Commentary

Mineral King Goes Downhill

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Mineral King Valley is one step closer to development than it was when an article1 on Mineral King appeared in *Ecology Law Quarterly*. Development as a ski resort was discussed as early as 1945,2 long before the Sierra Club filed suit in 1969 when the issuance of permits to develop Mineral King and to construct a highway through Sequoia National Park seemed imminent. That suit prompted compliance by the Forest Service with the environmental impact statement (EIS) process3 necessitated by the intervening passage of the National Environmental Policy Act (NEPA).4

Publication by the Forest Service of a preliminary draft EIS in June 19745 was followed in December by publication of the draft EIS.6 A total of 2,150 comments was received in response to the draft EIS,7 many of them extremely detailed. Reactions to the draft EIS differed. Far West Ski Association and United States Ski Association wrote, “The

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2. *Id.* at 499-500.
3. *Id.* at 525.
7. U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL STATEMENT MINERAL KING RECREATION DEVELOPMENT v (1976) [hereinafter MKEIS].
Mineral King Statement is impressively complete, but is flawed by over-emphasis of the negative.”

The Sierra Club found the draft EIS deficient in a multitude of particulars, as did the Department of the Interior. The Department of the Interior, of which the Park Service is a part, expressed concern that the draft EIS did not “discuss in detail the proposal’s interrelationship with Sequoia National Park, and the fact that such a development could have adverse effects completely incompatible with the basic purpose of the park.” Of particular concern to the Department of the Interior is the proposed improved highway which will pass through Sequoia National Park to provide access to the Mineral King development.

The final EIS was released on February 26, 1976. The preferred alternative calls for 18 ski lifts; a gondola to 11,100-foot Eagle Crest (3,300 feet above the Valley floor) where a restaurant, warming hut, ski slopes, and hiking trails will be constructed; a possible ski jump; a luge or bobsled run; ice rinks; swimming pools; campgrounds; and hotels (lodging for 4,500). These and other facilities will serve 8,000 people at one time during the winter.

The Forest Service maintains that the final EIS is “of sufficient detail to allow the responsible official to make a decision with full consideration of the environmental impacts to be expected.” This Commentary will analyze the EIS’s treatment of a number of critical issues, namely, wildlife, giant sequoias, fishery and hydrology, and skier demand.

A. Wildlife

The Forest Service is under a direct mandate to protect wildlife in Mineral King. In a normal situation of managing its lands, the Forest Service balances the adverse effects of one use (e.g., heavy human intrusion) against benefits of another (lesser intrusion with concomitant greater wildlife protection) and comes up with a compromise. But Mineral King is not a normal situation, for in 1926, Mineral King Valley was declared a Federal Game Refuge. The primary purpose of

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9. Letter from Michael McCloskey to Douglas R. Leisz, Mar. 31, 1975, in MKEIS at Appendix M.
10. Letter from E. Nathanial Reed, Assistant Secretary of the Interior, to Douglas R. Leisz, Apr. 4, 1975, in MKEIS at Appendix M.
11. MKEIS at 18-27.
12. Id. at 2.
the Refuge remains: "To protect from trespass the public lands of the United States and the game animals which may be thereon." The enabling Act authorizes only those management techniques which are in keeping with the Act's purpose. While several agreements for specific management activities have been entered into with California in the interim, these were deemed necessary to reduce overpopulation beyond the available carrying capacity of the area, and involved no detrimental effect to any species. In spite of EIS language to the contrary, it is not clear that the proposed development would be in keeping with this purpose. The EIS states that leaving wildlife protection with the Secretary of Agriculture does not preclude management options including increased human use, any more than such options are precluded within the National Parks. While the enabling Act certainly permits multiple uses, this statement has two defects. First, it is doubtful that development to the extent proposed would be permitted today in any National Park. Second, the Secretary is under a special obligation to protect wildlife which, while not absolute, is hardly fulfilled by the proposed level of development and its resulting potentially detrimental impact on several species of wildlife. This latter problem is discussed below.

The transportation corridor of the preferred alternative coincides with the migration route of the Mineral King deer herd; no potential disruptive effects on the herd from construction or noise levels are mentioned. Intensive development is to occur in the center of the summer range, practically on top of known fawning areas. Ski lifts and trials are to be located at some of the same spots mapped as fawning areas, a conflict not directly confronted by the EIS. While the EIS recognizes the need of deer for privacy when fawning, the only mitigation it proposes is to restrict access to these areas during May and June. It is doubtful that fawning activity is sufficiently completed by June to warrant lifting the restriction then. Additionally, no specific methods for restriction are mentioned which seem certain to accomplish this goal—does the Forest Service really believe that signs on trails, or even barriers, will keep people out? While educational displays are laudatory, they are an incentive to curious or malicious people to investigate critical areas. Further, no mention is made of the possibly destructive impact of all of these people on the summer range once the restrictions are lifted.

