In the

Supreme Court of the United States

ERRA CLUB,

Petitioner,

v. No. 70-34

ERS C. B. MORTON,
retary of the Interior, et al.

Respondent.

Washington, D. C.
November 17, 1971

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SIERRA CLUB, Petitioner,	:	
v.	:	No. 70-34
ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, et al., Respondent	:	

Washington, D. C.,

Wednesday, November 17, 1971.

The above-entitled matter came on for argument at 11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

LELAND R. SEINA, JR., ESQ., Feldman, Waldman & Kline, 2700 Russ Building, San Francisco, California 94104, for the Petitioner.

ERWIN N. GRISWOLD, Solicitor General of the United States, for the Respondent.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 34, Sierra Club against Morton.

Mr. Selna, you may proceed.

ORAL ARGUMENT OF LELAND R. SELNA, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. SELNA: Mr. Chief Justice Burger, and may it please the Court:

The Sierra Club brought this proceeding against the Secretaries of Agriculture and Interior, and their assistants, to establish that their plans to authorize a huge private recreational development at Mineral King in Sequoia National Game Refuge, and for a State highway across Sequoia National Park to reach that development were illegal.

The Club argued that unless temporarily enjoined, the implementation of those plans would cause irreparable harm to the special conservation interests of the Club and to the public.

The District Court, after two days of hearings, granted a preliminary injunction. The government appealed, and the Ninth Circuit reversed it, denying the Club standing and then finding the District Court erred in upholding the Club on the merits.

The order dissolving the injunction has been stayed pending the outcome of this case; and this Court granted the Club's petition for certiorari on February 22, 1971.

The case presents several key issues, including, first:

whether the Sierra Club may have standing for itself and the public to challenge violations of laws which would injure its long-held aesthetic and conservational interests in Mineral King in Sequoia National Park?

Second: Whether the Secretary of the Interior may permit the State of California to build an operate a new connecting link freeway across Sequoia National Park, when it serves no park purpose?

Third: Whether Congress has limited the size of long-term developments in national forests to 80 acres?

Fourth: Whether the Secretary of Agriculture may authorize a huge recreational development in a game refuge?

Mineral King is located in the Sierra Nevada Mountains, approximately 225 miles north of Los Angeles. It is a portion of a 15,000-acre game refuge which Congress created in 1926 --

Q Now, is the 15,000 acres the large area that you've got outlined, or is it the white area?

MR. SEINA: Mr. Chief Justice, the area that is in white is 15,000 acres. Sequoia National Park surrounds it on three sides.

Q Well, by the distinction now of the colors, is that white area now part of Sequoa National Park?

MR. SEINA: No, it is not, Mr. Chief Justice. It is a game refuge, and it is part of Sequoia National Forest. But it has that special status which we'll come to.

Q Yes. And the road that you're concerned with will pass from left to right into --

MR. SEINA: The road -- the smaller road is an existing road. The road that is in heavier mark is that which is proposed to connect the State highway here, across Sequoia National Park here, to dead-end at Mineral King here.

Q And when you say that it serves no park purpose, do you mean that it is -- its only purpose is to serve the white area which is not part of the park?

MR. SEINA: That's correct, Mr. Chief Justice.

Q Merely an access?

MR. SEINA: That's correct.

Walt Disney Productions has described Mineral King, and I'm quoting from the Appendix at page 53a, as "unsurpassed in natural splendor, ... perhaps more similar to the European Alps than any other area in the United States." And "generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas."

In 1969 the Forest Service accepted a proposal from Disney for a huge resort development at Mineral King. Disney was to construct hotels, lodges, restaurants, and other permanent facilities so that 14,000 persons could ski at Mineral King at one time.

Some of those permanent features, including ski lifts, parking and sewage disposal facilities, and roads, among other

things, would not fit on the 80 acres, which is the limit of Agriculture's term authority, under 16 U. S. Code 497.

The District Court found that up to 1,000 acres would be occupied and affected by the development.

Agriculture planned to get around that limit of 497 by issuing a second interlocking permit, relying on 16 U. S. Code Section 551, which authorizes him to make rules and regulations for the National Forests.

Now, the road that we spoke of that's in existence is only partially paved. It was in existence when the park was created, and has served Mineral King for 90 years. To solve the problem of transporting 14,000 persons at one time to Mineral King was a problem, and the State of California agreed to construct a high-standard freeway to dead-end at Mineral King, provided that it could cut across the park.

The State rejected other avenues as longer and more costly. The Secretary of the Interior finally acquiesced in the highway, although it would not serve a park purpose.

He also was prepared to issue a permit for a high-voltage transmission line across the park to serve Mineral King.

The Sierra Club has worked to preserve the lands at Sequoia National Park and Mineral King since its founding. It helped draw the boundary lines and to work out the compromise which established the game refuge in 1926.

As an incident of the Club's interest in the area, some

of its members use Mineral King.

Q Does the record show that?

MR. SELNA: Mr. Justice Blackmun, the record contains a letter which is written by a member of the Board of Directors of the Sierra Club, in which he in turn refers to his trips to Mineral King.

The public record, which is referred to at page 30 of our brief, in footnote 3, refers to testimony in 1920 before the House Committee on Public Lands, in which Stephen Mather, Director of the Park Service, refers, down about halfway in the footnote, "The Sierra Club members probably know that area better now than any other living people. They go in there nearly every year, a club of about 2,000 members, and they know every nook and corner of it."

