case paralleled the Justice Department's brief with respect to the position that the Act of June 4, 1897 (16 U.S.C., Sections 475 and 476) established a permissive rather than a mandatory policy for national forest timber sales.[98] But it added a new claim: that the Roads and Trails Act of 1964 (16 U.S.C., Section 532 et seq.) committed national forest road construction and timber sale projects wholly to the discretion of the

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[95]Memorandum Brief in Support of Motion to Dismiss, p. 6.

[96]Ibid., p. 7.

[97]Ibid., p. 9.

[98]Brief in Support of Motion to Dismiss and Motion for Summary Judgment by Kaibab Industries, p. 2.

Forest Service and made them unreviewable as a matter of law.[99]

Exhaustion of Administrative Remedies and the Timeliness of the Filing of Plaintiffs' Action

Although counsel for Kaibab Industries had brought up the question as to whether or not the plaintiffs' administrative remedies had been exhausted, in their May 8, 1969 Brief in Support of Motion to Dismiss,[100] neither the

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[99] Ibid., p. 4. Kaibab's final argument for dismissal of the case was the same as that used as a concluding argument by the Government--that the courts cannot set wilderness boundaries: "[I]nasmuch as the Plaintiffs can only obtain a wilderness area by Act of Congress, there is no legal basis for the courts to tell the Secretary of Agriculture that it must make recommendations to the President sooner than required by Congress and that it cannot carry on the normal purposes of the national forest prior to making its [wilderness] recommendations to the President." (Brief in Support of Motion to Dismiss and Motion for Summary Judgment by Kaibab Industries, pp. 10-11, citing for support McMichael v. U.S., 355 U.S. 283 [9th Cir. 1965].) In his February 27, 1970 Memorandum Opinion and Order, Judge Doyle acknowledged that only the President and Congress can make wilderness-boundary decisions, but pointed out that, unless he stopped the East Meadow Creek timber sale temporarily, he would be "allow-[ing] the Forest Service to take abortive action which effectively prevents [such] a Presidential and Congressional decision." (309 F.Supp. 593, at 599. Emphasis added.) See, Robert Broughton, "Aesthetics and Environmental Law: Decisions and Values," Land and Water Law Review, Vol. VII, No. 2, 1972, p. 494: "The court [in Parker] stated that to afford the appellants 'the discretionary right to destroy the wilderness value' of the area would be violative of the legislative intent that the President and Congress have an opportunity to add other contiguous areas to existing wilderness areas. 448 F.2d 793 (10th Cir. 1971). The legislative intent referred to is embodied in 16 U.S.C., Sec. 1132(b) (1970)."

September 26, 1969 Pre-trial Order, which listed twelve contested issues of fact and twelve contested issues of law, nor the trial court's opinions of December 24, 1969 and February 27, 1970 included mention of this matter. Perhaps, by its failure to emphasize this defense in its pleadings, the Government was acknowledging the "futility of recourse to administrative remedy because of the certainty of an adverse decision."[101]

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[100]At pp. 5-6: "The plaintiffs are trying to make this lawsuit a trial de novo which is not authorized under the [APA] inasmuch as that Act only authorizes a review of the record created in the administrative proceedings to determine if the record supports the action taken by the administrative agency . . . and there is no [such] record for this Court to review."

[101]Kenneth Culp Davis, Administrative Law Text (St. Paul, Minn.: West Publishing Co., 1959), p. 371. But see, an undated document prepared by the federal defendants for the Parker case entitled "Memorandum of Authorities" in which the question is asked, "Could COSC have taken an administrative appeal after receiving the Regional Forester's letter of October 23, 1968?" (This letter, from Nordwall to Edward Connors, Chairman, Wilderness Workshop of COSC, stated: "I have concluded it to be in the public interest to proceed with the [East Meadow Creek timber] sale as now planned.") This answer is provided: "The appeal regulations are contained in 36 C.F.R. 211.20-211.37. They provide for three types of appeals. The first two classes relate to appeals by a party to a written instrument. The third class covers appeals from other 'appealable decisions' involving the administration and management of the Forest which do not fall into the other two classes. There is no definition of an 'appealable decision' but in 211.29 the term 'decision' is defined: 'The term "decision" as used in this subpart shall include any order, ruling or other exercise of discretion by a Forest Supervisor, Regional Forester or the Board having a substantial effect on private rights.' Argument could be made that the decision of the Regional Forester would not have a 'substantial effect on the private rights.' The plaintiffs have made claim that their private rights are affected. The Forest Service has

When the lumber industry appellants, in their appeal pleadings, reasserted that appellate review in the case should be rejected because the appellees (plaintiffs) failed to exhaust their administrative remedies before instituting the action, they succeeded only in arousing the ire of the Tenth Circuit appellate panel. Said the Court of Appeals:

> [While i]t is undisputed that the plaintiffs did not pursue their right of appeal through the prescribed administrative process[,][102] [t]he issue of

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in the past given a very liberal interpretation to these regulations and has allowed appeals by almost anyone and upon almost any question. However, the appeal in this case would have been a class three appeal and class three appeals are not acted upon by the Board of Forest Appeals, but are referred directly to the Chief for his decision. No hearing is provided in a class three appeal. [Emphasis added.]"

For an example of the use of the U.S.D.A. appeal regulation, see: "Request for Review of Decision of February 6, 1957 by Secretary of Agriculture Concerning Land Classification in the Willamette National Forest" submitted to the Chief of the Forest Service by the Save French Pete Committee, 4530 Donald Street, Eugene, Oregon 97405 on June 10, 1969; notice of appeal filed on Oct. 10, 1969; statement of appeal filed on Dec. 11, 1969 by the Save French Pete Committee, the Obsidians, the Eugene Natural History Society Inc., the Friends of the Three Sisters Wilderness, Inc., the Chemeketans, the Oregon Environmental Council, the Federation of Western Outdoor Clubs, and Prince Helfrich for relief from the Sept. 12, 1969 decision of Regional Forester Charles A. Connaughton, which affirmed the decision of the Willamette National Forest Supervisor relating to management of the French Pete Creek drainage; and the Decision of the Chief, Forest Service, in re Save French Pete Committee, et al., Appellants, F. S. Docket No. 172, dated June 2, 1970.

The Sierra Club position: "French Pete has turned into a cause celebre, a symbol of Forest Service management policies that have supported the timber industry in Oregon

exhaustion of administrative remedies is raised for the first time on appeal and should therefore be given no consideration by this court[103] unless favorable consideration of the issue defeats jurisdiction.[104]

We can conceive of no legal nor logical reason why the doctrine of exhaustion of administrative remedies should be applied in this case at this late date. The reasons are many and manifest: There is no legislative mandate requiring such exhaustion; the dispositive issue is one of pure law requiring no application of administrative expertise;[105] the desirability of saving judicial time through insistence on administrative exhaustion is no longer applicable and would now amount to a mockery; the record clearly reflects that the administrative decision was informally considered through all levels of the appropriate agencies; the

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to the extent that there has been almost a total loss of those low elevation virgin forests for which the state was once famous. . . . In November [1969], after 1500 demonstrators made an unprecedented march on the Eugene Forest Service office in protest against French Pete timber sales, Secretary of Agriculture Hardin announced a 60-day moratorium on logging activity to give conservationists a chance to proceed with their administrative appeals. [Emphasis added.] . . . If the Forest Service should decide again that logging is to proceed, conservationists will turn to the courts. [Emphasis added.] In the meantime Oregon Senator Packwood has introduced a bill in the Senate to establish an intermediate recreation area in the French Pete drainage. Recreation area status for French Pete would prohibit logging." Sierra Club National News Report, Jan. 23, 1970, p. 2.

See also: Senator Robert W. Packwood, "S. 3262--Introduction of a Bill to Establish the French Pete Creek Intermediate Recreation Area," Congressional Record, Dec. 19, 1969, p. S 17249; S. 866, 92nd Cong.; H.R. 13002, 92nd Cong.; "French Pete Creek Controversy," Willamette National Forest, Eugene, Ore., Dec. 1969, 4 pp.; "Statement by Secretary of Agriculture on the Management of French Pete Creek Drainage, Willamette National Forest, Oregon," Oct. 14, 1971, 4 pp.; "News Release," Willamette National Forest, Nov. 8, 1971 ("[I]t may be at least 2 or 3 years before any major developmental action can take place to begin carrying out the Secretary of Agriculture's decision [which provides for salvage and improvement cutting]."); and "French Pete Creek Drainage Position Statement," Willamette National Forest, Nov. 8, 1971, 3 pp. including summary of steps taken in administrative appeal procedure.

> doctrine is applied for the benefit of orderly procedure in the administrative and judicial process and not for the benefit of third parties.[106]

The question posed by the author of "Environmental Litigation Involving Forest Service Lands" in the January 1971 Natural Resources Law Newsletter--"[C]an this type of plaintiff bypass the doctrine of exhaustion of administrative remedies and go into court from any decision of a Regional Forester or the Chief, without appealing to the Secretary?"--seems to have been answered in the affirmative.

The Parker plaintiffs had sought relief through administrative channels for two years, prior to filing a complaint in U.S. District Court, and transaction evidence documenting these efforts was filed with the district court as exhibits 4(a) through 4(r) and 14(a) through 14r.1.[107] Highlights of this citizen campaign included organization in 1964 of the Colorado Wilderness Workshop

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[102] 36 C.F.R. 211.20 et seq.

[103] Stephens Industries, Inc. v. Haskins & Sells, 438 F.2d 357 (10th Cir.).

[104] Seidenbach's v. Bland Terry Shoe Corp., 292 F.2d 206 (10th Cir.), cert. denied, 368 U.S. 933.

[105] See, Skinner & Eddy Corp. v. U.S., 249 U.S. 557; Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426.

[106] 448 F.2d 793, at 798.

[107] Pre-trial Order, Sept. 26, 1969, pp. 9-10, 20-21.

to assure the presence of a citizen-conservationist voice at the primitive area-reclassification public hearings required by the Wilderness Act (16 U.S.C., Section 1132[d]),[108] establishment in 1965 of a special Colorado Open Space Coordinating Council committee to keep channels of communication open with the Denver regional office of the Forest Service on subjects such as the East Meadow Creek timber sale,[109] and the submission to the Forest Service on October 4, 1967[110] and on February 13, 1969[111]

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[108]Mounsey, Reporter's Transcript, Jan. 26, 1970, p. 257.

[109]Roger P. Hansen, Executive Director, Colorado Open Space Coordinating Council, personal interview, Denver, Colo., Aug. 20, 1970: "The Forest Service was given two years of constructive notice as to where the East Meadow Creek timber sale was headed. COSC set up a special committee in 1965 to meet with the Denver staff of the Forest Service to discuss general policies and specific actions, hoping to establish a good rapport with them. The East Meadow Creek situation was discussed with the Service two years before litigation was begun, but the Forest Service was not ready to take conservationists into its confidence, and without this confidence there could be no rapport. Even though the COSC-USFS coordinating committee was set up and the dialog over East Meadow Creek was going, the Forest Service failed to be flexible on its decision to log East Meadow Creek, which absolutely was not negotiable. The Denver Regional Office staff views conservationists only as a special interest group on a par with grazers, loggers, miners, and reclamation interests, and the regional information and education director of the Forest Service refers to COSC representatives as 'purist-preservationists.' Arrogant and inflexible, convinced that the Forest Service knows best and that 'civilians' don't know what the score is, the agency's reaction in this Region to citizen requests to be heard seems to be an irritable, 'What do those people want?' The Forest Service, at least in this Region, apparently believes that diverse

of the Eagles Nest Wilderness Committee's "preliminary" and "revised" boundary recommendations for the Eagles Nest Wilderness.[112]

Two months after he had received a copy of the local wilderness committee's preliminary Eagles Nest Wilderness proposal, Assistant Secretary of Agriculture John A. Baker[113] responded with a letter that seemed to suggest that this citizens' committee should have achieved a consensus among all White River National Forest user

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interests cancel each other out, so the Forest Service can do as it pleases."

Rocky Mountain Region Multiple Use Coordinator Clayton B. Pierce's rebuttal (personal interview, Denver, Colo., Aug. 21, 1970): "Until Storm King, many Forest Service people thought they were hired to make and carry out professional decisions, without bothering the seemingly unconcerned public. The Forest Service has a reputation for efficiency, getting the job done, production. Public involvement is expensive, involves so much emotion, results in few good ideas, and is inefficient. How much involvement can the public afford?"

[110]On the basis of field work done in the Gore Range during the summer of 1967, the Eagles Nest Wilderness Committee submitted the following "Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness . . . of Approximately 111,000 Acres": "It is recommended that the following major units be added to the present Primitive Area (61,000 acres): 1) The East Slope unit of about 15,000 acres extending from Catarac Lake to South Willow Creek. A boundary one quarter mile east of the Gore Range Trail supports the present Forest Service practice of restricting the trail to horse and foot use and offers a practical choice of alignment even though some high quality wilderness will be left without permanent protection. 2) The Buffalo Mountain unit of about 17,000 acres including the Wheeler Lakes and the headwaters of South Willow, Meadow and North Fork Tenmile Creeks. In this unit man's work is substantially unnoticeable today. It is important that the Wheeler Lakes wilderness qualities that have been maintained by the Forest Service for many

groups on this issue and conducted sophisticated analyses of the regional economic impact of their wilderness plan, prior to bothering the Secretary of Agriculture with it:

> I do not find in your proposal the kind of quantification of needs, benefits, and costs which will be useful to the Secretary in reaching a decision. I hope, therefore, that the Colorado Open Space Coordinating Council and other responsible wilderness organizations will sit down with the winter sports enthusiasts, jeep clubs, motorscooter users, snowmobilers, travel-trailer people, water users, mining folks, timber industry people, and others and gather all of the facts which will enable you to give me a report showing the input-output or cost-benefit calculations which will assist the Secretary in making a sound decision.

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years be afforded permanent protection. 3) The Slate Mountain-Piney Lake unit of about 11,000 acres including the unique Soda Springs basin and the headwaters of North Fork Piney River and Meadow Creek. In addition to the preservation of the other wilderness values unquestionably present in this unit, it is vital that this wilderness habitat of a significant elk herd be preserved. 4) The Eaglesmere Lakes unit of about 2,000 acres extending from Catarac Lake to Hill 11942 on the Gore Range. This classic area of tundra, high mountain lakes and elk range requires protection as wilderness in the face of road building and logging operations that now reach to its borders. Other recommended deletions and additions bring the net gain to 50,000 acres. The recommended boundary follows natural terrain features where significant wilderness land will not be excluded. Otherwise, the boundary is located one quarter mile from existing trails or roads, on contour lines or on a line of sight. In certain places the contour line boundary can be replaced by an alignment parallel to a road or along a section line without materially affecting the recommendation. In other areas the boundary could be adjusted to exclude potential Forest Service campsites, but only if public access can be assured. It is recognized that private lands and access roads thereto that are included by the recommended boundary will be non-conforming inclusions in the Eagles Nest Wilderness just as many are now within the Gore Range-Eagles Nest Primitive Area. . . ."

The burden of conducting such an economic impact analysis has never been assumed by the Department of Agriculture, with all of its financial and scientific resources, and probably was well beyond the capability of the Eagles Nest Wilderness Committee.[114]

The transaction evidence shows that a COSC representative contacted District Ranger Price on November 20, 1967 ("[H]is arguments for an extension of the present primitive area boundary were the same old cliches,"

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[111]This revised citizens' plan, submitted by Bruce Batting of Vail, Colo., Chairman of the Eagles Nest Wilderness Committee, recognized the existence of nonconforming developments and private land along North Rock Creek and North Tenmile Creek and in the valley adjacent to and below Piney Lake by excluding lands in these locations which had been included in the original citizens' wilderness proposal. The revised proposal called for inclusion in the wilderness area of 6,000 acres more than the original proposal, however, by urging inclusion of part of the Piney River canyon, not included in the first COSC plan. The revised proposal emphasized that East Meadow Creek was recommended for preservation as wilderness; among the areas it specifically suggested be added to the existing primitive area was the Piney River unit of about 17,000 acres including Meadow and East Meadow Creeks, the unique Soda Springs basin, North Fork of Piney River, and part of the canyon of Piney River: "An excellent family camping area; it is vital that this wilderness habitat of a significant elk herd be preserved."

In contrast to the citizens' plan, the August 1970 Forest Service proposal for the Eagles Nest Wilderness (see, "Eagles Nest Wilderness, Proposal and Hearing Announcement," Federal Register, Vol. 35, No. 163, Aug. 21, 1970, and Vol. 35, No. 187, Sept. 25, 1970) called for the establishment of a 71,785-acre Wilderness (rather than a 117,000-acre area as the COSC-affiliated group had suggested) which left the way clear for the connection of the Meadow Creek and Sheephorn Roads and excluded East Meadow Creek. The post-field-hearing final recommendation of the Forest Service, approved by Secretary Hardin on Sept. 24, 1971, called for the establishment of a 87,755-acre Wilderness, still excluding East Meadow Creek.

reported Price[115]); that the Mayor and five other residents of Vail wrote to District Ranger Price on June 10, 1968, to protest the East Meadow Creek timber sale; that the Chairman of COSC's Wilderness Workshop asked the Regional Forester on September 25, 1968 for a postponement and reconsideration of the timber sale;[116] and that COSC Wilderness Workshop and Eagles Nest Wilderness Committee leaders, between August and December of 1968, wrote more than a dozen letters of protest to Colorado Congressmen Donald G.

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[112]Cf., the efforts of the Gandt plaintiffs, at Chapter III, pp. 62-67.

[113]Baker, letter to Edward Conners, Dec. 12, 1967.

[114]The 180-page "Report on the Proposed Eagles Nest Wilderness" approved by Secretary Hardin on Sept. 24, 1971 and published by the Rocky Mountain Region of the Forest Service included verbal descriptions of the area's resources and of relevant management considerations, but even it did not contain "quantification of needs, benefits, and costs." Data of the kind requested by Assistant Secretary Baker have been the subject of studies such as the following: Jay M. Hughes, "Wilderness Land Allocation in a Multiple Use Forest Management Framework in the Pacific Northwest," Pacific Northwest [Forest and Range Experiment Station] Research Note (Forest Service, Portland, Ore.), July 1965 ("Economic analysis does not provide the complete basis for choice. . . . The valuation of recreation is but one part of decision making. . . . Four economic choice mechanisms were . . . examined for their relevance to the wilderness land allocation decision. They are called: 1. Benefit-cost analysis. 2. Budgeting. 3. Least-opportunity-cost ranking. 4. Joint production analysis. . . . [T]he overall study conclusion was that all methods proved deficient in terms of providing a theoretically complete valuation of the alternatives, wilderness versus non-wilderness."); Maki, Schallau and Beuter, "Importance of Timber-based Employment to the Economic Base of the Douglas-fir Region of Oregon, Washington, and Northern California," Pacific Northwest Research Notes, April 1968; Bromley, Blanch and Stoevener, Effects of Selected Changes in Federal Land Use on a Rural Economy

Brotzman and Byron G. Rogers. In early 1969 the wilderness proponents kept up the pressure. An article by Bill Mounsey in the Vail newspaper on February 17 asked that community's residents, "Will you stand up and be counted, or knuckle under to Big Brother?"[117]

After receiving repeated requests for a public meeting or public hearing on the proposed timber sale--from Eagles Nest Wilderness Committee Chairman James Kemp (February 18), COSC Wilderness Workshop Chairman Edward Conners (March 17), and Kemp again (March 26)--Ranger

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(Corvallis, Ore.: Oregon State University Agricultural Experiment Station Bulletin 604, March 1968). See also, Daniel E. Chappelle, "Quantitative Analysis in a Qualitative World: Modeling Forestry Systems to Improve Decision Making," Proceedings of a Workshop on Computer and Information Systems in Resources Management Decisions, Stone and Ware, eds., Forest Service, July 1972; Marion Clawson and Jack L. Knetch, Economics of Outdoor Recreation (Baltimore: Johns Hopkins Press, 1966); Joseph L. Fisher, Natural Resource Trends and Their Implications for the Rocky Mountain Region (Washington: Resources for the Future Reprint No. 60, 1966) ("It is undoubtedly true that most of the national forests in the Rocky Mountain region can yield much higher benefits in recreation use than would be received from selling timber stumpage." [p. 17]); Marion Clawson, Methods of Measuring the Demand for and Value of Outdoor Recreation (Washington: Resources for the Future Reprint No. 10, 1959); Allen V. Kneese, Economics and the Quality of the Environment--Some Empirical Experiences (Washington: Resources for the Future Reprint No. 71, 1968); John V. Krutilla, Conservation Reconsidered (Washington: Resources for the Future Reprint No. 67, 1967); John V. Krutilla, "Balancing Extractive Industries with Wildlife Habitat," Transactions of the Thirty-Third North American Wildlife . . . Conference, March 11-13, 1968, pp. 119-130; Olaus J. Murie, "Wild Country as a National Asset," The Living Wilderness, Summer 1953 (special issue); Garrett Hardin, "A Lesson in Wilderness Economics," Not Man Apart, Vol. 1, No. 3, Feb. 1971; G. H. Stankey, "Myths in Wilderness Decision-Making," Journal of Soil and

Price and Supervisor Folkestad met with the wilderness advocates in Vail on March 31. The forest officers "explained to [the wilderness committee] their reasons behind their decision to go ahead with the timber sale."[118] Four days before the bids were opened on the East Meadow Creek sale, the Regional Office staff agreed to meet in Denver with representatives of the private conservation groups to discuss the "sale proposal."[119] James Kemp, representing

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Water Conservation, Vol. 26, No. 5, Sept.-Oct. 1971, pp. 183-188.

Professor Sax saw the Baker letter in this light (Defending the Environment, at pp. 198-199): "A dozen Solomons could hardly begin to answer in detail all the questions he raised, though they were obviously relevant considerations. The point is that they went far beyond any 'technical' decision about whether certain mature trees ought to be harvested. They were policy questions of considerable magnitude, and though essentially unanswerable in any rigorous fashion, they--like all live matters of public policy--had to be dealt with. The problem was whether they were ultimately to be left to the supervisor of the White River National Forest and his counterparts or to be reserved for the judgment of Congress."

[115]Price, memo to Forest Supervisor Folkestad, Nov. 20, 1967.

[116]Conners, letter to Nordwall, Sept. 25, 1968.

[117]William B. Mounsey, "Why Cut Now?", The Vail Trail, Feb. 17, 1969.

[118]Robert W. Parker, Reporter's Transcript, p. 74.

[119]George Lafferty, Assistant Regional Forester, memorandum to Regional Forester, Apr. 1, 1969. The meeting was held at the Rocky Mountain Region's headquarters offices in Denver on April 3, 1969.

the Eagles Nest Wilderness Committee and the citizens of Vail, and Clifton Merritt, Wilderness Society field services director stationed in Denver, attended. Their hosts included Regional Forester Nordwall, Deputy Regional Forester Crane, Assistant Regional Forester Lafferty, Regional Timber Management Chief Anderson, Wilderness and Special Areas Branch Chief Weidenhaft, Forest Supervisor Folkestad, and District Ranger Price. After two hours' discussion of the pros and cons of the East Meadow Creek sale, during which Nordwall asked Kemp "if he had a proposed alternate location of timber that could be harvested by these [dependent timber] industries" and Kemp responded that he had no alternative "since the people of Vail did not want any timber harvest in the area influenced by the Vail complex,"[120] Nordwall "restated that we would proceed

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[120]But see, H. Anthony Ruckel, Denver, Colo., personal letter to the author, Nov. 29, 1971, indicating that the conservationists had in mind an "alternative" of sorts: "The only real compromise viable in the circumstances was to cut timber elsewhere. This was always the Eagles Nest Wilderness Committee's view and so far as I know they never retreated therefrom. To me this was a viable compromise. Exhibit 9B, a map of White River National Forest showing many, many available areas for cutting which had already been identified by the Forest Service, is striking evidence of the viability of the compromise sought by the Eagles Nest Wilderness Committee. It must be noted that cutting only 4.3 million board feet of timber would have occasioned the same extensive road network with few deletions that the final sale involved. In addition, of course, we were at all times fighting the Forest Service dream road connecting Vail and Kremmling through the Sheep Horn Station at the top of the Gore Range. The issue was not 4.3 million board feet of timber alone, it was in excess of 35 or 40 million board feet, strung out from East Meadow Creek north and east to the Sheep Horn Station, a road traversing this whole area, and its obvious resulting exclusion from wilderness consideration."

with our plans to sell the timber" and Kemp "stated that they were prepared to go to court to prevent the sale if possible."[121] The last-minute meetings in Vail and Denver proved to be of no avail.

Had the Forest Service "accorded reasonable opportunity to all of the persons, firms, and organizations, including plaintiffs and others affected, to be heard"[122] with respect to the East Meadow Creek timber sale proposal? The Parker defendants maintained that there was no such

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[121]The confidence of the Denver Regional Office staff in the wisdom of its decision to make the East Meadow Creek timber sale over the objections of the wilderness groups may have stemmed in part from explicit approval of the proposed sale by House Interior Committee Chairman Wayne N. Aspinall. After Congressman Aspinall, in response to letters of protest from wilderness conservationists in Colorado, asked the Forest Service to brief a member of his staff on the controversy (Washington office recreation and timber management staff officers Larry Neff and Rex Resler briefed William Shafer on Apr. 1, 1969), the Interior Committee Chairman adopted a position in explicit support of the East Meadow Creek timber sale. Aspinall's Apr. 2 letter to Conners:

". . . From information available to me, it appears that the Forest Service has carefully considered all factors and is acting in what it feels to be the public interest. I am convinced the agency is trying to follow sound forest management practices. In my opinion, the Forest Service has clearly acted within its legal authority and is not usurping the prerogatives of Congress."

Later Forest Service references to the Apr. 3 meeting: "Regional Forester Nordwall opened the meeting, stating that it was our customary procedure to hear citizens' comments on National Forest proposals so that we could consider them in making decisions on the management of National Forest lands. . . ." (G. E. Weidenhaft, memo to Regional Forester, Apr. 8, 1969); "On April 3, James Kemp and Cliff Merritt . . . met with me and members of my staff and suggested I not make any timber sales in that particular area. I attempted to work out some suitable

requirement. The "due process" (Federal Register notice and hearing) provisions of the Administrative Procedure Act relating to agency rule-making[123] have not been applied to timber sale decisions. In fact, Forest Service timber sale reports and appraisals specifically are exempted from disclosure before the timber sale advertisement is published.[124] Only since the passage of the National Environmental Policy Act[125] have reports to the public describing the impact of "major Federal actions significantly affecting the quality of the human environment" been required.[126] The Parker defendants contended:

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arrangement [unspecified] with the apparent spokesman, Mr. Kemp, but he was adamant in his position of opposing any and all timber harvesting. He brought our negotiations [emphasis added] to an end by suggesting that he would take legal action to prevent a sale." (Nordwall, letter to Senator Peter H. Dominick, Apr. 4, 1969.)

[122]Complaint, p. 5.

[123]At Section 553 of Title 5, U.S. Code.

[124]At Section 200.6(d)(4) of the Forest Service Manual. See, U.S., Congress, Senate, Committee on the Judiciary, Responses to Questionnaire on Citizen Involvement and Responsive Agency Decisionmaking, Committee Print, Vol. 2, Submitted by the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary, Senate, 92nd Cong., 1st sess., 1971, pp. 373-381 and 660-709 (Forest Service submissions), especially p. 663.

[125]"NEPA," Public Law 91-190, approved Jan. 1, 1970.

[126]At Section 102(c) of P.L. 91-190. Among the many examples of Forest Service compliance with NEPA: "Draft Environmental Statement, Mackinac [Timber] Sale," Hiawatha National Forest, Escanaba, Mich., Feb. 22, 1971 (see, Alfred H. Troutt, Forest Supervisor, letter to Virginia Prentice, Mackinac Chapter, Sierra Club, Feb. 25, 1971, inviting Sierra Club comments and participation in a

> The Multiple Use-Sustained Yield Act does not, rightly interpreted, require administration of the national forests by public hearing or consultation.[127]

And the Wilderness Act also was interpreted by the Forest Service as not requiring a report or hearing on proposed timber sales near primitive areas.[128]

How well publicized was the East Meadow Creek timber sale decision? Six copies of the approved timber management plan were distributed to unknown parties outside the agency; potentially interested timber operators were

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field trip through the sale area on March 13, 1971, and asking, "Will [this new type of approach] result in broader public participation in resource management? Is it a good approach?", and the Mackinac Chapter's official response, on April 7, 1971: "The plans for the [clean cut aspen] sale as proposed are endorsed by the Sierra Club."); "Draft Environmental Statement, Pelican Butte Winter Sports Development," Region 6, Portland, Ore., March 17, 1972; "Draft Environmental Statement, Three-Year Road Construction Program for Kootenai National Forest," Libby, Mont., Apr. 3, 1972; "Umpqua National Forest Ten-Year Timber Management Plan" (with public meeting notice), Roseburg, Ore., May 31, 1972; "Final Environmental Impact Statement for the Snyder Hill Planning Unit Multiple Use Plan," Colville National Forest, Colville, Wash., Aug. 2, 1972.

[127]Brief in Support of Motion of Intervenor Western Wood Products Association for Summary Judgment, p. 2. The Multiple Use Act does require the Secretary of Agriculture to give due consideration to the relative values of the various resources (16 U.S.C., Sec. 529) and authorizes the Secretary, "in the effectuation of sections 528-531 of this title," to cooperate with interested . . . agencies and others in the development and management of the national forests" (16 U.S.C., Sec. 530).

[128]See, Reporter's Transcript, Jan. 26, 1970, pp. 315-316. Regional Forester Nordwall was asked by Judge Doyle, "Did you go through the formalities that are prescribed by the Wilderness Act in making this [East Meadow Creek timber sale] decision? Responded Nordwall: "No. We

made aware of it; and the participants in one hiking club outing were addressed by the district ranger:

> The general sale plan for this area became known upon distribution of copies of Holy Cross Working Circle Timber Management Plan which had been approved by Acting Chief of the Forest Service, Clare Hendee, on April 16, 1962. By letter dated May 3, 1962, Acting Assistant Regional Forester C. C. Averill sent the Forest Supervisor an approved file copy of the Plan, with eight copies for the individual Ranger Districts and six extra copies for outside distribution. Our records do not show distribution of these extra copies. Additional copies of the Plan were distributed to the Forestry School at Colorado State University, the Colorado State Forester, the Rocky Mountain Forest and Range Experiment Station, and to the National Forests adjacent to the White River.
>
> Our files do not contain records of specific actions calling public attention to the proposed East Meadow Creek sale at the time the Management Plan was made public [emphasis supplied]. The proposal was discussed by Forest Service employees at various meetings of timber operators subsequent to 1962. In 1964 the Meadow Creek road was advertised for contract during which time information was disseminated that one of the purposes of the road was to permit harvesting of timber in East Meadow Creek.

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made a very detailed review with the [White River National] Forest and with the [Regional Office] staff . . . in determining in our collective judgment that the highest use of that area was not for wilderness purposes. And if I understand the [Wilderness] Act correctly, it is not required if we reject an area that the report be made; that [a report] is required to be made [only] if we propose an area for addition to the wilderness area." Judge Doyle: "In any event you didn't hear anybody on it, I guess." Nordwall: "That is correct." Judge Doyle: "You made it within the Department?" Nordwall: "Yes, sir." Judge Doyle: "And you didn't file any report publicly, is that right?" Nordwall: "That is correct. We did discuss it with people in the Vail area, and our ranger had had a group of Colorado Mountain Club people out and other groups. So, there was nothing secretive about it. It was generally known in the area, sir."

> On July 2, 1966, Ranger Donald Price gave an illustrated talk to about 70 members and friends of the Colorado Mountain Club. The talk was given at the request of William B. Mounsey, a party to the suit. The talk was staged in the Pine Creek area near the newly constructed Meadow Creek road. Among other things, Ranger Price discussed plans for extending the road and plans for harvesting timber in East Meadow Creek.[129]

Requests for a public hearing on the proposed timber sale, including those of Eagles Nest Wilderness Committee Vice-chairman James Kemp[130] and Vail Mayor John Dobson,[131] were turned down,[132] as was COSC's suggestion

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[129]Memorandum from the Denver Regional Office to the Chief, Subject: "R-2, East Meadow Creek, Robert W. Parker vs. United States (your ref. 7/15/69), dated July 23, 1969.

[130]Kemp, letter to Nordwall, March 26, 1969.

[131] Dobson, letter to Folkestad, March 31, 1969: "[T]here [appear to be] contradicting facts as to the economic feasibility of the [East Meadow Creek timber] sale. Before the contract is awarded, these facts and figures should be accurately determined and presented to the taxpayers for their opinion. The Board of Trustees of the Town of Vail requests that the road and timber sale in the East Meadow Creek Unit be delayed until the Congress and the taxpayers have voiced their opinions."

[132]While it was adopted since passage of the National Environmental Policy Act, Secretary's Memorandum No. 1695 provides that, "[i]n some instances . . . informal exchanges may reveal some unexpected controversy and thus the need for an informal or formal hearing." U.S., Department of Agriculture, Office of the Secretary, Secretary's Memorandum No. 1695, Supplement 5: Providing Timely Information to the Public About USDA Plans and Programs with Environmental Impact to Obtain the Views of Interested Parties, Washington, D.C., Dec. 1, 1970, p. 3.

that the sale be delayed until after administrative field hearings on the agency's Eagles Nest Wilderness proposal had been held.[133] Regional Forester Nordwall saw in such requests potential for an unauthorized "moratorium on multiple use management of National Forest lands each time a citizens' group requests it," and concluded that it was "in the public interest [emphasis added] to proceed with the sale as now planned."[134] Regional Forester Nordwall's decision was supported by Forest Service Deputy Chief M. M. Nelson, in correspondence with Congressmen and conservationists.[135]

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[133]COSC Wilderness Workshop news release, Apr. 8, 1969: "COSC Wilderness Group Urges Delay in Timber Sale. . . . The Forest Service's refusal to postpone development of the area until wilderness studies can be completed and wilderness boundaries determined is a highhanded example of unwillingness to allow the public to have a voice in the establishment of such areas. . . ."

[134]Nordwall, letter to Conners, Oct. 23, 1968: "Recognizing some time ago a conflict with the proposed [East Meadow Creek] timber sale and the COSC proposal for including the area with the Gore Range-Eagles Nest Primitive Area into the Wilderness Preservation System, I initiated additional studies of the matter. Following complete review of the situation, including an on-the-ground study by Deputy Regional Forester Basil Crane and other members of my staff, I have concluded it to be in the public interest to proceed with the sale. . . . In proceeding we will not, in my judgment [emphasis added], interfere in any manner with lands that should be classified as wilderness. We have already moved the timber sale boundary one mile west in order to be responsive to your group's initial recommendation. This, I feel, was quite reasonable. . . . I am most anxious to have advice and suggestions from any individuals or groups interested in the National Forests and their management."

Compare Nordwall's "in my judgment" statement with Judge Doyle's observation, "One of the major purposes of

The alleged inflexibility of the Forest Service in this instance was far from total; the Regional Office did reduce the number of blocks to be cut in the East Meadow Creek drainage from fourteen to six. But having made this compromise internally between professional foresters favoring the sale and equally competent foresters opposing the sale at that time,[136] the agency proceeded to advertise for bids on some of the East Meadow Creek timber. But the conservationists had made a significant impact on the sale,

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the Wilderness Act was to remove a great deal of this absolute discretion from the Secretary of Agriculture and the Forest Service by placing the ultimate responsibility for wilderness classification in Congress." 309 F.Supp. 593, at 597. See also, Charles A. Reich, Bureaucracy in the Forests, at p. 2 ("[T]he power to create fundamental policy for the publicly owned forests has fallen to small professional groups. They make bitterly controversial decisions, choices between basic values, with little or no outside check."); and, Joseph L. Sax, Defending the Environment, at p. 148 ("[P]ublic rights must be removed from the stranglehold which bureaucrats now have upon them and returned to their true 'owners'--citizens as members of the public.") and at p. 200 ("The reasons [for the East Meadow Creek timber sale] were . . . quite rational from the perspective of an agency concerned with lumber production. . . . It did not take [Judge Doyle] long to conclude that there was no [compelling public interest in selling the timber].").

[135]"[W]e in the Forest Service welcome the advice and counsel of such special interest groups as the Colorado Open Space Coordinating Council, timber industry organizations, winter sports organizations, livestock owners organizations, and others. All such organizations have a legitimate interest in such decisions, and their advice or comment is carefully considered as we carry out our statutorily assigned responsibilities. However, if we were to administratively hold in abeyance the implementation of all long range plans which involve unroaded or otherwise undeveloped areas of the National Forests, until a formal wilderness review could be conducted, . . . it would in effect withdraw all of the resources within such areas

even without a public hearing. Regional Office awareness of COSC's October 1967 Eagles Nest Wilderness proposal unquestionably led to special handling of the East Meadow Creek sale and its reduction from seven to four million board feet. The forest products industry viewed this impact with alarm;[137] it was used to being the dominant special interest group.[138] The conservationist plaintiffs' position on this issue was well summarized by Robert W. Parker, in his September 11, 1969, deposition, when he observed that,

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from the National Forest management base. The net effect would be comparable to the creation of additional Primitive Areas, a step which the Congress, in the Wilderness Act of 1964, specifically prohibited us from doing.": Letter from Deputy Chief M. M. Nelson to Congressman Donald G. Brotzman, Nov. 25, 1968. See also, letter from Deputy Chief Nelson to William W. Mallory, Denver, Colo., Apr. 10, 1969: ". . . We are acutely aware of our responsibilities as stewards of the land; our objective is to seek the views of interested people and then make the soundest multiple use decisions we can. In these times of sharp competition for all land uses, we invite the counsel and understanding of all interested people."

[136] E.g., the Multiple Use Survey Report approved by Deputy Regional Forester Basil Crane on May 10, 1968, which directed that the sale include only four of the original fourteen blocks; Regional Forester Nordwall increased the sale to six blocks on June 14, 1968. "Questions" draft by C. B. Pierce, Sept. 12, 1969, p. 8.

[137] "[O]ur quarrel, if any, with what the Forest Service has here done arises out of what appears to be undue attention to the interests the plaintiffs represent; we are far from convinced that when, in response to the plaintiffs' outcry, the Forest Service created the "buffer zone" around this primitive area which cut the proposed sale nearly in half, it was not acting excess of its authority under the 1897 and 1964 Acts, since what it did there was to enlarge the primitive area, in effect, by executive fiat. As we read the act, only the President

> [it is] the public who should have, and who by law do have, the right to the final determination of the boundaries of a wilderness area. . . . [S]ince this area could and should be considered for inclusion in the wilderness area, the public has not had an opportunity to be heard because the Forest Service [wilderness] study has not been completed on the [Gore Range-Eagles Nest Primitive] area and because the public hearing regarding that area has not been held. . . . [N]ot until the study and the hearings have been completed and the Department of Agriculture has recommended to Congress what the boundaries should be, will the public be accorded reasonable opportunity to be heard.

This issue was not touched upon in so many words in the Parker trial and appellate court opinions, but Judge Doyle did observe that "[t]he Forest Service was unmoved by [the COSC] proposals"[139] and that the agency was required to report to the President on all regions

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could enlarge the Gore Range Eagles Nest Primitive Area at the time he submits his recommendations to the Congress, and that of course he has not as yet done." "Supplemental Brief in Support of Motion of Intervenor Western Wood Products Association for Summary Judgment," p. 4.

[138]"The [Western Wood Products] Association maintains constant liaison with the Forest Service, from the office of the Secretary of Agriculture to the forest supervisors on each forest from which its members purchase timber-cutting rights, with a view to creating and maintaining harmonious relations with that agency. In so doing, it promotes and encourages the exercise of the Forest Service's duties and responsibilities under the basic statutes under which it operates, to the end that those forests may regularly and constantly supply to the forest products manufacturing industry the raw material which it requires to meet its obligations to the housing needs of the nation." Affidavit of Wendell B. Barnes in Support of Motion for Intervention by Western Wood Products Association, Parker v. U.S., Oct. 15, 1969, p. 3.

[139]309 F.Supp. 593, at 596.

contiguous to primitive areas "which merely meet the test of suitability."[140] The appellate panel, acknowledging that

> the Forest Service, after listening to various protests concerning the original contract contemplated with Kaibab, reduced the number of board feet in the proposed contract and in so doing preserved a bumper area[,][141]

concluded that

> [t]he preservation of a "bumper" area does not probe the basic question presented, merely serves to lessen the impact of the agency action, and does not justify such action if otherwise prohibited.[142]

That there was an enormous amount of latent public interest in this controversy is shown by the fact that 21,432 oral and written responses were received by the Forest Service before, during, and within a month after public hearings were held on the agency's Eagles Nest Wilderness proposal in October of 1970.[143]

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[140] Ibid., at 601.

[141] 448 F.2d 793, at 796.

[142] Ibid.

[143] U.S., Department of Agriculture, Forest Service, Rocky Mountain Region, Report on the Proposed Eagles Nest Wilderness, Sept. 24, 1971, p. 22. For another index to the popularity of wilderness in Colorado, see: Donald G. Brotzman, "Colorado 1971 Second District Opinion Poll Results," Congressional Record, Sept. 22, 1971, p. E 9863: "Mr. Speaker, each year I poll the residents of the Second District of Colorado on a number of the important issues currently confronting the Congress and the Nation. Recently, I mailed the seventh such poll to my constituents. . . . This year's survey elicited responses from over 42,000 persons in the six county area. . . . I use the

The "Merits" of the Plaintiffs' Allegations

Disposition of the standing (plaintiffs' special interest), jurisdiction (sovereign immunity, judicial review) and due process (exhaustion of administrative remedies, reasonable opportunity to be heard) threshold issues in this case--issues common to all such cases--leaves only the issues of fact and law unique to the Parker case to be considered.

The Parker plaintiffs alleged that the Forest Service had violated both the Multiple Use-Sustained Yield Act of 1960 and the Wilderness Act of 1964 by attempting to proceed prematurely with the East Meadow Creek timber sale. The federal defendants, they said, had neither given due consideration to the relative values of all of the various resources in the area including wildlife and wilderness[144] nor reported to the President the area's suitability for preservation as wilderness and awaited the decision of Congress as to the final location of the Eagles Nest Wilderness western boundary[145] before taking

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results for guidance in formulating many of my own positions. . . . Moreover . . . Colorado voters have traditionally mirrored national opinion. . . . [A]mong the highlights of the poll were the following: . . . A whopping 81.1 percent favor according the Indian Peaks area northwest of Boulder, Colo., National Wilderness Area status."

[144] 16 U.S.C., Sec. 529.

[145] 16 U.S.C., Sec. 1132(b).

this potentially "abortive action."[146] Counsel for the Parker plaintiffs pursued aggressively and exhaustively all avenues of investigation open to them under the general heading of "discovery"--affidavits, depositions, interrogatories, subpoenas, exhibits, and expert witnesses as well as scholarly legal research[147]--and came into court determined to show convincingly that:

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[146]Judge Doyle, 309 F.Supp. 593, at 599.

[147]"Good discovery defines the issues. We obtained a court order and subpoenaed the Forest Service's entire file on the [East Meadow Creek timber sale] subject. Fifteen housewives volunteered to index the Forest Service material. We took depositions from Forest Service and other witnesses for seven days prior to the court hearing." Tony Ruckel, personal interview, Denver, Colo., Aug. 20, 1970. Between August 13 and September 29, 1969, twenty-one persons appeared at the offices of the U.S. Attorney in the U.S. Courthouse in Denver, before a notary public and certified shorthand reporter, and offered sworn testimony on the East Meadow Creek controversy in response to the questions of the plaintiffs' and defendants' attorneys. The deponents included local and national Sierra Club officers, COSC committee, board and staff representatives, Vail residents, the Forest Service's district ranger, forest supervisor, and regional forester, and technical experts on the subject of wilderness classification from the Sierra Club, The Wilderness Society, and the Forest Service. See, Pre-trial Order, Sept. 26, 1969, pp. 8-9. The subpoena, initiated by the plaintiffs on Sept. 23, 1969, ordered Regional Forester David S. Nordwall to provide the court by no later than September 29 with "your file containing correspondence and memoranda relating to the sale of 4.3 mil. bd. ft. of timber to Kaibab Industries in April, 1969, said timber being in the drainage of East Meadow Creek in White River National Forest, Colorado, and said file to include studies and reports received by your office relating specifically to said East Meadow Creek sale and relating to problems and factors which materially influenced your decision to allow such a sale to take place." The plaintiffs, according to Ruckel (personal interview, Denver, Aug. 20, 1970), had been unable to get from the Forest Service what they considered to be the "most important" letters until they obtained this court order.

(1) the agency's multiple use evaluation of the East Meadow Creek area was both superficial and biased in favor of the implementation of a timber management plan which had been adopted two years before the passage of the Wilderness Act, with its primitive area-and-adjacencies review requirement, and before the development of the nearby Vail resort complex, with its growing year-around population of recreationists; and

(2) the East Meadow Creek drainage qualified for inclusion in the agency's Eagles Nest Wilderness study report to the President and Congress and therefore must be left intact pending a Congressional decision.

As the fifty-page memorandum opposing dismissal of the case, written by plaintiffs' chief counsel, H. Anthony Ruckel, and filed with the court in late November of 1969, described these issues--

"There exist material questions of fact in this case" regarding whether or not the East Meadow Creek area qualifies as wilderness:

> Plaintiffs must confess their dismay at the cursory treatment accorded the East Meadow Creek area by the Forest Service study, review and consideration of its wilderness suitability and eligibility. The status of the requisite Forest Service studies of the Primitive Area and its contiguous lands, including East Meadow Creek, is in no way the "thorough and unbiased analysis of all factors involved" contemplated by the Forest Service Manual and should certainly amount to "an administrative violation."[148]

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[148]"Mr. [Gaillard] Weidenhaft [of the Forest Service] adheres to his position, maintaining that the

"Questions of fact are present regarding recreation and wildlife under the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. 528 et seq.":

> It cannot be disputed that recreation ranks very high in the use of National Forest land in Colorado. The importance of this lies not in any direct probative force in Plaintiffs' efforts to establish their case, but rather as a basic condition from which investigation of the Forest Service's recreation studies and evaluation of the East Meadow Creek area must start.[149]

"Questions of fact are present regarding"--

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existing road destroys the quality of 'solitude' in the area. . . . The legislative history of the Wilderness Act mentions administrative roads as 'compatible uses' in wilderness. . . . Mr. Weidenhaft states that he considers the existing road running partially into East Meadow Creek to be an administrative road. Of additional interest is Public Law 90-532, 82 Stat. 883 creating the Great Swamp National Wildlife Refuge Wilderness. Senate Report No. 1367 . . . states that the existing road therein should be closed. House Report No. 1813 . . . repeats this assertion. . . . Plaintiffs feel that the question of solitude must be considered in context with the consistency of Forest Service practices, Congressional statements and actions, and the expert opinions of those who constantly use the wilderness of East Meadow Creek. Certainly the record before the Court indicates that a material question of fact exists as to whether or not the character of East Meadow Creek is that of wilderness. . . . It is evident from [the record] that hearings and independent congressional actions have as their probable result the incorporation into wilderness of substantial areas [beyond the original primitive area boundaries and occasionally beyond the wilderness boundaries recommended by the administering agency, e.g., the Mt. Jefferson Wilderness, which Congress increased 3,000 acres in size over what was recommended by the Forest Service (P.L. 90-548, 82 Stat. 936)]."

[149]The plaintiffs' "discovery" efforts uncovered the fact that the Eagle District Multiple Use Management Plan, dated March 28, 1966, neither made any suggestion as to how or where the increased recreational use of the District due to the Vail development was to be handled, nor made any reference to "lands qualifying for wilderness

> the propriety of selling the East Meadow Creek timber from a silvicultural point of view. A commitment to sell timber on such a dearth of information and expertise will not use the resource in a manner yielding "the greatest permanent usefulness to the people of the United States."[150]

"The existing mining claims do not bar plaintiffs' cause of action; the argument of the government in this area is academic."

"Plaintiffs' request for relief is compatible with the functions and powers of the court":

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classification contiguous to the [Gore Range-Eagles Nest] Primitive Area"; the latter omission was termed a "laxity" by Ranger Price in his deposition. Deponent Roger Brown, a professional film producer, noted that "the sale area for my [photographic] purposes is particularly nice because it is heavily forested." Plaintiffs also alleged, on the basis of Mounsey's deposition, that the sale "could well have a crippling effect on the Gore Range elk herd."

[150]Plaintiffs questioned defendants' assertion that alternative sale areas were not available and suggested that the East Meadow Creek sale had been "preordained" in 1962. Forest Supervisor Folkestad's explanation in his deposition, that "it was just numbered up," led Ruckel to expostulate, "Plaintiffs view with great apprehension any possibility that an error once committed must proceed to an inalterable and calamitous end when much can be saved by halting its relentless progress. Surely this cannot satisfy the intent of Congress that the Forest Service 'provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions. . . ,' 16 U.S.C. 531(a)." Plaintiffs' memo also noted that there appeared to be "three overriding reasons for selling the particular timber now marked for harvesting in East Meadow Creek: (1) Said timber is overmature and has a zero to negative growth rate [Deponent Price admitted that no one had done a study of the growth rate of the trees in the sale area]; (2) Said timber, being overmature, is a potential forest hazard and could well be destroyed due to its extreme sensitivity to bark beetle infestation [Studies, investigations, and knowledge of the problem in the sale area were 'remarkably meager']; and (3) Said timber is the only timber now available for sale since it

Plaintiffs are before this Court requesting it to enjoin the harvesting of this timber and to declare the contract for the harvest of said timber unlawful upon proof of their allegations that the contract was entered into without sufficient study of recreational and wildlife values of East Meadow Creek, and the weighing of these values and the other multiple use values, including wilderness, under the Multiple Use Act, and without the required study for wilderness classification and the resultant hearing thereon under the Wilderness Act. Plaintiffs additionally allege that the decision to sell the specific timber marked for harvest in East Meadow Creek was not made in accordance with sound silvicultural practice and that the Forest Service's own regulations were not followed.

Since the Plaintiffs do not in any manner request this Court to assume the functions and make the decisions lawfully delegated to the Forest Service, we feel that the allegations of Defendants to the contrary are groundless. Plaintiffs respectfully suggest that upon proof of the allegations set forth in their Complaint . . . this Court may declare the sale of the East Meadow Creek timber unlawful and enjoin the sale and harvesting of timber in said East Meadow Creek until the study of its suitability, availability, and need for wilderness classification has been completed and the hearing process concluded so that the area's status may thus be more fully investigated and determined and the public may place its recommendations on record. Further, Plaintiffs respectfully suggest that such declaratory judgment be entered and such an injunction issue until such time as the Forest Service sufficiently studies the multiple use resources of East Meadow Creek, including timber and recreation, and sufficiently weighs their relative values.

. . . [W]e have in this case conduct which Plaintiffs strongly feel shows a prima facie case of agency action that is arbitrary and capricious and in abuse of discretion. . . .

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alone has road access ['There are twelve proposed sale areas south of U.S. Highway 6, all in the Holy Cross Working Circle and only one of which is near a wilderness area. . . . Four of these are closer to Defendant Kaibab Industries' processing mill at Eagle, Colorado, than the East Meadow Creek area.']." The East Meadow Creek sale involved the building of two miles of road.

> . . . Plaintiffs again note with a great deal of regret the apparently unchangeable determination in 1962 that the East Meadow Creek timber would be sold. Since that time much has occurred: a tremendous increase in recreation use of National Forests, including White River National Forest; the creation of the Town of Vail; and the passage of the Wilderness Act in 1964. Through all of this the Forest Service adamantly adhered to a sale of timber which Plaintiffs feel was unlawful in the first instance. Never once did the Forest Service in light of these events reconsider its decision to sell timber in the East Meadow Creek drainage of White River National Forest. This alone violates the Congressional mandate that Forest Service plans provide "sufficient latitude for periodic adjustments in use to conform to changing needs and conditions. . . ." 16 U.S.C. 531(a).

When the Parker case, initiated on April 4, 1969, got to the trial stage on January 26, 1970,[151] Tony Ruckel orally summarized his intentions for Judge Doyle:

> The proof will show that the timber sale area is within a mile or so of the Gore Range primitive area [and] that the timber sale area . . . can truly be described as wilderness under both the Wilderness Act and . . . the interpretation given the Act by the regular . . . practices and procedures of the United States Forest Service. . . . The plaintiffs will introduce able and interesting documents compiled by the Forest Service which show the high level of preparation the Service engages in for the wilderness proposals. Yet . . . the depositions indicate . . . that their equivalent has not been prepared for the Gore Range primitive area and its contiguous areas. . . . I submit that our theory of the case is really quite simple. Within the two acts under consideration by this Court are found mandatory provisions. . . . The provisions

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[151] At the outset of the trial, Judge Doyle disagreed with counsel for the federal defendants, Nelson Grubbe, that the case should be dismissed, stating: "We might just as well have a hearing to see whether or not this is clearly a primitive area. And if so, whether the Department of Agriculture can willy-nilly deprive it of this character." Reporter's Transcript, p. 9.

> are not complicated. They say we shall study wilderness. We shall weigh the relative values of the multiple uses. Your Honor, this has not been done and we submit that the plaintiffs will show this in the trial.[152]

Ruckel first built the record that led Judge Doyle to conclude after the trial:

> Witnesses who are familiar with wilderness say that a wilderness experience can be obtained in this area. . . . They have also testified that this is an important tourist attraction which is a great source of value to Vail. . . .[153]

His expert witnesses included Robert W. Parker, Vail businessman and former professional guide in the Wind River National Forest and Mount Ranier National Park;[154]

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[152] Reporter's Transcript, pp. 15, 18, and 22.

[153] 309 F.Supp. 593, at 596.

[154] "I think you have to experience a walking trip into the mountains to realize that every phase of the trip has its own attraction. Typically, you start at the road head and you're walking through forest the first part of the time. Then you're in alpine meadows and then you're on rocky peaks and then you're on snow slopes and finally on the peaks. And each zone has its own wildlife, its own wildflowers, its own particular attractions. . . . In talking to our guests and also talking to potential guests, the [combination] of comfortable resort facilities with nearby wilderness activity potential is probably what is particularly unique about Vail. [The wilderness] is important because it offers practically at the doorstep of the resort a varied, extremely beautiful and at the same time accessible natural wilderness. Wilderness per se has become a desired destination by tourists, by Americans of all kinds, and we recognize it therefore as an important resource now and in the future. We have many householders, people who have bought condominiums or homes which they use for vacation use who have said in so many words that they located their vacation homes in Vail because of the accessibility to the wilderness experience." Reporter's Transcript, pp. 51, 56, 72, 82-83.

James E. Kemp, Vail businessman, vice-chairman of the Eagles Nest Wilderness Committee, and a veteran of "forty or fifty" hunting and back-packing trips into the sale area;[155] John Donovan, Vail businessman and a member of the Vail Board of Trustees;[156] Clifton R. Merritt, Director of Field Services for The Wilderness Society and a life-long wilderness user;[157] William B. Mounsey, a commercial wilderness-trip outfitter who had taken several groups of paying guests on trips through the sale area;[158] and Paul

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[155] Ibid., pp. 90-145.

[156] Donovan supported Parker's contention that many people came to Vail for the sole purpose of using the primitive area and its environs; he noted for example that the Outward Bound organization had brought hundreds of teen-aged boys into the wilderness through Vail in recent summers. As a member of the Vail Board of Trustees, he testified that the Board had voted unanimously to join in the action as a party plaintiff, having reaffirmed its position as recently as two months prior to the hearing. Ibid., pp. 93, 153.

[157] Ibid., pp. 169, 177, 185, 217, 277. Merritt's statement, summarized: "[T]he area does qualify for wilderness consideration; man's works in the area are substantially unnoticeable and one can have a wilderness experience in the East Meadow Creek area. We feel that a wilderness area should not consist just of high goat rocks; that it should include a liberal cross-section wherever possible of the foothills, small valleys, streams, and any low country lakes up to the mountains and on to the highest peak and down to the other side. Where possible, it is desirable to have a wide representation of as many [life] zones as possible that are still undeveloped and in wild country so that you have a richer biota and a variety of scenery. If what we are going to end up with is just a wilderness boundary line on the high rocky escarpments, we haven't established an area thereby that can be enjoyed recreationally by the greatest numbers of people. We should leave some places at lower altitudes where persons can camp; where there might be grass for their recreational stock, and where people could travel by day up from these

Gilbert, Colorado Game, Fish and Parks Division area supervisor and source of the statement that East Meadow Creek constituted a summer range "nursing ground" for an important elk herd.[159] Between them, they convinced the judge that much of the East Meadow Creek drainage "meet[s] the [Wilderness Act's] test of suitability."[160]

Then it was the turn of the Forest Service personnel to testify. Judge Doyle already had been advised, by means of documents filed with the court over the preceding ten months' period, of the position of the federal

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camps down below in the less fragile country to the high alpine areas and back out at night, thus reducing the impact on the alpine country. [East Meadow Creek] provides a foreground to the high ramparts of the wilderness. . . ."

[158]"[T]he people I have on my trips are mainly from low elevations. Very frequently they fly out here one day and the next day they're starting off at nine and a half thousand feet from Vail at the start of the trail and they're perhaps--perhaps with a pack on, and for probably a week--they have taken quite a bit of effort in most cases to get themselves in some physical condition. But still, this is a trip for pleasure and it is not for any endurance contest. So East Meadow Creek is, I feel, sort of a setting for me. They can start off here and easily graduate. A beautiful stream running down through it, and part of the experience that these people have is right here, the first time they hit that East Meadow Creek, and I noticed it several times last year. People come to this stream and they say, 'Can I drink out of this water?' And of course I tell them, 'You can. . . .' So this is part of the experience, of working into this type of area." Ibid., p. 271.

[159]Ibid., p. 238.

[160]309 F.Supp. 593, at 601.

and industrial defendants and industrial intervenor that the court did not have jurisdiction to enjoin a discretionary administrative project and that, if it did enjoin the East Meadow Creek sale, this would "wreck the economy of the forest-using industry as well as wreck the housing goals of the nation."[161]

In their memorandum of points and authorities supporting their motion to dismiss, the federal defendants had alleged that the Forest Service was in "full and

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[161]Brief in Support of Motion of Intervenor Western Wood Products Association for Summary Judgment, p. 3.

Cf., Lloyd Meeds, "A Conservationist Views the Timber Supply Bill," Congressional Record, Nov. 24, 1969, p. H11345: "When Congress was working on the North Cascades bill, a highly respected business leader in Bellingham, Wash., said flatly that the local Georgia Pacific plant would shut down within five years if the bill were passed. Sportsmen's groups protested the legislation as threatening their activity. In fact, little of the timber cut in the Mount Baker National Forest was involved, and less than one percent of the State's deer kill was affected. This same litany of impending doom pursued us on the Redwoods bill, the Wilderness Act, and other measures. . . ."

See also: Letter from Secretary of Agriculture James Wilson to "The Forester, Forest Service," Feb. 1, 1905: "In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people and not for the temporary benefit of individuals or companies. . . . You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the home-builder first of all. . . ." U.S., Department of Agriculture, Forest Service, Lumber & Plywood Supply--A Situation Report, March 1969: "During the past year prices of softwood lumber and plywood have risen sharply to record high levels. . . . [The] tendency to build up inventories in expectation of a tight supply will continue to accentuate the supply and price situation. . . ." U.S., Congress,

complete compliance with the applicable statutes" and that "the Court is without jurisdiction to enjoin the matters that Congress has delegated to the agency for the exercise of its expert judgment."[162]

Intervenor Western Wood Products Association took a somewhat different tack, although agreeing that the case should be dismissed. As the author of these memos, James P. Rogers, saw the situation:

Senate, Committee on Banking and Currency, Problems in Lumber Pricing and Production, Hearings before the Subcommittee on Housing and Urban Affairs, 91st Cong., 1st sess., 1969 (hearings on S. 1832, "A bill to provide for the more efficient development and improved management of national forest commercial timberlands, to establish a high-timber-yield fund, and for other purposes). U.S., Congress, House, Committee on Agriculture, National Timber Supply Act of 1969, Hearings before the Subcommittee on Forests, 91st Cong., 1st sess., 1969. U.S., Congress, Senate, Committee on Agriculture and Forestry, National Timber Supply Act, Hearing before the Subcommittee on Soil Conservation and Forestry, 91st Cong., 1st sess., on S. 1832, 1969. U.S., Congress, House, Committee on Agriculture, National Forest Timber Conservation and Management Act of 1969, Report No. 91-655 [to accompany H.R. 12025], 1969. "Flyer" on National Timber Supply Act distributed by Sierra Club, Jan. 26, 1970, 12 pp. Floyd V. Hicks, "The National Forest Timber Conservation and Management Act," Congressional Record, Feb. 25, 1970, pp. E 1296-7 [summaries of statements in favor of passage of the bill, made by 42 political leaders and associations including labor unions, civil rights groups, housing officials' groups, and the forest products industry including the Western Wood Products Association]. Arnold Olsen, in House floor debate on H.R. 12025, Congressional Record, Feb. 26, 1970, at p. H 1333: "[I]n 1968 and early 1969, there was a real squeeze in the availability of logs for production of softwood and plywood due to log exports and heavy snows in logging areas. Also, there was a shortage of boxcars and all in all a sharp increase in prices resulted. But, of course, subsequently these prices collapsed when the expected housing boom did not materialize due to high interest rates [emphasis added] and the decline in demand for homebuilding." U.S., Congress, House, Committee

> What is involved here . . . is not just this sale, on this forest, but perhaps all sales on all national forests. . . . The power of the Forest Service to manage all national forests, and to sell cutting contracts therein, are not different in the White River National Forest in Colorado from in any other national forest in Colorado, or in any of the 11 other States of the United States where [WWPA's] members must buy timber. The plaintiffs put in issue here, on this sale, the meaning of statutes applying to national forest timber sale contracts everywhere in the United States; the final decision of the Court on the meaning and application of those statutes is a decision in all other forests, in other states, in all other sales, and therefore are of vital import to [WWPA's] members, the builders of homes where lumber, plywood, or other wood fibre products are required, and to the goals of the National Housing Act of 1968 and the riots and civil commotion giving birth to that Act.[163]

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on Appropriations, Department of the Interior and Related Agencies Appropriations for 1972, Hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 92nd Cong., 1st sess., 1971, Part 4, p. 14: "Mr. [Ed] Cliff: . . . During fiscal year 1970, 11.5 billion board feet of timber were cut and 13.4 billion board feet of timber were sold in 26,610 sales [in the national forests]. . . . Timber receipts totaled $284 million, down $23 million from fiscal year 1969. This decrease reflected the slow 1969 lumber market because of a reduction in housing starts." (The 4.3 million-board-foot East Meadow Creek sale represented three-hundredths of one percent of total national forest sales for the year.) "Planned Reforestation: Plenty for Now, Later," The State Journal, Lansing, Mich., Apr. 28, 1972, p. D-5: "George E. Kelly, executive vice president of the Southern Forest Institute, said wise harvesting and reforestation practices can insure there will always be enough trees to meet the nation's future needs: 'We're not running out of trees, not at all.'" John E. Ray III, "The Third Forest and the Economics of Scarcity," reprinted in the Congressional Record, Aug. 14, 1970, pp. E 7673-4: "In housing . . . production methods applied to the new factory built-modular homes indicate that 20 percent more dwellings can be built from a given amount of lumber and plywood." *U.S.*, Congress, Senate, Committee on Interior and Insular Affairs, "Clear-Cutting" on National Forest Timberlands, Hearings before the Subcommittee on Public Lands, 92nd Cong., 1st sess., Parts 1, 2, and 3, 1971. William M. Colmer, "Authorizing Committee on Banking and Currency to Conduct Investigation and Study of Prices of Lumber and Plywood," Congressional Record, Aug. 14, 1972, p. H 7569.

> [T]he timber sale in question, which Kaibab Industries accepts, was subject of an excess of investigation, consultation, etc., and an undue delay which, if followed in all sales, would be nearly as disruptive and destructive of [WWPA's] members' interests as would the construction of the Wilderness Act of 1964 urged by plaintiffs.[164]

Judge Doyle also had had access to the many depositions taken prior to the trial, which provided grist for the legal mill in the sense that differences of opinion between qualified experts came to the surface. (Examples might include the contrast between the views of two

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[162]Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 2. The federal defendants contended that the contract was authorized by the Act of June 4, 1897 (30 Stat. 34, 16 U.S.C., sec. 475 [1964]), which provided the early guidelines of public forest management; by the Multiple Use-Sustained Yield Act of 1960 (74 Stat. 215, 16 U.S.C., sec. 528, et seq. [1964]), and by the Act of October 13, 1964 (78 Stat. 1089, 16 U.S.C., sec. 532 [1964]), which specifies the congressional policy on the need for roads. Highlights of this memorandum: p. 5: "The basic charge to the Forest Service is to improve and protect the forests. How do you improve a tree? How do you protect a forest? Thinning, by removing the older trees, may improve a forest; and seeding or planting trees may be necessary. . . . The plaintiffs by this suit seek to stop the improvement and protection of the National Forest." pp. 9-11 re "discretionary actions of executive officers of the government are not subject to injunction," especially at p. 11: "Congress has wisely left these technical matters to the technicians. . . . The Court should not interfere." This memo also raised the issue, "Trees that the plaintiffs seek to retain may be removed by mining claimants." (p. 12)

[163]Memorandum of Points and Authorities in Support of Motion for Intervention [of Western Wood Products Association], p. 3. See also, Affidavit of Wendell B. Barnes in Support of Motion for Intervention by Western Wood Products Association, p. 4: "[A]ll of [WWPA's] members, as a class, have a real economic stake in the outcome of this litigation. If plaintiffs' position that the sale here in issue should be permanently enjoined were finally

professional foresters--District Ranger Donald E. Price and Sierra Club Consultant Gordon P. Robinson--with regard to the necessity of logging the East Meadow Creek drainage[165] and the observations of two employees of The Wilderness Society--William B. Mounsey and Clifton R. Merritt --with respect to the wilderness quality of the East Meadow Creek area, testimony which conflicted with that of the Forest Service.)[166]

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to prevail, the result could be disastrous for every one of the Association's members who are dependent in whole or in part on the processing of logs derived from the national forests. . . . As of October 1, 1969, slightly over nine million acres of national forest land in the 12 states in which the Association's members have their operations, have been proposed as wilderness areas or areas of limited use; of that total slightly over 2-3/4 million acres is productive forest land. If the plaintiffs' position in this case were upheld and sales of the allowable cut from these lands were terminated until their status had been determined by Congress, a large number of the Association's members would be forced out of business."

[164] Ibid., p. 5.

[165] Price, Sept. 5, 1969, pp. 55, 58-59: "We helped formulate the cutting budget for the . . . Holy Cross Working Circle. We made the first draft of the Working Circle cutting budget in about 1956, '57, which included East Meadow Creek. . . . [W]e are basing our recommendations for bug or insect attacks [spruce bark beetle] on the character of the stand and known outbreaks that have occurred, and that is a borderline stand of timber. We have had outbreaks occur in that type of timber, and in our opinions we have to go on that. . . . Insect activity at present is endemic. Since the saw-timber is overmature, it would be susceptible to further attacks if the beetle population was allowed to build up. Removal of some of the overmature spruce will improve the situation as regards possible outbreaks." Robinson, Sept. 29, 1969, pp. 19-20, 23: "I walked through [the East Meadow Creek sale area] and looked at the area and compared it with adjoining timber visually. I noticed that very few [of the trees to be removed pursuant to the contract were infected with

So Judge Doyle was not surprised by Justice Department Attorney Nelson Grubbe's opening assertion, on January 26, 1970, that the Forest Service had complied with all applicable statutes:

> The Forest Service has administered the forest as directed by Congress . . . for the past 60 years and more. . . . As the contract that is now before this Court developed, the regional forester and his staff reviewed and passed upon the situation for the contract, suggestions that were made in the field by the forest supervisor's office and the district ranger's office.

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disease or insects]. It was a healthy stand, I thought. . . . My opinion of the trees designated for removal is that most of them were healthy. . . . Whether I would remove that tree [referring to a photo of a "ratty" tree in the sale area] would depend upon the decision of whether the . . . highest and best use of the land was for wilderness or for timber production."

[166]Mounsey, Aug. 20, 1969, Summary, pp. 1 and 3: "Mr. Mounsey described the timber sale area as a de facto wilderness area containing unimproved roads and dilapidated structures. . . . Mr. Mounsey stated that he thought Mr. Price, district ranger, did not thoroughly study the area for all its wilderness characteristics and in the weighing of his decision, he believed that the wilderness characteristics played a very small part in Mr. Price's decision. . . . Mr. Mounsey stated that income from these wilderness trips [into East Meadow Creek and elsewhere] accounted for one-third of his income. . . ." He admitted that he had not requested the Forest Service to hold a public hearing on the sale, but said he had written to the Secretary of Agriculture on the subject. Clifton Merritt, personal letter, Aug. 26, 1970: "[M]y objectives in the deposition were two-fold: (1) To establish that the part of the East Meadow Creek area beyond the end of the road was of wilderness character, and (2) that prior to development Forest Service studies should be completed and a decision be made under the procedures outlined in the Wilderness Act as to whether the area should become a part of the Eagles Nest Wilderness." See also, Deposition of Clifton Merritt, Sept. 4, 1969, 74 pp.

> Within [the Eagle] district under the Multiple Use Act [the Forest Service] establishes management zones of use. They are set up administratively on the knowledge and experience of these field employees. The intermediate zone or all-purpose zone encompasses our contract area in this case. The zone was designed and put on a map in 1961, again the district and the Forest reviewed this and reestablished and reaffirmed the line in 1966. . . .
>
> Now, in 1964 after passage of the Wilderness Act, the regional office established procedures to carry out the required study of the primitive areas in this region. And one of the first things that was done concerning the Gore Range primitive area was a fact gathering study done by Mr. [Weidenhaft]. His general study and general procedure was to go out as far from the [primitive area] boundary until he hit some kind of non-conforming use such as a house or private land or a road and study from that back to the primitive area to be able to tell his supervisor what was in this area. . . .
>
> The evidence will show I'm sure that the Forest Service looked at this area with great detail . . . they did bring serious considerations of all the disciplines involved. . . .[167]

Regional Forester David S. Nordwall, who had been in all seventeen primitive and wilderness areas in his region "and in quite a few in other regions,"[168] told the court that, in his opinion, the East Meadow Creek timber sale contract area was not suitable for wilderness as defined by the Wilderness Act, and that the timber sale contract "best meets the needs of the American people,"[169] because:

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[167] Reporter's Transcript, pp. 24-26, 30, 37.