15. MKEIS at 89.
16. Id. at 185.
17. Compare id. at 16-17 (Figure II-3) with id. at 74-75 (Figure III-1) and id. at 88 (Figure III-14).
18. Id. at 184.
The Forest Service plans to clear ski runs and plant them to grass and browse shrubs. If successful, this plan could provide some increased browse which would help offset any decreased quality in the intensively developed summer range. But replanting is not always successful. No mention is made of the possibility that soil quality might not be high enough to foster regrowth, nor are any other adverse factors mentioned which might hinder this plan, such as erosion from summer storms. As with just about every other mitigation measure, the possibility of failure is not considered. There is current authority for the view that summer habitat is much more critical to deer survival than was once thought; the weight at which deer go to the winter range will have a great influence on rate of survival.\textsuperscript{19} The EIS's statement that herd size was stable at about 350 animals was refuted by the California Resources Agency, which claimed in its response to the draft EIS that the herd is declining.\textsuperscript{20} This claim was not clarified in the final EIS.

The draft EIS admits that much of the winter range is in poor condition,\textsuperscript{21} a statement with which the California Resources Agency agrees, although the final EIS states merely that part of the winter range is in poor condition.\textsuperscript{22} This cannot help but add a further burden on deer coming from a poorer summer range. That part of the winter range stated to be in poor condition is located at Oak Grove, the probable site of the bus maintenance facility. This means that acreage will be permanently removed from an already inadequate winter food supply. Further secondary effects may result from the development of private land adjacent to Oak Grove. Such development normally accompanies a project like the proposal for Mineral King, and would have the effect of removing wildlife habitat, particularly important because it includes part of the key winter range of the deer herd. While the EIS mentions this possibility, the only mitigation it suggests is winter range browse improvement projects.\textsuperscript{23} While the specific locations of and techniques involved in these projects are nowhere mentioned and thus have probably not been determined, it is at least questionable whether such projects could have much effect in an area of intensive human use. To have any effect whatsoever, the browse improvement should begin immediately, independent of any later development.

The EIS gives rather cursory treatment to the effects of the preferred alternative on several endangered, rare, and unique species—the

\textsuperscript{19} W. DASMANN, IF DEER ARE TO SURVIVE 72-73 (1971).
\textsuperscript{20} Letter from Claire Dedrick, Secretary of the Resources Agency of California, to Douglas R. Leisz, Mar. 28, 1975, in MKEIS at Appendix M.
\textsuperscript{21} DRAFT MKEIS at 171.
\textsuperscript{22} MKEIS at 87.
\textsuperscript{23} Id. at 185.
California condor, the American peregrine falcon, the southern bald
eagle, the wolverine, the California bighorn sheep, the spotted owl, and
the pine marten. While only the wolverine and the pine marten are
conclusively known to inhabit Mineral King Valley, the EIS recognizes
that the Valley affords potential habitat for all of them. It also
recognizes that the primary proposal will reduce usable range and
habitat for them, but offers virtually no mitigation measures. The
whole purpose of the Endangered Species Act, which explicitly protects
several of these species and which covers acts of the Forest Service, is to
give as much protection as possible to those species shown to have been
severely depleted, so they will be able to recover. Removing portions
of habitat, even if only potential habitat, will not further any species' re-
establishment, particularly in view of the low tolerance most of them
have for human intrusion. Also, possible secondary effects on these
species, especially the three to six mile distant bighorn sheep herd,
resulting from probable increased use of the backcountry in Sequoia
National Park have not been considered, nor has the impact on the
adjacent inventoried roadless area, a potential wilderness. Will the
Forest Service be fostering extinction of seven endangered, rare, and
unique species?

The preferred alternative will completely remove 108 acres of
wildlife habitat from production, and considerably alter 400 acres
more. No mention is made of the effects of secondary activities
involved in construction, perhaps because the Forest Service regards
them as too ephemeral to be concerned about. Both the new road and
the new facilities will result in a significant increase in noise level, which
the EIS recognizes and dismisses on the ground that too little is known
about noise to determine what sort of adverse impact it might have.
Conceivably, a constant noise level would adversely affect even species
normally tolerant of people.

