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SUPREME COURT, U.S.  
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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE,  
ET AL., Petitioners V. METHOW VALLEY CITIZENS  
COUNCIL, ET AL.; and  
JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.,  
Petitioners V. OREGON NATURAL RESOURCES  
COUNCIL, ET AL.

**CAPTION:**

**CASE NO:** 87-1703 & 87-1704

**PLACE:** WASHINGTON, D.C.

**DATE:** January 9, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 F. DALE ROBERTSON, CHIEF OF THE :  
4 FOREST SERVICE, ET AL., :  
5 Petitioners, :

6 v. :

No. 87-1703

7 METHOW VALLEY CITIZENS COUNCIL, :  
8 ET AL.; and :

9 -----x  
10 JOHN O. MARSH, JR., SECRETARY OF :  
11 THE ARMY, ET AL., :  
12 Petitioners, :

13 v. :

No. 87-1704

14 OREGON NATURAL RESOURCES COUNCIL, :  
15 ET AL. :

16 -----x  
17 Washington, D.C.

18 Monday, January 9, 1989

19 The above-entitled matter came on for oral  
20 argument before the Supreme Court of the United States  
21 at 10:03 o'clock a.m.

22 APPEARANCES:

23 CHARLES FRIED, ESQ., Solicitor General, Department of  
24 Justice, Washington, D.C.; on behalf of the  
25 Petitioners.

1 APPEARANCES: (Continued)

2 DAVID A. BRICKLIN, ESQ., Seattle, Washington; on behalf  
3 of the Respondents.  
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1703, Dale Robertson v. Methow Valley Citizens Council and a companion case.

Mr. Fried, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES FRIED

ON BEHALF OF THE PETITIONERS

MR. FRIED: Thank you, Mr. Chief Justice, and may it please the Court:

This Court, in a series of cases, has made quite clear what NEPA does and does not require. NEPA requires analysis and disclosure. It requires that the agency take a hard look at environmental effects of proposed action, and public participation and assurance that this hard look has been taken.

It does not require -- and CEQ regulations make this clear -- more and more information. More is not necessary more -- more. Sometimes it is less. That is why this Court imposes page limits.

The function of the environmental impact statement is to inform the decision maker, not to bullet-proof him against obstructionist litigation.

Furthermore, the -- the Court has made quite

1 clear what NEPA does not do. It does not impose any  
2 substantive environmental requirements, nor does it  
3 dictate the relative weights to be given to  
4 environmental as opposed to other concerns. In this  
5 respect, it's worth contrasting NEPA with the Endangered  
6 Species Act or Section 4(f) of the Transportation Act.

7 The court of appeals in these cases ignored  
8 these general precepts in overturning not only the  
9 agency's decisions, but those of reviewing district  
10 courts, and it made two specific legal errors common to  
11 both cases.

12 First, it demanded that the agency not just  
13 discuss and consider mitigation opportunities, but that  
14 it commit in the plan to complete and effective  
15 mitigation measures. The Respondents should not be  
16 allowed to hide behind the confusion that this  
17 substantive obligation is put forward as a requirement  
18 of what is supposed to be an analytic and descriptive  
19 document.

20 QUESTION: Mr. Fried, may I inquire of you?  
21 The statutory language of NEPA says that the agency has  
22 to describe in detail the adverse environmental effects  
23 which can't be avoided. Now, in this case do you think  
24 that a mere listing of possible mitigating measures  
25 without any consideration or discussion of how they

1 might be employed would suffice to meet that statutory  
2 language?

3 MR. FRIED: Justice O'Connor, I think here as  
4 throughout what governs is the rule of reason. And the  
5 more significant the environmental impact and the more  
6 important the mitigation, of course, the greater the  
7 obligation to go into detail.

8 This is very well illustrated by one of the  
9 things out of which the court of appeals made such heavy  
10 weather, which was the wildlife in the Marsh case.  
11 That's the Elk Creek Dam. In that case there were  
12 substantial environmental impacts in respect to the  
13 turbidity of the water, the muddying of the water,  
14 downstream from the dam. But also, the dam was going to  
15 flood 1,300 acres.

16 And we were faulted because we did not go into  
17 great detail about what we were going to do for -- and  
18 here, it's worth listing. We had 50 deer, a smaller  
19 number of elks, coyotes, otter skunks and 125 quail  
20 whose habitat was going to be flooded by that lake.  
21 Now, we did not go into a great deal of detail about  
22 that.

23 QUESTION: Well, in fact, no detail, wouldn't  
24 you agree --

25 MR. FRIED: No, I don't think that's correct.

1 What we said -- we committed to spend \$350,000 in  
2 cultivating what are called "edges," which is variations  
3 in foliage height because that is a more agreeable  
4 habitat for those animals which had been observed. It's  
5 not clear that they were going to be somehow wiped out.  
6 It's a little bit like Noah's ark, except that reminds  
7 me when --

8 QUESTION: Well, the, the, the point I'm just  
9 trying to make is is it enough in your view to just list  
10 possible mitigating actions as a list without in any way  
11 attempting to say this one could be successful, we think  
12 it will be, it will do thus and so. Do you have to go  
13 beyond just a mere sketchy little list?

14 MR. FRIED: Oh, I think you do for anything of  
15 significance. I think what you have here are --

16 QUESTION: (Inaudible) point it's just this is  
17 so insignificant they didn't have to do it?

18 MR. FRIED: Well, they did do a little bit  
19 more than that, but you have to be reasonable. How  
20 significant is the impact and, therefore, how much do  
21 you have to say about what you're going to do about the  
22 impact?

23 And when you see the mountain that was made  
24 out of this mole hill, you understand that this is just  
25 a charter for obstruction. When we talk about serious



1 impacts, such as air quality in the other case, the --  
2 the Forest Service case, then you've got to go into more  
3 detail.

4 But when you're talking about a few animals  
5 that had been observed and the lake is rising, the  
6 waters will rise, and so you're going to do a little bit  
7 for them, but you're not making a big deal out of  
8 something that isn't a big deal, I think to say that you  
9 have to go into excessive detail there is exactly what  
10 CEC was focusing on.

11 QUESTION: I take it that we're in -- that the  
12 circuit court and the district court are in the same  
13 position? The circuit court doesn't defer to the  
14 district court. They each engage in the same kind of  
15 review?

16 MR. FRIED: Well, the circuit court should  
17 certainly defer to the district court insofar as the  
18 district court held a trial and established facts. When  
19 we're talking about --

20 QUESTION: Why do you establish -- what facts  
21 do you establish to determine that a -- that a statement  
22 is or is not complete?

