MINERAL KING: A CASE STUDY IN FOREST SERVICE DECISION MAKING

Sierra Club v. Morton is a landmark case in the conservation field, but it presents much broader problems than the legal issues before the courts. This Comment explores the history of the decision to develop the Mineral King Valley to determine the nature of the administrative decision-making process and its inadequate reflection of a diversity of public interests. The structure of the Forest Service is laid out as a framework for understanding how the decision to develop was made. The Comment discusses improvements in the decision-making process that could be made to allow for a cross-section of public input. It then analyzes the legal issues presented by the Sierra Club and argues that judicial review is inadequate to reach the policy issues involved in the decision to develop. To remedy this, it concludes that the Forest Service administration must be opened to full public input and review at the crucial stages in the decision-making process.

The highly publicized decision Sierra Club v. Morton1 concerns a proposed ski resort and recreational facility which will be designed to affect up to 13,000 acres2 of the Mineral King Valley in California’s Sierra Nevada Mountains. This proposed development would lie within the 15,000-acre Sequoia National Game Refuge in the Sequoia National Forest, which is surrounded by Sequoia National Park. The valley floor is at an elevation of 7,800 feet and is surrounded by peaks as high as 12,405 feet.3

1. 405 U.S. 727, 3 ERC 2039 (1972), aff’g Sierra Club v. Hickel, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970), rev’g Civil No. 51464 (N.D. Cal., July 23, 1969).
2. Structures will occupy about 400 acres on permits involving over 1000 acres, allegedly physically affecting 13,000 acres of the 15,000-acre valley. Sierra Club v. Hickel, Civil No. 51464 (N.D. Cal., July 23, 1969) [hereinafter cited as District Court opinion], at 1-2; Brief for Respondent at 4, Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972).
3. CALIFORNIA REGION, FOREST SERVICE, U.S. DEP’T OF AGRICULTURE, PROSPECTUS—FOR A PROPOSED RECREATIONAL DEVELOPMENT AT MINERAL KING IN THE SEQUOIA NATIONAL FOREST 1 (1965) [hereinafter cited as 1965 PROSPECTUS] (on file with Ecology Law Quarterly). There are eight major basins within the valley and the snow is dependable for cover between November and late April. The valley floor is narrow.
Walt Disney Productions' master development plan, as first approved in 1969 by the United States Forest Service, included plans for hotels, restaurants, shops, a cog-assisted railroad, cleared slopes, and a number of ski lifts. The developer stated that the development would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations," and the "grooming and manicuring" of most slopes. The judicial controversy is between the Sierra Club, which wants to preserve the Mineral King area in its present state, and the federal government, which has issued permits for the private recreational development.

The Sierra Club filed suit in the United States District Court for the Northern District of California to enjoin the development. The area is now used for camping, as a base for pack trips, and for fishing, hiking, and horseback riding. Mineral King is 115 miles from Bakersfield, fifty-five miles from Visalia, eighty-five miles from Fresno, 178 miles from Modesto, 271 miles from San Francisco, and 228 miles from Los Angeles. Id. at (i).

The 25-mile county maintained road to Mineral King is narrow, winding, steep, and at present negotiable only in the summer. The last five miles of the road are in the Sequoia National Forest. About eleven miles pass through Sequoia National Park and nine miles are on public domain and private land. Id. at 3.


5. Id. at 9-12. The development is to be a year-round facility at Mineral King, catering to 1.7 million visitors annually, about 600,000 from outside California. The ski slopes will accommodate 20,000 skiers at one time. There will be a $35 million investment. A village including a chapel, ice-skating rink, convenience and specialty shops, conference center, theater, general store, post office, and lodging will be constructed. Twenty ski lifts will serve every type of skier and serve "campers, sightseers, picnickers, and wild-life enthusiasts during warm months." There will be hotels and lodges and ten restaurants in the valley. Tobogganing and sledding will take place in a snow play area. A Forest Service office, ski school, first-aid station, and hospital will also be included. Id.

When we go into a new project, we believe in it all the way. That's the way we feel about Mineral King. We have every faith that our plans will provide recreational opportunities for everyone.

All of us promise that our efforts now and in the future will be dedicated to making Mineral King grow to meet the ever-increasing public need.

I guess you might say that it won't ever be finished.


6. Walt Disney Productions, A Proposal for the Development of Mineral King from Walt Disney Productions (1965) (bid in response to 1965 Prospectus, supra note 3), cited in Affidavit of J. Michael McCloskey (Staff Director, Sierra Club) at 8, District Court opinion, supra note 2.


8. The named defendants were Walter J. Hickel, individually and as Secretary of the Interior; John S. 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, in-
district court held that the Club had standing to sue and granted a preliminary injunction. On appeal, however, the Ninth Circuit denied standing and vacated the preliminary injunction, finding little or no chance of the Sierra Club prevailing on the merits. Judge Hamley, concurring in the result, dissented on the issue of standing but agreed that the granting of the preliminary injunction was an abuse of discretion. The United States Supreme Court granted certiorari, and in April 1972 rendered a four-three decision, which denied standing and consequently did not reach the merits.

On June 23, 1972, in federal district court, the Sierra Club moved to amend its complaint to conform its allegations of standing to the Supreme Court's criteria and to add a third claim of relief arising under the National Environmental Policy Act (NEPA). The motions were granted, and the defendants moved to dismiss portions of the amended complaint. The motion to dismiss was denied. The case is now at the stage of discovery with no trial date set.

Aside from the procedural issue of standing, six substantive issues have been presented to the courts thus far. \(\text{Sierra Club v. Morton,}\) however, is even more complex and more important than the litigated issues themselves would indicate. The central issue that underlies the legal questions is the availability of effective outside input and review in the decision-making process of the Forest Service. The absence of such input has exposed a fundamental problem area in the realm of forest conservation; namely, the way the Forest Service administers the national forest land under its control. The Sierra Club is questioning the method by which the Forest Service, a public administrative agency, operates in the “public interest.”

Individually and as Forest Supervisor of Sequoia National Forest. Complaint, District Court opinion, supra note 2.

9. District Court opinion, supra note 2, at 11, 13.
10. Sierra Club v. Hickel, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970).
11. Id. at 38, 1 ERC at 1678 (Hamley, J., concurring).
14. See text accompanying notes 147-69 infra.
15. 42 U.S.C. §§ 4321 et seq. (1970); see text accompanying notes 177-78 infra.
16. The court has subsequently allowed plaintiffs to amend their complaint to make further allegations concerning standing; and, to add certain additional parties; and, also, to add a third claim for relief under the National Environmental Policy Act (NEPA).
17. Id.
18. See text accompanying notes 173-202 infra for discussion of these issues.
19. “The policy of the Forest Service, as you may remember, is 'the greatest good for the greatest number, in the long run.'” Letter from Charles Connaughton (Regional Forester) to Horace Reynolds, Sept. 8, 1965. This and the other letters and memoranda cited in this Comment are found in San Francisco Regional Office,
ment discusses aspects of the public decision-making process: (1) the method of decision-making employed by the Forest Service in deciding to develop Mineral King; (2) whether there should be outside review during this process; and (3) the need for judicial review, and how it was exercised in this case.

I

THE UNITED STATES FOREST SERVICE

The Forest Service—a bureau within the Department of Agriculture—administers the national forests, including the Sequoia National Forest within which Mineral King lies. Although the area to be developed is a part of the Sequoia National Game Refuge, it is within the jurisdiction of the Forest Service. The primary congressional mandate under which the Forest Service operates is the Multiple-Use Sustained-Yield Act of 1960, which establishes five uses to which the national forests may be put. No guidelines have been developed, however, as to how to determine which use ought to prevail in a given national forest area. This determination is left to the complete discretion of the Forest Service itself.

The basic administrative organizational structure of the Forest Service is territorial, under a hierarchical organization as follows: the Secretary of Agriculture, the Chief of the Forest Service, the regional foresters, the forest supervisors, and the district rangers. Each

Division of Recreation and Land, United States Forest Service, File No. 2340 [hereinafter cited as Forest Service File 2340].
22. 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.
(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.
Id. § 529(a) (emphasis added).
has different responsibilities and management functions within his authority, and each level of this hierarchy is controlled and reviewed by the next higher responsible authority. The district rangers execute the plans and objectives of the Forest Service at the local level.

In spite of its hierarchy, the Forest Service has consistently stressed decentralization, within the guidelines set by the *Forest Service Manual* and senior officials. At the same time the Forest Service has felt that it must have uniformity in the administration of its policies and guidelines. The Forest Service has recognized a need under certain circumstances to control the actions of the rangers to prevent them—as the liaisons between the local population and the higher Forest Service officials—from being influenced by local pressures that may not accord with the objectives of the Forest Service. Thus, even with the stress on decentralization, there is a necessity for some centralization to enable the Forest Service to insure compliance with

---

Forest Service, because the Forest Service is a bureau within the Department of Agriculture. The Chief of the Forest Service is the administrative head. His headquarters is in Washington, D.C., where he has an administrative staff that is divided into six major areas: Research, Administrative Management and Information, National Forest Resource Management, State and Private Forestry, Program Planning and Legislation, and Lands. These divisions are each run by an assistant chief and are not involved in field work. See *H. Kaufman*, supra, at 42.

The field work of the Forest Service is divided into three main administrative areas: research, experiments, and local administration. For local administration, the country is divided into ten regions, each of which is directed by a regional forester. Under each regional forester are several divisions: operations, fiscal control, information and education, personnel management, engineering, fire control, timber management, range and wildlife, lands, recreation and watershed management. *Id.* at 44. Each of these divisions is under an assistant regional forester.

The regions are divided into national forests directed by forest supervisors. There are line-staff officers who have various functions in an authoritative and responsible role. Finally, within each national forest there are districts, each headed by a district ranger. *Id.* at 46.

24. The organizational and management functions within the National Forest System are conducted on four levels:

1. The principal responsibilities of the Chief of the Forest Service are: national leadership in forestry; formulation of overall objectives and policies; Servicewide direction for all programs, activities and functions; preparation of major plans and agreements; program evaluation; and, assistance to line units.

2. The Regional Forester formulates objectives and policies, and directs programs within his region.

3. The Forest Supervisor is responsible for short-range planning and execution of measures needed for protecting, developing and utilizing the resources in the national forest.

4. The District Ranger formulates and carries out action programs.

**Land Use Planning**, supra note 23, at III-5.


26. *Id.* at 86. See also *Forest Service, U.S. Dep't of Agriculture, Forest Service Manual*, tit. 1000 (Organization and Management) [hereinafter cited as *Forest Service Manual*].

its general policy guidelines. Many of the rangers' decisions are consequently made for them.

