

regulations requiring such an analysis may well have expressed a permissible interpretation of NEPA, those regulations have since been amended to replace the worst case requirement with new requirements, and the Act itself does not mandate that uncertainty in predicting environmental harms be addressed exclusively by a worst case analysis. The Court of Appeals erred in concluding that the worst case regulation was a codification of prior NEPA case law, which, in fact, merely required agencies to describe environmental impacts even in the face of substantial uncertainty. Moreover the new CEQ regulations—which require that agencies, in the face of unavoidable information concerning a reasonable foreseeable significant environmental consequence, prepare a summary of existing relevant and credible scientific evidence and an evaluation of adverse impacts based on accepted generally scientific approaches or research methods—is entitled to substantial deference even though the worst case rule was in some respects more demanding, since there was good reason for the change in light of the substantial criticism to which the old regulation was subjected, and since the amendment was designed to better serve the EIS' "hard look" and public disclosure functions in preference to distorting the decisionmaking process by overemphasizing highly speculative harms.

3. The Court of Appeals erred in concluding that the Service's failure to develop a complete mitigation plan violated its own regulations, which require, *inter alia*, that "each special use authorization. . . contain. . . terms and conditions which will. . . minimize damage to . . . the environment." Since the Study made clear that on-site effects of the proposed development will be minimal and easily mitigated, its recommended ameliorative steps cannot be deemed overly vague or underdeveloped. Moreover, although NEPA and CEQ regulations require detailed analysis of off-site mitigation measures, there is no basis to conclude that the Service's own regulations must also be read in all cases to condition permit issuance on consideration (and implementation) of such measures. The Service's regulations were promulgated pursuant to its broad statutory authorization to allow recreational use of national forests and were not based on NEPA's more direct concern for environmental quality. As is clear from the text of the permit issued to MRI, the Service has decided to implement its mitigation regulations by imposing appropriate controls over MRI's actual development and operation during the permit's term. It was not unreasonable for the Service to have construed those regulations as not extending to off-site mitiga-

tion efforts that might be taken by state and local authorities, and that interpretation is controlling.

833 F. 2d. 810, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring statement.

A PREFACE TO THE SUPREME COURT AMICUS BRIEF OF THE AMERICAN PLANNING ASSOCIATION IN *ROBERTSON V. METHOW VALLEY* CITIZENS COUNCIL

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The amicus brief of the American Planning Association reprinted in this issue of *EPQ* deals with the question of what constitutes an adequate discussion of mitigation in an environmental impact statement.

The case of *Robertson v. Methow Valley Citizens Council* was decided on May 1, 1989 by the U.S. Supreme Court. The Court held that, while a reasonably complete discussion of possible mitigation measures is an important ingredient of an EIS and its omission therefrom would undermine NEPA's "action-forcing" function, there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, and a substantive requirement that a complete mitigation plan be actually formulated and adopted.

There were two different questions involved in the mitigation issue. The first was what constituted an adequate mitigation discussion in an EIS. The second was whether there was a substantive duty that agencies take action to mitigate the adverse effects of major federal actions, which entails the further duty to include in every EIS a detailed explanation of specific actions that will be employed to mitigate the adverse impact. It was the second issue on which the Supreme Court focused its attention—concluding that there was no such requirement. However, the APA amicus brief reprinted in this issue of *EPQ* focused on the first issue. The Supreme Court generally supported the brief's position but did not make a finding whether or not the mitigation discussion in the *Methow Valley* EIS was in fact adequate.

In the Methow Valley case the Forest Service published a final EIS in 1984 on a proposal to designate Sandy Butte in the Methow (pronounced "met-how") Valley for use as a major ski area capable of serving 8,200 skiers at one time. The EIS was used by the Regional Forester to adopt a plan which allocated the area to that use and to approve a special use permit for the Early Winters Project.

The final EIS was criticized by the plaintiffs in the original suit because of its lack of detail in the mitigation discussion. An example of the mitigation discussion in the EIS is the wildlife mitigation:

Specific mitigation for wildlife at the ski development can only be determined in review of the Master Plan. However, some measures are listed here to protect those opportunities that may exist.