23 MR. FRIED: Well, I think you -- really there  
24 should not be a factual -- a new factual record  
25 developed, but that practice has taken place, and we

1 have factual issues that were raised --

2 QUESTION: Well, I -- I was concerned about  
3 that because in -- In the Marsh case involving the Elk  
4 Creek Dam, the court made findings that the government  
5 was continuing to study wildlife mitigation. And it  
6 seems to me that the record is either closed or it isn't  
7 closed.

8 MR. FRIED: Well, in Marsh there were several  
9 things that happened that shouldn't have happened. In  
10 Marsh the Kramer memorandum and the things which are  
11 supposed to have set off some of these insufficiencies  
12 were raised at the trial. They were not raised at the  
13 administrative level. It reminds one very much of  
14 Vermont Yankee, where it's a little bit of an ambush.

15 Now, the standard of review quite clearly  
16 should be APA review. Was the agency arbitrary and  
17 capricious, first of all, in its decision, of course,  
18 and second, in its approach to what it does and does not  
19 include in the environmental impact statement?

20 QUESTION: Should we then discount the  
21 statement in footnote 9 by the district court that the  
22 agency is continuing to look at mitigation matters?

23 MR. FRIED: Well, it -- it's not I think of  
24 great significance. If the agency is continuing to look  
25 at mitigation, that's good. The question --

1 QUESTION: But the district court cited that  
2 to show that the -- NEPA was being complied with, and I  
3 -- I take it you would agree that NEPA is complied with  
4 or not based on what's contained in the EIS.

5 MR. FRIED: That is correct. That is correct.

6 I think that what we're talking about was  
7 extra efforts, extra measure of concern, and, and that's  
8 appropriate. But it would seem --

9 QUESTION: I thought we were talking about  
10 tiering, so-called, or phasing.

11 MR. FRIED: well, tiering is not an issue so  
12 much in the Marsh case as it is in Robertson. In  
13 Robertson you have -- in respect to the on-site effects  
14 of building the ski slope, there is the question about  
15 whether the location of the roads and the slopes and the  
16 towers and the -- and the ski trails will interfere with  
17 the mule deer.

18 And as to tiering, what the agency did is to  
19 say these are problems. We understand they're problems,  
20 but we want to see the master plan first before we  
21 decide whether they are going to interfere with the mule  
22 deer. And that's a rather small scale version of what  
23 we saw in the Kleppe case.

24 QUESTION: Does the master plan require an EIS?

25 MR. FRIED: Oh, it may very well. Oh, yes.

1 The approval of the master plan requires at the very  
2 least an environmental assessment, and it may require an  
3 EIS. And it is at that point, at the point of the  
4 approval of the master plan, that the detailed inquiry  
5 as to whether the roads will or will not cut off the  
6 migration routes of the deer would take place. It would  
7 be inappropriate to have it take place now because the  
8 permittee would have to develop the master plan before  
9 he got the right to occupy the land.

10 QUESTION: It would seem to me we would have  
11 to know that with some certainty before we could analyze  
12 the tiering argument.

13 MR. FRIED: Well, there's -- there's really no  
14 question that there is further environmental assessment  
15 that is required in respect to the acceptance of a  
16 master plan. It may not require an environmental impact  
17 statement. That will depend on whether it is a major or  
18 a minor matter. But then assessment must be made at  
19 that time.

20 And the permit, and the record of decision in  
21 the Robertson case quite clearly indicates, that the  
22 master plan must be approved. Well, that approval is an  
23 action which is subject to environmental review. And  
24 that's the point at which you go into those details.

25 QUESTION: General Fried, supposing the

1 government here in each of these cases had fully recited  
2 all the possible mitigating factors and that without  
3 committing itself to any of them, would that have  
4 satisfied the Ninth Circuit, do you think?

5 MR. FRIED: I fear it would not have satisfied  
6 the Ninth Circuit, but the Respondents tell us that it  
7 would. I'm afraid that what we have is one of these  
8 situations where today you are told it's dicta and  
9 tomorrow we'll be told it's stare decisis.

10 QUESTION: There is language in the Ninth  
11 Circuit opinion that suggests they would not be  
12 satisfied.

13 MR. FRIED: There is indeed, but it is  
14 confusing because, after all, an environmental impact  
15 statement is not an appropriate document for making  
16 commitments. It is an analytic and descriptive  
17 document. And that is one of the central issues in this  
18 case.

19 Specifically, what we ask the Court to do in  
20 respect to mitigation is to rule -- to rule -- that  
21 mitigation is an obligation -- involves an obligation to  
22 describe and to describe reasonably. If the effects are  
23 trivial, then the description may be cursory. If the  
24 effects are in the future, then the description may be  
25 general and postponed. And if the effects are upon us,

1 then they must be dealt with now. But it is a matter of  
2 description, and we're asking the Court to rule and to  
3 clarify the confusion which the Ninth Circuit, at best  
4 confusion, has injected.

5 We are asking also that as applied in this  
6 case, on remand, there be no obligation in  
7 respect to any of these matters to engage in further  
8 mitigation discussion because we believe -- and we've  
9 set this out in the briefs -- that the mitigation  
10 discussion for these levels of decision has been  
11 entirely sufficient.

12 QUESTION: General Fried, can I get you back  
13 to the provision, what is Subsection 2 of, of NEPA which  
14 says that you have to identify the environmental effects  
15 that cannot be mitigated? It does say that, doesn't it?

16 MR. FRIED: Yes, Justice Scalia. Now --

17 QUESTION: I, I can understand if, if, if  
18 you're willing to connect the NEPA statement with the  
19 action that the agency takes, sort of fuse the two  
20 together, I suppose it would be reasonable for an agency  
21 to say we don't know whether these effects can be  
22 mitigated or not, to tell you the truth, but it doesn't  
23 matter because even if they can't, we think this project  
24 is worth it -- 50 black-tailed deer or whatever.

25 MR. FRIED: Well, I think --

1 QUESTION: Now, if you connect the two, that  
2 is a sensible judgment. But you're telling us, no, you  
3 have to -- NEPA has nothing to do with, with the  
4 decision. NEPA is simply a -- a study in and of  
5 itself. Once you do that, it seems to me you got to  
6 give the language its literal effect, don't you? It  
7 says identify those effects that can't be mitigated.

8 MR. FRIED: well, the, the, the -- this calls  
9 me back to the -- the answer I gave to Justice  
10 O'Connor's question. It can't mean that you have to  
11 identify every single effect no matter how trivial that  
12 cannot be mitigated. It's a little bit -- think of the  
13 analogy to the informed consent before surgery. The  
14 more you go into it, the less useful it is to the  
15 patient.