Although the ranger may make the final decision in cases such as very small timber sales, issuance of some special use permits, and employment of labor to carry out necessary duties, most of his decisions are not binding until approved from above. And although the supervisors and the district rangers may do the research and preparation for a course of action, because of the massive communication system, any preformed decision made by the higher officials will prevail.

The Forest Service has a policy of maintaining good public relations and will, on occasion, have public hearings to ascertain public sentiment on a particular issue. Herbert Kaufman, in his study of the Forest Service stresses that the involvement of the rangers in community activities serves another purpose beside public relations:

Public relations is designed to reduce resistance from outside the Service, win support when possible, and counteract centrifugal tendencies that might induce field men to deviate from promulgated policy. It is intended to affect the external forces acting on the Rangers while it strengthens 'inside' them, by heightening their identification with the organization, tendencies toward conforming with agency decisions. It is not always and everywhere completely successful, but it seems to have been quite effective generally.

The Forest Service is a well integrated and organized administrative agency that operates to serve the public interest, which it defines as "the greatest good for the greatest number, in the long run." The public interest has been interpreted by the Forest Service, in treating lands like Mineral King, to stress recreational development. The Council on Environmental Quality has reported: "Although federal land management is meant to maximize public benefit and not to reflect only

---

28. [T]here are many influences besides the top policy pronouncements shaping their behavior. The customs and standards of the groups they work with, the values and attitudes and pressures of the communities in which they reside, and the preferences and prejudices they bring with them from their extra-organizational experiences and associations may lead them in a variety of directions. And the problems of internal communication make the task of directing them a complicated and difficult operation, leaving them vulnerable to the fragmentative influences.

Id. at 86-87.

29. Id. at 96; LAND USE PLANNING, supra note 18, at III.
31. Id.
32. H. KAUFMAN, supra note 23.
33. Id. at 197.
34. See generally, H. KAUFMAN, supra note 23; LAND USE PLANNING, supra note 23.
35. Letter from Charles Connaughton, supra note 19.
economic gain, land management agencies have been criticized for policies that overemphasize developmental values.  

Public sentiment, though important to the Forest Service, is only a minor source of information in its decision-making process. When the Service makes a decision, it has one paramount issue to deal with, namely, which of the five uses authorized by the Multiple Use Act of 1960 ought to be adopted for the given forest. Only when this large-scale decision is made does the Forest Service turn to the smaller considerations involved in administering the land. These smaller considerations determine more specifically how the area is to be used.

The twenty-seven year history of the proposed development of Mineral King Valley illustrates the values and inputs considered by the Forest Service in the administration of the national forests. The continuing failure of the administrative machinery adequately to consider competing outside interests led the Sierra Club to seek judicial review as a last resort. This failure invites a reassessment of Forest Service procedures to determine whether earlier public input would better ensure action reflecting diverse public interests.

II

THE HISTORY OF THE MINERAL KING DECISION

A. Early Studies and Plans

During the Second World War, the Forest Service received a letter from Marine Corps Major Robert S. Wade expressing an interest in the plans the Forest Service had for the Mineral King area as a potential winter sports area. Norman L. Norris, the forest supervisor, responded that very little consideration had been given to the Mineral King area and that the efforts of the Forest Service were directed elsewhere for development. Although the files of the Forest Service contain no other correspondence, the Forest Service apparently received many other inquiries about Mineral King. In August, 1945, an interoffice memorandum requested that a forester be sent into the


37. See generally Heyman & Twiss, Environmental Management of the Public Lands, 1 ECOLOGY L.Q. 94 (1971) for an overview of the Forest Service's procedures for considering the environmental impact of various land-use decisions. See text accompanying notes 133-34 infra for an indication of the specific considerations in arriving at the Mineral King decision.

38. See Forest Service File 2340, supra note 19.

39. "Our tentative plans for post-war development of winter sports areas provide for three possible areas on the forest. These are: Big Meadows, Quaking Aspen, and Tobias Mountain." Letter from Norman Norris (Supervisor, Sequoia Nat'l Forest) to Major Robert Wade, Feb. 2, 1945, in Forest Service File 2340, supra note 19.
Mineral King area to make preliminary studies of the area as a potential winter sports development.  

Forester James Gibson was sent into Mineral King, and reported: I believe that the effect of summer recreation must be given full consideration in the determination of an ultimate plan for this area. Conceivably, it might be deemed desirable to develop Mineral King primarily as a winter sports center, regardless of the summer values which might be injured or destroyed. On the other hand, this area represents one of the few remaining spots of this kind in California.

Gibson also stressed the remoteness of the valley and suggested that a small area be developed for low-intensity use so as not to destroy its natural condition. On the basis of this report and a memorandum sent by Assistant Regional Forester Morse, J. E. Elliot, then supervisor of Sequoia National Forest, stated that the Forest Service would not then consider Mineral King as a site for a winter sports development.

Interest in further studies of the area arose again in early 1946, prompting the Forest Service to send Robert H. Cron, the district ranger, into Mineral King in early March to analyze the winter skiing potential. Cron reported that the skiing for all types of skiers would be excellent because of the variety of slopes and types of snow, but that there was no good access road to the area and any development might conflict with the summer recreation.

By the end of 1946, several groups had expressed interest in obtaining special use permits to develop Mineral King as a winter sports area, with one party expressing interest in making it an all-year resort. The first public exposure of the Forest Service's interest in the possibility of developing Mineral King came on January 11, 1947.

---

40. This trip is designed to learn something of the country and to gather basic information . . . [because] there has been, during the last several months, so much discussion of the potentialities of Mineral King as a winter sports area that it seems desirable that we obtain some first hand knowledge of that country.

Interoffice memorandum, Aug. 21, 1945, in Forest Service File 2340, supra note 19.

41. Memorandum from James Gibson (Forester) to C.B. Morse (Ass't Regional Forester), Oct. 1, 1945, in Forest Service File 2340, supra note 19.

42. Id.

43. "I read [James Gibson's] report with considerable interest and fully concur with both you [Morse] and Jim that for the present, at least, we will not consider Mineral King as a winter sports area." Memorandum from J.E. Elliott (Supervisor, Sequoia Nat'l Forest) to C.B. Morse (Ass't Regional Forester), Nov. 13, 1945, in Forest Service File 2340, supra note 19.

44. "On the debit side are the lack of good access roads and the restricted area on the floor of the valley leading to conflict with summer recreation." Memorandum from Robert Cron (District Ranger) to J.E. Elliot (Supervisor, Sequoia Nat'l Forest), Mar. 19, 1946, in Forest Service File 2340, supra note 19.

45. E.g., letter from the Lawrence Company (of which Fay Lawrence, soon to become chairman of the Mineral King Committee, was President) to the Forest Service, Aug. 21, 1946, in Forest Service File 2340, supra note 19. See letter from Bruce
The *Times-Delta* of Visalia, California published two front-page articles concerning the interest of ski clubs in the valley as a potential ski area.⁴⁶ The major problem that stymied the development of Mineral King, as mentioned by Gibson and Cron in their reports,⁴⁷ was the inaccessibility of the area by road.⁴⁸ Yet, several expert skiers had expressed enthusiasm for the potential of Mineral King.⁴⁹ The Forest Service, based on its own observations and those of reputable skiers, had determined that the area should be considered for development.⁵⁰ The record shows that other interest groups that would be concerned with a development were not contacted or consulted at this stage of the decision-making process.

Because of the inquiries into permits for cabins and other non-commercial development in Mineral King, Assistant Regional Forester M. M. Barnum wrote John Sieker, Chief of the Division of Recreation and Land of the Forest Service in Washington, D.C., in 1948 that a more detailed study should be done before a final plan for the area could be drawn up. He stated that the Forest Service was not in a position to issue any special use permits for Mineral King.⁵¹ Ludvig Hasher and Gibson went into Mineral King in the winter of 1947-48 to make further winter studies of the conditions of the valley, especially the serious avalanche problem.⁵² Sieker felt that their studies would answer many of the questions the Forest Service had concerning Mineral King. He entered the following into the Forest Service record:

[I]f [the Hasher and Gibson study] supported the contention that

---


⁴⁷. Memorandum from James Gibson, *supra* note 41; memorandum from Robert Cron, *supra* note 44.


⁴⁹. *E.g.*, letter from the California Ski Ass'n (a division of the National Ski Ass'n), to M.M. Barnum (Ass't Regional Forester), Aug. 13, 1947, in Forest Service File 2340, *supra* note 19.

⁵⁰. It seems safe to say all forest officers who are engaged in winter sports development in California, as well as the top skiers, are agreed that [Mineral King] justifies development. The next question is "How?" The answer will require detailed study.

Letter from M. M. Barnum to Fay Lawrence (chairman of the Mineral King Committee and a representative of the California Ski Ass'n), Aug. 7, 1947, in Forest Service File 2340, *supra* note 19.

⁵¹. This is a somewhat complicated situation, in that we are not now in a position to issue Special Use Permits to Mineral King. A great deal of study and planning must be completed before a final plan can be prepared.

Memorandum from M. M. Barnum to John Sieker (Chief, Division of Recreation and Land), Jan. 7, 1948, in Forest Service File 2340, *supra* note 19.

the area is well suited to winter sports development, the Forest Service would be willing to make public its intention to permit the development, by private capital, of the winter sports facilities and accommodations necessary and desirable for maximum public use of the area.\textsuperscript{53}

The lack of a good access road continued to be the main stumbling block for the Forest Service.\textsuperscript{54} Fay Lawrence, chairman of the Mineral King Committee (a group interested in commercial development), wrote to Lyle F. Watts, Chief of the Forest Service, indicating that he wished to obtain a permit for the use of Mineral King. Watts responded that, when the Service was assured that there would be an all-weather road built into the area, “we will publish a prospectus stating the public need in Mineral King and setting forth the minimum development needed.”\textsuperscript{55}

At this time, one Cortlandt Hill applied to the Forest Service for a terminable permit\textsuperscript{56} to build facilities as a base of operations for studying the Mineral King Valley. He proposed to spend $50,000. Watts felt that this figure was very high for an operation that could be terminated at any time:

\begin{quote}
We think that a $50,000 investment on such a temporary basis is high and that it might embarrass us if cancellation became necessary in a year or two. It therefore seems desirable to have a statement from Mr. Hill that he is accepting the permit and investing $50,000 with full knowledge of its temporary and uncertain nature.\textsuperscript{57}
\end{quote}

Meanwhile, Hasher and Gibson completed their winter survey of Mineral King and submitted it to the assistant regional forester, who commented: “We do not think [the survey] could be used as a prospectus, however. The prospectus must represent a plan for development of the area which must await additional study, both summer and winter.”\textsuperscript{58}

\textsuperscript{53.} Statement by John Sieker, Jan. 8, 1948, in Forest Service File No. 2340, supra note 19.