Q But there isn't any direct testimony by members of the Club anywhere in the record, is there?

MR. SELNA: Direct testimony concerning their use, Mr. Justice Blackmun? No, there is not.

Q And this goes back to the days of John Muir, doesn't it?

MR. SELNA: Yes, it does.

Q All right.

MR. SELNA: Commencing in 1965 the Club sought public hearings to challenge the project, which threatened to seriously impair its conservation program, and to harm the public interest

in conserving these special lands. But the Secretary of Agriculture refused to conduct those hearings, and without them he promised to issue the two interlocking permits to Disney. Those permits were to become effective when the State of California let a contract for highway construction, and with those permits Disney would have commenced the bulldozing and earth-moving which would have caused irreversible change at Mineral King.

The Secretary of Interior was about to issue that highway permit, which would have triggered the entire project, when the Sierra Club filed this action.

We first argue that the Sierra Club had standing, too. Our success on this issue, though, without more, would leave unresolved significant national questions of public land management. It also would leave intact the Ninth Circuit's predisposition of merits in this case.

We therefore argue thatthe highway across the park and the Disney development would be illegal. We will not argue orally concerning the failure of the Secretary of the Interior to conduct hearings on the park highway, concerning the transmission line across the park and concerning the standards supplied by the Ninth Circuit in dissolving the preliminary injuction. These matters have been fully briefed.

This Court decided in the Data Processing case in 1970 that: aggrievement to aesthetic conservational, recreational, as well as economic values could sustain standards.

The Court in that case cited the Scenic Hudson Preservation Conference and Office of Communication of the United Church of Christ cases. Those were cases in which organizations, aesthetic or conservational, or recreational interests were sufficiently aggrieved to permit them to represent the public interest. Cases very comparable with this.

This Court, this year, granted the Sierra Club's standing in taking jurisdiction of the Citizens to Preserve Overton Park vs. Volpe case, to enforce the conservational purposes of Federal Highway Aid statutes.

All of these cases confirm the Sierra Club's standing here. The Club meets the standing tests of Data Processing. It provides a more than adequate assurance of concrete adversity.

The Club would be aggrieved or injured in fact by the threatened acts against its conservational interest in these lands. I refer to its long-term efforts and to its -- it's had a long-term program to preserve these lands through educational programs, writings, and advocacy, which would have been impaired if the development had occurred.

At the same time the development threatened the public's interest in preserving our natural resources for present and future generations.

The Club is within the zone of interest of the relevant statutes. We will see that 16 U. S. Code Section 1 protects Sequoia National Park in its present state, in its natural state.

Section 497 protects the National Forests against overdevelopment. Section 688 protects wildlife and its habitat in the game refuge.

All of these are conservation statutes. All of them protect the public interest which is shared by the Club.

Third, none of these statutes precludes judicial review.

Q How old is this Club?

MR. SELNA: It's over 70 years old, Mr. Justice Stewart.

Q It has about 78,000 members?

MR. SELNA: It had at the time the action was filed. I believe at this time there are over 100,000 members.

Q I was just wondering how far your argument would go. I'm reminded of these so-called clubs that get chartered airplane flights across the Atlantic Ocean, these ad hoc organizations. Could I form a club, Friends of Walt Disney Productions, and come in on the other side as a party?

MR. SELNA: The question of anybody's standing, Mr. Justice Brennan, ought to be an evaluation that a court would make --

Q My name is Stewart.

MR. SELNA: I'm sorry, Mr. Justice Stewart.

-- ought to be an evaluation which any -- which the court would have to make on a case-by-case basis.

Q Then on what criterion would it be?

MR. SELNA: A variety of criterion might be appropriate.

As: Has the organization been in existence, and has it taken a stand over an extended period of time that's consistent with its stand? Has it done anything which gives it special expertise in the area that it tries to argue about? Does it have an educational program? Does it write on the subject? Do its members use the area? Is it adequately staffed, so that it can present a case in a way that a court can understand it?

Q You think all of these things would have to be tried out and litigated and decided before one could decide whether or not this organization was a proper party?

MR. SEINA: Mr. Justice Stewart, you --

Q I must say, using my analogy, like all analogies, is not very exact perhaps, but of these clubs that charter airplanes across the Atlantic Ocean, even with all the force of the scheduled airlines, trying to implement policing of them, they haven't -- there hasn't been very successful policing of them?

MR. SEINA: No, Mr. Justice Stewart, but if the concern, as I understand it ought to be, is that the Court be assured that a case or controversy is presented, then while an exhaustive trial should not be necessary, or an exhaustive litigation of the quality of the Club's position should not be necessary, there are these criteria which I think rather quickly and rather easily could be determined by the court.

Q Even if the club were brand-new, if it were a club of association of people interested in -- say, Friends of

Bigger Highways. That was all in favor of these new highway coming into Mineral King, and they were all friends of great big, broad, paved highways, and they were bona fide, couldn't they associate and become a party and bring a lawsuit to --

MR. SELNA: It's conceivable that they could.

Q In the United Church case that you've cited, wasn't there a suggestion that the principal test of such an organization is whether it's truly representative of the interests that it seeks to assert?

MR. SELNA: Yes, Mr. Chief Justice, and --

Q You claim that Sierra is truly representative of the interests that it asserts in this case?

MR. SELNA: We do. We do. And the --

Q Then it wouldn't make any difference whether it was organized last year or 70 years ago, would it, really?