16 QUESTION: All right. Let's say the  
17 substantial effects that can't be mitigated. Let's,  
18 let's take the ski lodge case rather than the dam case.  
19 There were some substantial effects, and the agency  
20 really didn't say whether they could be mitigated. They  
21 say here are some possibilities for mitigation. They  
22 didn't say whether the possibilities would work. They  
23 didn't say whether anyone would, would -- some of them  
24 would have to be undertaken by the county or by the  
25 state. They just said here are some possibilities.

1 MR. FRIED: well, that --

2 QUESTION: Now, why is that adequate?

3 MR. FRIED: As to -- as to the county's  
4 efforts, there is another issue there because the  
5 obligation to mitigate is really the obligation of the  
6 local authorities, and it would be inappropriate for the  
7 Forest Service to somehow commit the county to actions  
8 which are within its range of responsibilities.  
9 Therefore, it was inevitable that the environmental  
10 impact statement indicated what the local authorities  
11 might do.

12 But again, the kind of description is  
13 appropriate to the kind of action. The action is the  
14 action of others whose responsibility, in some cases  
15 statutory responsibility, it is and therefore the  
16 explanation is, is, is at an -- a equivalent level of  
17 generalization.

18 QUESTION: I'm a little puzzled by that  
19 argument, Mr. Solicitor General. Is it not possible in  
20 one of these permit situations to say that a permit  
21 would be granted, conditional on the permittee having  
22 the third party take the action that would be essential?

23 MR. FRIED: It is possible. It would be  
24 inappropriate because NEPA is -- one of the things that  
25 it is not and cannot be allowed to become is a federal



1 land use planning -- a federal land use or federal  
2 zoning ordinance imposed on local authorities. And it  
3 would be even more inappropriate to hold the permittee  
4 hostage to the local authorities doing what it is their  
5 responsibility to do, in some respects their statutory  
6 responsibility -- under the Clean Air Act and Clean  
7 Water Act, for instance, their statutory responsibility  
8 to do.

9           So, I think we're entitled to assume that  
10 local authorities will do their job, and to advert to  
11 mitigation accordingly in an appropriate way.

12           If I may, I'd like to --

13           QUESTION: Well, do you mean -- you mean if  
14 the ski run would bring 5,000 people to the area, and  
15 those people would cause air quality problem because of  
16 their cabins in the city or in the -- in the  
17 municipality, then the government doesn't refer to that  
18 as an adverse environmental consequence?

19           MR. FRIED: (Inaudible). It adverts to it,  
20 and it is clearly adverted to. There is no -- It is not  
21 as if this is --

22           QUESTION: Well, it's required to under the  
23 statute, isn't it? Any adverse environmental effect.

24           MR. FRIED: Well, but there is advertence to  
25 it. It, it, it is something which is confronted.

1 Studies were done, and we're talking only about  
2 mitigation. The mitigation is the obligation of the  
3 local authorities.

4 This development, this migration, is something  
5 which is taking place in any event. It would be  
6 accelerated by the ski resort, but it is not the only  
7 cause of it. This would not remain a wilderness if  
8 there were no ski resort. And this is something which  
9 the local authorities have to deal with.

10 There is another matter here, which it's  
11 important to get before the Court, which relates to the  
12 worst case analysis, because the Ninth Circuit in both  
13 cases clearly demanded that in respect to uncertainties  
14 and, indeed, matters which were simply matters in  
15 dispute where we took one view and the opponents took  
16 another, that there must be a worst case analysis, that  
17 we must assume the worst in analyzing the effects.

18 Now, we ask the Court to rule that that is  
19 incorrect as a matter of law because the court of  
20 appeals thought that that obligation derived from NEPA  
21 itself rather than from CEQ regulations which have now  
22 been superseded. And as applied, we believe, that these  
23 are not proper cases for uncertainty analysis at all  
24 even under the new CEQ regs because what we have is not  
25 uncertainty, what we have is a dispute. We think that

1 the dam is going to cause this level of turbidity, and  
2 our opponents think it's going to cause some other level  
3 of turbidity.

4 If the Ninth Circuit is to be believed, there  
5 is always an obligation to analyze the effects as if the  
6 opponents, the people who see this in the most dramatic  
7 and drastic lights, are correct and to analyze on that  
8 basis. That can't be what CEQ meant in either the old  
9 or the new regulations. But in any event, it's very  
10 important to clarify that those new -- those old  
11 regulations are gone and are not part, and never were  
12 part, of NEPA itself.

13 If, if I may, I'd like to reserve --

14 QUESTION: Before you go, may I ask you would  
15 you -- would you be willing to -- to have an, an  
16 environmental impact statement evaluated in tandem with  
17 the decision that is based upon it? I frankly have a  
18 lot of difficulty deciding whether an EIS is adequate  
19 without knowing what decision was, was based on that.

20 For example, on the point of identifying those  
21 effects that cannot be mitigated, if the agency's final  
22 decision says, even assuming that all of these  
23 possibilities for mitigation never -- never come to  
24 fruition, even assuming that all of these effects are  
25 non-mitigable, we still think it's worth doing this,

1 then, then I would really have no quibble with the EIS.  
2 The, the agency has directed its attention to the  
3 problem and says we're willing to go ahead anyway.

4 MR. FRIED: Well --

5 QUESTION: Whereas, if the agency's decision  
6 is on the assumption that the counties are going to do  
7 this thing and the state are going to do the other  
8 thing, this seems to us a reasonable thing to do, then,  
9 then that environmental impact statement looks to me  
10 like a bad one.

11 MR. FRIED: The EIS here has a recommendation.  
12 They recommended -- they recommended the 8,400-person  
13 ski resort, and they did conclude in the EIS that that  
14 is a recommendation that makes sense even given the  
15 uncertainties about whether the state and local  
16 officials will do their job. It -- that was the  
17 recommendation.

18 And, and I think one can look to the record of  
19 decision of the regional forester who clearly said,  
20 look, I am prepared to go forward. I understand what  
21 risks we are running. So, I think that if you look at  
22 them in tandem, you clearly come out as we say -- but  
23 there is a recommendation in the EIS which says that  
24 these environmental hazards are worth running.

25 Now, the decision maker may say, well, you've

1 laid them out for us, and we don't agree with you. We  
2 -- I, regional forester, do not agree that these  
3 environmental impacts are worth running. But the  
4 environmental impact statement does make a  
5 recommendation, and, and, and says it's worth doing on  
6 that basis.