While admitting the development will negatively affect certain
species, hardly in keeping with intent behind the Game Refuge, the EIS

24. Id. at 84-86. See also id. at Appendix F.
25. Id. at 182-84.
Section 1531(c) states:
It is further declared to be the policy of Congress that all Federal depart-
ments and agencies shall seek to conserve endangered species and threatened
species and shall use their authorities in furtherance of the purposes of this
chapter.
27. MKEIS at 183 (Appendix F); V. Geist, Mountain Sheep: A Study in
Behavior and Evolution 87-88 (1971); I. McMillan, Man and the California
Condor (1968); Peregrine Falcon Populations: Their Biology and Decline 495,
28. MKEIS at 180.
29. Id.
claims the total wildlife experience will increase because of the probable increase in "tame" deer and other small animals, and birds that seem to thrive around camping areas. This, of course, presumes the success of all mitigation measures. It also means that the only people to benefit from this increased wildlife experience are those going to Mineral King specifically to use all of the Valley facilities. Anyone using Mineral King as a jumping off point for more remote areas of Sequoia National Park will probably find the wildlife experience has decreased, at least with respect to those seven endangered, rare, and unique species—the ones most in need of protection and most valued as part of a wilderness experience.

B. Giant Sequoias

Ancestors of the giant sequoia once populated much of the globe; today the species inhabits groves, somewhat isolated, in a narrow belt along the western slope of the Sierra Nevada at elevations of 4,000 to 8,800 feet. The limited distribution of this most massive of living things puzzled observers, although the presence of moisture in the soil was early considered crucial. A more recent study in the Giant Forest of Sequoia National Park has documented the giant sequoia's dependence on moisture, concluding that a late summer increase in soil moisture, probably attributable to subsurface percolation of ground water from high elevations, is the most critical factor limiting the present grove boundaries.

The proposed improved road would traverse slopes of at least 30 percent when passing through the bigtree groves in the National Park. The soil is very shallow and sandy, originating from granite parent material. If the road is founded on an impervious substratum or bedrock, as is usually the case with an all-purpose highway, the life-sustaining summer flows could be intercepted. Deep cuts to reduce overhangs could be as damaging, baring shallow soils to evaporation and transpiration by plants. Any excavation is certain to affect the

30. Id. at 180, 182, 184.
31. L. COOK, THE GIANT SEQUOIAS OF CALIFORNIA 2, 10 (NPS 1961). Incidentally, the tree growing at what is believed to be the highest elevation of the giant sequoia's natural range is a 13.7-foot member of the Atwell Grove through which the Mineral King Road passes. Id. at 26.
32. G. SUDWORTH, FOREST TREES OF THE PACIFIC SLOPE 144 (USDA 1908); J. MUM, OUR NATIONAL PARKS 268-330 (1901). "It is a mistake to suppose that the water is the cause of the groves being there. On the contrary, the groves are the cause of the water being there." Id. at 324.
33. Rundel, Habitat Restriction in Giant Sequoia: The Environmental Control of Grove Boundaries, 87 AM. MIDLAND NATURALIST 81, 97-98 (1972).
34. MKEIS at 44-45 (Figure III-3).
cohesiveness of moisture in the soil mantle and could threaten preservation of the groves.

An additional complication is posed by the expansive and shallow root systems of the trees. "Because the roots of the sequoia are all very close to the surface," a Park Service booklet reports, "it is necessary to prevent excessive trampling about the trunks." This prevention would include deposition of fill material. In general, roots radiate out two-thirds of the height of a bigtree, so that the root system of a 300-foot tree fills a circle of 400 feet, an area of approximately 2½ acres. According to the same Park Service booklet, "Great care is exercised in the selection of routes for roads, sites for structures, camps, etc., in order to avoid injury to these giant trees."

Great care was not taken by the Forest Service in its draft EIS to detail proposed efforts to protect the bigtrees. The Park Service commented:

The proposed access road realignment and/or cog railway will effect [sic] a large number of Sequoia trees in the National Park. This fact, its extent and importance is not recognized or evaluated in the statement. The irretrievable nature of the resource is not mentioned. An estimate of Sequoia trees that would be removed by direct action should be identified, along with an estimate of how many might be lost over the long-term due to root system changes or changes in the local hydrology. The statement dismisses the subject with a nebulous mitigating measure, non-specific in nature and open ended in commitment to "minimize" the effect on the Sequoia. Alternative designs and measures to minimize impact to the Sequoia groves should be discussed.

The draft EIS reported that the "roadside ecological niche of giant sequoias and nutmeg near Redwood Creek would be at least slightly diminished" by roadwidening and that a contemplated railroad would pass below "most of the giant sequoias." Passing over the complex and uncertain problem of soil moisture, the draft EIS declared, "Those sections of busway above giant sequoias will be designed and constructed so as not to interfere with the mid-summer movement of subsurface water."

In response to comments by the Park Service, Sierra Club, and others, the final EIS attempts to estimate the impact of the proposed

36. W. FRY & J. WHITE, BIG TREES 83 (1948). Fry and White observe that main lateral roots rarely attain depths over six feet and often reappear above ground.
37. Letter from E. Nathaniel Reed, Assistant Secretary of the Interior, to Douglas R. Leisz, Apr. 4, 1975, in MKEIS at Appendix M.
38. DRAFT MKEIS at 161-62.
39. Id. at 154.
transportation system (now a road) on the giant sequoias. Road improvement in the Atwell Grove will involve additional excavation “near” giant sequoias. How near and how deep is nowhere reported. “Specimen trees” will be avoided here and in the stand of bigtrees along Redwood Creek. The latter stand will be “slightly diminished,” reducing the vegetation by 10 percent. Sequoia National Park “[m]ay lose some redwoods to road construction.”