\textsuperscript{54.} See note 44 and accompanying text supra; Note, supra note 48, at 107-08.

\textsuperscript{55.} “The prospectus will list the permit conditions and the qualifications required of applicants, and will invite offers to undertake the development.” Letter from Lyle Watts (Chief, Forest Service) to Fay Lawrence, Mar. 26, 1948, in Forest Service File 2340, supra note 19.

\textsuperscript{56.} For a discussion of the permit system, see text accompanying notes 185-92 infra.

\textsuperscript{57.} Memorandum from Lyle Watts (Chief, Forest Service) to Region Five, July 8, 1948, in Forest Service File 2340, supra note 19 (emphasis added). The Sierra Club argued that the possibility of Forest Service embarrassment at having to cancel a revocable permit and destroy any investment undertaken pursuant to it showed that the Forest Service regarded the revocable permits as being in fact irrevocable. Brief for Petitioner at 52-54, Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972). See text accompanying notes 192-96 infra.

\textsuperscript{58.} Memorandum from M. M. Barnum (Ass't Regional Forester) to Paul W.
This survey dealt only with the feasibility of developing Mineral King, but once the feasibility determination was made, it was tantamount to the decision to develop. Ideally, after the feasibility of development is determined, there should be a second decision whether to go forward with development. Here, the two separate determinations were merged into one.

In spite of the recommendation for additional study, the first prospectus was issued that same month. Copies were sent to The Skier and Ski Magazine requesting publicity for the potential development of Mineral King, and the Forest Service released the information on the prospectus to the press in September, 1949. Hill and Lawrence joined together and filed a bid for a permit pursuant to the prospectus. Due to the cost and unfeasibility of building a proper access road, however, they did not pursue the application; but the Forest Service still desired to develop the area.

Strathem (Supervisor, Sequoia Nat'l Forest), Aug. 18, 1948, in Forest Service File 2340, supra note 19 (emphasis added). The Hasher and Gibson report was sent to, inter alia, representatives of the National Ski Association, the California State Chamber of Commerce, the Ski Advisory Committee, the California Ski Association, the Mineral King Committee, permit applicants, and the Sierra Club. Id.

59. See text accompanying note 53 supra.

60. A prospectus for a development is issued, setting forth specific minimum requirements. It states that bids will be received until a certain date upon which a selection process will pick the best bid submitted. There is no information available concerning this 1949 bid, though it may be presumed to have been much smaller than the 1965 prospectus.

61. Letters from James Gibson (Forester) to the editors of The Skier and Ski Magazine, Aug. 29, 1949, in Forest Service File 2340, supra note 19.

62. The Forest Service announces it will accept applications until Feb. 28, 1950, from individuals or firms who can show ability to develop and operate a resort and ski facilities at Mineral King. The successful applicant will receive a permit to use certain national forest land for the project, in return for payment of an annual fee.

Memorandum from M. M. Barnum (Ass't Regional Forester) to Paul W. Strathem (Supervisor, Sequoia Nat'l Forest), Sept. 22, 1949, in Forest Service File 2340, supra note 19.

63. Since a prospectus was issued for the proposed development at Mineral King and neither Mr. Hill nor any of his associates were sufficiently interested to seek a permit and we had no other applications, we are free to negotiate for a permit in this area, unless you have reason to believe that more than one applicant is interested. In that case we may have to issue a new prospectus or portion thereof and accept the one that will pay the highest rental, equal services being considered, to the government. You are free to talk to Mr. Rainwater [Secretary-Manager, Tulare County Chamber of Commerce] or any of the interested parties but all negotiations should be conducted on the basis of a development similar to that called for in the prospectus. If a less elaborate development is proposed we will have to get out a new prospectus. We do not believe this desirable, however, since the area is an expensive one to open and we believe the prospectus was the minimum to be considered.

Memorandum from M. M. Barnum (Regional Forester) to Supervisor, Sequoia Nat'l Forest, July 18, 1951, in Forest Service File 2340, supra note 19.
B. Promoting Development: The Hearing Stage

A new proposal for development was submitted in 1952 by Wolfe Frank and Robert Miller. The Forest Service was wary after the original prospectus was issued and had produced only one applicant, and wanted to analyze this proposal before issuing a new prospectus for the area. The interested ski associations continued to urge development, stating that there was a need for winter sports areas and the present facilities were inadequate.

In November, 1952, Edward Cliff, Assistant Chief of the Forest Service in Washington, D.C., wrote to Region Five:

The Forest Service is desirous of having the ski terrain of Mineral King developed and made available to the public because we believe that it is an outstanding area which will have great public value and should be developed for public use.

The basis for this belief appears to have stemmed from the Forest Service’s interest in recreational development, in this case of outside skiing facilities, to the exclusion of other interests that might, or might not, have been more important to the general public. The Forest Service regarded the question of issuing a prospectus on the basis of the Frank and Miller proposal as a completely internal decision and wanted to avoid publicity and potential public scrutiny.

At the same time, the Forest Service was not completely unaware

64. Frank and Miller’s proposal included the following: an investment of $750,000; all-year use; a resort lodge for 100 persons and an inn for 250; a dormitory; service building; funicular, cable car, cog railway or chair lift with a capacity of 600 persons per hour; a T-bar and rope tows; and a shelter/snack bar at the top of the lift. This development would not necessarily have stopped at this stage; final construction estimates included: accommodations for 2000; three lifts each with 600 persons-per-hour capacity; a ski jump and ice rink; and a cinema, school, and church. Forest Service File 2340, supra note 19.

65. I am always skeptical about possible promotion schemes organized on the strength of a Forest Service permit. However, one of these days, someone is going to promote an outstanding ski development in California and I believe we should follow this proposal [the Frank and Miller proposal] through until it proves itself one way or the other.

Memorandum from Jack McNutt (Supervisor, Sequoia Nat’l Forest) to M. M. Barnum (Regional Forester), Aug. 27, 1952, in Forest Service File 2340, supra note 19.

66. Interest in the sport of skiing has developed to the extent that present facilities are inadequate. Our association strongly favors a well-planned and well-supervised program of winter sports development.

Letter from Far West Ski Ass’n to Region Five, Oct. 16, 1952, in Forest Service File 2340, supra note 19.

67. Memorandum from Edward Cliff (Ass’t Chief, Forest Service) to Region Five, Nov. 3, 1952, in Forest Service File 2340, supra note 19.

68. “Until the Chief has approved the prospectus and sample special use permits, we are not at liberty to make copies or information available . . . .” Letter from M. M. Barnum (Ass’t Regional Forester) to Mr. Rainwater (Secretary-Manager Tulare County Chamber of Commerce), Jan. 8, 1953, in Forest Service File 2340, supra note 19.
of the importance of public sentiment. Cliff wrote to Region Five requesting an evaluation of regional and local sentiment in order to determine whether it was desirable to hold a public hearing in spite of Region Five's "general objections to a public hearing for a problem of this kind." 69 Cliff did not want to create the undesirable precedent of hearings as an integral part of the procedure for issuance of a prospectus. 70 But even while the Forest Service sounded out public sentiment, it still maintained that the area should be developed. 71 Interest in a public hearing on the issue of developing Mineral King grew during June of 1953. 72 The Regional Forester wrote to the Chief expressing the desire of the citizens of Tulare County for some type of public hearing, adding that he felt a hearing was necessary: "We are somewhat concerned that enthusiasm for development may have clouded the major issues requiring careful study of all public benefits." 73 This was the first real concern the Forest Service had shown about the potential interests of the non-skiing public in the future of Mineral King.

Arrangements were made for a public meeting in Visalia, California, conducted by Congressman Harlen Hagen under the auspices of the Tulare County Chamber of Commerce, in March of 1953. Cortlandt Hill and the Mineral King Survey Company were invited because of their past interest in the project, though they did not attend. Wolfe Frank and Robert Miller, the prospective permittees, were invited and attended. A total of eighty-two persons or groups, mostly Chambers of Commerce and ski clubs, were invited. Only three were conservation organizations. 74 Dr. Gould of the Sierra Club filed no

69. We appreciate your general objections to a public hearing for a problem of this kind, but we are not convinced that this may not be a case [in] which a hearing is justified and could be held without establishing any undesirable procedure.

Memorandum from Edward Cliff (Ass't Chief, Forest Service) to Region Five, Jan. 19, 1953, in Forest Service File 2340, supra note 19.

70. Id.

71. We have advised Mr. Hendee [Regional Forester] that it will be necessary for him to discuss [Mineral King] with local groups and individuals before we take any definite action or issue a prospectus relating to the development of Mineral King.

We all recognize that Mineral King has the terrain, snow conditions and location to become one of the really outstanding ski areas in the United States, and we are certainly anxious to see this development progress as rapidly as possible so that the general public can enjoy the wonderful winter and summer recreation opportunities which this unique mountain area can provide if properly developed.

Letter from Richard E. McArdle (Chief, Forest Service) to Mr. Rainwater, Jan. 27, 1953, in Forest Service File 2340, supra note 19.

72. See Forest Service File 2340, supra note 19. Most of the many correspondents desired a hearing.

73. Letter from Clare Hendee (Regional Forester) to Edward Cliff (Ass't Chief, Forest Service), Feb. 12, 1953, in Forest Service File 2340, supra note 19.

74. Note, supra note 48, at 108 n.20.
statement on behalf of the Sierra Club, but went on record as favoring sensible development since there already was partial development.  

The main question the hearing dealt with was access to the valley and its cost. The problem of providing a suitable access road, requiring the state of California to authorize construction and the National Park Service to grant permission to cross Sequoia National Park, blocked any further action on the proposal of Frank and Miller.  Almost nothing was done between 1953 and 1959 with plans for developing Mineral King because of this problem.

C. Large-Scale Development Plans

Walt Disney Productions first expressed an interest in Mineral King as a winter sports area in 1960.  However, Disney Productions too was stymied by the lack of an access road to the valley. Assistant Regional Forester W. S. Davis wished to encourage Disney Productions, sending it the following statement:

We both share [the] conviction of the very high winter sports development potential of the Mineral King area and feel that it is just a matter of time until a combination of proper financial interest and public need will turn it into one of the outstanding recreational attractions of southern California.

The problem of the road, however, prevented further consideration of developing Mineral King for several years. Toward the end of 1964 Davis expressed a desire that a new prospectus be considered because of increased interest in developing a winter sports area in Mineral King, including a new proposal from the American Resort Consultants.  Davis indicated that a prospectus would "test the extent of the interest."