7 If I may, I'd like to save the balance of my  
8 time for rebuttal.

9 QUESTION: Very well, General Fried.

10 Mr. Bricklin, we'll hear from you now.

11 ORAL ARGUMENT OF DAVID A. BRICKLIN

12 ON BEHALF OF THE RESPONDENTS

13 MR. BRICKLIN: Thank you, Mr. Chief Justice,  
14 and may it please the Court:

15 Twenty years ago Congress enacted the National  
16 Environmental Policy Act, NEPA, and imposed new  
17 procedures on all federal agencies. The purpose was to  
18 ensure full consideration of environmental actions. And  
19 the method was the preparation of an environmental  
20 impact statement, a statement which Congress said is to  
21 be "detailed." Compliance is to be "to the fullest  
22 extent possible." Congress' mandate to the agencies in  
23 the vernacular was look before you leap. And this Court  
24 has said that look must be a hard look.

25 The impact statements here do not meet the

1 standards that Congress established. Unsupported  
2 conclusions and wish lists do not meet the detail  
3 requirement. And sweeping under the rug difficult  
4 issues that are indicated from significant new  
5 information and uncertainty does not meet Congress'  
6 requirement to study the environmental consequences to  
7 the fullest extent possible.

8 That these Impact statements do not meet  
9 Congress' standards was recognized not only by the  
10 courts below, but by state and federal agencies with  
11 special expertise in environmental issues and by 29  
12 states that have joined in an amicus brief in this  
13 court.

14 The essence of the Solicitor General's  
15 argument is that the standards established by Congress  
16 should be relaxed by this Court, that unsupported  
17 conclusions and incomplete analysis should suffice  
18 despite -- despite Congress saying we want detail and  
19 compliance to fullest extent possible. Because Congress  
20 established these standards, it is only Congress that  
21 can relieve the agencies of their responsibility to  
22 comply with them. The Solicitor General's efforts in  
23 this Court must fail.

24 QUESTION: Did Congress impose a requirement  
25 that a -- that, that an agency commit itself to a, a --

1 operating a -- in a certain way so as to mitigate?

2 MR. BRICKLIN: No. As this Court has said,  
3 NEPA is essentially a procedural statute.

4 QUESTION: Don't you think there's language in  
5 the Ninth Circuit's opinion that suggests the contrary?  
6 Or --

7 MR. BRICKLIN: Yes, there is language in the  
8 Ninth Circuit's decision that says NEPA imposes  
9 substantive duties. That, that is not consistent with  
10 this Court or -- this Court's statements or the Act.

11 But the court's decision below that the impact  
12 statement was inadequate was not based upon that  
13 statement. The court below decided the impact statement  
14 was not adequate because it was conclusory, because it  
15 didn't provide the information that Congress required.  
16 And that was the basis of the court's decision.

17 QUESTION: So, you, you don't support the, the  
18 -- what you regard as the dicta, but you say the result  
19 is nonetheless --

20 MR. BRICKLIN: That's, that's exactly right.

21 QUESTION: Mr. Bricklin, in the -- in the ski  
22 resort case, how, how would you have had the -- the  
23 government do the job right with respect to those  
24 environmental effects that they say could only be  
25 mitigated by counties or states? What, what was the

1 government supposed to do to decide whether that  
2 mitigation would occur or not?

3 MR. BRICKLIN: Well, two things. First of  
4 all, it's -- it is not the case that the mitigation was  
5 beyond the Forest Service's control. For instance, to  
6 protect the deer herd's habitat, the Forest Service  
7 could have purchased habitat throughout the Methow  
8 Valley. In fact, it's co-Petitioner, the Army Corps of  
9 Engineers, in another case spent \$7 million purchasing  
10 off-site habitat lands. Or it could have required the  
11 applicant to do it.

12 QUESTION: What about air quality?

13 MR. BRICKLIN: Okay. Even regarding  
14 mitigation measures that may be beyond the agency's  
15 control, it is still required by NEPA to discuss the  
16 mitigation measures so that the decision maker can know  
17 whether the mitigation measures will work regarding air  
18 quality. The impact statement told the Forest Service  
19 that with mitigation, air quality standards could be  
20 met. The impact statements said that without mitigation  
21 you would exceed air standards by a factor of 20.

22 Now, what was the basis of that conclusion?  
23 There was nothing in the Impact statement or anywhere  
24 else. It was a completely unsupported conclusion that  
25 mitigation would allow the -- allow them to come into



1 compliance with the air standards.

2 NEPA's purpose is to allow for informed  
3 decisions.

4 QUESTION: Oh, I see. Is, is your complaint  
5 only that they were -- that they erroneously said that  
6 mitigation could produce compliance with the air  
7 standards? I thought your complaint was even if it  
8 could, we have no assurance that mitigation will occur.  
9 You're not complaining about the latter?

10 MR. BRICKLIN: That is a latter -- that is a  
11 question that really hasn't been reached in the courts  
12 below, and I don't think it's presented here.

13 QUESTION: I thought it was -- I thought it  
14 was part of your case really, that, that the federal  
15 government just said, well, if somebody wants to take  
16 care of these problems, they can. There are ways to do  
17 it.

18 MR. BRICKLIN: Well, the -- it's --

19 QUESTION: And, and, and your response is,  
20 well, that may be, but how do we know they're going to  
21 do it. And it isn't responsible to make a decision  
22 unless you know somebody is going to mitigate.

23 MR. BRICKLIN: There -- there's two parts  
24 really to the analysis, I believe. One is there is the  
25 procedural information part of the analysis. That's

1 what the Impact statement does. It gathers information  
2 so informed decisions can be made. We don't have that  
3 here.

4 The second step is the substantive decision  
5 that the agency makes, whether to proceed with the ski  
6 area, if so, under what conditions. That is a separate  
7 decision. That's a separate issue, and one in which the  
8 court serves a different function under the  
9 Administrative Procedures Act to determine on that  
10 second question whether the agency has acted arbitrarily  
11 and capricious, as this Court has recognized in  
12 Strycker's Bay and in -- and in Baltimore Gas. But  
13 that's a separate question. The review under the  
14 arbitrary and capricious standard of the substantive  
15 decision is distinct from the issue of whether the  
16 impact statement itself is adequate, whether it provides  
17 the information that the Forest Service needed in order  
18 to make a reasoned decision.

19 QUESTION: I don't understand what you mean by  
20 substantive review. I thought we did not substantively  
21 review for excessive environmental impact. I thought  
22 that as long as the agency says we're willing to do it,  
23 that's the end of the matter. Where, where is the  
24 substantive requirement not to harm the environment?

25 MR. BRICKLIN: The, the requirement is in the,

1 the Administrative Procedures Act, not in NEPA. It's in  
2 the Administrative Procedures Act, not NEPA. The  
3 Administrative Procedures Act provides that agencies  
4 shall not act in an arbitrary and capricious manner.

5 QUESTION: With respect to those things that  
6 the law forbids them from doing.

7 QUESTION: What supports the proposition that  
8 if they really do something which someone might regard  
9 as arbitrary in going ahead in spite of an EIS, that's  
10 subject to review under the APA?