[168] Ibid., pp. 406-407: "I am tremendously fond of wilderness and the purposes for which the Act was created. I just like them."

[169] Ibid., p. 412.

> In addition to our multiple use considerations, some of the reasons for determining that this area was not suitable, the series of private lands which are in an arc around the proposed sale area and within a half to three-quarters of a mile in several areas, and another reason was the road which penetrates the heart of the area; a third consideration was the proposal for the Denver expansion of the Denver water system, and a fourth was the presence of very substantial numbers of mining claims in the area.[170]

As far as he was concerned, the East Meadow Creek sale had been adequately planned and reviewed:

> In this particular instance we started with a sale approximating seven million feet. The studies were initiated at the ranger district level . . . reviewed by the district ranger and his staff, forwarded on to the forest supervisor at Glenwood Springs for review by the supervisor and his staff and that is made up of specialists in timber, range, recreation, wildlife and so on. . . . Following review at the supervisor's level, the material is sent in for review by the regional forester and his entire staff. . . . When it comes in, it is sent to the various divisions for their review and comments, after which it comes to our multiple use coordinator, who's my immediate officer for the screening and digesting of the material for review by the deputy regional forester and myself, after which it is subject to staff review and discussion. . . . The reason this sale came to our office was that it was beyond the authorization of the forest supervisor who has an authorization [delegated] for five million feet, and this was for seven million feet. . . . [The East Meadow Creek sale] was somewhat unusual because there developed a very considerable amount of interest, and I would say that my personal review and my personal review with my staff was considerably more intensive and comprehensive than it might have been in the conventional sale that comes through our office. . . . I talked with the chief [of the Forest Service] personally as well as members of his staff about it. . . . I believe it was in the range of four months before I made the decision in order to study this particular thing very, very thoroughly. . . . My decision concerning the

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[170] Ibid., pp. 368-369.

> original proposal was to move it back a considerable distance from the primitive area, which resulted in reducing the volume to be offered from some seven million to some four million feet. . . . [T]he principal reason was to move it back from what might have been the primitive area boundary.[171]

Judge Doyle had his doubts about the propriety of this procedure, and seemed impressed with the plaintiffs' argument that what was "afoot" was hasty, internal decisionmaking without adequate public involvement, as these exchanges between the judge ("THE COURT") and the regional forester ("THE WITNESS") demonstrate:

> THE COURT: I think what they charge here . . . is that you committed yourself to harvesting timber here and that it's a decision that is not subject to change even though it is better suited for dedication to wilderness. . . .
>
> THE WITNESS: . . . I reject the theory or the suggestion that the ten-year plan is a frozen plan from which we may not deviate. . . . I would like to tell you about the extent of our review and the qualifications of the people I have helping me to do this. I do not make these decisions independently. . . . I have twelve assistants. These men have been rangers. They have been forest supervisors. They have been specialists in timber planning, range planning, wildlife, watershed, recreation across the Gore. And so these men advise with me in a determination of "Do we make a timber sale" or "Do we dedicate this area for wilderness purposes." This is a very thorough review. . . .
>
> Q. (By Mr. [Donald] Carmichael [plaintiffs' co-counsel]) You have stated . . . that the proposed sale area was . . . pulled back [from the primitive area boundary]. Was this pulled back before you had heard from local conservationists . . . protesting the sale area? Just before or after?

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[171] Ibid., pp. 389-393.

A. The modification was made after we had received that proposal. But I would add that my decision was influenced only partly by the proposal that was made by the COSC group. I was far more concerned with encroaching on the wilderness boundary. . . .

THE COURT: [Y]ou had . . . decided in 1965 that you were going to use [East Meadow Creek] for this purpose?

THE WITNESS: To have a sale in that area, yes. . . .

THE COURT: Where is the compelling public interest in selling the timber? That's what I'd like to know.

THE WITNESS: I guess that's the crux of the total problem. And it's a very difficult decision. With the land base that we have and I think this is the key problem--there is only a certain land base that we have in the national forest. Some of it is more suitable for certain uses than others. There is demand for all uses way beyond our capacity to meet them. The demand for timber is tremendous. The demand for wilderness is great. The demand for wildlife area is great, for mass recreation, and there is only so much land. And so we use our best collective judgment and that of the people that we work with out on the ground to determine what the best use of an area is. And this must become a matter of professional judgment, Your Honor. There are no criteria for the public interest. [Emphasis added][172]

When the regional forester contended that a moratorium on development within the roadless area surrounding all primitive areas would put the Forest Service "out of business," Judge Doyle characterized his expressions of concern as references to "imaginary horribles" that represented "a Chicken Little approach to the law":

THE WITNESS: [T]his is . . . an example of an area that is outside a classified primitive area that

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[172] Ibid., pp. 311-317.

may have need for development in it before such time as it is studied [for wilderness purposes]. If we were to withhold action on all areas in a perimeter around the primitive areas before we made our detailed study and before enactment by Congress, we would be out of business in quite a few of those areas. . . .

THE COURT: What do you mean, "be out of business"?

THE WITNESS: I mean we wouldn't be able to proceed with our timber business, with special uses for perhaps a ski area, any type of development. If we were going to withhold areas, say, a mile, two miles, three miles around all of our primitive areas--

THE COURT: Oh, true. But, I don't suppose they would all be qualified anyway, would they?

THE WITNESS: Well, I'm afraid they would in the minds of some people, Your Honor. . . .[173]

* * *

Q. Would you tell the Court briefly what possible effect that an injunction would have upon management of this contract area, as well as any other ramifications that would naturally flow?

A. For the specific contract area it would mean that I have whatever time is indicated in the plans of the contractor. It has already been approximately a year that the contractor has been prevented from moving into the area. I think the significant factor here however is a symptomatic one, that should this situation be repeated around the primitive areas in my region alone, let alone the other western regions of the United States, there would be many communities affected by mills closing down;[174] there would be a very material effect on the availability of lumber, which is already in very short supply; and would have a very definite effect on the cost of housing and home building in the United States.

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[173] Ibid., pp. 322-323.

[174] See, William R. Bentley, "Forest Service Timber Sales: A Preliminary Evaluation of Policy Alternatives," Land Economics, Vol. XLIV, No. 2, May 1968, at p. 206: "There are few explicit legislative directives regarding sale of national forest timber. In 1897 Congress authorized the sale of timber from the Federal forest reserves with

THE COURT: These imaginary horribles don't impress me at all. This is a well-known technique in the law. "If you make this decision, this and that horrible will occur." They may or they may not. But, we have to discuss cases on their merits and not in relation to what horribles are going to occur; what catastrophes are going to overtake us. It's sort of a Chicken Little approach to the law, and I just don't approve of it. I just want you to know it. I don't think the sky will fall if an adverse decision comes in here. I think the Service will be able to handle it adequately, you know. . . . And one poor little judicial decision isn't going to disturb the basis of bureaucracy that has been described to me here today, I wouldn't think. It won't even cause a ripple.[175]

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the lands remaining in public ownership and management [Sundry Civil Appropriations Act of June 4, 1897]. Sales were not to be made for less than the appraised timber value but 'appraised value' was not defined. . . . Administrative directives provide most of the guidelines for timber sale procedures. The directive on timber sales emphasizes: (1) achievement of planned sales goals to sustain a 'progressive and healthy' forest products industry that can absorb timber harvests planned over the longrun; (2) coordination with other land uses; and (3) overall development of transportation networks and similar needs [Forest Service Manual, Sec. 2430.2]. Community and employment stability are specific goals and general encouragement of small firms and competition is directed. . . ." See also, Hubert D. Burke, Prospectus: Timber Values in the De Facto Wilderness of the Rocky Mountain Region (Denver: Rocky Mountain Center on Environment, July 17, 1970), p. 5: "In the 65 years since the establishment of the national forests small towns have grown up dependent upon the forest for their survival. The townspeople built trails, roads and repaired telephone lines, fought fire, cut timber, grazed cattle and sold gasoline, sandwiches, and cigarettes to tourists. Local rangers, depending heavily upon the people, felt a return obligation to them. In conversations on the subject one may hear rangers or ex-rangers rather ruefully tell of an instance, when snow precluded marking at more desirable locations, he marked some timber for cutting in a location that was against his personal inclination and professional training; yet he did it to provide work so that men could get their families through the winter. In the following summer, tourists, who enjoyed good jobs all winter and had enough money to take a vacation, came into the forest and complained bitterly because some of their scenery had been spoiled. Some tourists would go back and write

Judge Doyle's apprehension was not put to rest by the testimony of District Ranger Donald E. Price or Forest Supervisor Folkestad, which followed that of the regional forester. Price acknowledged that he had been able to prepare another timber sale to make up for the reduction in the East Meadow Creek sale volume ("It just increased our work load for that summer to put those sales up.") and that he was interested in maintaining the level of board footage to be offered "because of our commitment to the

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emotion-packed letters to the press about the evil timber industry and the evil government agency. All cutting has not been for such benign reasons, but the local social problem has been overlooked by the largely urban oriented and generally well-to-do wilderness advocates."

[175]Reporter's Transcript, pp. 412-413. For an indication as to how seriously the Forest Service took the Parker case, see, M. M. Nelson, Deputy Chief, memorandum to Regional Foresters, Aug. 13, 1969: ". . . [Parker] is a bellweather case. The Court has decided to hear arguments on a matter that has been historically one of administrative discretion. Our bid to dismiss the case on jurisdictional grounds was rejected. An injunction preventing development and management of undeveloped area adjacent to this Primitive Area is a precedent that could be extended to all others. There is reason to believe that attempts will be made to extend this precedent to other undeveloped areas of Federal lands which might be considered for inclusion in either existing or new Wildernesses. Finally, there is some reason to believe that this kind of legal action may be extended to many other matters of public lands administration. Obviously we are deeply concerned with this case. You will need to be informed of it because similar actions can be expected elsewhere if the Government loses this case. We will need information from all Regions having established Primitive Areas to substatiate the United States contention that injury will occur if the Court enjoins the timber sale operation. . . ." Data from the responses to the above memorandum were used to prepare a memorandum from Burnett H. Payne, Associate Deputy Chief, to Robert G. Rue, Director, Forestry and Soil Conservation Division, Office

industry [and because] we were funded for that amount."[176] Folkestad, while acknowledging that recreation probably was the "highest use" of the White River National Forest, explained that he had given no consideration to cancelling or postponing the East Meadow Creek sale "because the determination was made in the regional office."[177]

The wilderness and special areas branch chief for the Forest Service's Denver regional office, Gaillard Weidenhaft, went on record in favor of "good definable

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of General Counsel, USDA, dated Sept. 3, 1969: "The delay of non-wilderness National Forest activities in areas adjacent to established Primitive Areas pending study and classification under the National Wilderness Preservation System Act would adversely effect [sic] both National Forest programs and industries dependent upon those programs. Effects would be both tangible and intangible in character. The intangible effects would relate to disruption of project work and related public use such as trail construction, recreation developments, establishment of weather instrumentation sites, water improvement projects and construction of fuel breaks to aid fire control activities. . . . More tangible, but still not readily quantifiable . . . are the losses due to disease and insects caused by further delays in timber harvest activities. . . . Other damages of like character are those suffered by timber processors who are denied access to raw material that would otherwise be made available to them. In many cases, loss of markets, payroll losses to communities and other impacts would occur. . . . Direct and tangible losses are caused by delaying timber harvest operations. To the extent that timber offerings can be halted by legal proceedings similar to the East Meadow Creek Sale, direct and substantial loss would occur. . . . In areas adjacent to Primitive Areas, timber offerings totaling 684 million board feet are presently scheduled. . . . For each year the U.S. is deprived of the use of [the] anticipated stumpage receipts due to delay, the annual loss of interest amounts to $172,234.30. The annual loss to the local counties would amount to approximately 25% of the net stumpage value of $2,460,490 or $615,122. In addition, where sales are postponed, much of the field work must be redone. . . . It should be reiterated that

[wilderness] boundaries [such as a] rock escarpment, a major ridge--something that is readily visible when you're using the country." He opposed wilderness protection for East Meadow Creek because of the presence of the road to the sale area and an old "bug road" built for a bark beetle control project in the early 1950s (despite the fact that it was "getting vegetation on it").[178] He reiterated the regional forester's position that no public hearing was required with respect to the future management of areas contiguous to primitive areas but which the Forest Service decides are not suitable for Wilderness Act protection:

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these damages represent only the direct and readily definable items. There are numerous others that are real but subject to greater controversy in any appraisal process. For this reason, we have not attempted to include them at this time."

On this point Judge Doyle said: "The Forest Service has been considering the proposed sale of timber in East Meadow Creek for several years. The decision to sell and harvest having now been made, the Service claims that the plans must proceed immediately. We must disagree. The interests of the plaintiffs and the public in maintaining the status quo until the requirements of the [Wilderness] Act have been fulfilled far outweigh this desire to get the job done now--after more than ten years of delay. We are not unmindful of the interests and equities of Kaibab Industries, but here again we cannot give effect to this interest, for the cutting of the trees is, as we have noted, too final and conclusive. It must await the processes of law." 309 F.Supp. 593, at 601.

[176]Reporter's Transcript, p. 433. See, Sax, Defending the Environment, at pp. 200-201: "'The thrust of the [government's] testimony was that the presence of a road commits the area to industry use,' [Judge Doyle] observed. 'They [the government witnesses] assume the existing road would more or less go to waste if they didn't

> Q. Is it the policy of the Forest Service to cause detailed studies and have a public hearing on areas outside of primitive areas that the Forest Service has found to be unsuitable for inclusion in the wilderness system?
>
> A. [Weidenhaft] Not to my knowledge, no.
>
> THE COURT: Well, this forever dooms these areas, doesn't it?[179]

At the close of the four-day trial, the plaintiffs' chief counsel, Tony Ruckel, indicated that he neither relied on a violation of the Multiple Use Act--"That's a secondary supporting matter"--nor maintained that the Forest Service timber sale decision had been reached in a

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use it for industry purposes. That's their philosophy.' . . . The explanation sought by Judge Doyle of the Forest Service's need to go forward with its cutting program in the challenged area was never forthcoming."

[177] Ibid., pp. 454-455.

[178] Ibid., pp. 473-476. Weidenhaft's primitive area study technique is described at pages 467-469 of the Transcript. He not only drafted the wilderness area proposals for the Region and scheduled the public hearings on them, but also was responsible for analyzing the hearing records--hardly a neutral hearing officer.

[179] Ibid., p. 480. That the judge shared the plaintiffs' concern in this regard became obvious during a later exchange with plaintiffs' counsel: "THE COURT: The evidence is that they only consider those contiguous areas in their . . . final evaluation . . . which they positively determine are to be included [in their wilderness proposal]. MR. RUCKEL: Yes, Your Honor, and I think here we come to the crux of the case in this regard; that the defendants have not considered the area because the sale was going to be made." Transcript, p. 557.

spirit of bad faith, but that he relied primarily on "the mandatory procedures under the Wilderness Act which were not followed."[180]

Assisting Ruckel in trying the case for the plaintiffs was Donald Carmichael of Boulder, Colorado. Carmichael's closing remarks emphasized the possibility that administrative convenience had been given more weight than protecting wildlands without easily seen boundaries, in the agency's decisionmaking:

> I have been rather impressed [by] the constant mention of administrative convenience, the ease of administration. . . . [I]t strikes me that it has become perhaps something close to a tipping factor in . . . some situations. I think certainly Mr. Weidenhaft's evaluation of suitability as an aspect--availability was the second aspect of the area which he mentioned. By this he meant an administerable line, a line which could be administered which could be convenient, relatively simple to administer. . . . I wonder whether the administration, the administrative convenience of the Forest Service should be a major factor in the determination of which land will be saved for future generations. . . .[181]

Carmichael asked, let Congress make this decision:

> In closing we would simply ask that this area, East Meadow Creek, be left to an ultimate political decision, to the political arena from whence it legally came.[182]

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[180] Ibid., p. 567.

[181] Ibid., p. 625.

[182] Ibid., p. 628.

U.S. Attorney Nelson Grubbe, in closing, reiterated his position that the forest officers had not abused their administrative discretion:

> [T]he Court's function in reviewing what has been done by the Forest Service here is [to see if there] is . . . substantial evidence to support a determination by the Forest Service that this area remain in its multiple use status. And did they properly consider all the relative values involved which include the wilderness aspects and the wilderness capabilities and the management problems of the area and the public need. . . . [I]n this particular case it happened that the multiple use activity of building a road and cutting these trees just happened to coincide with the [wilderness] study that is being carried out here in the Gore. . . . The only decision that has been made . . . is to keep [East Meadow Creek] in that [multiple use] zone and go ahead with the plans there. . . .[183]

> We're talking about consideration of an administrator; what he does; what did he look at. And if you as a fact finder find that this . . . so clearly fits the suitability requirement of Congress under the Wilderness Act, you will decide he made a wrong decision. But, that doesn't get us completely there because he has discretion. And so you have to weigh it and see if he has abused his discretion. Has he gone through the steps necessary to safeguard the interest of the public? Has he thought about the values that Congress wanted him to think about when they gave him the power to make that decision? And we think there is nothing in this record to show any abuse of discretion. This man with thirty-seven years of experience and expert advice looked at this thing for four months. He studied it. He went out on the ground. He called his chief in Washington. He went through this from one end to another. Now then, during this time the plaintiff suggested to him that this area is wilderness under the Act. But, they have never here nor in the depositions nor at any time during the correspondence given him reason one why this should be preserved in the wilderness system. And I think that is significant.[184]

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[183] Ibid., pp. 343-345.

Judge Doyle's dissatisfaction with what he seemed to see as an arbitrary internal decisionmaking system surfaced again and again:

> THE COURT: There is some value, I'm sure you'll agree[,] in exposing it to the public. The deliberations in an opinion--in our trade we say, "Well, does the decision jell?" Why do we require judges to make findings of fact and conclusions of law? So it can be objectively considered. And will it hold together? Does it stand up? That's why we are encouraged to always write an opinion. And when you start writing opinions, as the lawyers know, you sometimes discover it just doesn't--your initial hunch perhaps is just no good. Because, it will not ripen, and you don't have a rational basis for it. And I say, this is not an idle exercise. There is good reason for requiring a man to put his reasons down, and so that they can be looked at . . . by everybody, and considered.[185]
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> * * *
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> THE COURT: . . . I'm sure that the Forest Service doesn't relish a court looking over its shoulder and I assure them that the court doesn't relish looking over its shoulder. We've got enough work to do without taking on any more or opening up any new areas for litigation. But, yet, this is such a complex society

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[184] Ibid., pp. 585-586. With respect to evidence regarding the wilderness quality of the East Meadow Creek area, the judge disagreed, saying, "There is quite a bit of evidence along this line."

[185] Ibid., p. 581. Grubbe responded, at pp. 590-591: "[The defendants] have introduced a lot of material. It shows a good, honest exchange of letters and correspondence all the way from 1967 up to the eleventh hour of letting the contract. The meetings; the participation by the Forest Service at night and to talk to the group; their wilderness groups and other plaintiffs there in Vail, to try to show them why this plan didn't fit the plan of the Forest Service [emphasis added] . . . it wasn't an isolated willy-nilly decision over here that the Forest Service made with earplugs, not listening to anyone or not responsive to anyone. . . ."

> nowadays--We didn't invent these actions or these groups or these pressures. And some people think if we just discourage everybody by throwing the case out, why, everything will be fine and dandy; and they will forget about it. But, they won't. As I say, it's an extremely complex society and people are going to assert their rights. They're just not going to behave. And so, we just have to be prepared to hear them and make a determination as best we can. . . .[186]

* * *

> THE COURT: . . . [I]f the trees are two hundred years old--why do we have to move so fast now? It takes ten years to prepare the plans. I mean, what's the necessity for speed? Where is the high or demanding or compelling public interest served by doing it now rather than after they have had a chance to at least present their case next summer [at the administrative hearing on the Eagles Nest Wilderness proposal]. I realize that you may establish a precedent that is undesirable of having courts butt into business that is none of their business, but is there any other compelling or public--I realize the equities of Kaibab are involved. They have been put to a lot of trouble and so on. But, is there any compelling equitable consideration or public consideration that says it has to be done now rather than several months from now?[187]

To which the federal attorney quickly responded, "We think so, Your Honor. . . .":

> In this particular case it's the compelling public need for the forest products that we have ready to go onto the market. And the contract for them to be manufactured into lumber. . . . I don't want to emphasize the horribles again, but the impact of holding up a sale in an area in which we now think of in this case, has raised a cloud over--I think will have an impact upon that problem, yes. Land managers just must have [management zone boundary] lines to live by. When they get in these grey areas, they have no management. . . . [Y]ou have pretty well clouded all of

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[186] Ibid., pp. 587-588.

[187] Ibid., pp. 600-602.

> these primitive areas out to where we no longer know where the line is. And this is perhaps as big a problem as we face in the whole case.[188]

One can sense the judge's impatience in his reaction:

> THE COURT: Well, that's the ease of administration again. . . . it's an illusion. There isn't any ease of administration any more. . . .

James P. Rogers of Portland, Oregon, appearing in court on behalf of the Western Wood Products Association, agreed with the federal defendants, as he had in earlier briefs, that the East Meadow Creek timber sale decision was beyond judicial review:

> [I]t seems to me that what [the plaintiffs are] saying is that they have a legal right to be heard and also to judicial review of every Forest Service administrative decision under the Multiple Use Act of 1960 when the following two things were present; first, it relates to an area contiguous to a primitive area and is claimed to be of wilderness character; and second, would have a tendency to injure the wilderness characteristics. These decisions they would have judicial review on are not limited just to the sale of timber. They would involve the building of a road, the construction of a campground, any other management decision which is not authorized under the Wilderness Act. And I submit, Your Honor, that that isn't the law.[189]

Judge Doyle listened, but in his closing remarks appeared to disagree:

> THE COURT: . . . I think . . . a pivotal factual point [is] whether [the plaintiffs] have established at least prima facie that it's of wilderness

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[188] Ibid.

[189] Ibid., p. 618.

> character. . . . Because, if they have, why, I think it puts the machinery into motion. I just don't feel that if it is of this character that the Secretary has the power to finally determine it on an intramural basis. . . . And by [the Wilderness Act] saying suitability, the thrust of this is that hearings shall be held.[190]

While the judge expressed the opinion that his decision would not be precedent-setting, federal attorney Grubbe speculated that it would have "widespread influences."[191]

As the Parker plaintiffs had requested on April 4, 1969, Judge Doyle--on February 27, 1970--did "adjudg[e] unlawful, and . . . enjoin the proposed sale"[192] of timber in East Meadow Creek until Congress determines whether or not the area will be administered as wilderness. Concluded the judge:

> . . . It is crystal clear from the evidence that the consummation of the present sale will effectively take all of East Meadow Creek out of contention as a primitive or wilderness addition. . . .
>
> . . . We are concerned not with whether the Secretary erred on his factual findings in ruling East Meadow Creek out as wilderness, but rather with whether there is sufficient evidence of its wilderness character so as to require study and submission to the President and Congress for determination of its

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[190] Ibid., p. 631.

[191] See, "Judge Refuses to End Trial on Timber Sale," The Denver Post, Jan. 29, 1970, p. 39, and "Timber Sale Suit Decision Awaited," The Denver Post, Jan. 30, 1970, p. 30.

[192] Complaint, p. 1.

> character and whether acts which would change its character should be enjoined until the determination can be made. . . .
>
> . . . Where as here the contiguous area is shown by the evidence to have wilderness character, it thwarts the purpose and spirit of the Act to allow the Forest Service to take abortive action which effectively prevents a Presidential and Congressional decision. . . .
>
> . . . In conclusion, we hold that the East Meadow Creek region meets the minimum requirements of suitability for wilderness classification and must, therefore, be included in the study report to the President and Congress. Furthermore, we find that if the proposed sale and harvesting of timber proceeds, it will frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture. . . .[193]

He implemented this opinion, on March 18, 1970, with the following order:

> [It is] ordered, adjudged and decreed:
>
> 1. That the preliminary injunction heretofore granted and issued by this Court herein on the 1st day of August, 1969, and entered in the office of the Clerk of this Court on the same day, be and hereby is continued indefinitely or until such a determination has been made by the President and Congress that the East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagles Nest or that it should not be, and that the Defendants, their officers, agents and employees, for such period of time, are enjoined from the cutting and grading of roads and the harvesting of timber within the Timber Sale Area in Eagle County, Colorado, as described in the Complaint herein; and
>
> 2. That the East Meadow Creek region be included in the wilderness study report of the Secretary of Agriculture to the President and Congress, as identified and set forth in said Memoranda herein referred to.

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[193] 309 F.Supp. 593, at 596, 597, 599, and 610.

It is further ordered, adjudged and decreed that the Defendants pay the costs of these proceedings to be taxed by the Clerk of this Court, and that execution issue for the same.

William E. Doyle, Judge
United States District Court

Conservation organizations and environmental lawyers lost no time in communicating with their colleagues about Judge Doyle's landmark decision.[194] When the federal defendants could not get the court order changed to give "the President" rather than Congress control over the fate of East Meadow Creek,[195] they appealed their case to the U.S. Court of Appeals for the Tenth Circuit.[196] Again, the federal defendants ("appellants") lost.

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[194] E.g., "Court Rules in East Meadow Creek Suit," Rocky Mountain Center on Environment Open Space Report, March 1970, p. 1; "E. Meadow Creek Timber Sale Halted by Court," Sierra Club National News Report, March 6, 1970, p. 2; "The Great Chicken-Little Case," American Forests, June 1970, p. 38; Senator Gale McGee, "Your Forest, Their Timber," Colorado, July-August 1970, at pp. 109-110; Oscar S. Gray, Cases and Materials on Environmental Law (Washington, D.C.: The Bureau of National Affairs, 1970), at pp. 107-114. See especially, Chapter 9, "A Pause in Time: The Moratorium," in Sax, Defending the Environment, 1971.

[195] Motion to Modify Order, filed Mar. 26, 1970 by James L. Treece, U.S. Attorney for the District of Colorado:

"Comes now the United States of America, by its attorneys, and moves that the Order entered on March 23, 1970 be modified as hereinafter set forth:

"The United States submits that paragraph 1 is broader in scope than the Court's Opinion in that the order requires cessation of timber harvest pending Congressional action, regardless of Presidential

In their decision filed on October 1, 1971,[197] the Tenth Circuit's three-judge panel (Lewis, Chief Judge, and Pickett and Adams, Circuit Judges) affirmed District Judge Doyle's opinion, holding that

> this action and the judgment neither constitute an unauthorized suit against the United States nor an unjustified judicial interference with the management powers of the federal appellants

as the appellants had claimed.[198] In fact, the appellate court panel seemed as concerned about the fate of the East Meadow Creek drainage as Judge Doyle had been:

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recommendations. It should, therefore, be amended to read as follows:

"That the preliminary injunction heretofore granted on the 1st day of August, 1969, be and the same is hereby continued in force until a determination has been made by the President of the United States that the sale area is or is not suitable for recommendation for inclusion within the National Wilderness Preservation System, and in the event the President recommends to Congress that such area be included within such System, the defendants, their officers, agents and employees, are enjoined from the performance of the timber sale contract described in the Complaint unless and until Congress decides otherwise."

Because of the delegation of authority and responsibility which occurs in the Executive Branch, it is the author's opinion that to have left this decision to the President would have, in effect, left the decision to the Regional Forester.

[196]See, Notice of Appeal of Kaibab Industries, Apr. 16, 1970, and Notice of Appeal on behalf of the federal defendants, May 11, 1970.

[197]448 F.2d 793 (1971).

[198]See 49-page Brief for the Federal Appellants, United States Court of Appeals, Tenth Circuit, Nos. 404-70, 405-70, 406-70, Robert W. Parker, et al., Appellees, v. United States of America, et al., Appellants, n.d. The

> Should we, in the case at bar, concede to federal appellants the discretionary right to destroy the wilderness value of the subject area, one contiguous to a designated wilderness, we would render meaningless the clear intent of Congress expressed in 16 U.S.C. 1132(b) that both the President and the Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation. . . .
>
> The trial court . . . was completely justified in directing inclusion of a study of the area in the mandated report to the President. This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper.[199]

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federal appellants' argument: "This case is of great importance to the Department of Agriculture, which is charged by Congress with the administration of the 154 national forests and other forest lands aggregating over 186.5 million acres . . . because this case squarely presents the issue whether management decisions shall remain, as intended by Congress, in the executive departments, or whether the federal courts, at the behest of private litigants who disagree with management decisions, will become immersed in the management of the public lands. The district court's decision erroneously imposes upon the Forest Service a mandatory duty to discontinue its multiple-use management of forest lands outside primitive areas and to study and report on the possible wilderness suitability of every area near a primitive area. By thus impinging on the Forest Service's management authority, the court has violated congressional intent and exceeded its own jurisdiction." The appellants' brief covered in detail these arguments: the plain meaning of the Wilderness Act shows that Congress intended to preserve the Secretary's discretionary management of lands outside of existing primitive areas; the Act's legislative history shows that, with respect to lands outside existing primitive areas, Congress intended to preserve the Secretary's discretionary management; and the Secretary's discretionary management of areas in national forests outside of existing primitive areas is not subject to judicial review. See also, "Parker Decision Upheld by Colo. Court of Appeals," Sierra Club National News Report, Oct. 8, 1971, p. 2.

[199] 448 F.2d 793, at 797.

The final setback to the federal appellants came with the U.S. Supreme Court's refusal to hear the Forest Service appeal.[200] Following the Supreme Court's denial of certiorari, Rocky Mountain Region conservationists congratulated themselves for having "won one"--but saw their court victory as only a prelude to their campaign to enlarge the Eagles Nest Wilderness beyond the recommendations of the Forest Service through Congressional action.[201]

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[200] United States et al., petitioners, v. Robert W. Parker et al., No. 71-915, petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied March 20, 1972. 92 S.Ct. 1252.

[201] See, "Conservationists Win One," Rocky Mountain Center on Environment Open Space Report, March-April 1972, p. 4: "A two and one-half year court struggle by conservationists to preserve a wild section of Colorado has ended in victory. The refusal by the U.S. Supreme Court to hear the Forest Service appeal in the East Meadow Creek case means that this 'wilderness' area contiguous to the Gore Range-Eagles Nest Primitive Area will remain intact at least until a full study of its wilderness potential has been conducted as required by the Wilderness Act of 1964. The Supreme Court decision not to review this precedent setting decision may also protect other areas with wilderness character which are waiting to undergo the review process. Unfortunately, however, the Forest Service proposal for the Eagles Nest Wilderness which was recently submitted to President Nixon excludes much of the disputed East Meadow Creek area. The 87,950-acre wilderness recommended by the Forest Service represents a substantial increase from its original proposal, but it is still far below the 125,000-acre area supported by conservationists. Backers of the larger wilderness area are particularly upset because the Forest Service proposal does not include much of the most desirable lower elevation territory. Additionally, it gives far more coverage to the views of those persons who want the smaller area than to the opinions voiced by the conservationists."

CHAPTER FIVE

SIERRA CLUB V. HICKEL

Mineral King Valley

Location and Description

Mineral King Valley, in southern California's Sierra Nevada, has escaped year-around resort development up to the present time because it is relatively inaccessible. The winding, narrow and dangerous county road into the valley is closed for several months each year by snow. At twice the elevation of Yosemite Valley, with rugged topography pitching steeply upward from the 7,800-foot-high valley floor to the surrounding 12,000-foot peaks, Mineral King is a classic glaciated, U-shaped valley. Its six-mile-long canyon is flanked by massive granite peaks and ridges. Between the towering peaks and the basin floor are eight alpine bowls and twenty lakes, in cirques and hanging valleys. Its principal attraction lies in the fact that, while it is only 100 miles from Fresno, 220 miles from Los Angeles, and 275 miles from San Francisco, it can boast

> [s]cenic grandeur of towering peaks and solitude. The basin gives the impression of being fresh and unspoiled.[1]

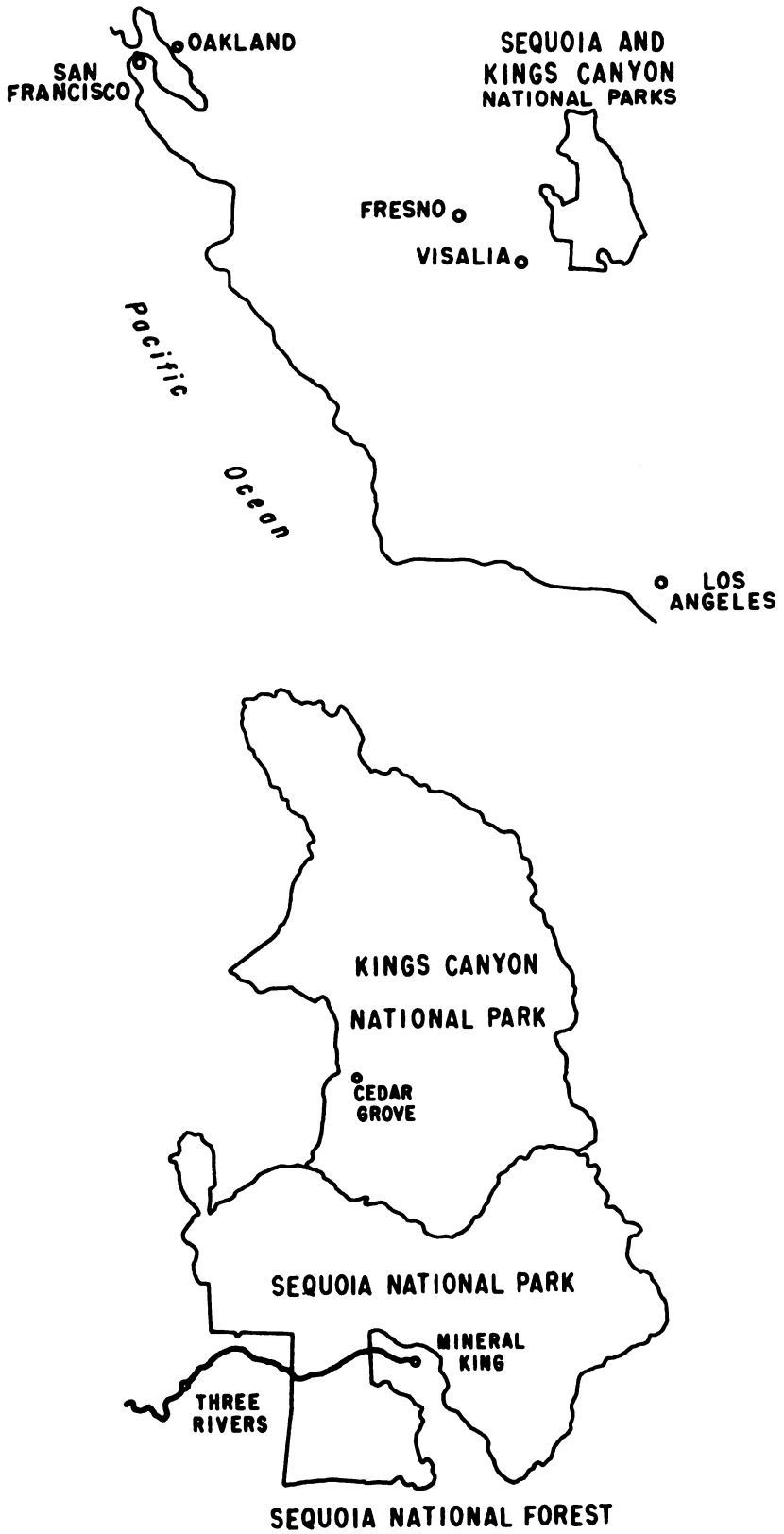

Figure 3. Mineral King Valley, California

It is in this high, rocky terrain with relatively little soil or vegetation that the East Fork of the Kaweah River gathers its waters which end up coursing slowly through irrigation canals in the San Joaquin Valley to the west, after an unconfined rush through Sequoia National Park. One hundred years after the first miner staked a claim there, Mineral King Valley remains "a sanctuary, one of a dwindling few."[2]

Alternative Uses of the Area

James A. Crabtree staked a claim on the White Chief lode in Mineral King Valley in 1873. Dozens of miners followed during the next two decades. A wagon road was opened to the valley in 1879, but a series of misfortunes--bunkhouses and other structures caved in by heavy snows and avalanches, and a silver ore too "rebellious" to be smelted economically--led to abandonment of

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[1]Area Plan, Mineral King Recreation Area, approved by Acting Regional Forester W. S. Davis, June 25, 1965, p. 1.

[2]"Every daydream of a mountain vacation should include a valley as tranquil and perfect as Mineral King. . . . [I]n all this most populous state, the rarest treasure may well be serenity. Those who dream of it come here. It is a sanctuary, one of a dwindling few. . . . For eight months [when the access road is impassible] only the ancient renewals of nature are at work. This long withdrawal from the management of men keeps the valley unspoiled, the complex relationships of its living things in balance. . . . Nature in Mineral King is not spectacular, not on a grand scale--but it has a certain beauty. It is a place to spend a happy summer--to remember--to return." Pat Adler, Mineral King Guide (Glendale, Calif.: La Siesta Press, 1963), pp. 5-6.

the mines at Mineral King before the turn of the century.[3] Human occupation of the valley was not so easily terminated, however. All who visited the area were impressed by its natural beauty.[4] As early as the 1890s, plans were under way to build a summer resort there,[5] and by 1902 Mineral King was being advertised as a "famous summer resort."[6] Not only were a hotel, a store and post office, and tourist cabins in place there by 1900, but in that year the Southern California Edison Company altered the naturalness of

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[3]See, "Mineral King," Los Tulares, Quarterly Bulletin of the Tulare County Historical Society, No. 66, Sept. 1965, pp. 1-4, and Samuel Thomas Porter, "The Silver Rush at Mineral King, California, 1873-1882" (unpublished M.S. thesis, College of Sequoias, Visalia, Calif., 1960).

[4]"Mineral King has inspired a rare affection throughout the hundred years of its history. Letters written by the miners long before conservation became popular show a concern for its natural beauty. These men treated their valley well. . . ." Adler, op. cit., p. 6.

[5]See, Louise DiSilvestro, Christian Science Monitor, Dec. 6-8 [sic], 1969, as reprinted in the Congressional Record of Jan. 22, 1970, at p. E271 by Congressman Robert B. Mathias under the heading, "Sequoia National Forest": "My great grandfather built the first wagon road, a toll road, into the valley in 1879 and that wagon road is basically the same one used today and is the main reason why so few people can enjoy and profit from the beauty of the valley. In 1896 my grandfather started a hotel, store and post office, and built a number of 'temporary' cabins to open a resort there for tourists. Until the last winter of 1968-69, when heavy snows destroyed many of the old buildings, those same 'temporary' cabins and store still comprised what resort there is. . . ."

[6]Mt. Whitney Club Journal, Vol. 1, No. 1, May 1902 (Visalia, Calif.).

four of the valley's lakes by building dams on them to increase their capacity to catch snow melt. These dams, still in use, are opened one at a time during the summer to maintain the East Fork of the Kaweah River's capacity to generate power at the hydroelectric station downstream at Hammond.[7]

Segregated from the public domain in 1893 with the establishment by Presidential proclamation of the Sierra Forest Reserve,[8] the portion of the Sierra Nevada which included Mineral King became a part of the newly created Sequoia National Forest in 1908.[9] By 1910 the Forest

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[7]Area Plan, Mineral King Recreation Area, June 25, 1969, p. 3.

[8]The establishment of forest reserves was first authorized by Sec. 24 of an Act of Congress approved March 3, 1891. The first such reserve, proclaimed by President Benjamin Harrison on March 30, 1891, consisted of lands lying between Yellowstone National Park's south boundary and "the forty-fourth parallel of north latitude" in Wyoming. James D. Richardson, Messages and Papers of the Presidents (Washington: Government Printing Office, 1898), Vol. IX, p. 142. Under this authority the Sierra Forest Reserve was created by President Harrison on Feb. 14, 1893. The proclamation specifically excluded "General Grant National Park," which in 1940 was to become part of Kings Canyon National Park. Richardson, pp. 369-375. Forest reserves originally were seen as "preserves": "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." Richardson, p. 143.

[9]Not until passage of the Organic Administration Act of June 4, 1897 (30 Stat. 35; Title 16, U.S. Code, Section 551) was active forest management and use of the forests' resources encouraged, although President Grover Cleveland, in his Second Annual Message, delivered on Dec. 3, 1894, had gone on record as "fully indors[ing] the

Service itself was in the "summer camp" business at Mineral King, to the extent of building a twenty-five dollar cabin there.[10] The presence of a Forest Service officer in Mineral King Valley during the summer months probably was justified, considering the relatively high volume of "tourist traffic" that streamed in and out of the valley on the old wagon road even in those days. By 1924, the Forest Service considered Mineral King to be "an intensively developed recreation area under national forest administration."[11]

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recommendation of the Secretary [of the Interior] that adequate protection be provided for our forest reserves and that a comprehensive forestry system be inaugurated." Said Cleveland: "Such keepers and superintendents as are necessary to protect the forests already reserved should be provided. I am of the opinion that there should be an abandonment of the policy sanctioned by present laws under which the Government, for a very small consideration, is rapidly losing title to immense tracts of land covered with timber, which should be properly reserved as a permanent source of timber supply." Richardson, op. cit., p. 543. It was not until 1905 that Chief Forester Gifford Pinchot was given the authority to put his scientific forestry theories into practice on the national forests, which until then had been administered by the General Land Office of the Department of the Interior. The culmination of Gifford Pinchot's efforts over many years came immediately following the American Forest Congress meeting in Washington which he had played the leading role in organizing. The Forest Congress met in January of 1905; on Feb. 1, 1905, Theodore Roosevelt signed H.R. 8460 which transferred the administration of the forest reserves from the General Land Office to the Bureau of Forestry, Department of Agriculture, which Pinchot headed. Another act, signed on March 3, 1905, renamed the Bureau the Forest Service and renamed the Forest Reserves the National Forests. See, Gifford Pinchot, Breaking New Ground (New York: Harcourt, Brace, 1947). See also, Dale White, Gifford Pinchot: The Man Who Saved the Forests (New York: Julian Messner, 1957), and, Henry Clepper, Professional Forestry in the United States (Baltimore: Johns Hopkins, 1971).

In 1926, Congress made the area a "National Game Refuge" at the same time that it expanded Sequoia National Park, originally established in 1890,[12] to embrace Mineral King on the east, north, and west.[13] The purpose of the "game refuge" hunting closure was to extend national park-type protection to the wildlife of the valley and to continue such protection in the case of those lands transferred from Sequoia National Park to Sequoia National Forest,[14] but it was supported by the Forest Service to reduce the

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[10] A. B. Patterson, Forest Supervisor, Sequoia National Forest, personal letter to George W. Purdy, Kaweah, Calif., July 12, 1910: "Your letter of July 8 came just as I was making my improvement estimates for the approval of the District Forester, and I slipped in one project of $25 for the construction of a summer camp at Mineral King. While, of course, I cannot be absolutely sure that this project will go through, I believe I can authorize you to purchase $25 worth of lumber within a short time; but you had better not do anything about it until you hear from me again."

[11] W. B. Greeley, Chief, Forest Service, Hearings Before the House Committee on Public Lands on H.R. 4095, 68th Cong., 1st sess., 1924, at p. 24: "[I]n the vicinity of Mineral King is quite an intensely developed recreational area under national forest administration. There are a good many campers in there. There are a good many summer home permits held by people who have constructed summer cabins [over sixty cabins were there in 1969] and who take their families up there for the entire season, and on account of that intensive recreational development we think it is preferable to exclude hunting from the region."

[12] By the Act of Sept. 25, 1890, 26 Stat. 478 as amended, Title 16, U.S. Code, Sec. 41.

[13] By the Act of July 3, 1926, P.L. 69-465, 44 Stat. 818-821, 26 Stat., Ch. 744, Sec. 6; Title 16, U.S. Code Annotated, Sections 45(a) and 688. Certain lands were excluded from Sequoia National Park, as created in 1890, and added to Sequoia National Game Refuge.

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chance of firearms accidents in the crowded resort and campground area.[15] The impact of this statute on the administration of Mineral King has been negligible because it prohibited all hunting and trapping except under regulations prescribed by the Secretary of Agriculture, and the Secretary has authorized hunting there in recent years to reduce an overabundant deer herd. The 1926 Act's most interesting provision, as far as this investigation is concerned, is that which allows the Secretary of Agriculture to

> permit other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which the game refuge is established[, i.e.,] to protect from trespass the public lands of the United States and the game animals which may be thereon.[16]

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[14] For an insight into the philosophy of game management at that time, see: S. B. Locke, "Game Refuges and Game Management on the National Forests," California Fish and Game, July 1923, pp. 83-86, e.g.: "The importance of the destruction of predatory animals as a game protective measure can not be over-emphasized." Cf., Adler, op. cit., at p. 13: "As a game refuge, the valley has had to go through a period of convalescence from past depredations. Cougars, wolverines, and other predators were 'cleaned out' by early prospectors and hunters. When all hunting was suspended, the ubiquitous mule deer promptly over-taxed their range."

[15] See footnote 11, supra.

[16] 53 Stat. 1432; Title 16, U.S. Code, Sec. 688. Emphasis added. Cf., Title 16, U.S. Code Annotated, Sec. 683: "Areas set aside for protection of game and fish. . . . The President . . . is authorized to designate such areas . . . as should, in his opinion, be set aside for the protection of game animals, birds, or fish; and . . . it shall be unlawful for any person to hunt, catch, trap, willfully disturb, or kill any kind of game animal . . . on any lands so set aside. . . ." Emphasis added.

This language is interpreted by the Sierra Club as requiring that the valley's wildlife and its habitat be protected from disturbance, encroachment, or development until such time as Congress specifically repeals the existing statute and declares that the valley is to be administered for some other primary public purpose; see page 279, infra.

Mineral King's reputation as a summer resort, camping area, summer home site, and horseback and hiking trailhead was well established before World War II. The twenty-five mile dead end access road into Mineral King from Highway 198 at Hammond--a one-lane road with hundreds of breathtakingly sharp curves along the Kaweah River canyon--never has been kept open in the wintertime, however, and this inaccessibility of Mineral King Valley when the snow there is deepest has frustrated skiers since the 1930s.[17] In 1937, "well-known cross-country skier" Otto Steiner described Mineral King as "a potential winter sports area second to none in the world."[18] In 1947 and

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[17]"Skiing was first introduced into California about a hundred years ago by Scandanavian miners at the Gold Rush camps of the early 1850's. The mining camps organized [ski] clubs. . . . When the miners drifted away as the mining camps began to shut down, skiing disappeared from the California scene until the Twentieth Century. The sport was not taken up again until 1913, and not really publicized until the Winter Olympics of 1932 awakened interest in skiing all over the country. In California the Southern Pacific [Railroad] destination was firmly established as Truckee. The first of [the SP's] Snowball Specials rolled out of Oakland in 1932. [They were] continued until the start of World War II. . . ." J. E. Carpenter, California Winter Sports and the VIIIth Winter Olympic Games at Squaw Valley (San Francisco: Fearon Publishers, 1958), pp. 38-39.

1948, Tulare County--with the California Ski Association, the Forest Service, the U.S. Weather Bureau, and the California Department of Water Resources cooperating--maintained a team of snow-surveyors in Mineral King Valley through the winters "in an effort to encourage the winter sports development of the area."[19] In 1948, the Sierra Club, whose membership always has included many skiers, pinpointed Mineral King Valley as the best site for a new ski resort to serve Los Angeles.[20] And in 1949, the

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[18]Mrs. Ray Buckman, "Back Country--Mineral King," The Kaweah Magazine, n.d., pp. 4-7.

[19]Robert J. Hicks, Mineral King Project Manager, Walt Disney Productions, address to Water Resources Section, California State Chamber of Commerce, 42nd Annual Meeting, Los Angeles, Calif., Jan. 15, 1970. See also, Ludwig J. Hasher and James N. Gibson, "Mineral King Winter Survey, 1947-48," Forest Service, 1948. Hasher and Gibson described Mineral King as the perfect location for a ski resort, suggested that a new road be built, and recommended that the resort be built in stages.

[20]This Sierra Club action may be understood only in the context of then-current events. These events included the growth of the population of Los Angeles; the proposal to develop a ski resort in the middle of the San Gorgonio Primitive Area near Los Angeles; the Sierra Club's positive effort to come up with an alternative site, not already dedicated as wilderness, for ski resort development; and the level of development which the club had in mind. See the following: Coles Phinizy, "The Battle for a Mountain," Sports Illustrated, Feb. 1, 1965, pp. 18-20: "In municipal Los Angeles and in the tangle of contiguous cities that lie with it under a blanket of smog, there are now more than 10 million people. . . . In southern California getting away from home on Saturdays and Sundays has become a calculated act, a rite that must be observed. . . . Knowing that the beaches and the freeways leading to them are impossibly crowded on weekends, many people go to the mountains to the lesser of two crowds, as it were. In winter many 'go to the snow.' . . . Quite obviously, for skiing or for any kind of 'snow play,' Los Angeles needs

Forest Service did its best to encourage private enterprise to build a ski resort there: on May 13, Secretary of Agriculture Charles F. Brannan withdrew the valley from mining location and entry under Regulation U-3(b) and designated it the Mineral King Recreation Area;[21] in July, G. A. Henry enthusiastically presented a Mineral King area road reconnaissance report to an audience consisting of private entrepreneurs Cortland Hill and Fay Lawrence (who were seeking permits to build a multi-million-dollar

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more room and more reliable snow." John Jerome, "Conservation and Wilderness--A Guide for the Thoughtful Skier," Skiing, Dec. 1968, pp. 77, 147: "With the passage of the Wilderness Act of 1964, about nine million acres of Forest Service land were placed into Wilderness classifications, with another five-and-one-half million retained as Primitive-classifications that effectively stop any ski development, among other things. . . . The precedent for all [the] emotion was San Gorgonio. San Gorgonio progressed from a Primitive Area back in 1947, to a Wild Area in 1956, to a Wilderness Area included in the original Wilderness Act in 1964. An amendment was proposed at that time excepting the natural (to skiers) skiing preserve smack in the middle of the area. The amendment was debated at length in Congress and defeated. A lot of skiers thought it was unfair then, think it is unfair now, and that as a precedent, San Gorgonio was a black mark in the history of the sport. But at the very least, it served to identify the combatants." David R. Brower and Richard H. Feltner, "Surveying California's Ski Terrain," Sierra Club Bulletin, March 1948: "In the course of the [Sierra Club's] campaign to save the San Gorgonio Primitive Area it became necessary to point out that there was in California much ski terrain not in wilderness and not yet developed for skiing at all, or at best not adequately developed. It was apparent that those who would protect the wilderness needed positive arguments. . . . So the good question during the campaign remained, 'Where, within close enough range of skiers who want to develop San Gorgonio, is there better skiing, development of which skier-conservationists can approve and advocate?'" Concluded Brower and Feltner, representing a ski terrain subcommittee of the Club's Winter Sports Committee: "[Mineral King represents] probably the most

"Alpine Village" at Mineral King) and the Sequoia National Forest staff; and on November 29, the agency distributed a formal prospectus soliciting proposals from private investors for the development of a resort and ski development at Mineral King. The 1949 development prospectus called for a 150-bed hotel and store at Aspen Flat, a one-mile-long chair lift up Farewell Gap, a 2100-foot-long T-bar lift from the end of the chair lift to Vandever Ridge, and rope tows, all of which was estimated to cost in the neighborhood of $350,000. The official deadline for the submission of applications was February 28, 1950. Apparently no one could see making that kind of investment in the absence of a winter access road.[22]

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spectacular site for commercial development on the west slope of the Sierra." They noted that "major realignment [of the access road] and costly snow removal, chargeable only to skiing, would be required for full development of the site." While it is true that, "in 1949, the Sierra Club Board of Directors unanimously favored Forest Service development of Mineral King, to protect the national parks and the San Gorgonio area" (Richard M. Leonard, Sierra Club board member, personal interview, San Francisco, Calif., Aug. 13, 1970), this "earlier Sierra Club 'ok' was based on the use of rope tows" (Maynard Munger, Jr., Sierra Club board member, personal interview, Denver, Colo., Feb. 12, 1971).

[21]P. J. Wyckoff, "Mineral King and Related Historical Chronology," Sequoia National Forest, Porterville, Calif., Nov. 5, 1968, p. 1.

[22]Said the prospectus, at pp. 2-3: "Although a possible year-long road has been discussed, no predictions can be made as to when or if such a road will be constructed. Winter visitors must be transported by over-the-snow equipment for a distance of 13-18 miles, depending on the snow line. . . . The ultimate development of Mineral King must await the construction of a high standard road designed

In February of 1965 the California Region of the Forest Service once again issued a "Prospectus for a Proposed Recreational Development at Mineral King in the Sequoia National Forest." This version contained three pages of maps, twelve pages of sample permits, and nine pages of copy not unlike the agency's 1949 Mineral King prospectus:

> The purpose of this prospectus is to solicit proposals from private investors for the development of an extensive winter and summer recreation site at Mineral King, California. . . .

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for snow removal and winter use by a large number of visitors. Since that road is not programmed for construction, and since there appears to be considerable demand for a partial and immediate development for skiing, the Forest Service proposes what might be termed an 'interim' or stage development. It must be clearly understood that in proposing this interim program the Forest Service in no way obligates itself to divert road money for the construction of the access road. The granting of permits as outlined herein bears no obligation or promise that funds made available to the Forest Service will be used for that purpose. In fact it seems certain that no funds will be available for this purpose for many years, if ever. The permittee must assume all obligation for transportation to and from the site, by whatever means may prove desirable. If and when an all-weather road is built, however, it is probable that additional facilities will be needed to care for the crowds expected to visit Mineral King. There will be particular need for more moderate priced accommodations than can be expected under present conditions. The holder of the permits under this present proposal will be given first opportunity to provide any additional facilities or service needed. . . ."

The prospectus also dealt with the subject of "Type of Permits," at pp. 6-7: "It would be desirable to issue a long term permit for this use. The Term Permit Act, however, restricts the area covered by such permits to five acres. It is proposed, therefore, that a term permit, for a period of twenty-five years, be issued for a five-acre tract to include the resort site. A terminable permit will be issued to cover the areas occupied by the

> Improving the access for winter travel is an essential first step in the development of the area. The Forest Service does not suggest how, when, or by whom this will be done. This prospectus is issued with the understanding that the successful applicant will find sufficient incentive, without obligation on the part of the Forest Service, to solve the winter access problem so that a major year-round recreation development may result. . . . Cost of relocating and improving the road to a winter access standard is estimated to exceed five million dollars. No public agency is obligated to undertake the road project, and the successful proponent will have to make appropriate arrangements. . . .
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> Upon selection of the best qualified proposal, a preliminary permit of three year duration will be issued during which time a development program with layout and construction plans is to be prepared. Improvement of the 25-mile access road from State Highway No. 198 near Hammond to such a standard that winter visitors can drive their own cars to Mineral King must also be programmed during the same period. . . . The entire development program will be the responsibility of the permittee. . . . [T]he Forest Service is not committed to participate in financing the improvement of the access road.
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> . . . [A]rrangements must be made to bring in power for the numerous requirements of the proposed development.

But whereas the Forest Service's 1949 prospectus had called for an expenditure by the developer of between $300,000 and $350,000, by 1965 the estimated cost of appropriate resort facilities had risen ten-fold:[23]

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ski lifts, upper shelter, etc. The permits will entail payment to the government of fees comparable to those assessed for similar projects on national forest land. . . ."

The only bidder responding to the 1949 prospectus, Hugh Wolfe Frank, was turned down because he could not meet Forest Service specifications.

> The initial development cost, not including the access road, is conservatively estimated at three million dollars. . . . Initial facilities at this location will include: 1. Lifts or tramways with a capacity of 2,000 persons per hour from the valley floor. 2. Parking for 1,200 automobiles. 3. Ski shelter, first aid, communications, water supply, sanitation, and maintenance structures. 4. Resort with overnight accommodations for at least 100 individuals. . . .

Deadline for submission of proposals for permits to "develop, operate, and maintain yearlong recreational facilities" at Mineral King, in response to the February 1965 prospectus, was August 31, 1965. The scene at Sequoia National Forest headquarters on the day the bids were to be opened was described by a Ski magazine writer:

> As an illustration of the intense attraction skiing now holds for large investors, a most interesting scene unfolded recently in the small Sierra town of Porterville. Porterville is the headquarters of the U.S. Forest Service's Sequoia National Forest office. The USFS, in addition to dousing forest fires and dealing with such problems as soil erosion and rust fungus, also has the right to issue permits for ski areas on Forest Service land to responsible bidders. It so happens that Porterville, midway between Los Angeles and San Francisco, is near one of the finest undeveloped pieces of ski terrain in the country, Mineral King. No less than six resort developers are interested in this 25-square-mile California plum, which one day may become the largest ski area in the country.
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> On August 31, the day chosen by the Forest Service to open the bids for Mineral King, the small USFS Porterville office was besieged. The day began when Walt Disney and a party of ten touched down at the airport in a private plane to be greeted by flag-waving

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[23]The successful bidder ultimately was to propose the expenditure of one hundred times the amount the 1949 prospectus had suggested for resort facilities; see p. 201, infra.

> children. Next a group headed by Robert Brandt, accompanied by his actress-wife Janet Leigh, arrived with a 55-foot trailer full of contour maps and models of facilities they planned for Mineral King. Four other bidders, newspapermen and television cameras, consultants and advisors jammed into the overtaxed Forest Service offices. ("It was crawling with Madison Avenue types," one observer commented.) Disney's group proposed a $12 million initial investment with eventual expansion that would run the total to $40 million. (Two percent of the receipts would go to the Forest Service.)
>
> After examining the proposals, the Forest Service backed down on its 30-day commitment to name a winner and passed the problem along to Washington. The Washington office pondered the problem and passed it on to Secretary of Agriculture Orville Freeman who promptly formed a three-man committee to study it. . . .[24]

On December 27, 1965, the Forest Service named the Walt Disney organization to develop the area, and on January 10, 1966, the Disney corporation was granted a three-year preliminary planning permit.[25] Because Disney had made it clear that "the road comes first,"[26] before his firm would spend any money on the development of Mineral King Valley, the way had to be cleared, by a series of political actions, for the State to take over the access route from Tulare County, build a high-standard highway

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[24] "Ski Resort of the Future," Ski, Jan. 1966, pp. 50, 54. Emphasis added.

[25] "Walt Disney Productions' Master Plan for the Development of Mineral King in Sequoia National Forest," Disnews, n.d., p. 2.

[26] "The Disney Mineral King Development: Its Impact on California," Walt Disney Productions, Burbank, Calif., May 1968, p. 5.

there, and assume responsibility for its maintenance. Between 1965 and 1968 several steps in this direction were taken: (1) On July 16, 1965, Governor Edmund G. (Pat) Brown of California signed a bill adding the Mineral King access road to the state highway system. It became State Route 276. (2) In April of 1966 the California State Highway Commission ordered another Mineral King access study and on October 24, 1967, it adopted a location for State Route 276. (3) After meeting with Walt Disney at Mineral King on September 19, 1966, and announcing that "[w]e are going ahead with the road," Governor Brown applied for and received a three-million-dollar grant from the federal Economic Development Administration to help finance the road's construction. (4) On April 20, 1967, the California Highway Commission voted to provide the remainder of the needed construction money ($20 million) from the State's highway tax fund. (5) On December 27, 1967, Secretary of the Interior Stewart Udall agreed to grant a right of way across Sequoia National Park, subject to further approval by the National Park Service, for the Mineral King access road. (6) On October 21, 1968, the State Highway Commission obligated $1.8 million for the first stage of highway construction.

Meanwhile, those who considered the Forest Service-approved Disney Productions plan for Mineral King Valley to be a threat to the natural scenery and community of

life there and a violation of its "game refuge" status had encouraged Phillip Burton of San Francisco, Member of the U.S. House of Representatives from California's Fifth District, to introduce a bill to add the Sequoia National Game Refuge to Sequoia National Park. This bill, H.R. 9629, was introduced in Congress on May 3, 1967, and it provided a rallying point for opponents of the Disney development.

The controversy was over this question, with all its ecological, social, economic, and political ramifications: Should a still "fresh and unspoiled" High Sierra valley serving 28,000 picnickers, campers, hikers, and horseback riders annually[27] be opened up to "welcome nearly two million visitors annually [upon completion of the first phase of construction, 1.6 million of them summer visitors, with] room ultimately for as many as 20,000 skiers at one time on its slopes"[28]?

The Legal Issues

On June 5, 1969, the Sierra Club--as the lone plaintiff--filed a complaint[29] with the U.S. District

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[27]Area Plan, Mineral King Recreation Area, June 25, 1965, p. 1.

[28]"The Disney Mineral King Development," Walt Disney Productions, May 1968, p. 3. Emphasis added.

[29]"Sierra Club, a non-profit California corporation, Plaintiff, vs. Walter J. Hickel, individually and as Secretary of the Interior of the United States; John S.

Court for the Northern District of California which initiated an action (1) for a declaratory judgment that construction of the proposed Mineral King resort in the Sequoia National Game Refuge would contravene federal laws and (2) for preliminary and permanent injunctions restraining federal officials from approving or issuing permits for the project. The District Court granted a preliminary injunction on August 4, 1969, and the federal defendants appealed. The U.S. Court of Appeals for the Ninth Circuit --disagreeing with District Judge William T. Sweigert's July 23, 1969 decision[30] on the threshold question of "standing"--vacated the injunction on September 16, 1970,[31] and "remanded the cause with directions." The U.S. Supreme Court granted the Sierra Club's writ of certiorari on February 22, 1971,[32] and the case was argued before the

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McLaughlin, individually and as Superintendent of Sequoia National Park; Clifford M. Hardin, individually and as Secretary of Agriculture; J. W. Deinema, individually and as Regional Forester, Forest Service; and M. R. James, individually and as Forest Supervisor of the Sequoia National Forest, Defendants." Complaint, Civil Action No. 51464, U.S. District Court for the Northern District of California, filed June 5, 1969.

[30]Memorandum of Decision, Sierra Club v. Walter J. Hickel, C.A. No. 51464, U.S.D.C., N.D. Cal., July 23, 1969, unreported.

[31]Sierra Club v. Hickel, 433 F.2d 24 (1970).

[32]Sierra Club, petitioner, v. Rogers C. B. Morton, individually and as Secretary of the Interior, No. 939, reported at 91 S.Ct. 870.

Supreme Court on November 17, 1971. On April 19, 1972,[33] the Supreme Court, in a four-to-three decision, affirmed the Circuit Court's decision, holding that in the absence of an allegation that the Sierra Club or its members would be affected in any of their activities or pasttimes by the Mineral King resort project, the Sierra Club lacked standing under the Administrative Procedure Act to maintain the action.

On June 2, 1972, the Sierra Club filed an amended complaint[34] with the U.S. District Court for the Northern District of California which, in addition to the club itself, included as parties plaintiff nine individuals "who use the Mineral King valley either as a summer residence or as a parkland and recreation area" and an unincorporated association of cabin owners in the Mineral King valley

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[33] Sierra Club v. Morton, 92 S.Ct. 1361 (1972), also reported at 405 U.S. 727 (1972).

[34] "Sierra Club, a non-profit California corporation; Larry E. Moss, Clyde Martin Litton, Albert J. Hill, Ellen Nadean Bissiri, David Green, Jean Koch, Lyal D. Asay, Leslie Avery and Ronald Kennedy, individuals, and Mineral King District Association, an unincorporated association, Plaintiffs, v. Rogers C. B. Morton, individually and as Secretary of the Interior of the United States; John S. McLaughlin, individually and as Superintendent of Sequoia National Park; Earl Butz, individually and as Secretary of Agriculture of the United States; Douglas R. Leisz, individually and as Regional Forester, Forest Service; and M.R. James, individually and as Forest Supervisor of the Sequoia National Forest, Defendants."Amended Complaint, Civil Action No. 51464 WTS, U.S. D.C., N.D. Cal., filed June 2, 1972 .

called the Mineral King District Association, this in order to conform to the "standing to sue" guidelines offered by the Supreme Court's April 19, 1972 decision.

A decision on the basis of the "merits" of the Sierra Club's complaint has yet to be filed.[35] The club alleged, in June of 1969, that the actions of the Secretary of Agriculture, the Secretary of the Interior, the Regional Forester for the California Region, the Supervisor of the Sequoia National Forest, and the Supervisor of Sequoia-Kings Canyon National Park with respect to the Mineral King project had been in excess of their statutory jurisdiction and authority, not in accordance with law, arbitrary, capricious, and in abuse of their discretion with respect to several statutes and regulations, enumerated below. The June 1972 amended complaint added to the list of statutes, allegedly violated by those defendants, the National Environmental Policy Act signed on January 1, 1970.

Standing to Sue

At the trial court level, the question which the federal appellate court and the Supreme Court were to

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[35]Although Judge Sweigert's July 23, 1969, decision dealt with the substantive issues in the plaintiff's complaint in the process of arriving at a rationale for the issuance of a preliminary injunction, and the appellate panel also discussed them and "respectfully [came] to a different conclusion." 433 F.2d 24, at 34.

belabor at length--that of the Sierra Club's standing to maintain the action by itself, without alleging individualized injury--was posed and answered in two brief paragraphs:

> Defendants contend that plaintiffs have no standing to sue because they have nothing more than a general interest in common with all citizens and cannot show that any private, substantive legally protected interest of theirs is being directly invaded with the meaning of such cases as Associated v. Ickes, 134 F.2d 694 (C.A. 2d 1943); Anti-Facist v. McGrath, 341 U.S. 123, 140-41, 151-52 (1951); Perkins v. Lukins, 310 U.S. 113, 125 (1940); Associated v. Camp, 406 F.2d 837, 838 (8th Cir. 1969).
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> We are of the opinion, however, that plaintiff Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint, may be held to be sufficiently aggrieved to have standing as a plaintiff herein. See, Scenic v. FPC, 354 F.2d 619 (2d Cir. 1965); United Church v. FCC, 359 F.2d 994 (D.C. 1966); Road League v. Boyd, 270 F.Supp. 650, 661 (N.Y. 1968); Powelton v. HUD, 284 F.Supp. 809, 825-828 (Pa. 1968).[36]

The Sierra Club had provided Judge Sweigert with a memorandum of points and authorities relating to the allegations made in its complaint; with reference to the complaint's assertion that the Club's "interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears," this memorandum stated:

> The Sierra Club . . . sues here as a representative of its members, and of the public in general, to protect and conserve the natural resources of the Sierra

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[36]Memorandum of Decision, July 23, 1969, p. 11.

> Nevada Mountains. . . . Recent cases clearly demonstrate that a personal economic stake in the administrative action is not prerequisite to "standing" as a representative of the public interest.[37]
>
> Who, if not the Sierra Club (or some like organization) could challenge this administrative action, or would want to test it against the rules and statutes which purport to guide and limit the agency's discretion? Certainly, neither Developer nor the federal agencies involved have shown any interest in presenting the case against the Developer's Mineral King project. The citizens of the gateway towns are predictably in favor of the project inasmuch as it will divert recreational expenditures from other parts of the state into their economy. . . . If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of the public lands, then the Sierra Club, or some comparable organization, must have an opportunity to be heard.

After oral arguments were heard by Judge Sweigert on June 30 and July 1, 1969, attorneys for the Sierra Club were given permission to file a "plaintiff's reply memorandum of points and authorities" to answer the defendants' June 27 "memorandum in opposition to a preliminary injunction." The plaintiff's reply brief, filed on July 7, 1969, reiterated the Club's contention that it had standing to sue:

> Defendants may not evade responsibility for their unlawful acts on procedural technicalities. . . . This

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[37] Standing cases cited by the plaintiff: Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965); United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Road Review League v. Boyd, 270 F.Supp. 650 (S.D.N.Y. 1968); Powelton Civic Home Owners' Assn. v. Dept. of H.U.D., 284 F.Supp. 809.

is a "case or controversy" in every respect as real as that presented in Flast v. Cohen, 392 U.S. 83, 20 L.Ed. 2d 947 (1968) or in United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). In neither case did the plaintiff have any measurable economic interest in the outcome. In each, the plaintiff was vindicating a principle.

Plaintiff has standing to sue. . . . Even Mr. Justice Harlan, dissenting in Flast v. Cohen, acknowledged that "this and other federal courts have repeatedly held that individual litigants, acting as private attorneys general, may have standing as 'representatives of the public interest.'"[38] . . . Congress enacted the legislation governing Sequoia National Park, National Parks generally, and the Sequoia National Game Refuge out of consideration for the exact principles upon which the Sierra Club was founded and for which it now stands to fight.[39] If the Sierra

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[38]Cases cited: Saxon v. Georgia Association of Independent Insurance Agents, Inc., 399 F.2d 1010 (5th Cir. 1968); Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Powelton Civic Home Association v. Department of HUD, 284 F.Supp. 809 (E.D. Pa. 1968); Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (S.D.N.Y. 1967); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[39]The Sierra Club was organized in 1892 "to explore, enjoy, and preserve the Sierra Nevada." Its first president, John Muir, had come to California in 1868 and, as a shepherd, saw how overgrazing was destroying the vegetation in the High Sierras. The Club led the political campaign to have extensive forest reserves--now national forests--established in California. See, Sierra Club Handbook, 1969, pp. 6-9. Excerpts:

"Muir began to earn his living in California by tending sheep near Merced, and accompanied a large flock into the Tuolumne Meadows in 1869. Ardent lover of flowers and trees that he was, he noted the destructive effects of those 'hoofed locusts' on the wild gardens and forests through which they passed. In 1889 he took Robert Underwood Johnson, one of the editors of Century Magazine, up into this High Sierra region, and around a campfire in the Tuolumne Meadows, they resolved to remedy this devastation. Muir wrote descriptive articles for the Century Magazine, calling attention to the necessity for protective legislation. Johnson, who had wide congressional acquaintance,

> Club may not be heard, then who speaks for the future generations for whose benefit Congress intended the fragile Sierra bowls and valleys to be preserved? If the Sierra Club does not have standing, then who may question the threatened illegal acts of the secretaries to whom this unique and irreplaceable natural resource has been entrusted? Who may challenge their breach of trust when they sell for money government land which is literally priceless in aid of a project for private profit?