These conclusions were reached on the basis of a “preliminary road location . . . completed to insure feasibility of this road.” This road location is exactly the same as that proposed in the draft EIS. The planners have not grappled with the unique problems of the giant sequoias; they have merely guessed at the number of trees which will be removed. Yet even this guess is not convincing to one who has traveled the Mineral King Road and observed the wide distribution of trees which could be called specimens. The finest trees often occur in draws which no road can avoid. In places, the narrow right of way, which constitutes the basic location of the improved road, is framed by good-sized trees on steep slopes. In constructing the 28-foot highway, avoidance of these trees will be impossible.

One impact has been completely overlooked in the Forest Service’s estimate of damage to the giant sequoias: underground electric and telephone cables. A transmission line sufficient to supply 25 million kilowatt-hours annually “will be buried across the National Park . . . if technically feasible.” Underground telephone and electrical cables ordinarily are buried within ready access. Will these cables be buried alongside the road, and if so, how much damage to roots and water flows can be expected? Even though the Park Service expressed concern that the added excavation and root cutting would harm giant sequoias, this impact is not discussed. As for telephone cables, the EIS states: “Any mitigation measures, if needed, will be determined by

40. MKEIS at 175.
41. Id. at 230.
42. Id. at 28.
43. Compare id. at 16-17 (Figure II-3) with DRAFT EIS at 18-19. A letter from the Department of the Interior suggests that the draft EIS’s proposed road understates the amount of reconstruction and realignment that will be necessary, especially considering the fact that heavy construction equipment and materials must move along the road. Letter from E. Nathaniel Reed, Assistant Secretary of the Interior, to Douglas R. Leisz, Apr. 4, 1975, in MKEIS at Appendix M.
44. See MKEIS at 268.
45. Id. at 28.
46. Id. at 30.
47. Letter from E. Nathaniel Reed, Assistant Secretary of the Interior, to Douglas R. Leisz, Apr. 4, 1975, in MKEIS at Appendix M.
the Forest Service in cooperation with the Pacific Telephone Company."

No attempt is made in the EIS to assess the future damage from root destruction and interference with subsurface water flows, yet the Mineral King Road could become the road to destruction for downslope stands of giant sequoias. It would seem that a seasonal soil moisture survey must be conducted before the anticipated impact can be predicted. Since the Park Service's objections have not been satisfied, it is possible that a detailed analysis of the impact of the proposed road and underground lines on the bigtrees will be necessary before the Department of the Interior will consider granting a construction permit.

C. Incorporated State Law and the Giant Sequoias

A more careful description of the possible impact of the proposed construction on the giant sequoias is necessary also to determine the legality of authorizing the improved road across Sequoia National Park, since the size of the trees to be affected is critical to a possible conflict with a statute protecting the sequoias. California has a statutory scheme protective of the sequoias which, if applicable to any trees that would be impacted by the proposed road may mean that the Interior Department cannot legally authorize the route. Resolution of the applicability issue turns upon the relationship between state and federal legislative jurisdiction over federal enclaves.

In 1919 the State of California ceded, and in 1920 Congress accepted, exclusive legislative jurisdiction over the territory within Sequoia National Park, with certain reservations not here relevant. Where federal jurisdiction is exclusive state law cannot apply of its own force. State civil law may apply, however, under the "international law" rule, and state penal law may be made applicable under the Federal Assimilative Crimes Act.

Under the international law rule, when legislative jurisdiction is transferred from one sovereign to another, the laws of the relinquishing sovereign continue in force until displaced by the accepting sovereign. State civil law in force at the time of the Sequoia National Park transfer was thus incorporated as part of the federal law applicable to the

48. MKEIS at 216.
territory. Since the most relevant portions of California's protective statutes have an origin predating the transfer, they should have survived unless they have been pre-empted in some fashion by federally articulated law or policy. The pre-emption issue also arises in connection with the Assimilative Crimes Act and will be considered below.

The Assimilative Crimes Act serves to supplement direct Congressional criminal legislation by incorporating state criminal law on subjects as to which Congress has remained silent. It provides that whoever within a federal enclave

is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State... in which such [enclave] is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

California Public Resources Code §4726 makes it a misdemeanor to willfully harm sequoias of a certain size in the area of the Park. Arguably, then, the Secretary of the Interior is without authority to undertake an action inconsistent with such an applicable criminal law. But assimilation ends where conflict with federal law or policy begins.