11 MR. BRICKLIN: I think that's both reflected  
12 in footnote 2 of the Strycker's Bay opinion and in  
13 Vermont Yankee. In both of those cases, the Court,  
14 although it held that NEPA was essentially procedural,  
15 said that, nonetheless, the courts under the APA, apart  
16 from NEPA, have the responsibility to determine whether  
17 the substantive decision was arbitrary and capricious.

18 QUESTION: Depending on applicable law  
19 governing substantive matters, and the NEPA is not a law  
20 governing substantive matters.

21 MR. BRICKLIN: The -- the Solicitor General  
22 concedes that mitigation measures must be considered to  
23 the fullest extent possible, and looks at the -- for  
24 instance, the Methow Valley impact statement and tries  
25 to excuse compliance with that procedural mandate on the

1 basis Justice Scalia inquired earlier about, the  
2 tiering, for instance.

3 Now, it is clear that the Solicitor -- that  
4 the Solicitor General's reliance on this tiering issue  
5 is misplaced. The plain meaning of the statute provides  
6 that the environmental impacts of the activity are to be  
7 analyzed in the impact statement regardless of whether  
8 they are on site or off site, regardless of whether this  
9 agency has control of them or doesn't have control of  
10 them. And the Act simply makes no distinction between  
11 the level of discussion that is required dependent upon  
12 whether the impacts are on site or off site.

13 QUESTION: Is -- isn't the -- isn't the  
14 requirement of reasonableness -- does -- doesn't that  
15 lay some ground for thinking that remote effects may be  
16 discussed with less precision and detail than immediate  
17 effects?

18 MR. BRICKLIN: Absolutely. But what happened  
19 in this case was the Forest Service itself recognized  
20 that the off-site impacts were the more severe impacts,  
21 that those were -- and precisely because the Forest  
22 Service recognized that those were the more severe  
23 impacts, it was those impacts that the Forest Service  
24 should have considered in more detail.

25 And in the Elk Creek case, the 1,300 acres,

1 lost habitat behind the dam that the Solicitor General  
2 now attempts to belittle as an insignificant impact, the  
3 -- the Army Corps itself recognized as a significant  
4 impact.

5 The --

6 QUESTION: Counsel, do you defend the Ninth  
7 Circuit's conclusion that the CEQ's rescinded worst case  
8 regulations are, in effect, still in effect?

9 MR. BRICKLIN: No, we, we do not. The worst  
10 -- the worst case analysis or, now as it's called, a  
11 analysis of catastrophic events, is analysis that flows  
12 from NEPA's mandate to consider environmental impacts to  
13 the fullest extent possible. And it's really a  
14 three-step analysis, and it's important to note that the  
15 first two steps are not in dispute.

16 Number one, if there is uncertainty regarding  
17 what the effects will be, that uncertainty must be  
18 disclosed. No one disputes that.

19 Number two, if there's uncertainty, the agency  
20 must try to fill the information void by conducting  
21 additional research. Nobody disputes that.

22 QUESTION: How does one know whether there's  
23 uncertainty?

24 MR. BRICKLIN: In, in this case we knew there  
25 was uncertainty, for instance, in the Elk Creek case

1 because several agencies -- environmental agencies at  
2 the federal and state level took issue with the Army  
3 Corps' conclusion that there would not be a turbidity  
4 problem. The National Marine Fisheries Service, the  
5 Environmental Protection Agency, and two state agencies  
6 said that turbidity was going to be a major problem. In  
7 fact, the Environmental Protection Agency reviewed the  
8 impact statement and complained that it had left  
9 unaddressed the major issue regarding water quality, and  
10 that was the turbidity issue. So, that's how we know in  
11 this case that there was uncertainty. The agencies with  
12 expertise on environmental matters said there was.

13 And as a result, the Army Corps had the  
14 responsibility of, number one -- number one, disclosing  
15 that and, number two, attempting to do the research to  
16 fill that information void. And it was only if that was  
17 unavailing that we'd come to the third step, which is  
18 where the dispute rises which is what do you do if the  
19 research doesn't fill the void.

20 And what the new regulation requires is that  
21 the agency consider the different outcomes that are  
22 possible, including in the words of the new regulation,  
23 catastrophic results even if they have low probability  
24 of occurrence. And that is, frankly, nothing different  
25 than what the case law and what the prior regulation

1 called for in different words when it called for a worst  
2 case analysis.

3 But that's not critical here. What's  
4 important is that the new regulation, on its face,  
5 appears to be consistent with NEPA's requirement to,  
6 number one, research to try to fill the information gaps  
7 and, number two, if you can't fill them and you still  
8 have uncertainty, don't look at the world through  
9 rose-colored glasses. Tell us what bad may happen as  
10 well as what good may happen.

11 Now, there's another issue in this case  
12 regarding the requirement to supplement the  
13 environmental impact statement. The court -- and that  
14 requirement occurred because significant new information  
15 came to light after the impact statement was prepared.  
16 Because NEPA provides a continuing responsibility for  
17 the agencies to take into account environmental factors,  
18 their responsibilities do not end with the filing of an  
19 impact statement. As the CEQ's regulations reflect --  
20 and the Solicitor General acknowledges, as this Court  
21 has, that they are entitled to, to substantial deference  
22 -- if significant new information comes to light, a  
23 supplemental environmental impact statement is required.

24 Now, in, in the briefs we describe five  
25 different areas in which significant new information

1 came to light. I just want to focus on one of those  
2 today, and that regards the new information regarding  
3 the impact on fish, new information that was revealed  
4 when a dam on the nearby Lost Creek was closed.

5 QUESTION: It came to light after the closing  
6 of the administrative record, in effect?

7 MR. BRICKLIN: Well, it's -- It clearly came  
8 to light -- I mean, the question is when does the  
9 administrative record close? And where you have  
10 significant new information that comes to light after  
11 the supplemental impact statement is prepared --

12 QUESTION: Well, but another question is when  
13 are these things over? I mean, when, when do you decide  
14 them? Because someone can always bring new information  
15 to light and you can just have a great big paper  
16 shuffling operation where nothing is ever decided  
17 finally.

18 MR. BRICKLIN: Right.

19 The -- In this case, the new information came  
20 to light in a -- In time for the Army Corps to use it in  
21 a -- In a meaningful manner, and that is why it should  
22 have been considered by the Army Corps. The --

23 QUESTION: Well, what does that mean to say it  
24 came to say it came to light in time for the Army Corps  
25 to use it in a meaningful manner?