Unwilling to wait for a trial on the merits at the district court level and anxious to seek reversal of Judge Sweigert's injunction order, the federal defendants, on

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had a bill introduced in Congress which in 1890 created the Yosemite National Park. . . . As soon as the full import of the Act was recognized and it was realized that sheep and cattle could no longer lawfully enter [this area], the stockmen, who had been reaping a rich harvest at public expense without paying a cent for grazing their flocks and herds on these lands, rose up in indignation and used every effort and political device to have the park abolished, or at least materially reduced in area. It took strenuous work on the part of those responsible for the creation of the park successfully to resist these powerful and persistent assaults.

"Johnson wrote to John Muir suggesting that he form an association in California of likeminded men who would assume some of the burden of resisting these attacks. . . . Professor J. H. Senger, of the University of California [became the] organizer. . . . Early in 1892 Senger interested Warren Olney, an attorney prominent in Oakland and San Francisco, in his plan of forming a 'Sierra Club.' He evidently wrote to John Muir to enlist his support. . . . On Saturday, May 28, 1892, in Olney's law office in San Francisco, the club's name and purposes were agreed upon, and Olney drew up the Articles of Incorporation. One week later the Articles and Bylaws were signed and the officers of the club were elected. There were 182 charter members. The first directors were John Muir, President; Warren Olney, Vice-President; William Dellam Armes, Secretary; J. H. Senger, David Starr Jordan (president of the new Stanford University), Robert M. Price, Mark Brickell Kerr, Willard D. Johnson, and John C. Branner

December 29, 1969, took a direct appeal from the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit. Having agreed to hear the case on the basis of an interlocutory appeal from the trial court's order,[40] the Ninth Circuit appellate panel heard oral arguments on February 9, 1970, and, in its September 16, 1970 decision, held "that the complaint fails to allege that the [Sierra] Club has the requisite standing to institute this action":

(later president of Stanford). Muir remained president until his death on December 24, 1914. . . .

"Because of forward-looking action on the part of the [Sierra] Club, California was the first western state to welcome and have extensive national forests established within its borders. . . ."

"Still another outstanding accomplishment [of the Sierra Club] was the creation of the Kings Canyon National Park in 1940. John Muir had recommended setting aside this area long before the turn of the century. Efforts had been made on various occasions to bring this about, but they had all failed except one which was partly successful in that it added the upper Kern River region, including Mount Whitney, to the Sequoia National Park. This was sponsored by the Sierra Club, and it was on the club's recommendation that Stephen Mather, director of National Parks, decided to add the Kern region to the existing Sequoia Park and to abandon temporarily the effort to include the High Sierra region of the Kings until a more propitious day. This time arrived when Secretary of the Interior Ickes made a special trip to the west coast to enlist the support of the Sierra Club in urging the creation of the Kings Canyon National Park. The proposed park boundaries were carefully drawn, mainly as the club had suggested. Powerful opposition arose and it was largely because of the convincing illustrated literature that was sent out by the club and like organizations that the area was saved as a national park. Secretary Ickes wrote that it was very doubtful whether the park could have been created without the club's help."

> The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all. On the other hand, the United States Ski Association, the Far West Ski Association, claiming 109,000 supporters, and the County of Tulare in which the development will be located, favor the action.
>
> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.[41]

Observing that "[s]tanding to sue" refers to the posture of the plaintiff and not to the "legal interests" to be unravelled, the Ninth Circuit opinion concluded:

> In almost every carefully-considered case where standing is sustained it is apparent in the facts or in the opinion that when the situation of the plaintiff is examined there is an element of legal wrong being inflicted upon him or he is adversely affected by agency action or aggrieved within the meaning of a relevant statute. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in the appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.[42]

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[40] "Jurisdiction of the court rests on 28 U.S.C., Sec. 1292(a)(1), 433 F.2d 24, at 26.

[41] 433 F.2d 24, at 30.

[42] Ibid., at 31.

> We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that the members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them.[43]

The standing-to-sue "formula" that was to take final form with the Supreme Court's disposition of this case on April 19, 1972, began to take shape in the appellate court's opinion when it pointed out the difference between the Parker v. U.S. plaintiffs (see Chapter IV) and the Sierra Club v. Hickel plaintiff:

> In holding that the complaint fails to allege that the Club has the requisite standing to institute this action, we are aware that federal courts have accorded the Club standing to object to alleged administrative infringements upon natural resources in two recent cases: Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97(2d Cir. 1970), and Parker v. United States, 307 F.Supp. 685 (D.Colo. 1969). In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action. . . .[44]

It is worthy of note that one member of the three-man Ninth Circuit appellate panel,[45] while concurring with

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[43] Ibid., at 32-33.

[44] Ibid., at 33. See, Chapter IV.

[45] Circuit Judge Frederick G. Hamley. The other two members of the panel were Circuit Judges John F. Kilkenny and Ozell M. Trask. Judge Trask wrote the majority opinion.

the majority that "the granting of the preliminary injunction amounted to an abuse of [judicial] discretion," dissented from the majority's holding on the matter of the Sierra Club's standing to sue:

> It seems to me that the rationale of recent Supreme Court pronouncements in this area, if not the precise holdings, call for . . . a determination [that the Sierra Club has standing to prosecute this lawsuit, citing Data Processing v. Camp, 397 U.S. 150].
>
> The Sierra Club represents thousands of members who have a deep interest in aesthetic, conservational and recreational values of a kind intended to be safeguarded by the statutes in question, and the regulations and practices thereunder. If these statutes are being disregarded, or the regulations and practices thereunder are invalid, and the result is that the described values are being undermined or disregarded, it seems to me the Sierra Club members may assert that a legal wrong is being inflicted upon them--a wrong which their chosen organization has standing to resist in this lawsuit.[46]

The Sierra Club had responded to the Federal Government's appeal of Judge Sweigert's decision by filing a seventy-page "brief for appellee" in the U.S. Court of Appeals in San Francisco on January 19, 1970, which cited some eighty-four cases supportive of its position. Scott Thurber, reporter for the San Francisco Chronicle, saw as most newsworthy the club's contention that "[t]he Federal Government simply does not want the Mineral King ski-resort controversy decided on its merits."[47] The brief stated:

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[46] 433 F.2d 24, at 38.

[47] "Sierra Club's Reply on Mineral King," San Francisco Chronicle, Jan. 21, 1970.

> In their eagerness to smother this case before its merits can be aired, appellants have urged a variety of theories for disposing of it summarily, at the threshold. Their principal argument is that the Sierra Club lacks "standing." They also suggest that the court below lacked jurisdiction and that appellants are cloaked with "sovereign immunity." We shall demonstrate that, under better-considered, recent "standing" cases the court below correctly found that the Sierra Club does have standing. The arguments that the court below lacked jurisdiction and that appellant government officials are protected from suit by the doctrine of sovereign immunity are frivolous. . . .
>
> Issues Presented. 1. Whether the District Court abused its discretion by issuing a preliminary injunction to prevent the defendants from authorizing construction of a huge private resort in Sequoia National Game Refuge and an unnecessary road across Sequoia National Park which threatened irreparable harm before defendants' violations of law and abuses of discretion could be confirmed at a trial. 2. Whether the Sierra Club, as a prime spokesman of the public interest in conserving and protecting the natural resources of the Sierra Nevada Mountains, and the only entity likely to challenge the threatened illegal acts by federal officers, should be barred from asserting that interest by outmoded and inapplicable doctrines of judicial abstention.[48]

It was this latter contention of the Sierra Club's, repeated in its appeal to the Supreme Court--that it was uniquely qualified to challenge the threatened illegal acts and that its longstanding concern and expertise were sufficient to give it standing as a "representative of the public"--that the high court found wanting.[49] When the

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[48] Brief for Appellee, pp. 51-52. Emphasis added.

[49] And in so finding, at 92 S.Ct. 1361, 1367, disapproving of the Second Circuit's appellate ruling in Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 105, in which the Court of Appeals had ruled: "We hold, therefore, that the public interest in environmental resources--an interest created by statutes affecting the

Supreme Court finally handed down its decision in Sierra Club v. Morton--three years after initiation of the action and five months after hearing the oral arguments--there was a split of opinion among the learned members of the court, as there was among the members of the Ninth Circuit panel, over the question of the Club's standing to sue. But the majority,[50] as has been reported above in Chapters I,[51] III,[52] and IV,[53] agreed that the Club's "standing" theory

> . . . reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.[54]

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issuance of this permit--is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

This April 1972 ruling also contrasted with District Judge Philip Neville's June 1970 finding in Walton v. St. Clair, 313 F.Supp. 1312, 1317: "The Izaak Walton League [the Sierra Club's name could be substituted here] is not a 'johnny-come-lately or an ad hoc organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an 'aesthetic, conservational and recreational' interest to protect. This gives it standing and meets the second requirement of Association of Data Processing."

As was noted in Chapter III, supra., the ruling also contradicts Judge Wallace Kent's trial court-level ruling in Gandt v. Hardin.

[50]Chief Justice Warren E. Burger and Justices Byron White, Thurgood Marshall, and Potter Stewart. Justice Stewart wrote the majority opinion.

[51]At p. 2.

[52]At pp. 35-36.

[53]At p. 73.

[54]92 S.Ct. 1361, at 1367.

Stipulated the Supreme Court majority:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.[55]

The majority opinion gave the Sierra Club cause for some optimism, however, by suggesting that the Club amend its complaint and try again at the district court level:

> In an amici curiae brief filed in this Court by the Wilderness Society and others [Friends of the Earth, Izaak Walton League of America, Environmental Defense Fund], it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. . . . Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure.[56]

Counsel for the Sierra Club were, in effect, given this concluding "lecture" on the rules of standing by Justice Stewart:

> The requirement that a party seeking review must allege facts showing that he is himself adversely

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[55] 92 S.Ct. 1361, at 1366. Emphasis added.

[56] Ibid., footnote 8. Emphasis added.

> affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.
>
> As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is affirmed.[57]

By so finding, the slim Supreme Court majority seemed to side with (but not agree completely with) the Government's attorneys, who had contended, inter alia:

> Plaintiff has no standing to sue. . . .
>
> No "right," apart from a most general interest of the entire citizenry, exists in the plaintiff corporation or voluntary association which is being threatened by the defendants. . . . The plaintiff's vague claim that it has a right to sue as a representative of its members and of the public to protect and conserve the natural resources of the Sierra Nevada Mountains is not supported by the cases upon which it relies. . . .[58]

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[57] Ibid., at 1368-69.

[58] Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, June 27, 1969. Cases upon which the Government relied: Associated Industries v. Ickes, 134 F.2d 694, 700 (C.A. 2, 1943), vacated as moot, 320 U.S. 707 (1943); Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Turner v. Kings River Conservation District, 360 F.2d 184 (C.A. 9, 1966); Association of Data Processing Serv. Organ v. Camp, 406 F.2d 837 (C.A. 8, 1969).

* * *

> Stripped of its allegations of bureaucratic tyranny, Sierra Club's lawsuit seeks to enlist the powers of the federal courts to overturn a policy decision regarding the management of federal land. Public land management involves many hard, often conflicting choices, between conservationists, recreationists and commodity groups over the use of national forest lands. . . . The point of view now advanced by Sierra Club is certainly legitimate and deserves our attention. The Sierra Club's views do not, however, represent the distillate of "public interest" and nowhere has it been accorded a roving commission to invite judicial intervention to substitute its views for the agencies in whom Congress has reposed federal management authority. . . .
>
> Sierra Club's attempt to embroil the federal courts in management decisions regarding the Nation's public lands shows the wisdom embodied in the constitutional and policy considerations which limit standing to invoke federal jurisdiction to only those parties with legally protected interests. . . . Ours is indeed a government of separation of powers, and federal judges are neither supervisors nor overseers of government agencies or institutions. . . . Had Congress been interested in deputizing parties, such as Sierra Club, to articulate the public interest in the management of public lands, it would have done so. Not having done so, the suggestion of Sierra Club that it[s] particular claims entitle it to special regard should be rejected.[59]

The Sierra Club contended throughout this litigation that it was a "prime spokesman of the public interest" and was not just attempting to "vindicate [its] own value preferences." The Wilderness Society, Friends of the Earth, the Izaak Walton League of America, and the

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[59] Reply Brief for Appellees, Feb. 1970, filed with the U.S. Court of Appeals for the Ninth Circuit by Shiro Kashiwa, Assistant Attorney General, Walter Kiechel, Jr., Deputy Assistant Attorney General, and three other attorneys from the U.S. Department of Justice.

Environmental Defense Fund indicated, in their amicus brief filed with the Supreme Court, their firm support of the Sierra Club position: that it adequately represented an aggrieved class of citizens. Those who saw the Club in the more parochial of these two roles, however, could point not only to the amicus brief urging reversal filed with the Court of Appeals by the United States Ski Association and the Far West Ski Association but to indications of support for the Forest Service-Disney position by other recreation and conservation organizations and/or their leaders. These included the members of Disney's "voluntary Conservation Advisory Committee" for Mineral King: Horace M. Albright, Former Director, National Park Service; Dr. Paul F. Brandwein, President, Center for Study of Instruction and Former Director, Gifford Pinchot Institute for Conservation Studies; Dr. Ira Gabrielson, President, Wildlife Management Institute; Thomas L. Kimball, Executive Director, National Wildlife Federation; Bestor Robinson, Past President, Sierra Club; Eivind T. Scoyen, Former Superintendent, Sequoia and Kings Canyon National Park and Associate Director, National Park Service; and William E. Towell, Executive Vice President, American Forestry Association.[60] They included, according to a brochure

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[60]"Walt Disney Productions' Master Plan for the Development of Mineral King," Disnews, n.d. [Jan. 1969], pp. 7-8. See also, Robert B. Mathias, "Sequoia National Forest," Congressional Record, Jan. 22, 1970, p. E 270:

published by the Tulare County Board of Supervisors, the National Wildlife Federation's California, Nevada and Hawaii state affiliate organizations; the American Forestry Association; the Southern California Council of Conservation Clubs; and the San Joaquin Chapter of the Soil Conservation Society of America.[61] Additionally, there was dissention within the Sierra Club itself over the decision to try to stop the development of accessible skiing facilities in Mineral King Valley.[62]

"Although the U.S. Forest Service's proposal to develop recreational facilities at Mineral King has been opposed by the Sierra Club, which is attempting to thwart this project through court action, this organization has not been supported in its action by the vast majority of nationally recognized authorities in the field of conservation. [Emphasis added.] In fact, seven of the Nation's most widely respected conservationists, who have taken the time to study the plans of Walt Disney Productions and the Departments of Agriculture and Interior, have joined a Conservation Advisory Committee, which will work with the Disney organization to develop and carry out a program which will make the Mineral King area a prototype in the field of conservation education. . . ."

[61]"The Facts About Mineral King," Board of Supervisors, Tulare County, n.d. [July 1969], p. 9. While observers new to the ways of the conservation movement in the United States might see this split among national conservation organizations as proof that the Sierra Club did not represent an "aggrieved class," those familiar with the roles played by, and the positions taken over the years by, these organizations would interpret this split as the usual one, predictable in controversies of this kind: One "class" of national conservation organizations tends to devote much of its energies to park, wilderness, wild river and trail system preservation projects on behalf of members who might be characterized as aesthetes, naturalists, and backpackers, among other things, while the other "class" of national conservation organizations tends to support developments involving management and use of natural resources to provide increased quantities of

Despite the absence of complete unanimity among conservationists with regard to the proposed resort at Mineral King, however, the position of the Sierra Club found enthusiastic support among Supreme Court Justices William O. Douglas, William Brennan, and Harry Blackmun, who agreed that the Sierra Club had standing.[63] The strong dissents of Justices Douglas and Blackmun are worthy of respectful consideration, as is an article by Professor Christopher D. Stone on the subject, "Should

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fish, game, forest products, and facility-oriented recreational opportunities on behalf of the sportsmen, recreational vehicle owners, foresters and others who support them. The former "class" opposes massive development at Mineral King; the latter "class" appears to favor it. Admittedly, this is an artificial dichotomy; these organizations share many common objectives and positions on issues. But their contrasting philosophies could be said to be those of John Muir and Gifford Pinchot--both "conservationists."

[62] E.g., a representative of the Sierra Club is alleged (at page 3 of the U.S. Ski Association amicus brief) to have made the following statement to the Far West Ski Association Convention in May of 1969: "Accepting the skiing development of Mineral King as a certainty, the Sierra Club is interested in seeing that there be the best planning possible of the access, the parking, and of the valley itself, with respect to the forest and wildlife on the one hand and service to skiers on the other. There are many organizations interested in the overall success of the Mineral King development. That includes the Sierra Club." This statement was "unauthorized"; see, Phillip S. Berry, President, Sierra Club, personal letter to Don Bice, Editor, Western Ski Time Newsletter, San Francisco, Calif., July 4, 1969: "The Club through action of its governing body, the Board of Directors, has been opposed to the development [at Mineral King] for some time, as shown by the attached resolution from its official minutes. Anyone who stated a contrary position while purporting to speak on behalf of the Club at your May convention was simply acting without authority. . . ." Two resolutions were

Trees Have Standing?--Toward Legal Rights for Natural Objects,"[64] which was cited by Justice Douglas as supporting his contention, in his Sierra Club v. Morton dissent, that

> [c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects for their own preservation.[65]

Until such time as nature itself is given standing, said Justice Douglas, those who "frequent it" should be regarded as its spokesmen:

> Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuollumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, or frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be a few or many. Those who

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enclosed, one passed on May 2, 1965 opposing commercial development at Mineral King as proposed in the 1965 prospectus, the other passed at the Board's December 14-15, 1968 meeting authorizing the Sierra Club staff to "undertake appropriate legal action to protect the Mineral King area and Sequoia National Park from development inconsistent with established Club policy."

[63] Justices Lewis Powell and William Rehnquist did not participate.

[64] Southern California Law Review, Vol. 45, No. 2, 1972.

[65] 92 S.Ct. 1361, at 1369. Justice Douglas' dissent was described as "eloquent" both by U.S. Senator Philip A. Hart, in the Senator's introduction to the reprinting of Professor Stone's article at Congressional Record, May 23, 1972, pp. S 8243-56, and by Congressman John D. Dingell, in the Congressman's introduction to the Sierra Club v. Morton Supreme Court decision which he inserted in the April 21, 1972 Congressional Record at pp. E 4113-19.

> have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.[66]

Sierra Club v. Morton provided Justice Douglas with an opportunity to vent his antipathy toward the Forest Service:

> The Forest Service--one of the federal agencies behind the scheme to despoil Mineral King--has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.[67]

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[66] 92 S.Ct. 1361, at 1371. Douglas described the Solicitor General's approach to the case as "wholly different": "He [the Solicitor General] considers the problem in terms of 'government by the Judiciary.' With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the 'public interest.' Yet 'public interest' has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub.L. 91-90, 83 Stat. 852, 42 U.S.C. sec. 4321, et seq., and guidelines for agency action have been provided by the Council on Environmental Quality . . . See 36 Fed.Reg. 7724. . . . The federal agencies . . . are not venal or corrupt. But they are notoriously under the control of powerful interests. . . ." 92 S.Ct. 1361, at 1371. Excerpts from the statement of the Solicitor General, inserted as an Appendix to Opinion of Justice Douglas: "If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the court before the administrator sworn to uphold the law can take any action. I'm not sure that this is good for the government. I'm not sure that it is good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders. I do not suggest that administrators can act at their whim and without any check at all. On the contrary, in this area

Perhaps more significant because of its unexpected source, as contrasted with Justice Douglas' predictable position on such matters, is Justice Blackmun's dissent in this case. Excerpts from this Justice's moving statement of concern and dismay:

> If this were an ordinary case, I would join the [majority] opinion and the Court's judgment and be quite content. But this is not ordinary, run-of-the-mill litigation. The case poses--if only we choose to acknowledge and reach them--significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?
>
> The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the "area of great natural beauty nestled in the Sierra Nevada Mountains," to use the Court's words, will become defaced, at least in part, and, like so many other areas, will cease to be "uncluttered by the products of civilization."[68]

Justice Blackmun suggested, in his minority opinion, two alternative courses of action:

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they are subject to continuous check by the Congress. Congress can stop this development any time it wants to." 92 S.Ct. 1361, at 1376.

[67] 92 S.Ct. 1361, at 1372. Emphasis added.

[68] Ibid., at 1376.

Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing. . . .

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing[69] to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in Data Processing itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. . . .[70]

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[69]Cf., Charles E. Wiggins, Member of Congress, 25th District of California, "A Plea for Judicial Restraint," Congressional Record, May 23, 1972, p. E 5621: "The traditional role of the courts . . . is changing. More and more, pioneering judges are entertaining litigation which is aimed at asserted public wrongs. If a legislature should frustrate the wishes of a class of citizens by rejecting their claims, the courts are being asked to fashion a remedy. This judicial activism is inconsistent with tradition and represents a dangerous shift of power from the people, acting through their elected representatives, to judges answerable only to their conscience. It is a trend which is bad for the courts and worse for the country. . . ."

[70]92 S.Ct. 1361, at 1377.

Professor Stone, in his Southern California Law Review article, "quite seriously" proposes--

> that we give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment--indeed to the natural environment as a whole. . . .
>
> The potential "friends" that such a statutory scheme would require will hardly be lacking. The Sierra Club, Environmental Defense Funds, Friends of the Earth, Natural Resources Defense Counsel, and the Izaak Walton League are just some of the many groups which have manifested unflagging dedication to the environment and which are becoming increasingly capable of marshaling the requisite technical experts and lawyers. . . .
>
> In point of fact, there is a movement in the law toward giving the environment the benefits of standing, although not in a manner as satisfactory as the guardianship approach. What I am referring to is the marked liberalization of traditional standing requirements [with respect to environmental action groups which] have challenged federal government action. Scenic Hudson Preservation Conference v. FPC is a good example of this development. . . . Only the Ninth Circuit has balked [a reference to the September 16, 1970, Sierra Club v. Hickel decision]. . . .
>
> How far are we from such a state of affairs, where the law treats "environmental objects" as holders of legal rights, I cannot say. But there is certainly intriguing language in one of Justice Black's last dissents, regarding the Texas Highway Department's plan to run a six-lane expressway through a San Antonio Park.[71] Complaining of the Court's refusal to stay the plan, Black observed that "after today's decision, the people of San Antonio and the birds and animals that make their home in the park will share their quiet retreat with an ugly, smelling stream of traffic. . . . Trees, shrubs, and flowers will be mown down." Elsewhere, he speaks of the "burial of public parks,"

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[71] San Antonio Conservation Society v. Texas Highway Department, cert. denied, 400 U.S. 968 (1970) (Black, J. dissenting to denial of certiorari).

> of segments of a highway which "devour parkland," and of the park's heartland. Was he, at the end of his great career, on the verge of saying--just saying--that "nature has 'rights' on its own account"? Would it be so hard to do?[72]

As was noted in Chapter IV, supra., even a spokesman for the Sierra Club's indirect opponent in this case, Walt Disney Productions, felt the Club to be entitled to a hearing on the merits of its complaint.[73] A Club representative's reaction to the Court of Appeals decision in Sierra Club v. Hickel was bitter:

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[72]Congressional Record, May 23, 1972, pp. S 8244-51. The context of Professor Stone's suggested attitude toward "environmental objects" (p. S 8243): "We have been making persons [with legal rights] of children although they were not, in law, always so. And we have done the same . . . with prisoners, aliens, women . . ., the insane, Blacks, foetuses, and Indians. Nor is it only matter in human form that has come to be recognized as the possessor of rights. The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few. Ships . . . have long had an independent jural life. . . ."

[73]Disney Project Manager Robert B. Hicks made a speech to the California State Chamber of Commerce in Los Angeles on Jan. 15, 1970 ("Class Litigation--New Tool for Resources Decision in Recreation") in which he observed that he could not object to the new "standing" rule or to the weakening of the "sovereign immunity" defense because "[c]itizens should have a place to go to test arbitrary and capricious agency action. . . . The judiciary thus affords a safety valve which in my judgment is pretty vital to the preservation of this tripartite system of government. . . . [T]his is not all bad, even on my side of the fence. . . . [T]he Sierra Club is doing a lot of people a favor, since these streets must run both ways."

> What, in effect, they [the Court of Appeals] are saying is that it doesn't matter if the Government is acting illegally, it doesn't matter if public interest is being shoved aside, no one can complain about it because no one is economically affected. . . . [74]

A year and a half later, with a new Secretary of the Interior--Rogers C. B. Morton--and with a Supreme Court opinion which clearly invited the Club to amend its complaint and try again, the Sierra Club's response was tempered with optimism. National newspapers termed the Supreme Court decision a "heavy blow to conservationists"[75] but also as only "a temporary defeat" for the Sierra Club.[76] New York Times reporter William M. Blair quoted the Sierra Club executive director's immediate reaction:

> Michael McCloskey, executive director of the Sierra Club, said that the "decision, while a rebuff, is by no means the end of the line." He said that the Court had extended "a clear invitation to come back" and that he expected the club's board of directors would carry on the fight after a more complete analysis of the decision.
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> "We feel that we can meet the [standing] test raised by the Court," he said by telephone from the

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[74] "Senator George McGovern--Environmental Law and Order," Congressional Record, Oct. 9, 1970, p. E 9060. Commented McGovern: "There is no logic in a decision which prevents citizens from protecting lands which are held in trust for them by the United States."

[75] William M. Blair, "Supreme Court Sets Aside Suit of Sierra Club to Block Resort," New York Times, Apr. 20, 1972, p. C7.

[76] "Sierra Club Effort to Bar Disney Complex at Mineral King is Set Back by High Court," Wall Street Journal, April 20, 1972.

> club's San Francisco headquarters. That means, he said, that the club can return to the Federal district court in San Francisco where the case started."

And that is what the Sierra Club did, filing a motion on June 2, 1972, in U.S. District Court in San Francisco to amend its original suit in conformance with the Supreme Court's ruling.[77] The Club's intention to persevere had been made clear in a resolution adopted by the group's board of directors at its annual meeting in San Francisco on May 6-7, 1972:

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[77]The Sierra Club's response was to Justice Stewart's observation, at 92 S.Ct. 1361, 1366, that:

"The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pasttimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be affected significantly by the proposed actions of the respondents."

To conform to the Supreme Court's newly clarified rules for standing, the Sierra Club amended its complaint (see footnote 34, this chapter) by (1) adding as new parties plaintiff nine individuals potentially "affected in their activities and pasttimes by the Disney development" and (2) adding new language describing in some detail just how the Club and its members might be "injured" by the development:

"The Sierra Club has conducted outings over the years on a regular basis in the Sierra Nevada. In addition, the Sierra Club has carried on a program to acquaint people with the values of the Sierra and to preserve it in National Parks and National Forest Wilderness Areas. In carrying out this program, Sierra Club has conducted, and

> The Sierra Club reaffirms its opposition to any ski development in Mineral King, and access facilities to it, not consistent with present usage. The Sierra Club also reaffirms its policy to obtain the expansion of the boundaries of Sequoia National Park to include the present Sequoia National Game Refuge.

Waiver of Sovereign Immunity and Authorization of Judicial Review

Without citing authority but apparently relying on such cases as Freeman v. Brown,[78] Norwalk Core,[79] and Road Review League[80] in which sovereign immunity was waived

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continues to conduct, substantial activities in and around the Mineral King area. In addition, several of the Club's chapters have conducted and continue to conduct outings in and around Mineral King on a regular basis. In addition, many of the Club's members individually or in informal groups undertake hikes and other trail outings in and around the Mineral King valley and engage in various outdoor recreational activities in and around the valley such as picnicking, hiking, climbing, photography, camping, and family outings. A few of the Club's members own or lease small cabins in the Mineral King area which they use as retreats during the summer season.

"The aesthetic, environmental, and recreational interests of the Club, its chapters and its members in the Mineral King area, including their enjoyment of the scenery, natural and historic objects and wildlife, would be injured by the conversion of the area into a commercial ski development. Use of the valley itself for the activities would be preempted. Development, furthermore, will impair the use and enjoyment of Mineral King as a beginning point for wilderness outings. In addition, with commercial chair and gondola lifts built up the mountainsides, the high country around Mineral King will be overloaded, depriving the Club, its chapters and its members of the wilderness experiences they have enjoyed since the turn of the century.

"In addition, the Sierra Club has spent and continues to spend substantial time and effort in the conservation of Mineral King and the protection of the ecology of Mineral King and its environs. Over the years the Club

where the Administrative Procedure Act applied and judicial review was granted to persons found to be "aggrieved by agency action within the meaning of a relevant statute," District Judge W. T. Sweigert found that the Sierra Club not only was "sufficiently aggrieved to have standing"[81] but that the agencies' actions with respect to the proposed Mineral King development could be, and should be, subjected to judicial review. Judge Sweigert's opinion concluded:

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has engaged in various campaigns to extend the boundaries of Sequoia National Park to include Mineral King. The early phase of this campaign culminated in 1926 with a compromise Act of Congress designating the area the Sequoia National Game Refuge. . . . The Club continues to seek to have the area added to the National Park. Mass development would obviously destroy the park qualities of the area and, in so doing, destroy the Club's conservational, environmental, and ecological interests in Mineral King. Thus, the ski development would destroy the scenic, natural wildlife and historic aspects of the Mineral King area."

The Club's amended complaint also takes into account the ruling of the Ninth Circuit Court of Appeals. By adding the Mineral King District Association as a party plaintiff, the Club responded to the appellate panel's observation that "[t]he Powelton case [284 F.Supp. 809, 825-828] would be in point if the homes of residents at Mineral King were to be razed and those homeowners objected. There is no such showing." 433 F.2d 24, 31. This Association is made up of Mineral King valley homeowners whose leases would be terminated or property condemned, should the Disney project go through.

[78]342 F.2d 205 (1965).

[79]395 F.2d 920 (1968).

[80]270 F.Supp. 650 (1967).

[81]Memorandum of Decision, July 23, 1969, p. 11.

> It is true that the scope of judicial review over officials to whom Congress has entrusted the control and management of public lands is a particularly narrow one in which there is, perhaps, less reason for interference with administration discretion than in any other kind of administrative action. Ickes v. Underwood, 141 F.2d 546, 548 (C.A. D.C. 1944).
>
> Nevertheless, we find that plaintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction against both Agriculture and Interior pending trial of these issues on the merits or the further order of this court.
>
> It is beside the point to argue, as do defendants, that a preliminary injunction in this case would interfere with progress by raising doubts about the validity of similar arrangements made with respect to 84 other recreation areas, including 5 in California.
>
> This court is not concerned with the controversy between so-called progressives and so-called conservationists. Our only function is to make sure that administrative action, even when taken in the name of progress, conforms to the letter and intent of the law as laid down by Congress and which only the Congress can change whenever it finds such change to be in the public interest.[82]

The Court of Appeals for the Ninth Circuit disagreed completely. The author of its majority opinion, Judge Trask, expressed strong contrary feelings. He quoted "now Mr. Chief Justice Burger" to the effect that Section 702 of the Administrative Procedure Act[83] "does not establish an independent right to review absent

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[82] Ibid., pp. 12-13. Emphasis added.

[83] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C., Sec. 702.

judicially articulated notions of 'legal wrong' or 'adversely affected or aggrieved * * * within the meaning of any relevant statute."[84] He found that the District Court should not have granted the preliminary injunction because--

> [t]he appellee has not shown with any degree of certainty that it will or can succeed [in a trial on the merits of its complaint]. Neither has it shown that it, or its members or anyone else will suffer irreparable injury. This is not a case "clearly warranting" the grant of a preliminary injunction.[85]

Judge Trask concluded, with some heat:

> The nation's natural resources are not the property of any particular group. One of the basic social ills of today is that we have too many people living too close together. It appears that the friction thus created is becoming increasingly abrasive. The satisfaction of the basic necessities of such a population creates environmental problems which are not within the expertise of this court. We cannot say, however, that the Secretary of Agriculture and the Secretary of the Interior have made an arbitrary and capricious judgment in determining to make available a vast area of incomparable beauty to more people rather than to have it remain inaccessible except to a rugged few.[86]

Justice Stewart, author of the Supreme Court's April 1972 opinion, came down mid-way between the district and circuit judges' findings. He cited Data Processing

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[84] Burger was quoted at Pennsylvania R.R. Co. v. Dillon, 335 F.2d 292. Emphasis by Judge Trask.

[85] 433 F.2d 24, at 37, citing Dymo Industries, Inc. v. Tapeprinter, Inc., 326 F.2d at 143.

[86] 433 F.2d 24, at 37-38. The valley served 28,000 recreationists in 1964. Area Plan, p. 1.

and Barlow as offering an expanded definition of "injury in fact":

> Early decisions under [the Administrative Procedure Act, 5 U.S.C. Sec. 702] interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing. But, in Association of Data Processing, Inc. v. Camp, 397 U.S. 150 . . . and Barlow v. Collins, 397 U.S. 159 . . ., decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under Section 10 of the APA where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.[87]

He noted that--

> neither Data Processing nor Barlow addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a non-economic nature to interests that are widely shared.[88]

"That question," he said, "is presented [for the first time] in this case." Importantly, from the standpoints of both potential conservation group plaintiffs and the environment itself, Justice Stewart held for the majority of the Supreme Court that the destruction of natural objects did qualify as "injury in fact" under the APA:

> We do not question that this type of harm [alleged by the Sierra Club, i.e., the destruction of the scenery, natural and historic objects and wildlife of

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[87] 92 S.Ct. 1361, at 1365.

[88] Ibid., at 1365-66.

> the "park" and impairment of the enjoyment of the "park" for future generations] may amount to an "injury in fact" sufficient to lay the basis for standing under Section 10 of the APA.[89]

But, he insisted, "the party seeking review must allege facts showing that he is himself adversely affected":

> The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and towards discarding the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review. We noted this development with approval in Data Processing . . . in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury.[90]

The Supreme Court thus cleared the way for the Sierra Club to win judicial review of the illegal acts by administrative agencies alleged in its complaint, once it amended its complaint to include persons adversely affected by those acts. A major clarification by the court of its interpretation of the Administrative Procedure Act, and a major victory for potential class-action plaintiffs, is how this landmark Supreme Court decision could be interpreted, despite the court's refusal to accept the Sierra Club's standing theory.

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[89] Ibid., at 1366.

[90] Ibid., at 1367-68.

Since June 27, 1969,[91] the U.S. Justice Department had contended that Sierra Club v. Hickel was an unconsented suit against the United States and that the courts lacked jurisdiction to try it--the "king" had not consented to be sued:

> [A]ny suit against a government officer is an unconsented suit against the United States unless it can be established that the officer is threatening to act illegally or under an unconstitutional act. [W]here any of the proposed decrees would directly affect the United States in the administration of its property the case must be dismissed.[92]

Not only was the sovereign immune from such suits; "he" should not be delayed in the execution of "his" projects by such "self-interest organizations" as the Sierra Club. As Forest Service Chief Ed Cliff's affidavit, filed with the Court of Appeals for the Ninth Circuit on December 29, 1969, expressed this attitude, the possible harmful consequences of a continuation of the preliminary injunction would include offering

> [e]ncouragement by plaintiff's success in this case to other self-interest organizations to seek to block, even if temporarily, other projects of a similar nature[,]

resulting in substantial and irreparable damage to the

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[91] In their Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction.

[92] Ibid., at p. 7.

American people (by being denied the use of such recreation areas).[93]

The Justice Department saw the Mineral King resort-development and access-road-construction projects as "validly undertaken by federal officials pursuant to the discretionary management authority granted by Congress" and not reviewable by the district court because:

> A. Issuance of the permit here was discretionary and in no way breached a plain duty imposed by the relevant statute[, and]
>
> B. No statute enlarges the relief here available against a federal official.[94]

In short, said the Justice Department, the Sierra Club cannot compel the federal courts to supervise the Executive Branch in its management of the federal domain.[95]

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[93]Cf., the "selfish" Sierra Club's leading role in the original establishment of the National Forest System, described at footnote 39, supra.

[94]Brief for the Appellants, November 1969, pp. 24, 29.

[95]Excerpts from the federal appellants' brief: "Issues Presented. 1. Whether the district court erred in issuing a preliminary injunction which halted creation of a recreation area in a national forest and park without a clear demonstration of plaintiff's likelihood of ultimate success or any irreparable injury to plaintiff. 2. Whether Sierra Club, a conservation organization that cannot establish infringement of any legally protected interest belonging to it, solely on the basis of a policy disagreement relating to management of federal land, has standing to challenge such project. 3. Whether this suit to enjoin the Secretaries of Agriculture and Interior from creating the recreation area must fail because the decision is a discretionary management judgment imposed by the relevant statutes, and is an unconsented suit against the United

The federal defendants had concluded their June 1969 memorandum in opposition to a preliminary injunction with the arguments that (1) there had been "no showing threat of irreparable injury to justify preliminary injunction" (because construction, as planned, could not begin on the road until July 1970 and on the resort until the summer of 1971) and (2) that the "Court must consider detriment to parties," in which connection

> . . . [t]he granting of a preliminary injunction would bring to a halt a major recreation development project involving the Federal Government, State of California and private enterprise who have already invested substantial sums and all of whom would incur great financial loss if a preliminary injunction were issued[, whereas, n]either the complaint of plaintiff nor the affidavit of McCloskey indicate any loss which the Sierra Club may suffer if an injunction is not granted.
>
> [Therefore,] equity compels the result that a preliminary injunction must not be granted.

States. Argument. This case is of great importance to the Departments of the Interior and Agriculture which are charged by Congress with the management and control of a major portion of the Nation's public lands, because this case, along with several others now pending in the federal courts, squarely presents the issue whether management shall remain, as intended by Congress, in the executive departments, or whether the federal courts, at the behest of such private litigants who may be dissatisfied with management decisions, will become immersed in the management of the public lands or agencies [emphasis added]. . . . In addition to not showing an irreparable injury for which it was without an adequate remedy at law, the appellee [Sierra Club] failed to demonstrate the existence of any breach of a duty which was absolutely plain from reading the words of the statute or applicable and involved no discretion. . . . [The Sierra Club cannot] employ Section 1331(a) [of 28 U.S.C.A.] as a device to compel the federal courts to supervise the Secretaries of Agriculture and Interior in the management of the federal domain."

The Sierra Club plaintiff used its July 7, 1969 reply brief to rebut this argument, pointing to the alleged "irreparable harm . . . to the public interest" as outweighing any injury to the agencies and corporations involved:

> The public interest, as represented by plaintiff, will sustain irreparable harm unless a preliminary injunction is granted. . . . [U]nless this court issues a preliminary injunction preventing the issuance either of a road construction permit or of a term permit, Developer will be free to commence physical work and to cause irreparable damage to the Mineral King area and to the Sequoia National Game Refuge at any time.
>
> The threatened injury to the public interest outweighs any injury to defendants. . . . [N]either $75,000 nor a sum one hundred times that amount will compensate the public interest for the harm which would be done to the National Park and National Game Refuge if excavation, blasting, bulldozing and clearing ultimately determined by this court to have been authorized illegally by the federal agencies involved were to proceed while this matter is pending.

At this point in their reply brief, counsel for the Sierra Club emphasized their allegation that officers of the United States had exceeded their statutory authority and thus were not shielded by the doctrine of sovereign immunity:

> Defendants are proper party defendants. . . . [T]he Sierra Club is not contending that the defendants in this case have made mistakes in the administration of matters within the scope of their authority. The complaint is that they have acted in excess of their statutory authority and in the face of statutory limitations on their authority--the type of claim which Larson (337 U.S. 682 [1949]) expressly recognizes as properly brought against the responsible officers rather than the United States.

> It is likely that plaintiff will prevail on the merits at a final hearing. Defendants Hickel and McLaughlin would act illegally in purporting to authorize construction of the proposed road. . . . Defendants Hardin, Deinema and James would act illegally in issuing permits for long-term use of more than 80 acres of Forest Service lands.
>
> [P]laintiff should be granted the preliminary injunction which is so essential to the avoidance of irreparable harm to the public interest pending a resolution of its contentions on the merits of the action.

Later, addressing themselves to the Ninth Circuit Court of Appeals, Sierra Club counsel summed up the case as "a simple case of administrative excess correctly decided [which] should therefore be affirmed."[96]

Exhaustion of Administrative Remedies and the Timeliness of the Filing of Plaintiff's Action

Judge Sweigert did not raise the "exhaustion of administrative remedies" question and saw the Sierra Club action as "timely":

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[96]Among the Sierra Club's arguments, in its Jan. 20, 1970, Brief for Appellee: "Management and control of the lands of the United States resides in Congress. It is true that Congress may delegate the power to manage the federal lands to the executive. It is not true that the executive may violate the limits of his power and seek to shield that violation from judicial scrutiny with the cloak of his 'discretion.' That is what this case is all about. . . . Judicial reticence ends when, as threatened by Agriculture and Interior in this case, the executive attempts to exercise this authority outside the limits of an unambiguous Congressional limitation or, when operating within the limits of his discretion, he abuses it by acting arbitrarily or unreasonably."

> It appears from the record that the National Park Service permit for construction of the highway by the State of California is ready for issuance at any time and, when issued, will authorize the State of California to proceed at any time thereafter with highway construction.
>
> . . . [A]s soon as Interior grants the highway permit, the State of California, which is not a party to this action and, therefore, not amenable to orders of this court, will be in a position to control the time within which highway construction contracts will be let and thus in effect determine the time when Agriculture must issue its permits to the Developer for construction of the Mineral King project.
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> In view of the possibility that Interior may issue the highway permit at any time, thereby substantially changing the existing situation and setting events in motion, plaintiff should not be left to "watchful waiting" upon the State of California. We find, therefore, that there is a sufficient showing of imminent and irreparable injury to require pendente lite relief. . . .[97]

Judge Trask held that a preliminary injunction--"the exercise of a very far reaching power"[98]--should not have been granted, because "[t]he court must balance the damage to both parties [and] the [Sierra Club] has shown neither a reasonable certainty that it will prevail nor irreparable injury."[99] He pointed to the Sierra Club's representation at an August 10, 1967 hearing held by the California Division of Highways as proof that the

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[97] Memorandum of Decision, July 23, 1969, p. 12.

[98] Citing Dymo v. Tapeprinter, 326 F.2d 141 (9th Cir. 1964) and Hall Signal Co. v. General Ry. Signal Co., 153 F.2d 907, 908 (2d Cir. 1907).

[99] 433 F.2d 24, at 33. Emphasis added.

"proposed roadway was not any clandestine project."[100] But he had nothing negative to say about the Club's efforts to find administrative relief or about the timeliness of the filing of its suit.

Justice Stewart acknowledged that the Sierra Club had actively sought administrative relief:

> Representatives of the Sierra Club . . . followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. [Justice Stewart had noted earlier that the final Disney plan had been approved by the Forest Service in January, 1969.] In June of 1969 the Club filed the present suit. . . .[101]

Nowhere in these opinions at three judicial levels was the administrative appeal route[102] held up as a necessary prelude to litigation, perhaps because the defendants in this case were from more than one Cabinet-level Executive Branch department. Neither did the courts take seriously the federal defendants' belated attempt to use the defense of "laches."[103] Not until after they had been

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[100] Ibid., at 37. "The matter of public hearings cannot be considered a substantial factor in this proceeding," Judge Trask concluded.

[101] 92 S.Ct. 1361, at 1363.

[102] 36 CFR 211.20-211.37. See, Chapter III, p. 47, and Chapter IV, pp. 86-88, supra.

[103] See, Chapter III, pp. 40-47, supra.

served with a preliminary injunction and ordered to file an answer to the Sierra Club's complaint did they[104] make this charge:

> Plaintiff is not entitled to maintain this suit by reason of laches since plaintiff had notice on or before May 1, 1965, of the proposed recreation development at Mineral King in Sequoia National Forest to be sponsored by the Forest Service . . . and was aware of the contents of the prospectus issued by the Forest Service in February 1965, which prospectus contained all fundamental standards and proposed permits to be issued and actions to be taken by defendants in connection with said recreation development, and plaintiff made no attempt to obtain judicial determination of its alleged rights until more than four years after having knowledge of said proposed development. That in absence of plaintiff's effort to obtain prompt judicial relief of its alleged rights, defendants in their official capacities have expended large sums of money in planning and investigation in connection with the proposed recreation development. Plaintiff has thereby been guilty of such laches as should in equity bar plaintiff from maintaining this action.

Justice Stewart seemed to dispose of this defense by oblique reference when he noted[105] that the Disney plan had been approved in 1969 and that it called for ten times the capital investment suggested in the 1965 prospectus--i.e., a different scale of development entirely.

The adequacy of public involvement in the decision-making process was called into question by two allegations in the Sierra Club's initial complaint: that the defendants were--

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[104] In their Sept. 2, 1969, Joint Answer, at p. 4.

[105] At 92 S.Ct. 1361, 1363.

> in violation of Forest Service rules and regulations, and in violation of applicable principles of administrative law, in that it has declined and refused to hold public hearings on the question of whether Mineral King should be developed, or how it should be developed for commercial-recreational purposes or for any other purpose; and . . . in violation of regulations requiring a public hearing with respect both to the general corridor to be occupied by the proposed road and to its design, as set forth in 34 Fed. Reg. 1405 (January 29, 1969).

Counsel for the plaintiff noted with some obvious skepticism that--

> [u]ntil Tuesday, April 26, 1969, it was clear that public hearings were required before the location and designs of roads and highways through national parks could be fixed. On that day, the present Secretary of the Interior, Walter J. Hickel, purported to revoke these hearing requirements.[106]

Judge Sweigert noted in his July 1969 decision that the question, whether or not this mild form of administrative relief--a public hearing--should have been provided, was worthy of further exploration in court:

> [T]here is presented the further question whether repeal, without general notice, of the pre-existing rule calling for public hearing concerning major road projects having substantial, social, economic or

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[106] See, "Roadbuilding in National Parks," Federal Register, Jan. 29, 1969, p. 19, and its "purported" revocation at Federal Register, Apr. 26, 1969, p. 6985. Plaintiff maintained that Hickel's revocation was "not only arbitrary and capricious, but a direct violation of law. By statutory definition, repealing a rule is just as much 'rule-making' as formulating it in the first place [which requires advance notice and public hearing or at least an opportunity for interested citizens to participate in the rule making (5 U.S.C. 553(c))]."

> environmental effects, is a mere rule of procedure, practice or policy and, if not, whether Interior was required by its own rule to conduct public hearings on the highway in question.[107]

While the plaintiff's June 1969 brief had contended that "hearings and findings are necessary to insure agency adherence to statutory standards,"[108] the defendants had countered with the point that hearings were not required:

> Plaintiff makes much of the lack of hearings with respect to the Mineral King development, the road permit and the revocation by Secretary Hickel on April 21, 1969, of the Udall road policy adopted on January 18, 1969 [but] to the best of our knowledge there is [no statutory requirement for such hearings].[109]

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[107] Memorandum of Decision, July 23, 1969, p. 11. Emphasis added.

[108] Citing NLRB v. Capitol Transit Co., 221 F.2d 864 (D.C.Cir. 1955) for support.

[109] While this position was taken for the record, federal employees associated with this case were not without appreciation of the value of citizen group input in the agency's decision-making process. Examples:

Russell J. Mays, Office of General Counsel, USDA, San Francisco, Calif., personal interview, Aug. 14, 1970: "We recognize that the ground rules are changing. It's really getting ridiculous, and cumbersome; if you try to solve every issue on the altar of public opinion, you're playing the numbers game. But it's a sign of the times, and it's better to have people challenging the System in the courts than in the streets. The Forest Service's feelings are hurt; the judgments of its experts are being questioned. But young people, because of Viet Nam, don't trust the experts any more."

M. R. James, Forest Supervisor, Sequoia National Forest, Porterville, Calif., personal interview, Aug. 17, 1970: "Because the Forest Service Manual doesn't require public hearings, we've never held public meetings or hearings, or done more than minimum data-collecting--but we will, in the future. If we had given Mineral King a lot

The Sierra Club had tried for four years to get the Forest Service to hold public hearings on its (and its permittee's) development plans for Mineral King Valley. Forest Service personnel did speak to groups on many occasions, outlining the evolving resort-development and access-improvement plans in general.[110] But the agency did not provide an opportunity for all concerned to place their comments on record at a public hearing, either at a convenient time and place before a neutral hearing officer empowered to sift the testimony so offered and arrive at recommendations to the agency based on this testimony, or even at an inconvenient time and place before a Forest Service "judge." Any account of the evolution of the

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of publicity, we'd have received thousands of pro and con statements. The emotional involvement of the public may not lead to the best resource-development decisions. Public hearings constitute a big 'flap,' after which we still have to make a decision. But public pressure is forcing us to do a better job of data-collecting."

[110]P. J. Wyckoff, Mineral King Staff Specialist, Sequoia National Forest, Porterville, Calif., (personal interview, Aug. 17, 1970) had given "more than one hundred" talks about the Forest Service's plans for Mineral King to groups in Fresno and other local communities, including Sierra Club and Audubon units and had spoken with Sierra Club representatives about Mineral King "at least a dozen times." Wyckoff acknowledged that Porterville Sierra Club member Jim Clark had led club-sponsored cleanup hikes in Mineral King and that club board members Fred Eissler and Martin Litton had visited the area, but he felt that the club had used "distortions" in describing Disney's Mineral King plans.

Sierra Club's position on the Mineral King resort project would be replete with references to requests for a hearing.

The Sierra Club did have a representative--but not staff member or official spokesman for the national organization--at a public meeting on Mineral King in Visalia, California, in 1953, but while the Forest Service describes this forum as a Congressional hearing, the Sierra Club refers to it as a Chamber of Commerce promotional meeting. The Forest Service version:

> [I]n 1953 Congressman Harlen Hagan headed hearings in Visalia to consider all aspects of it; to consider what should be done and to explore how to accomplish it. The area's development was supported from many directions ranging from local county officials to the Superintendent of the Sequoia National Park, and the Sierra Club.[111] Still, the matter of the all-weather road remained the unmovable road block.[112]

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[111]The following statement, taken from the "hearing transcript" on file in the Sequoia National Forest Supervisor's office in Porterville, Calif., was given by a local Sierra Club member: "Sierra Club Statement at Public Hearings on Proposed Development of Mineral King Recreation Area, March 13, 1953. Dr. Leslie H. Gould: 'Mr. Chairman, Members of the Panel, and Ladies and Gentlemen: The Sierra Club was organized in 1892 to preserve and enjoy natural beauty. Its interest has been in the preservation and best use of wilderness areas. We are especially interested in the Mineral King development. We recognize that there is already a road into the Mineral King area, and therefore, we don't take any particular stand on this development, either in favor, or against it. We would, however, be satisfied with the development program, if it were to provide a sensible development, making skiing possible to more California residents, with the area easily accessible.'"

[112]"Mineral King--A Planned Recreation Development," p. 4. Emphasis in the original.

The Sierra Club version:

> The "hearing" chaired by Congressman Hagan in Visalia in 1953 was not a congressional hearing, but a chamber of commerce promotional meeting. No invitations were sent to conservationists. We are aware of no public hearing in which the advisability of the development of a commercial-recreational complex at Mineral King was the issue.[113]

In a confidential report prepared for the Forest Service in 1964,[114] the Conservation Committee of the Kern-Kaweah Chapter of the Sierra Club alerted the agency to the club's probable stance on any major development at Mineral King:

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[113]Sierra Club Executive Director Michael McCloskey, personal interview, San Francisco, Calif., Aug. 13, 1970; also, Affidavit of J. Michael McCloskey, Sierra Club v. Hickel, p. 3.

[114]"The Mineral King Basin--A Preliminary Report on the Character and Uses of this Portion of the Sierra Nevada, Tulare County, Calif." Members of the Sierra Club's Kern-Kaweah Chapter first sought Sierra Club and National Park Service support for the addition of the Mineral King area to Sequoia National Park, but were rebuffed at that time by both other Club chapters, particularly those in Southern California who saw a ski development at Mineral King as preferable to one carved out of the Congressionally classified San Gorgonio Wilderness (Michael McCloskey, personal interview, San Francisco, Calif., Aug. 14, 1970), and by John M. Davis, Superintendent, Sequoia and Kings Canyon National Parks, as in this personal letter from Davis to John L. Harper, Conservation Chairman, Kern-Kaweah Chapter, Sierra Club, Jan. 1, 1964:

"It would be unrealistic to suppose that Park status would eliminate this [ski development] potential. Considering all the economic benefits to these communities of such a winter sports area development, I feel sure that any proposals which would seem to postpone or hinder it would be sure to draw a great deal of heated protest from all our nearby communities."

When neither the Club nor the Park Service would support a drive for park status for Mineral King Valley,

> It is this committee's contention that Sierra Club policy, which fifteen years ago did not oppose in principle winter sports development of the Mineral King basin under Forest Service auspices, might today object to any but the most humble of skiing establishments there. For, as indicated by this report, any elaborate development would destroy presently available and sorely needed recreational, conservational, scenic, and educational values. . . . Skiers might instead look to Jordan Peak, twenty miles due south of Mineral King.[115]

The Sierra Club's policy-makers "agonized"[116] over which position they should take on Mineral King. At first the club appeared to have accepted the fact that extensive development at Mineral King was inevitable; initially it simply sought conferences with Forest Service officials to obtain agreement on "essential guidelines for the protection of certain scenic and recreational values. . . ."[117]

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the Kern-Kaweah Chapter turned to person-to-person diplomacy with local Forest Service officials to try to keep the adverse environmental impact of the proposed Mineral King resort development to a minimum (McCloskey, Aug. 14, 1970).

[115]Utilization of Jordan Peak, located near Camp Nelson in the Sequoia National Forest, as a ski resort would require the reconstruction of 5.2 miles of road.

[116]Michael McCloskey, personal interview, San Francisco, Calif., Aug. 14, 1970.

[117]Letter from John L. Harper, Chairman, Kern-Kaweah Chapter, Sierra Club, Bakersfield, Calif., to L. M. Whitfield, Forest Supervisor, Sequoia National Forest, Porterville, Calif., March 8, 1965: "On the past weekend I have met with the Executive Committee of the Board of Directors of Sierra Club in regard to the Mineral King situation. The Club is anxious to publicly reaffirm the stand which it took in 1949. . . . The official policy decision then, remaining unchanged for sixteen years, was to find no objection to the winter sports development at

Its Kern-Kaweah Chapter officers requested a Saturday (March 20, 1965) meeting with Sequoia Forest officers. Its national board of directors first sought to confer with Regional Forester Charles Connaughton, later appealed to Forest Service Chief Ed Cliff and Secretary of Agriculture Orville Freeman, and finally met, on October 22, 1965, with Assistant Secretary of Agriculture John Baker.[118] The Sierra Club board's objection was to the "quantum jump" in the size of the project.[119] It adopted a policy

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Mineral King as proposed by the U.S. Forest Service. It is the consensus of opinion of those entrusted with policy making today not to alter that stand but to implement it with a few very essential guidelines for the protection of certain scenic and recreational values in the basin and in adjoining portions of Sequoia National Park. Prior to resolving a modernized Mineral King policy, it is felt that discussions with Forest Service officials about the basin's future would be fruitful. The local Chapter would appreciate an opportunity to confer with you, while certain Sierra Club Directors will contact Regional Forester Connaughton and his staff. Although we fully realize that the Forest Service normally does not conduct business on weekends, a Kern-Kaweah Chapter committee of five or so could best visit your office on a Saturday, at your convenience. At this point, Saturday, March 20, appears to be best suited for us. Please consider this proposal and notify us as to your desires in the matter. I am confident that better understanding and further good will can be realized from such a meeting. Thank you for the attention to our inquiries and request for a Mineral King prospectus. We were pleased at the abundance of thoughtful specifications spelled out by the prospectus. Any developer--Robert Brandt, W. E. Disney, Inc., or whosoever--evidently will be quite restrained from unwise development practice."

[118]Michael McCloskey, personal interview, San Francisco, Calif., Aug. 13, 1970.

[119]Ibid. Robert W. Jasperson, General Counsel, Conservation Law Society of America, San Francisco, Calif., personal interview, Aug. 13, 1970: "The original Sierra

opposing the February 1965 prospectus at its May 1-2, 1965 meeting, knowing that if it remained silent then but decided later to sue, it could be accused in court of "laches"--sleeping on its rights.[120] The new position of the Sierra Club was conveyed in a letter from Club President William E. Siri to Regional Forester Connaughton on June 7, 1965:

> At the most recent meeting of our Board of Directors, the following resolution was adopted:
>
> "The Sierra Club opposes any recreational development in the Mineral King Area as contemplated in the Forest Service 'Prospectus for a Proposed Recreational Development at Mineral King in Sequoia National Forest' dated February 1965.
>
> "The Sierra Club requests the Forest Service to conduct a public hearing on its management plan for the Mineral King Area and access roads contemplated; further the Sierra Club informs the Forest Service of its support of the primitive aspects of the Mineral King valley and the fragile ecological values of the

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Club position regarding the development of Mineral King was based on the old small-scale development concept; its new position was based on the magnitude of the Disney project. Many Sierra Club members wouldn't mind a modest ski resort in Mineral King."

[120] Ibid. Richard Leonard, Sierra Club board member, personal interview San Francisco, Calif., Aug. 13, 1970: "The board's vote was split, 10-5, with the past presidents [including Leonard] voting against changing the club's position on Mineral King; the majority felt that changing circumstances--decreasing wilderness, increasing population--called for a changed policy." George Marshall, former Sierra Club president, personal interview, Los Angeles, Calif., Aug. 18, 1970: "In 1949, the Sierra Club was interested only in parks and wilderness areas; the whole land use problem was taken into consideration later [in 1965]."

timberline zone surrounding it; and further the Sierra Club requests that no action be taken on any bid or bids submitted pursuant to the Forest Service Prospectus until after public hearings."

We realize that it would have been much more timely to have conveyed this viewpoint to you four months ago and perhaps even two years ago. However, our consideration of policy for the future of Mineral King has been long in gestation. For over two years, our chapters, our conservation committees, and officers have been deliberating on the matter. Though we knew your plans were well advanced, we were nevertheless concerned about the narrowing options left open to us in commenting on your plans.

On May 1-2 our Board of Directors considered the question exhaustively. When weighed against our long-standing principles of favoring the protection of fragile and scenic areas and safeguarding national parks against destructive intrusions (as re-construction of the access road would be), there could be little doubt that we had to oppose major commercialization and development of Mineral King. Though we are anxious to promote skiing and do not object to properly located developments throughout the west [ten areas cited], we cannot condone the sacrifice of fragile wilderness areas to large-scale developments.

We are also deeply concerned about the effect that a re-constructed access road would have on Sequoia National Park. We fear that re-construction would require the removal of many large sequoia trees and mutilation of canyon walls.

In view of the serious effects we believe a winter sports development at Mineral King would have, we urge that a public hearing be held on the proposal for converting the primitive, one-time mining camp into a modern ski resort before any development occurs. Only through a hearing and public discussion can a proper judgment be formed about what should be done at Mineral King.

Dr. Siri's letter to Connaughton was followed by a press release issued by the Sierra Club's Mills Tower staff, dated June 10, 1965, which announced that "[t]he Sierra Club today asked the Forest Service to hold a public

hearing on its management plan for the Mineral King area," urged that "no action be taken on any bids which are submitted until a hearing is held," and "expressed particular concern about crowding too much development and too many people into a fragile and relatively confined timber line area." Regional Forester Charles A. Connaughton's July 1, 1965 response to Dr. Siri's June 7 request was negative:

> As some of your Board know, the recreation development of Mineral King has been foremost in Forest Service planning since before 1949, when the first development prospectus was issued. At that time no bids were received. On March 13, 1963 [sic; actually 1953] Congressman Hagen conducted a public hearing in Visalia to determine what could be done to expedite development. We have the record of this hearing and it discloses no opposition.
>
> Subsequently, the Sequoia National Forest incorporated winter recreation development of this area as a major feature of a multiple use plan which was prepared months ago [date of its approval at Regional Office level: June 25, 1965]. Recently a prospectus has been issued inviting bids for development. Prior to issuance of this latest prospectus all public agencies which mightbe affected were consulted, including the National Park Service. Their concurrence was obtained. Consultation on this matter with representatives of the Sierra Club has taken place at intervals, as many of your members know. I outline these deliberations and actions merely to indicate the widespread consideration which has been involved in relation to Mineral King development.
>
> I know the Sierra Club is well aware of the public demand for additional ski areas, particularly tributary to the southern portion of California. Mineral King development is a real step ahead in supplying this need. Plans for the development are well known and of long standing. Our prospectus was issued soliciting bids under certain conditions. To hold another public hearing at this stage would not be consistent with the long standing situation or current action in relation to the prospectus. [Emphasis added.]

> Under the circumstances we regret that we cannot accede to your request for a hearing. I am sorry that in this instance the Directors of the Sierra Club may be in disagreement with our program and procedure. Whether or not any development as a result of the present prospectus will occur, can't be predicted with accuracy at this point.

A key document firming up Sierra Club opposition to the proposed development of Mineral King was the "Report on Mineral King" submitted to the club's staff on July 24, 1965 by Frederick Eissler, a club board member from Santa Barbara, California. A fourteen-page, single-spaced, typed account of the Eissler family's July 8-17, 1965 vacation camping trip to Mineral King Valley (during which time Eissler talked with several concerned individuals including Sequoia National Forest and Sequoia National Park personnel and Kern-Kaweah Chapter Chairman John Harper), this compilation of personal observations, plus notes from the reports of others, included these highlights:

> (1) . . . Mineral King and environs are unique. They are unlike any other roadhead that we have ever visited. Where else in the Sierra does a primitive road reach to the headwaters of a major river? Where else does a road provide such direct access to so many alpine passes? Yet the two mile long valley is essentially unspoiled. . . .
>
> (2) The Mineral King road is much more primitive than we had ever realized. . . . No doubt the condition of the road has been the principal restrictive factor in controlling public visitation to Mineral King, which for this reason retains its pristine quality.
>
> (3) All the evidence indicates that a ski development would completely destroy the uniqueness of Mineral

King and a large area adjoining it. . . . Where else in the Sierra would a modern twenty-five mile highway lunging into the heart of the back country be acceptable? Presumably the answer is nowhere and since Mineral King is superior to many Sierra regions, I would say definitely not here. . . . [The existing structures in Mineral King Valley] almost appear to be as much a part of the scene as the weathered snags and could be blown over by the same wind. It would not take much energy to remove this infinitesimal commercialization from the area. . . .

(4) Mineral King deserves to be spared from commercialization for its own sake. . . . [T]he Mineral King issue must be considered as one of the highest priority conservation problems faced by the club. . . . For more than two and a half years, the Kern-Kaweah Chapter has been urging dramatic action by the club to preserve Mineral King. Although club tardiness in recognizing this issue can be explained by the nature of a volunteer organization and by other factors that can be defined only at some length, we still have the effective opportunity to save Mineral King and the wide circumference of adjoining wilderness if we act with conviction, the full force of all our weapons, and our coordinated strength to protect the region from the impact of commercialization.[121]

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[121]Also described in this thorough "layman's" report: the three alternative routes into Mineral King considered at the 1953 Tulare County hearing; the Sequoia National Forest's Transportation Master Plan which included a timber access road to be built to a point five miles south of Farewell Gap, within the proposed Golden Trout Wilderness; the Department of the Interior's proposal for a Kern River Parkway over Farewell Gap; and plans for ski resort development at nearby Jordan Peak. Other Eissler suggestions:

"Mineral King is a unique watershed area, a completely visible and readily accessible headwater system of a major river. The East Fork of the Kaweah along with other branches in the Kaweah headwater systems might well be considered for some type of wild rivers protection. . . .

"Recreationists will have the extra jump on the back country offered by the lifts and with increased accessibility via a new road greater human impact can be expected on the ecology of the southern Sierra served by Mineral King trail heads. . . . Certainly the unspoiled

As of August 7, 1965, the Sierra Club was hoping (1) that a representative of its Kern-Kaweah Chapter might be appointed by the Forest Service to an advisory committee to help select the successful Mineral King permit applicant and (2) that if, under the terms of the preliminary permit, all the permittee's rights expired at the end of a thirty-six-month period if road construction had not begun, the Forest Service would have to issue another revised prospectus which would "offer another opportunity for public

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natural beauty of an unusual area would be destroyed. The assistant superintendent of Sequoia National Park said that a road to Mineral King would increase use tenfold in the southern part of the park, one of the heavy use areas already and the Park Service would have very little control over the visitation. Impact studies recently completed by the Sequoia-Kings Canyon National Park indicate the severity of overuse already evident in certain sections of this region. . . .

"Transfer of Mineral King to Sequoia National Park. . . . Mineral King is certainly of park quality. It lies within two arms of Sequoia-Kings National Park territory. The Game Refuge is virtually a park classification with its prohibitions on hunting, grazing and mineral entry. . . .

"Secretary Udall, Senators and Congressmen and whomever also we can mobilize in Washington should be urged to give maximum protection for the Mineral King Game Refuge. State Senator Farr of the Senate Natural Resources Committee, Assemblyman Z'berg of the comparable Assembly Committee might be encouraged to hold hearings on the subject if and when we consider this action appropriate. I can contact Senator Weingand and Assemblyman Shoemaker who are our local representatives on these respective committees. Members of comparable committees in Washington having authority in these matters might be consulted. . . . The Federal Fish and Wildlife Service should be notified. . . ."

opinion to express itself."[122] Sierra Club staff members met with representatives of the Forest Service to discuss Mineral King plans and possible alternatives but were dissatisfied with the agency's response to their pleadings.[123]

The Sierra Club then sought the introduction and passage of federal legislation to expand Sequoia and Kings Canyon National Parks again to include Mineral King Valley in Sequoia National Park's statutory boundaries.[124] A Club press release dated September 14, 1965 stated:

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[122]Memorandum from J. M. McCloskey, Assistant to the President, Sierra Club to John Harper, Chairman, Kern-Kaweah Chapter, Aug. 7, 1965.

[123]Michael McCloskey, personal interview, San Francisco, Calif., Aug. 15, 1970: "Asking the Forest Service for mitigation doesn't get you the time of day. Creative conflict [litigation] is the only way to stop the Forest Service." Robert Jasperson, personal interview, San Francisco, Calif., Aug. 13, 1970: "My role [in the Mineral King controversy] began when McCloskey had just about given up on getting cooperation out of the Forest Service. Mike kept plugging away with the Forest Service, trying to see their plans [etc., but was unable to feel he had made any progress with them]."

[124]Public Law 89-111 of Aug. 6, 1965 had added the Tehipite Valley and Cedar Grove areas, formerly national forest lands, to Kings Canyon National Park, which is administered with Sequoia National Park as a single unit by the National Park Service.

Michael McCloskey, personal letter, Sept. 7, 1972: "At [the Sept. 11-12, 1965,] meeting [of the Sierra Club's Board of Directors] we went well beyond the May 1 and 2 [1965] policy statement, in opposition to the February prospectus, and decided instead to seek transfer of the area into the national park. This was the meeting when the line of irreconcilable difference was drawn with the Forest Service."

> The Sierra Club is asking that an area in the Sierra proposed as a site for a ski development be added to Sequoia National Park instead. At a meeting of the club's Board of Directors September 11-12, the club re-affirmed its opposition to Forest Service plans to have a private developer construct a skiing resort in the Mineral King Game Refuge of the Sequoia National Forest east of Visalia. The Club said the area is logically a part of Sequoia National Park and is too important to be spoiled with massive development.

Many observers thought that the Sierra Club would concentrate on this project rather than go to court to stop the Disney project because of the club's history of legislative successes in Washington (e.g., "saving" the Grand Canyon and establishing the Redwood and North Cascades national parks).[125] The vehicle for the Club's add-Mineral-King-to-Sequoia-Park campaign became H.R. 9626, introduced on May 3, 1967, by Rep. Phillip Burton of San Francisco.[126]

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[125] According to Russell J. Mays, USDA Office of General Counsel, personal interview, San Francisco, Calif., Aug. 14, 1970.

[126] See p. 203, supra. Similar bills have been introduced in succeeding Congresses, none of which have reached the subcommittee hearing stage. They include H.R. 6596, introduced on March 23, 1971, by Rep. Ronald V. Dellums of Oakland, Calif.; H.R. 13000, introduced on Feb. 7, 1972, by Rep. Robert A. Roe of Paterson, N.J. (Commissioner of Conservation and Economic Development for the State of New Jersey, 1963-1969); and H.R. 16331, introduced on Aug. 11, 1972, by Rep. Jerome R. Waldie of Antioch, Contra Costa County, Calif., the text of which is as follows:

"H.R. 16331. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"Section 1. For the purpose of protecting its scenic and natural values and to prevent commercial exploitation, the Sequoia National Game Refuge . . . shall become

Sierra Club publicity in support of this legislation included a Los Padres (Santa Barbara) Chapter mailer dated June 1967 which quoted Sierra Club Conservation Director Mike McCloskey as saying,

> On planning grounds alone we think it is horrendous to put 2.5 million people into this small and essentially unmarred area at the head of a 25-mile dead-end road. It could be another Yosemite Valley all over again or worse.

The Los Padres Chapter mailer also questioned the resort development's financing:

> To obtain a 30-year lease on Mineral King, the Disney interests must raise funds for a new 25-mile highway to the proposed resort. The state is being asked to provide much of the costs. It is incongruous, the club believes, for the state to make a $20 million gift for a private venture when the California [Reagan] administration has cut the State Parks and Recreation budget for 1967-68 from $33 million to $1 million. Counties are increasingly disturbed that Disney allocations would deprive them of desperately needed support for essential urban highways and rapid transit.

The mailer concluded by urging recipients to (1) ask their state legislators to remove the Mineral King road from the state highway system, (2) encourage Interior Secretary

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part of the Sequoia National Park. The Secretary of the Interior is authorized to establish the new area of Sequoia National Park and the Secretary of Agriculture is authorized to transfer any areas that may fall within the jurisdiction to the park, which shall become effective upon publication thereof in the Federal Register. [Emphasis added.]

"Sec. 2. Nothing herein shall terminate or impair any private right in permits or property in this area.

"Sec. 3. Section 45a-3, 688, 689a-c, title 16 of the United States Code are hereby repealed."

Udall to oppose construction of a new road through Sequoia National Park, and (3) support Rep. Burton's bill to add Mineral King to Sequoia National Park by urging their Congressmen to seek its passage.

Summing up the position of the Club on the project in a memorandum entitled "Critique of the Mineral King Project and of Road Reconstruction" dated May 5, 1967, Conservation Director Michael McCloskey stated:

> I. The project is poorly conceived . . . too big . . . 16,000 persons within the narrow 300 acre valley bottom . . . a population density . . . more than the density of New York City . . . too many cars . . . 9850 . . . on peak summer weekends . . . the access road will be choked . . . roadways would inflict major scars on the steep granitic soils of Sequoia National Park. . . .
>
> II. The project was not planned with the protection of Sequoia National Park in mind.
>
> III. The project is forcing an undue financial burden upon the state . . . at the expense of other urgent highway projects. . . . Shouldn't the beneficiaries of this project pay for the road? . . . Other modes of access would be less destructive and would place the financial burden where it belongs. . . .