The operation of this principle is illustrated by Nash v. Air Terminal Services and Air Terminal Services v. Rentzel. In the former case the applicability of state segregation laws was held to survive, by means of assimilation, a transfer of jurisdiction to the United States; in the latter the same law was found to have been supplanted by a subsequently promulgated administrative regulation expressing federal anti-segregation policy.

In United States v. Warne California sought to apply its Milk Stabilization Law, which set minimum prices, to milk purchased by the United States for consumption on military reservations. Since the Law imposed penalties for its violation, assimilation was argued to the court. The court, however, pointed to an articulated federal procurement policy in favor of competitive bidding with which minimum pricing conflicted. To reach this result, the court had to distinguish a leading case in the field, Penn Dairies v. Milk Control Comm'n which found no federal policy conflict with a Pennsylvania minimum price law. While in Penn Dairies there was no federal legislative jurisdiction over

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60. 318 U.S. 261 (1943).
the enclave, state law could no more apply of its own force if in conflict
with the performance of proper federal functions than if there were such
jurisdiction and the law were to apply by assimilation: "There is an
implied constitutional immunity of the national government from a state
regulation of the performance, by federal officers and agencies, of
government functions."\textsuperscript{61} The immunity doctrine thus enun-
ciated parallels the doctrine of displacement by pre-emption of incor-
porated state law, making immunity cases relevant to the incorporation issue in
Sequoia National Park. \textit{Penn Dairies} establishes that state policy may
prevail even against a legitimate, competing federal interest—there one
of economy. Immunity of the federal function from state regulation is
not so absolute that it must be invoked in every instance where the feder-
al function stands to be somewhat fettered. While the \textit{Warne} court may
have found the federal policy against minimum pricing to have strength-
ened since the \textit{Penn Dairies} decision, \textit{Penn Dairies} remains a valid
illustration of the flexibility of the immunity doctrine.

The leading case on the immunity principle in the conservation
setting is \textit{Hunt v. United States}.\textsuperscript{62} It was there held by the Supreme
Court that state game laws could not obstruct a federal plan to reduce
the deer population on National Forest land, where the deer population
had increased to a point where forage was insufficient, causing over-
browsing and harm to vegetation. Federal authority was upheld on the
ground that the program was necessary to protect the federal land and
therefore necessary to its proper administration, a function the delega-
tion of which to the federal agency was clear.

Authority in the Secretary of the Interior certainly exists to pro-
mote and regulate the National Parks to conserve the scenery and
wildlife therein, a power that includes the destruction of plant life
detrimental to the use of the Parks.\textsuperscript{63} He also has the authority to build
roads in the Parks,\textsuperscript{64} but the legislative history of the granting statute
suggests that this authority is limited to cases where roads are designed
to facilitate park accessibility and enjoyment.\textsuperscript{65} Plant life might then be
destroyed if detrimental to the use of the Park in the sense that it
impeded a Park road necessary to Park enjoyment. But the sacrifice of
trees to a road for extra-Park purposes (access to Mineral King)

\textsuperscript{61} \textit{Id.} at 269.
\textsuperscript{62} 278 U.S. 96 (1928). \textit{Accord,} New Mexico State Game Comm'n v. Udall, 410
F.2d 1197 (10th Cir. 1969); Chalk v. United States, 114 F.2d 207 (4th Cir. 1940).
\textsuperscript{63} 16 U.S.C. §§ 3, 64 (1971).
\textsuperscript{64} \textit{Id.} § 8.
\textsuperscript{65} "The national parks were set aside for the benefit and enjoyment of the people
of this country. They have great scientific and educational value. . . . They should be
made more accessible and their roads should be modern, safe highways, suitable for
presents a far different issue than the Hunt line of cases discussed above. An analysis concluding that road authorization here would exceed the Secretary's delegated authority to administer the Park is thus fortified by the presence of state laws the incorporation of which is not rebutted by a clearly articulated federal policy diluting the protection of the sequoias. The federal function is delimited not only directly, by the scope of expressly delegated authority from Congress, but also indirectly by incorporated state law which serves to define that scope more precisely.

Arguing from Congressional silence is always problematic, but here the sequence of events suggests that the state protective policy was intentionally and expressly incorporated at the creation of Sequoia National Park. The protective California statutes of 1873-74 were in force in 1890, the year of creation. The preamble to the creating Act is significant:

Whereas, the rapid destruction of timber and ornamental trees in various parks of the United States, some of which trees are the wonders of the world on account of their size and the limited number growing, makes it a matter of importance that at least some of said forests should be preserved . . . .66

In 1919 when legislative jurisdiction was transferred to the United States, Congressional intentions as to the purpose of Sequoia National Park, expressed in this preamble, seem to have effected an incorporation of the state laws. These state laws were wholly consistent with declared federal policy then and have not since been declared pre-empted. Their continuing vitality raises serious questions as to the propriety of the road through Sequoia National Park.