1 MR. BRICKLIN: Well, in other words, the Army  
2 Corps learned that there was new information about the  
3 loss of the fish. The Army Corps should have stopped  
4 what it was doing at that point because you're talking --

5 QUESTION: But doesn't something depend on  
6 when this information came to light in view of the  
7 litigation and the, the state of the administrative  
8 record? I mean, supposing the day of the hearing in the  
9 court of appeals someone says, look, I've got new  
10 information here, does that start the clock running all  
11 over again?

12 MR. BRICKLIN: Well, and I know the Solicitor  
13 General suggests that that is what happened here, and I  
14 need to make clear and, and -- that, first of all, that  
15 argument was raised for the first time -- in three years  
16 of litigation, it was raised for the first time in the  
17 reply brief.

18 QUESTION: Well, I'm asking you a question. I  
19 hope you'll answer.

20 MR. BRICKLIN: Yes. The new information in  
21 this case was provided several years -- to the Army  
22 Corps, more than a year before the time of trial, and at  
23 a time when the dam was not under construction, and when  
24 changes in the Army Corps' decision could still be made.  
25 And specifically, because the Army Corps learned that

1 the fish in the Rogue River, which is recognized as one  
2 of the greatest fishing rivers in the world -- and we  
3 learned that there may be a devastating impact on the  
4 fishery, and the Army Corps hasn't built the dam yet,  
5 well, then let's stop and take a look at this new  
6 information because --

7 QUESTION: Well, Mr. Bricklin, did the Army  
8 Corps decide that the new information was not  
9 significant enough in its view to warrant a supplement  
10 to the EIS?

11 MR. BRICKLIN: No, and that's -- In, in fact,  
12 what the -- the Army Corps did not dispute the  
13 significance of the information and nor did the  
14 dissenting judge below. What the dispute was was as to  
15 the accuracy of the information. And the information --  
16 and let me elaborate on that for a minute or two if I  
17 may.

18 The information that was provided was the  
19 result of a study of the closure of the Lost Creek Dam  
20 on a nearby tributary. This --

21 QUESTION: Of the Rogue?

22 MR. BRICKLIN: Of the Rogue.

23 And this study was commissioned by the Army  
24 Corps itself. It was a ten-year study that examined the  
25 fishery downstream from the dam both before the Lost

1 Creek Dam was built and afterward. And what this study  
2 revealed was that it -- that the closure of the dam  
3 caused a warming of the waters downstream and the warmer  
4 waters caused the eggs, the salmon eggs, buried in the  
5 gravel to hatch prematurely, two months prematurely.  
6 And it was a critical two months because of hatching --  
7 because instead of hatching in the spring, they hatch in  
8 the middle of the winter.

9 QUESTION: Well, Mr. Bricklin, the Army Corps  
10 decided not to prepare a supplement. And why? It  
11 decided it because it didn't believe the accuracy of the  
12 new studies?

13 MR. BRICKLIN: Well, they, they claim --

14 QUESTION: Or they didn't think that it was  
15 significant because it was inaccurate, or what?

16 MR. BRICKLIN: They, they argued in court that  
17 they did -- that the information, if accurate, was  
18 significant, but they disputed the accuracy. And in  
19 doing that, they --

20 QUESTION: On what standard of review should a  
21 court review that determination by the Corps? Should it  
22 be on a reasonableness standard or an arbitrary and  
23 capricious standard?

24 MR. BRICKLIN: I --

25 QUESTION: And is there a difference?

1 MR. BRICKLIN: Actually if you will beg my  
2 indulgence for a second, I think it's yet a third  
3 standard. I believe the standard is established in the  
4 Administrative Procedures Act, which provides that  
5 agency actions are to be reviewed, among other things,  
6 to determine whether they have -- whether they are in  
7 accordance with the law. And that's in 706(2)(a). And  
8 in fact, the preamble in 706 --

9 QUESTION: Well, generally doesn't the APA  
10 contemplate an arbitrary and capricious standard of  
11 review?

12 MR. BRICKLIN: For factual determinations.  
13 But we are here interpreting a statute.

14 QUESTION: Would a determination of whether a  
15 study is accurate be a factual determination?

16 MR. BRICKLIN: Yes, a, a -- a question of the  
17 accuracy of the study would.

18 QUESTION: So, the standard would be arbitrary  
19 and capricious under ABA -- APA.

20 MR. BRICKLIN: Except that under the case law  
21 that has developed under the Environmental Policy Act  
22 that a rule of reason has been applied, and that is --

23 QUESTION: Well, is that what we have to  
24 decide here, whether that's proper or whether we go back  
25 to the APA for the standard?

1 MR. BRICKLIN: I, I think the Court has to  
2 decide that, but that determination is limited to  
3 factual issues. Regarding legal issues, in other words,  
4 what did Congress mean when it said significant? Does a  
5 particular impact rise to this level of significance?  
6 That's a legal question which the courts decide de novo.

7 Now, coming back to this question of the  
8 accuracy of the study that was prepared at the Corps'  
9 behest, ten-year study, \$4 million, and it considered  
10 many, many different issues not just this issue about  
11 the stream warming and causing the early hatching of the  
12 eggs. It reached conclusions about the size of the  
13 fish, the timing of their migration and a lot of other  
14 things. It's a big, fat, several hundred-page study.

15 And the Corps of Engineers sent it out for  
16 review by two outside people that they picked and one  
17 inside. And those reviewers found some problems with  
18 some of the conclusions in this study. And it is those  
19 critiques that the Solicitor General and the agency  
20 latch onto in suggesting that this conclusion about the  
21 temperature impact was not accurate.

22 But all of those critiques focused on other  
23 conclusions in the study. And with regard to this  
24 conclusion, that the dam raises the temperature and  
25 causes the early hatching of the eggs, that conclusion

1 was not questioned by anyone. And in fact, the reviewer  
2 who was the most critical of other sections of this  
3 study, Mr. Matthews -- he specifically agreed with these  
4 conclusions, and the Army Corps agreed that the biology  
5 underlying those conclusions makes sense.

6 And so, please do not be misled when, when the  
7 Solicitor General and the agencies below quote out of  
8 context other portions of these critiques because it was  
9 not directed at this key finding regarding the warming  
10 of the -- of the waters downstream.

11 I want to go back for one minute and talk  
12 about one issue regarding mitigation which has reached  
13 the -- that the Solicitor General has drawn some  
14 attention to, and that regards the court of appeals  
15 reference to a complete mitigation plan. And the  
16 Solicitor General has suggested that this is again the  
17 court below imposing new procedures not required by the  
18 Act.

19 It is -- It is clear when the court's decision  
20 in the Marsh case, where this first appeared -- when  
21 that decision is read in context, that the complete  
22 mitigation plan that the court was referring to was  
23 nothing more than the complete mitigation analysis that  
24 the Solicitor General and everyone recognizes must be  
25 included in an impact statement.