- a. Locate runs, lifts, roads, and other facilities to minimize disturbance of bluegrouse wintering areas (primarily ridgetops). . .
- d. Evaluate impact of mule deer migration routes in review of Master Plan. . . "

The concern was that the EIS presented a list of mitigation measures that can be required but does not discuss which measures will be required or how effective they would be. The Forest Service argued that further specificity can only be provided when the permittee presents a master plan for development which would not be required until after the land allocation and use permit decisions were made.

There is an added wrinkle caused by the multi-staged nature of the decision. The Regional Forester first decided to allocate the land to a ski development and determined the size of the development that would be permitted. This was done without knowledge of the specific site plan for development. The decision is similar to the adoption of a comprehensive plan designation which includes a commitment to a certain intensity of development.

This multi-staged approach to decision making is becoming more and more common for planners who deal with major planned developments. These projects typically seek early approval and commitment to a concept based on bubble plans, including a determination of permitted gross density, before detailed site plans are prepared. In these circum-

stances there is often conflict between the planner's desire to know what type of mitigation will be used before a commitment is made to an intensity of development and the applicant's desire not to do the detailed studies necessary to provide this information until density commitments are received.

The APA was invited by the plaintiffs in the original ski resort case to prepare a brief concerning the mitigation question. They were seeking an independent professional perspective and felt that the planning profession was a logical place to go for this advice.

In the APA brief, the mitigation plan is seen as an integral part of decision making. The major idea is that rational decisions require knowledge of the unavoidable adverse impacts and economic costs associated with project alternatives and that certain categories of information about the mitigation measures are needed to generate this information. These categories include the mitigation goals, the effectiveness of the measures, secondary impacts they might cause, their feasibility, and ways they can be implemented and monitored. The need for these categories of information exists regardless of how detailed a decision being made is or what stage is being considered in a multi-staged decision process, although the detail of the information might vary.

The Court seems to have agreed with the theory that knowledge of the cost and effectiveness of mitigation measures is necessary for the proper evaluation of the unavoidable adverse impacts of a proposal by both the public and decision makers. In its opinion the Court wrote:

Implicit in NEPA's demand that an agency prepare a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 USC 4332 (C) (ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. See D.Mandelker, NEPA Law and Litigation Sec. 10:38 (1984). More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups or individuals can properly evaluate the severity of adverse effects. An adverse effect that

can be fully remedied by, for example, an inconsequential public expenditure, is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast private and public resources. Recognizing the importance of such a discussion in guaranteeing that the agency has taken a "hard look" at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR 1508.25 (b) (1987), in discussing alternatives to the proposed action, 1502.14(f), and in explaining its ultimate decision, 1505.2(c).

The Court never provides additional details about the meaning of "reasonably complete discussion," nor does it discuss whether the EIS in question adequately discusses mitigation measures. Instead, it focuses on the question of whether NEPA requires that a mitigation plan be adopted before a project is approved; it finds no such requirement in NEPA. The Court's decision does not resolve the issue of whether the EIS contains an adequate mitigation discussion. Nevertheless the Court does imply that the mitigation discussion is part of the determination of likely adverse impacts and that both the cost and effectiveness of the measures are important information to have in making this determination.

This brief provides planners with a voice in the nation's highest court and a usable set of standards for evaluating an important element of planning practice. It will be interesting to see if the issue of mitigation discussion continues to move in the direction chartered in the APA brief in the future.

**IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1988**

**F. Dale Robertson, Chief of the Forest Service, et
al.,
Petitioners,**

v.

**Methow Valley Citizens Council, et al.,
Respondents.**

**On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit**

**AMICUS BRIEF OF THE AMERICAN PLANNING
ASSOCIATION
IN SUPPORT OF THE RESPONDENTS**

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The American Planning Association (APA) is the national organization of professional planners and planning officials. Many citizens interested in planning issues are also members. APA not only functions as a professional organization for its 22,000 members in 45 chapters, but also publishes books and periodicals on planning and offers training and continuing education programs around the country. Virtually every member of APA is familiar with the National Environmental Policy Act (NEPA). Many members serve either as authors of environmental impact statements (EIS's) or responsible officials whose decisions must balance environmental impacts with other policy considerations.