At the root of the club's frustration was its feeling that, as the organization which had done so much in the past to achieve protection of the Sierra Nevada through establishment of the national parks and forest reserves, it had been improperly left out of recent decisionmaking regarding the future of Mineral King. This frustration was evident in McCloskey's November 3, 1965 telegram to Secretary of Agriculture Orville Freeman:

> Your press release of October 27 regarding development of a ski resort in the Mineral King area of California has just come to our attention. Sierra Club is disturbed at implication in the release that a decision has definitely been made to go ahead and grant a permit to one of the bidders. At October 22 meeting with Assistant Secretary John Baker we were lead to understand that the question of whether to go ahead with development was still an open question, as well as the question of to whom a bid might be awarded if the decision were made to go ahead.
>
> Decision to go ahead raises disquieting questions about the Department's policies of providing for public participation in the decisionmaking process. The Department has represented that it is its policy to hold public hearings in advance of decisions on matters of significant public interest. Surely if there were ever such a matter, this is it. [Emphasis added.]
>
> The question is significant for three reasons. One, land use patterns of a fragile area with a special legislative history similar to the park that surrounds it are being drastically changed. Visitor densities up to 14,000 persons per day are being invited. Two, great sums of money for competing plans and concepts are at stake, involving perhaps $40 million, with possible public obligations involved as well. Three, Administration proposals for the area have been withheld from the broad public until lines of commitments were already undertaken.
>
> These commitments are still not irrevocable. The public has a right to know and express itself before such critical decisions are made. If hearings are not held on questions as momentous as the future of Mineral King, then there is little hope that they will be held on other questions too. A matter of principle is at stake: The public's right to be heard at the right time and before the right forum. We are looking to you to honor this principle. [Emphasis added.]

The Sierra Club had not "waited and watched"[127] or "slept on [its] rights"[128] without seeking relief. As its

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[127] See Chapter III, pp. 41-46, supra.

[128] Pennsylvania Environmental Council v. Bartlett, 315 F.Supp. 238 (1970), at 246.

June 1969 brief argued, it had indeed "made every reasonable effort to obtain effective participation in the administrative process and to obtain reconsideration of the agencies' conclusions, all without success."[129] Its suit had been filed within six months of the formal announcement of the size of the proposed development and before any construction contracts had been awarded. "Laches," in this case, was an unsuccessful defense.

The "Merits" of the Plaintiff's Allegations

Mr. Justice Stewart, in a footnote to the Supreme Court's April 1972 opinion, summarized the violations of law alleged by the Sierra Club:

> As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special use permit for construction of the resort exceeded the maximum acreage limitation placed upon such permits by 16 U.S.C. Sec. 497, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park in alleged violation of 16 U.S.C. Sec. 1, and that it would destroy timber and other natural resources protected by 16 U.S.C. Secs. 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U.S.C. Sec. 45c requires specific congressional

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[129] Memorandum of Points and Authorities in Support of Motion for Injunction, June 5, 1969, p. 11.

> authorization of a permit for construction of a power transmission line within the limits of a national park.[130]

That was as far as the Supreme Court majority took their discussion of the"merits" of the Sierra Club's case.[131] What are interesting to compare are the tentative findings of the District Court and the Court of Appeals on the merits--despite the absence of a trial on the merits. Issue by issue, these are the contrasting positions of Judge Sweigert and the appellate panel, preceded by the plaintiff's allegation and the defendant's rebuttal:

(1) The combination special use permit-revocable use permit question. Plaintiff's allegations: "The permits to be granted by the Forest Service are in excess of its jurisdiction and in violation of law."

> If the Forest Service is allowed to proceed as threatened, Developer will receive a 30-year term permit for the construction and maintenance of a "resort and associated structures and facilities" on substantially more than the 80 acres authorized by Congress. While economics may dictate this result, the law does not permit it.[132] [The issuing of such permits would be:]

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[130] 92 S.Ct. 1361, at 1364.

[131] "[W]e intimate no view on the merits of the complaint." 92 S.Ct. 1361, at 1369. But see, dissents of Justices Douglas and Blackmun, ibid., at 1369-1378.

[132] Memorandum of Points and Authorities in Support of Motion for Injunction, pp. 22-23. At pp. 19-21, this brief states:

"Despite the clear congressional limitation of 30-year term permits to 80 acres, the Forest Service, acting

> (a) in violation of the provisions of the Act of March 4, 1915, as amended July 28, 1956 (38 Stat. 1101, 70 Stat. 708; 16 USC 497) which limits the size, terms and manner of occupation of lands for resorts and associated facilities in the national forests and which is far exceeded by the subject development; [and]
>
> (b) in violation of the provisions of the Act of June 4, 1897, as amended (30 Stat. 35, 33 Stat. 628, 76 Stat. 1157 and 78 Stat. 745; 16 USC 551); regarding the permit power of the Secretary of Agriculture, which has been and will be exceeded.[133]

Counsel for the plaintiff questioned the "revocable" nature of the so-called revocable permit:

> Once the blasting, grooming, and manicuring of slopes has been accomplished, once cement footing and foundations have been imbedded for ski lifts, and once sewage plants and avalanche dams have been constructed, the ecology of Mineral King will be altered for all time, and the land, as well as its marvelous flora and

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on behalf of the Secretary of Agriculture, nevertheless intends to authorize the construction and development of 'structures' and 'facilities' by means of a so-called 'annual' or 'revocable' special use permit; these by its own admission include ski lifts and towers and other 'major' improvements, will directly affect another 300 acres and will involve all 13,000 acres. The Forest Service's own directives including its Manual, while acknowledging that these 'annual' permits are 'generally for use of short duration,' also states 'They will be limited to the time actually needed for exercising the use privileges.' (F.S.M. 2711.2-5 [October 1968, Amendment No. 12]). Here obviously the 'time actually needed' is at least 30 years. While the 'annual' permit purports to be terminable or revocable, we will demonstrate that it is not. The Forest Service is thus attempting to do indirectly what it cannot do directly. It is a clear and patent effort to circumvent the 80-acre limitation of 16 U.S.C. 497. . . . The entire project is so interwoven, so interlocking, that any so-called 'annual' or 'revocable' use permit is for all practical and legal purposes a grant of 13,000 acres for 30 years."

[133]Complaint, pp. 4-5.

> fauna, can never be returned to their present untrammelled state. . . . To claim that ski lifts and runs are incidental to a ski resort is like claiming that a golf course is incidental to the clubhouse and locker-room. . . . Congress has made clear its intention that 'facilities' be located within 80 acres.[134]

Defendants' answer:

> The United States intends to proceed with the development of this recreational area by issuing to the successful applicant, Walt Disney Productions, a term permit . . . for a period of 30 years [to] cover winter and summer recreation improvements to be constructed, operated and maintained on approximately 60 acres of land in the Sequoia National Forest . . . [and] a revocable special use permit . . . to develop and maintain ski slopes, trails, roads and similar uses in conjunction with the facilities and improvements authorized by the term permit. The revocable permit will cover approximately 1,000 acres.[135]

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[134]Brief for Appellees, p. 31. Related comments by plaintiff's counsel:

Robert W. Jasperson, General Counsel, The Conservation Law Society of America, San Francisco, Calif., personal interview, Aug. 13, 1970: "I did the early legal research on the case. When it appeared that we had a federal trial question, the firm of Feldman, Waldman and Kline was brought in because they were experienced in federal anti-trust suits and because a member of that firm, Lee Selna, had expressed interest in Mineral King. I remained on the case as an advisor. I'm not impressed with the 'right-to-a-high-quality-environment' approach; the Forest Service simply exceeded its statutory authority with regard to the eighty-acres-per-permittee limitation. It does not have the discretion to exceed eighty acres. Further, a non-park-oriented road in a national park is illegal. These points are germane only to this case."

Leland R. Selna, Jr., of the San Francisco law firm of Feldman, Waldman and Kline, chief counsel for the plaintiff, in oral argument before the Supreme Court, Nov. 17, 1971: "We are saying they could put up the darndest resort they could think of--Ferris wheels and all--but only on eighty acres."

[135]Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, pp. 3-4.

> As far as the Forest Service is concerned, plaintiff seems to base its whole case on the contention that the Secretary of Agriculture is without authority to issue both 80-acre, 30-year term permits under 16 U.S.C. Sec. 497 and revocable permits pursuant to 16 U.S.C. Sec. 551 in connection with the same project. In other words, plaintiff contends that because the revocable permits will cover ski runs in the mountains adjacent to the alpine village the ski run permits will not actually be revocable. This, of course, is not correct. . . . The Forest Service revocable special use permit authorizes only the use for which it is issued. The permittee will not have exclusive use of the land included.[136]
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> [W]e know of no case in which action taken by the Secretary [of Agriculture] in administering the national forests has been held to be illegal.[137]

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[136] Ibid., pp. 8-10. See, United States v. Grimaud, 220 U.S. 506 (1911); Light v. United States, 220 U.S. 523 (1911); McMichael v. United States, 355 F.2d 283 (C.A. 9, 1965).

[137] Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, p. 10. See, W. S. Davis, Affidavit, June 25, 1969, p. 5:

"That the proposed recreational development at Mineral King is not unique in combining a 30-year term permit for an aggregate acreage not to exceed the statutory limitation of eighty acres with terminable permits (for which there is no statutory limitation) [is shown by the fact that] there are now in the United States a total of at least 84 recreational developments on national forest lands in which there is such a combination of a 30-year term permit and terminable permits, and at least 15 of these are in the California Region of the Forest Service."

See also, Defendants' Reply Brief, filed with the Court of Appeals just prior to the February 9, 1970, hearing, for interesting examples of the use of "revocable special use permits," e.g., at p. 11:

"[T]wo ski resorts use public land under revocable special use permit only. The first is at Mount Snow in Green Mountain National Forest in New Hampshire. This represents a $2.9 million investment on 911 acres. The

The Far West Ski Association's amicus brief filed with the Court of Appeals cited, with reference to the agency's permit practice, the "Doctrine of Executive Construction" which asserts that if a branch of government is claiming the power to grant permits under existing legislation and if Congress does not amend the law to change the branch's practices, then Congress by implication approves of the practice.[138] The ski association saw in this suit a threat to all public land recreation development.[139]

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second in the Multiper Ski Bowl at Mount Hood National Forest in Oregon, where improvements in excess of $800,000 lie on 640 acres of public land. The Department [of Agriculture's] most recent use of a revocable special use permit was for an 802-acre, $75 million installation at the southern terminus of the Trans-Alaska pipeline containing 50 oil storage tanks, 300 feet in diameter. Since financing was no problem, the Department granted a minimal tenure to the permittee."

[138]Examples of the application of the "Doctrine of Executive Construction:

Universal Battery Co. v. U.S., 281 U.S. 580, at 583 (1929): "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong."

Gray v. Powell, 314 U.S. 402, at 412 (1941): "Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. . . . It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

Bowles v. Seminole Rock Co., 325 U.S. 410, at 413-14 (1944): "Since this involves an interpretation of an

The District Court's opinion:

> It is clear from the legislative history that the 80 acre limitation on [term permits for] hotels and resorts was intended to include, not only the resort or hotel, itself, but also any and all structures or facilities related to it, e.g., "elbow room" for ski lifts and other related service facilities. . . . The question arises whether this dual permit device is intended to circumvent the clear 80 acre limitation of Section 497 [of Title 16 U.S. Code] and thereby accomplish what would be in effect a violation of the section. . . . So far as so-called "revocable" permits are concerned, Congress has never expressly authorized them. Agriculture claims authorization for them only under its general power to so regulate the forest lands as

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administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter." (Emphasis added.)

Unemployment Comm'n v. Aragon, 329 U.S. 143, at 153-154 (1946): "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.' Labor Board v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944); Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939).

Power Reactor Co. v. Electricians, 367 U.S. 396, at 408-409 (1960): "We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision. Particularly is this respect due when the administrative practice at stake 'involves a

"to preserve the forests thereon from destruction" (16 U.S.C. Sec. 551) and under an Attorney General's Opinion of 1928 (35 Op. A.G. 485 [11/27/28]). That opinion, while recognizing an implied power to issue them, narrowly restricts their use to situations in which such a permit is (1) made expressly revocable at will by its terms, and (2) the permitted structures are capable of being removed in case of revocation, and (3) the permitted use will not permanently damage or destroy the land for government use, and (4) the permitted use will be of direct benefit to the United States. It is questionable whether the so-called "revocable" permits to be used by Agriculture in the present case meet the strict standards prescribed by the Attorney General. . . . [T]he uses granted to the Developer by the two purportedly separate permits admittedly relate to a single, unified project and are

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contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). And finally, and perhaps demanding particular weight, this construction has been brought to the attention of the Joint Committee of Congress on Atomic Energy. . . . No change in this procedure has ever been suggested by this Committee. . . . It may often be shaky business to attribute significance to the inaction of Congress, but under these circumstances . . . we think it fair to read this history as a de facto acquiescence in and ratification of the Commission's licensing procedure by Congress. Cf., e.g., Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 292-294 (1958); Brooks v. Dewar, 313 U.S. 354, 360-361 (1941)." (Emphasis added.)

Boesche v. Udall, 373 U.S. 472, at 482-483 (1962): "From the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question here, and Congress has never interfered with its exercise. . . . Although the Act . . . has been amended a dozen times in the last 40 years, Congress has never interfered with this long-continued administrative practice. The conclusion is plain that Congress, if it did not ratify the Secretary's conduct, at least did not regard it as inconsistent with the Mineral Leasing Act."

Udall v. Tallman, 380 U.S. 1, at 16 (1964): "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

> obviously interlocked and interrelated. . . . [W]e conclude that the proposal of Agriculture in the pending case, if carried out, may involve a violation not only of the letter, but also the purpose and intent of Section 497 so far as its 80 acre limitation is concerned. . . .[140]

The contrary opinion of the Court of Appeals for the Ninth Circuit, which appears to be based in large measure on an acceptance of the "Doctrine of Executive Construction":

> The court below has understandably relied upon the authority of the opinion of the Attorney General to the Secretary of War, 35 Op.Att'y.Gen. (1928). That opinion is the basis for the court's discussion of the necessity that a revocable permit be terminable "at will" and that therefore this permit is not properly issued. We have found no such limitation apart from this Attorney General's opinion. The same erroneous premise results in the district court's concern about the removability of any improvements placed upon the land covered by the revocable permit. It is at the bottom of the district court's conclusion that a combination of a term permit and a revocable permit may be an impermissible and unlawful exercise of administrative authority. Beginning from a correct premise that the revocable permit is an approved device for forest management under Congressional mandate from the Attorney General, the Supreme Court and the Congress, we believe an entirely different conclusion would have been reached. The fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which

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[139] See, "Mineral King: Court Action Threatens All Recreation Development on Public Lands," Western Ski Time, Oct. 1969, p. 15: "[I]t is very likely that practically all existing permits for ski lifts and runs on public land will be invalidated, or at least endangered [if the Sierra Club wins this suit]." See also, J. H. Auran, "Defend Your Right to Ski," Skiing, Oct. 1969, pp. 62-78.

[140] Memorandum of Decision, pp. 3-6. Emphasis added.

there is such a combination of the term permit and the revokable permit is convincing proof of their legality.

. . . The planned development in the instant case discloses that most major improvements are to be located upon lands held under the eighty-acre term permits while lifts and trails will be installed "throughout about 13,000 acres." Evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features appears throughout the planning reports attached as exhibit. We find little or no likelihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits.[141]

(2) The highway-construction permit question.

Plaintiff's allegations:

The approval of the routing of said access road and the impending issuance of authorization for rights-of-way, construction, and operation of said road and the acts of defendants HICKEL and McLAUGHLIN in connection therewith are in excess of their statutory jurisdiction, authority and limitations, are not in accordance with law, are arbitrary, capricious and constitute an abuse of discretion in that (among other things) the described acts are:

(a) in violation of the provisions of the Act of August 25, 1916, as amended (39 Stat. 535, as amended; 16 USC 1) which prohibits uses of the national parks which do not conform to the fundamental purposes of said parks;

(b) in violation of the provisions of the Act of September 25, 1890 (26 Stat. 478, 16 USC 41 and 43), establishing Sequoia National Park as a public park and imposing the duty upon the Secretary for the "preservation from injury of all timber, natural curiosities or wonders within said park, and their retention in their natural conditions";

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[141] 433 F.2d 24, at 35. Emphasis added.

> (d) in violation of Park Service rules and regulations, and fundamental principles of administrative law, in that defendants HICKEL and McLAUGHLIN have acted without due consideration of the factors which they are required by law to consider in reaching a decision upon whether an enlarged road across Sequoia National Park should be permitted for purposes not benefitting that Park, and, if so, what type of road should be permitted. . . .[142]

The plaintiff objected to the authorization by the Secretary of the Interior of a high standard highway across Sequoia National Park to serve a private development outside its boundaries, citing both the National Park Service organic act of August 25, 1916 (39 Stat. 535) and the Park Road Standards Committee Report implemented by the Secretary of the Interior on April 11, 1968[143] as prohibiting the construction of such non-park-purpose "connecting links."

Defendants' answer: The Department of the Interior "will issue" a permit to construct a road over Sequoia National Park to the State of California to provide access to Mineral King.[144] As far as the National Park Service

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[142]Complaint, p. 5.

[143]"These park road standards read in part as follows: '. . . Park roads are not continuations of the State and Federal network. They should neither be designed --nor designated--to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations. Within parks, no road or other circulation system should be designed simply as a connecting device to link points of interest . . .'" Plaintiff's Memorandum of Points and Authorities, p. 28.

[144]Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, p. 4.

is concerned, the defendants observed that no statutory inhibition on the Secretary of the Interior's general authority to issue road permits exists which would preclude granting permission for the construction of a road to serve a recreational area on adjoining national forest land "and no reason exists for judicial creation of such an inhibition":

> [T]he question of whether the Secretary should or should not grant a particular road permit over the national parks does not involve any issue of legality or illegality but merely one of discretion--and one where even the Secretary's motive would not create a basis for judicial review.[145]
>
> . . . [I]t is obvious that parks cannot be enjoyed by a large number of people without some sort of road system. . . . [T]he benefits of the road to the general public justify its construction as well as the conclusion that this national park segment should not be permitted to blockade public use of the adjoining forest lands. . . .[146]

The District Court's decision:

> In the present case the record shows that the proposed highway, so far as it will cut through Sequoia National Park, is designed and intended, not as an adjunct to the National Park, itself, but as a connecting link to route motorists through the Park to reach an ultimate destination outside the Park--the proposed, private Mineral King resort-hotel complex in the adjoining forest game refuge area. Thus, the question arises whether the particular highway here in question is fairly within the power of Interior as interpreted by its own standards.[147]

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[145] Ibid., pp. 13-14.

[146] Ibid., p. 15.

[147] Memorandum of Decision, p. 8. Emphasis added.

The appellate panel's conclusion:

> No cases have been cited to illustrate the alleged impropriety of this permit to cross 9.2 miles of national park lands in the twenty mile route from Three Rivers to Mineral King which traverses the same park. . . . The proposed road follows the alignment of the old road to some extent and substantially parallels it in others. The record shows a great deal of concern in its planning for preservation of aesthetic and ecological values. . . .
>
> No question is raised as to the wide discretion given to the Secretary of the Interior in managing national parks to construct and improve roads and trails therein. See 16 U.S.C. Sec. 8. We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway along a new but approximately parallel alignment is illegal. No authorities have been cited in support of such a position. We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality.[148]

(3) The failure-to-hold-public-hearings question.

Plaintiff's specific allegations and defendants' answer with respect to alleged public hearing requirements already have been described in the context of a discussion of the Sierra Club's exhaustion of its administrative remedies, at page 244, supra. The courts' opinions have not been reported, however; they were as follows:

The District Court:

> Whether Forestry Service [sic] was required by law to hold such hearings is not clear. As to Interior, however, plaintiffs contend that it has violated its own rule (34 Fed. Reg. 19 [1/29/69]), calling for both

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[148] 433 F.2d 24, at 36. Emphasis added.

corridor and design public hearings with respect to any major road project that would have a substantial social, economic or environmental effect. . . .

Thus, there is presented the further question whether repeal, without general notice, of the pre-existing rule calling for public hearing concerning major road projects having substantial, social, economic or environmental effects, is a mere rule of procedure, practice or policy and, if not, whether Interior was required by its own rule to conduct public hearings on the highway in question.[149]

The Court of Appeals:

It does appear . . . that there was a hearing on this project in 1953. It also appears that there was a public hearing on August 10, 1967 . . . held by the California Division of Highway which . . . was working closely with Agriculture and Interior. . . . The Sierra Club was present. . . . The matter of public hearings cannot be considered a substantial factor in this proceeding.[150]

(4) The power line transmission permit question.

Plaintiff's allegation:

[I]t appears that Developer proposes to meet its power requirements at Mineral King by means of a transmission line crossing the Park in the vicinity of the proposed road. Congressional authority for such a line is required. (Emphasis in the original.) (16 U.S.C. Sec. 45c) We ask whether it is in the public interest to permit the other phases of the proposed development to go forward and, in so doing, to permanently scar the landscape before Congress permits such a transmission line. Certainly Congress should not be asked for its approval after the investment is made and the damage done. The conservation purposes of the law are thwarted if Congress is presented with a fait accompli and asked to approve the furnishing of a final ingredient.[151]

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[149] Memorandum of Decision, pp. 10-11. Emphasis added.

[150] 433 F.2d 24, at 37. Emphasis added.

[151] Memorandum of Points and Authorities in Support of Motion for Injunction, p. 30.

Defendant's answer:

> The National Park Service has never viewed the language of the [July 3,] 1926 Act [44 Stat. 818, 16 U.S.C. Sec. 45c] as precluding the Department of the Interior from granting rights-of-way across park lands for transmission and distribution lines.[152]

The District Court's finding:

> [T]here arises the further question concerning the power of Interior to permit the transmission line--absent specific authority from Congress.[153]

The Court of Appeals' finding:

> [W]e fail to find this a substantial issue upon which to base the grant of a preliminary injunction. It seems unlikely that the appellee could prevail as to such a contention. Under 16 U.S.C. Sec. 5 authority is clearly provided to the Department of the Interior in its management of parks to grant permits and easements for rights of way for "electrical poles and lines for the transmission and distribution of power." It is suggested, however, that under 16 U.S.C. Sec. 45(c) such a permit may not be issued without an act of Congress. . . .
>
> The Secretary contends that this section was intended to apply only to the construction and development of hydroelectric power projects and related facilities including power lines. In the context of 16 U.S.C. Sec. 5 and the unlikely intention to require an act of Congress for each electrical line within the park we accept the argument of the Secretary as convincing.[154]

In addition to these four categories of alleged violations listed in the Supreme Court opinion's footnote,

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[152]Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, p. 16.

[153]Memorandum of Decision, p. 9.

[154]433 F.2d 24, at 36-37. Emphasis added.

two other legal issues were in dispute initially, with a third, alleged violations of the National Environmental Policy Act, added in the Sierra Club's amended complaint:

(5) The meaning-of-game-refuge-status question.

Plaintiff's allegation: The acts of the Department of Agriculture defendants were illegal in that they were:

> . . . beyond the jurisdiction of the said defendants in that responsibility for conservation of game, birds and wildlife in Sequoia National Game Refuge and other such sanctuaries was transferred to the Secretary of the Interior by the Reorganization Act of 1939; (53 Stat. 1431, Ch. 193, Sec. 4; 53 Stat. 813), and in violation of the provisions of the Act of July 3, 1926 (P.L. 69-465, 1926 Stats. Ch. 744, Sec. 6) establishing the Sequoia National Game Refuge whose purposes are contravened by the subject development.[155]

The plaintiff's initial brief stated that "the proposed development is a use inconsistent with the status of Mineral King as a National Game Refuge" (citing a California Fish and Game Commission statement agreeing that "considerable wildlife habitat would be lost and wildlife would suffer from human encroachment") and also stated that "it is questionable whether the Forest Service has jurisdiction to grant the proposed permits," arguing that the Reorganization Act of 1939 transferred jurisdiction over the wildlife in the game refuge to the Secretary of the Interior.[156] The plaintiff's Brief for Appellee suggested:

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[155]Complaint, p. 5.

> If the responsible agency had found that Disney's "wonderland" was a use consistent with the purposes for which the Game Refuge was established, that finding would have been an abuse of discretion, and more than slightly embarrassing to articulate.[157]

According to the defendants' brief, the development of Mineral King as proposed by the Disney organization would not violate the Act of June 3, 1926 designating the area as a game refuge:

> [T]here is nothing in this Act which states that the area cannot be used for recreation. . . . The recreational use may bring more people to the area but none that are permitted to hunt, capture or kill [the wildlife].[158]

The District Court alluded to this issue only in passing. The Ninth Circuit Court of Appeals concluded:

> It has been suggested that this project would somehow interfere with the refuge and be in excess of authority. . . . We find no substance in this argument.[159]

(6) The due-consideration-of-all-factors question.

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[156]But see, Historical Note, at Title 16, U.S. Code Annotated, Sec. 685 (p. 83): "1939 Reorg. Plan No. II . . . transferred the Bureau of Biological Affairs from the Department of Agriculture to the Department of the Interior. The Wichita National Forest, which was then administered by that Bureau, was affected by the transfer. However, the Grand Canyon National Forest was administered by the Forest Service and was consequently not affected."

[157]Brief for Appellee, p. 51.

[158]Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, p. 12.

[159]433 F.2d 24, at 37.

Plaintiff's allegation: The Department of Agriculture defendants' acts were illegal in that they were:

> . . . in violation of Forest Service rules and regulations, and in violation of fundamental principles of administrative law in that it has acted without due consideration of the factors which it is required to consider in reaching a decision on whether Mineral King should be developed, or how it should be developed, for recreational purposes.[160] [For example,] the Forest Service has accepted the Developer's proposal without any relevant consideration of the impact of the contemplated development on the national game range, or of the adjacent Park, and with a bland acceptance of Developer's studies of avalanche hazard. . . . The Forest Service's own officials responsible for wildlife and range management are concerned about the absence of ecological studies and have expressed concern about the impact of the project on the area.[161]

The Sierra Club's original allegations, particularly with reference to the statute establishing the national game refuge, include references to how "incredible [it was] that there is no evidence of an attempt by the responsible agency to determine whether or not the proposed ski resort was a use inconsistent with the national game refuge" and to the "peculiar story which surrounds the development of Mineral King [which] is one of violation of law and the absence of the consideration of the public interest."[162] The chronology which follows summarizes the evidence of studies made and factors considered:

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[160] Complaint, p. 5.

[161] Memorandum of Points and Authorities in Support of Motion for Injunction, pp. 5-6.

[162] Ibid., p. 25.

In the 1930s and 1940s, studies to identify the skiing potential and winter-access alternatives were conducted.[163] They culminated in the distribution by the Forest Service in 1949 of the first development prospectus, to which no qualified applicants responded because of the winter-access problem. The campaign by Tulare County and Fresno County businessmen to get a new, all-weather access road built into Mineral King at public expense included a public meeting in Visalia in 1953 chaired by Congressman

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[163] E.g., L. J. Hasher and J. N. Gibson, "Mineral King Winter Survey, 1947-48," Forest Service, 1948; and, G. A. Henry, "Road Reconnaissance Report, Mineral King Area," Forest Service, July 1949. See, Michael McCloskey and Albert Hill, "Mineral King: Wilderness versus Mass Recreation in the Sierra," in Patient Earth, John Hart and Robert H. Socolow, eds. (New York: Holt, Rinehart, Winston, 1971), pp. 173-174: "The Forest Service has always assumed that development at Mineral King should be pushed, that it was in the public interest. Building a resort was the assigned mission. This assumption grew out of studies done in the 1930s and 1940s which identified the skiing potential of the area. Because of growing evidence that a ski resort could be developed, the Forest Service grew to believe that it should be. There was never an opportunity to test the hypothesis that 'what could be done, should be done.' Once the commitment to the mission became fixed with the Forest Service, anything that might call the decision into question was looked upon as an obstacle to be overcome. Justification studies were not done. Ecological studies were not done. Only snow and weather studies and development planning studies were done. These aided the project; the others might impede it. No judicious weighing process ever took place. By the 1940s the Forest Service had become committed, and it then became just a question of how to find the capital and the developer that would bring the project into being."

Sources of information on the "demand" for developed downhill skiing opportunities in Southern California in the 1960s include:

Harlan Hagen[164] and the passage by the California Senate in 1958 of a resolution requesting that a Mineral King access road feasibility study be made by the State Division of Highways.[165]

Wilfred S. (Slim) Davis, appointed Chief of the Division of Recreation for the California Region of the Forest Service in 1958, became aware of Walt Disney's interest in developing a ski resort on National Forest land in Southern California in 1960, and sought from that

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Kern Valley Sun, Sept. 7, 1967, p. 9: "[D]espite the fact that only one Californian in 100 goes skiing[, s]now skiers in the Golden State spent over $45 million in the winter of 1963-64, which was $18 million more than was spent in Colorado, the second highest state in both expenditures and mountain peaks."

"The Disney Mineral King Development: Its Impact on California," Walt Disney Productions, Burbank, Calif., May 1968, p. 2: "In the next ten years, western ski area attendance will more than triple. Since 1960, the number of skiers flocking to western slopes has increased an average of 20 percent per year. Lack of adequate snow areas and overnight accommodations severely limit winter sports activities for Southern Californians--60 percent of the State's population. On a per capita basis, those in the southern part of the state enjoy only one third as many days of skiing as Northern Californians."

John Henry Auran, America's Ski Book (New York: Scribner's, 1965), pp. 199-200: "Skiing in California is concentrated in two relatively small sections of the state. Within a hundred miles of Los Angeles, there is a cluster of about a dozen areas catering mostly to residents of that city. The other cluster is to be found in the Donner Pass-Lake Tahoe region. . . . About halfway between . . . is Mammoth Mountain. . . . In the south of the state snow is a highly unpredictable commodity. It may not come at all. . . . The skier who relies on Southern California snow must be both tolerant and patient."

Abby Rand, Ski North America: Your Guide to the Top 28 Resorts (Philadelphia: Lippincott, 1969), pp. 3,

time forward to "stimulate [Disney's] interest in the Mineral King area."[166] In 1965 this sequence of events took place: February--distribution of the new development prospectus.[167] April--Superintendent of Sequoia National Park registers mild concern regarding routing of new access road.[168] June--Walt Disney Productions employee Robert B. Hicks buys twenty-eight acres of privately owned land including Mineral King Village and deeds from eighteen owners.[169] June--multiple use plan for Mineral King

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157: "Most skiers would prefer to vacation in the Rockies. . . . The resorts along the Pacific Coast, from Garibaldi's Whistler up in British Columbia down to Mammoth Mountain in California, attract mostly those who live within 500 miles of each mecca. . . . Mammoth has all the famous characteristics of the Golden State: grandeur, exoticism, overpopulation, overcommutation, overabundance, sunshine and a bigness so big that the name Mammoth is understatement. Only in California would this repository on the east flank of the Sierras be considered 'close to Los Angeles.' It is a five-or-six-hour drive that thousands make every weekend. Mammoth's lift capacity of 11,000 per hour still is not enough to delete weekend jams of people for the parking lots and lower slopes and shelters."

U.S., Department of Agriculture, Forest Service, "Mineral King: A Planned Recreation Development," Feb. 1969, p. 7: "Why turn public property over for private profit [at Mineral King]? The public needs the development, almost desperately. We are confident that the [Mineral King] plan, when implemented, will assure that Mineral King will serve well the recreational needs of the many families of California and the Nation." (Emphasis added.)

Cf., Daniel E. Chappelle, "A Resource Economist Looks at Recreation Research," Department of Resource Development, Michigan State University, unpublished paper, n.d. (Feb. 1971), p. 5: "For some reason, recreation professionals seem to implicitly assume that the population's 'need' for recreation must be fully satisfied. This would seem to be a very heroic assumption and

Recreation Area approved. July--Governor Brown signs bill adding Mineral King access road to state highway system.[170] August--bids opened from "five qualified competitive proponents."[171] September--California Administrator of Resources registers mild concern regarding protection of Mineral King's scenic qualities.[172] December--Forest Service chooses the Walt Disney organization to develop Mineral King, granting it a three-year preliminary planning permit on January 10, 1966. At that point, planning for

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completely inconsistent with the way we view other goods and services in our economy--even food. Ask the hungry children of America whether this nation feels committed to fully satisfy their 'need' for food! The answer, of course, is that there is no commitment on the part of the nation to fully satisfy any 'need' of the population, whether that 'need' be classified as a necessity or a desirable."

[164]Charles A. Connaughton, Regional Forester, Forest Service, San Francisco, Calif., letter to Dr. William E. Siri, President, Sierra Club, San Francisco, Calif., July 1, 1965: "[T]he recreation development of Mineral King has been foremost in Forest Service planning since before 1949. . . . On March 13, 1963 [sic; 1953] Congressman Hagen conducted a public hearing in Visalia to determine what could be done to expedite development. . . ."

[165]P. J. Wyckoff, "Mineral King and Related Historical Chronology," Nov. 5, 1968, Forest Service, p. 2: The cost of such a road at that time was estimated to be four million dollars. The role of the leading businessmen of Tulare and Fresno counties in creating an atmosphere of support for the development of Mineral King during this period was described as follows by Maynard Munger, Jr., a Sierra Club board member (personal interview, Denver, Colo., Feb. 12, 1971):

"A key to the success of the local drive to escalate Mineral King into a national recreational priority was a group of horseback-riding companions from the financial 'establishments' of Fresno and Tulare counties who,

Mineral King seems to have been turned over--at least in large part--to Walt Disney Productions, according to a Forest Service brochure:

> As soon as Walt Disney Productions received its preliminary permit, it started an aggressive study and planning program. A permanent team was established in the valley, particularly to study its weather and snow patterns, and especially its avalanche hazards. Other teams of experts were sent to study successful ventures of a similar nature, not only in the United States, but all over the world. Conversely, many experts have been brought to Mineral King and to the Company's planning headquarters in Burbank. . . . In total, the

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after their first of many annual rides into Mineral King years ago, named themselves the Irascible Order of Soararsis. Congressmen, regional foresters, park superintendents and forest supervisors were invited to attend the convivial 'Soararsis' rides. When this politically potent group decided that a long-term public subsidy would be needed to make the Mineral King resort development 'go,' and help the region's economy grow, it campaigned in the Legislature to get the Mineral King access route included in the state highway system."

Public servants who shared this desire to see resort development at Mineral King go forward included:

Congressman Robert B. Mathias (Congressional Record, Jan. 22, 1970): "Only through completion of the Mineral King recreational area, with its new jobs and capital improvements at the gateway cities, can the county of Tulare hope to correct its present depressed economic condition. . . ."

Sequoia National Park Superintendent John M. Davis (letter to John L. Harper, Jan. 20, 1964): "Considering all the economic benefits to these communities of such a winter sports area development, I feel that any proposals which would seem to postpone or hinder it would be sure to draw a great deal of heated protest from all our nearby communities."

Sequoia National Forest Supervisor Lawrence M. Whitfield (Kern Valley Sun, Sept. 7, 1967, p. 9): "Whitfield sees the proposed development at Mineral King as a

> Company has spent over a half-million dollars in making basic studies, surveys, and planning efforts; all looking forward to determining how best to spend the $35.3 million it has committed itself to invest in developing the outdoor recreation potential of Mineral King.
>
> Concurrent with the beginning of the Company's planning effort, the Forest Service assigned an experienced recreation expert to work full time with the Company's planners [Peter J. Wyckoff]. He has had the assistance, when needed, of the full range of the Forest Service's technical support staff.[173]

This arrangement placed the day-to-day burden of "policing" the multi-million-dollar Disney operation on

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tremendous asset to California skiers and to the state's economy as well[, adding] that Mineral King will have price ranges to satisfy all pocketbooks, winter and summer."

Forest Service Chief Ed Cliff (Affidavit, Oct. 27, 1969): "[I]f Walt Disney withdraws, it will be many years before the combination of private and public endeavor, particularly the needed funding, could be brought together again to construct the access road and recreation facilities. The result could be that Mineral King will not be developed. Revenues through taxes and fees will be delayed a year as well as development and payrolls within the county--an area where this is sorely needed to bolster the local economy. The greatest loss will be suffered by the people of California and the Nation if they are, because of this action, denied the use of this recreation area."

[166]W. S. Davis, Affidavit, June 25, 1969: "I have been intimately involved in all phases of the planning and implementation of the Mineral King project continuously since 1960." W. S. Davis, memo to the file, July 8, 1960, describing his meeting with Walt Disney and Disney's ski resort-development consultant, Willy Schaeffler, on July 7, 1960:

"I suggested that [Disney] check with Tulare County and the Tulare County Chamber of Commerce to determine what speed-up on the access road could be attained if there was assurance of a really well-qualified bid on a prospectus. If, as a follow-up on this, a request is received from Disney Enterprises, we could consider issuing

the shoulders of one man in the headquarters office of the Sequoia National Forest in Porterville, California--Mineral King Specialist "Pete" Wyckoff. Wyckoff's role may have been an uncomfortable one, i.e., how strict could he be with the Disney planners without bringing down on his head the ire of someone in the Regional Office or elsewhere anxious to see the project move forward without delay?[174]

In 1966, these planning-related events took place: February--Walt Disney Productions snow survey crew starts

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a conditional prospectus to stimulate the successful bidder in pushing the improvement of the road.

"Supervisor Bauer and I were both impressed with Mr. Disney's sincerity and realistic approach. He has succeeded in almost everything he has ever undertaken, and has surrounded himself with the most qualified men available for all his enterprises. Since we have had an overdose of experience with permittees who operate on a shoestring, I hope it will be possible to further stimulate his interest in the Mineral King area [emphasis added]."

(On March 11, 1960, Davis had arranged for Schaeffler to tour Mammoth Mountain, Mineral King and San Gorgonio with Forest Service guides. Schaeffler's June 10, 1960, report described Mineral King as a "magnificent alpine area" and urged its development.)

[167]George Marshall, a past president of the Sierra Club, describes the issuance of the 1965 prospectus as a "sudden bursting on the world." "The Forest Service got it out awfully fast, and it was not well drawn." Personal interview, Los Angeles, Calif., Aug. 18, 1970.

Not all new ski resort proposals utilizing National Forest lands go the "prospectus route"; some are handled on a less-formal basis. See, Memorandum from James O. Folkestad, Forest Supervisor, White River National Forest, Glenwood Springs, Colo. to Regional Forester, Denver, Colo., Dec. 27, 1966: "We feel that the proposed expansion [of the Vail resort] is both desirable and defensible. . . . Competition in the Vail-Minturn-Avon area is

its studies.[175] March--Department of the Interior informs Agriculture Assistant Secretary Baker that National Game Refuge status excludes Mineral King from mineral entry.[176] April--State Highway Commission orders another Mineral King access study.[177] September--Forest Service watershed study predicts erosion hazard in Mineral King will be "moderate to high" after development;[178] Governor Brown announces that the State is going ahead with construction of the Mineral King access road.[179] November--National

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available at Meadow Mountain-Grouse Mountain where we have issued a five-year 'study permit' . . . covering 12,600 acres, plus private, State and Bureau of Land Management land. . . . [I]t's logical to include all of the skiable area that's definitely confined by topographic features (and the Forest boundary) when the permit revision takes place rather than adding a portion at a time. Keep in mind that this is also an administrative tool for us when we get serious proposals from promoters to come in the back door. . . . We've considered other alternatives such as a 'study permit' or a 'letter of intent' to establish a case file priority for the permittee and for protection against the vultures. The 'letter of intent' is being considered at Sunlight for the slopes on the east-northeast side of Sunlight Peak where the same trend is developing from the wait-and-exploit people as it has at Snowmass and Vail. We're also trying to look ahead twenty-five years when all kinds of transportation systems will be available for ski areas and when sites will eventually have several base areas such as at Snowmass. Mineral King and Heavenly Valley in California and Nevada are similar situations as far as acreage, expansion, boundaries, development phases, etc., are concerned even though Mineral King went the prospectus route."

[168]John M. Davis, letter to Lawrence M. Whitfield, Supervisor, Sequoia National Forest, Apr. 9, 1965: "The prospectus . . . has been read with great interest. . . . We will have to assume our primary responsibility for the preservation of the sequoia trees [along the route of the new access road] and would expect to specify standards and location for any part of the road within the Park that may require reconstruction."

Park Service holds hearings on its wilderness proposal for Sequoia National Park in Fresno, later interpreted by the Forest Service as hearings on its Mineral King plans.[180] December--Economic Development Administration approves a federal grant of three million dollars to the California State Highway Commission for Mineral King access road construction.[181]

During 1967, serious objections to the Mineral King development project were filed by the Forest Service's

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[169] Fresno Bee, June 13, 1965.

[170] "The state bill to add the Mineral King access road to the state highway system was tacked on as a rider to another bill; the State Highway Commission didn't want it, but there were no hearings held (or notice given) on this bill--a 'star chamber' tactic." Michael McCloskey, personal interview, San Francisco, Calif., Aug. 13, 1970.

[171] Edward P. Cliff, Chief, Forest Service, Affidavit, Oct. 27, 1969. At the California Regional Office in San Francisco, Assistant Regional Forester W. S. Davis applied an objective rating scheme consisting of three tables to compare the six development proposals received on the basis of various criteria. The comparison was done in three steps. Step one analyzed each proposal for "compliance with minimum requirements" such as sufficient parking and service facilities, sufficient lift and/or tramway capacity, sufficient accommodations, and financial plan. Two of the six proposals failed at this step. Step Two compared "proposed details for initial development five years after road completion" including parking capacity, internal public conveyance system, public housing capacity, lift and/or tramway capacity, village concept, ski jumps, skating rink, snow play provisions, camping or summer lodging, trailer court, golf course, swimming pool, convention center, stables, and fee (paid to the government). Step Three involved an administratively confidential evaluation of qualified Mineral King development proposals which covered "capacity to serve people," "financing," "ability to perform," "other factors" (alpine village, summer home displacement considerations, complete

regional range and wildlife management staff, who termed the Disney plan "unacceptable,"[182] and by the National Park Service, which wanted serious studies made of the potential ecological impact of alternative means of access before it approved a right-of-way.[183] But the naturalists' concern for the park's water quality and giant sequoias and the valley's unusual caves,[184] ancient foxtail pines,[185] and its fragile ecosystem in general[186] does not appear to have been the primary concern of the State Highway

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planning control, avalanche recognition), and "fee." The result of this objective procedure was the decision to award the permits to Disney. Disney expects to pay $600,000 annually in rental payments to the Forest Service upon completion of the first phase of development. Documents provided by W. S. Davis, personal interview, San Francisco, Calif., Aug. 14, 1970.

"Secretary Freeman took the decision away from the Regional Forester regarding the successful bidder to avoid an appeal; he wanted to start at the top of the [administrative] appeal ladder": Russell J. Mays, Office of General Counsel, U.S. Department of Agriculture, personal interview, San Francisco, Calif., Aug. 14, 1970.

[172]Hugo Fisher, letter to Regional Forester Charles Connaughton, Sept. 15, 1965: ". . . I know you will continue to give strong emphasis to the protection of the outstanding scenic and aesthetic qualities that make Mineral King a magnificent part of the California heritage with which we are all concerned."

[173]"Mineral King: A Planned Recreation Development," Forest Service, Feb. 1969, p. 5.

[174]See, P. J. Wyckoff, Mineral King Staff Specialist, Porterville, Calif., personal letter to Robert Hicks, Walt Disney Productions, Burbank, Calif., Nov. 18, 1966, comments on "Preliminary Site Studies" report by Disney consultant Danes and Moore, excerpted: "In general the report is good [but] where [is the] source of fill material[?] We question the advisability of changing the

Commission, which on April 20, 1967, authorized the expenditure of $23 million on the Mineral King road over a seven-year period[187] ($1.8 million was obligated for the first stage of construction on October 21, 1968) or certain other Forest Service personnel who, in April of 1967, found themselves briefing Congressmen on the resort-development project[188] and "drumming up" letters to Congressmen in support of the project.[189] Letters on the subject of transportation alternatives were exchanged by

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river channel as indicated. [T]he use of equipment in the existing channel may be more detrimental than the slight additional area made available. Also there are numerous trees growing in the river channel and we want to have these remain in place. Under the village area, I wonder if your plans have changed as to the location. [I]t appears that the entire village area will be . . . across the present avalanche path. [I]f they are thinking of changing the [Kaweah River] channel further to the south along the eastern edge of Aspen Flat then we question this drastic change in topography. I don't believe we can stand the slope disturbance of building access roads to each of [the proposed check] dam sites. There may be a conflict in putting check dams in Monarch Creek with the fisheries. Aesthetically [a dam] 50 feet high would not be compatible with the site and would have an adverse effect on the scenery. A one cubic foot per second flow down the main drainage we do not feel is adequate for fish and aesthetics. Unless absolute and complete treatment of [sewage] effluent is considered we doubt whether direct discharge into the Kaweah River would be satisfactory."

Related oral comments by Wyckoff, personal interview, Porterville, Calif., Aug. 17, 1970: "We may have some overuse problems associated with heavy summer use of trails; separate foot and horse trails may have to be established. Ski areas do have an impact on the environment, but we can curve the runs and feather the edges, leave tree islands, and prevent erosion. The towers won't have to be any taller than the trees, and because there will be no skiing on the lift lines, they won't have to be cleared of small trees. Disney originally planned a lift

the Department of the Interior, State of California transportation officials, and officers of the Walt Disney corporation. Governor Ronald Reagan met with Regional Forester Connaughton, Forest Service Chief Cliff, National Park Service Director Hartzog, and Bureau of Outdoor Recreation Director Crafts on April 27, 1967 to push for prompt action on the Mineral King project. The Executive Office of the President ultimately was involved in forcing a reluctant Secretary of the Interior to agree to the

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up to Mineral Peak, but has pulled out of the western slope. The Forest Service will have to be hard-nosed with the Disney organization because their consultant, Willy Schaeffler, is interested primarily in ski racing and ski jumps and is not sensitive to aesthetics; we will have to 'sit' on Disney to control circus stuff during construction. Some people in the Forest Service are over-awed by Disney, but we should be the leaders and not the followers."

Disney's plans for Mineral King call for "grooming and manicuring of most slopes [by means of] extensive bulldozing and blasting in most lower areas and extensive rock removal at higher elevations," plus avalanche and flood control work. McCloskey and Hill, op. cit., p. 172. The Disney firm has employed Willy Schaeffler, race course chief for the Squaw Valley Olympics, as its technical consultant to direct the laying out of the ski trails. At Squaw Valley, Schaeffler "bulldozed all kinds of moguls and devilry to make the Olympics downhill a tough one," but also "tamed" the Squaw Valley "monster" with bulldozers. Morten Lund and Bob Laurie, Skiers' Paradise: 100 Best Ski Runs in North America (New York: Putnam's, 1967), pp. 210, 212, 215. The lift towers and individual chairs at Squaw Valley are painted in birthday-candle colors. Rand, op. cit., p. 213. The avalanche-control program may resemble that used at Jackson Hole, Wyoming: "The mountain is avalanche-prone, but the control program is rigorous (and loud, when the 105mm guns play revielle)." Rand, op. cit., p. 122.

[175]Feb. 1: "Mineral King Chronology," p. 2.

[176]March 4: Ibid.

Secretary of Agriculture's urgent request that he grant the new Mineral King access highway right-of-way through Sequoia National Park.[190] Sierra Club authors Michael McCloskey and Albert Hill have published this report of their view of those "secret negotiations" and their result:

> [B]y 1967 heavy pressure stemming from the White House was brought upon the Secretary of the Interior to relent [agree to grant the right of way]. In a complicated set of trade-offs engineered by the Bureau of the Budget to keep peace between the two contending departments, Interior was instructed to promise to

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[177] Ibid., p. 3.

[178] September 9: L. L. Bernhard, Chief, Division of Watershed Management, Forest Service, "Soil Problem Areas, Mineral King Project."

[179] September 19: "Mineral King Chronology," p. 3.

[180] "Mineral King--A Planned Recreation Development," Forest Service, Feb. 1969, p. 5:

"Late in 1966, the National Park Service, acting under the Wilderness Act of 1964, held public hearings to consider its recommendations that certain parts of the Sequoia National Park be included in the National Wilderness Preservation System. In structuring these wilderness proposals and responding to understandings which had been reached by local Forest Service and Park Service officials before the Forest Service's 1965 Mineral King Prospectus was released, a corridor was left between two recommended Wilderness units to accommodate that part of the planned Mineral King road which would have to go through the Sequoia National Park.

"In many respects the public hearing which had been planned to consider wilderness proposals in the Sequoia National Park became a hearing on the desirability of developing Mineral King in the Sequoia National Forest, especially on that part of the access road through the National Park which was necessary to make the National Forest development possible. . . .

"Many of those objecting to the Forest Service plans for Mineral King and/or the road, and the

grant the right-of-way when it was needed. The trade-offs involved land exchanges in connection with a Redwood National Park and a jurisdictional transfer involving land needed for the new North Cascades National Park. Secretary of the Interior Stewart Udall, acting under instructions, then did agree to the access road, but he imposed conditions that it always be limited to no more than a two-lane road and that it be constructed in a way that would minimize damage to the park.

The context in which these trade-offs were negotiated again precluded public involvement. By their nature these were secret proceedings which only happened to be exposed as an outgrowth of the heated controversy over establishing a Redwood National Park. Without public knowledge, the President made a decision

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organizations to which they belong, have long been among the most vigorous supporters of the country's wilderness movement. This is probably why many, on the basis of little information or misinformation, but who have consistently supported the wilderness movement, jumped to the conclusion that the development of Mineral King, in effect, must be a violation of wilderness values. Based upon this information, the objectors to Mineral King's development picked up considerable support throughout the country, and soon the issue was being taken to members of Congress and high officials in the Executive Branch for resolution." Emphasis added.

[181]Edward P. Cliff, Affidavit, Oct. 27, 1969. See, "The Facts About Mineral King," Tulare County Board of Supervisors, n.d. [1969]: "The overwhelming majority of our citizens prefer to drive free of charge to recreational areas. The additional tax revenues generated by the proposed development will more than pay for the cost of the road. Also, the Economic Development Administration made available $3 million to assist in road construction, recognizing that the operation of public facilities at Mineral King will generate more than 2,000 new jobs throughout Tulare County, which is presently an area of high unemployment."

Cf., U.S., Department of Commerce, Economic Development Administration, Technical Assistance Report, "Fresno Community Economic Analysis and Development Strategy," Community Renewal Program No. Calif. R-125 (CR), June 1971: "The State of California has not confronted in any organized, coherent manner the fact that it

> to prevent the Secretary of the Interior from doing his duty, as he saw it, of protecting the parks that were, by law, placed in his care.
>
> The secret and closed nature of the process by which decisions were made left the critics with no recourse but the courts. . . .[191]

Why was an automobile highway chosen, initially, over other means of access to the "alpine valley"? According to the Forest Service:

> [S]tudies show that feasible development of Mineral King depends on improved road access and that no proven

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contains, within its borders, depressed areas, such as Fresno and Stockton, roughly equivalent in magnitude to nationally recognized and funded areas such as Appalachia. . . . The discrepancy between agricultural wealth and human deprivation in the San Joaquin Valley will remain masked and low-priority until those responsible for policy formulation in the valley state their case for assistance in clearer and more direct terms than they have to date. . . . When the major technological and economic breakthroughs such as the development of the Westside of the San Joaquin Valley occur, human and economic dislocations result. Unfortunately, the costs of dislocation are not evenly spread, and are often so indirect that they are not recognized, let alone reimbursed."

[182]See, Plaintiff's Exhibit Q, Sierra Club v. Hickel (memorandum dated Jan. 6, 1967): "The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of proposed alteration of the basin is unacceptable to us--the damages extend beyond effects on fish and wildlife, and these alone are critical." Emphasis added.

But see, W. S. Davis, Assistant Regional Forester, letter to Forest Supervisor, Sequoia National Forest, Jan. 9, 1967 (Plaintiff's Exhibit P): "By accepting the development proposal we have also accepted that some effect on fishery values, streamflow, vegetation, soil, and other resources must be provided for." Emphasis added.

economically-sound substitutes are available. . . . The existing road will be eliminated and natural conditions restored. The California Division of Highways plans to make this road a model which combines the best practices to meet the needs of the public and protect the natural environment of this unique alpine area.[192]

From the beginning . . . local National Forest officials have worked closely with local officials of the National Park Service. Had their studies not convinced them that, with special care, the road could be built without damage to the Park values, it most certainly would not have been planned. And further, had not the Forest Service been assured by the National Park Service that the road through the Park

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[183]The National Park Service's Washington, D.C. headquarters office had issued a release in January 1967 stating that, while "[t]he National Park Service concurs with the Forest Service in believing that suitable recreational development at Mineral King is appropriate," it had "requested that alternative means of access, such as tramways, monorails, and tunnels be fully considered. Moreover, the National Park Service is insisting that the relative effect of the several construction possibilities upon the ecology of the national parklands be fully evaluated. . . . The effects upon park values of possible long-term demands for additional roads and other developments which might follow the development of the Mineral King area are also being considered. A permit to improve the access to Mineral King outside of the presently county-owned right-of-way for the 11-mile section of road within the park is being withheld pending completion of these studies."

In March of 1967 the Disney corporation submitted to the National Park Service a "Report on the Feasibility of Alternative Transportation Systems into Mineral King" which concluded that Americans are car-oriented and that rail systems were too expensive ($57 million for monorail or $30 million for cog railway [to be paid for by users] versus $23 million for road [to be paid for by the general public]).

[184]William R. Halliday, Caves of California, June 1962: "The White Chief caves may well lay claim to being California's most remarkable group of caves. The group includes Cirque Cave, White Chief Cave, and many other caves; the extent and nature of which are as yet almost

> would be permitted, they certainly would not have issued the prospectus inviting proposals for the valley's development. . . . We are certain that silt pollution of the Kaweah River can and will be kept well below tolerable levels. . . . [N]o other access method showed any promise of economic feasibility. Even the most promising would, if installed, result in a service that could be afforded only by the wealthy. Further, it is questionable whether an alternative transportation medium would result in less pollution, noise, or "scarring" of the landscape.[193]

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unknown. Half a dozen entrances in the marble often are visible simultaneously, and only a few have been penetrated and recorded. Franklin Creek caves are the highest known limestone caves in California."

[185]"No studies have been conducted to find out what the total impact will be on animal populations or on the plant life, some of which is unique, including the oldest known foxtail pines." McCloskey and Hill, op. cit., p. 170.

[186]W. S. Davis, Assistant Regional Forester, personal interview, San Francisco, Calif., Aug. 30, 1970: "While the Forest Service had stipulated in its prospectus that $3,000,000 was the development investment minimum, we had hoped for more. The Forest Service used its past experience to decide that Mineral King would easily handle $35,000,000 in development. The Mineral King environment is tough, not fragile. Small developments grow; if we had started Mineral King small, it would have grown. The Forest Service required road access. Today's recreationist requires road access. Disney volunteered to look at other means of access--monorail, cog railway; they are feasible, but the round-trip ticket would cost ten dollars--too high. Such trains wouldn't serve private land, National Park Service purposes; we couldn't get fire trucks in [to Mineral King]. We didn't see the need for more public involvement; we had checked with other groups, including the Sierra Club." Cf., Richard J. Costley, Director, Division of Recreation, Forest Service, Washington, D.C., personal letter to Jack Hope, Museum of Natural History, New York, N.Y., March 8, 1968: "[W]ith the thin soils and short growing season of [Mineral King's] high mountain setting, any development would have to be planned and administered with extreme care lest the valley's outstanding but fragile alpine beauty be in some way compromised."

A Forest Service release dated February 10, 1969, described the access road right-of-way situation as essentially resolved:

> The Secretary of the Interior has approved the construction of that road through Sequoia National Park, subject to precise on-the-ground location and construction standards that will protect National Park values; and on-the-ground location of the road and construction standards have been substantially agreed upon by all agencies concerned. . . . No Giant Sequoias will be jeopardized.

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[187]Fiscal year 1968--$800,000, F.Y. 69--$3 million from the E.D.A., F.Y. 70--$1 million, F.Y. 71--$6 million, F.Y. 72--$8.5 million, F.Y. 73--$6 million, F.Y. 74--$1.5 million. "Mineral King Highway Okayed," Visalia Times-Delta, Visalia, Calif., Apr. 21, 1967: "State Commits Funds to Build Road to Resort. State highway commissioners on a 5-2 vote yesterday committed funds to assure the construction of a 23-mile highway into Mineral King. The road would lead to a projected $40 million winter and summer resort to be built by Walt Disney Enterprises in the virgin area of the southern Sierra. . . . The commission obligated $800,000 in highway funds for the 1967-68 fiscal year to purchase the entire right-of-way for the two-lane all-weather highway. . . . J. C. Womack, state highway engineer, said it was necessary to take action on the funds by May to qualify for a $3 million federal grant from the Economic Development Agency. . . . With opposition from some groups swept aside yesterday, the only factor remaining is obtaining approval of the road route from the National Parks [sic] Service and Secretary of Interior Stewart Udall. . . . In a 4-3 vote the commission agreed to ask the California Legislature to consider toll road financing of the mountain highway. Commissioners Alexander H. Pope of Los Angeles and Abraham Kofman of Alameda had fought for a toll road and said gas taxpayers should not subsidize skiers. Pope's motion to make the road a toll road was rejected. Womack indicated the immediate funds for the right-of-way purchase would come largely from allocations ordinarily assigned to highway district 7, which includes the Los Angeles, Ventura and Orange County areas. Yesterday Assemblyman Alan Sieroty, D-Beverly Hills, echoed his opposition to the highway and argued that a rail system should be built. Gordon C. Luce, commission chairman, declared the commission had no authority to undertake rail line projects. Sieroty then advocated a toll highway. At the March meeting of the commission, Sieroty opposed the

How did the National Park Service feel about the construction of a new road through Sequoia National Park to Mineral King? An indirect answer may be gleaned from these National Park Service statements:

> [A]t this point in the history of National Parks new roads should be considered the last resort in seeking solutions to park access[. R]esearch is needed on alternative methods of transportation such as tramways and monorails[.] National Parks cannot indefinitely accommodate every person who wants to drive an automobile without restriction through a

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highway saying it will divert funds from Southern California freeway construction. He also introduced a bill in the Assembly to remove the road from the state highway system which was only placed in the system by the legislature last year. . . . Attending the meeting in San Jose yesterday were 29 residents of Tulare County including [local government officials and representatives of the chamber of commerce, the Automobile Club, and the telephone company]. Telegrams and letters supporting the funding for the road . . . read into the record . . . were from U.S. Secretary of Agriculture Orville Freeman, Sen. Thomas Kuchel, Sen. George Murphy, Mayor Samuel Yorty of Los Angeles, Rep. Bob Mathias of Visalia, State Sen. Howard Way of Exeter and Assemblyman Gordon Duffy of Hanford."

[188]T. W. Koskella, Branch Chief, Winter Sports and Developed Sites, Division of Recreation, Forest Service, Washington, D.C., memorandum to the file, Apr. 28, 1967: "On Thursday, April 27, 1967, I arranged a meeting with Congressman Bob Mathias of California for the purpose of briefing him on the progress of the development at Mineral King. . . . Bob Mathias said that [National Park Service Director] Hartzog had called him earlier in the week and discussed the Mineral King road. He made a convincing case to Mathias on the inadequacy of a two-lane road for handling the traffic to Mineral King. Mathias asked me if we thought Interior was purposely trying to delay the development. I responded by indicating that it was impossible to determine whether their action was meant to intentionally delay the development or whether they sincerely feel they are trying to serve the best public interest. . . . He expressed interest in getting the development moving. . . ."

National Park[. I]f the park experience is to maintain its distinctive quality the numbers of people and their methods of access will have to be more closely controlled.[194]

[S]omething has happened in the philosophy of our country with respect to transportation and that is, we support the highway program with a gasoline tax and the highway trust fund revenues but we have no comparable system for supporting transportation in some other way. And yet a railroad into El Portal [in Yosemite National Park] or a mass transportation system from El Portal . . . into the floor of the [Yosemite] valley, in my opinion, at the height of the summertime might be one of the most joyful experiences Americans

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[189]Theodore A. Schlapfer, California Region, Forest Service, memorandum to the file, Apr. 27, 1967: "We also discussed the advisability of 'drumming up' letters of support to Mathias and [Senator] Kuchel encouraging the timely development of road access so that plans for Mineral King can go forward. The Region will begin action on this."

[190]Secretary Freeman had been seeking Secretary Udall's acquiescence for at least a year; on Dec. 12, 1966, the Agriculture Secretary had written the Interior Secretary: "I am sure that the management plan for the [proposed Hockett] Wilderness [in Sequoia National Park] and the development plan for Mineral King can be so coordinated that there will be no conflict." As the Forest Service's 1969 "Planned Recreation Development" booklet states, "Initially, the Secretary of the Interior was dubious over the proposal of the Forest Service, and it was not until special studies had been made showing conclusively that the road was the only feasible access, and he was assured by the Secretary of Agriculture that the possibility of pollution and environmental deterioration could be controlled that in December 1967 he agreed to permit the road to be built. . . ."

[191]McCloskey and Hill, "Mineral King: Wilderness Versus Mass Recreation in the Sierra," Patient Earth, John Hart and Robert H. Socolow, eds. (New York: Holt, Rinehart, Winston, 1971), p. 177. See, Jack Hope, "The King Besieged," Natural History, Nov. 1968, pp. 81-82:

"In July, 1967, the nature of the suspected pressure on Secretary Udall was made public. To the consternation of those who had labored to defeat the Mineral King proposal, it was revealed that through the complicated

> could have because they would be free of that automobile with which their lives are entwined day after day in the city, they would be free from the traffic congestion, would have reliable transportation service provided on the floor of the valley. You know air pollution in Yosemite Valley in the height of the summertime with all of the campfires, automobiles, diesel engines on buses, and so forth, is quite a problem.[195]
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> [Aerial tramways, helicopters, t]he Monorail. The visitor shuttle bus concept. All of these things are techniques that need to be explored, it seems to us. [H]eretofore we have confined our work to roads and trails. Where do you stop with this? Other communities have adopted these things; other countries have adopted different techniques with great success.[196]

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machinery of Washington diplomacy, the fate of Mineral King had become linked to the ongoing negotiations between various federal agencies and the state of California over the size and location of the proposed Redwoods National Park. Apparently, the Johnson administration felt that Governor Reagan would be more amenable to the installation of a national park in his state if he were offered certain concessions in return. One of several concessions offered the state was the administration's active support of the Mineral King development and its access road. The nature of this transaction was spelled out in a letter of June 22, 1967, from an administration spokesman, Phillip S. Hughes, Deputy Director, Bureau of the Budget, Executive Office of the President:

"'Following is the Administration position on a number of items over and above the provisions of S. 1370 [the redwoods bill introduced by Thomas Kuchel]. The Administration is prepared to implement these provisions immediately.' The Mineral King proposal is listed under a section labeled 'Other Conservation Program Actions.'

"Mineral King. It is in the interest of the Administration and the State that the Mineral King area be developed. The Department of the Interior has been requested to consider issuance of a permit jointly to the Department of Agriculture and the State of California for a two-lane road through the Park [Sequoia] to provide access to Mineral King. . . .'

"The letter's contents provoked angry protests from the project's opponents. In December [1967], a

A Walt Disney Productions "fact sheet" candidly listed the agencies and individuals who assisted in seeing to it that an all-weather road to Mineral King would be provided by the taxpayers:

> A condition of the agreement between the Forest Service and Walt Disney Productions was the construction of an appropriate all-weather road to the Mineral King area. Through the cooperation of the California Highway Commission, the California Department of Public Works, the State Highway Engineers, the Office of the Governor of California, the Departments of Agriculture,

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high-level Mineral King meeting was called. Attendants in favor of the project included: Secretary of Agriculture Freeman, California Senators Kuchel and Murphy, Congressman Robert Mathias, and for the administration, Phillip Hughes. Attendants opposed: Stewart Udall. Shortly after the conference, Freeman issued a press release announcing that the right-of-way for a road through Sequoia Park was being prepared by the Interior Department and that the Disney development would proceed as planned. To this day, Udall has not voiced support of the access road, leading to the conviction that this decision was predetermined by the administration."

See also, Edward C. Crafts, "Men and Events Behind the Redwood National Park," American Forests, May 1971, p. 22, regarding the key role of Phillip S. Hughes "in negotiations with the State of California."

Cf., Anthony Astrachan, "Canadians Resolve Park Conflict: 'The Killing of Village Lake Louise,'" The State Journal, Lansing, Mich., Sept. 8, 1972, p. A-11; "The Canadian government recently killed a proposal for a $30 million resort project in [the Lake Louise] area of Banff National Park. . . . Northern Development Minister Jean Chretien said even the modified project was too large 'and could result in an undue concentration of visitors and residents in this area. . . . Where there is room for doubt we must err on the side of park protection.'" Emphasis added.

[192]"Road to Mineral King Approved," U.S. Department of Agriculture press release USDA 4063-67, Dec. 27, 1967.

> Interior and other federal agencies, U.S. Senators, Congressmen, State Legislators, Tulare County officials and municipal governments, plans are now being implemented for the construction of State Route #276 from Three Rivers to Mineral King.[197]

An alternative to a new highway had been advanced by Fred Strauss of the Porterville firm of Althouse-Strauss Engineering Service to the Sequoia National Forest as early as August, 1965. Strauss offered to design a tunnel to Mineral King for mass-transit vehicles, but the Forest

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[193]Richard J. Costley, Director, Division of Recreation, Forest Service, Washington, D.C., personal letter to Jack Hope, American Museum of Natural History, New York, N.Y., Mar. 8, 1968, p. 4. Cf., the following sequence of letters between Interior and Agriculture officials on this matter:

Interior Secretary Udall, letter to Agriculture Secretary Freeman, Oct. 16, 1968: "No permit has been issued for construction of this [Mineral King] road because the National Park Service has not reached agreement with the Forest Service and State Highway Department as to location and design standards of the road, and plans for needed utility lines. When these matters have been resolved, the permit will be issued. . . . [W]e are concerned about what we have been told concerning the size of the planned Disney development. Will one two-lane road of park standards be adequate, or will Interior later receive a request for another road?"

Edward A. Hummel, Associate Director, National Park Service, Washington, D.C., personal letter to Edward P. Cliff, Chief, Forest Service, Washington, D.C., Nov. 14, 1968: "[W]e now agree that the Division of Highways' route should be selected. Certain of the standards, as now proposed by the State, are not acceptable to us. We suggest the Division of Highways and Forest Service work with us to establish satisfactory design criteria. We propose that many of our consultant's recommendations on the use of additional bridges, tunnels, viaducts, cribbing, retaining walls and other methods be fully exploited. . . . We request your assurance that the Forest Service and the Division of Highways will work with our people to construct

Service was insistent at that point on the need for a public road.[198] Time, however, may be on the side of those who oppose new road construction in the park. (On May 3, 1972, E. Gordon Walker, President of Walt Disney Productions, Inc., issued a document entitled "remarks" which placed the Disney organization on record in favor of extending the electrically powered, cog-assisted railroad Disney had planned to use in Mineral King Valley "westward across Sequoia National Park to a termination point . . .

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a road of park-like quality which will be a credit to the Forest Service and the National Park Service."

Interior Secretary Udall, personal letter to Agriculture Secretary Freeman, Nov. 19, 1968: "I am enclosing, for your information, a copy of the letter from the National Park Service to the Chief of the Forest Service, giving approval to the State of California, Division of Highways' selection of a route for a road through Sequoia National Park to Mineral King. This, of course, is subject to agreement on design standards. I ask your continued support to make certain that the road constructed will be a credit to our respective Departments. I also would like to repeat the request contained in my letter of October 16, that Interior be assured that the Disney development will not require additional road access across park lands at a future date."

See also, John G. Schmitz, California State Senator, personal letter to Evelyn Gayman, Laguna Beach, Calif., June 3, 1969: "I have discussed plans for the [Mineral King] road with two other Senators familiar with the area . . . and they assure me that the road will be extended beyond the Disney project . . . to form part of a new east-west highway system across the Sierras."

[194]U.S., Congress, House, Committee on Interior and Insular Affairs, Policies, Programs, and Activities of The Department of the Interior, Part IV, Hearings before the Committee on Interior and Insular Affairs, House of Representatives, 91st Cong., 1st Sess., April 17, 1969, pp. 35-36, from the statement of National Park Service Director George B. Hartzog, Jr.

outside the National Park," with the railway traversing the existing road right-of-way held by Tulare County and with the power line to Mineral King buried in the railroad roadbed. And on August 18, 1972, Governor Reagan signed Assembly Bill No. 1556 which deleted as a State project the proposed highway through Sequoia National Park.[199])

The first joint "preliminary master development planning meeting" to be held between Walt Disney Productions representatives and Forest Service personnel took

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[195]U.S., Congress, House, Committee on Interior and Insular Affairs, National Park Service Briefing, Hearing before a subcommittee of the Committee on Interior and Insular Affairs, House of Representatives, 90th Cong., 2nd Sess., Jan. 18, 1968, p. 32, from the statement of NPS Director Hartzog.

[196]U.S., Congress, House, Committee on Interior and Insular Affairs, Policies, Programs, and Activities of The Department of the Interior, Part IV, Hearings before the Committee on Interior and Insular Affairs, House of Representatives, 90th Cong., 1st Sess., Jan. 30, 1967, p. 37, from the statement of NPS Director Hartzog.

[197]"Walt Disney Productions' Master Plan for the Development of Mineral King," Disnews Fact Sheet, n.d. [1969], p. 2.