MR. SELNA: Except to the extent that the question as to whether it's truly representative might be reflected in its age and --

Q The 70 years tends to reinforce your claim that it's --

MR. SELNA: Truly representative.

Q -- and the 100,000 members?

MR. SELNA: Yes, it does, Mr. Chief Justice.

Q Why does it have to be an association? Why couldn't it be a man, let's make him an old man, who, for 70 years,

has had a very genuine interest in what the Sierra Club is interested in. He's now 75, and he's had this very genuine interest since he was five years old, for 70 years. And he can show it to the satisfaction of a court. Has had exactly the same interests that this Sierra Club has. Why couldn't he bring this lawsuit?

MR. SELNA: Mr. Justice Stewart, I think that he could.

Q Yes.

Q John Muir, for instance, if he were still living today?

MR. SELNA: Right. He could do it.

Q Now, I take it, Mr. Selna, from early March you concede there is some limitation other than a broad -- and that a broad general interest in the problems of ecology is not enough. To be more specific, if there were a controversy about the installation of a nuclear power plant on the Mississippi River, would you feel the Sierra Club would have standing to sue in connection with that?

MR. SELNA: Mr. Justice Blackmun, I am not at this moment familiar with whether the Sierra Club has a chapter or an expertise in that area. I would have to consult with the Club before I could answer your question. But it would have to have competence in the area in which it sought to represent the public interest or it wouldn't be able to do it.

Now, the Ninth Circuit denied standing in this case,

because, and I quote from its opinion, "The Club had not asserted that any of its property will be damaged, that its organization or members will be endangered, or that its status will be threatened." That's in the Appendix at page 217.

These injuries to property organization of status have nothing to do with aesthetic conservational or recreational values. They are not redressable under a conservation statute, because while the litigant beautifully satisfies the first test of Data Processing, he's injured in fact. He's not covered by the conservation purposes of the statute, and he's outside his zone of interest.

Now, because the Sierra Club represents not only itself but the public interest, the government is wrong in its argument that injury to the public demands a special statutory grant in order to permit standing. The Data Processing case already answered that argument, when it recognized that widely held aesthetic conservational and recreational values, which, by their nature, affect the public, could be a basis for standing.

Its zone of interests and reviewability tests apply only to cases where no special statute confers standing. And the fact that the interested group is broad does not bar standing, as this Court has recognized in Flast vs. Cohen in 1968 and Baker vs. Carr in 1962.

On the contrary, it's because the Club represents the public interest that any questions regarding standing should be resolved in its favor. Because in this case conservationists'

organizations may be the only people who will step forward to challenge the illegality.

The Sierra Club does not seek to review authority over the exercise of the administration -- does not seek to have its own review authority over the exercise of the administrative discretion, but asks the court to do that in which it is expert; namely, to decide whether the federal administrator stepped outside the bounds of their statutory authority. That review should not be barred at the courthouse door.

We argue that the Disney development at Mineral King would be illegal on several grounds, but, in any event, the proposed new high-speed access highway across the Sequoia National Park is independently illegal. Congress has expressly protected these parks in their natural state, and has severely limited the use of parklands.

The organic Act of 1916, which established the National Park Service, included Section 16 U. S. Code Section 1, as quoted at page 66 of our brief. That section permits the use of parks only -- and I quote -- "By such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objections and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as would leave them unimpaired for the enjoyment of future generations.

This statute requires that any changes in parks from their natural state ought to be in conformity with the park purpose.

Q Mr. Selna, are you telling us now that there are no roads in Sequoia National Park? Is it just for hiking and horseback parties, and that sort of thing?

MR. SELNA: Mr. Chief Justice, there is a road which is the State highway that traverses Sequoia National Park and serves the purpose of providing access to the park. There is a Mineral King road, which existed prior to the existence of the park.

Q The one that more or less parallels the proposed new road?

MR. SELNA: Parallels it but on an entirely different route.

Q Mr. Selna, let me -- I'm still struggling -- let me ask my question in the reverse, although I realize it's one that perhaps I should ask the Solicitor General.

If an organization like the Sierra Club is not qualified to bring litigation of this kind, who would be? To protect alleged overreaching by the government in an area of this kind where, I take it, private plots of land are not anywheres near the Mineral King development?

MR. SELNA: Mr. Justice Blackmun, in fact there are private holdings --

Q In there?

MR. SELNA: -- in Mineral King. In fact, this is an

instance where it is conceivable that there are people who -- individuals who would have an injury of a type that would cause them, in theory, to step forward. There are practical limitations on their doing this: One is that often people in these holdings are benefitted economically by the development that's about to occur. And any aesthetic impulse they have is overpowered by the contrary economic impulse.

In many instances, and in the case of Sequoia National Park itself, it's a good example. There aren't users in the sense of people who have private holdings that would be affected one way or the other by the development.

So, in answer to your question, if not the Sierra Club, in many instances nobody; or if not an environmental organization, nobody.

Q But in this specific case there are private land owners up there, aren't there?

MR. SEINA: Yes, there are.

Q I was -- you can take pack trips out of there, and they, as I've done, and there are outfitters and so on.

MR. SEINA: Mr. Justice Stewart, they've been there for many, many years.

Q I know.

MR. SEINA: Now, in order to give the highway a park purpose, the government argues now that the Mineral King really is part of the park. That the statute is clear that Congress did not

include Mineral King in the park. That if it had, there'd be no need for the highway, because the Disney Development could not be built in Sequoia National Park.