This brief is not intended as an authoritative legal memorandum. As a consequence, rigorous citation to legal authority has been left to the petitioner, respondent, and other interested parties. The focus

of this brief is conceptual—identifying the essential elements of a mitigation plan and describing the role of mitigation in agency decisionmaking. This brief suggests a framework within which the issues presented by this case can be analyzed. One of APA's principal purposes is to encourage actions that improve public agency decisionmaking processes. Towards this end, this Amicus Brief is offered for the Court's consideration.

SUMMARY OF ARGUMENT

NEPA is a decisionmaking statute. NEPA's goal is to improve the quality of agency decisions, not the quality of agency documents. The EIS is a tool in this process used to disclose information. One of the central purposes of an EIS is to define the unavoidable adverse impacts associated with an action and its alternatives.

Mitigation measures are an indispensable element of environmental analysis. They are used to avoid, minimize, rectify, reduce or compensate for environmental impacts. It is essential that the mitigation measures identified be directly applicable to the decision in question. Without knowing mitigation, unavoidable adverse effects cannot be identified and a central purpose of an EIS is not served.

An adequate mitigation plan must contain five elements:

1. Determination of mitigation goals;
2. Evaluation of effectiveness;
3. Identification of new impacts;
4. Analysis of feasibility;
5. Development of implementation/ monitoring programs.

While level of detail might change as an action progresses from the programmatic to site specific stage of a tiered decisionmaking process, information on each of these five elements is always required.

In some special cases analysis might be deferred to a later stage in the decisionmaking process. However, to ensure that mitigation options are foreclosed, the ability to change the decision must be expressly reserved. Further, deferral is permissible only when a subsequent EIS will be required to disclose the information for public comment.

The *Early Winters* decision fails the tests of adequacy. Mitigation measures identified in the EIS are simply listed. No information is provided regarding the five essential elements of a mitigation plan.

Further, the mitigation offered fails to match the decision. No measures are offered that affect the decision in question—the location, size, intensity or duration of a four season destination recreation resort.

Finally, though much of the pertinent analysis has been deferred by the Forest Service, no provision has been made to modify its decision based on this information. Further, no subsequent EIS will be available to disclose this information if and when it becomes available.

A review of the literature on similar decisions, i.e., *Mineral King*, demonstrates that the Forest Service could have provided far more information on mitigation if it had wished to do so. For example, its own studies identify mitigation measures to reduce the impact on mule deer and provide information on the effectiveness of these measures. Under these circumstances, the EIS fails to satisfy the requirements of NEPA. Therefore, the judgement of the Court of Appeals should be affirmed.

ARGUMENT

NEPA is essentially a decisionmaking statute. *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S. Ct. 1197, 1219 (1978). NEPA's procedures serve two functions: (1) to ensure that federal agencies have adequate information about the potential environmental consequences of their actions and about legitimate alternatives to the proposed action; and (2) to alert the public to any possible negative environmental effects of the proposed agency action. *Trout Unlimited v. Morton*, 509 F. 2d. 1276, 1282 (9th Cir., 1974). NEPA procedures are designed to ensure that environmental information is available to public officials and citizens *before* decisions are made and to ensure that those decisions are based on an understanding of environmental consequences. 40 CFR 1500.1(b), (c).

The EIS is a tool used in this process for improving both the information that is available and the process that is used in decisionmaking. A central purpose of an EIS is to define the unavoidable adverse impacts, that is those impacts which cannot or will not be mitigated. Of necessity, a decisionmaker must weigh these unavoidable impacts in his determination of whether the impacts are acceptable, balancing environmental concerns with economic, technical, and other policy considerations. See 42 USC 4321 *et seq.* (cited as NEPA) 102(2)(B) and 102(2)(C)(ii);

and 40 CFR 1501.2 (b) and 40 CFR 1508.20.