[198]The January 1972 issue of Ski magazine treated this proposal as "news": "A King-Size Solution to Mineral King. While the courts are backing and filling over whether Mineral King should/should not become a white Disneyland of skiing, someone named Fred Strauss of Porterville, California has come up with a far out plan that takes some of the edge off the antipollution campaign against Mineral King. . . . Strauss suggests that the solution is simply to build a 15- or 20-mile, $50 million tunnel through the surrounding ridge and take skiers in by mass transit vehicles from a parking lot on the outside. This would eliminate auto smog in the Mineral King valley, minimize noise impact on wildlife, and make the whole project more palatable ecologically. Besides, says Strauss,

place on April 10 and 11, 1968 at Glendale, California, near Disney's headquarters in Burbank.[200] On April 15, 1968, Disney's preliminary planning and surveying permit was extended to September 1, 1969.[201] On January 8, 1969, Walt Disney Productions submitted its Mineral King Development Master Plan to the Sequoia National Forest Supervisor for his approval.[202]

On January 21, 1969, according to the transaction evidence, two somewhat contradictory events took place: the directors of the Forest Service's divisions of wildlife management and range management in Washington, D.C.--"after one quick review of the Mineral King Master Plan"--expressed serious reservations about the plan's ecological implications,[203] while, in Porterville, California, the Forest Supervisor approved the plan:

$30 million of the initial investment would come back via fares paid by visitors to the valley, summer and winter. This makes the Strauss plan $30 million cheaper than any other plan. . . ."

[199]Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Amended Complaint, Aug. 29, 1972, pp. 29-30.

[200]Wyckoff, "Mineral King Chronology," p. 3.

[201]Ibid.

[202]"Mineral King: A Planned Recreation Development," p. 6.

[203]W. O. Hanson, Director of Wildlife Management, memorandum to Richard J. Costley, Director, Division of Recreation, Jan. 21, 1969: "After one quick review of the Mineral King Master Plan, I have a few comments to offer:

> By letter of January 21, 1969, the Forest Supervisor notified the Company that the plan was approved with the understanding that the approval is "subject to changes and further refinements as ways are found to improve it, and site development plans and detailed structure plans are yet to come." The Forest Supervisor's letter went on to tell the Company, "The 30-year term permit authorizing construction and operation to begin will be issued as soon as the State Division of Highways issues the first contract for the improved Mineral King access road. We expect this to take place within the next 6 months."[204]

Apparently it was not until 1970, and then on an informal basis, that the staff of the Sequoia National Forest

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1. Horse concession.--It appears that this could cause serious problems in sanitation and esthetics where there is very limited area in which to operate. Presumably, this would be a large operation involving at least 50 horses. The trails would have to be surfaced to control erosion. More serious, however, would be sanitation and the need to supply all needed forage. 2. Alternatives for sewage disposal.--The plan shows 2 primary sewage facilities and provides that effluent will be filtered through soil enroute to the stream drainage. With the large quantity of daily sewage discharge expected, I would question whether the soil can adequately handle the effluent. Should alternatives be considered, such as piping effluent out of the canyon, etc.? 3. Check dams to collect debris. --The Plan is not clear on the purpose or function of these dams. Presumably they are to prevent damage from flooding and from debris accumulation. Is a dry-dam structure planned? Also, what is the source of the debris? Will it result from timber cutting on the ski runs? In conclusion, I would hope that we study the impacts of this concession for a long time before permitting another one [emphasis added]."

R. M. DeNio, Director of Range Management, memorandum to Costley, Jan. 21, 1969: "To what degree has the compatibility of planned horse programs with resource needs been determined? The projected use by people, in itself, will have a very real impact on these fragile soils and vegetation without the additional effect of horse use. Any horse activity as well as others influencing soils and vegetation could well utilize the services of an ecologist during the planning stage." (Emphasis added.)

sought to avail itself of the relevant expertise of the Yosemite National Park staff, with regard to the ecological consequences of human crowding in a High Sierra valley.[205]

The courts did not focus sharply on the "due-consideration-of-all-factors" question in their opinions. Judge Sweigert noted, with respect to the Department of Interior's actions, that:

> It appears . . . that in May, 1968, Interior adopted certain Park Road Standards providing that

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See, Dewey Anderson, "Mineral King--A Fresh Look," National Parks and Conservation Magazine, May 1970, p. 8: "So far as I have been able to learn, no serious study is available that defines what will be the effect on the Mineral King ecosystem [of the Disney plan]. That is the starting point from which any plan should be considered."

Cf., 1970 Multiple Use-Sustained Yield Act (74 Stat. 215, 16 U.S.C. 528-531): ". . . In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. . . . 'Multiple use' means: . . . harmonious and coordinated management of the various resources . . . and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."

[204]"Mineral King: A Planned Recreation Development," p. 6. Emphasis in the original.

[205]See, Russ Olsen, Assistant Superintendent, Yosemite National Park, letter to M. R. James, Forest Supervisor, Sequoia National Forest, Aug. 7, 1970, containing "the answers to your questions" regarding numbers of visits, overcrowding, visitor conflicts, environmental impact ("Overcrowding . . . leads to increased development of facilities to meet the needs of the people, with over-utilization of available water, increased acreage devoted to sewage disposal works, new telephone and power lines, new transportation system, etc. These effects can be more profound than those of individual visitors and more long-lasting."), maximum capacity ("We are still looking for

> . . . a professional ecological determination must precede approval of road construction and design to make sure that resulting effects on wildlife, drainage, stream flow and climate will be minimal.[206]

Judge Trask accepted the defendants' allegations that their plans would not degrade the natural environment:

> Evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features appears throughout the [Forest Service] planning reports. . . . The record shows a great deal of concern in [the Interior Department's] planning for preservation of aesthetic and ecological values.[207]

Justice Blackmun registered a strong protest in his dissent to the Supreme Court majority's opinion:

> Is this the way we perpetuate the wilderness and its beauty, solitude and quiet? . . . [A]ll this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization[.]"[208]

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ways to compute such a figure. If your statisticians and ecologists have any ideas, we will appreciate them."), new concessioner developments, sewage treatment, master plan, backcountry overuse, and smog.

[206] Memorandum of Decision, pp. 7-8.

[207] 433 F.2d 24, at 36.

[208] 92 S.Ct. 1361, at 1378. His distress was shared by Justice Douglas, who referred in his separate dissent to the "scheme to despoil Mineral King." 92 S.Ct. 1361, at 1372. See, in this vein: Peter Browning, "Mickey Mouse in the Mountains," Harper's Magazine, March 1972, pp. 65-71; Jeanne Nienaber, "The Supreme Court and Mickey Mouse," American Forests, July 1972, pp. 29-31, 40-43.

(7) The National Environmental Policy Act (NEPA) question.

Plaintiffs' amended complaint, filed on June 2, 1972, added this claim for relief, alleging that:

> Defendants have not fulfilled their responsibilities under Sections 101(b) and 102(c) of NEPA [42 U.S.C. 4331 et seq.] to prevent the degradation of the Mineral King area and to preserve the natural environment of the area as a wildlife refuge.
>
> Defendants have also failed to comply with the procedural requirements of Section 102(2) of NEPA. Among other things, they have failed to prepare and circulate for public comment an Environmental Impact Statement pursuant to Section 102(2)(C).
>
> Among other things, defendants have failed (a) to "consult with and obtain comments" from any Federal agency with regard to the required detailed statement, (b) to make copies of the required detailed statement available to the President, the Council on Environmental Quality, and to the public pursuant to 5 U.S.C. 552, and (c) to have the required detailed statement accompany the proposed project through the existing agency review process.
>
> Defendants have also, among other things, failed to study, develop and describe appropriate alternatives to the areas selected for development as required by Sections 102(2)(D).[209]

Plaintiffs Sierra Club et al. asked that the defendants be enjoined from proceeding with the Mineral King resort project unless and until the defendants comply with "NEPA." Complying with NEPA would involve complying with the Forest Service's own regulations:

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[209]Notice of Motion and Motion to Amend Complaint, June 2, 1972, pp. 5-6.

> Forest Service Manual Chapter 1940 entitled "Environmental Statement" was distributed by the Chief on July 13, 1971. The Regulation specifically implements NEPA, Executive Order 11514, the Council on Environmental Quality's "Revised Guidelines for Statements on the Proposed Federal Action affecting the Environment," 36 Fed. Reg 7724 (April 23, 1971), Office of Management and Budget Bulletin No. 71-3 (1970), and the Secretary of Agriculture's Memorandum No. 1995 (1971). Section 1941.22 of the Chief's Directive provides as follows: "Plans, Programs, and Major Projects. Environmental Statements will be prepared on major proposed plans, programs, and major projects directly undertaken by the Forest Service, or supported in whole or in part through land use permits, leases, contracts, grants, cooperative agreements, subsidies, technical assistance or granting of rights." Section 1941.22(2)(f) provides that "The need for Environmental Statements should be seriously considered for . . . major public service developments" and lists "winter sport sites" as an example.[210]

In connection with the Forest Service Manual, the plaintiffs noted:

> Section 1941 of the Forest Service's regulation and paragraph 5b of the CEQ Guidelines require the filing of an Environmental Statement when there is potential that the environmental impact is highly controversial. The controversy in the instant case is a matter of wide public knowledge. Indeed, the very existence of the lawsuit demonstrates that controversy exists. See, Nolop v. Volpe, 333 F.Supp. 1364 (D.S. Dak. 1971), at 1341.[211]

"In summary," the plaintiffs contend, "no permit, approval or right-of-way can be granted for any part of the Disney project either in the Game Refuge or the National Park unless and until, among other things:

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[210] Amended Complaint, June 2, 1972, pp. 12-13.

[211] Memorandum of Points and Authorities in Support of Motion to Amend Complaint, p. 17.

> (1) An environmental impact study has been prepared and made available to the President, the Council on Environmental Quality and the public and [has] accompanied the proposal through the defendants' review process;
>
> (2) An independent study of alternatives has been prepared;
>
> (3) An environmental cost benefit analysis has been prepared demonstrating the benefit outweighs the harm of this project. This latter requirement cannot be fulfilled with regard to this project.[212]

Plaintiffs noted that the leading case interpreting NEPA is Calvert Cliffs Coordinating Council, Inc. v. AEC[213] and that violations of NEPA can legally form the basis for a claim for relief.[214] On this issue plaintiffs concluded:

> [I]t is not only the fact of "proceeding" which plaintiffs seek review of. Rather it is also defendants decision of approval we seek to review. It is plaintiffs' allegation that the approvals [relating to the Disney resort and access to it] have been made, have not been rescinded, are illegal under NEPA, and cannot be made legal by a post hoc study designed to rationalize the decision.[215]

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[212] Ibid., p. 9.

[213] 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 19__).

[214] "There are now many cases in the reports concerning such claims. See, e.g., Brooks v. Volpe, __F.2d ___, 3 ERC 1859 (9th Cir., 1972); Latham V. Volpe, 455 F.2d 1111, 1 ELR 20602; 2 ELR 20090 (9th Cir., 1971); Calvert Cliffs Coordinating Council v. AEC, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir., 19__); Ely v. Velde, 451 F.2d 1130, 1 ELR 20612 (4th Cir., 1971); National Helium Corporation v. Morton, __F.2d ___, 1 ELR 20479 (10th Cir., 1971), Green County Planning Commission v. FPC, __ F.2d ___, 2 ELR 20017 (2nd Cir., 1972)."

[215] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Amended Complaint, p. 33. This brief states, at p. 37: "In a

The response of the U.S. Department of Justice to the Sierra Club's filing of an amended complaint with the U.S. District Court for the Northern District of California was to file a Motion to Dismiss the Amended Complaint, on July 24, 1972, based on the contention that:

> [T]he law of the case having been decided by the Ninth Circuit Court of Appeals . . . there is no issue of fact or law which has not been decided.[216]

In its Memorandum in Support of Motion to Dismiss the Amended Complaint, the government hinted at the application of the doctrine of res judicata:[217]

> On trial of a case after remand, questions which are settled by the Court of Appeals cannot be relitigated, Webb & Co. v. Robert Miller Co., 176 F.2d 678 (3 C.A. 1949)(Headnote 5) [and] Sherwin v. Welch (C.A. D.C. 1963) 319 F.2d 729.[218]

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great number of very recent cases federal courts, including this Court, have enjoined projects initiated prior to January 2, 1970, until and unless there is compliance with Section 102(2)(C) [of NEPA]. E.g., Latham v. Volpe . . .; Brooks v. Volpe . . .; Arlington Coalition v. Volpe, ___ F.2d ___, 3 ERC 1995 (No. 71-2109, 4th Cir., April 4, 1972); Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749, 757 (E.D.Ark., 1971); Nolop v. Volpe, 334 F.Supp. 132 (N.D.Ga., 1971)." See, John W. Giorgio, "Parklands and Federally Funded Highway Projects: The Impact of Conservation Society v. Texas," Environmental Affairs, Vol. 1, No. 4, March 1972, pp. 882-901. See also, West Virginia Highlands Conservancy v. Island Creek Coal Company, 441 F.2d 232 (4th Cir. 1971).

[216]Defendants' Memorandum in Support of Motion to Dismiss the Amended Complaint, p. 2.

[217]See, Chapter III, pp. 57-58, supra.

[218]Defendants' Memorandum in Support of Motion to Dismiss the Amended Complaint, p. 3.

And it maintained, with perhaps less justification, that the plaintiffs' claim under NEPA was "premature and does not present a case or controversy."[219] The defendants suggested:

> Once the NEPA statement is filed with the President's Council on Environmental Quality which was established by NEPA, the plaintiffs may seek to attack its legal sufficiency, but until then there is no controversy and they have not pleaded one.[220]

By the summer of 1972 a querulous tone had crept into the pleadings of the parties on both sides of this long-drawn-out action:

> The plaintiffs [said the Department of Justice brief] could have alleged [individual interest] long ago, but purposely chose not to. Throughout this case, for 3 years of litigation at great expense to the taxpayers and burdening of the courts, Sierra Club's primary concern was to establish its right as a conservation club to maintain lawsuits to force Sierra Club policies on the Federal Government. It seeks to tell the various executive branches [sic] of Government as Department of Interior and Department of Agriculture, which deal with Federal lands, how best to manage the national parks and forests. Mineral King was a secondary consideration in plaintiffs' mind. The law on standing has been undergoing change with many and varied opinions. The allegations the Sierra Club now makes . . . all existed when the suit was filed in 1969 and for many years before. . . . [O]nly after losing its test case to see how powerful it was . . . [does it want] another test, being fully aware that its delays have preserved to its members the right to hike up the mountains in the summertime while depriving the winter vacationers the right to ski down the mountains in the wintertime. . . .[221]

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[219] Ibid., p. 6.

[220] Ibid., p. 8.

Countered the plaintiffs:

> The Club's former theory of its standing . . . has obviously been rejected by the Supreme Court. Thus, the Sierra Club had erroneously thought that the injury to its nonecomonic interests was not the key, but that its longstanding concern and expertise in such matters were sufficient to give it standing as a "representative of the public." . . . The Sierra Club, however, . . . does have an interest it can allege in conformity with the Supreme Court's decision and need not and does not attempt to stand on its former allegations.[222]

> The defendants would have this Court believe that the Sierra Club's failure to amend its complaint in the higher courts proves it sought undue delay. The Club, however, had no reason to amend prior to the Ninth Circuit's ruling. . . . The defendants also suggest that the Club is more interested in some abstract "test case" than in Mineral King itself. This charge is absolute nonsense. The Club will show . . . that it is vitally interested in Mineral King itself and that it has been since the turn of the century.[223]

On July 6, 1972, United States District Judge W. T. Sweigert signed an order granting the Sierra Club's motion to amend its complaint, while noting, with respect to the Ninth Circuit Court of Appeals' 1970 ruling in this

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[221]Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Amend the Complaint, June 22, 1972, pp. 2-3. Emphasis added. For a description of the typical "test case" see, Robert Scigliano, "Interest Groups in the Courts," The Courts: A Reader in the Judicial Process (Boston: Little, Brown and Co., 1962), pp. 176-188.

[222]Memorandum of Points and Authorities in Support of Motion to Amend Complaint, June 2, 1972, p. 7.

[223]Plaintiffs' Reply Memorandum in Support of Motion to Amend the Complaint, June 29, 1972, p. 5. Emphasis added.

case, that "further proceedings . . . may be an exercise in futility."[224] The Sierra Club already had accomplished its objective, at least in part, however: the Disney organization announced on May 6, 1972, that it planned to scale down its investment in the Mineral King Valley from $30 million to $15 million and provide access to the valley by electric, narrow-guage railway.[225] And at the September 8, 1972, hearing before Judge Sweigert on the defense motion to dismiss (denied by the judge), a government attorney "admitted that the Forest Service has scrapped plans for a road through Sequoia National Park to Mineral King."[226]

Litigation had stayed the awarding of construction contracts "in the absence of full knowledge [and] under circumstances where the facts seem to have been buried under political exigency."[227]

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[224]Memorandum of Decision on Plaintiff's Motion for Leave to Amend Complaint, July 6, 1972, p. 2.

[225]Gladwin Hill, "Disney Cuts Back on Resort Plans," New York Times, May 7, 1972. The Sierra Club's Michael McCloskey was quoted by Hill as describing Disney's changes as "constitut[ing] an admission that their previous plans were overblown" and a belated recognition "that there are ecological limits as what the area can sustain."

[226]Sierra Club National News Report, Sept. 15, 1972, p. 3.

[227]Joseph L. Sax, Defending the Environment, p. 211.

CHAPTER SIX

WALTON V. ST. CLAIR

The Boundary Waters Canoe Area

Location and Description

One million of the three million acres in the Superior National Forest in northeastern Minnesota have been set aside as a special kind of wilderness[1] called the Boundary Waters Canoe Area (BWCA). Many of the users of this vast area enter it through the town of Ely, two hundred and fifty miles from Minneapolis and half that far from Duluth. The BWCA extends for one hundred miles along the Canadian border.

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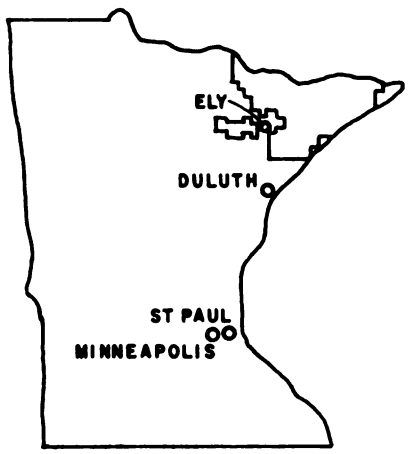
[1]See, Richard J. Costley, "An Enduring Resource," American Forests, June 1972, pp. 8-10: "To be administered under the [Wilderness] Act was a system of 53 separate statutory wildernesses and the Boundary Waters Canoe Area which was deceptively like them in some superficial ways. The inclusion of the Superior National Forest's Boundary Waters Canoe Area in the [1964] System was an unfortunate 'accident'; definitely unfortunate for the BWCA and potentially unfortunate for the Wilderness System. Undoubtedly one of the most unique and spectacular recreation areas in the National Forest System, it clearly is not wilderness in the context of the objectives of the Act itself, and the wishful thinking of some to the contrary, it never can be. Managed as it deserves to be it can provide a near-primitive recreation experience without equal. Managed under the constraints specified for the [Wilderness] System--as some would have it--this would be impossible and the area would be neither fish nor fowl. The Act itself--by special



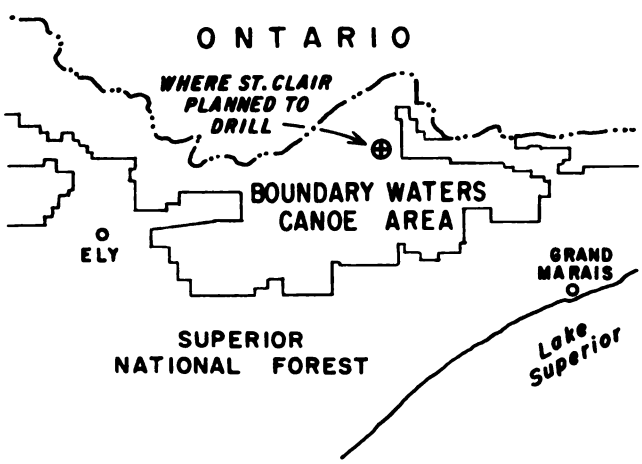


Figure 4. Boundary Waters Canoe Area, Minnesota

The area has been called "one of America's greatest remaining natural legacies."[2] Its attributes include a thousand lakes over ten acres in size, twelve hundred miles of canoe routes, and 400,000 acres of virgin forest. The only relatively complete example of the northern conifer forest ecosystem left in the United States, it shelters a remarkably full complement of native wildlife species:

> To be sure, the passenger pigeon and caribou are gone, but the moose, deer, beaver, otter, fisher, black bear, timber wolf, bald eagle, osprey, spruce grouse, and other species are still present. And some of these species are uncommon, rare, or even endangered elsewhere. The endangered species of the BWCA include the eastern timber wolf and American peregrine falcon.[3]

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provision [16 U.S.C. Section 1133(d)(5)]--recognizes this. Unfortunately there are some who do not. Should their advice prevail the temptation to export a BWCA pattern of management and use . . . to the entire Wilderness System hangs over the System's integrity like an ominous cloud." Title 16, U.S. Code, Section 1133(d)(5): "Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Souix, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: Provided, That nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats." (Emphasis added.)

[2]A Wilderness in Crisis--The Boundary Waters Canoe Area (Minneapolis: North Star Chapter, Sierra Club and Natural History Society of Minnesota, 1970), p. 7.

[3]Ibid., p. 8.

Its relatively unpolluted waters support populations of lake trout, walleye, bass, and northern pike.[4]

The Boundary Waters Canoe Area also has been described as "a living tribute to a large group of dedicated conservationists who have fought since 1900 to protect its wilderness qualities."[5] One of those conservationists, Sigurd F. Olson, has summarized the use-history of the area in terms of "man's quest for treasure" (without mentioning the area's nickel ore "treasure"):

> For nearly 300 years this region . . . felt the impact of the white man's quest for its treasures--first for furs, fish, and game, and later for timber. . . . Among its treasures, none is so worthy of preservation today as the distinctive primitive quality that still prevails. Twentieth century voyageurs travel its ancient waterways by canoe in the same setting as Indians and exployers of long ago. Here they find solitude, adventure, and freedom, and gain perspective on their lives. In this country which more than any other seems made for such enjoyment, they find release from the tensions of modern living.[6]

This land was first occupied by Souix and Chippewa Indians, then by French and English fur traders. After 1854, the year of the signing of the Treaty of LaPointe,

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[4]"The Boundary Waters Canoe Area," The Izaak Walton Magazine (special issue), July 1965, p. 2.

[5]A Wilderness in Crisis, p. 2.

[6]Sigurd F. Olson, "Mining Threatens the BWCA: Wilderness Challenge," The Living Wilderness, Vol. 34, No. 110, Summer 1970, p. 3.

mineral prospectors[7] and loggers worked their way through this region, so that by the time of World War I much of the area had been cut or burned over. Today the BWCA is a mixed forest of jack pine, spruce, balsam and aspen, rather than a pure stand of red and white pine and white spruce.[8]

The so-called "seventy-year fight to preserve the Canoe Country" has been described in detail elsewhere.[9] This chapter describes only certain aspects of one recent controversy there, over the proposed exploitation of low-grade nickel-copper ore, within this area "zoned" by Congress for wilderness use, on the basis of privately held mineral rights. The following highlights of the history of the BWCA are recalled to enable the reader to see these current events in their historical context.

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[7]Whose efforts led to the ephemeral gold rush at Lake Vermilion in 1865-66 and to the development of the major iron ore deposits of the nearby Mesaba Range.

[8]"The Boundary Waters Canoe Area--A Synopsis of Historical Events," n.p., n.d. [1970], distributed by the Superior National Forest, Duluth, Minn., 6 pp. While the BWCA, unlike many western wilderness areas, has not been subjected to domestic livestock grazing, forest fire has been a frequent actor in its ecological history. See J. E. Potzger, Bogs of the Quetico-Superior Country Tell Its Forest History (Chicago: The President's Quetico-Superior Committee, 1950) and Miron L. Heinselman, "The Natural Role of Fire in Northern Conifer Forests," Naturalist, Vol. 21, No. 4, 1970, pp. 15-23.

[9]E.g., works cited at footnotes 2, 4, 7, and 8, supra.

The History of the BWCA

The long line of "dedicated conservationists" who strove to protect this canoe country from development began with C. C. Andrews:

> In the early 1900's a far-sighted [State] Forestry Commissioner, General C. C. Andrews, sought tenaciously to have lands in northeastern Minnesota set aside for posterity. When success was not realized in the Minnesota Legislature, he turned to the Federal Government. On June 30, 1902, 500,000 acres of forested Public Domain land were set aside in Lake and Cook counties [by the Commissioner of the General Land Office, U. S. Department of the Interior]. A second withdrawal of about 141,000 acres was made on August 18, 1905, and a third of 518,700 acres on April 22, 1908. On February 13, 1909, Presidential Proclamation 848 signed by Theodore Roosevelt designated much of this area as the Superior National Forest, aggregating 1,018,638 acres.[10]

The first of many steps taken by the Forest Service of the U.S. Department of Agriculture toward protecting America's wildland heritage was taken in northern Minnesota in response to the recommendations of Arthur H. Carhart:

> In 1922 Arthur H. Carhart, a landscape architect for the Forest Service, submitted a recreation plan calling for the enhancement, preservation, and development of the canoeing features of the [Superior National] Forest. The plan was not immediately implemented, and a controversy over road building in the Canoe Country soon developed. This discussion . . . eventually produced the first real policy for the area, issued by Secretary of Agriculture Jardine in 1926. A so-called "primitive area" was declared. . . .

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[10] A Wilderness in Crisis, pp. 11-14. See also, "Synopsis of Historical Events," p. 3: "Conspicuously absent from this Forest was the strip of border country from Basswood to Saganaga Lake, which contains some of the choicest portions of the present [BWCA]. It was not to become a part of the Forest until 1936. This area, which was largely alienated, generated many of the problems of management, some of which are still not solved.

> Shortly after this event a major controversy broke out over a proposal . . . to dam up many of the boundary lakes [for water power]. After a long fight the proposal was blocked by the Shipstead-Newton-Nolan Act (Public Law 539, 71st Congress, July 10, 1930). The Act prohibited logging within 400 feet of natural shorelines . . . and prohibited further alteration of natural water levels. . . .[11]

In a pioneering step in the direction of citizen involvement in agency decisionmaking President Franklin D. Roosevelt, in 1934, created a citizens' advisory committee for this area called the Quetico-Superior Committee. "Its purpose was to consult and advise Federal agencies [emphasis added] and the State of Minnesota concerning management of the area." The committee has been extended by succeeding Presidents.[12]

Potential future problems were created as the federal government acquired the surface rights--but not the mineral rights--to that portion of the BWCA which had been in private ownership:

> Between about 1930 and 1941 many of the areas now within the BWCA were acquired through the purchase of tax-forfeited lands. The mineral rights, however, often were not acquired [emphasis added]. . . .
>
> In 1938 the Superior Roadless Primitive Area (boundaries similar to the present BWCA) was established by the U.S. Forest Service. . . . The first No-Cutting zones were established administratively about 1941 and contained 362,000 acres adjacent to the international boundary. . . .

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[11] A Wilderness in Crisis, p. 14.

[12] Ibid.

> [I]n 1948 the Thye-Blatnik Act was passed (Public Law 733), authorizing the Forest Service to acquire lands within an area covering about two-thirds of the BWCA. . . . [This and subsequent] actions have now resulted in acquisition by the Federal Government of nearly all private inholdings except mineral rights [emphasis added].[13]

Today the United States owns the mineral rights to less than half of the BWCA.[14]

Sigurd Olson of Ely, Minnesota, led the successful post-World War II campaign to outlaw pontoon-equipped private airplanes in the canoe country. In 1949, President Harry S. Truman issued an Executive Order establishing an airspace reservation over the roadless area prohibiting flights below 4,000 feet except in emergencies.[15] During the late 1950s and early 1960s this "roadless" tract was renamed the Boundary Waters Canoe Area and given additional protection through the efforts of both Secretary of Agriculture Freeman and the United States Congress:

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[13]Ibid., pp. 14-15

[14]See, "BWCA Landownership Statistical Area Data 12/22/69," Forest Service, Duluth, Minn.: "In round figures this includes 400,000 acres which never left the public domain and 60,000 acres reacquired by the Federal Government with the mineral rights intact. The State of Minnesota owns the mineral rights to 260,000 acres within the wilderness area's boundaries--103,000 acres of State land plus the bottom area of 157,000 acres of meandered water area. Private owners control the mineral rights to 298,000 acres within the area while three counties own the mineral rights to 14,000 acres which reverted to them for non-payment of taxes."

[15]Executive Order 10092, Federal Register, Vol. 14, No. 246, Dec. 22, 1949, pp. 7637, 7639-7640 (signed by the President on Dec. 17, 1949).

> In 1958, the name "Boundary Waters Canoe Area" was selected by the Forest Service. . . . [I]n 1964, conservationists sought designation of the BWCA as a full Wilderness Area--which would have eliminated logging and all mechanized travel. Secretary of Agriculture Orville Freeman appointed a special BWCA Review Committee, chaired by Dr. George Selke. After many public hearings [emphasis added], the Selke Committee brought in its recommendations in December, 1964. Secretary Freeman accepted the report, and issued the management Directive that now governs BWCA policies. This order became effective December 15, 1965. It increased the No-Cutting Zones [bringing] the total area closed to logging up to 512,000 acres in 1965 and to 612,000 acres by 1975. Motors and snowmobiles were . . . limited to certain designated routes. . . .
>
> On September 3, 1964, while the Selke Committee was considering BWCA management policies, the Wilderness Act was passed by Congress (Public Law 88-577, 88th Congress). This Act includes the BWCA within the National Wilderness Preservation System as a Wilderness Area. However, the Act leaves actual management policies with respect to timber harvesting and mechanized travel up to the Secretary of Agriculture.[16]

One of the present problems in the BWCA, as was indicated earlier, is the presence there of copper-nickel ore under land in the Canoe Area to which the federal government does not hold the mineral rights. It has become a problem only in recent years (although the mineral's presence had been noted in the 19th century) because demand for the metal, and therefore its price, have gone up; advances in the technology of economically extracting the metal from low-grade ore constantly are being made; and a relatively low but steady pressure always is on to exploit domestic sources of raw materials, for various reasons--to

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[16] A Wilderness in Crisis, p. 15.

improve the Nation's balance of payments posture, to make the Nation self-sufficient from a national defense standpoint, and just "because it is there" and from a geologist's point of view should not be "wasted."

Two Alternative Uses of the Area--Wilderness and Nickel-Mining

The Boundary Waters Canoe Area is, by Act of Congress, a unit of the National Wilderness Preservation System. Yet special regulations applying only to the BWCA provide for a zoning system there which permits some use of motor boats and snowmobiles and a limited amount of logging. Conservation organizations see in the BWCA an opportunity to restore wilderness conditions; they will seek continued expansion of the area's "no-cut" and "no-motor" zones, trusting that, in time, the imprint of man's work will become "substantially unnoticeable", as this Sierra Club statement indicates:

> Logging and road building within the BWCA must be stopped permanently, now. When this is done the U.S. Forest Service can at last shift its management emphasis in the BWCA from selling timber to the challenging new tasks of maintaining the area's natural plant and animal communities, and to restoring those areas previously damaged by logging and road building. . . .
>
> [R]ecreational use of the BWCA is heavy and growing rapidly.[17] [Motorized] use is clearly incompatible with wilderness values and should be eliminated. . . . [T]he

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[17] "[The BWCA] is already the most heavily-used in the entire Wilderness Preservation System--112,800 visitors spent 820,600 visitor days enjoying it in 1968. Visitors come from all 50 states and many foreign countries. . . ." A Wilderness in Crisis, p. 7.

> time for eliminating the remaining incompatible uses has arrived. . . . All we seek is the same protection for the BWCA that is afforded all other units of the National Wilderness Preservation System. . . . The time has come for these [incompatible use] problems to be dealt with by a legislative mandate.
>
> [Furthermore,] copper-nickel mining and smelting must never come to the BWCA. . . .[18]

Others disagree, feeling that the nickel ore known to exist in the Boundary Waters Canoe Area should be located and mined immediately. Pressure has built up over two decades to exploit this mineral resource. The nickel ore found in the vicinity of the BWCA is the Duluth gabbro, a source of nickel-bearing minerals which is treated lightly in the literature on economic sources of nickel which devotes far more space to the sulphide ores of Canada, Western Australia, Botswana, Norway, South Africa and the U.S.S.R.,[19] the lateritic ores of New Caledonia, the Phillippines, the Republic of the Congo, and the tropical American nations of Cuba, the Dominican Republic, Columbia, Venezuela, Guatamala and Brazil,[20] and the manganese-cobalt-nickel nodules on the ocean floor,[21] all of which offer vast reserves of this metal.

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[18] Ibid., pp. 26-27.

[19] T. S. Lovering, Minerals in World Affairs (New York: Prentice-Hall, Inc., 1943), pp. 234-235.

[20] Charles F. Park, Affluence in Jeopardy: Minerals and the Political Economy (San Francisco: Freeman, Cooper and Co., 1968), pp. 87-89.

[21] Joseph R. Boldt, Jr., The Winning of Nickel: Its Geology, Mining, and Extractive Metallurgy (London: Methuen & Co. Ltd., 1967) p. 6.

Occurences of copper and nickel minerals were reported from the Duluth gabbro as early as 1899[27] and 1919,[28] but deposits of commercial significance were not identified there until 1948 when copper stain was noted in rock being used for road building in the Superior National Forest.[29] In 1951, International Nickel Co. (Inco) obtained permits to prospect in the national forest (but outside the BWCA); in 1952, Inco acquired private leases in the general area of the original discovery near Ely.[30] While Inco pursued a substantial core-drilling project and located large reserves of potentially minable copper-nickel sulfides, conservationists were registering with federal administrators in Washington their concern regarding this discovery and its potentially adverse impact on the BWCA.[31]

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[27]U. S. Grant, "The Geology of Cook County," The Geology of Minnesota, Minnesota Geological and Natural History Survey, 1899, p. 344.

[28]M. L. Nebel, "The Basal Phases of the Duluth Gabbro near Gabemichigami Lake, Minn.," Economic Geology, Vol. 14, 1919.

[29]P. K. Sims, "Copper and Nickel Developments in Minnesota," Mining Congress Journal, March 1968.

[30]See, "International Nickel Co. Buys S. Kawishiwi Ore Discovery," The Ely Miner, June 12, 1952, p. 1, and "N.Y. Firm May Exploit Ely Nickel Ore Land," Minneapolis Morning Tribune, June 13, 1952, p. 1.

[31]E.g.: Charles S. Kelly, Chairman, President's Quetico-Superior Committee, letter to Secretary of the Interior Douglas McKay, Nov. 14, 1953: "The President's Committee is deeply concerned about this new mining development. While it recognizes the importance of rich deposits

A positive response to the appeals of the Izaak Walton League of America and other groups for protection of the BWCA's wilderness values from the threat of mining came on March 10, 1954, when Forest Service Chief Richard E. McCardle approved a "policy pertaining to prospecting permits and mining leases for special areas within the Superior National Forest" which stipulated that:

> Mineral leases inside the Roadless Areas will not be approved unless or until production of minerals outside of the Roadless Areas indicates beyond doubt that it is in the public interest to permit development of minerals inside the Roadless Areas.

This restatement of Forest Service policy also pledged that:

> Such steps, as are proper and feasible to protect the public recreational values, will be taken if mineral development on private lands or on privately-owned mineral rights threatens the interests of the United States inside the Roadless Areas.

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of rare metals to the nation's welfare, it is opposed to the useless waste of priceless social values which can result from the exploitation of low grade mineral deposits." Sigurd F. Olson, Ely, Minn., notes from Nov. 22, 1953 conference with Forest Service Chief Richard McArdle and Deputy Chief Ed Cliff: "McArdle expressed himself as being in accord with the stand of the President's Committee; that the time had come for the USFS to declare itself in support of the long record of preservation of [the BWCA]. . . ." Report to the President of the United States by the Quetico-Superior Committee, December 1953, 16 pp: "If mineral deposits of major value are found, the public welfare must be the deciding factor in their use and development. If it cannot be demonstrated that their commercial use is of greater public value than the wilderness that can be destroyed, such use should be prohibited. Should mining developments be warranted, then everything possible should be done to screen operations and to minimize the destruction of recreational values."

On May 21, 1964, as noted above, Secretary of Agriculture Orville L. Freeman appointed a Boundary Waters Canoe Area Review Committee chaired by Dr. George A. Selke, former Minnesota Commissioner of Conservation, (and including Izaak Walton League Minnesota Division Vice President Raymond A. Haik) which examined the area, held public hearings, and submitted a letter containing twenty-five recommendations to Secretary Freeman on December 15, 1964. The Secretary's January 12, 1965 statement on the "Selke Report" contained his approval of the committee's recommendations that the BWCA be managed as a primitive-type recreation area and that consent to future applications for mineral prospecting permits in the Canoe Area be withheld except in cases of national emergency. Proposed regulations to implement the committee's recommendations were issued in June of 1965,[32] and over three thousand responses to the agency's request for public comment were received.[33] Out of this process came a so-called "Management Direction" for the BWCA which requires that objectives of management emphasize "the preservation and maintenance

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[32]See, "The Special Regulations for the Boundary Waters Canoe Area in Minnesota," Remarks by A. W. Greeley, Deputy Chief, Forest Service, before the Thirteenth Annual Assembly of Minnesota Conservation Federation, Detroit Lakes, Minn., Sept. 17-19, 1965.

[33]A. W. Greeley and L. P. Neff, "Forestry Decisions in the Light of Multiple Products (A Case Study [of the BWCA])," Journal of Forestry, Oct. 1968, p. 790.

of the primitive character of the area in the vicinity of lakes and streams."[34] Others, outside the Forest Service, also officially recognized the growing importance of canoeing and other resource-based types of recreation to northern Minnesota.[35]

Counter-pressure built up during the 1950s and 1960s, however, to exploit the BWCA's mineral resource. Geologists saw the Duluth gabbro as soon becoming an economic ore as the price of copper and nickel continued to rise on the world market. A spokesman for this point of view was

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[34] Ibid., p. 791.

[35] E.g.: Minnesota Outdoor Recreation Plan--Executive Summary, 1969 (St. Paul: Minnesota Department of Conservation, 1969), p. 30: "Canoeing is an important recreation activity in Minnesota where more than 4,000 miles of river trails exist. These rivers with their natural shoreline environments are becoming increasingly important to the state. . . ." Uel Blank, "Tourism in the Lake of the Woods-Rainy Lake Area," Minnesota Agricultural Economist, Nov. 1, 1971, pp. 1, 3: "Studies in northern Minnesota have shown that a dollar of expenditure by tourists generates total local economic activity ranging from $2.63 in the case of eating establishments, to $3.37 in the case of resorts because of respending by local firms. . . . Fishing currently provides the greatest travel attraction for non-business tourists to the LOWRL area. . . . For the 1970s, resource demands require an appropriate mixture of intensive use of certain localities and preservation of the wild character of others." Charles E. Aguar, Regional Development Plan, Regional Planning Area, Mesabi and Vermilion Ranges, Minnesota (Hibbing, Minn.: Iron Range Planning Board, 1969), pp. 9, 20: "Recreational Rivers, labeled 'aqua-highways' should be developed as part of the proposed region-wide system of linear parks and scenic corridors which contain many of the multi-purpose trails. . . . It is possible that a well developed, maintained and promoted trail system could someday do for many Range communities what canoe outfitting has done for the City of Ely."

Dr. Paul K. Sims, Professor of Geology at the University of Minnesota and Director of the Minnesota Geological Survey, who wrote in 1968 the following account of the potential of the BWCA-centered ore:

> The Duluth gabbro is largely within the Superior National Forest, and a part is within the Boundary Waters Canoe Area. . . . Inco has reported that the material it is developing in [the South Kawishiwi River] area contains somewhat less than one percent combined copper and nickel in the ratio of about three parts copper to one part nickel. Drilling information and random surface samples indicate that, in addition to material of this grade, there are large quantities of lower grade material containing 0.3 to 0.6 percent combined copper and nickel. . . . The deposits that are known are marginal at today's metal prices. If they can compete favorably in the world market, the region could become a leading producer of copper and nickel. . . . If the deposits cannot be mined profitably today, it is probable that they will become economic within the next few years, as technology and market conditions improve.[36]

Perhaps inevitably, the discovery of the Duluth gabbro in the context of an increasing demand for nickel led to an attempt by a holder of "severed" mineral rights within the BWCA to conduct mechanized mineral exploration there. On December 17, 1969, Craig Rupp, Forest Supervisor of the Superior National Forest, Duluth, Minnesota, issued a press release announcing that (a) one George St. Clair of New York City had declared his intention to begin mineral exploration, using heavy diamond drilling equipment, in the BWCA; (b) the mineral rights involved in St. Clair's plans are private rights which the Government cannot take without

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[36] P. K. Sims, "Copper and Nickel Developments in Minnesota," Mining Congress Journal, March 1968.

just compensation; and (c), while the Forest Service encourages the development of minerals where the conflict with other resource uses and activities can be resolved, "[i]nside the [BWCA] it is not possible to resolve this conflict." Rupp stated:

> The Forest Service does not think it would be in the best interest of the American people to mine inside the Boundary Waters Canoe Area, a unit of the National Wilderness Preservation System. . . . [T]he Forest Service will use every legal means available to prohibit exploratory drilling and subsequent mineral development until the problem is resolved.[37]

The Legal Issues

On December 23, 1969, the Izaak Walton League of America filed with the United States District Court for the District of Minnesota, Fifth Division, a complaint[38] seeking a declaratory judgement to:

(1) determine right, title and interest, if any, of defendants George W. St. Clair and Thomas Yawkey to minerals that might be present in the Boundary Waters Canoe Area;

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[37]"News Release, Superior National Forest," Duluth, Minn., Dec. 17, 1969. "[St. Clair] couldn't have picked a worse place for his attack on the BWCA--Gabimichigami, Peter, Gillis, Howard, Jerry and the other lakes involved are all gems--clear, cold, trout lakes, in a unit of virgin forest, and deep within the Interior Zone (No-cutting Areas)." Miron L. Heinselman, St. Paul, Minn., personal letter to Stewart M. Brandborg, Executive Director, The Wilderness Society, Washington, D.C., Dec. 24, 1969.

[38]Izaak Walton League of America v. St. Clair, 313 F.Supp. 1312 (D. Minn. 1970)(Civil Docket No. 5-69-70).

(2) enjoin federal defendants Secretary of Agriculture Clifford Hardin, Forest Service Chief Edward P. Cliff, and Superior National Forest Supervisor Graig Rupp from granting permission to St. Clair and Yawkey to enter into the BWCA for the purpose of drilling, exploring or removing minerals; and

(3) enjoin defendant Minnesota Commissioner of Conservation Jarle Leirfallom from granting permission to St. Clair and Yawkey to enter or cross state-owned lands or waters for the purpose of exploring for or removing minerals from the BWCA.

Minnesota Commissioner of Taxation Rufus T. Logan also was named as a defendant in the complaint based on the plaintiff's belief that no taxes had been paid on the mineral rights claimed by St. Clair and Yawkey and that no minerals could be removed until the back taxes on this property had been paid.

Filed with the IWLA's complaint by its chief counsel (and national president), Raymond A. Haik of the Minneapolis law firm of Popham, Haik, Schnobrich, Kaufman and Doty, were (1) a motion for a temporary injunction to bring preparations for mechanized mineral exploration in the BWCA to an immediate halt; (2) a fifty-eight-page "brief" in support of this motion; and (3) an affidavit of Robert L. Herbst, Executive Director of the Izaak Walton League, describing the League's efforts since 1922 to win wilderness-type protection for the BWCA. On January 7, 1970, counsel for

the IWLA filed an amended complaint containing an additional claim alleging that "preferential and discriminatory rights and privileges [had been] afforded holders of severed mineral rights" in the BWCA.

On January 10, 1970, U.S. Department of Justice Attorney Nelson H. Grubbe filed with the court the federal defendants' memorandum of points and authorities in opposition to plaintiff's motion for a preliminary injunction. This short statement dealt only with these defendants' position that "[t]he plaintiff has not passed the threshold test of standing."

On January 13, 1970, the State of Minnesota--nominally a defendant in this action--asked the court to issue a restraining order, "to be effective until the determination of plaintiff's motion for a temporary injunction herein," to keep St. Clair and Yawkey from moving core-drilling equipment into the BWCA. This motion, filed by State Attorney General Douglas M. Head, was based on an affidavit by Conservation Commissioner Leirfallom which cited state and federal policies to preserve the wilderness values of the BWCA and which stipulated:

> Under the present wilderness policy [of the State of Minnesota], any minerals existing on state land [in the BWCA] are regarded administratively as a mineral reserve, available for use in case of national emergency.[39]

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[39]Affidavit of Jarle Leirfallom, Jan. 13, 1970, p. 5.

Leifallom's affidavit concluded:

> [I]t is imperative that defendants St. Clair and Yawkey . . . be stopped from entering the BWCA for such purposes [drilling for mineral exploration] pending judicial determination of their rights to do so, and thereby avoid unnecessary and perhaps irreparable damage to the wilderness character of the area.[40]

On January 14, 1970, a Duluth attorney, William P. O'Brien, filed a one-page affidavit with the court stating that defendant Thomas A. Yawkey

> . . . has not been personally served with any document pertaining to this proceeding [and] has not held any land or mineral rights in said area for many years and . . . presently has no right, title or interest in land and minerals within the Boundary Waters Canoe Area.

The attorney for defendant Yawkey asked for an order quashing the motion for temporary injunction, and for dismissal of all proceedings, on sixteen grounds including the allegation that

> . . . the proceedings constitute an abuse of process motivated by publicity and subverts the proper purposes of this court.

On January 18, 1970, the U.S. Department of Justice filed its motion to dismiss, together with a memorandum of points and authorities in support of its motion, the motion on behalf of the federal defendants reading in its entirety:

> The defendants, [Hardin, Cliff, and Rupp], move the court as follows:
>
> (1) To dismiss the action because the complaint fails to state a claim against the above-named defendants upon which relief can be granted;

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[40] Ibid., p. 7.

> (2) To dismiss the action because this is an unconsented suit against the United States and this court is without jurisdiction;
>
> (3) To dismiss the action because the plaintiff has no standing to sue the federal defendants.

An already complex legal picture became even more complicated on March 6, 1970, when the state defendants filed their answer to the IWLA's complaint and at the same time "asserted cross-claims." Conservation Commissioner Leirfallom alleged that defendants St. Clair and Yawkey, "by laches and inaction," had forfeited any rights they may have possessed to remove minerals from the BWCA (because they had knowingly acquiesed" in the zoning of the BWCA as a "primitive wilderness management area subject to mining only as related to a national emergency"). And the state conservation commissioner alleged that the federal defendants

> . . . have by certain past actions evidenced their intention to allow defendants St. Clair and Yawkey to enter upon lands within the BWCA under certain conditions for the purpose of exploring for or removing minerals therefrom, contrary to said wilderness policy and zoning[,][41]

and that, "unless restrained by Order of this Court," the federal defendants

> . . . will allow defendants St. Clair and Yawkey to enter upon said lands under certain conditions for the purpose of exploring for or removing minerals therefrom, thus causing irreparable damage for which there is no adequate remedy at law.[42]

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[41]Answer of Defendants for the State of Minnesota, p. 10.

[42]Ibid.

Documents continued to be filed with the district court throughout the month of March, 1970, in regard to this case. On March 11 the plaintiff filed a brief in opposition to the motions to dismiss; plaintiff's counsel pointed to the December 24, 1969, decision of Judge Doyle in the Parker case[43] to support his contention that the Izaak Walton League had standing. On March 16 defendant Commissioner of Conservation Leirfallom filed a brief in opposition to the motions to dismiss ("The state defendant . . . has standing to challenge the actions of both federal defendants and the individual defendants St. Clair and Yawkey. . . ."). Also on March 16, the federal defendants filed a supplemental memorandum in support of their motion to dismiss.

March 16, 1970, was the day on which the case of Walton v. St. Clair came before U.S. District Judge Philip Neville at Duluth, Minnesota, for oral argument. Raymond A. Haik represented the plaintiff; William P. O'Brien and Phillip M. Hanft represented defendants St. Clair and Yawkey; and Robert C. Renner, U.S. Attorney, and Nelson H. Grubbe, Department of Justice, Washington, D.C., appeared for the federal defendants. Attorneys representing the Office of General Counsel of the U.S. Department of Agriculture and the Attorney General of the State of Minnesota also were present.

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[43] 307 F.Supp. 685; see, Chapter IV, supra.

Judge Neville's decision, filed on June 2, 1970, constituted an "Order Denying Motions of Defendants Hardin, Cliff and Rupp for Dismissal.[44] Oral argument on the merits of the Izaak Walton League's complaint, before Judge Neville in Duluth, did not come until more than two years later, on September 15, 1972. The reasons for the delay in the resolution of this conflict probably were well summed up in this March 18, 1970, observation by plaintiff's chief counsel, Raymond A. Haik:

> As a lawyer, I was somewhat amazed at the complex and interrelated number of state and federal laws that bear on the questions involved in this litigation. I was also somewhat surprised at the extent to which there are special and specific laws dealing with mineral development within the State of Minnesota.[45]

Walton v. St. Clair differs from the preceding three cases in several ways. In the first place, the Izaak Walton League filed suit in order to help the Forest Service achieve the agency's publicly stated goal: to keep St. Clair's core-drilling rig out of the wilderness area. To do so it had to sue the Forest Service. It alleged that the agency broke the law when it permitted St. Clair's agents to enter the BWCA for any kind of mineral-exploration purpose, mechanical or otherwise, contending that federal and state "zoning"

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[44] 313 F.Supp. 1312 (1970), also reported at 1 ERC 1401. See, Bob Lundegaard, "Judge Says U.S. Must Face BWCA Suit," The Minneapolis Tribune, June 3, 1970, p. 16.

[45] Raymond A. Haik, personal letter to Harry C. Applequist, Duluth, Minn., Mar. 18, 1970.

statutes (principally the Wilderness Act of 1964) preclude any such activity there. To supplement this basic "zoning" theory upon which it pinned most of its hopes for success, the League (and "cross-claimant" Natural Resources Commissioner) added these claims: the League's members had been denied equal protection because St. Clair's prospectors had been allowed to camp in the wilderness area much longer than recreational campers were allowed to; the State had failed to promulgate regulations and procedures, including hearings, under which permits were to be issued to mineral prospectors to cross state lands and waters in the BWCA; and St. Clair's and Yawkey's mineral rights were invalid because of non-payment of taxes, laches in asserting their rights, and fraud in the original patenting of the private rights.

In the second place, one of the defendants, the State Commissioner of Natural Resources, was a cross-claimant against the other defendants and assumed a role similar to and supportive of the plaintiff. And in the third place, this was the only one of the four cases involving defendants other than employees of the United States Government, and the list of these individual defendants--mineral rights lessors as well as lessee St. Clair--grew longer as the case progressed and added a unique additional dimension to the pleadings. The result was a pulling and hauling in four directions, instead of two, because the objectives of the

Izaak Walton League, the State of Minnesota, the Federal Government, and the mineral rights-holders all were different. The several legal issues involved are discussed separately below:

Standing to Sue

Judge Neville's June, 1970, decision on the question of the IWLA's standing to sue was based largely on the March, 1970, Association of Data Processing Supreme Court opinion;[46]

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[46] Association of Data Processing Servicing Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (3/3/70). See, Kenneth Culp Davis, "The Liberalized Law of Standing," The University of Chicago Law Review, Vol. 37, No. 3, Spring 1970, pp. 450-473. Davis, at pp. 471-2: ". . . The live issue now is whether the [Supreme] Court should travel the remaining . . . distance [in its liberalization of the law of standing] to the sole test of 'injury in fact.' . . . Six Justices have held back, attempting in the Data Processing opinion to create a second test that must be satisfied for standing--'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' . . . The reasons for rejecting the second test are powerful ones. The 'to be protected' part of the test is analytically faulty in that an equity court would be deprived of its accustomed power to decide, on the basis of its conception of what equity requires, whether or not to provide judicial protection in nonstatutory and nonconstitutional interests. The 'to be regulated' part is even more seriously faulty in that a person who is not 'to be' regulated under the statute would lack standing to challenge an agency's unlawful regulation of him. The test would deny standing to many persons who have had standing under pre-1968 law, and the Court could not intend that, because its basic purpose is to liberalize the law of standing, not to restrict it. . . . The main test should be 'injury in fact' . . . ."

Cf., Sierra Club v. Morton, 92 S.Ct. 1361 (1972). In this Mineral King case (see Chapter V, supra.), the Supreme Court majority reiterated Data Processing's

The district judge concluded that the conservation group plaintiff did have standing to sue. This is what Judge Neville said:

> The question of standing it seems to the court has been settled by the two recent Supreme Court cases of Association of Data Processing and Barlow. . . .[47] Association of Data Processing establishes two requirements for standing: 1. "As we recently stated in Flast v. Cohen, 392 U.S. 83, . . . '[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" 90 S.Ct. at 829.
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> Clearly here the plaintiff, Izaak Walton League, will present the case in "an adversary context." The League has a long history of activity in conservation matters and natural resource preservation. It has been active for many years in urging congressional and other legislative action. In fact it is stated that it bought a substantial quantity of the land now forming the Boundary Waters Canoe Area while working to secure congressional establishment of the area and later deeded or resold the same to the Federal Government. There is no doubt in the court's mind that plaintiff actively will pursue in an adversary way the prosecution of this suit. . . . The first requirement of Association of Data Processing and Barlow is thus met.
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> 2. The second Association of Data Processing requirement . . . is that plaintiff must allege "that the challenged action has caused him injury in fact, economic or otherwise." It is of course a fact that

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"interests to be regulated or protected" test but dwelt at far more length on the "injury in fact" test: [T]he party seeking review [must] be himself among the injured." "Individualized injury" on the part of the plaintiff specifically was made a requirement for standing. 92 S.Ct. at 1366-67. Thus the Supreme Court appeared to be going in the direction suggested two years earlier by Professor Davis.

[47] Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (3/3/70).

plaintiff does not own any of the land nor does it claim to own any mineral rights in the Boundary Waters Canoe Area, nor does it have any real economic interest in the outcome of the suit since it is a not-for-profit corporation. . . . [I]t is clear in the case at bar that this second requirement is met . . . as "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" which the Association of Data Processing states to include: " . . . That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. . . ."[48]

The Izaak Walton League is not a "johnny-come-lately" or an ad hoc organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an "aesthetic, conservational and recreational" interest to protect. This gives it standing and meets the second requirement of Association of Data Processing.[49]

. . . [T]he first requirement [of Data Processing] is met here . . . in view of the Congressional declaration that it is "the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness" 16 U.S.C. Section 1131(a). If an organization such as plaintiff cannot challenge governmental activity in view of this declaration, it is hard to think of anyone who would have standing.[50]

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[48]Cases cited for support: Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616; Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-1006; Abington School District v. Schempp, 374 U.S. 203; FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477.

[49]Cases cited for support: Scenic Hudson; Citizens Committee for Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D.N.Y. 1969); Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (6th Cir. 1967); Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (S.D.N.Y. 1967); Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, 284 F.Supp. 809 (E.D.Pa. 1968); Western Addition Community Organization v. Weaver, 294 F.Supp. 433 (N.D.Cal. 1968); Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir. 1968); Parker v. United States, 309 F.Supp. 593 (D.Colo. 1970).

[50]313 F.Supp. 1312, at 1316-17.

Plaintiff Izaak Walton League had described itself to the court in its complaint as a not-for-profit Illinois corporation which, since its founding in 1922, had supported the United States Forest Service, the State of Minnesota, the Quetico-Superior Council, and the President's Quetico-Superior Committee in securing the state and federal legislation "which now maintains and protects the wilderness and primitive character of the BWCA."[51] Furthermore:

> Plaintiff maintains an endowment fund which it has used to purchase some 7,000 acres in the BWCA, most of which has been sold and transferred to the United States of America.[52]

The League's Executive Director, Robert L. Herbst, provided the court with additional details in his sworn affidavit, including these:

> In 1922, the Izaak Walton League, joining with a now defunct organization called the Superior National Forest Recreation Association, with the aid of Arthur H. Carhart of the Forest Service and Paul B. Riis of the American Institute of Park Executives, fought and foiled a plan to cut broad highways into the BWCA. Despite the fact that the Forest Service supervisor then managing the Superior was stoutly in favor of building the roads, the wilderness land use by the public as [was?] recognized and after about two years of skirmishing, the idea was abandoned. In 1924, "Outdoor America," the official publication of the Izaak Walton League, headlined, "Superior National Forest Saved". . . .[53]

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[51] Complaint, p. 3.

[52] Ibid.

[53] Herbst affidavit, p. 8. (Emphasis added.)

> In later years, backed by many other conservation groups, it sought and obtained legislation which protected the area by zoning laws, froze at their present height the water levels of the lakes, and forbade the cutting of waterside timber so that the beauty of the shorelines would forever be preserved. . . .[54]

> The Izaak Walton League, as a landowner and as a nationally recognized citizens conservation organization of long standing, through its endowment has a continuing concern and interest in the BWCA. . . . In order to complete acquisitions of private holdings [with the BWCA], the Izaak Walton League of America began a program of land purchase in the BWCA and has expended hundreds of thousands of dollars to acquire private lands within the BWCA for subsequent transfer and sale to the federal government.[55]

Attached to Herbst's affidavit as Exhibit 1 was a list of land purchases made by the Izaak Walton League Endowment--lands conveyed to the federal government to help "complete" the BWCA--which begins with an eighty-two-acre purchase in 1946, includes a 3,368-acre transaction in 1951, and concludes with these totals:

Cost to the Izaak Walton League Endowment	$377,493.91
Sale Price to the Federal Government	$285,313.88
Acreage	7,349.30

The League's position that it was not only a potentially injured party itself but also that it sued on behalf of the public interest in the wilderness values at stake surfaced in its Brief in Support of Motion for Preliminary Injunction, in the section dealing with the court's jurisdiction and the amount in controversy:

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[54] Ibid., p. 10.

[55] Ibid., p. 12

> [I]n the case at hand, where the plaintiff has purchased land by the expenditure of approximately $400,000 . . . and since that value depends largely upon the maintenance of the "wilderness" status of the BWCA, therefore, unless the plaintiff's demands for injunctive relief are granted, the plaintiff and the public in general stand to lose an amount far in excess of $10,000. The entire value to the public of the BWCA area depends upon its wilderness status. . . .[56]

Eight pages of this brief were devoted specifically to a discussion of the question of the plaintiff's legal standing to maintain the action--a discussion with a resemblance to two briefs on this subject described in previous chapters on the Gandt and Parker cases.[57] Attorney Haik's brief for the IWLA borrowed from attorney Ruckel's brief for the Gandt and Parker plaintiffs the list of law review articles on the concept of standing "commended to the court's attention."[58] It reiterated the plaintiff's "special and long-standing interest in the BWCA and its efforts to preserve the wilderness and recreational status of that area."[59] And its cited for support ten recent cases[60] including the

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[56]Brief in Support of Motion for Preliminary Injunction, p. 3.

[57]See, Chapter III, pp. 44-47, and Chapter IV, pp. 115-116, supra.

[58]This list of articles is found at p. 44, supra.

[59]Brief in Support of Motion for Preliminary Injunction, p. 12.

[60]Essentially, those cited later by Judge Neville; see, footnote 49, this chapter, supra.

Parker[61] and Sierra Club v. Hickel[62] opinions at the district court level--another indication of how the four cases described in this study leapfrogged past one another through the time period 1969-1972, feeding off of one another in the process to the extent that the fruits of the legal research done on behalf of the various plaintiffs were shared and supportive opinions won in the other cases were cited by plaintiff's counsel in the case at bar.

(Interestingly, one of the cases heavily relied upon by the Walton v. St. Clair plaintiff--Citizens Committee for the Hudson Valley v. Volpe--was specifically disapproved of by the Supreme Court in its April, 1972, Sierra Club v. Morton [Mineral King] decision.[63] Would the Izaak Walton

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[61]307 F.Supp. 685 (D.Colo. 1969), 309 F.Supp. 593 (D.Colo. 1970).

[62]Civil Action No. 51464, U.S. District Court for the Northern District of California, July 23, 1969, unreported.

[63]"The [Sierra] Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public.' [Footnote inserted:] This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 105: 'We hold, therefore, that the public interest in environmental resources--an interest created by statutes affecting the issuance of this permit--is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.' [End of footnote.] This theory reflects a misunderstanding of our cases involving so-called 'public actions' in the area of administrative law." 92 S.Ct. at 1367.

League fail the Supreme Court's "standing" test, should this St. Clair case be appealed to that level, as the Sierra Club failed that test in its Mineral King case, because of the lack of any allegation of individualized injury? Presumably this would depend on the definition of "individualized injury" adopted by the court. The League's $400,000 investment in the BWCA's wilderness status could be regarded as a tangible interest threatened with injury, despite the absence of "individual" plaintiffs.)

Defendants' Pleadings on the "Standing" Issue

The Minnesota Conservation Commissioner's brief in opposition to the motion to dismiss referred to Data Processing and Barlow as decisions which "enlarge upon the class of people who may protest administrative action" and declared that

> . . . the state has standing and is not barred from protesting the Secretary of Agriculture's action. The state probably would have standing to intervene in any similar lawsuit which might be initiated subsequent to the present action if it fails for any reason.[64]

The state threatened to sue St. Clair, Yawkey, and the Forest Service if the Izaak Walton League's case was dismissed:

> The administration of justice will only be delayed by a dismissal followed by commencement of a new action which will involve the same parties. All issues can be fully developed by all parties in the present action.[65]

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[64]Defendant Commissioner of Conservation's Brief in Opposition to Motions to Dismiss, p. 5.

[65]Ibid., p. 6.

The Justice Department's arguments regarding the "standing" of the Izaak Walton League will be familiar to those who have read chapters III, IV, and V, supra. The tone of the federal defendants' initial memorandum in opposition to the League's motion for a preliminary injunction reflected the fact that it was written on January 10, 1970, prior to the Supreme Court's March 3, 1970, rulings in Data Processing and Barlow:

> The plaintiff's complaint against the Federal defendant should not be heard by this Court. Unless the plaintiff can demonstrate some legal connection to an interest in the land involved, the plaintiff cannot prevail against the Federal defendants.[66]
>
> "Standing to sue" a federal officer requires a showing of an invasion of a legal right--a right of property or of contract, a right to be free of tortious invasion or a privilege conferred by statute. Tennessee Power Co. v. TVA, 306 U.S. 118 (1939). [67]

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[66]Federal Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, p. 2.

[67]Ibid., p. 3. See, Davis, op. cit. (at footnote 46), p. 453:

"In reversing [the Eighth Circuit's holding in Data Processing], the Supreme Court quoted the Tennessee Electric remark and specifically rejected it, saying only, 'The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' 90 S.Ct. at 830. The Court emphasized in a footnote that 'the existence or non-existence of a "legal interest" is a matter quite distinct from the problem of standing.' A huge

> [T]he plaintiff does not allege injury or threatened injury to a legally protected interest. There is no logical connection between the status of the plaintiff and the activities of the Federal defendants that the plaintiff seeks to enjoin. The plaintiff does not attack the constitutionality of the federal activities nor does it allege any wrongful act by the Federal defendants.[68] The principles of standing in the Flast[69] and Jenkins[70] cases have not been met.[71]
>
> The Izaak Walton League brings the Secretary of Agriculture to this Court for an advisory opinion concerning the defendants' rights in public land. None of the criteria of standing have been met. The burden of defense should not be placed upon these Federal defend-

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portion of the former foundation of the law of standing was thus knocked out. The old test of 'a recognized legal interest' was specifically rejected."

Regarding the concept of "rights," see a non-lawyer's comment: George L. Peterson, Ph.D., Associate Professor and Director of Urban and Regional Planning, Northwestern University, Evanston, Ill., letter to the editor, Outdoor America, Apr. 1970, p. 4: "[St. Clair] is one man with mineral rights, but there are millions of us with recreation and wilderness rights. . . ."

[68]Cf., Judge Neville's June 2, 1970, conclusion: "While it is true that plaintiff's complaint does not allege in haec verba that defendants have done or are threatening to do an unlawful act, by violating their management authority over the National Forests or the BWCA but is directed for the most part to defendants St. Clair and Yawkey, clearly it is pregnant with the claim and assertion that granting permission to these latter defendants is 'inconsistent with the state and federal zoning laws and the public policies of the United States and the State of Minnesota which have been established to regulate mineral development in the BWCA.'" 313 F.Supp. at 1314.

[69]392 U.S. 83 (1968).

[70]395 U.S. 411 (1969).

[71]Federal Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, p. 5.

> ants. The plaintiff has not passed the threshold test of standing. No injunction against the Federal defendants should be issued.[72]

The Federal defendants' February 18, 1970, memorandum in support of their motion to dismiss the case took the "no standing" argument further, describing the plaintiff's legal action--taken, in fact, at the unofficial request of the Forest Service--as having the effect of frustrating and delaying the mandate of Congress:

> The plaintiff seeks to impose upon the federal defendants its theories of real property law. Although the complaint is directed primarily at St. Clair and Yawkey, the subject of the case is public land. This is to be managed and directed by Congress. By filing the case and putting the federal defendants to their defense the mandate of Congress is frustrated and delayed. The public interest involved in the protection of these federal lands is a matter for Congress, not the courts. The plaintiff does not have a sufficient legal right to be entitled to a hearing against the federal defendants.[73]

On March 16, 1970--after the Supreme Court had ruled on Data Processing--the federal defendants filed, at the request of the court, a supplemental memorandum in support of their motion to dismiss which maintained that the IWLA did not meet the standing tests provided by Data Processing and which concluded:

> The plaintiff simply seeks to have the court take over the management of the public lands involved.[74]

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[72] Ibid., p. 6.

[73] Memorandum in Support of Motion to Dismiss, p. 5.

[74] Supplemental Memorandum in Support of Motion to Dismiss, p. 5. Cf., Sax, Defending the Environment, pp. 196-7:

"Government lawyers responded in predictable fashion. No mere citizen could sue to enforce the Wilderness Act, they

The editors of the respected Minneapolis Tribune reacted to the posture of the United States Department of Justice in this case with wonderment bordering on disbelief:

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said [with reference to the Parker plaintiffs]. What Congress had created, they claimed, was not a right enforceable by members of the public, but a direction to the Forest Service to exercise its discretion, and if it exercised that discretion erroneously, the citizens could always bring their complaints to Congress. Their lawyers failed to note, of course, that by the time citizens could get to Congress (which has a few other priority matters on its agenda), the wilderness they sought to save would probably already have been cut over [in the St. Clair case, roaded, drilled, and/or mined]. . . .

"Assertions like this typify the indiscriminate way in which government lawyers tend to polarize the issues in such cases. . . ."

See also, Raymond A. Haik, personal letter to John McGrory, Legal Department, Cargill, Incorporated, Wayzata, Minn., Jan. 22, 1970, p. 2: "The position that the Justice Department has taken when cases have been commenced against federal officials is to oppose all of the cases on the basis that there is no standing for groups such as the Izaak Walton League to maintain an action. This was the position that was strongly argued by Mr. Nelson Grubbe, an attorney from the Department of Justice. Our approach to the federal government attorneys was one which said that we have common cause [emphasis added] if the ultimate objective is to secure and protect the BWCA; therefore, we felt that the federal government should avail itself of the type of support that we can develop in order to demonstrate that (1) there is no right of entry for any type of commercial exploration, and (2) that if there is, the valuation theory that is applied when these rights are to be acquired is not one which is premised on the federal government officials' assumption that the holders of the severed mineral interests are entitled to enter into the area in violation of regulations that are presently imposed on other users of the BWCA. The position which the Justice Department is taking in this case is similar to a position which they are taking in other cases around the nation. There may also be a reaction from the federal officials in Washington that can be summarized as resenting the implication that they have not adequately protected the public's interest in insuring that no commercial exploitation occurs within the BWCA."

> The Izaak Walton League's action, if successful, would "tie the hands" of the Forest Service "on matters of public land management," according to the Justice Department. To the contrary, the league's suit would enable the Forest Service to manage the BWCA exactly the way it has been, and the way Congress had directed--as a wilderness area.[75]

And how did defendants St. Clair and Yawkey plead on this issue? Plaintiff's chief counsel, Raymond Haik, indicated in a letter to Judge Neville on April 7, 1970, that plaintiff's counsel

> . . . have not received any responsive pleading from the individual defendants; however, we assume that they are awaiting a decision on the motion of the federal government [to dismiss the case].[76]

The documents which attorney William P. O'Brien, attorney for defendant Yawkey, filed with the court on January 14, 1970, had argued, without discussion of the point, that the Izaak Walton League was without standing to sue. They also had stipulated that defendant Yawkey owned no land or mineral rights in the BWCA. No pleadings on behalf of defendant St. Clair were filed with the court prior to the March 16, 1970, district court hearing.[77]

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[75]"The Justice Department and BWCA" (editorial), The Minneapolis Tribune, March 3, 1970, p. 10.

[76]Raymond A. Haik, personal letter to The Honorable Philip Neville, United States District Judge, Minneapolis, Minn., Apr. 7, 1970, p. 2.

[77]Why had George W. St.Clair and Thomas Yawkey been chosen by counsel for the plaintiff as individual defendants in this action? See, Raymond A. Haik, personal letter to John McGrory, Legal Department, Cargill, Incorporated, Wayzata, Minn., Jan. 22, 1970, p. 1: "The lawsuit commenced

Plaintiff Supported by Other Conservation Organizations

As noted earlier, Walton V. St. Clair differs from the other three cases described in this study (although the stereotyped pleadings of the Justice Department attorneys

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by the [IWLA] names as defendants Mr. George W. St. Clair and Mr. Thomas Yawkey, who from the records that we have been able to check in the court house at Grand Marais, Minnesota, are the holders of severed mineral interests being explored in Cook County. They were named as defendants because of correspondence which came into my possession (emphasis added; see below) that indicated that during the past year, Mr. St. Clair had been exploring for minerals within the BWCA and had been maintaining some semi-permanent or permanent camping locations within the area. This activity, in our opinion, constituted a recognition by the federal officials of the right of the holders of severed mineral interests to explore for and remove minerals within the BWCA. . . ."

How had this correspondence come into his possession? See, e.g.: Craig Rupp, Forest Supervisor, Superior National Forest, Duluth, Minn., personal letter to Raymond A. Haik, Dec. 22, 1969 ("Enclosed is a copy of correspondence with Mr. St. Clair and some exhibits that may be helpful to you. . . .") and, Rupp, letter to Haik, Jan. 21, 1970 ("Enclosed are copies of the following instruments involving BWCA mineral ownership of Messers. St. Clair and Yawkey. 1. Thomas Yawkey mineral Certificates of Title in Cook County. . . . Mr. Ray Sjoberg, Cook County Register of Titles, confirms these Certificates . . . to be uncancelled and still of record as of January 13, 1970. 2. George W. St. Clair mineral interests consolidated through various deeds and mineral leases in Lake and Cook County. Mr. St. Clair, in his July visit to this office (emphasis added), presented these copies indicating they were only a partial list of his total interest. . . ."