And in that park, 16 U. S. Code, Section 45(b), which is set forth at page 16 of our Reply Brief, bars the use of more than ten acres for more than 20 years for this type development. Disney Development violates both the space and time limitations of that section.

The government urges us to disregard all of these statutes, because the Secretary of the Interior ought to be able to cooperate in such a way as to provide access to something that's legal outside the park.

In the first place, the route across Sequoia National Park is not the only available route of access to Mineral King. But if it were, this argument must fail. It would permit Interior to disregard all limits on its power as long as he was acting in aid of another governmental official.

Nor is the fact that there is a road in existence, a legalizing effect for the proposed new highway. The new highway would be huge by contrast, it would be on a different route, with new cuts, fills, and structures, and the record shows that its effect would be to wipe out 220 acres of virgin park land, to endanger Sequoia trees, and to create a barrier for the free travel of man and wildlife.

Q Will you tell me what the distance is from that

main highway to the development?

MR. SEINA: This is from the State Highway to Mineral King is approximately 25 miles. The highway distance across Sequoia National Park is approximately nine [illegible] miles. Concerning Mineral King itself, Agriculture would not have authority to allow it, even if it were ordinary national forest land, which it's not. 16 U. S. Code Section 497 permits the term use of only 80 acres of that land for recreational purposes. The Disney Development at Mineral King is so large that it spills over those 80 acres, and it's permanent facilities extend beyond them.

The Secretary of Agriculture's attempt to get around 497 by issuing a second permit for indispensable acreage violates that law.

16 U. S. Code Section 551 is not authority for the expanded term use; that statute, as this Court found in United States vs. Grimaud in 1911, delegates Congress power only over administrative detail. It is not the necessary express delegation of power to transfer term interests in federal land.

Q And yet it has been used rather widely, hasn't it?

MR. SEINA: Mr. Justice Blackmun, it's been used widely for permits, which the government has represented in every case were terminable at will. And those permits have been for structures in many instances. But in every instance the government has said, "We're in a position to take this use away immediately

and restore the public's right in that land."

The fertile difference, the difference here is that the term use is set for 30 years under the 80-acre permit, and other uses are absolutely indispensable, to the use that's made on the 80 acres, and it results in a tying together of a use which is one for permits for a period of 30 years for acreage exceeding 80.

The government correctly argues -- Section 497 previously had a five-acre limitation, and that was amended in 1956. The government correctly argues that the motivation of those who wanted to expand five acres to 80 acres was to obtain certainty of tenure and increase the national support for larger developments.

But this explanation of what happened in 1956 is incomplete. Because it considers only the goals of those who sought relief from the five-acre limit by disregarding the reason for any acreage limitation at all.

Congress was concerned over the averse effects of large developments on national forest lands. The Forest Service told Congress that 80 acres was necessary in order to include all the facilities in modern developments, including ski lifts.

It calmed Congress' fears by saying that 80 acres was the maximum limit. This is set forth in our Reply Brief at page 11, footnote 25.

Congress did not make the amendment which would have been in order if certainty of tenure had been its only concern, it didn't just wipe out the five-acre limit;

instead it set a new limit of 80 acres. In the entire history of this case, no one has explained the purpose of that limitation, if not to restrict developments to 80 acres.

Now, when he was campaigning for relief from the five-acre limitation, the Secretary of Agriculture did reveal that he had used combined permits to get around the five-acre limit. He did not say that any of these combined permits exceeded 80 acres. The key to this matter is that he was not seeking to have Congress ratify his practice of combining permits, rather he was representing that if he could grant permits for up to 80 acres, the practice would be discontinued.

The Ninth Circuit erroneously decided that the interlocking supplement permit to be used in this case need not be terminable at will. Several Attorneys General, including Harlan Fiske Stone, have said otherwise.

The government admits at page 48 of its brief that the supplemental permit is essential to the viability of the project. It is correct. Revocation would destroy the $35 million Disney investment, a major portion of which will be within 80 acres. The terrific impact on Mineral King of this development would make it impossible to restore it to its natural state.

The supplemental permit is not even technically revocable.

Now, the government has said that if the Court finds that all of this is illegal, it will affect 84 existing ski resorts.

The fact of the matter is that it need not do that. This is not a consistent administrative practice. Some regional forces have used the practice and others have rejected it. And, in any event, there is no general department policy or regulation on this subject.

These illegal acts don't legalize Mineral King, and they don't require this Court to choose between closing them down and making Mineral King legal. The Court may make the operation of its order in this case perspective only.

Now, the Disney development as it stands on a national forest, but it's doubly illegal because it was attempted to be placed on a game refuge.

In 1926, when it created that game refuge, Congress said that its purpose was to protect from trespass the public lands of the refuge and the game animals that may be on it. "Which may be thereon" is the language of the statute.

The impact of the Disney Development on the game's habitat would be enormous. California Fish and Game Commission personnel have stated "that in an extensive development" -- and I'm reading from our Appendix at page 30 -- "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment."

The Secretary has made no finding on this subject. If he had, the finding would have shown that he abused his

discretion.

We previously have argued that the refuge is not in Sequoia National Park, and that whatever practice there may be on national parks in regard to ski resorts does not legalize it at Mineral King.