75. See Forest Service File 2340, supra note 19.
76. Id.
77. Letter from John Sieker (Chief, Division of Recreation and Land) to Hans Granger of Aspen, Colorado, Mar. 31, 1959, in Forest Service File 2340, supra note 19.
78. Letter from Disney Productions to W. S. Davis (Ass't Regional Forester), July 8, 1960, in Forest Service File 2340, supra note 19.
79. Letter from Disney Productions to W. S. Davis (Ass't Regional Forester), July 8, 1960, in id. See also letter from W. S. Davis to Willy Schaeffler (ski expert associated with Disney Productions), July 11, 1960, in id.
80. Letter from W. S. Davis (Ass't Regional Forester) to Edsel Curry (Manager, Disney Productions), Aug. 9, 1960, in Forest Service File 2340, supra note 19. The letter endorsed ski expert Willie Schaeffler's enthusiasm regarding skiing conditions in Mineral King.
81. See Forest Service File 2340, supra note 19.
82. Due to the increasing interests in the development of the Mineral King area for winter sports, it may be necessary to prepare some form of prospec-
Meanwhile, the Sierra Club's Kern-Kaweah Chapter had studied the Mineral King Valley and wrote to the supervisor of Sequoia National Forest, L.M. Witfield, stating that it wished to know what the Forest Service plans for the area were. The Chapter stated that it would oppose development of Mineral King and that the valley should be preserved for the existing uses: "hiking, fishing, pack-train tripping, camping [with] minor modifications."

Witfield responded to the Kern-Kaweah Chapter by stating that the Forest Service was considering the issuance of a new prospectus to developers and that the best proposal would be accepted if suitable and within the terms the Forest Service had outlined. Witfield's letter indicates that although the Sierra Club had a legitimate interest in the environment, it had no influence on the decision-making process of the Forest Service regarding Mineral King's future. Witfield later stated to the Sierra Club that there was a public interest in the development of the Mineral King area and that the Forest Service should not delay this development, although the Sierra Club would be invited to consult with the prospective permittee. Even if the Sierra Club

Memorandum from W. S. Davis (Ass't Regional Forester) to L. M. Witfield (Supervisor, Sequoia Nat'l Forest), Dec. 8, 1964, in Forest Service File 2340, supra note 19.
84. Because of renewed interest in development of Mineral King, the Forest Service is considering the issuance of a prospectus to potential developers. The prospectus would call for proposals for development of the area. The most suitable proposal would be selected by the Forest Service and a temporary permit issued which would allow use of the National Forest land for advanced planning purposes only. If, within a specified period, improved access is programmed, a long term permit for actual development would be issued. It may well be that those interested will find development is not feasible at this time because of access or other problems . . . .
85. The Sierra Club, which was founded in 1892 by John Muir, has evolved from a western outing club with few public environmental programs to an active organization that provides vigorous leadership in protecting natural places and processes, including recourse to the courts.
1970 ENVIRONMENTAL QUALITY REPORT, supra note 36, at 216.
86. Our purpose here has been to strike a meaningful balance and to meet public need while still protecting the resources. Otherwise having made the determination that the development of winter sports activities is desirable and a proper form of management, there seems to be little reason for the Forest Service to hesitate in this development . . . .
If a permit for study is issued, we would very much like to direct the permittee to your group so that he may have the benefit of your study [Report of the Conservation Committee of Kern-Kaweah Chapter on Mineral King] and thoughts on his development program.
had been able to consult with a prospective permittee, the decision to develop had been made and the minimum size of the development had already been dictated by the qualifications of the prospectus. Any possibility of meaningful negotiations to preserve Mineral King relatively intact was past. The Forest Service had made its decision on the future of Mineral King.

The prospectus was issued in February, 1965. The initial facilities included:

1. Lifts or tramways with a capacity of 2,000 persons per hour from the valley floor.
2. Parking for 1,200 automobiles. Ski shelter, first aid, communications, water supply, sanitation, and maintenance structures. Resort with overnight accommodations for at least 100 individuals which may be located on privately-owned land.\(^87\)

The estimated cost of the private facilities was $3,000,000.\(^88\) On February 27, 1965, a news release announced the prospectus,\(^89\) and copies of the prospectus were sent to interested parties, including the Sierra Club. In the months following the issuance of the prospectus, the Forest Service received a large number of letters protesting the prospective development plan, and a few supporting it.\(^90\) The Forest Service response to the protesting letters indicated that it felt the public interest would best be served through the development, which would proceed under Forest Service supervision to insure the least possible detrimental impact on the environment.\(^91\)

On June 7, 1965, the Sierra Club requested that the Forest Service hold a public hearing concerning the prospectus.\(^92\) Regional
Forester Charles A. Connaughton responded that a public hearing was held in 1953, and that there was no record of opposition at that hearing. The Forest Service also felt that the holding of a public hearing would not be consistent with its commitment to development as embodied in the prospectus. The Forest Service also noted that a development might not result from the issuance of the prospectus.

Two months later, the Sierra Club sent a new request for a public hearing to Cliff. The position taken by the Forest Service was:

By issuing the prospectus, the Forest Service in effect announced a decision that Mineral King should be developed for recreation by private enterprise. *We now have the strongest moral obligation to accept the best proposal* that meets or exceeds our specifications. We have a legal right to reject any and all bids, but *to make no award at all would be totally indefensible* unless all fail to qualify. That hardly seems likely now.

*The time for indecision in the Mineral King matter passed when the prospectus was issued.*

Several other letters were received by the Forest Service regarding requests for a public hearing to which the Forest Service responded that a hearing had been held in 1953, and that the main change in the situation since that time was that there was a greater demand for the development of recreation areas. Many letters were received in opposition to the plan to develop Mineral King. The Forest Service responded to each that it was working in the best public interest. In one letter the Regional Forester wrote:

The policy of the Forest Service ... is "the greatest good for the greatest number, in the long run," and in Southern California, in particular, one of our key concerns is the serving of vast numbers.

Six bids were received, and Cliff, Assistant Secretary of Agriculture John Baker, and Executive Assistant Thomas R. Hughes reviewed the bids to make a final recommendation to Secretary of Agric...
Before the final decision was reached, the Forest Service continued to receive many letters opposing the development, to which it responded:

We appreciate receiving your views concerning the proposed development of Mineral King. It is obvious that you have strong and sincere convictions on this matter. However, there are others who just as sincerely do not agree with you. They too are making a case for their position.100

Disney Productions' bid was accepted December 17, 1965,101 and a three year preliminary permit was issued for Disney Productions to develop a master plan to be submitted for approval by the Forest Service.102 On January 8, 1969, Disney submitted its master plan and was told two weeks later that the plan was approved.103 Plans for turning the isolated valley of Mineral King into a year-round sports development were completed.

III

THE MEANING OF THE MINERAL KING DECISION

In light of this administrative history, three important questions arise: how much outside influence and input does and should the Forest Service include in its decision-making processes; what opportunities for outside review should there be throughout the course of its decision-making processes; and finally, should the Mineral King development be reviewed in court as demanded by the Sierra Club.

A. Inclusion of Outside Influence and Input in Forest Service Decision Making

Analyzing the Mineral King decision requires a determination of what interests were at work within the Forest Service, and what interests were considered and finally persuasive in the development decision.

1. Inadequate Procedures for Outside Participation

The record shows that there was a predisposition within the Forest Service to develop this area. The issue of whether there should be

99. San Francisco Chronicle, Oct. 28, 1965, at 52, col. 2; see Forest Service File 2340, supra note 19. The importance of the decision made concerning Mineral King was such that the Secretary of Agriculture made the final decision on which bid to accept, a decision he would not normally make. See Forest Service Manual, supra note 26, tit. 1000 (Organization and Management).
100. E.g., letter from Edward Cliff (Asst Chief, Forest Service) to James Murphy, Nov. 12, 1965, in Forest Service File 2340, supra note 19.
101. See Forest Service File 2720, supra note 7.
102. Id.
103. Id.; see Note, supra note 48, at 110.
development was handled by the evaluations of ski interests and ski experts.\textsuperscript{104} The ski interests were well articulated and well received by the Forest Service, and while they were not the only interests being expressed through the mail, they were the only group exerting any significant influence. Some special interest groups were virtually ignored in the decision-making process.\textsuperscript{105} Not all of the interests outside the Forest Service were given sufficient opportunities to oppose the Forest Service's plans or propose alternative suggestions for controlled and responsible development; to present their points of view on the proposed development in a forum in which these views would be influential in the planning of the size and type of the development and its overall impact on the Mineral King Valley; or to insure that the Forest Service was not determining what the public interest was without any outside views.

Congress has given the Department of Agriculture the right under the Multiple-Use Sustained-Yield Act of 1960\textsuperscript{106} to determine the uses to which the national forests may be put. This Act does not set out the method by which the Forest Service is to choose which of the five uses (outdoor recreation, range, timber, watershed, and wildlife and fish purposes)\textsuperscript{107} ought to be administered in a particular area.

It is within the discretion of the Forest Service to do anything within the scope of the Act that it deems to "best meet the needs of the American people."\textsuperscript{108} There are no guidelines for determining what the public interests are. There is no early check on the decision-making process to insure that all interests are considered and that the Forest Service is not dealing with the environment in a way that some segments of the public would not deem proper.\textsuperscript{109}

The Forest Service conducted its own studies on the environmental impact of its projects,\textsuperscript{110} even before NEPA required such review by all federal agencies.\textsuperscript{111} The purpose of NEPA is to insure that the

\textsuperscript{104} Letter from M. M. Barnum, \textit{supra} note 50.
\textsuperscript{105} See text accompanying note 92 \textit{supra}; Letter from W. S. Davis, \textit{supra} note 91.
\textsuperscript{107} \textit{Id.} § 528.
\textsuperscript{108} \textit{Id.} § 531.
\textsuperscript{109} For the most part, program development, planning and decision-making are made within the Forest Service without formal notice to or participation by the public, and without effective check or review beyond the Secretary of Agriculture, the Bureau of the Budget, and Congress. Except for the informal channels which the Forest Service mainly uses to inform and advise interested public of Forest Service plans and policies, there are few effective formal channels through which the public can operate to initiate or review proposals.
\textsuperscript{110} \textit{Id.} at III-36 to -61. \textit{See Forest Service Manual, \textit{supra} note 26, tit. 2100 (Multiple Use Management); tit. 2140 (Multiple Use Surveys).}
\textsuperscript{111} See note 177 \textit{infra}.
decisions of administrative agencies are made with full consideration for their environmental effects.\textsuperscript{112} The requirements of NEPA are not intended to become mere administrative procedures which will not affect the substantive decision made\textsuperscript{118} but the courts can only insure that the procedural requirements are fulfilled.\textsuperscript{114} Further, the environmental impact statement need not even be completely fair or objective,\textsuperscript{115} as long as it fulfills its minimum statutory purposes. NEPA does not authorize the Council on Environmental Quality to review and alter the decision made,\textsuperscript{116} nor does it give the courts the power to review the merits of a decision.\textsuperscript{117} Although NEPA forces certain procedural requirements on governmental agencies,\textsuperscript{118} it is clearly inadequate at providing for the consideration of diverse public interests in the decision-making process.