Before unavoidable impacts can be defined, the possible and appropriate measures for mitigating or reducing the identified environmental impacts must be established and their effectiveness must be known. Mitigation measures include means for avoiding, minimizing, rectifying, reducing, or providing compensation for environmental impacts. These mitigation measures must commensurate in detail and appropriate to address the decision and its impacts.

This brief addresses what constitutes an adequate mitigation plan in an EIS. It will place mitigation in the context of decisionmaking theory and show its essential and inextricable role in the process of rational decisionmaking.

A. NEPA Requires Rational Decisionmaking

The NEPA regulations, 40 CFR 1500-1508 provide:

The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. 40 CFR 1500.1(c).

This regulation essentially summarizes the rational decisionmaking process. Rational decisions are made by determining the consequences of alternative courses of action available to the decisionmaker and evaluating the comparative merits of the alternatives based on the goals of the decisionmaker and other participants. (*J. Friedman & B. Hudson, 1974; Jannis & Mann, 1977; Van de Ver and Koenig, 1976*). As suggested by the regulation cited above, in context of environmental impact assessment, rational decisionmaking usually involves evaluating the relative merits of alternative plans or projects in light of their environmental, social, and economic impacts and pertinent goals.

Complete information about the consequences of decisionmaking is not always available. The level of detail, specificity, and reliability can also vary. Usually one develops more detailed information and types of information available to the decisionmaker changes as one proceeds from general plan, program, or policy decisions to specific project decisions. Rational decisionmaking requires, however, that information be roughly commensurate with the decision being made. That is, a very specific commitment usually requires specific information and broad,

general decisions should be made with access to broad and general information about the consequences of the decision. A mismatch between the level of decision and its supporting information can result in a failure of the rational decision process. In interpreting NEPA, this Court has generally agreed with this principle, holding that the detail required by NEPA in an EIS depends on the nature and scope of the proposed action. See *Aberdeen & Rockfish R.R. Company v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 322, 95 S. Ct. 2336, 2356 (1975).

The importance of having information commensurate with the decision being made is evident in a comparison of a few of the kinds of information necessary to making a plan or policy level decision (such as a plan for an entire wilderness area) with that necessary for a project level decision (such as development of a portion of that area as a ski resort using septic systems and wells). See Table 1.

TABLE 1: MATCHING INFORMATION WITH DECISIONS

INFORMATION CATEGORY	PLAN	PROJECT
topography	10' contours	2' contours
soils	generalized soils associations and characteristics.	specific soil types; bearing capacity; erodibility; percolation rate.
groundwater	generalized yields; seasonal variations; long term trends	well's ability to produce required yield; impact of withdrawal on site, location and production of wells in the vicinity.
traffic	general volumes and road capacity.	specific volumes by use; direction of travel; distribution; peak hour trips; improvement requirements.

The plan level decision is analogous to the forest; the project to the trees. At the first, most basic level of decisionmaking, we need to know where the forest

is. This cannot be known by studying the individual trees. Only an overview perspective will bring the forest into view. At the project level it is the trees—their kind, location, and condition—which are important.

B. Mitigation is Integral to NEPA Analysis

Information about environmental impact mitigation is an integral part of an EIS and decisionmaking process. This is because choices made concerning environmental mitigation will affect both the impacts and the cost of the option. Mitigation determines which impacts are unavoidable. In turn, this information helps determine whether the project is acceptable. Therefore rational assessment of the economic costs and environmental impacts of an action necessarily involves the consideration of the possible mitigation measures that will be used.

Mitigation information also is integral to decisionmaking because decisions foreclose mitigation options. A decisionmaker should know what mitigation options are available and how they would be affected by any decision. Not having this information might result in unintentionally foreclosing mitigation options. Using the foreclosed options becomes impossible or requires the reversal of earlier decisions.

Decisionmaking involves the simultaneous choice between alternatives and mitigation strategies. The decisionmaker must compare the economic costs and benefits and unavoidable environmental impacts of each alternative. The cost and impact associated with each option depends on the mitigation measures that are selected to accompany the option. For example, how one chooses to insulate a home affects both the cost of its construction and its impact on the use of energy. Therefore the evaluation and selection of an option must be done in conjunction with the evaluation and selection of mitigation measures.