Who were defendants St. Clair and Yawkey? George W. St. Clair was born in Virginia, Minn., and in recent years lived in Jackson Heights (Queens), N.Y., and Mexico City. He studied geology at the universities of William and Mary, Pennsylvania and Oklahoma, managed various businesses in Latin America, was associated with his father in St. Clair Exploration Co., one of the major diamond-drilling concerns on the iron ranges, and supervised drilling contracts for

tend to obscure the difference) in that the conservation group plaintiff and the federal defendants in this case shared a common objective: to prevent mechanized mineral exploration

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this company in the U.S., Mexico and Africa. He introduced rotary drilling in the Texas oilfields and owned an oil drilling company in Alberta. He died at the age of 65 on February 25, 1972, in New York City. His obituary in the March 25, 1972, Skillings Mining Review noted:

"George St. Clair will be remembered chiefly in the Minnesota mining region for his recent challenge to state and federal legislation affecting the mineral exploration of the Boundary Waters Canoe Area. His opinion was that mining operations, consisting of a single access road and modern techniques of reforestation and revegetation of dumps and tailing ponds, would not be detrimental to the environment. He also contended that such legislation, by forbidding access for exploratory purposes impaired the rights of mineral interests in this area, such as those held by the St. Clair family since the early part of the century. . . ."

The New York Times ("Ore Hunt Fought In Canoe Reserve," Dec. 28, 1969) reported that St. Clair had "hired a number of geology students to prospect in the [BWCA] last summer" and that he "has been joined in the hunt for minerals by Thomas A. Yawkey, the New York millionaire, who is the owner and president of the Boston Red Sox." St. Clair was quoted by the Times as having estimated that profits from mining the BWCA ores would run "from $75 million to $300 million."

The Winter 1970 issue of Wilderness News, a newsletter published by the Quetico-Superior Foundation of Minneapolis, Minn., stated that St. Clair had inherited the underground mineral rights to 30,000 acres in the BWCA from his grandfather, George A. St. Clair, an "oldtime Mesabi pioneer," and that he controlled or "represented" mineral rights to "150,000 BWCA acres, all sitting atop the Gabbro Contact." This report noted that Yawkey, too, was "descended from an old Minnesota mining family."

See also, Joseph H. LaCour (an employee of Thomas A. Yawkey), New York, N.Y., personal letter to Charles H. Stoddard, Minong, Wis., Jan. 6, 1970: "Mr. Yawkey does not own any minerals within the BWCA. . . . Mr. Yawkey has no lease or any other agreement with Mr. St. Clair. . . . I

and mining in the BWCA. The Izaak Walton League of America is generally regarded as a relatively conservative organization in the sense that its policies are shaped to a considerable extent by sportsmen from small communities in the Midwestern states (in contrast, for example, with the Sierra Club's large membership in the large metropolitan areas of the East and West Coasts), and it is not often found at odds with the professional resource managers of the Forest Service. The fact that it found itself in a "private attorney general" role was due to the following combination of circumstances:

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regret the irreparable damage done to Mr. Yawkey's reputation. . . ." Cf., Wayne R. Nicholls, Land Adjustment Officer, Superior National Forest, Duluth, Minn., memorandum to the Forest Supervisor, Jan. 13, 1970: "We have extracts from several Title Certificates indicating mineral ownership [in the BWCA] vested in Thomas Yawkey. Upon checking with Ray Sjoberg, the Register of Deeds and Register of Titles in Cook County this date, I was advised that none of these certificates has been cancelled. . . ."

The mineral rights agreements controlled by St. Clair and Yawkey contain a phrase that grants the holder "the right to enter, mine and remove" subsurface minerals "in the usual and customary manner." Ron Way, "Conservationists Face Defeat: Drilling Plan Reopens Boundary Waters Battle," The Minneapolis Tribune, Dec. 21, 1969.

The Order on Pretrial Motions for Walton v. St. Clair handed down by Judge Neville on April 19, 1971, stipulated, in response to the allegation by counsel for Yawkey that their client owned no mineral or other interest in the BWCA, that the plaintiff's complaint "be and the same hereby is dismissed with prejudice as to the defendant Yawkey; provided that defendant Thomas Yawkey is and shall be bound by the final judgement rendered in this case as to any interest, whether leasehold, fee, mineral or otherwise, that he may now own or may have owned in the Boundary Waters Canoe Area at the time of or prior to the commencement of the above action."

(1) The Boundary Waters Canoe Area had been the Izaak Walton League's top-priority conservation project since the time of the organization's founding in 1922. As the League's Conservation Director, Joseph Penfold, has stated:

> Over the years no area of the Nation has claimed more Izaak Walton League of America attention and devotion. The battle to preserve its wild character and its unique opportunities for wilderness canoe travel has been increasingly difficult, oft times bitter.[78]

(2) In response to a 1963 resolution of the League's Minnesota Division calling for action to preserve the BWCA's wilderness values, Secretary of Agriculture Orville Freeman appointed a review committee headed by Dr. George Selke to stury the area's problems and make recommendations for action Minnesota Division President Raymond A. Haik was named to this committee. Thus, Haik became better acquainted with the BWCA, its Forest Service administrators, and their problems. Sociologists call this technique co-optation.[79]

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[78] The Izaak Walton Magazine, Outdoor America, Vol. 30, No. 7, July, 1965, p. 2.

[79] See, Amitai Etzioni, Complex Organizations (New York: Holt, Rinehart and Winston, 1962), pp. 184-185: "Co-optation has been defined as the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence. Co-optation makes still further inroads on the process of deciding goals; not only must the final choice be acceptable to the co-opted party or organization, but to the extent that co-optation is effective it places the representative of an 'outsider' in a position to determine the occasion for a goal decision, to participate in analyzing the existing situation, to suggest alternatives, and to take part in the deliberation of consequences. From the standpoint of society . . . co-optation is more than an expediency. By giving a potential

(3) When Forest Supervisor Rupp found himself, in late 1969, running out of administrative means of preventing St. Clair from entering the BWCA with a core-drilling rig, he advised Haik--now national president of the Izaak Walton League--of his dilemma.[80]

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supporter a position of power and often of responsibility in the organization, the organization gains his awareness and understanding of the problems it faces. . . . Moreover, by providing overlapping memberships, co-optation is an important social device for increasing the likelihood that organizations related to one another in complicated ways will in fact find compatible goals. By thus reducing the possibilities of antithetical actions by two or more organizations, co-optation aids in the integration of the heterogenous parts of a complex society. By the same token, co-optation further limits the opportunity for one organization to choose its goals arbitrarily or unilaterally."

[80]See, footnote 77, paragraph two, supra. See also: Raymond A. Haik, personal interview, Norfolk, Va., July 10, 1970: "I was tipped off by the Forest Service. . . ." Ron Way, "Foresters Worried: Boundary Waters Area Prospected," The Minneapolis Tribune, Aug. 17, 1969: "'We're really holding our breath on this one,' said Craig Rupp, supervisor of the Superior National Forest. . . . 'This is a first-class mess,' said Arthur Greeley, associate chief of the Forest Service in Washington, D.C. . . . 'I can't blame St. Clair for what he is doing--the present situation not only allows it but encourages it,' [Raymond] Haik said." R. J. R. Johnson, "Matter Now In Hands of Ag Department Counsel: Court May Decide Boundary Canoe Area Mineral Rights," St. Paul Dispatch, Dec. 18, 1969, p. 13: "The problem of mineral rights in Minnesota's [BWCA] undoubtedly will reach the U.S. secretary of agriculture and may end up in court, [M. M. Nelson,] a deputy chief of the U.S. Forest Service[,] said today. . . . Nelson said the issue may have to be resolved in the courts. He did not elaborate on the steps that may lead to this. . . . Raymond Haik, Minneapolis attorney and national president of the [IWLA], said his organization has been following the development for a long time and will do all it can to protect the area--'with due process.'" Eric J. Curtis, Attorney in Charge, Office of the General Counsel, U.S. Department of Agriculture, Milwaukee, Wis., personal interview, Milwaukee, Wis., March 16, 1972: "The Izaak Walton League pulled us

(4) Haik, seeing in this conflict opportunities to protect the BWCA while gaining favorable publicity for the IWLA in the process, hastily obtained permission from a majority of the League's leaders to commence legal action.[81]

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out of a hell of a bind. Rupp was about to go ahead [to keep St. Clair out of the BWCA] on dubious authority." John O. Wernham, former Forest Supervisor, Superior National Forest, personal interview, Duluth, Minn., July 24, 1970: "We would be hopeful that the League would win [this case]." Eldon L. Erickson, Duluth, Minn., personal letter to Raymond Haik, Dec. 29, 1969: "I've talked to the Forest Service people recently and they seem to talk as if their hands are tied and they do not like the situation any more than we do. In spite of the fact that they are a party to the suit, they are willing to help us with information we will need." Sigurd F. Olson, IWLA wilderness consultant, Ely, Minn., personal letter to the author, July 9, 1970: "You will find Craig Rupp the new supervisor a real help. I admire him greatly."

Cf., R. J. R. Johnson, "Walton BWCA Suit May Flop," St. Paul Pioneer-Press, Feb. 28, 1970: "[U.S. Attorney Nelson Grubbe] said he can't foresee the federal government joining the league in seeking a declaratory judgement on mineral rights. 'We have different interests and different problems,' he said."

[81]See, e.g.: Raymond A. Haik, personal letter to Alden J. Erskine, Sioux City, Iowa, Jan. 8, 1970: "The developments in the Boundary Waters Canoe Area litigation were such that we did not have a great deal of time to get the matter prepared and proceed. On the basis of information which I received, I spoke with Bob Herbst, Vern Hagelin and the others who happened to be in Washington for another meeting. . . . On the basis of all the information available and the contacts and information that we were properly able to receive from the federal and state officials, it appeared that the only course of action was to initiate a lawsuit in the name of the Izaak Walton League. This was cleared with the Executive Board and others and it was my understanding that everyone was fully apprised. . . . [T]he League may be involved in what could be one of the more important land resource cases of the next decade. The whole area of the right of the holder of the surface lands to control the actions of the owner of the severed mineral rights will be

The League's action was unanimously applauded by other conservation organizations, those with national affiliations as well as regional and local groups.

Professional wildlife managers offered the League their assistance; Dr. Frank D. Irving, President of the Minnesota Chapter of the Wildlife Society, promised Haik:

> If you will give us some idea of the specific fisheries and wildlife technical information which might be most useful to you, we will ask those among our membership who have the necessary expertise to contact you.[82]

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of increasing importance. . . . I hope that you will inform everyone on the Endowment Board that we are probably embarked on a course of litigation that will determine, in large measure, the real protection that will be afforded the Boundary Waters Canoe Area. We ought to maximize every opportunity that this litigation will afford to secure additional contributions and members for the League." (Emphasis added.) Raymond Haik, personal letter to Charles S. Kelly, Chicago, Ill., Jan. 9, 1970: "I have asked Bob Herbst . . . to coordinate the efforts to secure financial assistance and to use the present dispute as a means of increasing the membership of the League. . . . [T]he principal objective [of the litigation] is to determine [if] the protections afforded the area by present state and federal law are adequate. . . . [I]f they are not, then we will need to obtain remedial legislation." (Emphasis added.)

[82]Frank D. Irving, School of Forestry, St. Paul, Minn., personal letter to Raymond Haik, Jan. 12, 1970. This letter also stated:

"We believe that the full value of the fisheries and wildlife resources must be considered when the key decisions are made concerning the BWCA. The fact that these values are not commonly measured by existing markets does not and should not permit either public or private parties to ignore them. Especially in the case of mining, every effort must be made to avoid the destruction of a rare and valuable resource because a market economy has led to an incorrect decision."

The North Star (Minnesota) Chapter of the Sierra Club organized a February 28, 1970, protest rally at the junction of the Gunflint Trail and the Kekakabic Trail,[83] proposed legislation to transfer mineral rights in the BWCA to the federal government immediately,[84] and published, in cooperation with the Natural History Society of Minnesota, a comprehensive analysis of the BWCA's problems entitled A Wilderness in Crisis--a thirty-six-page booklet with four-color illustrations and maps which was sold for two dollars per copy and which called for Congressional action to give the BWCA "complete and permanent protection."[85] The Natural History

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[83]See, Richard J. Thorpe, Chairman, North Star Chapter, Sierra Club, mailer headlined, "BWCA RALLY February 28, 1970. WE NEED YOUR HELP . . ." See also, Sierra North Star (newsletter of the Sierra Club North Star Chapter), Vol. IV, Nos. 1 (Feb. 1970) and 2 (April 1970).

[84]See, Lewis Patterson, "LeVander Opposed to Prospecting," St. Paul Pioneer-Dispatch, Dec. 21, 1969, p. 6: "The North Star chapter of the Sierra Club, a constant fighter for preserving natural resources, likely will propose federal legislation to protect the Canoe Area. Richard Thorpe . . . said the legislation would compare to that used in creating Redwoods National Park. . . ."

[85]A Wilderness in Crisis, p. 32. This document also states, at p. 31: "[C]onservationists must take effective action now if the wilderness character of the BWCA is to be saved. One major move already has been taken--the legal actions by the Izaak Walton League of America and the State of Minnesota. These lawsuits are strongly endorsed and supported by all conservationists and wilderness advocates. There is a possibility here of new precedents in conservation law that will contribute in a major way to protection of the BWCA, and perhaps the entire Wilderness System. No action should be taken by conservationists that will damage these possibilities."

Society of Minnesota published a special issue of its high-quality Naturalist magazine devoted to the BWCA.[86] The Northern Environmental Council (NOREC), with offices in Duluth, Minnesota, and composed of some twenty local conservation groups from Northern Michigan, Wisconsin, Minnesota, and North Dakota, published a "policy research paper" in May, 1970, which challenged the Forest Service to produce a true wilderness plan for the BWCA and concluded:

> The U. S. Forest Service is facing a test of its capability to administer this last fragment of frontier wilderness in a manner similar to National Park standards. Failure to do so will give rise to pressure for transfer of the BWCA from the Forest Service to the National Park Service.[87]

The Wilderness Society,[88] the National Audubon Society,[89]

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[86]Naturalist, Vol. 21, No. 4, Winter 1970, inside front cover editorial by Clayton S. Rudd: "Certainly no wilderness has been more fought over and for a greater length of time than our own Canoe Country. Many Americans . . . realize that wilderness must be perpetuated by natural means. . . . These goals can be attained only by the understanding and support of many citizens."

[87]NOREC Policy Research Paper #1, May, 1970, p. 10.

[88]Sigurd F. Olson, "Mining Threatens the BWCA: Wilderness Challenge," The Living Wilderness, Vol. 34, No. 110, Summer 1970, pp. 3-7. At p. 6: "The Izaak Walton League, a champion of 50 years of effort for the canoe country, filed suit in the United States District Court on December 23, 1969, seeking and injunction against mineral exploration within the BWCA. . . . Early in 1970 the State of Minnesota announced its intention of joining the IWLA in a similar suit. If both are successful it will give temporary protection, but this is not enough. Permanent legal protection by the laws of the land must be the ultimate goal."

[89]Sigurd F. Olson, "Wilderness Besieged: The Canoe Country of Minnesota," Audubon, July 1970, pp. 28-33. At p. 32: "Only an aroused public can stop prospecting and

and the National Wildlife Federation's Michigan affiliate[90] published material supportive of the Izaak Walton League's position, as did regional groups including Friends of the Wilderness,[91] the Minnesota Environmental Control Citizens Association (MECCA),[92] the Minnesota Emergency Conservation Committee,[93] "Clean Air Clean Water Unlimited,"[94] the Ely Outfitters' Association,[95] and the "Save Our Voyageurs Area" organization.[96] Even the Northern Dakota County (Minn.)

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mining by demanding that Congress repeal old mining laws which no longer apply, that new statutes be passed prohibiting prospecting or mining in the canoe area. . . ."

[90]"Boundary Area Threatened By Old Mining Claims," Michigan Out-of-Doors, published by the Michigan United Conservation Clubs, May, 1970.

[91]William H. Mage, Secretary, Friends of the Wilderness, Duluth, Minn., "So-Called Mineral Rights," letter to the editor, St. Paul Pioneer-Press, Jan. 19, 1970.

[92]"Ban Supported on BWCA Exploration," Duluth News-Tribune, Jan. 11, 1970; "Group to Save BWCA Forms," St. Paul Pioneer-Press, Jan. 16, 1970, p. 34.

[93]Charles L. Horn, Chairman, and Olin L. Kaupanger, Secretary, Minnesota Emergency Conservation Committee, Minneapolis, Minn., news release entitled "U.S. Should Control BWCA Mineral Rights," May 25, 1970.

[94]"Boundary Waters Canoe Area Again Under Attack," Clear Air Clean Water Unlimited Newsletter, Vol. VIII, No. 6, Feb. 1970, p. 3.

[95]Bob Cary, Secretary, Ely Outfitters' Association, Ely, Minn., letter to the editor, Minneapolis Tribune, Jan. 18, 1970.

[96]Robert G. Grich, Chairman, Save Our Voyageurs Area, Minneapolis, Minn., "Mining no, Voyageurs no," letter to the editor, Minneapolis Star, Jan. 24, 1970.

Young Republican Club went on record as opposed to mineral exploitation of any kind within the BWCA.[97]

That the Izaak Walton League's action was popular is clear from this June 18, 1970, letter to Raymond Haik from Congressman John A. Blatnik, who represents Duluth and Cook County, plus ten other counties, in the United States Congress and is the powerful Chairman of the House Public Works Committee:

> I agree with your position and feel very strongly that any exploratory work should be done in the Superior National Forest Outside the BWCA where vast areas remain untouched and other areas are desperately in need of attention.
>
> Ray, keep up the good work and know that we are behind you 100 percent.

Waiver of Sovereign Immunity and Authorization of Judicial Review

Judge Neville, in his June 2, 1970, denial of the federal defendants' motion for dismissal, concluded that "the merits should be considered and not be barred at this preliminary stage by the doctrine of sovereign immunity.[98] Excerpts from his opinion:

> In both Malone[99] and Larson[100] The Supreme Court set forth two recognized exceptions to the sovereign

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[97]"YRC Opposes Mining Plans," St. Paul Dispatch, Feb. 3, 1970, South Area Section, p. 1.

[98]313 F.Supp. 1312, at 1315-16.

[99]369 U.S. 643, at 646 (1962).

[100]337 U.S. 682 (1949).

> immunity doctrine: (1) actions where the allegation is that officers of the United States acted beyond their statutory powers and (2) cases where, even though officers acted within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. . . .
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> [P]laintiff's complaint . . . is pregnant with the claim and assertion that granting permission to [St. Clair and Yawkey] is "inconsistent with the state and federal zoning laws and the public policies of the United States and the State of Minnesota which have been established to regulate mineral development in the BWCA." This it seems to the court is a sufficient allegation to bring this case which is one for injunctive relief against the federal defendants within the first exception above set forth to the doctrine of sovereign immunity.[101]

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[101] 313 F.Supp. 1312, at 1314. Judge Neville added, at 1314-15 and 1317: "The court subscribes to the language used in Justice Douglas' dissent in Malone (369 U.S. at p. 652) that 'Sovereign immunity has become more and more out of date, as the powers of the Government and its vast bureaucracy have increased'. . . . It is noted that in the two most recent cases on standing, [Data Processing and Barlow], one or more of the defendants in each case were federal employees and apparently no question was raised concerning sovereign immunity despite the fact that both cases challenged actions taken by them as government officials. In the recent case of State of Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969), it was held that an allegation that a government official has exceeded his statutory authority brings the case squarely within one of the stated exceptions to the sovereign immunity doctrine. . . . Plaintiff is seeking to enjoin the possible future action of the federal defendants. . . . The court can see no difference between allowing this type of action and that in which a court is asked to review the quasi judicial action previously taken by an administrative agency. The very purpose of a declaratory judgement proceeding is to permit a party to bring suit before action is taken which may wreak harm. Were the plaintiff in this case to wait until St. Clair and Yawkey actually explored and drilled for minerals, the case would be moot at least partially as to the land already altered. Certainly the relief sought by the plaintiff is not an 'intolerable burden' on governmental functions if granted and would seem to fall within the well-established exception to the sovereign immunity doctrine relating to an

Plaintiff Izaak Walton League brought the action under the Declaratory Judgement Act,[102] the Administrative Procedure Act,[103] and Title 28, U.S. Code, Sections 1331, 1332, 1346 and 1361 of the Judicial Code, and alleged that the value of the rights involved exceeded $10,000.00, to establish jurisdiction and venue. In addition to the claim that the federal defendants had exceeded their statutory authority with respect to the so-called zoning laws,[104] plaintiff alleged that the Forest Service had abused its discretion under the Multiple Use-Sustained Yield Act of 1960[105] by not giving "due consideration . . . to the relative value of the various resources," and that defendants St. Clair and Yawkey had been afforded preferential and discriminatory rights and privileges in conflict with

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allegation that government officials are exceeding their statutory powers. . . . Association of Data Processing stands for the proposition that the Administrative Procedure Act is to be construed generously and 'not grudgingly but as serving a broadly remedial purpose.' To preclude judicial review, an act of Congress 'if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.' There has not been brought to the court's attention any prohibition in the various acts of Congress relating to National Forests, Wilderness areas or the Boundary Waters Canoe Area prohibiting or proscribing judicial review."

[102] 28 U.S.C., Secs. 2201 and 2202.

[103] 5 U.S.C., Secs. 701 et seq.

[104] Minnesota Statutes, Sec. 84.43, Subd. 2, and the Wilderness Act of 1964, 16 U.S.C., Secs. 1131 et. seq. Complaint, pp. 9-10.

[105] 16 U.S.C., Secs. 528 et. seq. Complaint, p. 10.

controlling laws and regulations.[106] On this issue, the plaintiff's brief in opposition to motions to dismiss stated:

> If, as plaintiff has alleged, the federal zoning laws totally prohibit the exercise of any mineral rights in the B.W.C.A. then the public statements of the federal defendants are inconsistent with their duty to enforce the applicable federal laws and regulations. For, they are conceding greater rights to defendants St. Clair and Yawkey than plaintiffs believe exist under federal law. For example, defendant Rupp has stated publicly that the only way to resolve the problem was to purchase the private mineral rights Plaintiff's complaint is premised on the ground that no mineral exploration or related activity can be conducted in the B.W.C.A. under the present federal law. Plaintiff's action seeks to require these federal defendants to fulfill their duty to enforce the applicable federal law against conflicting rights claimed by defendants St. Clair and Yawkey. The federal defendants are, therefore, proper parties to this action.[107]

Plaintiff's chief counsel, Raymond A. Haik, cited Judge Doyle's December 24, 1969, ruling in the Parker case[108] as supporting his contention that provisions of the Administrative Procedure Act entitled the League to judicial review.[109]

Federal Defendants Refuse to Acknowledge Allegations of Illegal Acts

One assertion made in the federal defendants' February 18, 1970, motion to dismiss--that "this is an unconsented suit against the United States and this court is without

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[106] Amended Complaint, p. 14.

[107] Plaintiff's Brief in Opposition to Motion to Dismiss, p. 3.

[108] 307 F.Supp. 685 (1969).

[109] Plaintiff's Brief in Opposition to Motion to Dismiss, p. 6.

jurisdiction"--apparently was based on an interpretation of the complaint which differed from that made by Judge Neville. Justice Department Attorney Grubbe's brief stated:

> [T]here [are no] allegations that the federal defendants have violated or threaten to violate any laws or otherwise acted in excess of their statutory authority.[110]

Proceeding from this point of departure, which is at odds with the judge's later assertion that the complaint was "pregnant" with the claim of threatened illegal acts on the part of the federal defendants, the Justice Department's brief recited this familiar defense:

> A suit to enjoin a federal officer from permitting certain uses upon United States land is a suit against the United States. It is an effort to dictate how property of the United States shall be used. There is no authority for such an action. Congress has not consented to such a suit.
>
> It is firmly established that the courts will not interfere with the public administration of government property.[111] A waiver of sovereign immunity by the United States "cannot be implied but must be unequivocally expressed."[112] An injunction against the federal defendants tying their hands on matters of public land management has not been authorized by Congress. This prohibition has been recognized in many cases against federal officials.[113]

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[110]Memorandum of Points and Authorities in Support of Motion to Dismiss, p. 3.

[111]Cases cited: Larson, 337 U.S. 682 (1949) and Dugan v. Rank, 372 U.S. 609 (1963).

[112]Cases cited: U.S. v. King, 395 U.S. 1 (1969) and U.S. v. Sherwood, 321 U.S. 584 (1941).

[113]Cases cited: Malone v. Bowdoin, 369 U.S. 543 (1962); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Gardner v. Harris, 391 F.2d 885 (5th Cir. 1968).

> No issue has been raised concerning the constitutionality of the acts of the federal defendants. No allegations have been made that the federal defendants threaten to go beyond the authority vested in them by Congress. There is no consent to bring this suit against the federal defendants.[114]

This traditional position was reiterated in the government's March 16, 1970, supplemental memorandum in support of motion to dismiss:

> No controversy is presented here. No wrongdoing has been alleged. No difference of opinion is expressed. . . . The plaintiff simply asks for an advisory opinion without alleging damage or the threat of damage. . . . The plaintiff has failed to tell us of an injury that might befall it if the injunction is not issued. The federal defendants are entitled to an order of dismissal.[115]

Judge Neville concluded otherwise, holding that the IWLA's indirect claim--that the Forest Service was about to commit an allegedly illegal act by granting St. Clair permission to set up permanent camps and conduct mechanized core-drilling operations in the wilderness area--was a "sufficient allegation" to overcome the sovereign immunity defense.

Exhaustion of Administrative Remedies and the Timeliness of the Filing of Plaintiff's Action

Judge Neville's June 2, 1970, order acknowledged that no use of the U.S. Department of Agriculture's appeal procedure had been attempted, but treated this as no problem

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[114]Memorandum of Points and Authorities in Support of Motion to Dismiss, pp. 3-4.

[115]Supplemental Memorandum in Support of Motion to Dismiss, pp. 5-7.

and in effect declared the complaint to have been filed in a timely manner:

> [T]here has been no past quasi judicial action of an administrative body which this court is asked to review. . . . Plaintiff is seeking to enjoin the possible future action of the federal defendants. . . . Were the plaintiff in this case to wait until St. Clair and Yawkey actually explored and drilled for minerals, the case would be moot at least partially as to the land already altered.[116]

A number of pretrial motions were argued before Judge Neville on January 4, 1971, the result of which was an April 19, 1971, order on pretrial motions which stated, inter alia:

> Defendant St. Clair's motion to sever certain issues for prior consideration and decision strikes a responsive note with the court. The legal question as to . . . whether laches obtains as a defense . . . would seem to be [one issue] to be decided by the court. . . .[117]
>
> Defendant St. Clair further moves for a dismissal on [the ground that] plaintiff has failed to exhaust administrative remedies. Defendant does not specify in what manner such have not been exhausted, nor did his counsel seriously argue such at the hearing. [St. Clair's motion to dismiss was denied.][118]

The State of Minnesota defendants had filed a cross-claim against the other defendants "seeking much the same relief as is prayed for by plaintiff."[119] They presented a motion at the January 4, 1971, hearing requesting an order

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[116] 313 F.Supp. 1312, at 1315.

[117] Order on Pretrial Motions, Apr. 19, 1971, p. 4.

[118] Ibid., p. 5.

[119] Ibid., p. 6.

joining as parties-defendant Robert E. Gardner, Evelyn A. Gardner, William A. Gardner, Marea B. Gardner, Jane G. Head, Murdock Head, Michigaumi Iron Company and Muskegon Bank and Trust Company. These individuals were alleged to have leased an interest in minerals in the BWCA to St. Clair. Judge Neville's response was that "joinder would seem proper."[120] He ordered that each of them be served with a summons and be given a period of time in which to answer the Izaak Walton League's complaint. Their answer, filed on July 12, 1971, functioned as a rebuttal to arguments by the plaintiff and the State "defendant and cross-claimant," Commissioner of Natural Resources Robert L. Herbst. A ninty-nine-page brief filed by the IWLA's chief counsel, Raymond A. Haik, made this laches-related argument:

> The doctrine of laches and the public policy of preserving the BWCA preclude the assertion and enforcement of any mineral rights against the state and federal governments for purposes of conducting exploratory mining operations in the BWCA. . . . [T]he individual defendants and their predecessors in title have failed to recognize, protect or use their asserted mineral rights during the long history of establishment and preservation of the BWCA. The individual defendants are now estopped from relying on any property interests they may possess.[121]

Part D of the plaintiff's brief dealt with the argument, "Individual defendants are estopped from asserting any mineral rights because they are guilty of laches":[122]

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[120] Ibid., p. 6.

[121] Plaintiff's Brief, n.d. [Sept. 13, 1971], p. 42.

[122] Ibid., pp. 47-51.

> Courts define laches as such neglect or omission to assert a right taken in conjunction with lapse of time or other circumstances causing prejudice to an adverse party, as well operated as a bar in equity. The doctrine is based on the injustice that would result from the enforcement of a neglected right or claim.[123]

> One will not be permitted to sit idly by while another expends time, energy and money in the development of property and then be permitted to participate in the fruits of the effort. . . . The Supreme Court has held that laches and estoppel are more relentlessly enforced in application to mines and mining.[124]

> The doctrine of laches has been used by the courts in deciding environmental disputes with issues which were not substantially different from the issues in this case.[125] . . . The evidence presented in this case has shown convincingly that the individual defendants and their predecessors in title have "sat on their alleged rights for . . . [30 to 80 years] and during these years the plaintiff and the federal and state governments have expended great amounts of time, effort and money in preserving and establishing the BWCA as a wilderness recreational area. . . .[126]

Plaintiff's counsel Haik noted that district courts had used the doctrine of laches to bar plaintiff Sierra Club's claims in Sierra Club v. Hardin[127] (the Tongass

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[123]Cited: 27 Am.Jur.2d, Equity, Secs. 152 et seq. (1966); Paducah v. Gillispie, 273 Ky. 101, 115 S.W.2d 574 (1938); 3 Pomeroy, Equity Jurisprudence, Sec. 818 (5th Ed. 1941).

[124]Cited: Patterson v. Hewitt, 195 U.S. 309 (1904).

[125]Cited: Triangle Improvement Council v. Ritchie, 314 F.Supp. 20 (S.D.W.Va. 1969).

[126]Plaintiff's Brief, p. 50.

[127]325 F. Supp. 99 (D.Alas. March 25, 1971). "In this case, plaintiff brought suit to enjoin the sale of timber and the patent of land in the Tongass National Forest. The court dismissed all claims except those based upon an alleged violation of the National Environmental Policy Act

National Forest, Alaska, case) and plaintiff Save Our Sylvania Action Committee's claims in Gandt v. Hardin[128] (the Sylvania Recreation Area, Michigan, case).

The subject of laches also was alluded to by counsel for Commissioner of Natural Resources Robert L. Herbst in his role as defendant and cross-claimant (rather than in his original role in this litigation as Executive Director of the Izaak Walton League, a job he left in order to accept the state position). The State's memorandum in support of its motion to amend its pleadings, filed on September 14, 1971, which dwelt on the argument that "the mineral interests now asserted by defendant St. Clair were wrongfully wrested from the public," stated that "the statute of limitations for cancelling patents does not apply in the present case"[129] and that "there are public policy considerations

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of 1969 by holding that plaintiff's failure to take timely action in asserting its claims exacerbated the reasonably foreseeable financial consequences to U. S. Plywood-Champion Papers, Inc. (U.S.P.) and thereby violated the doctrine of laches. U.S.P. had expended over $2 million in good faith reliance upon its formal contract with the United States and without knowledge of any claims that the contract was invalid between February, 1968 and February, 1970, at which time the plaintiff commenced the action. Plaintiff was unable to provide sufficient justification for this unreasonable delay in asserting its claims." Plaintiff's Brief, p. 51.

[128]See pp. 59-70, Chapter III, supra.

[129]Citing Bailey v. Glover, 21 Wall. 342, 22 L.Ed. 636 (1875).

which override the doctrine of laches or estoppel[130] as a defense in this connection. The State defendant also asserted that--

> . . . since the defendants have paid no real property taxes on the minerals during the same years they have watched the public restore the wilderness (through their federal and state governments and private organizations), the public is entitled to specific restitution of some sort to prevent unjust enrichment of defendant St. Clair and his lessors [in the event that their mineral rights within the BWCA are condemned and paid for by the government].[131]

Ten pages of the State's October 12, 1971, memorandum supporting its cross-claim and on other related matters were devoted to the subject, "Laches and Unjust Enrichment"; the following is representative of the state defendants' position on that matter:

> Defendant St. Clair and His Lessors Have Waited Too Long to Exercise Their Mineral Rights, Except As May be Permitted in a National Emergency. . . .[132]
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> In short, defendant St. Clair, his lessors, and in certain of the defendants' cases, their predecessors in interest, have done nothing but speculate since patenting the lands, watching while the wilderness has gradually been restored at great effort and expense by federal and state governments and by private citizens. To permit them now to mine, except as related to a national emergency, after not paying any taxes for approximately 40 years while the public has expended millions of dollars to restore the wilderness, would be manifestly unreasonable, would unjustly enrich the

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[130] State's Memorandum in Support of Its Motion to Amend Pleadings, p. 25.

[131] Ibid., p. 19.

[132] State's Memorandum Supporting Its Cross-Claim and On Other Related Matters, p. 42.

> defendants at the expense of the public, and would compound the wrongs of the past. At no time have defendant St. Clair or his lessors challenged the public wilderness management policy for the area, until now, when it became speculatively worthwhile to do so.[133]

The first answer to these claims, made by counsel for defendants George St. Clair, the Gardners, Jane and Murdock Head, and the Muskegon Bank and Trust Company and filed on July 12, 1971, stated that the State was barred from attacking the validity of the patents by the State Statute of Limitations[134] and that its failure to discover the alleged fraudulent practices earlier was the result of negligence on the State's part.[135]

The use of laches as a serious defense did not surface in this case until counsel for the individual defendants filed their November 29, 1971, memorandum with Judge

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[133] Ibid., pp. 47-48. Noted the State, at p. 47: "It is interesting to note that defendant Gardners . . ., defendant Michigaumi Iron Co., and defendant-trustee Muskegon Bank and Trust Company, were unable to secure as their lessee any of the world renowned mining companies who bid so competitively for state lands outside the B.W.C.A. These companies include the International Nickel Co., the Bear Creek Mining Co. (exploratory arm of Kennecott Copper), the New Jersey Zinc Co., U.S. Steel Co., the Hanna Mining Co., Duval Corporation, Newmont Exploration Limited, Humble Oil and Refining Co., Phelps Dodge Corporation, the Cleveland-Cliffs Iron Co., and Texas Gulf Sulphur Co. The only reasonable explanation for the lack of interest of these companies in defendants' holdings in the B.W.C.A. is recognition by these companies of the public policy of wilderness management inside the B.W.C.A."

[134] Defendants' Memorandum in Opposition to State's Motion to Amend Pleadings, p. 20. See, Minnesota Statutes, Sec. 541.05.

[135] Ibid., p. 21.

Neville's court. This fifty-five-page answer to the League's and the State's allegations was couched in uncompromising language, as exemplified in these excerpts dealing with the plaintiff's and cross-claimant's use of the doctrine of laches:

> Laches is available as a defense only and this is more properly asserted by the defendant St. Clair than by the plaintiff. The Izaak Walton League has been aware, for many years, of the reserved mineral interest in the BWCA and has sat idly by while St. Clair has expended time, effort and monies in acquiring the leases and preparing for and engaging in mineral exploration activities. Triangle Improvement Council v. Ritchie, 314 F.Supp. 20 (S.D.W.Va. 1969); Sierra Club v. Hardin, 325 F.Supp. 99 (Alas. 1971); Gandt V. Hardin (Civil No. 1334, W.D.Mich. 1969). . . .[136]

"Who is guilty of laches?" asked counsel for St. Clair:

> It is a matter of public record that the Izaak Walton League has in the past constantly urged the Federal Government to purchase the mineral rights of individual owners with the BWCA. In specific recognition of those rights and because the Federal Government has not chosen to do so, thus frustrating the lofty aims of this special interest group, they are willing, on the theory that ends justify means, to urge upon this Court any specious theory in an effort to divest private owners of rights in order to facilitate their special interests.
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> As one reads the briefs of the Izaak Walton League and the State, what is most pervasive is the clear and present danger to the status of all individual property rights when an entity with the high repute of the Izaak Walton League, joined by the State, engages in such an abuse of process. . . .
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> . . . The Federal Government has the right of condemnation--they have chosen not to exercise that right. The Izaak Walton League, at the time the

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[136] Memorandum of George W. St. Clair, et al., pp. 39-41. Emphasis added.

> transactions were made, advise that they knew and were involved in acquisition. Why did they not then object to the reservations? Who is guilty of laches?[137]

Was the IWLA Guilty of Laches?

The court has not ruled on "whether laches obtains as a defense."[138] Transaction evidence in the court's hands or potentially available to it indicates, however, that the League filed its complaint prior to the commencement of any drilling in the BWCA by St. Clair or any approval of such drilling by the Forest Service.[139] The evidence shows that communication between George W. St. Clair and the staff of the Superior National Forest apparently began with a meeting in Forest Supervisor John Wernham's office in Duluth, Minnesota, on June 16, 1967, when Supervisor Wernham and Land Use Staff Office Jack Wolter tried to discourage St. Clair and J. W. Trugg, a St. Clair employee, from conducting mechanized mineral exploration in the Disappointment Lake area of the

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[137] Ibid., pp. 52-53.

[138] Order on Pretrial Motions, Apr. 19, 1971, p. 4.

[139] Cf., Clark v. Volpe, ___F.2d___, (C.A. 5, No. 72-1631, July 10, 1972), in which the plaintiffs brought suit to enjoin further construction of a federal-aid highway crossing the entire width of City Park in New Orleans, La., after a quarter to a third of the construction work had been completed. The district court dismissed the action by application of the doctrine of laches. St. Clair had notified the Forest Service of his intention to drill during the winter of 1969-70 but did not bring in drilling equipment.

BWCA.[140] Two years later, after St. Clair had leased from the Gardners and the Heads their mineral rights in Lake and Cook counties, Minnesota,[141] he began exploration in the BWCA in earnest, establishing semi-permanent base camps on the Gabimichigami Lake-Howard Lake and Crooked Lake-Awl Lake portages within the BWCA. These camps, established during the summer of 1969,[142] were not dismantled until the Forest Service impounded the camping equipment and removed it by airplane on January 27, 1970.[143]

Perhaps the key dates in the chronology of St. Clair-Forest Service contacts provided in the February 1, 1971, Federal Defendants' Answer to Plaintiff's First Set of Interrogatories are November 28, 1969 ("Telephone call from St. Clair to [Forest Supervisor] Rupp giving notice of intention to drill"), December 1, 1969 ("Letter from

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[140]Federal Defendants' Answer to Plaintiff's First Set of Interrogatories, Feb. 1, 1971, p. 2. "Wernham kept miners out of the BWCA for years by discouraging them over the telephone, and by 'jawboning'," according to Dean Buchanan, Timber Management Staff Officer, Superior National Forest, Duluth, Minn., personal interview, Duluth, Minn., July 24, 1970.

[141]See, Memorandum Agreement entered into on Feb. 1, 1969, between William A. Gardner, Robert E. Gardner and Jane G. Head, Lessor, and G. W. St. Clair, Lessee. The mineral rights (excluding oils and natural gas) were leased to St. Clair for seventy-five years.

[142]Federal Defendants' Answers to Plaintiff's First Set of Interrogatories, p. 4.

[143]R. J. R. Johnson, "Prospector's Gear to Be Impounded," St. Paul Dispatch, Jan. 27, 1970.

St. Clair to Rupp giving notice of intention to drill"), December 17, 1969 ("Telephone call from Rupp to St. Clair advising St. Clair not to commence drilling"), and December 22, 1969 ("Letter from Rupp to St. Clair requesting title evidence and advising that drilling would be restricted to maximum extent permitted by law").[144] The Izaak Walton League filed its complaint and its motion for a preliminary injunction, and obtained from Judge Neville an order to show cause and a temporary restraining order, on December 23, 1969.

When IWLA President Raymond A. Haik was made aware of St. Clair's pressure on the Forest Service[145] and sensed

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[144] Pp. 3-4.

[145] Copies of correspondence forwarded to his office by the Forest Service included St. Clair's letter of Dec. 1, 1969 ("I have decided to send a drill and a crew into the BWCA the latter part of December, or the first of January."), Rupp's response of Dec. 5, 1969, asking for additional information, and St. Clair's response of Dec. 12, 1969: "1. We will use a diamond core drill sufficiently large to drill from 300-600 feet in depth. 2. To transport the equipment and materials, we will use a tractor or large snow vehicle to pull the equipment over the ice and through the portages. 3. For the drilling at Gabimichigami Lake, we will ship the equipment from Sea Gull Lake over the portages to Gabimichigami. For the drilling at the south end of Jerry and Gillis Lake, we will ship the equipment over the ice from Round Lake through the portages to Jerry Lake. 4. We intend to drill 2 or 3 holes on the eastern shore of Lake Gabimichigami. Also, possibly a hole [on the shores of Peter or Howard Lakes]. Also, the Gabimichigami-Peter Lakes portage area and possibly on the shore of Jerry and Gillis Lake. Of course, we will drill only on those lands which we have leased. . . . 5. We intend to establish an all-weather camp probably near the Gabimichigami-Howard Lake portage. Also one in the Jerry-Gillis Lake area. 6. The

confusion and disarray on the part of the Forest Service with respect to its efforts to stop the drilling,[146] he reacted by filing suit in the role of the Dutch boy plugging

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duration of the drilling will depend to a great extent on the results of 2 or 3 holes. Therefore, our guess, at the present time, is that the drilling will take from 4-12 months. . . ."

[146]Ray Haik, personal interview, Norfolk, Va., July 10, 1970: "The Forest Service didn't want to do anything; it could have adopted tougher mining and zoning regulations. Why should it buy out [mineral] rights that may not have any value?" Eric J. Curtis, Attorney in Charge, Office of General Counsel, U.S. Department of Agriculture, Milwaukee, Wis., personal interview, March 16, 1972: "The Forest Service fought like a tiger to avoid mineral exploration but was advised by its own attorneys that there was difficulty in barring [St. Clair's] operations [because this would constitute an unconstitutional taking of private property rights]." See, News Release, Superior National Forest, Dec. 17, 1969 ("The Forest Service does not think it would be in the best interest of the American public to mine inside the Boundary Waters Canoe Area, a unit of the National Wilderness Preservation System. . . . [A] way must be found to purchase those private mineral rights. . . . [T]he Forest Service will use every legal means available to prohibit exploratory drilling and subsequent mineral development until the problem is resolved."); "Mineral Activities Within Boundary Waters Canoe Area," Position Statement by Eastern Region [Forest Service], Dec. 17, 1969; News Release, Regional Office, Forest Service, Milwaukee, Wis., Dec. 17, 1969 ("According to Regional Forester George S. James, . . . it is not possible to resolve the conflict between mining and wilderness recreation use in the Canoe Area. . . . [T]he Federal Government cannot take the mining rights from private owners without due process and just compensation."); Craig W. Rupp, Forest Supervisor, Superior National Forest, personal letter to George W. St. Clair, Jackson Heights, N.Y., Dec. 22, 1969 ("It is my intention to enforce the existing BWCA Regulation to the extent applicable as to your operations and thus to the extent thus authorized: prohibit widening of trails and portages; prohibit construction of new portages, trails and roads on routes disapproved by the Forest Service; prohibit use of motorized equipment; prohibit use of aircraft; prohibit construction of permanent or semi-permanent camps and

the leak in the dike with his finger, although he later reflected, "I had no idea of the amount of work that is involved."[147] Haik filed suit as soon as he learned that the initial exploration work was to be expanded and that

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buildings; and particularly to maintain the primitive character of the area in the vicinity of lakes, streams, and portages. It is the ultimate plan, which will require special legislation, to acquire all of the privately owned minerals by the United States and to allow extraction under controls that will protect other resource values and then only as the need for minerals may be so great as to be paramount for the United States. . . ."); "Crisis in the Boundary Waters Canoe Area," Divison of Information and Education, Forest Service, Milwaukee, Wis., Jan. 16, 1970, 3 pp.; and, News Release, Superior National Forest, Feb. 28, 1970 (Excerpts from speech presented by Joe Harn, Deputy Forest Supervisor, Superior National Forest, to Sierra Club rally at Gunflint Trail, Feb. 28, 1970: "The BWCA is . . . the only canoe wilderness in the United States. . . . The Forest Service wants to keep it that way!").

[147]Haik, personal letter to Charles S. Kelly, Chicago, Ill., Jan. 9, 1970. Added Haik: "[W]hile I intend to and have proceeded on my own with my own time, I am not in a position to commit the time and resources of other attorneys who to date have voluntarily agreed to serve with the understanding that we would try to secure some funds. I received some assurances from the Chairman of the Executive Board of the Izaak Walton League that Endowment monies might be available." See also: Carl V. Pearson, President, Minnesota Division, Izaak Walton League of America, mailer, "Save the Boundary Waters Canoe Area": "Mr. Haik, a Minneapolis attorney, will be chief counsel for the League, assisted by six Twin City attorneys who have volunteered their services. . . . A continuing court fight will cost money. Contributions to the 'Save the BWCA' fund should be sent to the Minnesota Division . . ."; and, "Injunction Sought To Halt BWCA Mineral Exploring," Duluth News-Tribune, Dec. 24, 1969: ". . . Raymond A. Haik . . . said in a press conference Tuesday he hopes state and federal governments will join in and 'do the lion's share' of the legal work after the case gets going."

drilling equipment was to be moved into the BWCA during the winter of 1969-70:[148]

> We became concerned over the possibility that the United States Forest Service officials were (1) unnecessarily conceding the right of the holders of severed mineral interests to enter the BWCA, and (2) might be exposing the general public to a substantial payment if the end result is achieved; namely, the purchase of all privately held severed mineral interests within the BWCA. We commenced an action against Mr. Clifford Hardin, Secretary of Agriculture; Mr. Edward P. Cliff, Chief of the Forest Service, and Mr. Craig Rupp, the Supervisor of the Superior National Forest, which has as its principal basis the assertion that these federal employees have afforded preferential treatment and privileges to the holders of severed mineral interests by their consent to preliminary exploration in the area and by their apparent public assumption that the only solution is the acquisition of the private mineral interests.[149]

The League's position was that it had filed suit in a timely manner, prior to the issuance of any drilling permits or other approvals by the Forest Service.

The "Merits" of the Plaintiff's Allegations

Oral argument before the court on the substantive issues in the plaintiff's complaint was not had until September 15, 1972, and Judge Neville's ruling on these issues was not available in time to be included herein. The decision ultimately made by Judge Neville or a higher court if his ruling is appealed may well determine whether

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[148] Haik, personal letter to John McGrory, Wayzata, Minn., Jan. 22, 1970.

[149] *Ibid.*

the Boundary Waters Canoe Area is to remain a wilderness area or if it is to become a new mining region. The judge had summarized these issues in his June 2, 1970, order:

> The Izaak Walton League . . . initiated a declaratory judgement action to determine the right, title and interest, if any, of defendants George W. St. Clair and Thomas Yawkey to minerals that may be present in the BWCA. In the event it is determined that defendants St. Clair and Yawkey do have a right, title and interest to such minerals, plaintiff seeks to enjoin the federal defendants from granting permission to St. Clair and to Yawkey to enter into the BWCA for the purpose of drilling, exploring or removing minerals it being alleged and made to appear by counsels' statements at the hearing that heretofore said federal defendants have permitted such entry.[150]

The point of departure for arguments on the merits, as far as the conservation group-plaintiff was concerned, was the following thesis:

> [P]laintiff has brought this suit for the purpose of obtaining a judicial declaration of the public's right to continued wilderness use of the BWCA and to enjoin further entries for purposes of mineral exploration. . . . [T]he public's interest in the preservation of the wilderness and recreational qualities of the BWCA is greater than the rights of the individual defendants to endanger the surface lands and waters for purposes of conducting exploratory mining operations. Accordingly, plaintiff seeks judgement permanently enjoining the federal and state defendants from authorizing such activities and enjoining the individual defendant St. Clair from carrying out any entry into the BWCA for purposes of engaging in exploratory mining operations.[151]

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[150] 313 F.Supp. 1312, at 1313. Judge Neville stated, at 1315, "The court presently does not pass on the merits of this question but does believe that the merits should be considered" and concluded, at 1317-18, "The court does not . . . at this time and without further proceedings or a trial express any opinion on the merits of plaintiff's claims or whether under the existing statutes and acts of Congress and particularly 16 U.S.C. Sec. 1133(d)(2) plaintiff ultimately will or will not prevail."

[151] Plaintiff's Brief, pp. 1-2.

Counsel for the individual defendants including St. Clair reacted negatively to this point of view:

> "Inherent in the [plaintiff's] proposition are the following suppositions:
>
> (A) That nonrecurring mineral resources which are to be found in less than 1% of the surface of the earth are not a subject of public interest.
>
> (B) That the public interest does not require that such limited natural resources be located, explored and inventoried in order to be available for the public needs, including national emergencies.
>
> (C) That the public welfare of citizens of the United States is not intimately tied to constitutionally guaranteed private rights.
>
> (D) That appropriate exploration procedures are incompatible with preservation of aesthetic or recreational values of the BWCA.[152]

The first legal issue raised by the plaintiff was the argument that the BWCA has been zoned to prohibit commercial enterprises including exploratory mining operations:

> Federal and state legislative, executive and administrative actions have established a regulatory scheme which zones the BWCA so as to prohibit exploratory mining operations within this unique wilderness area. Until St. Clair's entry into the BWCA, no commercial mining enterprises had been permitted within the wilderness district of the BWCA regardless of whether they were conducted on public or private property. Only uses consistent with preserving the wilderness and recreational values of the BWCA are permitted. Exploratory mining operations is not a use currently permitted within the BWCA.[153]

Raymond Haik's brief for the plaintiff described the following federal treaties, laws and regulations as,

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[152] Memorandum of George W. St. Clair, et al., p. 2.

[153] Plaintiff's Brief, p. 2.

in one way or another, prohibiting mining operations in the Boundary Waters Canoe Area: the 1842 Webster-Ashburton boundary treaty; the 1873 act withdrawing lands in Michigan, Wisconsin and Minnesota from the general mining laws;[154] the 1891 act authorizing Presidential establishment of national forests;[155] the 1897 Organic Administration Act[156] which, said Haik, "declared that a national forest was zoned as a forest to the exclusion of mineral development"; President Theodore Roosevelt's 1909 action to create the Superior National Forest; the Secretary of Agriculture's 1927 action[157] to establish the first Roadless Area in the Superior National Forest,[158] and the Shipstead-Newton-Nolan Act which prohibited logging of all shores to a depth of four hundred feet

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[154] 17 Stat. 890, 30 U.S.C. Sec. 48.

[155] 16 U.S.C. Sec. 471.

[156] 16 U.S.C. Sec. 473 et seq.

[157] "pursuant to 16 U.S.C. Sec. 551."

[158] "The purpose for this regulation was described in United States v. Perko, 108 F.Supp. 315 (D. Minn. 1952) [, at 317,] as follows: 'The first road ban regulation in the Superior National Forest was promulgated before there was any extended use of aircraft as a means of travel into remote recreational areas, and was prompted no doubt by a policy to preserve the unique character of this national forest which extends along the Canadian border for many, many miles. . . . Public interest in the conservation of this area so that it might be retained in its primitive condition undoubtedly motivated the Secretary of Agriculture in establishing regulations so that the intrusion of automobiles and other vehicles would not destroy the unique recreational appeal of this Forest Reserve.'"

from the natural water line and the alteration of the natural water level of any lake or stream within or bordering upon the area.[159]

Haik's brief also stated: the language of the Weeks Act of 1911[160] (which created the National Forest Reservation Commission and authorized the purchase of national forest land) "reflected an explicit Congressional intent to zone and control both mineral and timber development of the land"; the Thye-Blatnik Act of 1948 as amended in 1956[161] "extinguished the rights of the holders of mineral reservations"; and "the zoning of the BWCA as a wilderness area was reaffirmed" by passage of the Wilderness Act of 1964.[162]

Additional pages of the plaintiff's brief were devoted to documenting the allegations that: federal officials and administrators have recognized the wilderness zoning applicable to the BWCA;[163] Minnesota laws prohibit

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[159] 16 U.S.C. Sec. 577a, b.

[160] 16 U.S.C. Sec. 513 et seq.

[161] 16 U.S.C. Sec. 577c, g, n.

[162] 16 U.S.C. Sec. 1131 et seq.

[163] E.g., the 1949 air space reservation (Executive Order 10092), the regulations to implement the 1964 Wilderness Act (especially 36 C.F.R. Sec. 251.85[e]: "Except for national emergencies consent will be withheld on all requests for permits to mine Government owned minerals [in the BWCA]"), and the BWCA Management Handbook (especially Sec. 371, regarding control of access to non-Federally owned minerals).

exploratory mining operations in the BWCA;[164] state officials and administrators have consistently recognized and supported the wilderness zoning applicable to the BWCA;[165] and several United States Presidents and committees established by Executive Order have recognized and supported the wilderness zoning applicable to the BWCA.[166] Somewhat reminiscent of the Sierra Club v. Hickel, federal defendants' use of the Doctrine of Executive Construction to support the continuation of its long-time practice of granting both term and terminable permits to the same ski resort permittees was the IWLA's argument that, because the Forest Service had granted no permits to drill in the BWCA in the past, it could not do so in the future.

More than fifty cases were cited in the plaintiff's brief to support its argument that "courts have recognized that the Federal and State governments under their police

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[164] Minnesota Statutes, Secs. 1.041, 1.045, 14.46, 84.43, 84.44, 84.521, and 92.45.

[165] See, e.g., Chapter 21 NR 1000, "Use of State Lands and Waters Within the Boundary Waters Canoe Area," enacted by the Department of Conservation on Dec. 31, 1970. Haik argues in this brief that the Doctrine of Executive Construction ("administrative practices and unchallenged interpretations by state officials and administrators are entitled to consideration in the highest respect from the courts") should apply in this case, where "state officials . . . have long recognized the wilderness zoning applicable to the BWCA under both federal and state laws." He cites 2 Am. Jur. 2d Administrative Law, Secs. 241-243.

[166] E.g., President Franklin Roosevelt's 1934 establishment of the Quetico-Superior Committee (Executive Order 6783) and President Lyndon Johnson's 1967 re-establishment of this Committee (Executive Order 11342).

power may by zoning or other regulatory means prohibit the conduct of exploratory mining operations and other commercial enterprises.[167] A series of cases beginning with Hadacheck v. City of Los Angeles, 239 U.S. 394 (1915), which upheld a city ordinance which prohibited brick kilns in certain areas of the city, and including State ex rel Beery v. Houghton, 164 Minn. 146, 204 N.W. 569 (1925) and the well-known zoning case of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), were cited in an attempt to show that the State Government has the authority to "regulate and even prohibit" the conduct of exploratory mining operations or other commercial activities in the BWCA.[168] (Typically, the zoning power has been delegated by the states to their local units of government--counties, townships and munici-

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[167] Plaintiff's Brief, p. 21.

[168] Among other cases cited were: Alexander Co. v. Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946); Northwestern Telephone Exchange Co. v. Minneapolis, 81 Minn. 140, 83 N.W 527, 86 N.W. 69 (1900); Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949); Kiges v. City of St. Paul, 240 Minn. 522, 62 N.W.2d 363 (1953); City of St. Paul v. The Chicago, St. Paul, Minneapolis and Omaha Railroad Co., 413 F.2d 762 (8th Cir. 1969); Maryland Coal and Realty Co. v. Bureau of Mines of State, 193 Md. 627, 69 A.2d 471 (1949); Dufour v. Maize, 357 Pa. 309, 56 A.2d 675 (1948); Minneapolis St. Ry. Co. v. Minneapolis, 279 Minn.502, 40 N.W.2d 353 (1949); Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N.W. 8 (1934); City of Duluth v. Cerveny, 218 Minn. 511, 16 N.W.2d 779 (1944); Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931); Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 254 P.2d 865 (1953); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342 (1962); Town of Seekonk v. John J. McHale & Sons, 325 Mass. 271, 90 N.E.2d 325 (1950).

palities. A modest wave of support for state zoning, which began in Hawaii, is evident in a few states across the country. This involves the recapture from the local units of the zoning power, one aspect of the states' police power. But the idea of a state "zoning" land owned by the Federal Government--particularly a one-million-acre tract--would seem to run counter to Article IV of the U.S. Constitution which provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.") In the following manner the Izaak Walton League plaintiffs sought to lead the judge from Euclid v. Ambler to Walton v. St. Clair:

> [I]t is . . . clear that a municipality may totally prohibit . . . excavation within its borders, so long as such a prohibition is reasonably related to the objects of the police power.[169] . . . These regulations and ordinances have all been upheld because they are reasonably related to the health, safety, and general welfare of the public. . . . While the effects of smoke, dust, fumes and noise and the fire and other safety hazards resulting from conducting mining and oil drilling operations . . . have been the primary factors relied upon by the courts in sustaining such regulations, the courts have also relied in part on aesthetic considerations.[170]

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[169]Citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), and LaSalle National Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965).

[170]Citing Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945), and Township of Bloomfield v. Beardslee, 349 Mich. 296, 84 N.W.2d 537 (1957).

> While a large number of courts long held that aesthetic considerations may not be taken into account by a legislative body in exercising its police power, the modern trend is toward upholding legislation which is based to a considerable extent on aesthetic considerations.[171]

> Since the police power of the state may be used to prohibit the conduct of exploration, mining and excavation operations within the residential areas of a municipality, it can also validly be used to prohibit exploratory mining and other such activities within the wilderness and recreational areas of the state.[172]

The plaintiff's brief went on to argue that the federal government has the authority to prohibit mineral exploration and mining in the BWCA, citing Berman v. Parker, 348 U.S. 26 (1954), to show "that the federal government does possess and can exercise its police power,"[173] United States v. Perko, 133 F.Supp. 564 (D.Minn. 1955), to show that Congress may exercise its police power to maintain wilderness areas,[174] and the National Environmental Policy Act of 1969 to show that Congress has placed on the federal government the responsibility to "preserve important . . . natural aspects of our national heritage."[175]

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[171]Citing Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968), McMichael v. United States, 355 F.2d 283 (9th Cir. 1965), and 46 No. Car. L. Rev. 103 (1967).

[172]Plaintiff's Brief, pp. 27-29.

[173]Ibid., p. 29.

[174]Also cited: United States v. Gregg, 290 F.Supp. 706 (W.D. Wash 1968) (airplane regulations) and McMichael v. United States, 355 F.2d 283 (9th Cir. 1965) (motor vehicle regulations).

[175]42 U.S.C. Sec. 4331(b)(4).

> In sum [said the IWLA's brief], the Court should determine it to be in the public interest to preserve the BWCA as a wilderness and it therefore must find that federal laws and regulations and court decisions, cited herein, have zoned the BWCA so as to prohibit exploratory mining operations by the individual defendants.[176]

Two further arguments in this vein were advanced by the plaintiff: that "federal courts have upheld wilderness zoning and prohibitory regulations by determining that a greater public interest exists in the preservation of wilderness areas"[177] and that "courts have recognized the BWCA as a wilderness and have upheld restricting access into the area."[178] The League's statements on this issue built to this conclusion:

> The court need only decide . . . that federal and state laws and regulations . . . have zoned the BWCA so as to prohibit exploratory mining operations by the defendants. This zoning is effective under police power precedent even if defendants' claims are based on

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[176] Plaintiff's Brief, pp. 31-32.

[177] Ibid., p. 32, citing Coastal Petroleum Company v. Secretary of the Army, 315 F.Supp. 845 (1970); Utah Power and Light Company v. United States, 243 U.S. 389 (1917); Udall v. Federal Power Comm., 387 U.S. 428 (1967); Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S.Ct 814 (1971); Parker v. United States, 309 F.Supp. 593 (1970); United States v. Foresyth, 321 F.Supp. 761 (D. Colo. 1971); and The West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971).

[178] Plaintiff's Brief, p. 37, citing United States v. Perko, 108 F.Supp. 315 (D. Minn. 1952), affirmed, 204 F.2d 446 (8th Cir. 1953), cert. denied, 346 U.S. 832 (1953); Perko v. Northwest Paper Co., 133 F.Supp. 560 (D.Minn. 1955); Bydlon v. United States, 175 F.Supp. 891 (Ct. Cl. 1959); Mackie v. United States, 194 F.Supp. 306 (D. Minn. 1961); and, especially, United States v. 967,905 Acres of Land in Cook County, Jake Pete Claim, 305 F.Supp. 83 (D. Minn. 1969).

> valid property rights. Since other institutions of the government are unable or unwilling to initiate responsibility for environmental decision-making, it is incumbent upon this court to recognize the problems of maintaining environmental quality and to thereby safeguard the public's interest in the preservation of the BWCA.[179]

The issues in some of the cases cited to support the League's conclusion are not exactly the same as those in Walton v. St. Clair. For example, Overton Park hinges on a statute (the Federal Aid Highway Act) which contains "a plain and explicit bar to the use of federal funds for construction of highways through parks."[180] Parker, as readers of Chapter IV, supra., are aware, revolved around a statutory requirement (in the Wilderness Act) that undeveloped land contiguous to a Primitive Area and minimally suitable for administration as wilderness be withheld from development pending Congressional action to reclassify the Primitive Area as a Wilderness. Foresyth--another ruling by Judge William E. Doyle of Denver--concluded that the Forest Service may obtain an injunction to keep mining claimants (rather than holders of private mineral rights) from mining limestone in an area reserved for recreational and scenic purposes pending determination of the validity of the claims.[181]

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[179] Plaintiff's Brief, p. 41.

[180] 91 S.Ct. 814, at 821.

[181] 321 F.Supp. 761, at 767: "[T]he Forest Service is advancing a valid interest in seeking to preserve the scenic character of this area. The public has an interest in preventing the needless defilement of forest lands at least pending determination of the validity of the claims and the attempted withdrawal."

The case cited which most closely fits the Walton situation is West Virginia Highlands Conservancy v. Island Creek Coal Company [and Frederick Dorrell, Supervisor of the Monongahela National Forest], 441 F.2d 232 (1971). The Highlands Conservancy, both the district judge at Elkins, West Virginia, and the Fourth Circuit appellate panel found, had standing to maintain the action because it "alleged injury in terms of aesthetic, conservational and recreational values" and because

> . . . it is clear that Conservancy sought to protect the same conservational interests with which the National Environmental Policy Act and the Wilderness Act are concerned.[182]

More importantly, in this context, the district court and the court of appeals agreed that the following claims of the plaintiff--not unlike those in Walton--offered adequate basis for the issuance of a preliminary injunction pending trial: (1) the Forest Supervisor had no authority to allow Island Creek to proceed because the latter's mineral rights do not include the right to build access roads; (2) no mining or timber-cutting activities could be undertaken in the area without the submission of an environmental impact statement

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[182] 441 F.2d 232, at 234. Added the Court of Appeals, at 235: "[The Conservancy's] interest and the injury [its members] would suffer are much more particularized and specific than those of the Sierra Club and its members in a portion of Sequoia National Park. We think our case falls outside of the [Ninth Circuit's] doctrine of Sierra Club [the Mineral King case]."

(under NEPA, 42 U.S.C.A. 4332[2][c]); and (3) the Forest Supervisor should not be permitted to take any action with respect to Otter Creek Basin which was inconsistent with its wilderness characteristics until the Conservancy's suggestion in this regard, advanced in a petition to the Regional Forester, has been finally determined.[183] "Zoning," per se, was not mentioned in any of the cases cited for support, however.

Supplementing the plaintiff's "zoning" argument were these assertions:

(1) Abandonment, laches and public policy preclude the exercise of any right the individual defendants may have to mine and remove minerals from the BWCA.[184]

(2) Defendants should be prohibited from further entry, mineral explorations and the removal of minerals unless and until they comply with rules, regulations and policies of the federal and state governments. Individual defendants' asserted implied easements are insufficient to allow entry. ("In light of its special value, the surface

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[183] See this case for an example of the use of the U.S. Department of Agriculture's appeal regulation. While the Conservancy's appeal to the Chief of the Forest Service to designate Otter Creek a wilderness study area was pending, the Forest Supervisor gave the mining company permission to conduct core-drilling operations there. It was at this point that the Conservancy filed suit.

[184] Plaintiff's Brief, p. 41. See discussion of this issue at pp. 278-287, supra.

lands and waters of the BWCA have long had a dominance over the mineral interests."[185]) The Minnesota Commissioner of Natural Resources, the U.S. Secretary of Agriculture, and the Chief of the U.S. Forest Service have an affirmative duty to take all action necessary and proper to preserve the wilderness and recreational status of the BWCA. ("[T]he protective purposes of the regulatory objectives [promulgated under the Wilderness Act[186]] are so strong and clear as to prevent the Chief of the Forest Service from issuing any mining permit or access permit to defendants for mineral exploration activities in the unique BWCA wilderness."[187]) The Chief of the U.S. Forest Service must comply with the substantive and procedural duties imposed by the National Environmental Policy Act of 1969 before granting special permits to individual defendants.[188]

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[185] Hamon v. Gardner, 315 P.2d 669 (Okla. 1957); Atlantic Refining Company v. Bright & Schiff, 159 Texas 500, 321 S.W.2d 167 (1959).

[186] 36 C.F.R. Secs. 251.70 to 251.84 and Sec. 251.86.

[187] Plaintiff's Brief, p. 75. See also, at p. 81: "While the determination of regulations and policies governing federal and state lands and waters in the BWCA is a matter for the discretion of the responsible agencies, subject to appropriate judicial review, the court can by mandamus require administrative officials to take action to establish regulations and policies governing the use of lands in the BWCA, including holding hearings and making a decision in issuing regulations and policies statements. See, Simpkins v. Davidson, 302 F.Supp. 456 (S.D.N.Y. 1969)."

[188] "Plaintiff recognizes that the federal defendants have not at this time acted in violation of the NEPA. This discussion is presented to the court at this time as further

(3) The federal defendants have breached their duties to hold and protect the lands and waters within the BWCA in trust for the public.[189]

(4) Allowing individual defendants to conduct exploratory mining operations will cause unreasonable degradation of plaintiff's rights to a decent environment as guaranteed by the Ninth Amendment to the U.S. Constitution.[190]

(5) The State of Minnesota has enacted, enforced and permitted preferential and discriminatory rights, privileges and uses within the BWCA which are in violation of plaintiff's fundamental rights guaranteed by the U.S. Constitution.

(6) Individual defendants should prove to the satisfaction of the court that they have full, clear and valid right, title and interest to minerals that may be located within the BWCA.

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and most recent proof that the preservation of natural resources is of greater public interest than is private mineral development. The court must weigh all of the issues in this litigation in light of the overwhelmingly protective national environmental policy." Plaintiff's Brief, p. 84.

[189]Citing Illinois Central v. Illinois, 146 U.S. 387, 452 (1892); Allen v. Hickel, 424 F.2d 944, 947 (1970); Archbold v. McLaughlin, 181 F.Supp. 175, 180 (D.D.C. 1960); Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971); Seaton v. Texas Company, 256 F.2d 718 (D.C. Cir. 1958).

[190]Citing Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp., Civil No. 1694 (D.Mont., filed Nov. 13, 1968); Fairfax County Fed'n of Citizens Ass'ns v. Hunting Towers Operating Co., Civil No. 4963-A (E.D.Va., filed Oct. 1, 1968).

As a "last resort" set of arguments, in case it was determined that the individual defendants did have a right of entry to explore for minerals, the Walton plaintiff asked that the court at least require both the State Commissioner of Natural Resources and the Forest Service to hold public hearings before issuing permits to drill, to help establish what conditions should be imposed on the permittees to protect the environment, and that the court require the Forest Service to comply with the substantive and procedural requirements of the National Environmental Policy Act before issuing any such permits.[191]

The Individual Defendants' Answers

The above allegations of the plaintiff were answered in a document entitled "Memorandum of George W. St. Clair, et al." filed with the court on November 29, 1971. Its organizational structure parallels that of the plaintiff's brief, and it constitutes a point-for-point rebuttal of that brief:

> I. Introduction.
>
> [T]he assertion that the defendant St. Clair was not privileged to plan exploration activities without the consent and/or knowledge of the Minnesota Commissioner of Natural Resources is absurd. Mr. St. Clair dealt with the proper federal agency charged with the management of the BWCA. . . .

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[191]Plaintiff's Brief, pp. 96-97.

[T]he State of Minnesota reserved minerals in its transfers to the Federal Government and . . . they are regarded as important reserves for use in national emergencies. It is disconcerting to note that no effort is being made to establish what in fact is available for such emergencies. The failure of our state administrators to take steps to determine the nature, extent and location of such reserves for use in a national emergency is arguably gross negligence. Such shortsightedness cannot be said of the private owners.

II. Has the BWCA been "zoned" to prohibit exploration of mining rights?

Plaintiff argues that the Organic Administration Act, 16 U.S.C. Sec. 473 somehow supports its zoning theory. Section 478 of the Act provides specifically otherwise.[192]

[I]n 1950 Congress enacted Chapter 430, Public Law 594 (now 16 U.S.C. Sec. 508[b]) which specifically permitted the development of mineral resources in the national forest of Minnesota. . . . This legislation was enacted subsequent to the time that the BWCA was declared a roadless area and did not exclude the BWCA from its operation and effect.

The Shipstead-Newton-Nolan Act, 16 U.S.C. Sec. 577 et seq. only regulates logging on lands bordering lakes and streams and the alteration of the water level of said lakes and streams and does not in any manner prohibit mineral activities within the BWCA.

The Weeks Act contemplates mining activity.[193]

The Wilderness Act of 1964 (16 U.S.C. Sec. 1131 et seq.) further refutes the contentions of plaintiff and defendant State of Minnesota. The Act specifically makes the ban on permanent roads and motorized equipment

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[192]"Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof."

[193]"16 U.S.C. Sec. 520 (Weeks Act) reads: 'The Secretary of the Interior is authorized . . . to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under sections 513-519 of this title. . . .'"