The Forest Service is involved primarily with duties that directly affect the environment. It should assure not only that approved developments and projects are designed so as to have minimal impact on the

\begin{itemize}
\item \textsuperscript{112} "Section \textsuperscript{102(2)(C)} must be read to indicate a congressional intent that environmental factors, as compiled in the 'detailed statement,' be \textit{considered through agency review processes.}" Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1117-18, 2 ERC 1779, 1784-85 (D.C. Cir. 1971).
\item \textsuperscript{113} NEPA requires that an agency must—to the \textit{fullest} extent possible under those other statutory obligations—consider alternatives to those actions which would reduce environmental damage. That principle establishes that consideration of the merits must be more than a \textit{pro forma} ritual. \textit{Id.} at 1128, 2 ERC at 1792.
\item \textsuperscript{114} Conservation Council v. Froehlke, — F.2d —, 4 ERC 1044 (4th Cir. 1972) (NEPA is complied with even if the cost of a project exceeds the benefits and even though strong evidence is presented that casts doubt on the advisability of continuing the project).
\item \textsuperscript{115} The court is satisfied that the new [Environmental Impact Statement], although obviously not as fair and impartial and objective as if it had been compiled by a disinterested third person, meets the full disclosure requirements of NEPA and is a record upon which a decision-maker could arrive at an informed decision. EDF v. Corps of Engineers, 342 F. Supp. 1211, 1217, 4 ERC 1097, 1101 (E.D. Ark. 1972).
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making processes and to advise other interested agencies and the public of the environmental consequences of planned federal action. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1114, 2 ERC 1779, 1782 (D.C. Cir. 1971).
\item \textsuperscript{118} But there is no way that [the decision-maker] can fail to note the facts and understand the very serious arguments advanced by the plaintiffs if he carefully reviews the entire environmental impact statement. \textit{Whether [the] decision-maker is influenced by such facts, opinions and arguments, or whether such facts, opinions and arguments cause that decision-maker to call for further studies and investigations, is another matter—not one over which this, or any other court, has any control.} EDF v. Corps of Engineers, 4 ERC 1097, 1101 (E.D. Ark. 1972) (emphasis added).
\item \textsuperscript{118} \textit{See} \textit{Forest Service Manual}, tit. 1900 (Environmental Planning and Management), Chs. 1940 \textit{et seq.;} 2 ELR 46058 (1972).
\end{itemize}
ecological stability of the national forests, but also that the overall amount of approved development is consistent with the need to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . ." However, while the Forest Service has adequate legal authority to protect ecological values,

there is no statute or executive order that specifically directs the Forest Service to maintain particularized standards of environmental quality in carrying out its activities . . . . Thus, the Service is enabled but not directed, and its choice of priorities and standards is largely its own. Given the fact that the Service often gives greater emphasis to resource production, recreation, and other uses of the forests than to environmental preservation, members of the public concerned with environmental values must have more adequate ways to challenge Forest Service priorities and plans when they feel these values are being sighted.

120. Heyman & Twiss, supra note 37, at 128; cf. Land Use Planning, supra note 23, at III-25.
122. The problem at Mineral King is that recreationists [the Forest Service here] and protectionists [the Sierra Club] look at the same thing with different eyes. One sees public land unused and considers it a waste. The other sees the same public land unused, and considers it preserved. One sees the tampering with nature, and considers it necessary. The other sees the tampering with nature, and imagines a biotic community jeopardized, . . . . The recreationist at Mineral King says: "Look beyond the ridges; there are still nearly two million acres of adjacent wilderness. What's wrong with using this tiny piece of land, this mere 1,500 [sic] acres, this less than one-tenth of 1 per cent of all the national forest land in California?" The protectionist sees population growing and public land shrinking, and he wonders where it will ever stop.

The recreationist sees public land put to use; the protectionist sees it put to auction. In California alone, 46 ski areas have been built on national forest land; throughout America, the figure is nearly 200. The only thing unique—say the recreationists—is that the Disney resort will be better than any other. The only thing unique—say the protectionists—is the magnitude of the Disney development.


It is apparent from the record in this case that the Forest Service and the Department of Agriculture have excellent appeals procedures affording fair and expeditious forums for persons such as these plaintiffs to lodge their suggestions, protests and objections and have them fully and fairly considered and evaluated.

Id. at 1538. The administrative review provisions found in 36 C.F.R. § 211 (1972), although not applicable in this case, could prove a viable vehicle for outside input and interim review.
The failure of the Forest Service to consider serious outside participation is clearly exemplified by the Mineral King case. Disney Productions' vast development was not formulated as a specific proposal at the time of the 1953 hearing when the Frank and Miller proposal was before the Forest Service. In operating size and total land area to be used, the two proposals are incomparable. The Forest Service used this hearing to express its feelings that outside interests were given a sufficient opportunity to express themselves, and that by 1965 the only change that had occurred was in the demand for a winter sports area.

2. Form for External Input

The Forest Service has made it a policy to maintain good public relations as it fulfills its role as administrator of the national forests. Thus, as much as possible, decisions are to be made at the local level, in order to reflect local opinion. However, this policy has only recently been emphasized. Once the Forest Service has decided on a particular course of action it feels free to ignore public opinion. In the development of Mineral King one public hearing was held twelve years before the issuance of a prospectus that bore no comparison in size and cost to the plans on which the hearing was held. The result—final development plans on which there was never an opportunity for public comment or protest.

Public hearings are held by the Forest Service only when required by law or public pressure. The Forest Service does not favor pub-

123. Frank and Miller's proposal [see note 59] and the Disney proposal [see note 5] are vastly different in the number of ski facilities: Disney proposed 20 ski lifts, Frank and Miller contemplated 3 major lifts, a T-bar and some rope tows; the ecological impact of the Disney proposal on the basins and mountain sides would obviously be far greater than that of the few lifts proposed by Frank and Miller. Disney wants to spend $35 million dollars while initially Frank and Miller wanted to invest $750,000 with a speculative maximum of $5 million. On its face, the Disney proposed development is a much larger investment, incorporating much more land than the Frank and Miller proposal that was the subject of the 1953 hearing.

124. Letter from W. S. Davis, supra note 95.

125. At its June 1967 meeting, the Northwest Regional Multiple Use Advisory Council discussed whether major Forest Service management decisions should be made at the local level, or on a more centralized basis at regional or national levels in order to reflect the needs of the public most completely. The consensus was that public opinion and reaction to Forest Service management decisions are steadily becoming more significant, that public opinion must be evaluated and be made a part of decision making, and that decisions should be made as near to the local level as the situation permits.

126. Id. at III-232. However, it should be noted that when the Forest Service has not committed itself to a final decision and sees the need for or usefulness of public input, it can go to great lengths to seek and stimulate that input. Thus the Forest Service held 5 “listening sessions” in various California cities to get public comment.
lic hearings as a way of determining public sentiment. There is some question as to the effectiveness of the 1953 Visalia hearing specifically and of hearings in general. The Forest Service can hardly make any sound decision based on what goes on in a public hearing other than determining whether the local citizens are very much for or against the proposed course of action. Although the public hearing approach is imperfect, it is a necessary and constructive procedural step toward outside consideration and review as a part of the Forest Service's internal decision making. The public will have a greater opportunity to analyze the proposed actions of the Forest Service and the Forest Service will learn more about public sentiment toward their potential courses of action.

Another method of increasing outside participation in the decision making is the submission of formal counter-proposals to the Forest Service from outside groups. When a major land-use plan reaches the decision stage, alternative proposals could be solicited and then reviewed by the Forest Service. This would enhance the input of the concerned public. The Forest Service would then approach its plan with several alternative points of view and could thus make decisions that would be more accommodating to the various interests involved. Together with expanded hearing opportunities, such a system would improve the Forest Service's responsiveness to diverse public interests.

B. Opportunities for Outside Review

1. Need for Non-Judicial Review

The Forest Service had three important policy decisions to make during the planning of the Mineral King development. In order to prevent the Forest Service from justifying each decision on the grounds

on proposals for management of national forest land in the Lake Tahoe region. Over 700 people attended these sessions and received a slide presentation of the planning background as well as a fairly detailed graphic and textual pamphlet. In addition, Forest Service officials made speeches concerning the planning effort to various groups. See J. Deinema, Report to the President on the Tahoe Regional Planning Agency 3 (March 1972); Lake Tahoe Basin Planning Team, Forest Service, U.S. Dept of Agriculture, Lake Tahoe Basin: Planning for Environmental Quality (1971) (copies on file with Ecology Law Quarterly).

127. Id. at III-239. See text accompanying note 55 supra.
128. LAND USE PLANNING, supra note 23, at III-238.
129. Although notice of the hearing is made by announcement in local newspapers and bulletins, and various interest groups are personally notified, there is no assurance that the procedure will elicit all pertinent views—especially those representing national interests. It is frequently found that the views expressed are those of people who will either benefit from the action or be adversely affected . . . In addition, once the final decision is made by the Chief of the Forest Service, there is no provision for further public review.

Id. at III 238-39.
that it was then too far into the next planning stage to reconsider,\textsuperscript{130} each policy decision should have been subjected to outside review when made.

The first decision deserving review was the fundamental question whether Mineral King would be developed or not.\textsuperscript{131} The second decision regarded the size of the development and its type—winter, summer, or all-year use. This policy decision was viewed in the context of the Forest Service’s opinion that Mineral King was needed to serve the expanding public demand for mountain recreation.\textsuperscript{132} The third decision regarded the details of the development and its construction. The inquiry at this stage was focused on both practical and economic feasibility.\textsuperscript{133} The specific factors dealt with were the questions of accessibility; financial responsibility of the bidders; effects on special use permittees with summer homes and private landowners in the valley; air, water, and noise pollution, including sewage treatment, erosion, sedimentation; and soil stability, avalanches, and damage to the sub-alpine ecology.\textsuperscript{134} Although these specific considerations might best be analyzed by experts from the Forest Service and Disney Productions, this should not necessarily preclude review of their decisions.