To do this it is necessary for the decisionmaker to have more than simply a list of available options. Simply knowing what type of insulation will be used in a house is useless information without knowing what it is there to do, how much heat loss it will allow, what it will cost, whether it is feasible to install, and who will install it. (Alexander, 1985; Van Meter & Van Horn, 1975). Not surprisingly, court decisions reflect this viewpoint. A mere listing of mitigation measures does not qualify as a reasoned discussion. *Northwest Indian Cemetery Protective v. Peterson*, 795 F. 2d 688, 697 (9th Cir. 1986).

Again, turning to NEPA, an EIS is required to disclose environmental impacts and unavoidable adverse effects of a proposed action. NEPA 102(2)(c)(i), (ii). To determine unavoidable effects, mitigation measures must be established. The unavoidable impacts of a proposed are those environmental impacts that remain after considering the mitigation. A conceptual equation which illustrates these points can be described as follows:

$$\text{Environmental Impact} - \text{Mitigation Measures} = \text{Unavoidable Adverse Effects}$$

A decisionmaker must also consider the economic costs of a decision. Mitigation measures are not free and contribute to the total cost of any option being considered. This is illustrated as follows:

$$\text{Project cost} + \text{Mitigation Cost \& Unavoidable Adverse Impacts} = \text{Total Cost}$$

Thus, when viewed in this framework, mitigation is not something that can be added at the end—like icing on a cake. Rather, it must be integrated with decisionmaking. The identification of mitigation measures is an indispensable element of rational decisionmaking.

In order to know how mitigation will affect these considerations, certain basic categories of information about mitigation options are necessary. Without such information, the decision to choose a certain option is made without full knowledge of the environmental impacts or economic costs of the decision. If the true cost and effect of the mitigation had been known, a totally different alternative may have been chosen.

C. To be Adequate, Mitigation Must Include Five Elements

There are five categories of information about mitigation that should be presented in an EIS.

1. Mitigation Goals must be determined. The impact or impacts intended to be reduced and the *acceptable impact level or threshold* must be known. This information guides the decisionmaker's decision regarding the relevance of the mitigation measures to the options under consideration and the extent to which impacts must be affected by mitigation.

2. Effectiveness of a mitigation measure must be evaluated. Effectiveness can be expressed in terms of both the extent to which the impact will be reduced as well as the probability of success of the mitigation measure. Information on the track record of the measure, applied in other comparable situations, can be used to reduce risk and uncertainty, a goal of rational decisionmaking.

3. Any new **Adverse Environmental Impact** created by mitigation must be identified. The environmental impact of mitigation measures adds to the unavoidable impacts and costs associated with a decision option. For example, improvement to or protection of mule deer habitat might involve the purchase of land or restrictions on the use of private land—costs and/ or burdens that must be disclosed before a decision is made.

4. Mitigation analysis is not complete unless a measure's **Feasibility** is established. Feasibility, which refers to the capability of seeing an action through to completion, must be known and discussed in terms of legal, social, economic, and technological factors. A mitigation measure might be socially acceptable and technologically possible, but unrealistic economically.

5. An **Implementation/ Monitoring** plan must be developed for each mitigation measure. The requirements for implementation of a mitigation must be known. Without this information the decisionmaker cannot determine whether decisions about effectiveness are valid. Components of implementation include the identification of responsible persons or agencies, funding and monitoring. Related to both effectiveness and implementation, there should be a contingency plan if monitoring demonstrates that the selected mitigation is ineffective.

All five categories of information—goals, effectiveness, impacts, feasibility, and implementation—are essential for mitigation to fulfill its role in the decision-making process regardless of the decision level.² The level of generality or specificity inherent in the decision under consideration does not affect the need for all five categories of information, it only affects the level of specificity with which they are treated. If any of these categories of information is missing, the mitigation information will not allow the decisionmaker to identify the unavoidable adverse impacts that could occur.