> subject to existing private rights. 16 U.S.C. Sec. 1133(c). In connection with mining activities, Section 1133(d)(2) provides as follows: 'Nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about minerals or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. . . .'
>
> [T]he entire Wilderness Act is made subject to existing private rights. . . . The legislative history of the Wilderness Act makes it clear that the intent was not to zone wilderness areas so as to prohibit mineral activity.[194]

This document filed on behalf of the individual defendants, after making the above-quoted observations, asked:

> How it can be argued that the above quoted Federal enactments and regulations could possibly be construed to reflect a Federal "scheme" to deny private existing rights to the individual defendants, defies comprehension. Wishful thinking or thoughtless zeal on the part of the Izaak Walton League is perhaps the answer.[195]

The third section of the individual defendants' memorandum dealt with State laws and pointed to Minnesota Statutes, Section 93.43, which declares "[t]he business of mining . . . nickel . . . to be in the public interest." The balance of the defendants' memorandum was devoted to demonstrating how the cases cited by the plaintiff in support of its theories were not in point with the merits of this litigation, and to otherwise disparaging the plaintiff's --and the State's--allegations:

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[194] See, 1964 U.S. Cong. & Adm. News, p. 3615-3624.

[195] Memorandum of George W. St. Clair, et al., pp. 19-20.

> It is respectfully urged that the statutes passed . . . speak clearly to the intent of Congress to protect existing private rights in recognition of constitutional imperatives and that the Izaak Walton League, enthralled with its single idea and blinded with zeal to implement the idea, would sacrifice constitutional rights to achieve its end.[196]

> The State and the Izaak Walton League are writing news media material and not legal briefs. . . . The State's brief is rife with invective, unsupported innuendo and classical demagoguery which addresses itself unjustly to the position of all persons who in good faith conveyed to the Federal Government, properly reserving a property right in the minerals that were known to exist subject to regulations then existent.[197]

> The contention that the mineral interest has forfeited for failure to pay taxes is totally without merit.[198]

> The Public Trust Doctrine raised by both the plaintiff and State of Minnesota is not applicable to reserved mineral interests in the BWCA.[199]

The individual defendants asked the Court to determine

> . . . [t]hat there is no indication that the individual defendants would exercise their reserved rights other than in accordance with the law, and the actions of the Izaak Walton League and the State be dismissed on the grounds that they are premature.[200]

The State's Allegation of Fraudulent Actions by Original Land Patentees

The only major aspect of the Walton v. St. Clair litigation not touched upon in the preceding commentary is

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[196] Ibid., p. 23.

[197] Ibid., p. 24.

[198] Ibid., p. 33.

[199] Ibid., p. 50.

[200] Ibid., p. 55.

that which formed the basis of the State's motion to amend its pleadings, heard by Judge Neville on August 21, 1971; the State alleged

> . . . that the land owned or leased by defendant St. Clair in the BWCA was separated from the federal public domain through unlawful, fraudulent or both unlawful and fraudulent actions of the original patentees of the land and their accomplices, and through actions of the federal officers, agents, or employees.[201]

Why, State Cross-claimant Herbst asked, should the public buy out St. Clair's rights when they were "wrongfully wrested from the public in the first place"? The State filed a thirty-one-page memorandum on this issue on September 11, 1971, followed, on October 9, 1971, by a fifty-four-page memorandum supporting its cross-claims and hitting again at this "unjust enrichment" theme.[202]

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[201]State Memorandum in Support of Its Motion to Amend Pleadings, Sept. 11, 1971, p. 2.

[202]State's Memorandum Supporting Its Cross-Claim and on Other Related Matters, Oct. 9, 1971, pp. 43-45: "[I]t is unreasonable . . . for defendant St. Clair and his lessors to now mine their minerals contrary to the public wilderness management policy for the BWCA, except as related to a national emergency, for the following reasons: 1. The original patenting in the 1880's and 1890's was related to mineral speculation and was clouded by unlawful land practices existent in the district of the Duluth Land Office; 2. The rights thus obtained were held in fee, generally without change except for some logging, until the onset of the great depression in the late 1920's and early 1930's, when it became expedient for the owners to separate the ownership of the surface from the minerals, sell off the surface which was subject to real property taxation, and retain the minerals which were free from taxation because no drilling had been done and thus no real property taxes had been assessed on the minerals. Without taxation there could be no tax forfeiture of the property. This strange

Counsel for the individual defendants called this claim "absurd." A combination of circumstances worked to the cross-claimant's disadvantage, including the statute of limitations and the impact of a favorable decision on real estate title in Minnesota generally:

> It has been well established by the United States Supreme Court that one who seeks to annul a patent for fraud must assert a greater right that the patentee.[203] . . . It is an equally well established principle that the issuance of a patent raises the presumption that it was validly issued, and one seeking to set it aside must sustain his averment in that regard by clear proof.[204]

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and wonderful situation resulted from the Washburn v. Gregory Co. decision, 1914, 125 Minn. 491, 147 N.W. 706, which determined that mineral estates separated from the surface estate prior to forfeiture, do not forfeit with the surface. Notwithstanding the statement by the court in that decision, at page 496 of 125 Minn., that "[t]here is nothing whatever in the law or in this opinion that in any way tends to permit the owner of a separate mineral estate to escape paying property taxes on this property," the effect of the decision was the accidental creation of a class of tax exempt private real property, "severed minerals," because no county assessed severed minerals without drilling, which was rarely, if ever, done. Thus, as a consequence of this judicial interpretation the defendant St. Clair and his lessors were able to string out their speculative ownership interest in minerals in northeastern Minnesota and Superior's roadless area, throughout the great depression and seemingly forever thereafter, without any cash outlay. This tax loophole was created by accident and in obscurity, in contrast with the open and deliberate development of the public wilderness management policy for the area. . . ."

[203]Citing Northern R. R. Company v. McComas, 250 U.S. 387 (1919); Fisher v. Rule, 248 U.S. 314 (1919); Sparks v. Pierce, 115 U.S. 408 (1885).

[204]Citing United States v. Maxwell Land-Grant Co., 121 U.S. 325 (1887).

> If, as the defendant contends, the patents were invalidly issued and if, as a result thereof, the State is entitled to a conveyance of the lands granted by the patents . . . then it follows that the State is entitled to a conveyance of not only the mineral interest but also of the surface, thus divesting the United States of its fee simple interest in the surface. It cannot be said that a patent, acquired by fraudulent practices, granting the entire fee simple interest in real property, is valid as to the surface and invalid as to the mineral interest.
>
> The absurdity of such a result is evident. Any time a sovereign, or an individual for that matter, has a need for privately held real property, all it need do is to find evidence of some fraud in obtaining the patent (which practice was apparently widespread throughout the United States. . . .) and thereafter seek to have the fee owner declared a trustee. Litigation would become voluminous and title to real estate would never be laid to rest.[205]

Judge Neville found for the individual defendants on this issue. In his Order Denying Motion of Defendant Herbst for Leave to File Amended Cross Claim, filed on May 16, 1972, the judge observed that

> . . . to allow a challenge now to the patents might put in jeopardy and unsettle thousands of titles in Northern Minnesota and raise havoc with real estate ownership.[206]

To agree to the state's claim would be to declare St. Clair a trespasser, and this resolution of the case would not get to the merits of the plaintiff's zoning theory. The judge explained this possible result:

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[205]Defendants' Memorandum on Opposition to State's Motion to Amend Pleadings, July 12, 1971, pp. 11-12.

[206]Opinion appended to Order Denying Motion of Defendant Herbst for Leave to File Amended Cross Claim, May 16, 1972, p. 6.

> The proposed amendment to the cross-claim . . . if allowed, would inject a new claim into the case so that in addition to its contention that Federal and State laws prohibit drilling and exploring for minerals in the BWCA, the Commissioner would contend either that the title to the various pieces of land is still in the United States because the patents thereto were obtained by fraudulent practices and are voidable so that no individual has any rights therein and thereunder, or that the title under either a constructive trust or a public trust theory is held by the present owners for the benefit of the public. Obviously, if St. Clair is attempting to drill on or to explore for minerals in lands, the title to which is not in him or his lessors, he is a mere trespasser and the court need not reach the question as to the effect of Federal and State laws on the BWCA; for whatever their applicability or effect, if St. Clair or his lessors have no title he can be excluded on that basis and the lawsuit is dismissed. . . .[207]

> It is . . . crystal clear, and the Federal Government does not argue to the contrary, that its right to challenge the patents is barred. While there is authority that where fraud is present the statute [of limitations] does not begin to run until it is discovered,[208] there can be no question here based on the Commissioner's own showing, that the Federal government, including the Secretary of Interior in 1885 was aware of the fraud and the conditions and transactions in the Duluth land office.[209]

> The question then is, whether if the Federal government cannot attack patents, the Minnesota State Commissioner has standing to challenge the 600 some fraudulently procured patents. In this court's opinion he does not.[210]

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[207] Ibid., pp. 2-3.

[208] Citing Exploration Co. v. United States, 247 U.S. 435 (1918) and Bailey v. Glover, 21 Wall. 342. (1875).

[209] Citing United States v. Christopher, 71 F.2d 764 (10th Cir. 1934).

[210] Citing Northern Pacific Ry. v. McComas, 250 U.S. 387 (1919) and Fisher v. Rule, 248 U.S. 314 (1919). Cf. Herbst, in State's Memorandum in Support of Its Motion to Amend Pleadings, Sept. 14, 1971, at p. 18: "If the State, acting through the Commissioner of Natural Resources,

A ruling on the Izaak Walton League's "zoning" theory was pending as this report was written. Meanwhile, the issue is being debated in the press, in the state legislature, and in the Congress. Minnesota Geological Survey Director P. K. Sims' attitude--"Clearly, we have an obligation to future generations to determine the mineral resources of all areas, including those that are to be set aside for preservation of natural environment"[211]--has its supporters, among them former Congressman Clark MacGregor who in 1970 sought "mineral evaluation studies of the BWCA at the earliest possible opportunity."[212] On the other hand, the point

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cannot assert the allegations contained in its amendment on behalf of the public and in protection of the wilderness, and if the federal defendants chose not to do so - for whatever their reasons, who is left to represent the public in this issue? Citizen volunteers, such as the Izaak Walton League? If no one can or will assert these allegations, the wrong which occurred in the patenting of these lands . . . will be compounded without challenge on the part of anyone. The restored wilderness might very well again be lost to the public."

[211]Sims, "Letters From Readers," Minneapolis Tribune, Jan. 8, 1970.

[212]MacGregor, personal letter to Walter J. Hickel, Secretary of the Interior, March 12, 1970. See also: Haik, personal letter to MacGregor, Apr. 7, 1970 ("In the context of the present litigation and the opportunities for mineral development and exploration outside the [BWCA], it would appear to me that the public's expenditures would be best spent if we were to encourage development in areas which have not been set aside and devoted to aesthetic wilderness and recreational purposes."); Charles W. Merrill, Acting Chief, Division of Field Operations, U.S. Bureau of Mines, Washington, D.C., personal letter to Ted Pankowski, Jr., Conservation Associate, Izaak Walton League of America, Washington, D.C., Apr. 23, 1970 ("We are . . . encountering

of view of H. E. Wright, Jr., Director of the University of Minnesota's Limnological Research Center--"[T]he opportunity exists for the public and its elected and appointed representatives to make some choices that reflect environmental sensitivities rather than simply the traditional concern for maintaining or improving the standards of living without significant sacrifices or substitutes"[213]--has its supporters, not only among conservation groups but in the United States Congress, where Oregon Senator Robert W.

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a question of national priorities. . . ."); "Conservationists Score Bureau of Mines on Mineral Exploration in Wilderness Zone," News Release, Izaak Walton League of America, Washington, D.C., May 8, 1970; Robert L. Herbst, Executive Director, Izaak Walton League of America, telegrams to President Nixon and Secretary Hickel, May 8, 1970 ("In our view it would be entirely inappropriate to use public funds for mineral exploration in the [BWCA] until the court makes a determination based on the merits of the case. We respectfully request that you use your good office to prohibit what can only be regarded as a concession to mining interests who are parties in the suit."); Robert B. McCormick, Coordinator for Wilderness Activities, U.S. Bureau of Mines, Washington, D.C., personal letter to Haik, May 20, 1970 ("Unless extenuating circumstances require, a mineral resource survey of the BWCA [authorized by Section 4(d)(2) of Public Law 88-577, the Wilderness Act,] will not be scheduled to start for at least two or three years."); Congressman John A. Blatnik, personal letter to Haik, May 20, 1970 ("[T]his [Interior Department activity] is only a thinly disguised effort to reap a windfall profit from the American taxpayer. . . . [N]o action should be taken by either the State or the Federal Governments until the League's lawsuit is resolved.")

[213]Wright, "Letters From Readers," Minneapolis Tribune, Jan. 18, 1970.

Packwood has introduced legislation to stop all mining in all federal wilderness areas.[214]

The Forest Service, unable to freeze its BWCA planning pending the final outcome of this litigation, has drafted a new Superior National Forest Land Use Plan and an accompanying environmental impact statement based on studies and public involvement sessions conducted in 1972, and has indicated that it expects to adopt this new management plan early in 1973. This plan will replace present Ranger District Land Use Plans, some of which are ten years old. The new plan, according to the agency, will identify

> . . . not only the resource potential but the least harmful way of utilizing it.[215]

And the plan will "never [be] done":

> [I]t is open ended for ideas, new data and critique.[216]

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[214] S. 1783, 92nd Cong., 1st sess., May 6, 1971. See, "Stop All Mining," remarks by Senator Packwood in connection with the introduction of S. 1783, Congressional Record, May 18, 1971, pp. S 7190-91. See also, "Oregon Approves Pollution Rules; Strict Regulations to Block Mining in Wilderness," New York Times, Jan. 30, 1972: "The most immediate effect of the regulations [approved by the Oregon Department of Environmental Quality] will be to stop all mining activity permitted by the Federal Wilderness Act of 1964. However, the regulations will stop virtually all future use of the land. It is believed that this is the first time that a state has attempted to intervene to control mining in areas that are under Federal jurisdiction."

[215] "Three Million Plus," prepared by the Superior National Forest Planning Team, March 16, 1972, p. 29.

[216] Ibid., p. 7.

CHAPTER SEVEN

A COMPARISON OF FOUR CASES

Differences

The Substantive Issues

Conservationists in Michigan, Wisconsin and Minnesota were asked to support the purchase of the Sylvania tract by the Forest Service to preserve its wilderness characteristics.[1] At the same time, the attention of representatives of local government and the forest products industry was being directed to the part of the tentative Sylvania management proposal calling for intensive recreational development and timber sales. The Forest Service thus created different images of Sylvania in the minds of their regional and local publics. The Gandt plaintiffs were members of the regional public. They had read the wilderness brochures and press releases, not the development agreements made between the Forest Service and the Gogebic County Board of Supervisors. They were stunned by the extent of the development which

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[1]Chicago Tribune Press Service, "Sylvania Tract Open to Public," Washington Post, May 26, 1967, p. D6: "Mark J. Boesch of the Forest Service explained: 'Our hope is to manage Sylvania so that we may keep it as much of a near-natural (wilderness) area as possible.'"

followed federal acquisition: bathing beach and bathhouse; boat landings and parking lots; picnic and camp grounds; water-access campsites with privies, picnic tables, tent pads, fireplaces and metal garbage cans; highway construction through heavy, old-growth timber; and a timber sale. They sued because, as they saw it,

> . . . such activities violate the original intent in purchasing this area which was to keep it in its wilderness condition.[2]

The Gandt plaintiffs also sued because they felt implementation of the Forest Service management plan would threaten the nesting success of the Sylvania area's resident population of "endangered" bald eagles, and--in a more general sense--because they believed that irreversible steps were being taken to diminish the tract's wildness in the absense of adequate information on the environmental impact of these activities. The Gandt plaintiffs saw the development of Sylvania, as proposed by the Forest Service, as

> . . . not an appropriate use of said property according to the nature thereof [and] not . . . in the public interest.[3]

In short, the issue in Gandt was: For what purpose had the Sylvania tract been purchased?

A Forest Service specialist chose the hydrographic divide as the boundary for a reclassified Eagles Nest

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[2] Gandt, Complaint, Nov. 12, 1969, p. 6.

[3] Ibid., p. 7.

Wilderness because of its ease of administration. The East Meadow Creek drainage was thus excluded from further consideration as wilderness. The agency "numbered up" the East Meadow Creek timber sale as it was scheduled in a seven-year-old timber management plan without revising that plan in view of changing local demands (related to the growth of the nearby resort town of Vail) and new statutes (e.g., the Wilderness Act). The Forest Service consciously acted in support of the local sawmill industry and its own long-range road-construction goals and over the objections of local wilderness recreationists and a coalition of state conservation groups. The Parker plaintiffs sensed a growing demand for wilderness recreation opportunities near Vail and appreciated East Meadow Creek in its status quo as wildlife habitat and de facto wilderness. They were opposed to the unpublicized and incremental construction of a new forest highway between Vail and Kremmling "amortized" by a series of timber sales. They took the position that the agency's decision to sell timber in East Meadow Creek was based on

> . . . a dearth of information and expertise . . . [in]sufficient study of [the area's] recreational and wildlife values . . . [and] cursory treatment [of] the East Meadow Creek area [during] the Forest Service study, review and consideration of its wilderness suitability and elgibility.[4]

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[4] Parker, Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment, p. 17.

The Parker plaintiffs described the East Meadow Creek timber sale decision as one which

> . . . will not use the resource in a manner yielding "the greatest permanent usefulness to the people of the United States."[5]

The issue in Parker was: What was the best use of the East Meadow Creek drainage? The question the courts focused on and which Congress will have to answer was, Does the East Meadow Creek area qualify as wilderness under the Wilderness Act's definition?

Resort development at Mineral King to provide additional skiing opportunities for Southern Californians was encouraged by the Forest Service despite the area's statutory status as a game refuge and its use as a campground and wilderness trailhead. It approved permittee Walt Disney Productions' resort development plan over the objections of its own range management and wildlife management personnel. It was accused of being a "political instrument [afflicted with] numbers madness"[6] and of having conducted "no serious study [of] the effect on the Mineral King ecosystem."[7] The Sierra Club v. Hickel plaintiff, which had not objected to the construction of a modest resort costing $350,000

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[5] Ibid., p. 38.

[6] John Jerome, "Conservation and Wilderness," Skiing, Dec. 1968, p. 150.

[7] Dewey Anderson, "Mineral King--A Fresh Look," National Parks and Conservation Magazine, May 1970, p. 8.

(as proposed in a 1949 Forest Service prospectus) concluded that the construction of a resort costing $40 million (1965 Disney proposal) attracting two million visitors per year, three-quarters of them in the summertime, would lead to an unacceptable level of adverse environmental impact on public land. The plaintiff took the position that it had to

> . . . speak for the future generations for whose benefit Congress intended the fragile Sierra bowls and valleys to be preserved.[8]

The actions of the federal defendants were characterized by the plaintiff as a

> . . . breach of trust when they sell for money government land which is literally priceless in aid of a project for private profit.[9]

The issue in Sierra Club v. Hickel was: What was the optimum level of development of Mineral King Valley?

The Forest Service assumed that it would have to purchase privately held mineral rights in the Boundary Waters Canoe Area at a cost of "between $10 million and $100 million"[10] in order to prevent the exploitation of low-grade copper-nickel ore in this National Wilderness System unit. In the view of some, it was thus submitting to

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[8] Sierra Club v. Hickel, Plaintiff's Reply Memorandum of Points and Authorities, June 30, 1969, p. 12.

[9] Ibid.

[10] Edward P. Cliff, Chief, Forest Service, letter to Senator Walter F. Mondale, quoted by Al McConagha, "No Funds Exist for Mineral Rights," Minneapolis Tribune, Jan. 25, 1970, p. 18 B.

"blackmail"[11] on the part of mineral rights lessee George W. St. Clair "[who] has all the appearances of a poker player dabbling with the pot to see how large the payoff can be coaxed."[12] The Forest Service appeared to be about to concede the right of the mineral rights-holders to conduct core-drilling in the BWCA subject only to restrictions to minimize environmental damage. The Walton v. St. Clair plaintiff learned that the Forest Supervisor of the Superior National Forest--who had threatened to use "every legal means available to prohibit exploratory drilling"[13]--had been advised by his legal counsel that there were no legal means to bar St. Clair's drilling operation, short of proceedings to condemn and purchase the severed mineral rights. No money had been appropriated for this purpose. Sensing the agency's imminent capitulation and envisioning serious damage to one of the most attractive sections of the BWCA if drilling were permitted under any circumstances, the Walton plaintiff sought a declaratory judgment

> . . . that federal and state laws and regulations . . . have zoned the BWCA so as to prohibit exploratory mining operations by the defendants.[14]

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[11]State Senator Rudy Perpich, Hibbing, Minn., quoted by Jim Talle, "Perpich Asks Mineral Rights Swap," Minneapolis Star, Jan. 21, 1970.

[12]Jim Klobuchar, columnist, Minneapolis Tribune, Jan. Jan. 16, 1970.

[13]News Release, Superior National Forest, Dec. 17, 1969.

[14]Walton, Plaintiff's Brief, p. 41.

The IWLA alleged that the Forest Service had afforded the holders of severed mineral rights "preferential and discriminatory rights and privileges" by permitting them to camp in the BWCA for more than fourteen days--the limit for other users. The substantive issues the Walton plaintiff hoped to get the court to rule on ranged from

> . . . taxing severed mineral interests to prerequisites of obtaining permits from state and federal agencies, and traversing lands and waters to the cutting of timber, to the determination of ownership of claimed mineral rights, and, most fundamentally of all, the issue of what the lands and waters of the Boundary Waters Canoe Area have been set aside for.[15]

Alleged Violations of Legislative Intent

During the Gandt court hearing, counsel for the plaintiffs withdrew earlier claims under the Wilderness Act (because the Forest Service was not required by law to review Sylvania for its suitability as wilderness) and under the Endangered Species Act (because the Forest Service was not required by law to administer Sylvania as an endangered species refuge inasmuch as the area's "northern" bald eagles were not on the Interior Department's official list of endangered species and subspecies). This left the plaintiffs with one claim: that the Forest Service had violated the intent of Congress as expressed in the Multiple Use-Sustained

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[15]Frederick S. Richards, "Walton v. St. Clair: The Standing Question," Natural Resources Lawyer, Vol. IV, No. 1, Jan. 1971, p. 57.

Yield Act of 1960. Under this statute, the Forest Service is required by law to take certain procedural steps to assure that "due consideration is given to the relative values of the various resources in particular areas"[16] before it can begin any kind of National Forest development. (Judge Doyle noted in his December 24, 1969, Parker opinion that "there is no compromise with this requirement."[17]) In order to get a court to overturn a Forest Service decision under this statute, however, a plaintiff must prove that the agency's action was not merely ill-advised in the opinion of outside experts but that it was in fact arbitrary, capricious, malicious, or unreasonable; otherwise, the administrator is given discretion to adopt any rational course of action which results from a consideration of the factors involved, and the courts will not substitute their judgment for that of the Forest Service. The Gandt plaintiffs fell far short of demonstrating that the decision to adopt and implement the Sylvania Recreation Area Management Plan was a malicious, unreasonable or irrational decision, and their complaint therefore was dismissed.[18]

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[16]Title 16, U.S. Code, Section 529.

[17]307 F. Supp. 685, at 688.

[18]Cf., Dorothy Thomas Foundation v. Hardin, 317 F. Supp. 1072 (W.D.N.C. 1970), and Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971), similar cases with similar results.

At the conclusion of the Parker trial, the plaintiffs' chief counsel indicated he relied primarily on "the mandatory procedures under the Wilderness Act [of 1964] which were not followed," rather than on a violation of the Multiple Use Act, also claimed, which he termed "a secondary supporting matter."[19] The violation of legislative intent alleged in this case involved the Wilderness Act and the Forest Service's failure to identify the East Meadow Creek drainage as meeting the minimum requirements of suitability for wilderness classification, its failure to report this conclusion to the President in connection with the agency's mandatory review of the Gore Range-Eagles Nest Primitive Area, and its failure to await the judgment of Congress as to the location of the Eagles Nest Wilderness boundary prior to attempting to take abortive action to remove East Meadow Creek from contention as a wilderness addition.[20] The Parker plaintiffs were able to establish "at least prima facie"[21] that the East Meadow Creek drainage, contiguous to the Gore Range-Eagles Nest Primitive Area, was of wilderness character. This showing, according to the district and appeals courts which heard the case, was sufficient to require that the Forest Service withhold any development, include the area in its preliminary

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[19] Parker, Reporter's Transcript, p. 567.

[20] 309 F.Supp. 593, at 596.

[21] Parker, Reporter's Transcript, p. 631.

wilderness report, take testimony on its suitability at a field hearing, include a recommendation on the area in its report to the President, and keep the area undeveloped until final Wilderness boundaries are set by Congress. The district court ruling, affirmed by the Court of Appeals for the Tenth Circuit, stipulated:

> [If] the area in question falls clearly within the definition of wilderness under the standards of 16 U.S.C., Section 1131(c) [the Wilderness Act], and [if] it is ecologically interrelated with the primitive area . . . the Secretary [of Agriculture has] no discretion but [must] report to the President as to the suitability of these contiguous areas for wilderness classification.[22]

The appellate court panel explained:

> This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper.[23]

The Forest Service was ordered to wait until Congress determines whether or not the East Meadow Creek area is to be made a part of the Eagles Nest Wilderness before it proceeds with road construction or timber-cutting in whatever portion of that area is not included in the Wilderness.

Several violations of legislative intent were alleged by the Sierra Club v. Hickel plaintiff. The most important were enumerated by a co-counsel for the plaintiff:

> The Forest Service simply exceeded its statutory authority with regard to the eighty-acre-per-permittee limitation. It does not have the discretion to exceed

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[22] 307 F.Supp. 685, at 688.

[23] 448 F.2d 793, at 797.

> eighty acres. Further, a non-park-oriented road in a national park is illegal.[24]

The Sierra Club alleged that the permits to be granted by the Forest Service to Walt Disney Productions were in excess of its jurisdiction and in violation of the provisions of the Act of March 4, 1915, as amended July 28, 1956 (38 Stat. 1101, 70 Stat. 708; 16 U.S.C. 497) which limits the size, terms and manner of occupation of lands for resorts and associated facilities in the national forests "and which is far exceeded by the subject development"[25] and the provisions of the Act of June 4, 1897, as amended (30 Stat. 35; 33 Stat. 628; 76 Stat. 1157; 78 Stat. 745; 16 U.S.C. 551) regarding the permit power of the Secretary of Agriculture "which has been and will be exceeded."[26] Sierra Club allegations on this key issue:

> Despite the clear congressional limitation of 30-year term permits to 80 acres, the Forest Service . . . nevertheless intends to authorize the construction and development of "structures" and "facilities" by means of a so-called "annual" or "revocable" special use permit. . . . While the "annual" permit purports to be terminable or revocable, we will demonstrate that it is not. The Forest Service is thus attempting to do indirectly what it cannot do directly. It is a clear and patent effort to circumvent the 80-acre limitation of 16 U.S.C. 497.[27]

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[24]Robert W. Jasperson, General Counsel, The Conservation Law Society of America, San Francisco, Calif., personal interview, Aug. 13, 1970.

[25]Sierra Club v. Hickel, Complaint, p. 4.

[26]Ibid., p. 5.

[27]Sierra Club v. Hickel, Memorandum of Points and Authorities in Support of Motion for Injunction, pp. 19-21.

> To claim that ski lifts and runs are incidental to a ski resort is like claiming that a golf course is incidental to the clubhouse and lockerroom. . . . Congress has made clear its intention that "facilities" be located within 80 acres.[28]

Other alleged violations of legislative intent: authorization by the Secretary of the Interior of a high standard highway across Sequoia National Park to serve a private development outside its boundaries, contrary to the National Park Service organic act of August 25, 1916 (39 Stat. 535) and the Park Road Standards Committee Report implemented by the Secretary of the Interior on April 11, 1968, which prohibits the construction of such non-park "connecting links"; failure to obtain the permission of Congress to build a power line across Sequoia National Park to serve the Mineral King resort, contrary to the Act of July 3, 1926 (44 Stat. 818, 16 U.S.C. 45[c]) which established new boundaries for Sequoia National Park and at the same time established the Sequoia National Game Refuge; proposing a development inconsistent with the status of Mineral King as a National Game Refuge, contrary to the purpose of the Act of July 3, 1926; acting to approve a resort development without due consideration of the factors which it is required to consider in reaching such a decision, an apparent reference to the requirement of the Multiple Use Act (16 U.S.C. 529); and failure to comply with the requirements of the National Environmental Policy

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[28] Sierra Club v. Hickel, Brief for Appellees, p. 31.

Act (42 U.S.C. 4331 et seq) including the requirement that an environmental impact statement for the proposed resort development be prepared and circulated and the requirement that alternatives to the areas selected for development be studied and described. The federal district court which tried this case was impressed with the Sierra Club's arguments; the Court of Appeals for the Ninth Circuit was not. A decision on the merits of the Club's complaint had not been filed at the time of this writing.

The main violation of legislative intent alleged by the Walton v. St. Clair plaintiff was the authorization by the Forest Service of "exploratory mining operations" by mineral rights-lessee George W. St. Clair, contrary to "federal and state legislative, executive and administrative actions [which] have established a regulatory scheme which zones the [Boundary Waters Canoe Area] so as to prohibit [such operations] within this unique wilderness area."[29] Federal statutes cited in support of this zoning theory included the Shipstead-Newton-Nolan Act of 1930 (16 U.S.C. 577[a] and [b]), the Thye-Blatnik Act of 1948 as amended in 1956 (16 U.S.C. 577[c], [g] and [n]), and the Wilderness Act of 1964 (16 U.S.C. 1131 et seq.) which made the BWCA a part of the original National Wilderness Preservation System. Presidential executive orders, federal regulations, state

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[29]Walton, Plaintiff's Brief, p. 2.

statutes, and court opinions also were cited to support this theory. Counsel for the Walton plaintiff brought to the court's attention the existence of the National Environmental Policy Act, not to claim that the Forest Service had violated it yet, but to remind the court of "the overwhelming protective national environmental policy."[30]

Similarities

The Plaintiffs

United States Senator Hubert H. Humphrey of Minnesota, while addressing a regional section meeting of the Society of American Foresters at Milwaukee, Wisconsin, on March 16, 1972, observed that "there are professional fight promoters in conservation." This sobriquet could be applied, with no disrespect intended, to the principal plaintiffs in at least two and possibly all four of the cases under discussion here. The individuals arbitrarily chosen to serve in this context as principal plaintiffs are Dr. Jerome O. Gandt, William B. Mounsey, and surrogate individual plaintiffs Frederick Eissler and Raymond A. Haik. Note their similarities:

Jerry Gandt, the Green Bay, Wisconsin, dentist and principal plaintiff in Gandt v. Hardin, is a canoeist, backpacker, and organizational activist who, prior to the Sylvania controversy, had been elected to the board of

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[30] Ibid., p. 84.

directors of a local Izaak Walton League chapter. He had the strength of personality to bring into being an eintirely new organization, the ad hoc Save Our Sylvania Action Committee (SOSAC), and the dedication and commitment to his objective to use his own personal savings to finance the litigation. He is an avid user of the Sylvania Recreation Area.

Bill Mounsey, retired military officer and wilderness guide and outfitter from Evergreen, Colorado, is a backpacker, sportsman, and organizational activist who has served as a consultant to the Western Regional Office of The Wilderness Society. He takes two or more parties of paying guests on backpacking trips through the East Meadow Creek area every year. He had the leadership qualities necessary to breathe life into two new wilderness organizations (the Colorado Wilderness Workshop [1964] and the ad hoc Eagles Nest Wilderness Committee [1967]) and convince the Sierra Club and other groups that they should support the Parker litigation.

Fred Eissler, the Santa Barbara, California, high school teacher whose July 24, 1965, report on the Mineral King area helped solidify Sierra Club opposition to the Disney resort plan, is a backpacker, naturalist, and organizational activist who has served on the Sierra Club's national board of directors. At his urging, the Los Padres Chapter of the Sierra Club took the lead in the 1967 campaign to have Congress annex Mineral King Valley to Sequoia National Park. It was on the basis of a week-long family camping

vacation in Mineral King Valley that Eissler wrote his July 1965 report, and he has been a strong advocate of the Sierra Club v. Hickel litigation.

Ray Haik, the Minneapolis, Minnesota, attorney who stepped in to help the Forest Service with the Walton v. St. Clair lawsuit when the government apparently had run out of legal ways to keep George St. Clair's core-drilling rig out of the Boundary Waters Canoe Area, is a sportsman, an author[31] and an organizational activist who has gone up "through the chairs" in the Izaak Walton League of America to President of the League's Minnesota Division and, soon thereafter, to President of the national organization. He saw League intervention on behalf of the wildness of the BWCA as the logical continuation of a League policy which had been in effect since 1922.

All are wilderness users, organizational leaders (with a certain amount of organizational chauvinism), and natural resource-management laymen in the sense that they have not had professional training in forestry, wildlife management, land-use planning or any allied field. They appear to be the philosophical descendants of Henry Thoreau ("In wildness is the preservation of the world.") and John Muir, rather than of Gifford Pinchot, the country's

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[31] E.g., "The Law: Enforcing Quality," No Deposit-No Return (Reading, Mass.: Addison-Wesley Publishing Co., 1970).

first Chief Forester, whose philosophical descendants also were present in these conflicts in the persons of the Regional Foresters and their staffs.

The similarities of the plaintiffs become even more pronounced when the kinds of organizational plaintiffs involved in the four cases are compared and when the roles played by other non-plaintiff groups who let their positions on the controversies be known are categorized and tallied. The accompanying table is an attempt to portray graphically the degree to which the various national conservation organizations either supported or opposed the plaintiffs in these four cases. Three plus signs (+++) indicates the role of plaintiff or co-plaintiff; two plus signs (++) indicates the role of witness for the plaintiff or amicus curiae in support of the plaintiff; one plus sign (+) indicates that the group published material in its house organ supportive of the plaintiff's position. Conversely, three minus signs (---) indicates the role of defendant, two minus signs (--) the role of witness for the defendants or amicus in support of the defendants' position, and one minus sign (-) indicates that the group publicly stated its opposition to the position taken by the plaintiff.

Verbally, here is how the conservation organizations lined up in these four cases:

Gandt v. Hardin. Joining the ad hoc SOSAC committee as parties plaintiff were one nationally affiliated Audubon

	Gandt v. Hardin	Parker v. U.S.	Sierra Club v. Hickel	Walton v. St. Clair
Sierra Club	(++[1])	+++	+++	+
Izaak Walton League of Am.	(++[2])		++	+++
The Wilderness Society		++	++	+
National Audubon Society	(++[3])			+
Friends of the Earth			++	
Environmental Defense Fund			++	
National Parks Ass'n			+	
National Wildlife Federation	-[4]	-[5]	-[6]	?[7]
Wildlife Management Inst.	-	--	-	
The Wildlife Society	(++[8])			+[9]
American Forestry Ass'n			-	
State Resources Agency	-	++	-	++[10] -[11]
State University Faculty	+[12] -[13]	++		++[14] -[15]
Local Government	-	+++	--	

Figure 5. Degree to which plaintiffs were supported by national conservation organizations and other institutions.

[1]Chairman of Sierra Club's North Star (Minn.) Chapter was individual plaintiff; John Muir (Wis.) Chapter agreed with suit; Mackinac (Mich.) Chapter disagreed with suit; expenses of plaintiff's chief counsel were paid by national Sierra Club.

[2]President of IWLA's Michigan Division was individual plaintiff.

[3]Michigan Audubon Society was plaintiff.

[4]Michigan and Wisconsin affiliates of NWF opposed suit.

[5]Colorado affiliate of NWF opposed suit.

[6]California, Nevada and Hawaii affiliates of NWF opposed suit; NWF executive director served on Disney advisory committee.

[7]Michigan affiliate of NWF reprinted Forest Service press release in opposition to mining in BWCA; attitude regarding litigation unclear.

[8]Wisconsin Ecological Society was plaintiff.

[9]Minnesota Chapter offered IWLA professional assistance.

[10]Commissioner of Natural Resources (cross-claimant).

[11]State Geological Survey, Department of Economic Development.

[12]University of Wisconsin at Green Bay (biology faculty).

[13]University of Michigan and Michigan State University (forestry faculties).

[14]University of Minnesota (Limnological Research Center).

[15]University of Minnesota (geology faculty).

group (the Michigan Audubon Society) and two independent Wisconsin organizations (the Wisconsin Ecological Society and two independent Wisconsin organizations (the Wisconsin Ecological Society and the Wisconsin Resource Conservation Council). Lending their names in support of the plaintiffs' cause were individual leaders of state units of the Sierra Club and the Izaak Walton League, plus scientists from the faculty of the University of Wisconsin at Green Bay. The position of the plaintiffs was viewed with disapproval, however, by the Michigan unit of the Sierra Club and by members of the forestry faculties of three state universities in Michigan. It was strongly opposed by the Michigan Natural Resources Commission and by the Michigan and Wisconsin affiliates of the National Wildlife Federation.

Parker v. U.S. The ideally balanced variety of plaintiffs in this case included the national Sierra Club, the statewide Colorado Open Space Coordinating Council, the local ad hoc Eagles Nest Wilderness Committee, local government (the Town of Vail), and a nationally circulated travel-promotion magazine (Colorado magazine). They were encouraged by representatives of The Wilderness Society, the Colorado Game, Fish and Parks Division, and the federal Bureau of Outdoor Recreation. Prepared to serve as witnesses for the federal defendants, on the other hand, were representatives of the Wildlife Management Institute, the Society of American Foresters, and the American Forest Institute. And the Parker

plaintiffs' position was flatly opposed by the National Wildlife Federation's Colorado affiliate, the Colorado Wildlife Federation.

Sierra Club v. Hickel. Joining the Sierra Club as party plaintiff on the amended complaint, in addition to several individuals, was a local association of summer home owners (the Mineral King District Association). The Conservation Law Society of America assisted the Sierra Club with legal research, and the Izaak Walton League of America, The Wilderness Society, Friends of the Earth, and the Environmental Defense Fund filed an amicus brief with the Supreme Court in support of the Sierra Club's claims. The National Parks Association, the American Museum of Natural History and the New York Times editorialized on behalf of the position taken by the Sierra Club. On the other hand, the Forest Service-Disney position was supported by several ski associations and skiing magazines, by the California Resources Agency, by local government, and by the Wildlife Management Institute and the American Forestry Association. Once again, the National Wildlife Federation's state affiliates in the region (California, Nevada, Hawaii) went on record as being pro-Forest Service and anti-Sierra Club.

Walton v. St. Clair. The Izaak Walton League's fight to save the BWCA from the impact of mechanized mineral exploration was applauded by the Minnesota unit of the Sierra Club, by The Wilderness Society, by the National Audubon

Society, and by the Minnesota Chapter of The Wildlife Society. State, regional and local conservation groups including the Natural History Society of Minnesota, the Quetico-Superior Foundation, the Northern Environmental Council, Friends of the Wilderness, the Minnesota Environmental Control Citizens Association, and the Ely Outfitters Association also raised their voices in support of the League's stand. Of like minds on this issue were the editors of the Minneapolis Tribune, the director of the University of Minnesota's Limnological Research Center, and even a nominal defendant, the State Commissioner of Natural Resources. The National Wildlife Federation's Michigan affiliate reprinted in its magazine a Forest Service press release opposed to mining in the BWCA--a somewhat ambiguous stance. The only overt opposition to the League's claims, however, came from (in addition to the holders of severed mineral rights in the BWCA) the State of Minnesota's Geological Survey, its Division of Ore Estimates, and its Department of Economic Development.

These cases provide four examples of conservation controversies in which the split between those who prefer extensive management of wildland resources and landscapes to preserve natural ecosystems and appearances and those who prefer intensive management of natural resources to produce higher-than-natural outputs of forest products, fish and game is evident. They thus fall into the classic

"preservationist-versus-wise user" pattern set in the 1890s by John Muir and Gifford Pinchot who, according to Michael Frome,

> . . . pursued different branches of conservation philosophy, one of preservation and the other of use, but . . . arose from the same root of dedication to nature and the outdoors.[32]

Notice Given of Intention to Fight

In all four cases the Forest Service had several months' notice of the plaintiff's intention to fight. The matrix below documents this assertion. It provides four key dates in the development of each controversy: when the Forest Service announced its plan; when the plaintiff-to-be first registered his strong objection to the plan; when the Forest Service moved to implement the plan; and when the plaintiff commenced legal action.

Requests for Hearings Denied

The Forest Service held no public hearings on its Sylvania Recreation Area Management Plan, nor indeed were public hearings held on the proposed acquisition of the area by the federal government. The agency is authorized by the Weeks Law of 1911 (16 U.S.C. 513 et seq.) to purchase private land for National Forest purposes, so no special legislation

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[32] Whose Woods These Are: The Story of the National Forests (New York: Doubleday & Company, Inc., 1962), p. 49.

Case	Plan Announced	Protest Made	Plan Implemented	Complaint Filed
Gandt v. Hardin	Dec. '68[1]	Feb. '69[2]	Oct. '69[3]	Nov. '69
Parker v. U.S.	Apr. '62[4]	Oct. '67[5]	Mar. '69[6]	Apr. '69
Sierra Club v. Hickel	Feb. '65[7]	Jun. '65[8]	Jan. '69[9]	Jun. '69
Walton v. St. Clair	Jun. '67[10]	Aug. '69[11]	Nov. '69[12]	Dec. '69

Figure 6. Key dates in the development of each controversy.

[1]Sylvania Recreation Area management plan approved.

[2]Gandt, letter to Secretary Freeman: "I will not hesitate to resort to litigation . . . ." See also, Prentice, letter to Regional Forester James, Sept. 30, 1968.

[3]SOSAC's protest march, when Gandt saw logging for new highway right-of-way.

[4]Holy Cross Working Circle timber management plan approved.

[5]COSC's first proposal for Eagles Nest Wilderness submitted to Regional Forester Nordwall.

[6]Invitation to bid on East Meadow Creek timber published.

[7]Mineral King development prospectus issued.

[8]Siri, letter to Regional Forester Connaughton: "The Sierra Club opposes any recreational development . . . as contemplated in the . . . prospectus."

[9]Disney's resort-development plan approved.

[10]St. Clair's first meeting with Forest Supervisor Wernham.

[11]Haik's intention to "support retention of the BWCA as a wilderness" reported in Minneapolis Tribune.

[12]St. Clair's call to Forest Supervisor Rupp stating his intention to drill.

was needed to authorize the purchase of the Sylvania tract and therefore no Congressional subcommittee hearings were held, in Washington or in the field, on this specific subject. The Interior and Related Agencies Subcommittees of the Senate and House Appropriations Committees did hear both agency and public witnesses on the general subject of the proposed Land and Water Conservation Fund budget for fiscal year 1966 which included five-and-three-quarter-million dollars for the acquisition of the Sylvania tract. Forest Service Deputy Chief M. M. Nelson testified before the Senate appropriations subcommittee on February 18, 1965, and before the House subcommittee on March 3, 1965, in favor of Sylvania's acquisition by the Forest Service; Senator Philip A. Hart placed a statement in the Senate hearing record in support of this budget item; but no conservation organization mentioned Sylvania in its submission to these subcommittees--and that is the total extent of the public hearing record on Sylvania.

After the acquisition of Sylvania in 1966, the Ottawa National Forest staff, assisted by specialists from the Milwaukee Regional Office, drafted a management plan which was mailed in 1968 to fifty known conservation group leaders in the region. They were asked to submit their comments on the draft plan in person at a September 20-21, 1968, meeting arranged by the Forest Service at Houghton, Michigan. Seventeen persons attended this meeting and

expressed conflicitng reactions to the plan. The plan, slightly revised, was adopted on December 5, 1968. The March 4, 1969, request of the Wisconsin Resource Conservation Council and the November 8, 1969, request of the Midwestern chapters of the Sierra Club for public hearings throughout the region on the Sylvania plan were turned down by the Washington Office of the Forest Service with the suggestion that those who had criticisms to make of the plan should take their suggestions to the Forest Supervisor in Ironwood, Michigan.

The Forest Service held no public hearings on its plan to sell timber in April of 1969 in a portion of the White River National Forest contiguous to the Gore Range-Eagles Nest Primitive Area known as East Meadow Creek. It was required by law, however, to hold public hearings on its preliminary proposal to revise the boundaries of the primitive area and recommend to Congress that area's reclassification as the Eagles Nest Wilderness. These hearings were held in Frisco, Colorado, on October 8 and 9, 1970, and in Denver, Colorado, on October 12 and 13, 1970. East Meadow Creek remained a viable wilderness-addition candidate area qualifying for discussion at these administrative wilderness hearings in 1970 only because a court order forbade the cutting of timber there until after Congress determines the Eagles Nest Wilderness boundaries--the result of the Parker litigation.

The decision to sell timber in the East Meadow Creek drainage was made on April 16, 1962, with Washington office approval of the Holy Cross Working Circle Timber Management Plan. Fewer than two dozen copies of this plan were made, only six of them for distribution outside the Forest Service. The plan was discussed with timber operators in succeeding years, and the Meadow Creek road was begun in 1964. The District Ranger gave an illustrated talk on the East Meadow Creek logging plan to a Colorado Mountain Club group on July 2, 1966. But plans for the reclassification of the Gore Range-Eagles Nest Primitive Area, being developed by both the Forest Service and the Colorado Wilderness Workshop, were not viewed by the Denver Regional Office as reason enough to completely cancel the East Meadow Creek timber sale. Representatives of the Wilderness Workshop of the Colorado Open Space Coordinating Council, the Eagles Nest Wilderness Committee, and the Town of Vail asked the Regional Forester, in March and April of 1969, to either hold public hearings on the East Meadow Creek sale or at least delay the sale until after field hearings had been held on the agency's Eagles Nest Wilderness proposal. The Regional Forester encouraged the District Ranger and the Forest Supervisor to meet with the Vail wilderness advocates on March 31, 1969, "to try to show them why [their] plan didn't fit the plan of the Forest Service"[33] and arranged to host an

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[33]U.S. Attorney Nelson Grubbe, Parker, Reporter's Transcript, pp. 590-591.

April 3, 1969, meeting with the plaintiffs-to-be at the Denver Regional Office, four days before bids were to be opened on the East Meadow Creek sale, but refused to hold hearings on the timber sale or delay making the sale because to do so, he felt, would have been tantamount to declaring a "moratorium on multiple use management of National Forest lands each time a citizens' group requests it."[34]

The Forest Service did not hold a public hearing on its plan to develop the Mineral King area of Sequoia National Forest as a year-around recreational resort, nor did the California Legislature hold a public hearing on the bill passed in 1965 which added the Mineral King access road to the state highway system. Hearings were held on related matters by the Tulare County Chamber of Commerce (1953, to develop interest in Mineral King development generally), the National Park Service (1966, on its wilderness proposal for Sequoia National Park), and the California Division of Highways (1967, on its financing plans for the Mineral King access road). But the following requests of the Sierra Club for Forest Service hearings on its 1965 Mineral King development prospectus were denied:

> The Sierra Club requests the Forest Service to conduct a public hearing on its management plan for the Mineral King Area and access roads contemplated [Sierra Club President William E. Siri, letter to Regional Forester Charles A. Connaughton, June 7, 1965].

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[34]Regional Forester David S. Nordwall, letter to Edward Conners, Oct. 23, 1968.

> [N]o action [should] be taken on any bids which are submitted until a hearing is held [Sierra Club press release, June 10, 1965].
>
> Decision to go ahead raises disquieting questions about the Department's policies of providing for public participation in the decision making process. The Department has represented that it is its policy to hold public hearings in advance of decisions on matters of significant public interest. Surely if there were ever such a matter, this is it [Sierra Club Executive Director Michael McCloskey, telegram to Secretary of Agriculture Orville Freeman, November 3, 1965].

Instead of holding public hearings, Forest Service personnel participated in unpublicized private meetings with Members of Congress, representatives of the California Governor's Office and Walt Disney Productions, and others to drum up political support for their ski resort project. This activity climaxed in a Federal Bureau of the Budget decision in June of 1967 to promise Governor Reagan of California prompt completion of the Mineral King resort development, and other concessions, in exchange for the Governor's cooperation in the passage of Redwood National Park legislation. It also may have been at the root of Secretary of the Interior Water Hickel's April 26, 1969, action to revoke (without notice or time for comments) the regulation promulgated by his predecessor, Stewart Udall, on January 29, 1969, which required the National Park Service to hold public hearings on all new park road location and design plans.

The only public hearings that have dealt at all with the subject of mining in the Boundary Waters Canoe Area were those held in the late 1950s and early 1960s by the Interior

Committees of Congress on various versions of what was to become the Wilderness Act of 1964 (which, as adopted, permits mining in wilderness areas until December 31, 1983 [16 U.S.C. 1133(b)(3)]), and those held in 1964 by the BWCA Review Committee chaired by Dr. George A. Selke. None have been held by the Forest Service in regard to George W. St. Clair's application for permits to drill in several locations in the Gabimichigami Lake section of the BWCA. The Izaak Walton League has asked, however, that should Judge Neville reject its zoning theory to protect the wilderness area, that the judge at least order the Minnesota Commissioner of Natural Resources and the U.S. Forest Service to hold public hearings prior to the issuance of any such permits, to help determine what conditions should be imposed in connection with these permits. The Superior National Forest has conducted "listening sessions" in the process of developing its new BWCA management plan, as an experiment in public involvement in agency decision-making.

Professor Davis, in his administrative law "hornbook," has observed that when a practicing lawyer tries to handle a case in the field of an administrative agency, "he is uncomfortable and unhappy" because

> . . . [t]he same agencies serve as investigator, prosecutor, judge, jury, and executioner; he strongly prefers the judicial process, which follows the elementary principle that no man may judge his own cause.
>
> Furthermore, the administrators of many of the agencies seem to Mr. Practitioner to be biased. Many

> of them have obviously been appointed to carry out a particular program, not to see that justice is done, not to keep the scales in even balance. . . .[35]

Davis offers these guidelines in regard to participation in agency rule making:

> Informal written or oral consultation with affected parties or with advisory committees is the mainstay of rule-making procedure. The principal requirement of the APA[36] is "opportunity to participate in the rule making

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[35]Kenneth Culp Davis, Administrative Law Text (St. Paul: West Publishing Co., 1959), pp. 19-20.

[36]Administrative Procedure Act, 5 U.S.C.A. 1001, Section 4, "Rule Making": "Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts--(a) Notice.--General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretive rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (b) Procedures.--After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection. (c) Effective Dates.--The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or

through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner." The Model State Act calls for "opportunity to submit data or views orally or in writing."[37]

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In absence of statutory requirement of hearing, the case law does not require a public meeting or argument type of hearing. After all, even in an adjudication, parties ordinarily have no constitutional right to present oral argument on issues of law, policy, or discretion.

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interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule. (d) Petitions.--Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

The extent to which Forest Service actions are exempted from these APA requirements is described at pp. 373-381 and 660-709 of, U.S., Congress, Senate, Committee on the Judiciary, Responses to Questionnaire on Citizen Involvement and Responsive Agency Decisionmaking, Committee Print, Vol. 2, Submitted by the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary, Senate, 92nd Cong., 1st sess., 1971.

An example of a statutory hearing requirement is provided in the Michigan Wilderness and Natural Areas Act of 1972, Act No. 241 of the Public Acts of 1972, signed on August 3, 1972, at Section 4(3): "The commission shall dedicate a wilderness area, wild area or natural area, or alter or withdraw the dedication by promulgating a rule in accordance with the subject to Act No. 306 of the Public Act of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948 [the State Administrative Procedure Act]. The department shall hold a public hearing relative to the dedication in the county where the land to be dedicated is located before a rule making the dedication may be promulgated. . . . All persons who have notified the commission in writing during a calendar year of their interest in dedication of areas under this act shall be furnished by the commission with a notice of all areas pending dedication or alteration or withdrawal from dedication during that calendar year."

[37]Davis, Administrative Law Text, p. 102; see Chapter Five for definitions of the term, "rule."

Statutes requiring hearings are often interpreted to mean public meetings or arguments, and not trials. But the meaning of the term "hearing," when a trial is not intended, is often unclear. Probably an opportunity to submit written evidence or written argument without an oral process is not within the term. The Supreme Court once declared: "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."[38]

The speech-making or argument type of hearing or open conference has a widespread use. The notion that hearing cannot or should not be attempted when parties are numerous is false. Agencies have held hearings in as many as twenty-five cities on a single question. The ICC has had four or five hearings on the same question progressing simultaneously in a Chicago hotel. No trace appears of breakdown of any hearing on account of too many parties. . . .[39]

* * *

The essence of justice is largely procedural. Time and again, thoughtful judges have emphasized this truth. Mr. Justice Douglas: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."[40]

The Lawsuit as a Last Resort

The federal courts have become so attractive to conservationists that instead of being an unused last

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[38] Londoner v. Denver, 210 U.S. 373 (1908).

[39] Davis, Administrative Law Text, p. 105.

[40] Ibid., p. 142, quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, at 179 (1951).

> resort they have become a first stage in many conservation and environmental efforts.[41]

Can these four cases be cited to support this observation by H. Anthony Ruckel? Probably not. It is true that in none of these cases was advantage taken of the Department of Agriculture's Appeal Regulation (36 C.F.R. 211.20-211.37); the futility of appealing these cases to the Chief of the Forest Service evidently was obvious to all concerned. But it also is true that irreversible alterations of natural features were planned for the Sylvania Recreation Area, the East Meadow Creek drainage, the Sequoia National Game Refuge, and the Boundary Waters Canoe Area, in the absence of an immediate court order enjoining such activities, and that the commencement of legal action in all four cases followed many requests for administrative relief. In these cases litigation appears to have been viewed by the parties plaintiff as a last resort and as a holding action pending the passage of protective legislation by the Congress. For example, although they couldn't prove it, the Gandt plaintiffs alleged that

> . . . [u]nless this court enjoins any further cutting or felling of trees or timber . . . [t]he wilderness character of the area "Sylvania" . . . will be . . . irreparable damaged[, w]aters including ponds and lakes

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[41] Ruckel, "The Legal Dilemma of the Forest Service," The Case for a Blue Ribbon Commission on Timber Management in the National Forests (Denver: jointly published by the Sierra Club and The Wilderness Society. n.d. [1970]), p. 45.

> in the area . . . will be further polluted and adulterated . . . and irreparably damaged thereby[, and t]here will be created a grave danger to the environment. . . .[42]

The Parker plaintiffs, on the other hand, were able to convince the court that their case would rapidly become moot without the court's help:

> The Forest Service was unmoved by [the plaintiffs'] proposals, making clear to the plaintiffs that East Meadow Creek would not be included in the study and report to the President and Congress on the Gore Primitive Area and that the proposed sale and harvesting of timber would proceed as planned. The plaintiffs then instituted the present suit.[43]

> [A]s to the question whether the present efforts of the plaintiffs to obtain prior relief are appropriate, suffice it to say that if the timber is sold the question would suddenly become moot. The trees can, of course, always be cut down, but they cannot be restored if they have already been cut.[44]

Likewise, the Sierra Club v. Hickel plaintiff was able to demonstrate to the federal district court its need for pendente lite (pending the suit; while litigation continues) relief:

> In view of the possibility that Interior may issue the highway permit at any time, thereby substantially changing the existing situation and setting events in motion, plaintiff should not be left to "watchful waiting" upon the State of California. We find, therefore, that there is a sufficient showing of imminent and irreparable injury to require pendente lite relief.[45]

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[42] Gandt, Complaint, p. 8.

[43] 309 F.Supp. 593, at 596.

[44] 307 F.Supp. 685, at 688.

[45] Sierra Club v. Hickel, Memorandum of Opinion, July 23, 1969, p. 12.

And the Izaak Walton League's allegations in regard to the impending threat to the wildness of the Boundary Waters Canoe Area were enough to convince the federal district court judge that their case should not be dismissed:

> [S]ufficient allegations appear in the plaintiff's complaint which if proved would tend to support its cause of action. The court believes it cannot grant the motion of the federal defendants [to dismiss] on this ground.[46]

The Minnesota district judge also agreed with the conservation group plaintiff that to deny the request for preliminary injunction would quickly render moot the argument raised by the plaintiff:

> Were the plaintiff in this case to wait until St. Clair and Yawkey actually explored and drilled for minerals, the case would be moot at least partially as to the land already altered.[47]

The "last resort" nature of the plaintiffs' pleadings in these four cases is reflected in the language of the decisions quoted above.

Standing and Judicial Review: Cases Relied On By Plaintiffs and Defendants

The conservation organization plaintiffs in these four cases (all filed in 1969) relied on the same family of leading cases on standing to sue:

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[46] 313 F.Supp. 1312, at 1314.

[47] 313 F.Supp. 1312, at 1315.

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965), cert. denied
Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (1966)
Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (1967)
Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (1967), cert. denied
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)
Powelton Civic Home Owners Association v. HUD, 284 F.Supp. 809 (1968)
Norwalk Core v. Norwalk Development Agency, 395 F.2d 920 (1968)
Flast v. Cohen, 392 U.S. 83 (1968)

And they also relied on the same authorities to penetrate the federal defendants' cloak of sovereign immunity and win judicial review of the agency's actions:

Administrative Procedure Act, Section 10 (5 U.S.C. 701 ff.)
Freeman v. Brown, 342 F.2d 205 (1965)
Knight Newspapers, Inc. v. U.S., 395 F.2d 353 (1968)

State of Washington v. Udall, 417 F.2d 1310, was decided in 1969 in time to be of help to the Walton v. St. Clair plaintiff.

The federal defendants countered the plaintiffs' pleadings with a set of opposing authorities and arguments which were similar in all four cases. Relied on were:

Perkins v. Lukins Steel Co., 310 U.S. 113 (1939), Jenkins v. McKeithen, 395 U.S. 411 (1969), and Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939)[48]

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[48]Cf., Kenneth Culp Davis, "The Liberalized Law of Standing," The University of Chicago Law Review, Vol. 37, No. 3, Spring 1970, p. 453: "In reversing [the Eighth Circuit's holding in Data Processing], the Supreme Court quoted the Tennessee Electric remark and specifically rejected it. . . ."

for the "no standing to sue" argument, and:

> Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949),
> Dugan v. Rank, 372 U.S. 609 (1963), and
> Malone v. Bowdoin, 369 U.S. 643 (1962)

for the "no judicial review" argument. The reaction of the United States Department of Justice to these "public actions" initiated by private conservation associations was so uniform it became predictable; the following four statements were made by the Justice Department in these four different cases:

> The plaintiffs . . . have only a general interest in the management of the national forest, which interest is no different than the interest of the general public. This is not a sufficient "legally protected interest" to support an injunction against the federal defendants. . . . Congress has delegated the management of the national forests to the Secretary of Agriculture. The method of management and the details of use and development of any one particular area are left to the discretion of the Secretary. [Gandt v. Hardin][49]

> [T]he plaintiffs do not have a legal right to have all trees within the national forests remain in their natural state. . . . If the plaintiffs have standing to have the court review the judgement of the foresters to cut or not cut public timber, the next step would be a review of the employment practices, procurement procedure, the location of offices and finally what segment of society is to be favored. . . . Projects planned by the executive branch and funded by the legislative branch relating to public lands should not be frustrated by the judicial branch at the whim of any citizen who disagrees with the justification of such projects. . . . If successful, [the plaintiffs] can block a grazing permit, a mining location, a range experimentation program, a recreational site, a ski area, or any such type

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[49] Gandt v. Hardin, Memorandum of Points and Authorities in Opposition to Preliminary Injunction, pp. 4-6.

> of activity and thus emasculate multiple use and a balancing of the public interest in the use and enjoyment of the public lands. [Parker v. U.S.][50]
>
> Stripped of its allegations of bureaucratic tyranny, [the plaintiff's] lawsuit seeks to enlist the powers of the federal courts to overturn a policy decision regarding the management of federal land. Public land management involves many hard, often conflicting choices, between conservationists, recreationists and commodity groups over the use of national forest lands. . . . The [plaintiff's] views do not represent the distillate of "public interest" and nowhere has it been accorded a roving commission to invite judicial intervention to substitute its views for the agencies in whom Congress has reposed federal management authority. [Sierra Club v. Hickel][51]
>
> The plaintiff seeks to impose upon the federal defendants its theories of real property law. Although the complaint is directed primarily at [the individual defendants], the subject of the case is public land. This is to be managed and directed by Congress. By filing the case and putting the federal defendants to their defense the mandate of Congress is frustrated and delayed. The public interest in the protection of these federal lands is a matter for Congress, not the courts. [Walton v. St. Clair][52]

Even the Supreme Court's landmark 1970 decisions, Data Processing and Barlow, have not changed the Justice Department's basically negative attitude toward these

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[50] Parker v. U.S., Memorandum Brief in Support of Motion to Dismiss, pp. 3-9.

[51] Sierra Club v. Hickel, Reply Brief for Appellees, pp. 1-2. See also, Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Amend the Complaint, pp. 2-3: "[Plaintiff's] primary concern was to establish its right as a conservation club to maintain lawsuits to force [its] policies on the Federal Government."

[52] Walton v. St. Clair, Memorandum in Support of Motion to Dismiss, p. 5. See also, Supplemental Memorandum in Support of Motion to Dismiss, p. 5: "The plaintiff simply seeks to have the court take over the management of the public lands involved."

citizens' suits, as the following comment from the April 1970 issue of the Department's Land and Natural Resources Division Journal indicates:

> Neither [Data Processing nor Barlow] is any help in defining what constitutes "injury in fact" or "personal stake" when noneconomic interests are concerned. Mere disagreement with discretional managerial decisions by federal officers cannot be deemed an injury in fact or provide such a personal stake. No plaintiff should be able to enlist the court to substitute his judgment for that of the federal officers charged by Congress with administration of statutorily created programs. The standing hurdle must continue to be placed in the path of plaintiffs so that the courts may have the opportunity to more clearly define their concepts of standing to sue.[53]

The Sierra Club v. Morton Supreme Court decision of April 19, 1972, may have helped to put this issue to rest, but the U.S. attorneys involved in these cases appear to have resisted finding "common cause"[54] with the citizen group plaintiffs and probably would find Professor Stone's (and

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[53]"Standing to Sue," Land and Natural Resources Journal, Vol. 8, No. 4, Apr. 1970, pp. 81-83.

[54]See, e.g., Raymond A. Haik, personal letter to John McGrory, Jan. 22, 1970: "Our approach to the federal government attorneys was one which said that we have common cause if the ultimate objective is to secure and protect the BWCA. . . ." Cf., R. J. R. Johnson, "Walton BWCA Suit May Flop," St. Paul Pioneer-Press, Feb., 28, 1970 ("U.S. Attorney Nelson Grubbe said he can't foresee the federal government joining the league in seeking a declaratory judgement on mineral rights. 'We have different interests and different problems,' he said.") and, Miron L. Heinselman, Forest Service research scientist, St. Paul, Minn., personal interview, Ely, Minn., July 25, 1970 ("The word did get down to the [Forest Service] research station to 'clam up'; we were told not to help the Izaak Walton League. Nelson Grubbe said he didn't want [the Walton v. St. Clair] case tried in the newspapers.").

Justice Douglas') contention that legal rights should be given to natural objects in the environment[55] unpalatable.

The Interrelatedness of the Four Cases

A web of interconnections exists between the four cases under review. Not only do they have many obvious similarities including the fact that the Forest Service was a defendant, but the legal research of plaintiffs' counsel was shared and the other cases were cited to support the case at bar. For example, the Memorandum Brief in Opposition to Defendants' Motion to Dismiss filed by the Parker plaintiffs in Denver on June 12, 1969, became the basis of the Plaintiffs' Brief in Support of Motion for Injunction filed by the Gandt plaintiffs in Kalamazoo on December 2, 1969, and a part of the Brief in Support of Motion for Preliminary Injunction filed by the Walton plaintiff in Duluth on January 14, 1970.

H. Anthony Ruckel of Denver served as plaintiffs' chief counsel in both the Gandt and Parker cases. Judge Doyle's December 24, 1969, opinion, granting standing to the Parker plaintiffs, cited Judge Sweigert's July 23, 1969,

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[55] See, Christopher D. Stone, "Should Trees Have Standing?", Southern California Law Review, Vol. 45, No. 2, 1972, and Justice Douglas' dissent in Sierra Club v. Morton, 92 S.Ct. 1361, at 1369-70.

opinion granting standing to the Sierra Club v. Hickel plaintiff.[56] Somewhat ironically, Judge Doyle's opinion was cited in turn by Judge Trask in his September 16, 1970, Ninth Circuit opinion denying the Sierra Club v. Hickel plaintiff standing.[57]

The Walton plaintiff was able to cite both the Parker decisions and the district court's ruling in Sierra Club v. Hickel to support its "standing" argument in its January 14 and March 11, 1970, pleadings, and Judge Neville cited Parker in his June 2, 1970, opinion granting the Walton plaintiff standing. The Walton plaintiff cited Parker as an example of a federal court upholding "wilderness zoning." And both the Izaak Walton League and the individual defendants cited Gandt in their arguments over whether or not the plaintiff was guilty of laches in filing suit in an untimely manner and whether or not the defendants were guilty of laches in not having exercised their mineral rights prior to this point in time.

The manner in which the four cases "leapfrogged" one another during the period April 1969-September 1972 is shown graphically on the following pages.

In summary, Gandt, Parker, Sierra Club v. Hickel and Walton v. St. Clair represent one discrete stage in the

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[56] 307 F.Supp. 685, at 687.

[57] 433 F.2d 24, at 33.

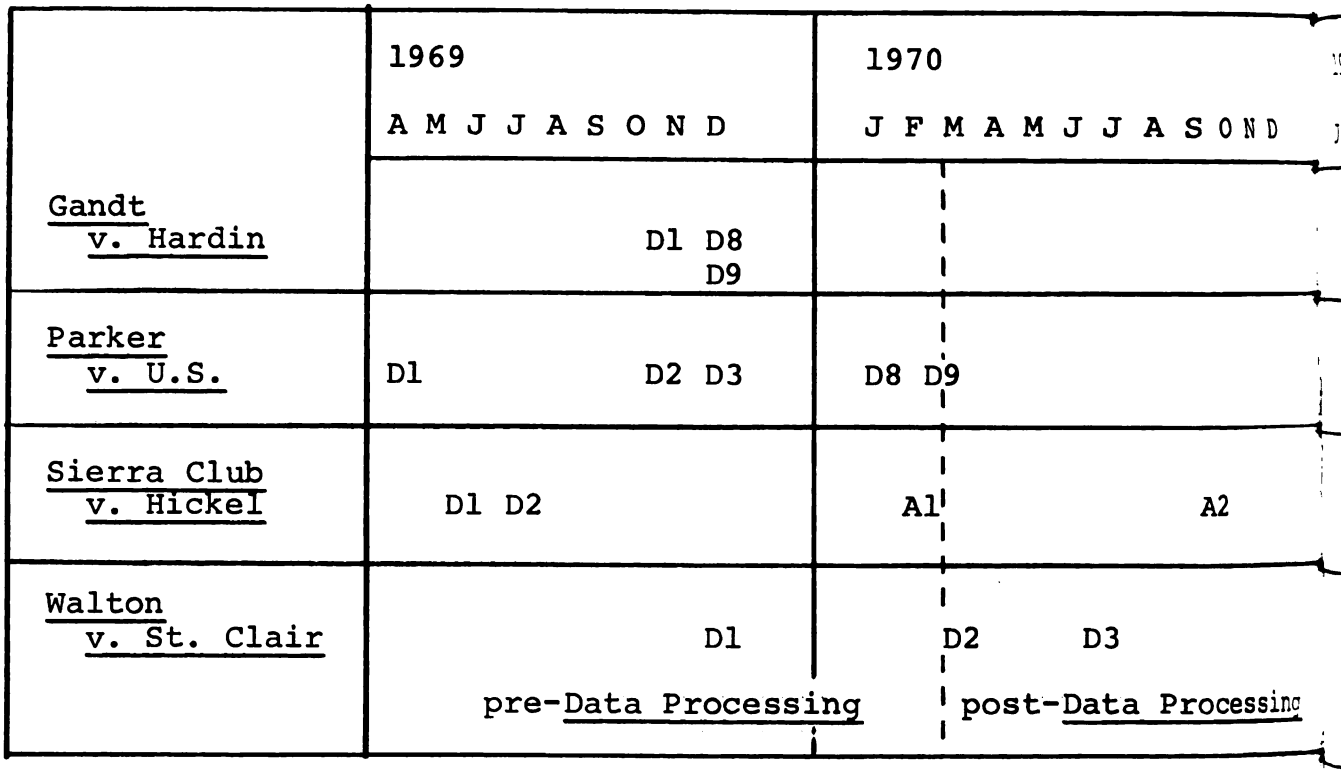

Figure 7. Comparative chronology of the four cases.

CODE: D1 = complaint filed in federal district court
D2 = oral argument on threshold issues
D3 = decision of threshold issues
D4 = pretrial motions argued
D5 = order on pretrial motions
D6 = hearing on motion to amend pleadings
D7 = order on motion to amend pleadings
D8 = hearing on the merits and final disposition
D9 = decision on the merits and final disposition

D10 = amended complaint filed
D11 = oral argument on threshold issues
D12 = decision on threshold issues

A1 = oral argument before court of appeals
A2 = court of appeals decision

S1 = Supreme Court grants or denies certiorari
S2 = oral argument before Supreme Court
S3 = Supreme Court decision

1971 J F M A M J J A S O N D	1972 J F M A M J J A S
A2	S1
S1 S2	S3 D10 D11 D12
D4 D5 D6	D7 D8

evolution of public actions to preserve the quality of the environment. They were litigated after Scenic Hudson (which made them possible), during the time the Supreme Court's Data Processing decision was handed down (which strengthened the liberal Scenic Hudson standing rule), but before the first "Earth Day" (April 22, 1970) and succeeding "Earth Weeks" which stimulated the Nation's environmental awareness. They were initiated before the passage of the National Environmental Policy Act (NEPA) which provides for public comment on draft environmental statements and for the consideration of alternatives. They led to the Supreme Court's April 1972 Sierra Club v. Morton decision, which provides the clearest set of guidelines yet offered by the high court to environmental organization plaintiffs with respect to how to hurdle the "standing to sue" barrier and get on with trials on the merits of complaints alleging illegal environmental degredation by employees of federal agencies.