D. Fishery and Water Quality

The EIS estimates total annual use for streamside fishing and wading at 46,000 visitor days.67 No information was provided, however, to justify this figure, yet the accuracy of such a statistic is of critical importance. Furthermore, numerous important factors equally necessary to assess the impact were omitted. Such factors include the following: percent of the fishing and wading visitor days attributed to stream (as opposed to lake) use; total length of the river considered in the EIS; percent of this length actually fishable or wadable; duration of actual as opposed to legal fishing season; and intensity of the use as a function of time through the season. All of these factors are important not merely in determining how crowded fishing conditions will be along the stream, but in determining the impact of the people on the stream and stream-

67. MKEIS at 23 (Table II-C). A “visitor day” represents 12 hours of use.
side ecosystems. Will solid wastes be left behind by the people in sufficient quantities to have a negative impact on the purity of the stream and the well-being of its aquatic inhabitants? Will coliform bacteria levels rise? If so, how far? High enough to endanger the recreational use of the water or its use as a public water supply? Will frequent and concentrated streamside activity cause erosion problems?

Without the above data, the allusion to 46,000 visitor days of wading and fishing has little if any value. Even the accuracy of this estimate is doubtful. Without more information, stream and streamside use cannot be characterized as fully as necessary in order to assess the impact of the proposed Mineral King development.

It is stated that the permittee will cooperate with the California Department of Fish and Game and the Forest Service in developing the fishing potential of the lakes and streams in Mineral King and the East Fork Kaweah River. Such a commitment should not be made without forecasting what it might entail. Before making such a statement, the EIS should first have analyzed the present quality and nature of the fishery in question, the possible sources of impact on the fishery, the resulting, anticipated impact, the steps needed to reduce or eliminate the impact, the economic feasibility of taking such steps, and the demands that might be placed on the permittee by the Department of Fish and Game and the Forest Service. Only by analyzing these issues could the permittee determine whether or not cooperation in the stated manner would even be possible, let alone agreeable.

Fishing demands in the Mineral King region now necessitate the stocking of 16 of the 21 lakes by the California Department of Fish and Game. How will the anticipated increase in fishing demand affect the present stocking program? If the stocking must increase, what will be the cost and who will bear the burden? The EIS alludes to the fact that the Mineral King development presents erosion and sedimentation potential. This impact on the aquatic environment of the East Fork Kaweah River in particular has not been analyzed. What effect will it have on the aquatic vegetation, aquatic insects, and the fish themselves?

The EIS states that "[s]ewage from chemical and vault toilets in the backcountry will be pumped and removed by helicopter." No data are offered, however, on the number of such toilets to be serviced, their possible locations, or the frequency with which they will be emptied. Without such information, the noise impact and the air pollution of the helicopter in a pristine wilderness setting cannot be determined,
nor can the economic feasibility of such a disposal technique. If the
technique should prove undesirable, what alternatives are possible?

Reference is made to the "quality trout fishing" of the Mineral
King area, yet no studies are cited which would allow such a charac-
terization. Furthermore, without such a basic study, the impact of the
Mineral King development cannot be accurately assessed. Without
knowing the initial state of the fishery, its final state, after having been
subjected to various hazards, can hardly be predicted. Nor can the
nature of the anticipated "management of the fishery" be forecasted.

The assessment of the impact of the proposed Mineral King project
on water quality and the Mineral King fishery is at best superficial. The
data presented are simply inadequate to carry out, let alone assess, an
impact analysis. A Mineral King fisheries management plan should be
developed and included as an integral part of the EIS process.

E. Skier Demand

The decision to develop Mineral King into a ski resort is, one
would think, dependent on unmet future ski demand. Those who
favor developing Mineral King frequently warn of legions of frustrated
skiers in the future unless the supply of facilities is drastically increased.
Nevertheless, the draft EIS was unable to show the necessary demand.
The pre-recession estimates used in the draft EIS placed total 1985-
1986 Southern California skier demand at from 3,375,000 to 3,890,600
skier days. According to the draft, Mammoth Lakes ski area will ab-
sorb 1.1 million skier days, and one-third will be satisfied out of state.
Then, based on figures for Los Angeles County, the draft EIS gen-
eralized that 29 percent of the users will ski locally and in the Lake
Tahoe area. Finally, June Mountain, which is just north of Mammoth,
was expected to accommodate 175,000 skier days.