D. Special Treatment of Mitigation is Needed for Tiered Decisions

NEPA and its implementing regulations recognize that many decisions will be made in tiers or stages, proceeding from a very general decision such as a decision to undertake a certain kind of action (often referred to as a programmatic decision) to subsequent more specific decisions based on that initial decision. Progressively, decisions must be made on location, size, intensity, duration and specific site design. 40 CFR 1502.20, 1502.28. See also 40 CFR

1501.2(b). (Etzioni, 1986; Steiner, 1979) In the case of multi-stage or tiered projects, it is not whether the project's site specific impact is evaluated, but when such evaluation should occur. *County of Suffolk v. Secretary of Interior*, 562 F. 2d 1368, 1378 (2d. Cir. 1977) cert. denied, 434 U.S. 1064, 98 S. Ct. 1238 (1978).³

In addition to guiding subsequent decisions, early choices foreclose subsequent options. These foregone options could include important ways of reducing the economic cost or environmental impact of the project or plan. A rational decision requires knowledge of the choices forgone by decisions. This includes mitigation options that may become infeasible as a result of a given decision.

Although tiered decisions begin with broad, general choices, they nevertheless can be made with the best available information. At the earlier stages this analysis occurs at a more general level, but it is still based on the evaluation of the relative merits of different options.

What varies from stage to stage is not the need for this information, but the level of detail of the information that is available. (Delberg, 1974). At the earliest stage of decisionmaking the decisionmaker will only have general options before him. Even though general in nature, a mitigation plan is not adequate unless it tells both the decisionmaker and the public something about goals, effectiveness, impacts, feasibility and implementation.

The answers to these questions will frequently determine whether a project is a "go" or a "no go." If for example, it is impossible or prohibitively expensive to mitigate impacts which by law must be avoided, or which are simply unacceptable, it might not be worth proceeding to subsequent stages in the decision process. This can only be known by early identification of available mitigation options.

Each subsequent decision in a tiered process will consider a more detailed set of choices, a more detailed set of impacts, and result in a more detailed decision and commitment which will guide the formulation of choices in the decisions that follow. Alternatives become narrower in scope and the decision becomes increasingly irrevocable. A more detailed understanding of mitigation measures is needed in order to understand the unavoidable adverse impacts that remain. At each stage of this process, the detail in the choices considered, the impacts being evaluated, the mitigation measures,

and the commitments made should be commensurate with one another. (Gregory & McDaniels, 1987).

A detailed decision regarding a specific site plan cannot be rationally based upon very general impact studies. Similarly, early general decisions do not require highly specific impact information.

However, if detailed decisions are being made, then detailed mitigation information should be available. Doing otherwise increases the risk that mitigation measures will be found to be infeasible or ineffective after making commitments based on the assumption that they would work.⁴ In such cases, because significant expenditures may have been made, decisionmakers feel they cannot deny a project even though its unavoidable impacts are unacceptable. It is this result which NEPA is designed to avoid. 40 CFR 1500.1(b).

E. Early Winters Mitigation failed to Match the Decision in Question

Petitioner suggests that a "tiered" decisionmaking process has been used for *Early Winters* (Pet. Br. p. 28). Petitioner agrees that the level of detail devoted to mitigation measures depends on the nature of the action proposed (Pet. Br. p. 28). Therefore, to determine the extent and the depth of analysis of mitigation that is required depends on where the decision in question rests in the tiered or multi-staged process.

The Record of Decision and Special Use Permit Authorizations (SUP) reflect a specific decision regarding the location (Sandy Butte); the size (3900 acres); the intensity (8200 skiers at one time); and the duration (30 years) of a destination, four season recreation resort. More specifically, planning, construction, operation and maintenance are authorized with construction required to begin within two years of the issuance of the permits. Further, the permits set forth terms and conditions of operation including the requirement that no construction is authorized until, among other requirements, a specific site development plan is approved. This plan must show all buildings, service areas, roads and structures. In the context of the staged or tiered decisionmaking process, one agency decision remains—site plan approval. Therefore, the mitigation measures relevant to the decisionmaker are not those relating to site layout and design, for those can be reserved for later decision if a subsequent EIS is expected. At this time, the decisionmaker must be fully informed of those measures that affect the environmental impacts associated with the Sandy

Butte location, the size and intensity of the operation (3900 acres/ 8200 skiers) and the projects duration (30 years). Mitigation measures must address these decisions; they do not.