CHAPTER EIGHT

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

Through the use of interviews and the study of documentary transaction evidence, the histories of four Forest Service-conservation group conflicts which became the subjects of federal court hearings have been reconstructed. One chapter of this report was devoted to each of the four conflicts, which arose over Forest Service management decisions in regard to the Sylvania Recreation Area in Michigan, the East Meadow Creek drainage in Colorado, Mineral King Valley in California, and the Boundary Waters Canoe Area in Minnesota. Following the case history chapters, a chapter comparing the four cases was provided. This chapter described the differences and similarities between the four cases studied and demonstrated that--although the legal bases for the suits did differ somewhat after the threshold issues common to all such litigation had been considered--the conflicts had many characteristics in common.

In the Sylvania case the plaintiff sought to have the area management plan declared arbitrary, capricious and the product of an abuse of administrative discretion under

the Multiple Use-Sustained Yield Act mandate that "due consideration be given to the relative values of the various resources in particular areas." Unfortunately for them, they were unable to show that the agency had not given due consideration to all resources, and the burden of proof was on the plaintiff. It was noted that similar and contemporary suits against the Forest Service in Alaska and North Carolina also had failed for the same reason. Abuse of discretion under the Multiple Use Act is difficult to prove.

In the East Meadow Creek and Mineral King cases, the courts sought to interpret statutes with somewhat more precise requirements. As the courts advised the Forest Service in the Colorado case, that agency has a duty under the Wilderness Act to identify all areas on the periphery of all Primitive Areas which qualify as wilderness under the Act's definition and withhold these areas from development pending Congressional establishment of new Wilderness boundaries. The plaintiffs, in this case, were able to prove to the court's satisfaction that East Meadow Creek measured up to the definition in the Wilderness Act and that therefore the Forest Service was about to breach its duty by letting road-construction and timber-sale contracts in this wilderness candidate area. In California, the district court and the court of appeals disagreed over how the Term Permit Act of March 4, 1915, as amended July 28, 1956 (16 U.S.C. 497), should be interpreted. The district court

agreed with the plaintiff that the agency's practice of combining term and terminable special use permits to grant ski resort permittees the use of more than eighty acres of National Forest land for their private resorts constituted illegal circumvention of the statute and that this practice was not justified by the legislative history. The Ninth Circuit's reaction was, in effect, Congress has not objected to this long-standing practice and therefore it is legal, adopting the defendants' "Doctrine of Executive Construction" argument as controlling.

The Minnesota case involves a plaintiff's attempt to win a judicial interpretation of the Wilderness Act as an exercise of the federal proprietary and police powers which constitutes a "zoning" of the Boundary Waters Canoe Area for uses compatible with wilderness preservation only. Plaintiff's argument is that the severed mineral rights in the BWCA--which have never been taxed, have never been exercised until this point in time, and which may have been fraudulantly acquired in the first place--can be "zoned" out of existence without compensation. Both the Forest Service and the holders of the mineral rights had assumed that these rights could be re-acquired by the Federal Government only through condemnation under the eminent domain power and after the payment of just compensation. But determination of just compensation requires core-drilling, which in itself would adversely affect the wilderness area. Can

Congress "zone" such private property rights into oblivion in order to preserve wilderness values in the public interest? The court had not yet ruled on this theory as this dissertation was written.

Of more significance, as far as the end product of this research is concerned, are the many similarities that were found among the four cases studied. The organizational plaintiffs have much in common. So do the individual plaintiffs. The individuals are sportsmen and backpackers who use and enjoy wilderness areas and who have had no formal training in natural resources management. The organizations filed suit primarily to protect natural landscapes and ecosystems, and secondarily to enhance their own images as effective forces for conservation. All of the plaintiffs had asked the Forest Service repeatedly to change its plans or postpone their implementation pending public hearings and further study. All of these requests were denied. Hearings were not required by law. The National Environmental Policy Act, with its consideration-of-alternatives and draft environmental impact statement-distribution requirements, had not been signed by the President when these lawsuits were initiated. In all four cases, litigation was resorted to as a last resort means of stopping major actions with long-lasting impact on the environment: road-construction, logging, ski resort-development, and mechanized mineral exploration. Congressional action to add

the areas to the National Wilderness Preservation System or the National Park System and to eliminate all mining in wilderness area was seen as the ultimate objective, with the courts' injunctive relief serving as a source of additional time to achieve legislative goals.

Over the objections of government attorneys, the courts granted the citizens' groups standing to sue because the groups alleged injury to their aesthetic, conservational and recreational interests and because these interests paralleled the purposes for which Congress had passed recent environmental-quality-protective legislation. And the courts overruled the government's "sovereign immunity" defense and denied its motions to dismiss because the plaintiffs alleged that the forest officers had abused their administrative discretion and exceeded their statutory authority in ways described above.

With the possible exception of Walton, (which if successful might be viewed as legitimizing the confiscation of property rights without compensation for "aesthetic, conservational and recreational" purposes and thus constitute a break with the past, although zoning for health, safety and welfare purposes has often been upheld by the courts), these suits conform to traditional legal approaches. For example, attorneys otherwise engaged in the more routine aspects of the practice of law were employed to draw up the conservation group plaintiffs' complaints and represent them

in court. As in any other lawsuit, it was necessary in each of these four cases for the plaintiff to establish that the court had jurisdiction over the defendants, that the court's location was the proper place for the trial (venue), that the plaintiff had standing to maintain the action, and that the defendant's actions were reviewable by the court. In all cases a breach of duty was alleged. The plaintiffs do represent a new class to whom the courthouse doors only recently have been opened, but once beyond these doors the burden on them to prove their case is the traditional one--they must go forward with their evidence, and they must establish a prima facie case by a preponderance of the evidence presented.

Conclusions

In future suits, the statutes alleged to have been violated may well differ from those upon which the four cases reviewed herein were based. For example, the Multiple Use Act requires only that the Forest Service "consider" the relative values of the various resources; what the administrator decides to do after he has "considered" these values is pretty much up to him. Alleged violation of the Multiple Use Act's provisions has been shown to be a slender reed on which to base a lawsuit and probably will be used in future only as a "secondary, supporting matter" (as it was referred to by counsel for the plaintiffs in the Parker case).

Similarly, it is unlikely that there will be many more suits based on the review requirements of the Wilderness Act. Congress will be making final disposition of all areas required to be reviewed under the Act in a very few years, including all of the National Forest Primitive Areas. The final outcome of the Mineral King litigation will determine whether or not the Forest Service will have to ask for an amendment of its Term Permit Act to clarify its authority to do what it has been doing for years (combining term and terminable permits to tie up more than eighty acres for a single permittee).

Future suits of this kind probably will be based, at least in part, on alleged violations of the specific substantive and procedural requirements of the National Environmental Policy Act. The objective will be much the same: a "stay of execution" of natural values while legislation is sought to permanently resolve the controversy. But "NEPA" shifts the burden of proof from the plaintiff (who, under the Multiple Use Act, must prove abuse of discretion) to the federal defendant who, under NEPA, must show that he has considered alternatives and studied the environmental impact of these alternatives by means of techniques including benefit/cost analysis in which

intangibles including aesthetics are considered).[1] And plaintiffs will scrutinize the required environmental impact statements prepared in connection with projects to which they object to see if the agency's own regulations, adopted to implement the National Environmental Policy Act, have been followed to the letter. If the adopted procedures have not been followed, the officials involved will be charged with acting ultra vires--in excess of their authority.

Why did the plaintiffs in the four cases studied go to court, when a court trial is seen as "unique and terrifying . . . the ultimate sanction"?[2] What were the causal conditions? Exhaustion and frustration were present; Dr. Jerry Gandt expressed it in these terms:

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[1] "The courts are becoming involved to a greater degree each day in the interpretation of NEPA and it seems safe to assume that judicial actions will play a major role in shaping the future application of NEPA. Several major decisions have been handed down by the courts in recent months. Probably the most noted case to date is the Calvert Cliffs nuclear power plant proposal of the Atomic Energy Commission. This decision has established that submitting statements only if a project becomes controversial does not carry out the intent of the law. The EIS's [environmental impact statements] are to be prepared where there is significant impact even if there is no controversy." Hurlon C. Ray, U.S. Environmental Protection Agency, "Reviewing Environmental Impact Statements at the Regional Level," reprinted at, Congressional Record, May 17, 1972, p. S. 7996. Regarding the impact of NEPA on environmental litigation, see also: John W. Giorgio, "Parklands and Federally Funded Highway Projects: The Impact of Conservation Society v. Texas," Environmental Affairs, Vol. 1, No. 4, March 1972, pp. 882-901.

[2] Fred Reiter, SOSAC attorney, personal interview, Green Bay, Wis., July 28, 1970.

> I have never been involved in any action of this kind before, but after repeatedly being ignored by the Department of Agriculture, I feel we must act.[3]

Dr. Gandt felt "dwarfed" by a "huge monolith" (the Forest Service) which had to be hit "ten times as hard [through court action] to pierce the armor of officialdom."[4]

Structures other than litigation for the resolution of these conflicts either were not present or were not used. Person-to-person verbal communication failed. Dr. Gandt and Forest Supervisor Kizer misunderstood what the other meant by "the road to Whitefish Lake." The special committee set up by the Colorado Open Space Coordinating Council to communicate with the Denver Regional Office was not used by the agency as a responsible sounding board and a source of useful input. Sierra Club Executive Director Michael McCloskey's expressions of concern regarding the environmental impact of the Disney resort plan for Mineral King were met with disinterest in the San Francisco Regional Office. The Justice Department rejected the Izaak Walton League's notion that the conservationists and the Federal Government had a "common cause" to protect the Boundary Waters Canoe Area.

(In the opinion of the investigator, the many speeches made by forest officers to tell service and

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[3]Press Release, Save Our Sylvania Action Committee, Aug. 17, 1969.

[4]Fred Reiter, personal interview, Green Bay, Wis., July 28, 1970.

conservation clubs what the agency planned to do--e.g., Supervisor Kageorge's speeches regarding Sylvania, Ranger Price's presentation to the Colorado Mountain Club, and Mineral King Specialist Wyckoff's remarks before local Audubon and Sierra Club units--do not constitute public involvement. They could be described as public relations activities of a positive and helpful nature, perhaps, but not as public involvement in agency decision-making as a means of resolving conflicts.)

An ad hoc committee on Sylvania was called together once by the Forest Service, to react to the presentation of a single management plan without a choice of alternative solutions to choose from, and then it was dissolved. Bids on the East Meadow Creek timber sale were only hours away from being opened when the Denver Regional Office agreed to meet to "negotiate" with the conservationists. Private understandings between forest officers, politicians, and Walt Disney Productions supplemented a minimum of public explanation by the Forest Service of its Mineral King development scheme, and wilderness-conservationist input was not invited. The relatively fast-breaking BWCA mining crisis was viewed by the Justice Department as an internal problem the government would have to handle by itself, and the IWLA's involvement was not welcomed.

The plaintiffs were aware of the existence of the opportunity to file an administrative appeal with the Chief

of the Forest Service, but did not need a crystal ball to predict what the Chief's rulings would be in these particular four cases. The Chief would be judging his own cause, his office had taken a public position in opposition to the position of the plaintiffs in all four cases, and his mind was made up from the outset in favor of his Regional Foresters' decisions. What the plaintiffs needed, by the time they filed suit, was an order to stop the bulldozers and the chain saws. Only a court of law was likely to give them this.

Prior to recent cases such as those described here, private citizens' groups had been unable to obtain orders to enjoin such government actions, but judges are not immune from changing societal values, as the late Supreme Court Justice, Benjamin N. Cardozo, has stated:

> [W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.[5]

Thus courts of equity, which serve as the "King's conscience," have begun to issue judicial decrees (in the form of preventative or remedial measures such as injunctions or restraining orders) to stop projects with an adverse environmental impact in response to the Nation's visibly heightened

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[5]Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921, reprinted 1967), p. 65.

interest in the preservation of an attractive environment.[6] The courts will rarely tell the Secretary or the Chief of the Forest Service what to decide, as James P. Rogers has pointed out:

> . . . [The courts] will instead review the factors and considerations upon which [the forest officer] acted. If he used the wrong ones or false ones, refused to use those he should have used, or discriminated between members [of] the interested class, they will remand the case to him for a new decision in which he has used all of the proper criteria the Congress has specified in the statute and the Constitution requires. Thus, it seems, would the judiciary protect statutorily created general interests and enforce "due process" concepts, and yet avoid invasion of the executive department's functions.[7]

At the heart of these cases was the plaintiff's urgent demand to be heard, to have his point of view seriously considered and weighed in the agency's decision-making process. The conservation groups' demand apparently reflects their interpretation of the rights guaranteed all citizens in the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws. [This] enumeration . . . of certain rights shall not be construed to deny of disparage others retained by the people.

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[6] See, Henry J. Abraham, The Judicial Process (New York: Oxford University Press, 1962), pp. 15-18.

[7] James P. Rogers, "The Need for Meaningful Control in the Management of Federally Owned Timberlands," Land and Water Law Review, Vol. IV, No. 1, 1969, pp. 121-143.

But they were based on a more modern belief:

> Certain [environmental] rights should be invulnerable, inalienable. Just as nature's law of limits fixes the tolerances needed for life, our laws also should set environmental limits beyond which society cannot intrude, no matter what the excuse. [New rights should be] established now: the right to be free from uninvited assault by noxious and annoying substances; the right to be undisturbed by uninvited sounds; the right to be unregimented and uncrowded; the right to have nature's presence accessible and to have its most vivid and vital expressions undefiled; the right to have representative biological communities survive and to have the best soils conserved; the right to live as part of a healthy ecosystem.[8]

Has increased public involvement in agency decision-making--in these cases, through obtaining judicial review of the agency's actions--resulted in better decisions? In the author's opinion, the answer is yes. These better decisions have been expensive, both to the American taxpayer[9]

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[8]Michael McCloskey, "A Bill of Environmental Rights," No Deposit-No Return (Reading, Mass.: Addison-Wesley Publishing Company, 1970), pp. 270-271. On November 4, 1969, the people of New York State approved an amendment to that state's constitution which, in essence, guarantees the right to enjoy a healthy and safe environment. The Michigan constitution has contained a similar provision since 1963.

[9]See, e.g., U.S., Congress, House of Representatives, Committee on Appropriations, Department of Agriculture Appropriations for 1971, Hearings before a subcommittee of the Committee on Appropriations, House, 91st Cong., 2nd sess., 1970, testimony of Edward M. Shulman, General Counsel, Office of the General Counsel, USDA, at p. 809: "In recent years, Forest Service programs have been expanding steadily bringing about a greater demand from the Forest Service for legal services. The major impact is felt in activities relating to the administration, use, and protection of the national forests. The demand for legal assistance intensified during the last year as a result of the marked increase in the number of lawsuits brought by conservation interested organizations contesting Forest Service's land management decisions involving timber sales, recreation developments, and

and to the citizens' group plaintiffs suing as private attorneys general on behalf of a broad class of people.[10] Forest Service projects were delayed in three instances, but the costs associated with delayed implementation of decisions

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wilderness preservation. Further increase in litigation can be expected if current trends continue." (USDA's Office of General Counsel employs 450 persons and its annual budget is approximately $5-3/4 million.)

[10]According to Professor Joseph L. Sax, Professor of Law, University of Michigan, public lecture, East Lansing, Mich., May 4, 1972, plaintiff's costs associated with legal action under the State of Michigan's Environmental Protection Act (Act 127 of the Public Acts of 1970) have varied from $2,000 (settlement out of court with no hearings) through $5,000 (hearings but no trial) to $10,000 (full trial) based on lower-than-Wall Street law firm legal fees and no expert witnesses. "Costs would double if expert witnesses were used." Professor Sax contends that "adequate representation before either the Executive Branch, the Legislative Branch or the Judicial Branch is very expensive, but you get more for your dollar in the judicial setting." According to Michael McCloskey, Executive Director, Sierra Club, personal interview, San Francisco, Calif., Aug. 14, 1970, "litigation is attractive because of the absence of Internal Revenue Service constraints [on non-profit groups such as the Sierra Club, in comparison with the IRS constraints on the legislative 'lobbying' activities of such groups]." McCloskey noted that very little Sierra Club dues income had been used to support the Club's litigation and that the Sierra Club Foundation had been used to finance this aspect of the organization's activities.

For a discussion of another financial aspect of environmental litigation, see: "Project Owners Make Opponents Pay," Engineering News Record, April 13, 1972, p. 11 ("Project owners . . . are now asking the courts to make the opponents of a project post a security bond to cover damages caused the owners in the event the environmentalists win a preliminary injunction but ultimately lose the case. . . .") and, "Sierra Club Responds to $20 Million Suit Filed Against It," News From the Sierra Club, June 28, 1972 ("Sierra Club President Raymond J. Sherwin today called a $20 million countersuit filed against the Club by the Western Timber Association a 'ploy to muddy the issues' and 'a frivolous suit.'. . .").

may have been more than offset by resource-conservation benefits associated with the re-thinking of those decisions on the basis of additional input from both inside and outside the agency. As John Krutilla has suggested in a somewhat different context,

> . . . the real cost of refraining from converting our remaining rare natural environments may not be very great.[11]

For example, the Sylvania Recreation Area, partially because of publicity given the Gandt plaintiffs' allegations and to dicta from Judge Kent urging control of motorboats and snowmobiles in the area, has benefitted from being the focal point of litigation. Since that time the headquarters staff of the Ottawa National Forest has become a more multidisciplinary planning team, including water quality, wildlife management, soil science, landscape design, and natural history interpretation specialists, and a permanent citizens' advisory committee is to be appointed.[12] These steps are likely to mean that the Sylvania Management Plan will be implemented with special sensitivity and that "due consideration of the relative values of various resources" will be more than a multiple-use slogan there.

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[11]John V. Krutilla, Conservation Reconsidered (Washington: Resources for the Future Reprint No. 67, 1967), p. 784.

[12]According to Michael Barton, Assistant Forest Supervisor, Ottawa National Forest, personal interview, Ironwood, Mich., Aug. 9, 1971.

The Parker litigation has had both short-term and long-range effects. East Meadow Creek remains a viable candidate area for possible addition to the Gore Range-Eagles Nest Primitive Area when Congress sets final boundaries for the Eagles Nest Wilderness. This is in conformity with the Wilderness Act's review provisions which stipulate that the establishment of Wilderness boundaries is a Congressional responsibility without delegation. This case also served to underscore the importance of citizen group input in the wilderness review process, elevating the status of wilderness boundary recommendations from such groups to a level of importance that cannot be ignored by the agency. Prior to Parker, the Regional Foresters used their own judgment to rule areas contiguous to Primitive Areas either as suitable for preservation or as better suited for some more intensive form of management. Now, if a group which specializes in wilderness conservation and use recommends an area for inclusion in a new Wilderness centered on an existing Primitive Area, and that area meets the minimum requirements of the Wilderness Act's definition, it appears to be the duty of the Forest Service to keep that area free of development until Congress itself establishes the Wilderness boundary.

Furthermore, the Parker case may have stimulated Forest Service Chief Edward P. Cliff, on February 25, 1971, to ask his Regional Foresters to "identify [all] those areas which still should be studied for potential wilderness

classification [and] protect [them] to preserve their wilderness potential during the study period and until a final determination [by the Forest Service] is made." The product of this "Roadless Area" inventory is to be a national list of "Proposed New Wilderness Study Areas" chosen from the far longer national list of "roadless areas" by a Forest Service team in Washington, D.C., on the basis of such criteria as size, proximity to population centers, and number of other wilderness areas in the immediate vicinity.

The Sierra Club interpreted the Chief's action as "creating . . . a whole new Primitive Area system" and asked the Chief for a "30 month extension of time in which to make final recommendations on the designation of New Study Areas."[13] The Club wanted two summers to get scouting parties into all of the roadless areas and develop its own recommendations. The Chief said no. The Club filed suit (Sierra Club v. Butz) to halt timber sales in all "roadless areas" until more studies and hearings had been conducted, and won a temporary restraining order.[14] The timber industry filed a countersuit against the Sierra Club. The suits were awaiting trial as this dissertation was written.

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[13] Sierra Club Bulletin, March 1972, p. 6.

[14] "Injunction Delays Roadless Areas Development," Friday Newsletter (a Forest Service personnel newsletter published in Washington, D.C.), No. 33, Aug. 18, 1972, p. 1.

But the effort of the Chief to conduct a thorough search for previously overlooked and unprotected wilderness in the National Forests ran afoul of wilderness conservationists because of a telescoped review time schedule and "due process" (notice and hearing) shortcomings, and ended up being characterized as:

> . . . a crash effort . . . to hasten the demise of de facto wilderness before the public even has a chance to be heard.[15]

The controversy over de facto wilderness, which had broken out originally in a few widespread locations (Michigan, Colorado, Oregon, Alaska, North Carolina), had evolved into litigation with significant nationwide consequences.

The three-year postponement of the Mineral King resort project apparently will result in the preparation of an environmental impact statement and the serious consideration of alternatives. At the very least it will produce a plan of development more protective of natural values and the use of a cog-assisted railway built on the existing road right-of-way to control crowding and pollution, in place of a new highway through a national park.

And during the "pause in time" created by the Walton litigation, those who seek to preserve the Boundary Waters

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[15] "Wilderness vs. Logging Controversy Sees New Developments," News From the Sierra Club, July 20, 1972, p. 3. See also, Phil Cogswell, "Timber Officials Upset Over Sierra Club Suit," The Sunday Oregonian, Aug. 13, 1972, p. 26; and, Leverett Richards, "Court Suspends Oregon Logging," The Oregonian, Portland, Ore., Aug. 18, 1972.

Canoe Area may find additional support for their zoning theory, such as that expressed in regard to conflicts of this general nature by Professor Joseph L. Sax in a recent Yale Law Journal article on "Takings, Private Property and Public Rights." It seems to this investigator that the application to the BWCA controversy of the following "rule of thumb" suggested by Professor Sax would serve well the interests of the Izaak Walton League:

> As a rule of thumb, it may be said that the proper decision as to competing property uses which involve spillover effects is that which a rational single owner would make if he were responsible for the entire network of resources affected, and if the distribution of gains and losses among the parcels of his total holding were a matter of indifference to him.[16]

In this article Professor Sax also deals with examples of conflicts between uses which owners of adjacent tracts of land desire to make upon their tracts and how such conflicts would be amenable to resolution in favor of either owner without the loser being entitled to compensation, even though the loser's land may be rendered worthless. (One example cited: airport and nearby residence.)

Beyond this aspect of the case, growing recognition of the worldwide abundance of higher grades of nickel ore may render the Duluth gabbro a less attractive mining chance than once was anticipated.

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[16]Joseph L. Sax, "Takings, Private Property and Public Rights," The Yale Law Journal, Vol. 81, No. 2, Dec. 1971, p. 172.

And beyond this immediate kind of impact of the law on society, there are three ultimate effects of this kind of litigation, in the author's opinion:

(1) better planning;[17]

(2) better regulations;[18] and

(3) placement of the burden of drafting solutions to national environmental problems, with clearly enunciated

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[17]E.g., M. R. James, Forest Supervisor, Sequoia National Forest, personal interview, Porterville, Calif., Aug. 17, 1970: "Public pressure is forcing us to do a better job of data-collecting." See also: Edward P. Cliff, Chief, Forest Service, in, U.S., Congress, House, Department of the Interior and Related Agencies Appropriations for 1972, Hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 92nd Cong., 1st sess., 1971, Part 4, pp. 4-5: "As you know, we are involved in a number of lawsuits and formal appeals that reflect public awareness of our activities. Our work is being closely watched by groups organized to scrutinize and to complain about what they don't like. We are changing some of our methods to stress 'quality' work performance. We strongly believe the times demand these changes. We believe we may have stressed quantity at the expense of quality."

[18]E.g., Edward M. Shulman, General Counsel, Office of the General Counsel, U.S. Department of Agriculture, in, U.S., Congress, House of Representatives, Committee on Appropriations, Department of Agriculture Appropriations for 1971, Hearings before a subcommittee of the Committee on Appropriations, House, 91st Cong., 2nd sess., 1970, p. 816: "Mr. Shulman. Groups interested in conservation . . . are bringing lawsuits to contest Forest Service management decisions that they believe threaten the quality of the environment. Mr. Langen. Does this have a tendency to take a little more time and be a little more secure in issuing regulations that are legally foolproof? Mr. Shulman. Yes, sir. When we know that we are facing possible litigation we try to be extra cautious in preparing regulations."

standards and duties, on the United States Congress, where it belongs.[19]

Recommendations

The foregoing case studies constitute something less than a firm basis for a definitive prescription as to what procedures to adopt to minimize such litigation in the future. The behavior of human beings can be predicted, but not with great accuracy. It has been noted that the plaintiffs in the four cases studied were not accorded formal hearings, that there were omissions in the multiple use plans, and that vague statutes had created problems of interpretation. One might conclude that, if public hearings were required, multidisciplinary planning was required, and amendments were adopted to clarify the intent of the statutes, the litigation problem would be solved.

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[19]E.g., "Forest Service Response to Recommendations of Forestry Deans," Forest Service, June 1972, p. 5: "The Congress, the courts and the Executive are all striving to develop concepts and laws which will meet today's needs and resolve conflicts and uncertainties that exist." See also, Charles M. Haar, in Cities and Space, Lowdon Wingo, Jr., ed. (Baltimore: Johns Hopkins Press, 1963), p. 226: "Without a general objective against which particular action can be judged, administration may not be even-handed and may have a patchwork pattern of policy implementation. It is also difficult to check arbitrary execution of the law, by either judicial or administrative review. Here the formulation of the objective is a matter of clear legislative statement. The judiciary, too, can play a role in prodding the legislature by refusing to enforce laws which lack adequate standards."

Passage of the National Environmental Policy Act resulted in some procedural improvements, but "peace has not broken out." Suits continue to be filed. Some of the pressure of the kind which led to a protest march through one National Forest and to picketing in front of another National Forest headquarters office[20] probably has been relieved as a result of the impact statement requirements of the National Environmental Policy Act. But an agency can go through the motions of making concessions to its user groups and still not offer them a meaningful role in the making of its decisions. Perhaps this is why citizens' groups are continuing to go to court--in a search for "power parity."

Additional steps to perfect the public involvement process are required. A perfect formula for weighting public input is not at hand. But as suggested in more detail below, the good will of user groups will be more readily obtained if they are invited to participate early in the planning process for particular areas, if they are offered a choice of alternative solutions to "vote" for, and if they are given as much lead time to develop their own counter-proposals as the agency uses to do its own studies and preliminary planning. The Forest Service has adopted new procedures in recent years to provide for

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[20]The Ottawa and Willamette National Forests were so besieged; see p. 62 and footnote 101, p. 129, supra.

additional public involvement, and is further "down the road" toward a mutually satisfactory relationship with its conservation and recreation clientele groups than it was in 1969.

Changes Made Since 1969 In Federal Agency Public Involvement Procedures

All four cases discussed in this dissertation were initiated in 1969. On January 1, 1970, President Richard M. Nixon signed the National Environmental Policy Act of 1969 (NEPA; Public Law 91-190; 83 Stat. 852) and on March 7, 1970, he issued Executive Order 11514 outlining the responsibilities of Federal agencies and the Council on Environmental Quality (CEQ) under this Act. CEQ published interim guidelines for the preparation of environmental impact statements (EIS) in the May 12, 1970 Federal Register (35 F.R. 7390-93) and permanent EIS-preparation guidelines in the April 23, 1971, Register (36 F.R. 7724-29). These were supplemented by an Office of Management and Budget Bulletin (No. 72-6, dated December 14, 1971) establishing official EIS-preparation procedures. Most of the major units of the Federal Executive Branch have published in the Federal Register their own unique interpretations of these guidelines and procedures. One compilation of these Federal agency NEPA-implementation procedures appeared as Part II of the December 11, 1971, Federal Register (36 F.R. 23666-712). Several agencies have published updated NEPA

procedures in the Register since that time. Listings of environmental impact statements filed with CEQ are provided both in the Council's monthly periodical, 102 Monitor, and in the Federal Register.

The Congressional units responsible for the drafting and passage of NEPA--the Senate Committee on Interior and Insular Affairs, Senator Henry M. Jackson, Chairman, and the House Subcommittee on Fisheries and Wildlife, Representative John D. Dingell, Chairman--have exercised their "oversight" prerogative through hearings to determine how well the law is being enforced, and what the results have been. These hearings offer important insights into the opportunities created by, and the problems associated with, NEPA's implementation.[21]

NEPA confronts Federal agencies with an action-forcing device which requires complete public disclosure. The action-forcing ingredient is NEPA Section 102(2)(C), which requires that an environmental impact statement accompany every major action and legislative proposal involving federal funds having a significant effect upon the environment. The impact statement must be made available to other

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[21]See, two hearings published by the Senate Committee on Interior and Insular Affairs--Calvert Cliffs Court Decision (1971) and National Environmental Policy Act (1972)--and four volumes published by the House Committee on Merchant Marine and Fisheries--Administration of the National Environmental Policy Act, Parts 1 and 2 (1970); Administration of the National Environmental Policy Act--1972; and Environmental Citizen Action (1972).

government agencies and to the public for comment. All comments received within the allotted time frame must be dealt with in the final statement on the project.

In litigation, as was noted earlier in this chapter, NEPA's effect has been to shift the burden of proof to the agencies, who must be able to show that they have complied with the Act's substative and procedural requirements before proceeding with any major project. NEPA therefore offers encouragement to the conservation group which detects shortcomings in an agency's compliance with the Act's requirements in connection with a project the group opposes. No longer is the "discovery" burden as onerous as it once was when such a group sued, for example, under the imprecise terms of the Multiple Use Act (see Chapter III, supra.). Many find this transfer of the burden of proof (to the "polluter"), together with the liberalized law of standing, a refreshing turn of events, even though it may result in more litigation:

> This new judicial course in making available the courts to objectors of arbitrary, capricious, or unauthorized action by executive or administrative decisions is basically directed to the protection of the individual or group against the action of a government grown so big as frequently to be insensible to the rights and requirements of its citizens.[22]

While the courts are not apt to provide reforms (because judges epitomize society's "Establishment") or permanent

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[22]James P. Rogers, "The Need for Meaningful Control in the Management of Federally Owned Timberlands," Land and Water Law Review, Vol. IV, No. 1, 1969, p. 138.

solutions, litigation does function to ventilate decisions made out of public view (in "smoke-filled rooms"), publicize minority viewpoints for scientific change, and spotlight areas where new legislation is needed. It can be a healthy exercise in counter-control and, because it serves as a catalyst to get an issue settled, it may actually strengthen the hand of the erstwhile defendant, the regulatory agency (see Chapter VI, supra.). Therefore, litigation is not all bad, and NEPA's reasonable requirements now provide a minimal yardstick for measuring agency performance that can serve as a cause of action.

But it has been suggested that better decisions will result in fewer lawsuits. Has NEPA encouraged better decisions? From the standpoint of its effectiveness in protecting the environment, NEPA's implementation has had its weaknesses. The following criticisms of its "102 process" were made in March, 1972, by the Environmental Information Center of the Florida Conservation Foundation:

1. Few agencies initiate environmental considerations at the planning stage of a project. At the time the 102 statement is written, the agency is already sufficiently committed that a free and impartial decision is practically impossible.

2. No mechanism or procedure exists to insure that environmental statements or comments are given consideration when a decision is made by the final authority.

3. The decision-making process is not subject to public scrutiny and persons responsible for decisions are not held answerable.

4. Most agencies consider the environmental impact statement as a necessary nuisance which is relegated to lower echelon employees for preparation.

5. The writing of 102 statements is considered strictly an in-house project and few agencies request or utilize expertise available from outside specialists or from other agencies.

"The result," suggests the Florida group's report,[23] "is predictable--the agencies engage in vast, complicated paper-shuffling exercises which have little effect upon the final outcome of a project."

On the other hand, NEPA has its strengths. The draft environmental impact statement it requires becomes the focal point of public involvement. CEQ's official "20 Questions and Answers Explaining the NEPA Section 102 Environment Impact Statement Process" explains the role of the public in the "commenting process":

> The agency preparing the draft statement is responsible for making it available to the public (under the Freedom of Information Act [5 U.S.C. Section 552]). Any individual or organization may then comment on the draft; he may express support or opposition, suggest alternatives, or point out project effects that may have escaped the attention of its sponsors. These comments may be in the form of a letter, a critique, or even, as done by some citizen's groups, a "counter-102" setting forth their views and analysis in as great a depth as the draft itself.[24]

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[23] Enfo Newsletter, Florida Conservation Foundation, Winter Park, Fla., March 1972, p. 3.

[24] 102 Monitor, Vol. 1, No. 10, Nov. 1971. Reprinted at two places: "Appendix B" of Environmental Impact Analysis: Philosophy and Methods, Robert B. Ditton and Thomas L. Goodale, eds., University of Wisconsin, Madison, 1972; and Congressional Record, November 15, 1971, p. E 12213.

Forest Service
Compliance With NEPA

The following summary of the actions taken by the Forest Service to comply with the requirements of the National Environmental Policy Act is taken from the Report of the Chief, Forest Service, 1970-71, at page four:

> Insofar as Forest Service activities are concerned, the National Environmental Policy Act (NEPA) is an extension of the Multiple Use Act and Organic Acts. NEPA makes environmental considerations full partners with economic and technical matters. NEPA has had its greatest effect on Forest Service activities in two principal ways:
>
> 1. It further formalizes and extends public involvement and relationships with the Federal, State, and local agencies. NEPA has given a new dimension to citizen participation and citizen's rights.
>
> 2. The process requires a wider and more vigorous exploration of alternatives that might avoid some or all of the adverse environmental effects of forest land management opportunities.
>
> The part of NEPA one hears mentioned frequently is the "action-forcing mechanism--the environmental statement." To date the Forest Service has filed statements with the Council on Environmental Quality on 46 major environmental actions. Both draft and final statements have been filed for many of these actions. Statements have been filed for a variety of proposed actions, i.e., timber cutting practices, wilderness proposals, national recreation areas, pesticides, powerlines, unit plans (multiple-use), timber management plans, mining regulations, and other actions. . . .
>
> In the past 2 years many Forest Service people assisted in development of manual directives on preparing environmental statements. These procedures have been working satisfactorily and have been generally praised by the Council on Environmental Quality (CEQ), Environmental Protection Agency (EPA), and General Accounting Office (GAO).

The Forest Service Manual directives to implement NEPA constitute Chapter 1940 of the Manual, distributed on July 13, 1971.[25] The following are highlights from the "public involvement" sections of Chapter 1940:

> 1943.1. . . . For Forest Service proposals, consultation with other appropriate agencies and the public should be obtained at the earliest possible time. Generally, this should be during the analysis phase and before the draft environmental statement is prepared. . . .
>
> 1943.2. . . . The public must be informed about actions having an impact on the environment, and public comments and suggestions will be encouraged.
>
> 1943.3. . . . The rejection of comments or problems raised in the review process should be explained. . . . If hearings are scheduled for a proposed administrative action requiring an environmental statement, the draft environmental statement should be made available to the public at least 15 days prior to the time of the relevant hearings.

Another response by the Forest Service to NEPA and related expressions of concern regarding the protection of environmental quality (such as the litigation reviewed above) was the creation in October of 1971 of a "Multifunctional Planning Process Development Team." This team's mission statement referred to the agency's opportunities under NEPA:

> On a National level, the Environmental Policy Act has required detailed analysis and public consultation and participation for actions that would significantly affect the human environment. The Act has provided those who do not agree with a proposed action a strong way to challenge agencies in the courts. Polarized extremes have developed which leave many people searching

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[25] This FSM chapter was reprinted at pp. 23669-23672 of the December 11, 1971, Federal Register.

> for leadership which will provide correct, supportable and understandable answers to their concerns about the management and use of their Forest and Range lands. They seek leadership which will include their participation as an input into plans for use of the land and its resources. Traditionally, this has been a leadership opportunity for the Forest Service.[26]

Discussions of management alternatives with interested citizens are recognized by foresters as opportunities for needed "compromise and reconciliation":

> We must recognize that a managed environment represents a compromise, a gray area. . . . Compromise and reconciliation are not cop-outs, as often charged by extremists of both sides; they are not a rationalization for moral disengagement. They simply constitute the only realistic course to pursue.[27]

Examples of Forest Service environmental statements and their accompanying field trips, public meetings, and graphics include those prepared for the Hiawatha National Forest's proposed Mackinac Timber Sale in 1971 (an aspen clear-cut endorsed by the Mackinac Chapter of the Sierra Club after a field inspection), the Umpqua National Forest's Ten-Year Timber Management Plan in 1972 (color slides were used to explain it at a public meeting, after which comments were invited for a thirty-day period), and the Coconino National Forest's proposed Timber Management Plan in 1972 (fold-out maps accompanied descriptions of alternatives).

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[26] "Mission Statement, Multifunctional Planning Process Development Team," p. 1, distributed to Regional Foresters with a memorandum from Chief Edward P. Cliff on October 28, 1971.

[27] Thomas F. McLintock, "Criteria for a Managed Environment," Journal of Forestry, Sept. 1972, pp. 556-557.

How Other Agencies Have Complied With NEPA

Department of the Interior agencies are guided by Part 516 of their Departmental Manual; Chapter 2 of Part 516 deals with the "Statement of Environmental Impact." It stipulates that the public will be provided with timely information, including information on alternative courses of action, and notes that procedures for discretionary public hearings are provided in Part 455 of the manual. Many of the Interior Department's bureaus have adopted their own directives to supplement the Departmental Manual's guidelines regarding implementation of Section 102(2)(C) of NEPA.

The Bureau of Land Management, for example, has adopted BLM Manual Section 1792, which contains procedures for the preparation of environmental statements and which includes this "public participation" language:

> Effective two-way communications should be developed between the Bureau and the public providing for the exchange of information on environmental conditions and environmental impacts of resource management actions. [Emphasis added.]
>
> Although public meetings and hearings are not required for all environmental statements, the Bureau will follow a policy of assuring that the public has a full opportunity to participate in the process of statement preparation. Mechanisms for assuring public participation include informal consultations, notices, public meetings, and formal public hearings. [Emphasis added.]
>
> The Bureau will follow a policy of holding public meetings and hearings whenever public concern over the potential environmental impact of an action is high.

> Whenever possible, copies of draft and final statements, including required attachments, will be made available to the public at no cost.[28]

And the Bureau of Reclamation's "Instructions Chapter 376.5" includes the requirement that the agency's Regional Directors "develop and maintain a mailing list of local environmental, conservation, and other groups who have expressed an interest in reviewing draft environmental statements during the concurrent review process."[29]

The Corps of Engineers of the Department of the Army is working to overcome a negative image in this general area. Traditional Corps procedures were summarized in a 1970 Oregon State University report as follows:

> In actuality, there is very little local involvement in water resource development planning. The local people are viewed, and they view themselves, as recipients of water resource development. At the public hearings, the Corps of Engineers presents the plan it has developed. Usually the Corps places primary emphasis on the benefits of the project and plays down any costs. . . . The alternatives provided by the Corps are normally those which require its additional services. Other possible alternatives which might be implemented without Corps of Engineers expertise normally are not offered or considered.[30]

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[28]The BLM Manual section is reprinted at 37 Federal Register 15015-20, July 27, 1972.

[29]The Bureau of Reclamation's Instructions part is reprinted at 37 Federal Register 1126-29, Jan. 25, 1972.

[30]Thomas C. Hogg and Courtland L. Smith, Socio-Cultural Impacts of Water Resource Development in the Santiam River Basin, Water Resources Institute, Oregon State University, Corvallis, 1970, p. 57.

In response to criticisms of this sort, some of the agency's district offices have adopted a "fishbowl" planning technique:

> An official of the Seattle District Office of the Corps of Engineers advised that the "fishbowl" technique is now required for all civil works projects in that District. This official stated that the technique can be called experimental only in the sense that it is innovative and continuously undergoing a process of evolution and improvement and that there is no plan to terminate the application of it. This official added that the technique is also being used at the Corps' Rock Island and San Fransisco district offices and the Soil Conservation Service's Seattle office.[31]

The Corps' official "Engineer regulation on preparation and coordination of environmental statements" includes this "public participation" section:

> Public participation will be incorporated into the conduct of the Corps water resources program and must be viewed as an integral part of planning and administrative process. Public participation is a continuous two-way communication process which involves: Keeping the public fully informed about the status and progress of studies and findings of plan formulation and evaluation activities; actively soliciting from all concerned citizens and conservation and environmental groups their opinions and perceptions of objectives and needs; and determining their preferences regarding resources use and alternative development or management strategies

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[31] U.S., Congress, House, Committee on Merchant Marine and Fisheries, Administration of the National Environmental Policy Act--1972, Hearings before a subcommittee of the Merchant Marine and Fisheries Committee, House of Representatives, 92nd Cong., 2nd sess., 1972, p. 366. See also, Harry N. Cook, "Nourishing Public Participation," Water Spectrum, Vol. 3, No. 3, Fall 1971, pp. 7-11 ("'Fishbowl planning' is the order of the day. It involves the use of meetings--not hearings--in the form of small workshops, planning committees, public forums, etc.").

plus any other information and assistance relevant to plan formulation and evaluation.[32]

After two years of experience with the National Environmental Policy Act, the Council on Environmental Quality published a list of "recommendations for improving agency NEPA procedures."[33] These recommendations covered the following points:

A. Substantive Issues: The Required Content of Environmental Statements.

1. Duty to Disclose Full Range of Impacts.

2. Duty to "Balance" Advantages and Disadvantages of the Proposed Action. [Record trade-offs of competing values.]

3. Duty to Consider Opposing Views.

4. Reasonable "Alternatives" to the Proposed Action.

B. Procedural Issues: Preparation and Circulation of Environmental Statements.

1. The "Pre-Draft" Stage. [Agencies should devise an appropriate early notice system, by which the decision to prepare an impact statement is announced as soon as is practicable after that decision is made.]

The impact of NEPA on the Federal Establishment was summarized in President Nixon's August 7, 1972, message to Congress on "Environmental Quality":

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[32]The Corps of Engineers regulation is reprinted at 37 Federal Register 2525-31, Feb. 2, 1972. See also, Spenser W. Havlick, "The Construction of Trust: An Experiment in Expanding Democratic Processes in Water Resource Planning," Water Spectrum, Vol. 1, No. 2, Fall-Winter 1969-70, pp. 13-19.

[33]102 Monitor, May 16, 1972, reprinted in the June 27, 1972, Congressional Record at pp. E 6489-92.

> Under the National Environmental Policy Act (NEPA) we have undertaken a fundamental reform in the requirement that Federal agencies give careful analysis to the potential environmental impacts of proposed Federal actions. Already this changed emphasis has led to reconsideration of some projects, improvements of many others, and, overall, a far more thoughtful and comprehensive planning process. Our requirement that this whole process of environmental analysis must be open to the public for examination and comments--well before proposed actions are taken--is providing a new and more open dimension to Government. We can be proud of this record of improved citizen participation in the vital process of public decision-making.[34]

Discontent With Forest Service Public Involvement Procedures

Although the Secretary of Agriculture has adopted, for application to lands under his jurisdiction, the provisions of the Administrative Procedure Act relating to rulemaking,[35] the Secretary's Office does not use the Federal Register to full advantage to publicize the Department's official, adopted procedures. For example, the following is the entire text of the Federal Register announcement, on March 17, 1971, of the Secretary's "Environmental Quality Policy, Procedures and Guidelines":

> The Department of Agriculture has many concerns about the responsibilities for the quality of our

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[34] Reprinted in the August 7, 1972, Congressional Record at p. S 12944.

[35] J. Phil Campbell, Under Secretary of Agriculture, in, U.S., Congress, House, Committee on Interior and Insular Affairs, Public Land Policy Act of 1971, Hearings before a subcommittee of the Committee on Interior and Insular Affairs, House of Representatives, 92nd Cong., 1st sess., 1971, p. 171.

> environment. I have enunciated a general environmental quality policy for the Department in a Secretary's memorandum and established procedures and guidelines to be followed in implementing that general policy in several supplements to the basic memorandum. The memorandum and supplements give particular attention to the National Environmental Policy Act of 1969, related Executive orders, and other guidelines and directives from the Executive Office of the President.
>
> Secretary's Memorandum No. 1695 and Supplements 1 through 5 are included in this notice. Supplement 4 is largely based on Interim Guidelines issued by the Council on Environmental Quality. These guidelines are being modified and Supplement 4 will be revised accordingly. Comments about ways in which the basic memorandum and its supplements can be improved will be welcomed.[36]

Only by writing to the Department, however, could one obtain a copy of the Secretary's Memorandum No. 1695, including Supplement 5, "Providing Timely Information to the Public About USDA Plans and Programs with Environmental Impact to Obtain the Views of Interested Parties." Publication of this memorandum in the Federal Register with the above announcement would have provided much better dissemination of the Department's policy statements.

As Senator John Sherman Cooper has stated, with specific reference to the Federal-Aid Highway Act of 1968 but of equal application to the activities of the Forest Service,

> . . . Congress has been quite specific in its intention that citizens participate in the selection, planning, and designing of major public works and other projects

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[36] 36 Federal Register 5148-49, March 17, 1971.

> and programs which have significant impact on their communities and involve substantial expenditures of public funds.[37]

Coping with such citizen participation on behalf of the public trust in a quality environment has been difficult, apparently, for some forest officers. Those who have thought in terms of "my Ranger District," "my National Forest," or "my Region" . . . those who have depended for support on local or national political connections . . . those who have seen heresy in the questioning of their profession's basic tenets . . . even those to whom the continued financial success of local, forest-dependent industries is most important, have reacted negatively to this shift in the balance of decision-making power, viewing public hearings, for example, as special interest pleading which "stirs up the natives."[38] When forest officers with these attitudes are placed in positions of responsibility, there is a negative reaction from the public, as the following examples demonstrate:

Mike Frome, American Forests, October 1970, p. 3:

> Citizen activists can no longer be easily dismissed as well intentioned but misguided extremist minority groups. They are signaling [with their litigation] that

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[37] Congressional Record, Apr. 14, 1970, p. S 5706. See, U.S., Department of Transportation, Federal Highway Administration, Bureau of Public Roads, Policy and Procedure Memorandum 20-8, "Public Hearings and Location Approval," Jan. 14, 1969.

[38] See, Senator Alan Cranston, "No Phosphate Mining in Los Padres National Forest," Congressional Record, Sept. 15, 1971, pp. S 14320-21.

> there is something wrong with our national forests. That something may lie within the Department of Agriculture. The time has come for the people to demand a comprehensive accounting of the management of their lands. Does the Forest Service old guard suffer a case of hardening of the arteries and is it out of touch with the changing times? Is it unresponsive to public needs?

James W. Moorman, "Preserving De Facto Wilderness," Sierra Club Wilderness Conference, September 25, 1971, p. 7:

> The officers of the Forest Service will resist your petition, resent your petition, ignore your petition, sabotage your petition, and generally do everything they can think of to thwart your petition. They will not do the one thing that citizens should be able to expect from government officials--they will not give your petition serious consideration on the merits. The Forest Service is so taken by the notion that it has been given the forests to manage as it sees fit[39] that it has forgotten that the people may have the right to participate in the management decisions. In fact, the Service seems to resent the notion that citizens would have any say, or even inquire of the details of the Service's management.

"Battle for the Eagles Nest: The Forest Service Versus the People," inserted by Senator John V. Tunney of California in the Congressional Record, May 17, 1972, p. S 7983:

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[39] Cf., "Mr. Pinchot at the New Orleans Meeting," Conservation (forerunner of American Forests, published by the American Forestry Association), Dec. 1909, p. 781: "Fortunately, [said Gifford Pinchot, United States Forester,] the charge of illegal action is absolutely false. The Forest Service has ample authority for everything it has done. Not once since it was created has any charge of illegality, despite the most searching investigation and the bitterest attack, ever led to reversal or reproof by either house of Congress or by any Congressional committee. . . . [N]ot once has the Forest Service been defeated as to any vital legal principle underlying its work in any court or administrative tribunal of last resort. Thus those who make the law and those who interpret it seem to agree that our work has been legal."

> [I]n October, 1970, the U.S. Forest Service scheduled an Eagles Nest [Wilderness] hearing in the little village of Frisco at the eastern tip of the proposed area. No other sessions were planned even though the conservationists asked the Forest Service to hold additional hearings in Denver. Urban residents, they explained, would be the greatest users of the Eagles Nest Wilderness, and few of them could get off several days to be present at Frisco. But the Government balked and argued that it was too late to arrange for a longer hearing. However, it was implicit that the Service really did not want the people of the Denver area to have their say about Eagles Nest. . . . For one of the rare times in the history of the Wilderness Act, public hearings took place in a major urban center where the majority of the users actually lived [in response to mounting citizen pressure].

Representative Ken Hechler, Member of Congress from the Fourth District of West Virginia, personal letter to Secretary of Agriculture Hardin, May 17, 1971, reprinted in the Congressional Record, June 29, 1971, p. H 6050:

> This Forest Service practice of giving those "concerned with development and use of the National Forests" [e.g., the American Mining Congress] ample opportunity to comment on regulations affecting the public's property and resources, while totally excluding the general public from commenting on them through the established rule-making procedures of the Administrative Procedure Act (5 U.S.C. 553) is unconscionable and should be halted.

Arnold W. Bolle, Dean, School of Forestry, University of Montana, November 18, 1970 (U.S., Congress, Senate, Committee on Interior and Insular Affairs, A University View of the Forest Service, Senate Document 91-115, December 1, 1970):

> The Forest Service as an effective and efficient bureaucracy needs to be reconstructed so that substantial, responsible, local public participation in the process of policy-formation and decision-making can naturally take place. . . . Those most directly affected

> [by Forest Service decisions] have little reason to accept practices imposed upon them through bureaucratic decisions made elsewhere. They insist on being part of the decision-making process, and their participation must be more meaningful than invitations to public hearings and briefing sessions.

Forest Service Response to Criticism Of Its Public Involvement Procedures

The critical passages quoted above (admittedly chosen because of their extremely uncomplimentary nature) appear to indicate that what actually happens in the field falls short of what the Forest Service leadership thinks it is offering in terms of the adequacy of public involvement opportunities. Contrast, for example, the following two statements. They seem to describe the same procedure from two points of view. First the Forest Service view:

> Citizens and citizen groups do contribute a great amount of input. The Forest Service encourages public participation and takes pride in leadership in this respect. The nature of the Forest Service responsibilities and its programs encourage and demand it.[40]

Then the citizen-conservationist's view:

> We're not going to be patted on the head by any [Forest Service] public relations effort.[41]

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[40] Forest Service Chief Edward P. Cliff's response, in, U.S., Congress, Senate, Committee on the Judiciary, Responses to Questionnaire on Involvement and Responsive Agency Decisionmaking, Vol. 2, Committee Print, 1971, p. 374. See, entire Forest Service response, pp. 373-381 and pp. 660-709.

[41] Donald Carmichael, attorney, Boulder, Colo., personal interview, Aug. 20, 1970.

The image of the agency's public involvement procedure somehow must be changed from that of a head-patting exercise to that of a sharing of information and a reconciliation of diverse viewpoints. Reconciliation will require mutual respect for each other's positions and values. More maturity, responsiveness and understanding on both sides of the issues than has been evident in some instances in the past will be called for. The Forest Service has taken steps which appear to be taking the agency in this direction.

Published in February of 1970, Framework for the Future--Forest Service Objectives and Policy Guides includes the following statement of agency policy:

> Involve the public in forestry policy and program formulation.
>
> --Seek out and obtain local and national views in the process of policy and program formulation.
>
> --Discharge our responsibilities in ways that make our management processes visible and our responsible people accessible.
>
> --Consult with and seek cooperative action with agencies at all levels of Government, and with private groups and individuals, in programs for resource management and economic development.

In January of 1971, the Chief of the Forest Service issued A Guide to Public Involvement in Decisionmaking which brings to the attention of forest officers the fact that "the key to awareness is 'listening'":

> This means a lot more than listening to individuals and groups that come to you. It means keeping fully informed as to the attitudes, interests, and desires of local, regional, and national publics. It means seeking out and listening to individuals and groups which may have

> traditionally opposed certain aspects of Forest Service management. It means spending as much time and effort at listening as we do at informing. It means that every technique and medium that we use to inform and involve the public should have built into it a procedure for eliciting public response. [Emphasis added.]

In May of 1971, the Chief's office placed additional emphasis on identifying procedures and responsibilities in the area of public involvement with the issuance of a draft program entitled "Inform and Involve." The objective of these policy guides, which were revised and reissued in 1972, is:

> . . . to inform the public of the scientific, social, environmental, and economic factors that relate to land and resource management, and to involve the public constructively in providing information, comment, and points of view that will lead to better land and resource management decisions.[42]

Examples of recent Forest Service "public involvement" activities were included in the Forest Service Response to Recommendations of Forestry Deans, made to the Council on Environmental Quality, published in June, 1972. (The deans had suggested, among other things, that the agency "try to make earlier determinations of what the public wants from its forests.") The agency's response:

> . . . In the East, public involvement in land use decisions was a key part of a major Forest Service effort to coordinate planning and programs on all the National Forests in the Appalachian Mountains. A series of public meetings was held throughout the area to obtain

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[42] Report of the Chief, Forest Service, 1970-71 (Washington: Government Printing Office, 1972), pp. 48-49.

> public reaction to a proposed comprehensive land use plan for the region.
>
> In the East and South the Forest Service has asked through local and national media for public comment and recommendations to determine primitive outdoor recreation possibilities on National Forest lands. In the West, an extensive public involvement effort is underway in selecting areas to be studied for wilderness potential. In population centers west of the 100th meridian more than 180 public meetings have been held by late May [1972] soley to discuss possible wilderness study areas. . . .
>
> In the complexity of today's Forest Management, Research, State and Private Forestry, we are, nevertheless, making significant headway in informing and involving the public in the decision-making processes of land and resource management. More land than ever before under Forest Service management is receiving public scrutiny by request. The Forest Service is listening to the public's wants from its forests and implementing their concerns in the decision-making process.[43]

It also should be acknowledged that the Forest Service is experienced at utilizing advisory committees (it had one hundred and sixty-six of them as of April 7, 1969[44]),

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[43] At p. 13. But see, "Public Pressure Stymies Public Involvement," Region Nine Contact, Forest Service, Milwaukee, Wis., Sept. 1972: ". . . When [Hoosier] National Forest Supervisor Donald M. Girton closed that Forest to off-road vehicle use last October, the plan was to develop some workable policy, regarding this form of recreation, utilizing public involvement. After numerous 'listening sessions' and concentrated staff work, Girton unveiled a proposal for public view . . . in July. The proposal was soundly rejected by both sides of the ORV issue . . . possibly taking the outcome of this issue out of the hands of those most interested in it."

[44] Response to Questionnaire on Citizen Involvement, Senate Judiciary Committee Print, p. 376. See also, Thomas E. Cronin and Norman C. Thomas, "Federal Advisory Process: Advice and Discontent," Science, Vol. 171, Feb. 26, 1971, pp. 771-779.

that it makes frequent use of "ad hoc committees," and that the Forestry Appeals Board exists to supplement the input of these committees. The Forest Service is reviewing its appeals procedure "to insure that it adequately provides for review of agency decisions"[45] and perhaps to render it less of an exercise in futility.[46] Also of interest is the fact that, on October 19, 1971, a subsection was added to the Federal Highway Administration's "Regulations for Administering Forest Highways" requiring public hearings prior to forest highway construction.[47]

If for no other reason than the fact that a convincing demonstration of public involvement may sway a judge to favor the federal defendants' position in a lawsuit such as the four described earlier in this dissertation, Government attorneys have urged the adoption of more such techniques:

> . . . Now comes testimony concerning the public need--the cultural and aesthetic justification. Courts may not be convinced that it's a good idea just because the Forest Service thinks so. We must show the public

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[45] Public Land Policy Act of 1971, House Interior Committee Hearing, 1971, p. 171.

[46] See. e.g., footnote 101, Chapter IV, supra.

[47] 36 Federal Register 20220. The revision reflected changes required by the Federal-Aid Highway Act of 1970, approved Dec. 31, 1970, P.L. 91-605, 84 Stat. 1713.

> involvement if it played a role in the decision-making process.[48] Maybe we could show how public opinion polls were utilized, if they were. Hopefully we'll have some praise from the news media. We'll probably have ample correspondence from industry or conservation groups. All this material will be used to support an argument that the broad mandate of "do good" has been followed.[49]

Recommendations for Action to Improve Public Involvement in Forest Service Decision-Making

One need only read the headlines of our daily newspapers to sense the changing mood of the country toward unilateral bureaucratic decision-making: "Rigid Institutions Blamed for Upheaval";[50] "Conflict Called Tool for Change";[51] "Adversary Scientists Needed";[52] "Participatory Ecology is Country's New Bag."[53] Into this turbulent social environment

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[48] E.g., "Sylvania Recreation Area Public Involvement," 10 pp., mimeo., a listing of "show-me" trips and press trips, formal talks and public appearances, outside consultation and special studies, and special meetings prepared for the use of the U.S. attorneys in the Gandt v. Hardin litigation (see Chapter III, supra.)

[49] Nelson H. Grubbe, Attorney, U.S. Department of Justice, "Multiple Use in Court," speech to Conference of Forestry School Deans and Eastern Region, Forest Service, Milwaukee, Wis., Feb. 10, 1970, p. 7.

[50] The State Journal, Lansing, Mich., Sept. 18, 1970, p. A-6.

[51] The State Journal, Lansing, Mich., July 5, 1972, p. D-12.

[52] Edwin Newman, "Speaking Freely," NBC News, title of talk by Dr. John Gofman, University of California, Berkley, Calif., Dec. 13, 1971.

[53] St. Paul Pioneer Press, St. Paul, Minn., Sept. 29, 1969.

steps a new Forest Supervisor, who is a planner as well as having many other duties. His university forestry training included little, if any, exposure to communication, psychology, sociology, or political science theory. He feels he was employed to make professional resource allocation and use decisions. He soon finds himself in much the same dilemma as the urban planner described by Law Professor Beverly S. Pooley:

> [W]hat actually happens in our society is that we employ one professional, the planner, to make professional judgments. We recognize the validity of his judgments, I presume, since we are ready to employ him to exercise his skill, and we accept his expert testimony in court. We then provide two other professional groups to set on him. The lawyers, to tell him when he had exceeded his authority, or when he has made an arbitrary, discriminatory or unreasonable decision. And we further provide politicians to make sure that his plans do not go beyond what is politically acceptable.
>
> We have here a microcosm of one of the basic and fundamental and unsolved problems of our society. There are many matters upon which we need, as a community (be the community great or small) to rely upon the advice of persons who have received a professional training. We are not, understandably, prepared to put ourselves entirely into the hands of a ruling junta of experts. We control them first by politicians, who make a decision on what is politically acceptable; and lawyers, who contrive to distill from the constitution and other documents a viable notion of the permissible norms of governmental action.[54]

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[54]Beverly S. Pooley, "People, Problems, Property Rights and Politics," address given at the 1966 Annual Conference of the Michigan Society of Planning Officials, Grand Rapids, Mich., May 11, 1966.

The Forest Supervisor as planner has what he might consider an advantage over his opposite number, the director of a city planning staff, who must expose his plans to review by a legislative body before their implementation. The only legislative oversight the forest officer must contend with is that of a preoccupied United States Congress. Yet this "advantage" may have made National Forest planning all too insulated from the will of the people or their elected representatives. NEPA was passed in an attempt to reduce the discretion of Federal agency administrators such as Forest Supervisors.

Not that the requirement of city council or city planning commission approval has resulted in responsive city planning, as the late Catherine Bauer Wurster has observed:

> It is the very nature of the enlightened American City Plan--with its emphasis on a single overall scheme--that all the big decisions will have been made in advance, all conflicting interests compromised and alternative possibilities resolved, before the plan comes out for public approval. What is missing is the public understanding and debate of the big alternatives. Moreover, it is the lack of this step which, I think, keeps city planning feeble and ineffectual in this country.[55]

The enlightened National Forest Plan of the past also could be described in these terms--all the big decisions made in advance, before its exposure to the public. Charles A. Reich

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[55]Catherine Bauer Wurster, American Institute of Planners Annual Conference, 1954.

put his finger on this phenomenon a decade ago, in his rather prescient paper, Bureaucracy and the Forests:

> In large measure, the power to create fundamental policy for the publicly owned forests has fallen to small professional groups. They make bitterly controversial decisions, choices between basic values, with little or no outside check.[56]

Reich saw a need for reform in the way Forest Service hearings are conducted, and suggested that they would be more useful both to the public and to the agency if conducted by a person effectively independent of the proposing function in the agency, and if this person were allowed to make his own report on the merits, for the information of those empowered to reach a final decision.[57] As he noted:

> In a purely advisory hearing the public may talk, but there is no assurance that anyone will listen. Requiring an explanation for a decision might encourage listening.[58]

One example of the use of an independant hearing officer to help resolve a natural resource-management conflict was reported in a recent Michigan Department of Natural Resources press release:

> The Department of Natural Resources recently appointed Lansing attorney Frederick S. Abood as a hearing officer

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[56]Charles A. Reich, Bureaucracy and the Forests (Santa Barbara, Calif.: Center for the Study of Democratic Institutions, 1962), p. 2.

[57]Charles A. Reich, "The Public and the Nation's Forests," California Law Review, Vol. 50, No. 3, p. 404.

[58]Reich, Bureaucracy and the Forests, p. 6.

> to preside over an appeal case centering on the DNR's denial of a drilling permit for a 40-acre tract in Corwith Township, Otsego County, where it has leased state oil and gas rights. Abood will hear both sides of the appeal and from this testimony will draw up recommendations which are to be presented to the Natural Resources Commission for its final decision-making on the question.[59]

If the Forest Service has used this technique, it has not come to this investigator's attention.

Another conflict-resolution technique involving a neutral party (but not a judge) is that of binding arbitration, mediation, or conciliation. Dr. Charles H. W. Foster, now Massachusetts Commissioner of Natural Resources, has encouraged the use of this method but has acknowledged the difficulty of applying it to citizen group-Federal agency disputes:

> The most serious obstacle confronting environmental conciliation may lie less with the nature of the dispute than the types of disputants involved. In many, if not most situations, a private, local group will be pitted against a public agency, each alleging to speak for the public interest. Unequally engaged in terms of technical and financial resources, the parties will be further handicapped by the agency's legal posture of sovereignty which may make it powerless to bring commitment to the negotiating table. Under such circumstances, traditional arbitration approaches may prove fruitless.[60]

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[59] Michigan Department of Natural Resources News Bulletin, Sept. 6, 1972, p. 4.

[60] Charles H. W. Foster, "The Case for Environmental Conciliation," address presented at the Annual Meeting of the American Institute of Biological Sciences, University of Vermont, Burlington, Vt., Aug. 19, 1969. One specific advantage of this "meeting of the minds" approach to conflict-resolution, says Foster, is its relative inexpensiveness: "[M]ost environmental disputes could be successfully

Hearings, as a means of having influence on decision-making, have been less than successful as seen from the viewpoint of conservation groups. By way of review, the conservation group members would like to see hearings held early, as well as late, in the planning process; in comfortable, convenient, neutral locations from the standpoint of all interested citizens; and after at least thirty days' advance notice and adequate publicity. Ideally, they would be conducted by neutral hearing officers in a relatively unhurried manner, with court reporters on hand to make verbatim transcripts of the proceedings. The product of these hearings, in addition to the transcript and the usual tallies of numbers of proponents and opponents, would be reports to the decision-makers (e.g., Regional Foresters) going to the merits of the issues, based on a sifting of the worthwhile contributions of fact and philosophy from the empty rhetoric, and suggesting an equitable decision or set of alternative decisions supported by reasons much as they are offered in a court's opinion. The Federal Mediation and Conciliation Service might be a source of such neutral hearing officers, or a new corps of such personnel could be recruited by the Department of Agriculture.

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conciliated for an expenditure of between $500 and $1,000, or roughly a week's worth of a professional mediator's time. In comparison with the high costs of delay or alternative litigation, it is astonishing that the mediation approach has not been utilized more frequently."

But hearings of the best sort are no substitute for good will, trust, and understanding between forest officers and the members of their clientele groups based on mutual respect, and it is to this ultimate end that the agency's long range staffing and in-service training plans should be directed. Respect for forest officers will be enhanced more by substantive changes in the agency's planning efforts than by new procedural experiments. If the public is permitted to comment on a set of resource-use alternatives based on sound, comprehensive, multidisciplinary planning, half of the battle will be won; the reasons for the best alternative may well appear obvious in the light of all the facts.

The conclusion to be drawn: Excellence in planning will reduce the conflict with clientele groups and their "environmental change agent" leaders or, as a minimum, will eliminate any legal cause of action under the substantive requirements of the National Environmental Policy Act. Excellence in planning will come from broadening the variety of disciplines and value-systems represented on Forest Service planning staffs and from in-service training programs oriented in this direction.

Procedures should be considered open for continued refinement. Robert H. Twiss made this point in 1966:

> I question the continued reliance on public relations or communications alone. . . . I would try to encourage a basic change of behavior . . . actually

> doing something a bit different. . . . [S]eek out and support goals that you hold in common with recreation groups. . . . [P]rovide new alternatives. . . . [Take] the initiative to show that you understand these points of view and [don't] wait to react.[61]

One basic change in procedures, which has been emphasized as desirable in various Federal agency directives to implement NEPA, is the need to give citizen groups as much lead time as possible to make their own studies, arrive at their own policy conclusions--which in some instances may take months of resolution-debating in local club, district, regional, state, and national conventions--and, if necessary, file their own "Counter-102 Statement." For example, timber sales, which are scheduled five years in advance, could be publicized three years in advance "to let the sparks fly." In some circumstances, forest officers may have to depart from their passive roles as "listeners" at currently popular "listening sessions" and play the role of mobilizer of citizen input and coalition-builder, as long as they resist the temptation to "stack the deck" in the process. Advisory committees to Forest Supervisors ought to be independent of the Supervisor's whim as to whether they meet, live or die. A new structure for such bodies is needed within which members of advisory committees would be appointed for stated terms, the committee would be free to live within a stated

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[61] Robert H. Twiss, "Recreationists as Decision Makers," paper presented at the 57th Western Forestry Conference, Dec. 7-9, 1966.

budget covering the cost of its transportation, meetings, and report-duplication, and would otherwise be free to make independent recommendations.

Work should proceed on improving the Forest Service's existing public involvement procedures. Models of these procedures, with flowcharts pinpointing the various opportunities for public input at different stages in the decision-making process, and with differing "weights" assigned to differing kinds of public input, are worthy of developing to better understand and perfect the process. Perhaps the Forest Service's Division of Information and Education should be renamed the Division of Public Information and Involvement and given a new mission with the broader mandate implied in the new title. Representatives of this restructured unit then would be responsible for coordinating citizen input in the early stages of the development of a plan or an incipient controversy. Resolution of potential conflicts early and locally through the mediation efforts of such public involvement specialists might serve to stem the trend toward continually reducing the discretion of the field personnel of the Forest Service, a trend identified in 1969 by Greeley and Neff:

> As national interest and pressures grow, decisions are made in more detail and at higher levels within the government. The latitude of the local Forest Service

> administration to make decisions is concomitantly curtailed.[62]

The communications specialists required to staff such a new Forest Service unit would be an added expense to the agency, but one which the conservation organizations would see as worthy of their support in presentations before the Appropriations Committees of Congress.

Decision-making in a democratic society is not easy, and new procedures will not make them so. Charles Reich has come to this conclusion:

> Procedural reforms cannot be expected to solve the dilemma of how planning for the public good can be accomplished in a democracy. Professional planners and managers cannot be dispensed with. But some means of public participation, however inadequate, would at least offer the beginning of a system of planning that would encompass a broader vision and a deeper relation to democratic ideals.[63]

Charles H. Stoddard is of the same opinion:

> [T]he ideal toward which the democratic process strives is clear enough: It is to bring out all the facts and viewpoints so that decisions can represent the fully enlightened majority will--not merely a consensus and not a meaningless compromise, but a reasoned conviction that an effective solution has been found.[64]

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[62] A. W. Greeley and L. P. Neff, "Forestry Decisions In the Light of Multiple Products" (a case study of the Boundary Waters Canoe Area), Journal of Forestry, Oct. 1968, p. 791.

[63] Reich, Bureaucracy and the Forests, p. 13.

[64] Charles H. Stoddard, "Some Aspects of the Political Decision in Forestry," Journal of Forestry, Oct. 1968, p. 785.

At the root of the contention that improved public involvement in decision-making is essential is the definition of the "public interest" and, springing from that definition, how one goes about determining what to do "in the public interest." "Indeed," suggests Professor Reich,

> . . . it can be argued that in a democracy the "public interest" has no objective meaning except insofar as the people have defined it; the question cannot be what is "best" for the people, but what the people, adequately informed, decide they want. Professional forest and recreation managers, no matter how dedicated, are not necessarily qualified to engage in this form of planning on their own.[65]

The Forest Service should be glad that more persons are interested in the National Forests, and that they are becoming more effective in expressing their interests. Involved citizens are potential supporters of the agency's programs. More importantly, involved citizens are assuming a personal responsibility for renewing and preserving our environmental heritage, and in the process restoring and strengthening that faith of individuals in themselves which is the source of national direction and generosity of deed.[66]

The dilemma in which today's public administrator finds himself from the standpoint of dealing with an increasing amount of public involvement in his decision-making

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[65] Bureaucracy and the Forests, pp. 9-10.

[66] See, Fred Krinsky, Democracy and Complexity: Who Governs the Governors? (Beverly Hills, Calif.: The Glencoe Press, 1968), p. 128.

has been eloquently summed up by the Secretary of the U.S. Department of Health, Education and Welfare, Elliot L. Richardson:

> The hard choices, in the end, are bound to depend on some combination of values and instincts--and, indeed, it is precisely because the content of choice cannot be reduced to a mathematical equation that we need the political forum to reach the final, most difficult decisions.
>
> To recognize this, however, reinforces the importance of being as honest and explicit as possible in articulating the non-measurable considerations that transcend the limits of objective analysis. Only if these considerations are exposed to full view can we bring those whose expectations have to be deferred--or over-ruled--to accept the legitimacy of the process by which this was done. Only thus can we hope to reconcile the loser to losing and encourage the impatient to wait.
>
> Without this sort of open discussion of the hard choices we must continually make, the gap between public expectations and government performance will keep growing, and the erosion of confidence in government's ability to bring about desirable change will continue.[67]

And with public involvement, hopefully, will come some degree of understanding of and support for the decisions that are made--"in the public interest."

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[67]Elliot L. Richarson, "Choice: A Cruel Necessity," inserted by Rep. Richard W. Mallary in the Congressional Record, Apr. 21, 1972, p. E 4075. Emphasis added.

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