All three decisions—but particularly the first two—deserve public input and review. Each is distinct and involves a separate set of considerations. The Forest Service, however, blurred the distinctions between the decisions such that they were all made together over the same period of time. The considerations involved were first articulated in 1948 when the first winter survey was completed,\textsuperscript{135} and were gradually formed into a composite decision that had no definite time or place of origin. The first time a conscious final decision was articulated was when the second prospectus was issued,\textsuperscript{136} and by then no other course of action could be taken.

Unless the present lack of procedures for stage-by-stage review is changed, many decisions of the Forest Service affecting major con-

\textsuperscript{130} See text accompanying note 95 \textit{supra}.

\textsuperscript{131} Since 1960, the legal context of this decision is the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. § 528-31 (1970)], whereby the land of the national forests is to be administered for the public benefit and in the public interest. See \textit{Land Use Planning}, \textit{supra} note 23, at III-239.

\textsuperscript{132} Letter from Charles Connaughton, \textit{supra} note 19. See text accompanying note 92 \textit{supra}; \textit{Forest Service}, \textit{supra} note 4, at 4.

\textsuperscript{133} \textit{Forest Service}, \textit{supra} note 4, at 4. A smaller side effect was the aid that would go to the Forest Service and to Tulare County. The Forest Service expected to receive $600,000 annually upon completion of the project, 25% of which would go to Tulare County. See 1965 \textit{Prospectus}, \textit{supra} note 3, at 8.

\textsuperscript{134} See Forest Service File 2340, \textit{supra} note 19.

\textsuperscript{135} See text accompanying notes 52 & 62 \textit{supra}.

\textsuperscript{136} See text accompanying note 95 \textit{supra}.
2. **Interim Review—What Type?**

The inadequacy of judicial review¹³⁷ is a strong argument for some sort of outside review during the course of the decision-making process. Judicial review restricts the ways the Mineral King problem could be solved; the court cannot fashion any compromise between the Sierra Club and the Forest Service. An advantage of non-judicial review is that the parties are not restricted to legal issues as in the courtroom. Serious environmental issues can be discussed and be the subject of bargaining. All ecological considerations may be analyzed fully without being placed in a purely legal context, for during judicial review, the narrow scope of legal issues tends to exclude consideration of policy and environmental factors. Another benefit is that many problems may be solved before reaching the courts. Though neither side will compromise on all of the questions that arise, there should be a method promoting compromise before resorting to the courts for a final, winner-take-all determination. Compromise opportunities offer better overall solutions to the environmental questions that arise. However, this is not to say judicial review does not have its important function to perform. Judicial review should remain to resolve uncompromisable issues that clearly rest on the application of the law.

There is a need for outside review of important decisions by the Forest Service;¹³⁸ the challenge is to specify the form for such outside involvement.

Public hearings would be a constructive forum for outside review—for criticism, proposal of alternatives, and the injection of public sentiment—at each stage in the decision-making process for a major project. Although there was a public hearing on Mineral King, it dealt largely with the issue of road construction.¹³⁹ There was no opportunity to review the decision to develop, or the size and potential impact of the development contemplated by even the first prospectus, much less the later, incomparably more grandiose Disney Productions plan. Such an opportunity must be provided.

Other procedures are necessary to grant fuller review and the possibility of compromise, and to insure that all interests have the opportunity to be heard and accommodated. At each stage, conferences could be established to discuss and review the decision made, as a fo-

---


¹³⁸. LAND USE PLANNING, supra note 23, at III-239; see note 109 supra.

¹³⁹. See text accompanying notes 75 & 76 supra.
rum for negotiation and arbitration between different conceptions of the best course of action. With conferences and arbitration at several points during the planning of a project, outside interests would be insured of participation in Forest Service decisions, and its actions would be more likely to reflect the influence of diverse public interests. Through this method of review, compromise may be reached and matters at issue will stay out of the courts. Another approach to review is through expanded use of Forest Service advisory boards, giving them more authority and the proper membership to deal with environmental questions.¹⁴⁰

Although NEPA does force the Forest Service to consider environmental consequences, it does not provide for a substantive review of decisions made.¹⁴¹ Even though the Forest Service is submitting an environmental impact statement on Mineral King,¹⁴² this does not cure the basic problem which Mineral King presents—the insulation of Forest Service decision-making processes, which NEPA does not affect.

The present powers of the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA)¹⁴³ could be expanded to permit more substantive review of the environmental impact statements. Either or both agencies should be empowered to reject environmental impact statements where there is insufficient consideration of the environment, thereby requiring further study and analysis of potential environmental effects.¹⁴⁴ This approach, while not guarantee-

¹⁴⁰ Heyman and Twiss comment that the Forest Service now uses 166 public advisory committees but that they serve a predominately public relations function. Heyman & Twiss, supra note 37, at 140.
¹⁴¹ See note 117 supra.
¹⁴² See Environmental Impact Statement folder, in Forest Service File 2340, supra note 19.
¹⁴³ The CEQ was established by NEPA § 202 [42 U.S.C. § 4342 (1970)] with duties including the responsibility “to review and appraise the various programs and activities of the Federal Government in light of the policy set forth in subchapter I [of NEPA].” Id. § 4344(3). Executive Order No. 11514 states that the CEQ may conduct public hearings or conferences on environmental concerns and may instruct agencies and request reports and other information from them so it may carry out its responsibilities. Exec. Order No. 11514, 3 C.F.R. 902 (Supp. 1966-70), 42 U.S.C.A. § 4321 (Supp. 1972).
¹⁴⁴ However, the CEQ stated: “The Council’s goal is to make the 102 process
ing public input, would force review of the sufficiency of the environ-
mental impact statement during the decision-making process, resulting 
in a fuller analysis of alternatives and the environmental effects of 
agency action. Although this review would be conducted by another 
governmental body, it would at least remove evaluation of the environ-
mental decision from the original agency. The danger inherent in such 
interagency review is that the reviewing agency might become a rubber 
stamp for decisions made when the environmental impact statement was 
drafted.

The use of interagency review would be a constructive step, but 
would not serve to inject the cross-section of public interest that hear-
ings and conference procedures guarantee.

C. Judicial Review of Forest Service Decision Making 
in the Mineral King Case

Currently the only remedy for the lack of input or review of For-
rest Service decisions by outside interests lies in the courts. The Sierra 
Club was forced to turn to judicial review of the decision to allow Dis-
ney to develop the valley. An examination of the issues of the case 
outlines the difficulty in effectively representing the public interest in 
court.

1. Roadblocks to Effective Judicial Review: Standing

The Supreme Court in *Sierra Club v. Morton* posited that a 
person has standing to seek judicial review under the Administrative 
Procedure Act “only if he can show that he himself has suffered or 
will suffer injury, whether economic or otherwise.” It explained 
that although aesthetic and environmental harm may amount to “injury 
in fact,” not only must an injury to a cognizable interest be asserted, but 
the party suing must be among the injured. The Court then denied 
the Sierra Club standing on the basis that nowhere in its brief did it as-
sert that it or its members used the area or would be injured by the 
proposed development.

The Sierra Club based its case upon the theory that this was an 
action on behalf of the public challenging the proposed use of natural 
resources, and that the Club’s longstanding interest and expertise in 
the environmental field should give it standing as a representative of
the public. The Court denied this basis for standing by distinguishing standing from the arguments that can be raised after review is granted. The fact of injury is required to give standing to seek review under the Administrative Procedure Act, it held, but once review is granted, then public interest arguments can be raised to show that the agency has not complied with its statutory restrictions.

A review of the cases leading up to Association of Data Processing Service Organizations v. Camp, and those which had since applied its tests to environmental litigants reveals that the test for standing neither had to be nor should have been read so narrowly in cases where there are adverse interests.

150. Id. at 736, 3 ERC at 2042.
151. Id. at 734-35, 3 ERC at 2042.
152. Id. at 740 n.15, 3 ERC at 2044 n.15.
153. 397 U.S. 150 (1970); see Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 1 ERC 1096 (2d Cir. 1970) (granting standing to conservation groups who had evidenced their concern by organizing and expending considerable money and effort, and ruling that they had a "legally protected interest" due to an expressed consideration of environmental interests in applicable statutes); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967) (granting standing despite lack of provision for judicial review in the Federal-Aid Highway Act); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 1 ERC 1084 (2d Cir. 1965), cert. denied, 384 U.S. 941, 2 ERC 1909 (1966) (allowing "aggrieved parties" the right of judicial review of "aesthetic, conservational, and recreational" interests).

154. In Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 1 ERC 1271 (M.D. Penn. 1970), aff'd on other grounds, 454 F.2d 613, 3 ERC 1421 (3d Cir. 1971), the court held that conservation interests are within the "zone of interests" to be protected by the National Environmental Policy Act, the Federal-Aid Highway Act, and the Department of Transportation Act. Standing was granted to groups that demonstrated an interest in conservation and alleged that these interests were not properly considered by the agency. In Izaak Walton League v. St. Clair, 313 F. Supp. 1312, 1317, 1 ERC 1401, 1405 (D. Minn. 1970), the Izaak Walton League's interest in the wilderness was found to be continuing, basic and deep, and it therefore had an "aesthetic, conservational, and recreational" interest to protect; standing was granted. Although these cases involved individual plaintiffs alleging specific injuries, either economic or as residents, the courts did not deny standing to the organizational plaintiffs. Rather, standing was granted specifically on the ground that a demonstrated concern for environmental interests can constitute a "legally protected interest." Accord, West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 2 ERC 1422 (4th Cir. 1971); Izaak Walton League v. Macchia, 329 F. Supp. 511, 2 ERC 1661 (D. N.J. 1971); Sierra Club v. Hardin, 325 F. Supp. 99, 2 ERC 1385 (D. Alas. 1971); but see Alameda Conservation Ass'n v. California, 437 F.2d 1087, 2 ERC 1175 (9th Cir.), cert. denied, 402 U.S. 908, 2 ERC 1910 (1971). It therefore should have followed that action which would damage the interest for which the Sierra Club had shown long-standing concern would be an injury-in-fact. In the case of Mineral King, the statutes involved are by their very nature concerned with preserving scenic resources, which should have brought the interest of the Sierra Club within the "zone of interests" contemplated for protection by the statutes.

The Supreme Court conceded in *Sierra Club v. Morton* that changes in the aesthetics and ecology of the area may amount to an "injury in fact" sufficient to grant standing under § 10 of the Administrative Procedure Act, and on that issue affirmed the trend of recent cases to grant standing on the basis of suffered environmental rather than economic harm. The Court found that the Sierra Club had not suffered environmental harm, because it did not allege use of Mineral King and Sequoia National Park. The Court explained:

[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. It concluded that this was necessary to prevent any and all individuals and groups from litigating to vindicate their own value preferences, without having a direct stake in the result.