As explained previously, in a tiered or staged decision process, the preceding decision serves to guide and limit subsequent decisions. Therefore information on environmental impacts and mitigation measures from preceding stages serves the same function. In the case of *Early Winters*, three decision documents were prepared in earlier stages of the tiered process.

In 1968, the Winthrop Ranger District Multiple Use Plan (MUP) was completed. In 1970, this plan was revised to indicate that winter sports activities might be included in the Early Winters area depending on feasibility studies that were to be initiated in the near future. Also in 1970, a second plan was prepared by the Forest Service focusing specifically on winter sports in the North Cascades.

In the 1970, the *Winter Sports Study* established three priorities for winter recreation development. First priority, for the next ten years (1970-1980), was to develop fully existing ski areas. Second priority was to study intensively possibilities for ski-touring, snow shoeing and ski mountaineering. Two specific sites were proposed as alpine tour sites.

The third priority established in the 1970 Winter Sports Study was for new downhill ski areas. Three sites were identified, two were classified as locally important and one site, Sandy Butte was considered to have the necessary physical features for a site of major importance. The 1970 Study concluded that:

Time schedules for development of these three sites will depend upon demand, need, discovery of better potentials, the success of Priority One recommendations and the results of a . . . systematic procedure for developing potential winter sports sites.⁵

Winter Sports Study, p.8.

In total, thirteen potential downhill sites were analyzed. Though only operational factors were considered, it is clear from the Study that programmatic (destination Ski resort) and location (Sandy Butte) decisions were made.

These two were followed in 1974 by the Joint Plan

for the North Cascades Area. This Plan, prepared by the National Park and National Forest Services, also identified the Early Winters area as a potential downhill ski resort site. While all three of these documents were prepared or revised after the effective date of NEPA (January 1, 1970), not one of them was subjected to any environmental analysis. Not one met the standards of NEPA. Therefore, no subsequent stage or tier in the decisionmaking process could rely on any prior environmental analysis, for such analysis is non-existent.

The next planning document, the *Early Winters Sports Study*, was completed a decade later, in 1984. A draft and final EIS was prepared, the adequacy of which is challenged in this proceeding. For the first time, the environmental impacts, unavoidable adverse effects, alternatives and mitigation measures associated with a destination recreation resort and the Sandy Butte location, are disclosed. While "tiered" decisionmaking might have predated the Early Winters SUP decision, tiered environmental analysis did not.

The failure to comply with NEPA at early stages in the decisionmaking process increases the scope of analysis and level of detail that must be expected before the issuance of a special use permit. For example, while previous studies established that a new destination downhill ski resort was needed and that the Sandy Butte Site was the best location for such a facility, no environmental analysis has been completed comparing the impact of a downhill ski resort with other resource uses. Further, the environmental impacts of Sandy Butte have not been compared with those that could be expected at other locations.⁶ A fully informed decision could not be made without this information. Further, subsequent decisions in the tiered process would be deficient unless this information is generated. The only way to remedy this situation is to ensure that the environmental documents prepared for the SUP cover programmatic and location decisions as well as those relating to size, intensity and duration. Further, while deferred analysis might be appropriate in some circumstances (see footnote 3), it must be expressly reserved for a subsequent EIS. Here it was not. Rather, construction is required to begin in two years and permit conditions focus on operational issues. The mitigation measures presented in the Early Winters Project do not match the scope and detail of the decision.

F. The *Early Winters* Mitigation Failed to Meet the Five Element Test

In a tiered decisionmaking process, the failure to complete a sufficient analysis at earlier stages compounds the difficulty of decisions at later stages. This situation can be illustrated by examining the environmental impacts of the Early Winters project on mule deer.

The 1984 Study discloses an unavoidable adverse impact on the mule deer population amounting to a reduction in population of up to 15 percent, while acknowledging, however, that other agencies with expertise (i.e. Washington State Departments of Ecology and Game) place this estimate at 50 percent. A list of possible mitigation measures is also identified⁷, most of which are site specific to be incorporated in project layout and design. This focus on site planning is entirely understandable since it is the next decision in the tiered process. However, to focus on site design means that significant mitigation measures that would have normally been identified at an earlier programmatic or location phase—perhaps the only ones that can significantly reduce the impact of the decisions—are given only very general treatment.