1           And I'd like to point the Court's attention,  
2 in fact, to that part of the opinion where this language  
3 appears. The opinion is the first appendix in the Marsh  
4 case, and at page 8a and -- excuse me -- 6a and 7a, the  
5 court makes reference to the analysis in the impact  
6 statement of the mitigation elements. And notice that  
7 the court refers to this discussion as a plan. It says  
8 this mitigation plan requires such and such. And so, on  
9 page 7a, when the court says the importance of a  
10 mitigation plan cannot be overestimated or when it says  
11 without a complete mitigation plan the decision maker is  
12 unable to make an informed decision, it is clear,  
13 reading this in context, that the -- that the court is  
14 requiring a complete mitigation discussion.

15           And in fact, this -- the court says so itself  
16 in the next paragraph. In the -- in the last -- or in  
17 the last paragraph before section 3 on page 7a, the  
18 court says that because the wildlife mitigation plan  
19 here merely lists measures and includes neither an  
20 analysis nor an explanation of effectiveness, it is  
21 inadequate. That's what the court was looking for, an  
22 analysis, an explanation of effectiveness of what the  
23 costs would be. And that's all the -- that's all the  
24 court meant when it required a mitigation plan.

25           In sum, regarding the mitigation, the fact

1 that the impact statements here relied exclusively upon  
2 conclusions that did not have any support in any facts  
3 or any studies and relied upon mere wish lists, that  
4 does not meet Congress' purposes, does not meet the  
5 standard of preparing a detailed statement, and rendered  
6 the impact statements inadequate.

7 QUESTION: Mr. Bricklin, do you agree with the  
8 Ninth Circuit that the Forest Service has to develop an  
9 adequate mitigation plan before it can issue a special  
10 use permit, as in the ski resort case?

11 MR. BRICKLIN: Well, if first of all we mean a  
12 plan in the sense of an analysis, a full discussion,  
13 yes, because that's what NEPA requires. If we're  
14 talking about some other different procedural construct,  
15 the Forest Service regulations do require a -- the  
16 applicant to submit a mitigation plan, and then goes on  
17 and requires the agency to implement and condition the  
18 permit with mitigation terms and conditions. And so,  
19 yes, in that case it is required.

20 And that actually brings me back to the  
21 question that the Chief Justice inquired about. Where  
22 does -- where under -- would we have any substantive  
23 requirements to apply? Here the Forest Service's own  
24 regulations require the applicant to submit detailed  
25 plans and then goes further and requires the agency to



1 implement and include mitigation plans --

2 QUESTION: But didn't the agency interpret  
3 those regulations in doing what it did?

4 MR. BRICKLIN: Well, yes and the -- yes.

5 QUESTION: So, presumably it thought it was  
6 complying with its regulations.

7 MR. BRICKLIN: Presumably it did.

8 QUESTION: And some deference is given to the  
9 agency when they're interpreting their own regulations.

10 MR. BRICKLIN: That's clear. But on the other  
11 hand, if the plain meaning of the regulation says one  
12 thing and the agency does something else, then deference  
13 is not required. And I think that's the situation we  
14 have here.

15 The --

16 QUESTION: Is it clear that the special or  
17 that the master plan is going to be presented to the  
18 United States government, to the Forest Service, in the  
19 ski run case?

20 MR. BRICKLIN: It is clear, but it is also  
21 clear that that will have no usefulness in determining  
22 how to mitigate the off-site impacts which the Forest  
23 Service recognizes as the more significant impacts.

24 The mitigation -- the on-site master  
25 development plan is going to tell the applicant where to

1 put the specific ski runs and ski lifts. That's all  
2 well and fine, but it doesn't do anything to address the  
3 issue of how are we going to deal with the loss of deer  
4 herd in other areas of the valley.

5 QUESTION: Does, does the permit that was  
6 granted now allow any actual construction or site  
7 clearing?

8 MR. BRICKLIN: No. No, it does not.

9 QUESTION: That awaits the master plan?

10 MR. BRICKLIN: That -- that is true.

11 QUESTION: Isn't it the government's position  
12 that until they see the actual contours of the  
13 construction, they can't really evaluate mitigation  
14 matters -- measures and that they're much better off  
15 simply waiting for the master plan stage to do that?

16 MR. BRICKLIN: That's true with regard to the  
17 on-site -- to some of the on-site mitigation. In other  
18 words, if you're talking about runoff from the ski  
19 slopes that are cleared, where are you going to put in  
20 your catch basins? Yes, that would wait till you have  
21 your ski area laid out in front of you.

22 But where here you're talking about -- where  
23 the agency is talking about loss of wildlife habitat  
24 elsewhere in the valley or air pollution occurring  
25 elsewhere in the valley, the location of the ski runs

1 isn't going to provide the agency with any more  
2 information regarding that. And in fact, in their reply  
3 brief, the Solicitor General finally admits just that,  
4 that there is no second tier regarding the off-site  
5 impacts, and that's a critical, critical difference  
6 between the on-site and off-site impacts. The off-site  
7 impacts are the more severe, and there's not a second  
8 tier regarding those.

9 In sum, this is neither the time nor the place  
10 for relaxing NEPA standards for detailed statements and  
11 compliance to the fullest extent possible. Congress'  
12 mandate has never been more important. Environmental  
13 hazards that 20 years ago were barely recognized today  
14 face us in full force. Witness nuclear wastes seeping  
15 into our groundwater, the warming of the global  
16 atmosphere, and the loss of the ozone layer.

17 Nor is this is the place for relaxing  
18 Congress' standards. The Solicitor General's pleas for  
19 relief in this court must be unavailing. This Court's  
20 decision far transcends the issues regarding a ski area  
21 and a dam. At a time when the leaders of the greatest  
22 nations in the world rank the environmental hazards as  
23 major problems confronting national and international  
24 security, the Solicitor General's plea for perfunctory  
25 compliance with NEPA must be rejected. Assuring fully

1 informed decisions has never been more important.

2 QUESTION: You, you don't disagree that --  
3 that the detail of the statement has to be commensurate  
4 with the severity of the harm. I mean, you wouldn't  
5 require any statement to be made about -- how many acres  
6 was it? Eighteen hundred acres flooded? You wouldn't  
7 require them to say so many million ants will be -- will  
8 be killed.

9 MR. BRICKLIN: Absolutely. That's correct,  
10 Your Honor.

11 QUESTION: You wouldn't require anything at  
12 all.

13 MR. BRICKLIN: That's --

14 QUESTION: So, there is some relationship  
15 between --

16 MR. BRICKLIN: It's a rule of --

17 QUESTION: -- how serious and -- and whether  
18 you have to say anything at all.

19 MR. BRICKLIN: And the CEQ regulations reflect  
20 that when they define significance in term of -- in  
21 terms of intensity of the impact and the value of the  
22 resource.