The floodgate rationale and the desire to avoid cases based on abstract value preferences can easily be appeased by alternative tests. Neither are they sufficient reasons for precluding suits restricted to specific facts litigated by dedicated, skilled plaintiffs who have exhaustively pursued the case. In this case, the two goals of standing requirements—to avoid collusive suits by requiring truly adverse litigants, and to avoid advisory or political opinions by restricting jurisdiction to specific fact situations with an injured party—are met. The Sierra Club is certainly adverse in interest to federal officials who want to develop public lands which the Sierra Club is dedicated to preserving in their natural state. The facts and legal issues are specific—a master plan for a ski resort on specified federal lands under federal permits—and there is a party dedicated to preserving these lands for less environmentally disruptive purposes, an interest conceded by the Court to be susceptible of injury. None of the arguments against standing in cases involving collusive litigation, advisory opinions, or moot or abstract, unspecific legal issues applies.

Under the unnecessarily burdensome standard set up by the Supreme Court, the Sierra Club amended its complaint in June 1972. It alleged chapters with substantial membership in the Los Angeles area and the San Joaquin Valley, in addition to the San Francisco Bay Area,
and use of the Mineral King area by Club members.\textsuperscript{161} It also joined as plaintiffs nine private individuals who use the Mineral King Valley for summer residence or recreation, and an association of cabin owners in the valley.\textsuperscript{162} These amendments respond directly to the Supreme Court opinion, and should be sufficient for the Sierra Club finally to receive standing.

Beyond the Mineral King case, these standing requirements will restrict the access to the courts for the purpose of protecting the natural resources. To have to allege use of an area in order to preserve it in a substantially undeveloped state is somewhat contradictory. There is a value in preserving areas as wilderness for future generations. To be required to conduct tours and camp throughout such an area in order to save it\textsuperscript{163} infringes upon the very purpose of preservation.

The Sierra Club had alleged that for many years the organization has by its activities exhibited a special interest in the conservation and sound management of national lands; it represents other persons so interested; and that one of the Club's principal purposes is conservation of the Sierra Nevada.\textsuperscript{164} If the Administrative Procedure Act seeks to encourage reviewability,\textsuperscript{165} who can better challenge abuse of discretion in the management of national forests and parks? To whom do they belong? If they belong to the public, does any member of the public who fears abuse have regularly to have used the particular portion in question? The test that the Supreme Court has thrust upon us may leave many virtually untouched areas without competent plaintiffs with standing to seek review of mismanagement of public lands. In this and other cases, those plaintiffs living on route to the development stand to profit economically from any resort installation.\textsuperscript{166} Without the dedication of the Sierra Club and other similar organizations to protecting such lands for the future, there may be no qualified plaintiffs.

Although requiring injury to environmental interests and a plaintiff alleging regular use promotes the possibility of unchallenged discre-

\textsuperscript{161} Plaintiffs' Notice of Motion and Motion to Amend Complaint at 2-3, Sierra Club v. Morton, 348 F. Supp. 219, 4 ERC 1561 (N.D. Cal. 1972). The Sierra Club alleged use both by individual members and by the organization through group outings.

\textsuperscript{162} Id. at 3-4.

\textsuperscript{163} Several of the [Sierra] Club's chapters have conducted and continue to conduct 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.

\textsuperscript{164} 405 U.S. at 735 n.8, 3 ERC at 2042 n.8.


\textsuperscript{166} 116 CONG. REC. 904, 905 (1970) (remarks of Rep. Mathias); Brief for the County of Tulare as Amicus Curiae at 8-9, Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970); see note 133 supra.
tion in the management of public lands, it is hard to believe that the Supreme Court favors that result. There seems to be little judicial interest in differentiating between a person who uses an area and sues to preserve it, and a group which has a longstanding interest—evidenced by its activities—in preserving such an area, particularly when, as here, the group has shown its willingness to assume burdensome litigation.

The Government's interest is in the optimum management of public lands. Under the statutes designed to conserve scenery, natural resources, and wildlife, and in light of government policy as expressed in the National Environmental Policy Act, a test that grants standing to challenge administrative action to a trapper or concessionaire while denying it to the Sierra Club seems unworthy of sanction by the Supreme Court, and contrary to the public interest. Although it is a clear test, it is an inappropriate test.

The Supreme Court ruling has reversed the trend in the development of standing requirements that recognized the unique problems of environmental plaintiffs. Judge Hamley, although concurring with the Ninth Circuit's decision later affirmed by the Supreme Court, recognized both the trend and the need for broader standing:

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 practice thereunder. If [these are disregarded or] 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.168

Judge Hamley's opinion would be a sound standard for future cases involving environmental litigants seeking to review abuse of discretion by government agencies. By rejecting such a test, the Supreme Court has left many valid environmental claims lacking competent plaintiffs, and freed the administrative discretion of government

169. 405 U.S. at 739, 3 ERC at 2043-44.
170. Although plaintiffs have alleged that they will be adversely affected, none has shown any individualized harm. None was able to allege . . . an economic loss as a result of the Earth City project. . . .

The only injury to plaintiff is the apparent fact that the actions of defendants are personally displeasing or distasteful to them due to the parties' different philosophies of land-use planning.

agencies from review under the Administrative Procedure Act. Standing has again become a hurdle to the environmental litigant, a low hurdle perhaps, but one that may preclude review.

2. The Merits of the Case

The merits of Sierra Club v. Morton involve specific allegations that the Forest Service has acted illegally—beyond its statutory authority. The scope of judicial review in this case is very narrow, dealing with issues only obliquely related to the decision-making process of the Forest Service. The courts, by their very nature, are limited in their ability to hear and adjudicate such environmental issues. Although there may be a resolution of the legal questions, the courts cannot deal with the underlying policy problems in decision making—how the agency acts within its powers in an insulated and unresponsive manner. Important policy considerations are not reached by the legal issues presented to the district court. But because judicial review is the only available type of review, the Sierra Club is forced to argue the legal merits of the case without ever having the opportunity to question the Forest Service decision-making procedures, which underlie the reasons the case is before the court.

The substantive issues that the Sierra Club has presented the courts are sixfold. Three of these issues, regarding the construction of a road and powerline through Sequoia National Park have been changed or rendered moot since Disney Productions revised its master plan to substitute an electric railway with power lines buried in the roadbed. The California state legislature followed Disney Production's

348 F. Supp. 916, 4 ERC 1408 (N.D. Miss. 1972) (organizational plaintiffs alleged use and were granted standing under Sierra Club v. Morton).

171. See Citizens for Clean Air v. Corps of Engineers, 4 ERC 1456 (S.D.N.Y. 1972):

While these allegations as to standing are just about as bareboned as possible, they do marginally skirt the brink of dismissal. Guided by the mandate of Rule 8(f) to construe the pleadings to do substantial justice, we . . . deny the motion to dismiss for lack of standing on the condition that plaintiffs amend the complaint within 20 days to make the pleading of standing explicit rather than implicit.

Id. at 1463.

172. A similar problem is presented by limited court authority in adjudication of compromise. See text accompanying notes 139 & 140 supra.


174. The ability of such a railway to control visitor-load would, according to Disney Productions, ban automobiles and their resultant pollution from the valley,
change in plans with a bill excluding appropriations for an access road to Mineral King.\textsuperscript{175} Although this substitution will lessen the environmental impact of such a development, the underlying legal issues probably remain the same. The changes are not yet formally approved by the Forest Service and are thus not presented in the Sierra Club's amended complaint.\textsuperscript{176}

A fourth issue has not been litigated and was presented to the district court in the amended complaint—the National Environmental Policy Act. The Sierra Club argues that under § 102(2)(C) of NEPA, the Forest Service is required to file an environmental impact statement on the Mineral King development.\textsuperscript{177} The Forest Service apparently has conceded this issue and is preparing an impact statement that will be submitted in 1973.\textsuperscript{178}

The fifth and sixth issues were treated by the district court\textsuperscript{179} and by the Ninth Circuit,\textsuperscript{180} but not by the Supreme Court.\textsuperscript{181} The fifth issue concerns Mineral King's status as the Sequoia National Game Refuge.\textsuperscript{182} The Sierra Club claims that the Disney Productions project is inconsistent with the purpose of the game refuge statute:

\begin{center}
[T]o protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of local game laws . . . . \textsuperscript{183}
\end{center}

This argument has not been persuasive—the district court failed to mention it and the circuit court summarily rejected it.\textsuperscript{184} The argu-

\begin{itemize}
  \item eliminate the necessity of parking structures and other automotive facilities, and scale down the size of the development. San Francisco Chronicle, May 4, 1972, at 2, col. 1, and May 5, 1972, at 31 (full page advertisement by Disney Productions). See note 19 supra.
  \item 176. For an extensive analysis of the law and developments regarding the road to Mineral King, see Note, supra note 48. There is some question whether the law referring to roads would be equally applicable to railroads. But the issues of use of the Park for a non-park purpose and failure to obtain congressional authorization for the power transmission line are not substantially changed.
  \item 177. The statement must include, \textit{inter alia}:
    \begin{itemize}
      \item (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
      \item (iii) alternatives to the proposed action,
    \end{itemize}
    \item (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

\item 178. See Environmental Impact Statement folder in Forest Service File 2340, \textit{supra} note 19.
\item 179. District Court opinion, \textit{supra} note 2.
\item 180. 433 F.2d 24, 1 ERC 1669 (1970).
\item 181. 405 U.S. at 741, 3 ERC at 2044.
\item 183. \textit{Id}.
\item 184. 433 F.2d at 37, 1 ERC at 1678.
ment is weak because of the statutory language; the statute does not purport to be a conservation statute which would bar any proposed development. Although Congress did intend to distinguish the Mineral King area from standard national forest classification, it did not establish statutory preservation. The Sierra Club's argument is based on a definition of "game refuge" as a preserve, which is not how the phrase has traditionally been interpreted.

In the sixth issue the Sierra Club alleged that the issuance of a term permit (thirty years for eighty acres) coupled with revocable permits is illegal. The Sierra Club alleged further that the use of the term permit is violated by the Disney Productions proposal in that the revocable permits are not revocable at all. Term permits may be issued for the use of eighty acres of national forest land for a maximum of thirty years under 16 U.S.C. § 497. As now proposed, the Disney Productions plans for the ski lifts, towers, and sanitation facility would be located on land retained through the revocable permit, outside the eighty acres covered by the term permit. This, according to the Sierra Club, is a clear violation of the legislative intent contained in the eighty-acre limitation and the statutory authority of the Secretary of Agriculture. The Sierra Club pointed out how Acting Secretary True D. Morse conceived of the term permit limitation then in force:

Under existing laws this Department has adequate authority to issue revocable permits for uses for which long-term tenure is unnecessary or undesirable. . . .