I'll reserve the balance of my time, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Selna.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GRISWOLD: May it please the Court:

It is important, I think, to get the setting in this case. Mineral King is not a wilderness area, and has not been for nearly 100 years. There was substantial mining activity there back in the 1870's. The road in to Mineral King was built by the County of Tulare in the 1880's and has been continuously maintained since that time.

That is the road -- this is the main public highway in to Sequoia Park, and this is the road which has existed since the 1880's; for nearly 90 years, in to Mineral King.

In the early 1900's a hydroelectric facility was built at Mineral King, which is still in use there. There are many cabins, 60 summer homes, two small resorts, a commercial pack station, and three public campgrounds located in Mineral King, as the record shows at page 80.

There is indeed a great deal of wilderness area in Sequoia National Park. That is well shown by the map which is near the end of the brief filed in this case by Tulare County, which is essentially the same area as the map on the board behind me. But the enormous gray areas on that map are wilderness areas, had been so designated by the President and recommended by him to Congress for establishment as wilderness area.

The publicly occupied part of Sequoia Park is entirely to the west, in here where the big trees are. All of this area over here is wilderness area. Mount Whitney is here (indicating) and that is full of pack trails and things like that, but is wilderness area.

Q Mount Whitney is in the national park?

MR. GRISWOLD: Mount Whitney is on the border of the park, about here (indicating), Mr. Justice.

Q Yes. I see.

MR. GRISWOLD: We have been in something of a dilemma in preparing this case. It's been our best judgment that a decision on the merits of the case would be in favor of the respondents, and of course we would welcome such a decision.

Nevertheless, a decision on the merits could be reached only after it was concluded that the petitioner here had adequate standing to raise the questions on the merits in the District Court.

The question of standing is important to the government,

and to the Court, too, I believe, for this case, in a very real sense, is the ultimate case on standing. If the petitioner here has standing, then I believe it's fair to conclude that any one who asserts an interest in a controversy has standing.

In our judgment, we would not meet our responsibility, either to the government or to the Court, if we accepted such a position without fully canvassing the problems involved.

The Sierra Club --

Q As you know, General, I think the State of Michigan enacted a law giving standing to any citizen in environmental controversies such as this.

MR. GRISWOLD: Yes, Mr. Justice, and --

Q There is a bill before Congress doing the same thing.

MR. GRISWOLD: There are bills pending before Congress. We refer to them in our brief. They have not been adopted.

Q Has it been reported out of --

MR. GRISWOLD: That would certainly be irrelevant and important. I'm not sure that even Congress has the power to create a case or controversy which is within the jurisdiction of this Court. Although it is certainly relevant and could press the matter further than it would be without the Act of Congress.

Certainly Congress can, in certain circumstances, authorize what have been called by the Attorneys General.

The Sierra Club is the only plaintiff here, in this

respect it is different from what, -- for example, in Overton Park, there were many other plaintiffs, and we didn't have to question the position of the Sierra Club.

In its complaint in the District Court, it did not allege that it had any financial interest in the controversy. It did not allege the ownership of any property involved or any interference with any activities it is conducting. It did not even allege a special interest in Mineral King.

The whole basis of their standing is in paragraph 3 of the complaint, at the top of page 4 of the Appendix, and it is -- its sole allegation is that it has a large number of members and that it has exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country. And that would include New Hampshire and Maine as well as California. With particular reference to the national resources of the Sierra Nevada Mountains.

And that is the complete allegation in the complaint, page 4, paragraph 3.

Q Well, would they need only to amend the allegation, to say that they continually run -- their members continually run pack trips into Mineral King?

MR. GRISWOLD: That would help, but they haven't done it. They've come close to it, as I'll say in a moment.

One of the amici here, the Wilderness Society -- incidentally, I find I have 19 papers altogether in this case;

it's something of a pleasure to find three of the briefs amici filed on my side rather than having them all against me. And I would call the Court's attention particularly to the brief filed by the County of Tulare, and the brief filed by the Far West Ski Association, both of which, it seems to me, are in some respects rather better than the brief which we have filed.

But the Wilderness --

Q I had a motion for leave to file a brief, amicus curiae, on behalf of the United States Ski Association and the Far West Ski Association --

MR. GRISWOLD: Well, I --

Q -- last January; I don't seem to have their brief. Did they file?

MR. GRISWOLD: Well, the one I'm referring to is a red one, which -- Tulare County is yellow.

Q I have that one.

MR. GRISWOLD: And the red one, I believe, leave to file was granted by consent of both sides.

But the Wilderness Society says that the Sierra Club really has more specific grounds of standing, and in its Reply Brief and in the oral argument here, the Club now adopts the position of the Wilderness Society. But there are no allegations in the complaint to warrant such a decision.

The complaint was based solely on the baldest grounds of standing of interest. It's not inappropriate to conclude, I

think, that the Sierra Club took this position for two reasons, and one -- the first of these reasons is now disclosed in -- on page 6 of their Reply Brief, where they say: "The government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap."

What they say is that if they had a real plaintiff here, he couldn't have shown irreparable harm because whatever damage he suffered would be met by the government. They could not, on that basis, have got a preliminary injunction. So they had to appear in the most general terms in order to get a preliminary injunction, which they got.

And then the second ground of their proceeding as they have, I think, is that in the hope that there would be a decision on the merits, and that such a decision would thereby establish the proposition that the Sierra Club and numerous other worthy organizations, old and new, have standing to raise in court any legal question in which they assert an interest and without more.