Concern regarding the environmental impact of a ski area development on mule deer population is not unique to Early Winters. Previously, the U.S. Forest Service was faced with this issue in the proposed development of the Mineral King Ski Area in the Sierra Nevada Mountains in California.⁸

To better understand the environmental impact and mitigation measures relating to mule deer, the Forest Service commissioned research studies which were completed in 1978.⁹ The Study indicates the single most effective mitigation measure is to reduce the scale of development.¹⁰ Land acquisition, winter range management, and improvement to migratory summer range were some of the other measures identified.¹¹ All have their own environmental consequences, and differing levels of effectiveness and feasibility. Possibly, the cost and impact of these measures, if considered at an earlier stage in the tiered process, might have led the Regional Forester to have selected another location; or reduced the size of the project; or selected an alternative involving fewer skiers; or shortened the duration of the approval; or some combination of the above. All we know for sure is that the Forest Service did not disclose its own research and that none of these options have been reserved for consideration at later stages of the decision process.¹² The mitigation

measures presented in the Early Winters project do not meet the five element test proposed by this Amicus.

CONCLUSION

For all of the foregoing reasons, the judgement of the Court of Appeals should be affirmed.

Respectfully submitted,

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Footnotes

1. All parties have consented in writing to the participation of this amicus pursuant to rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondent, Methow Valley Citizens Council, et al., in No. 87-1703 and addresses the duties of the United States Forest Service under the National Environmental Policy Act and the Council on Environmental Quality regulations implementing NEPA.

2. These five categories are described in various articles published by USFS in the *Proceedings of the Mitigation Symposium: A National Workshop on Mitigating Losses of Fish and Wildlife Habitants, July, 1979*.

3. Deferral of discussion on some issues from an earlier EIS until a later EIS has been permitted. To do so, however, the Court looked at the realistic possibility of acquiring the information and the necessity of the information at a particular stage in a project. Further, this is allowable only if a multi-stage project can be modified when the new information is available; the agency has reserved the power to make such a modification based on new information; and a subsequent EIS will be available to disclose the new information. *County of Suffolk, 562 F. 2d. at 1378*.

4. One commentator has likened mitigation to Noah's

Ark—it being the first recorded example of a mitigation measure used to avoid a portion of the impact of the great flood.

5. The procedure is set forth in the 1970 Study and reflects a near classic listing of the steps taken in a multi-staged, *rational* decisionmaking process.

6. Both of these areas of analysis are included in the systematic procedure described in the 1970 Study. The Ninth Circuit has required analysis of alternative locations and Petitioners have presented this issue to the Court.

7. The 1984 Study, pp. 16-17, lists site specific measures concluding that the exact measures used cannot be determined until a Master Plan is reviewed. This listing is in the mitigation section of the Study. Further back in the document at pp. 77-78, off-site measures are identified but never referenced in the summary.

8. *Mineral King* was the subject of litigation in *Sierra Club v. Morton, 405 US 345, 92 S. Ct. 1361 (1971)*. After subsequent decisions by the District Court, the project has not built and agency jurisdiction has been transferred from the Forest Service to the National Parks Service. *Mineral King* is instructive, however, because it is very similar in size and scale to the *Early Winters* proposal and involves similar impacts.

9. See generally *Cornell, et al.*, pp 474-480.

10. *Ibid*, p. 479.

11. *Ibid*, p. 477-479.

12. The terms and conditions of the SUP provide no authority for the Forest Supervisor or the Regional Forester to require any change due to the environmental impact of the project on mule deer. Arguably, only conditions 48, 50, 53 and 76 even relate to possible environmental impacts. The Record of Decision does identify three off-site mitigation measures intended to alter the project's impact on mule deer. However, effectiveness, impact, feasibility and implementation are not addressed. Further, none are linked in any way to the approval of the project.