The act of March 4, 1915, however, is inadequate to meet other needs for term permits on the national forests because it limits use and occupancy to summer homes, hotels, stores, or other structures needed for summer recreation or public convenience, and the permit area to a maximum of 5 acres. . . .

S. 2216 would meet needs to grant term permits up to 80 acres for such public and semipublic uses as landing fields, resorts, campgrounds, picnic areas, organization camps and ski lifts and to industrial and commercial enterprises . . . .

189. Letter from Acting Secretary Morse to the Chairman of the Senate Comm. on Agriculture and Forestry, Aug. 5, 1955, cited in Brief for Petitioner at 50-51, Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972); S. REP. No. 2511, 84th Cong., 2d Sess. 3 (1956).
Along with this violation of the eighty-acre limit on term permits, the Sierra Club alleged that revocable permits cannot be combined with term permits to circumvent the eighty-acre limit. Further, it contended that there is no authority granting the Secretary of Agriculture under 16 U.S.C. § 551 the power to issue such revocable permits. The Sierra Club argued that this revocable permit is not really revocable, for if the Forest Service were to revoke the permit, Disney Productions would have to remove the ski lifts and other facilities outside of the eighty-acre limit, virtually destroying the $35 million investment.

The district court relied on legislative history to determine that eighty acres was the maximum that could be used for resorts:

[T]he eighty acre limitation on hotels and resorts was intended to include . . . any and all structures or facilities related to [the resort], e.g., "elbow room" for ski lifts and other related service facilities. . . . To hold otherwise would be to assume that the Congress . . . contemplated that it could be circumvented, even nullified, by the device of coupling two different kinds of permits for a single . . . development, occupying more than 1,000 acres of a forest game refuge area. If Congress had any such situation in mind, it could have spared itself time and trouble by omitting any area limitation—or by otherwise indicating its intent.

The Ninth Circuit reversed, holding that the Secretary of Agriculture has the authority to issue these permits, and noting that over 80 ski resorts operate under this type of permit system. Among other

---

190. The statute provides in relevant part:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . .; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. 16 U.S.C. § 551 (1970).


192. Id. at 53. See text accompanying note 57 supra.


194. 433 F.2d at 35, 1 ERC at 1676; Brief for Respondent at 55, 80, Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972). The figures range from, e.g.,

<table>
<thead>
<tr>
<th>AREA NAME OR PERMITTEE</th>
<th>PERMIT ACREAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carson-Taos Ski Valley</td>
<td>4.8</td>
</tr>
<tr>
<td>Dodge Ridge</td>
<td>8.5</td>
</tr>
<tr>
<td>Mount Reba</td>
<td>80</td>
</tr>
<tr>
<td>Heavenly Valley</td>
<td>80</td>
</tr>
<tr>
<td>Mount Hood Meadows</td>
<td>80</td>
</tr>
<tr>
<td>Snowmass</td>
<td>80</td>
</tr>
<tr>
<td>Vail</td>
<td>80</td>
</tr>
</tbody>
</table>

Abstracted from id. at 80 (appendix B).
reasons for invalidating the permit, District Court Judge Sweigert had found that the permits were in practice irrevocable, because revoking them, with the result of destroying the development, would result in an embarrassment to the Forest Service. The Ninth Circuit ignored this point.

The Disney Productions development would have permanent structures on approximately 400 acres and would ultimately affect 13,000 acres of the 15,000-acre valley. It is questionable whether such a vast development was within the intention of Congress when enacting 16 U.S.C. § 497. As the district court found, comments by the Forest Service to Congress clearly indicate that eighty acres was to be the maximum limit for permits involving permanent structures for non-Forest Service use.

This is the first case to challenge the operation of the Forest Service permit system. The Ninth Circuit's failure to view this case as one that would affect the future of Forest Service administration of lands under its control may have serious consequences in the event of numerous future Mineral Kings. If the decision stands there will be no project too huge for execution by issuance of numerous "revocable" permits to accompany a single term permit. The only check on the Forest Service permit policy will apparently have to come from within the Service if future large-scale developments of this kind are to be scrutinized. It can be argued that preservation of our natural environment can only be achieved through the National Park System, or through the classification of wilderness areas, but such lands may not be sufficient to meet future demands on the environment that peace, solitude, and escape from the man-made world may require, particularly if existing park lands are licensed for large-scale, man-made developments. It is precisely because of the severely limited public input in

195. The very opinion of the Attorney General relied on by Agriculture warns of just such a possible danger to the public interest in granting revocable permits, saying: "In cases where it appears that the permittee intends to make substantial improvements the removal of which would cause him a great loss in the case of revocation of the permit, it is a matter of departmental policy whether a situation should be created by the issue of a permit which may afterwards embarrass the head of the department in the exercise of the powers of revocation."

District Court opinion, supra note 2, at 6. See text accompanying note 57 supra.

196. See Affidavit of Michael McCloskey filed June 4, 1969, at 7, District Court opinion, supra note 2.

197. District Court opinion, supra note 2, at 3.


199. See id. §§ 1131 et seq.

200 1970 ENVIRONMENTAL QUALITY REPORT, supra note 30, at 8, 17-20. "Wilderness also needs to be regarded as a quality—defined in terms of personal experience, feelings, or benefits." Id. at 19. "The impact of the destruction of the environment on man's perceptions and aspirations cannot be measured." Id. at 17.
the current Forest Service decision-making process that the courts\textsuperscript{201} must protect the complete spectrum of public interests from uncontrolled development by the Forest Service. The Ninth Circuit erred in overruling the district court on the permit issue. It should have looked beyond the decision to determine the overall effect on the Forest Service's administration of the national forests; instead the circuit court ignored the intent of Congress and adopted a history of dubious statutory interpretation as precedent. The district court decision need not have been retroactive, so as to affect the other areas in the national forests that now operate under this combination of term and revocable permits. Since those areas are already developed, they could be more fully developed to meet the increased demands for that recreation, to obviate the need for expanding into new areas for new developments.

Although a court may be able to control the method of issuing permits by the Forest Service, it is unable to challenge Forest Service policies and decision-making procedures. In this respect, review by the courts is inadequate. The merits of individual decisions may be considered, but underlying policies are ignored. The future of Mineral King now depends on the legal questions presented, since they provide the only, albeit inadequate, available review. Through minor changes in the administrative decision-making procedures of the Forest Service, future contemplated developments could be subjected to less limited opportunities for review, thereby increasing the guarantees that our limited resources of forest lands are administered responsibly and consistently with an interest less attuned to special interest groups.

CONCLUSION

Three major considerations have been discussed concerning the decision-making process of the Forest Service: the absence of outside influence and input; the lack of opportunities for outside review; and the nature and limitations of the judicial review in the Mineral King case.

\textsuperscript{201} N.Y. Times, Aug. 17, 1969, § 6 (Magazine), at 66, col. 3:
The problem won't be getting Disney to leave out things, but to keep it from throwing in more. Yet there is nobody to keep it from throwing in more. The Forest Service is, by law, that check, but a Disney official says with contempt: "Our standards are higher than the Forest Service's."

What we have at Mineral King is another absentee landlord. It is easy enough to be offended by the Disney project, and its threat to the ecology of Mineral King. Something is going to be taken forever from Mineral King—nature with the bloom of creation upon it. In its place, Disney will leave another pleasure palace, for Southern Californians, who have more pleasure palaces per capita than any other people in the world. So it is easy for the protectionist to take his potshots at the Mineral King development.

But more significant is how government landlords—Park Service, Forest Service and the like—continue to allow massive violations of public land.
Because there are inadequate procedures for outside participation in Forest Service decision making, not all interests are equally considered, as this failure of influence is exemplified in the history of Mineral King. NEPA may now help to insure that environmental factors are considered by the Forest Service, but there are no express statutory provisions requiring outside input or influence.

There is a need for participation from without the Forest Service to insure that no one interest is being respected, to the exclusion of other equally legitimate interests. One form for allowing such input in the decision-making process is to hold public hearings. Although the public hearing has its deficiencies, it is a necessary procedural step to solving the problem. The Forest Service could also seek the submission of formal counter-proposals on a proposed course of action, which would promote consideration of each serious alternative to the planned course of action.

There is, however, also a need for outside, non-judicial review. The history of Mineral King reveals that there were three major decisions to be made, none of which was considered apart from the others as a distinct policy matter. There should be a stage-by-stage review procedure established to prevent the blurring of issues and decisions and to promote development responsive to the public as well as private interests concerned.

Judicial review is inadequate in this regard because of its inability to effect a compromise between groups on environmental issues. The court structure generally prohibits judges from adequately promoting or adjudicating compromise. Thus, interim non-judicial review is necessary. And public hearings, in spite of their drawbacks, could provide a forum for such review of decisions. The establishment of conferences at each stage of the decision-making process, at which there could be arbitration and negotiation, would promote compromise as a viable alternative to blind pursuance of a policy established prior to the obtaining of complete and full information.

Although NEPA contains no provisions for review, the role of the Council on Environmental Quality or the Environmental Protection Agency could easily be expanded to provide for interim review during planning stages. Through these, or other, review procedures the Forest Service would be forced to be responsive to all interests and fully informed about the concerns of the public.

In the Mineral King case, the Sierra Club has resorted to the courts for judicial review as its last opportunity to challenge the Forest Service's developmental plans. The Supreme Court has, in Sierra Club v. Morton, made it more difficult to attain judicial review for conservationists by reasserting strict standing requirements. Thus ac-
access to judicial review has been limited to those who have "an injury in fact." This decision emphasizes the need for expanded administrative review procedures. By restricting the availability of the courts as a forum for review, the Supreme Court has necessitated the establishment of other methods of review, if there is to be any check on the Forest Service's administrative decisions.

Although the merits of the case present important legal questions concerning the role of the Forest Service and the extent of its power to issue permits under existing statutes, a larger, underlying problem has not been reached. The method of decision making employed and the levels of outside participation allowed raise questions that are not before the courts, although they have certainly been presented by the controversy underlying the development of Mineral King. Judicial review will have to suffice in the present attempt to preserve Mineral King; but for the future, other procedures must be established. Judicial review is not adequate to deal with the complex environmental and policy issues that will face the Forest Service and that will be questioned by interest groups outside the Service.

Arthur B. Ferguson, Jr.
William P. Bryson*

* A.B. 1969, Stanford University; J.D. 1972, Boalt Hall School of Law, University of California, Berkeley.