If such a result is reached, I believe that any individual, whether he be citizen or alien, and in the Amchitka case we had a Canadian club of a few hundred members as a party,

would have standing to raise any question in court in which he asserts he has an interest without more.

I don't think there's any magic in the fact that the Sierra Club is a club, or that has members, or a long and distinguished history, many of which members may well share the interest which its management now advances. If it is the fact that it is a group that gives it standing, how big a group must it be? Three members or five or fifty? Or fifty thousand?

What reason is there for picking any number? If any group has standing because it has an intellectual or emotional interest, does it not inevitably follow that any individual who asserts an interest likewise has standing to raise these legal questions?

If the Sierra Club has standing, as Mr. Justice Blackmun suggested, would not John Muir have standing?

If the Sierra Club has standing, why does it not follow that John Gardner, and my estimable former student Ralph Nader likewise have standing to raise in court any questions of law which appeal to them as being in the public interest?

Q Mr. Solicitor General, in the United Church case, which was not treated in this Court but only in the Court of Appeals, the standing was rested on the idea that television and radio broadcasters reach into the private homes of every, virtually every listener every day. And on that ground listeners were given standing. Would you quarrel with that kind of a concept?

MR. GRISWOLD: No, Mr. Justice, although I think it is very close to the line, but I think it's on the proper side of the line. That's a little complicated because it arose out of an administrative proceeding and, as I understand it, the United Church was a party in the administrative proceeding, and thus might well be a party aggrieved under the statute authorized by Congress.

Here there has been no administrative proceeding, and the Sierra Club claims no standing as a party.

I can accept the United Church of Christ case, perhaps, because I happen to like the outcome. But I think it is very close to the line, and not quite the same as this one.

If the Sierra Club has standing, why would not the Wilderness Society and the other amici likewise have standing?

There's no reason --

Q By the way, did any of them seek to intervene?

MR. GRISWOLD: No, Mr. Justice.

There's no reason that I can see why such cases would have to be brought in the Northern District of California. The suits are against government officers, and they can now be served anywhere in the United States. Theoretically we could have a thousand suits brought by interested individuals and organizations in the 93 Judicial Districts of the United States, with resulting vast confusion. This could probably perhaps be helped by transfers and special procedures for multi-district litigation, but it would be complex at best.

In the matter involving the recent Amchitka blast, there was not only the suit in the District of Columbia, a bit of which came to this Court, but there was also a suit in the District Court in Alaska. That court decided the case on November 4th, two days before the decision here. We knew about the decision but did not have the text available on the Saturday morning of the argument here.

The decision was favorable to the government. Whether it was in some way entitled to a res judicata effect, I do not know.

Why would it not be a good idea to let anyone raise in court any legal issue which he is moved to raise? At least, if he is moved enough to litigate about it, do we not have, as this case shows, the vigorous thrust of the adversary system, so that this Court and the lower courts will be fully informed on the issues involved? Was that bridge not crossed in Baker vs. Carr?

But the plaintiff in Baker v. Carr lost his right to have his vote fairly counted. He was injured. The plaintiff in the Association of Data Processing Service Organizations suffered immediate competitive injury. It was injured. The plaintiff in Barlow v. Collins suffered direct economic injury, or at least contended that he did.

As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from

the complaint here, its interests would be widely affected. And that "it would be aggrieved" by the acts of the defendant, has standing to raise legal questions in court.

But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions that must be decided by the courts? Why should not the courts decide any question that any citizen wants to raise?

As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. The doctrine derives from Locke and Montesquieu and others, which permeates our Constitution and the Federalist papers, and has so often been recognized by this Court in cases as divergent as Marbury v. Madison, and Myers v. the United States.

Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. It litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the Executive Branch should have wide powers.

All these officers have great responsibilities. They are not less sworn than are the members of this Court to uphold the Constitution of the United States.

This, I submit, is what really lies behind the standing

doctrine, embodied in those cryptic words "case" and "controversy" in Article III of the Constitution.

Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would not be, I submit, a good system.

More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

Over the past 20 or 25 years, there has been a great shift of the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

I've already mentioned the most ancient of all: case or controversy. Which was earlier relied on to prevent the presentation of famed issued to the court.

But there are many other doctrines, which I cannot go into in detail: reviewable, justiciability, sovereign immunity, mootness in various aspects, statutes of limitations in laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

Under all of these headings, limitations which previously existed to minimize the number of questions decided in

courts, have broken down in varying degrees.

I might also mention the explosive development of class actions, which has thrown more and more issues into the courts.

In this connection I would refer to the case of Laird v. Tatum in which certiorari was granted yesterday, and that it was because of the very extreme nature of the position in that case that I thought it worthy of bringing to this Court. The position there is that the plaintiff can maintain that suit as a class action, although the plaintiffs in that case are not intimidated as is shown by the fact that they bring the suit, but they bring it on behalf of other citizens who might be intimidated if they didn't stand up and talk for them.

And, similarly, in the case of Alabama v. The Secretary of the Treasury, at the very last minute a common cause applied to me for consent to file a brief amicus curiae. I thought it came much too late to grant my consent. I don't know whether the Court adopted their motion or not, but they did file a motion and a brief in which they said that common cause intends to litigate many issues involving fiscal and other matters, and therefore it is much interested in the questions of standing involved in that case.

If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator, sworn to uphold the law, can take any

action. I'm not sure that this is good for the government. I'm not sure that it's good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders.