Applying these figures to the lower projection of total skier de-
mand discloses a surplus facilities supply of 3,750 skier days over
demand in the 1985-1986 season without developing Mineral King.
Using the higher projection results in an excess demand of only
190,459 skier days—nowhere near enough to justify building a
facility with a capacity of 830,000. Yet a study at UCLA concludes

72. Id. at 185.
73. DRAFT EIS at 106.
74. The miscalculation was brought to the attention of the Forest Service by letters
from the Sierra Club and the Public Lands Project, Northwestern University, both of
which are reproduced in Appendix M to the EIS. The discrepancy between the Sierra
Club’s and the Public Lands Project’s corrections of the miscalculation in the draft EIS is
due to the fact that the Public Lands Project reckoned the one-third of total demand to
be satisfied out of state by multiplying by 33 percent instead of dividing by three.
that Mammoth will accommodate 1.45 million skier days (not 1.1 million) if developed to capacity. Substituting this estimate yields an excess demand in facilities of only 159,451 skier days, even when the more liberal demand projection is used.

The Forest Service used the same figures and erroneously calculated that there would be unmet skier demand from Southern California of approximately 984,060 to 1,225,460 skier days. The Forest Service first subtracted the portion of skier demand which will be absorbed by Mammoth and June Mountain. It was from this adjusted figure that one-third (expected demand satisfied out of state) and 29 percent (expected demand satisfied locally and at Lake Tahoe) were subtracted. The final EIS admits, but only partially rectifies, the miscalculation. The total unmet skier demand from Southern California for the 1985-1986 season is estimated in the final EIS at 332,500 to 566,000 skier days instead of -3,750 to 190,459, the properly calculated figures.

It is not surprising that the Forest Service introduces a new study, adding to the EIS's snowstorm of confusion on skier demand. This study forecasts the potential skiing capacity of Mammoth, Sherwin Bowl, and June Mountain in terms of "skiers at one time," but it in no way indicates what future demand will be. The EIS also drops the "skier day" measurement of the draft and adopts "visitor days." Skiing will consume 309,900 visitor days, which should translate to 619,800 skier days, 287,300 to 53,800 skier days in excess of the Forest Service's miscalculation of skier demand for the 1985-1986 season and 429,341 to 623,550 skier days higher than the forecasted skier demand properly calculated.

How can the ski development be justified? One means attempted in the EIS is to confound winter and summer use. To the 309,900 estimated visitor days of skiing are added other activities: viewing outstanding winter scenery (17,500); viewing winter sports (23,300); snow craft (5,800); ice skating (35,000); sledding and tobagganing (35,000); snow play (25,300); and others, including "understanding" (3,800). Then numerous summer activities are listed, including mountain climbing (1,200), nature study (7,800), hiking and

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76. Draft EIS at 110.
77. MKEIS at 273.
78. See id. at 107.
79. See id. at 23. A visitor day represents 12 hours of use.
80. Id. Understanding is defined: "Acquiring general knowledge of basic matters relating to the earth; its resources, geology and history."
walking (180,100), and hunting (1,000). Winter use will account for over 40 percent of the activity. 81 These figures, including the winter activities other than skiing, total an impressive 2,475,700 visitor days, but they have nothing to do with the desirability of building ski slopes. And skiing is inconsistent with hiking and other summer recreation. Summer storms turn the ski slopes of Montana's Big Sky ski spa into mudslides which a fleet of bulldozers is marshaled to contain.

What does justify the optimistic anticipation of skier demand? Two comparisons are introduced which were not present in the draft. From 1967-1971, the use of National Forest ski areas in California increased less markedly than in Colorado, Oregon, Washington, Utah, and Wyoming. The Forest Service concludes that this discrepancy is "partially a reflection of a limited skiing opportunity." 82 The comparison is invalid for a number of reasons: the figures are dated, Squaw Valley and Granlibakken are not included, the figures are not related to population, and they do not take into account the length of the season. Also troublesome is the assumption that Californians, especially Southern Californians, prefer skiing to boating, swimming, and other recreation available in California, Nevada, Arizona, and New Mexico in the winter. The EIS cites the fact that 63 percent of the total skier use in California comes from the northern part of the state which has 36 percent of the population. "This indicates a large potential demand in Southern California that can be served with the development of skiing closer to home." 83 The illogic is apparent. The statement overlooks the year-round outdoor activities available in Southern California and the disposition of Southern Californians to a milder climate. People in Arizona probably ski less than people in Northern California; that does not mean they want to ski more.

The EIS also suggests that demand can be borrowed from Mammoth, that developing Mineral King will relieve pressure on Mammoth to expand. 84 Before this rationale can be seriously considered, the Forest Service will have to include in its EIS an assessment of the environmental impact of enlarging the capacity of Mammoth, 85 also situated in a National Forest. How else can it be said that developing Mineral King is preferable to expanding Mammoth, especially when Mineral King is still essentially pristine?