This point is well and briefly covered in the red-covered amicus brief filed by the Far West Ski Association. In this case, on page 8 of their brief, they caution against the situation where the government will be besieged in the future by those who would substitute their judgment for the government's judgment to the point where it can no longer fulfill its responsibilities to its citizens.

And they add on page 9: administrators must be held to act within the scope of authority provided them, but likewise actions which they take within that scope of authority must not be subjected to protracted litigation for the sole purpose of forcing another _____. That's a decision already reached.

I do not suggest that the administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to.

MR. CHIEF JUSTICE BURGER: I think, Mr. Solicitor General, we'll resume after lunch. That's a good stopping point.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may resume. You have seven minutes remaining of your time.

MR. GRISWOLD: I must conclude my argument on standing. The issue here, in that respect, is a basic and fundamental one. It is the appropriate limit on the judicial function under our constitutional system.

Should judges be dealing almost continuously with heated social, and economic controversies? Will not the courts be in a better position to decide the many difficult and important questions which only the courts can effectively resolve in our constitutional system if they do not undertake to decide all the legal questions that anyone -- anyone -- wants to present to them?

Now, with respect to the merits, there are essentially three questions. There is the question of the term permit not exceeding 80 acres for 30 years.

Q Mr. Solicitor General, isn't the question whether an injunction, a temporary injunction --

MR. GRISWOLD: Yes, Mr. Justice, but that turns in part on the question of standing.

Q I understand, but --

MR. GRISWOLD: Well, on the merits, by that I mean on whether there was sufficient chance that the plaintiff could

win in a trial on the merits, that it was appropriate for the court to grant a temporary injunction.

Q Because this case is going to be tried, isn't it?

MR. GRISWOLD: I appreciate that, Mr. Justice, but if the Court can conclude that the legal situation is such that no showing of facts would warrant the issuance of a permanent injunction, then there should not be issued a temporary injunction.

Q So you are --

MR. GRISWOLD: Or indeed even less than --

Q -- saying that we should decide these three questions you're going to talk about here?

MR. GRISWOLD: Only, Mr. Justice, that they are not serious enough to make it appropriate to grant a temporary injunction without a trial.

Q We don't have, finally, to decide them?

MR. GRISWOLD: You don't have, finally, to decide them. But my position is that it can be readily found that they are not serious enough so as to warrant the granting of a permanent injunction, even though there is some chance that after trial it might be that circumstances could be shown which would lead to the other conclusion.

Mineral King is not a national forest -- excuse me, Mineral King is a national forest. It was excluded from the Sequoia National Park in 1926 because there were mining claims

there. Perfectly obvious that it is geographically a part of the park area. And new mining claims cannot be located in a national park. Although it is not a national park, it was made a national game refuge; and the function of that is that hunting is not allowed in a national game refuge, although it is allowed in a national park.

There is nothing about making it a national game refuge which means that it must be kept a wilderness or that people may not use the park freely.

As long ago as 1949, the Secretary of Agriculture designated the area as a recreation area "hereby set apart and reserved for public recreation use".

And in 1960 Congress enacted the multiple-use sustained-yield Act which provides for recreation use.

There are two statutes, one of which now authorizes term permits for 80 years, the other of which authorizes -- term permits for 80 acres up to 30 years; the other of which authorizes revocable permits without limitation of area, but always revocable.

And the legislative history makes it perfectly plain that when Congress extended the term permit area from five acres to 80 acres in 1956, both committees in both houses of Congress recorded in the committee reports that the Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the Act of June 4,

1897.

I do not see that there is any basis for saying that there cannot be both term permits and revocable permits, and, as the Appendix in our brief shows, there are 84 situations where that has been done over a period of many years, and both the practical construction and the fact that this has been repeatedly called to the attention of Congress leads to that conclusion.

Now, with respect to the highway through the park, that becomes the Interior Department rather than Agriculture Department. 16 U.S.C. 8 expressly provides that the Secretary of the Interior shall have power "to construct, reconstruct, and improve roads in the national parks."

This is either a construction of a new road or a reconstruction. It is in part on the same right-of-way and in part elsewhere. There is nothing in the statute which says that the road must be for park purposes. Nevertheless the road does have a legitimate park use. It will enable people to see areas in the park which would not otherwise be available to them.

It will connect certain areas in the park where there are now camps. More important, I am advised that it will provide markedly improved access for equipment and men engaged in fighting forest fires within the park.

Perhaps the superficially most difficult problem in

the case is the provision with respect to the electric line. This is a 66,000-volt transmission line which, however, is to be buried in the road, no lines and no cables, and we do have a statute, Section 45(c), which says that no permanent license, lease, and so forth, for conduits, reservoirs, dams, powerhouses, transmission lines, or other work for storage or carriage of water shall be granted or made without specific authority from Congress.

And if that statute is read alone, it becomes very difficult to deal with.

However, the legislative history shows very plainly that this language first appeared in the Federal Power Act and was intended to prvent the Federal Power Commission from granting licenses to build hydroelectric establishments, dams, water power and transmission lines in national parks. This was done in 1921.

When Sequoia National Park was established in 1926, this same paragraph was taken over verbatim and put into the Sequoia National Park Act. But at that time Congress expressed in the committee report that this was done to prohibit the development of hydroelectric power in the proposed enlarged park except by Act of Congress.

This has nothing to do with hydroelectric power. There are other statutes which expressly authorize the Secretary to grant rights-of-way for electric poles, plants, and lines for the generation and distribution of electrical power and for

telephone and telegraph purposes, and in the light of all the history, we think it is plain that Congress did not intend to repeal those statutes when it put in this provision designed to prevent the establishment of hydroelectric establishments in the national parks.

Q Mr. Solicitor General, I have one question, and I suppose it's presumptious of me to ask it at this stage of the case. The road, if put in and developed, would be, at best, a two-lane road with little turn places or passing places. It strikes me as though this is likely insufficient for the number of daily guests and trucking requirements for the Disney Center if it ever comes.

Do you have any feel about that? I think it's clearly a --

MR. GRISWOLD: There is a provision in the proposed permit, Mr. Justice, which says that the road will not be increased in size, and that if it turns out to be inadequate, that the State will provide other means for getting into the area, and it is possible to do so.

This, I am told, is paragraph 37 of the proposed permit, on page 76 of our brief:

"As a condition for granting this permit, Permittee" -- which is the State of California -- "agrees that should it ever be necessary in the future to provide for increased visitor capacity in Mineral King, an alternate means of access to

Mineral King shall be provided which does not involve access through the Park; or in the alternative, such excess capacity shall be accommodated through mechanical means in lieu of any further improvement of road access."

And the only thing that I can think of that the "mechanical means" is would be helicopters or maybe some other kind of airplane.

I am told that it is possible to construct roads through here, which, however, would be much longer and would involve a greater injury to public land, though not to the national park. (Indicating)

Certainly the problem with which -- to which your question is directed, Mr. Justice, has been considered by the Department.

Let me say just one more thing. There is some confusion, for which we are to blame, about the difference between this Appendix in our brief, of a proposed permit being different from the one in the Ninth Circuit. It was not intended to be. It's intended to be the same permit, but when it got to our office a member of my staff found that there were two paragraphs 17, so he proceeded to renumber the subsequent paragraphs, and that naturally is confusing. But this is essentially the same permit as was presented to the Court of Appeals.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. --

Q By the way, Mr. Solicitor General, you said you had covered the standing question in the footnote. It doesn't appear in the copy of the brief that I have. Could you -- would you mind submitting a --

MR. GRISWOLD: That I covered standing in a footnote?

Q In answer to my question about legislation dealing with standing.

MR. GRISWOLD: Oh. Yes, I'm sure it is in there.

Q Well, would you mind --

MR. GRISWOLD: I will find it and --

Q Thank you.

MR. GRISWOLD: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Selna, you were about out of time, but in view of this enlargement we will give you three minutes.

REBUTTAL ARGUMENT OF LELAND R. SELNA, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. SELNA: Thank you, Mr. Chief Justice.

In looking at the merits, this Court will find that both the issue of the legality of the highway in the national park and the legality of the term permits, or combining of permits to exceed 80 acres, are such that they could indeed be finally decided in this Court.

Turning to the question of standing, it should be

clear from our argument that we do not urge that the doors of courts be opened wide to anyone. We've argued that there are criteria that should be applied by a court, by which organizations' or individuals' qualifications for standing should be tested.

The Club in this case did, in fact, allege its special interests in the area involved. And in this era of novus pleading, no one in California, at the District Court level, had any question in their mind as to the deep involvement of the Club with Sequoia National Park and Mineral King. So that a case or controversy would be assured.

Now, the Solicitor General has made reference to the Reply Brief, to our Reply Brief, in dealing with the matter of the Club's use of the area in question.

It is true that the Sierra Club for a number of years has run pack trips in Mineral King, and it's also true that that specific indicator of its interests in the area was not part of the allegations of the complaint.

Those pack trips are a non-profit activity. They are not for any private purpose. Their purpose is to acquaint people with the natural features of the area, so that they in turn will be workers to help to preserve it.

Any interference which the Disney plan would have with those pack trips would not have been of sufficient importance to this Club to undertake the litigation that has ensued

here. And because those pack trips, though they are non-profit, and though they are in furtherance of its interest in the area, could have been misunderstood as an economically oriented or other private interests not directly related to the public interest, they were not alleged.

Now, concerning whether the courts will be inundated by the granting of standing in a case such as this, I should only say that the experience which many, many cases have alluded to has been not that the courts have been inundated at all, but that the number of lawsuits brought by environmentalists and conservation groups has been significantly limited by the practicalities and the realities of carrying out litigation of this type.

Now, concerning injury, it's true that injury to aesthetic conservational and recreational values is different in kind than an injury to a voter's rights or an injury to a taxpayer's rights, it's nevertheless a concrete injury, and it should serve every bit as strongly as this Court has already noted in the Data Processing case as a basis for statutory agreement -- aggrievement under the Administrative Procedure Act as those other types of injury.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Selna.

Thank you, Mr. Solicitor General.

MR. GRISWOLD: May I respond to Mr. Justice Douglas's question?

MR. CHIEF JUSTICE BURGER: Yes, by all means.

MR. GRISWOLD: Mr. Justice Douglas, it was not a footnote. It's on page 17 of our brief.

Q Thank you very much.

MR. GRISWOLD: Just at the middle of the page, and then there is a related reference on page 26, with a footnote following that, and I think that's what I had in mind.

Q Thank you very much.

MR. GRISWOLD: At pages 17 and 26.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

(Whereupon, at 1:15 p.m., the case was submitted.)