81. Id. at 106.
82. Id. at 7.
83. Id.
84. Id. at 7, 188.
The truth of the matter is that there is not, at present, the demand in Southern California to justify development of Mineral King for skiing, nor do present studies forecast sufficient demand. This is not to say the venture would fail; it would doubtless be a commercial success, perhaps at the expense of floundering resorts in California and elsewhere. More likely, promotion by Walt Disney Productions would manufacture demand, in the same way that demand could be manufactured for building a reservoir or a forest circus in Mineral King. As a final justification, the EIS states: "Development can be expected to give added impetus to the rising popularity of skiing, generating an increased demand for ski facilities." It is not in our interest for the Forest Service to tell us what we want. It is not in the interest of the nation or the National Forests to make an irretrievable commitment to a ski resort to satisfy the whims of a few in the Forest Service, relying on post hoc justifications of manufactured demand.

CONCLUSION

The Mineral King EIS raises recurrent problems about the usefulness of environmental impact statements in the planning process. Programming agencies to react to this new stimulus has been slow in the embryonic years since NEPA was passed. A thorough assessment of NEPA's effect on the proposed Mineral King development must await a more comprehensive analysis than has been attempted here, but three effects can be noted. The first is obvious: the delay in resolution of the legality of the development. A second is the reduction in size of at

86. MKEIS at 188.
least the initial proposal for development. The third is the deletion from the Forest Service’s vocabulary of the word “decision.” The draft EIS stated that it was prepared “to analyze the effects of implementing the decision made in 1966 to award the development to WDP, and the 1969 acceptance by the Forest Service of WDP’s master plan.” This passage does not appear in the final EIS. Of course, an agency must be somewhat committed to a project before it will undergo the EIS process, but the Mineral King EIS seems to describe a foregone conclusion, and there is considerable reason to view it in this fashion, especially when the Forest Service could not produce one study to justify its optimistic skier demand projections. NEPA has not noticeably dulled the Forest Service’s determination to develop Mineral King for skiing.

The intricacy of natural systems is illustrated in part by our criticisms of the EIS, and many problems have not even been mentioned. As commentators have noted, judicial review of agency decisions made on extensive factual records is difficult. However, the Mineral King EIS does seem to present one NEPA issue squarely: May agencies rely on manufactured demand to justify proceeding with a project. This issue is not squarely presented to the extent that it is impossible to ascertain whether demand and supply projections are accurate. But the EIS explicitly relies on generated demand, and, as has been shown, without it, the skiing development at its presently proposed size cannot be justified.

NEPA is seldom, if ever, the only legal claim raised in environmental litigation. The Sierra Club’s suit concerns the revocability of permits, compliance with the Endangered Species Act and the Act creating the Sequoia National Game Refuge, and the Secretary of Interior’s authority to permit transmission lines across Sequoia National Park and to permit construction of a highway through the Park for extra-Park, commercial purposes. (This includes the issue of the legality of destroying giant sequoias for extra-Park purposes.) All of these causes of action are traditional in nature and depend in part on factual determinations within judicial competence. The environmental planning process comprehends planning according to law. Greater clarity of the factual record on these issues would increase sensitivity of decisionmakers to their legal obligations.

The Forest Service has not yet announced its intention to proceed with the project. When it does, construction will await judicial resol-
tion of the legality of the proposal. At present, *Sierra Club v. Kleppe* (which is still listed as *Sierra Club v. Hickel* on the trial court's calendar) is on the civil inactive list,92 established by a recent rule believed to have been primarily motivated by the Mineral King case. The case can be restored to the active calendar by motion of any party.

Focusing on the issues of the litigation should not lead the reader to think of Mineral King in a narrow vein. Mineral King is not an isolated valley; its identity with Sequoia National Park is very strong.

Mineral King valley is surrounded on three sides by Sequoia National Park which provides many of the same recreational activities presently undertaken in Mineral King. In fact, many of the recreationists entering Mineral King valley use the valley as a staging area for entrance into remote areas of Sequoia National Park. A proposed wilderness area located in the Park lies adjacent to the Mineral King area . . . 93

A glance at the map appended to this Commentary reveals that Mineral King is more a part of Sequoia-Kings Canyon National Park than the EIS suggests. It is a geological, hydrological, botanical, and zoological one with the Park. Mineral King Valley is virtually embraced by the Park.

In recognition of their natural oneness, legislation has been introduced to include Mineral King in Sequoia National Park. Congressman Miller's bill94 has recently been followed by one from Senator Cranston.95 Citing effects adverse to his district's interests,96 the local Congressman, John Krebs, has introduced legislation similar to Senator Cranston's.97

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92. N.D. Cal. R. 119(d).
93. MKEIS at 97.
95. S. 3322, 94th Cong., 2nd Sess. (1976). In addition to including Mineral King in the National Park, this bill directs the Secretary of the Interior to prepare a management plan for Mineral King and to provide for additional recreation.