23 Thank you.

24 QUESTION: Thank you, Mr. Bricklin.

25 General Fried, you have seven minutes

1 remaining.

2 REBUTTAL ARGUMENT OF CHARLES FRIED

3 MR. FRIED: A few factual matters.

4 Among the states which have joined the  
5 Respondents are not included the states of Washington  
6 and Oregon.

7 As to when the Kramer memorandum, which  
8 included what is defined -- what is argued to be the  
9 significant new information, it is true it came a year  
10 before trial, but it was submitted after suit was filed.  
11 And the judgment of the Corps was that the information  
12 there was casual and unreliable. That conclusion, as  
13 well as EPA's comments, were submitted to the Council on  
14 Environmental Quality; and there was no objection raised  
15 there.

16 So, I think what we have is an argument that  
17 uncertainty is to be equated with a dispute between  
18 proponents and opponents of a measure, and that cannot  
19 be a -- that is an argument --

20 QUESTION: Mr. Fried, just to help me a little  
21 bit, did they find it unreliable with respect to the  
22 precise point your opponent made about the two-month  
23 delay in hatching the eggs?

24 MR. FRIED: Well, there is on --

25 QUESTION: He said they made a lot of other

1 criticisms, but that one was quite important and was  
2 accepted by everybody.

3 MR. FRIED: well, I think there is some --  
4 there was some thought that it would have something to  
5 do with the time the eggs would hatch. That's correct.  
6 But it was not as important to the life cycle of the  
7 fish as it was claimed.

8 QUESTION: It sounds pretty important.

9 MR. FRIED: In other words, the matter was --  
10 the SIR, the supplemental information review, did  
11 address this. They looked at it, but they concluded  
12 that it did not have the scientific or the ecological  
13 effects which were being claimed for it.

14 And as to the turbidity, we just thought they  
15 were wrong.

16 QUESTION: You mean it wouldn't -- it wouldn't  
17 harm the fish to be hatched in winter instead of spring?

18 MR. FRIED: well, I don't -- I think that --

19 QUESTION: That seems to be what you're  
20 saying, if I understand you.

21 MR. FRIED: It was --

22 QUESTION: He said there was no dispute on  
23 this, and I just don't know whether I should believe him  
24 or you.

25 MR. FRIED: well, I don't think there is a

1 dispute on when the eggs would hatch.

2 QUESTION: Or whether it's significant.

3 MR. FRIED: well, I think there was a dispute  
4 about whether that measure of -- that difference of  
5 hatching would make that difference, yes. Now, you can  
6 treat that as a question of law, but it seems to me that  
7 is much more a question of what is important to fish,  
8 and that sounds to me like a factual matter.

9 And more specifically, we strongly assert that  
10 these factual matters are to be governed by the APA  
11 arbitrary and capricious standard as well as the  
12 question of whether the decision whether to reopen the  
13 record and perform yet another analysis, because this is  
14 a project that has been under study for quite a long  
15 time, is itself an arbitrary and capricious standard.

16 QUESTION: May I ask one other question? I  
17 think under your proposed disposition, you do suggest  
18 there be further proceedings before the agency.

19 MR. FRIED: Oh, yes, on the --

20 QUESTION: There will be -- the record will be  
21 reopened.

22 MR. FRIED: But only as to specific matters  
23 about the combined effects of all three dams. We didn't  
24 think that was an issue which was worth bringing to this  
25 Court.

1           What we would strongly urge is that there be  
2 no remand on any of the matters subject to the  
3 litigation here because we are concerned not only about  
4 the two specific legal issues, which I take the  
5 Respondents to have conceded, but we are concerned about  
6 the approach of the court of appeals here which is just  
7 unduly persnickety. We are told that there is a wish  
8 list, and that "wish list" phrase occurs in the Elk  
9 Creek Dam case. And I must say the only thing to which  
10 that nice phrase can apply is those skunks and coyotes  
11 and so on that have been flooded out, and it seems  
12 inappropriate to say this is an insufficiently detailed  
13 mitigation statement because it's just a wish list.

14           So, we would require guidance not only on the  
15 legal issues which have been conceded, but also on the  
16 appropriate approach, and we think the approach of the  
17 Ninth Circuit here has not been appropriate because on  
18 mitigation -- on mitigation you have three kinds of  
19 things bearing on reasonableness. First of all, just  
20 how significant is the impact and can't you tailor your  
21 discussion to how big a deal you've got here.

22           Second, there is the issue of tiering which is  
23 the question of is the issue ripe for detailed  
24 discussion or is general conceptual discussion  
25 sufficient.



1                   And finally, the discussion should  
2 appropriately take into account who it is that is going  
3 to be doing the mitigation, and if it's state and local  
4 authorities that are going to be doing it, then the kind  
5 of discussion is appropriately more conceptual than it  
6 would be if the actual decision maker would be the one  
7 asked to do the mitigation.

8                   And this is all just spinning out the rule of  
9 reason as to the detail of the mitigation statement. In  
10 other words, it mustn't be forced to be so detailed that  
11 it ceases to be useful to the decision maker and just  
12 becomes a kind of a mine field which the agency has to  
13 try somehow to negotiate lest it blow up on them at  
14 suit, at trial, perhaps indeed in a court of appeals.  
15 One doesn't know when. That's --

16                   QUESTION: It's curious you should say rule of  
17 reason instead of rule of arbitrary, capricious -- or  
18 rule of arbitrariness or capriciousness.

19                   MR. FRIED: Oh, I --

20                   QUESTION: Is there any difference between the  
21 two really?

22                   MR. FRIED: I hope I chose my words carefully.  
23 It is the --

24                   QUESTION: I think you said a rule of reason.

25                   MR. FRIED: It is the agency which is bound to

1 apply a rule of reason. A reviewing court applies the  
2 arbitrary and capricious standard.

3 Now, I must tell the Court --

4 QUESTION: We're only talking here about the  
5 reviewing court.

6 MR. FRIED: That is correct.

7 Agencies have consistently come to the  
8 Solicitor General and asked him to bring to this Court  
9 cases in which courts of appeal and district courts have  
10 said, well, it's a rule of reason that governs us. And  
11 we have thought that issue all by itself is not worth  
12 bothering the Court with because it may be rather  
13 verbal. But since we have it here, it would be a  
14 marvelous opportunity to clarify that the agency is  
15 bound by a rule of reason and the reviewing court is  
16 bound by the arbitrary and capricious standard.

17 I thank the Court for its attention.

18 CHIEF JUSTICE REHNQUIST: Thank you, General  
19 Fried.

20 The case is submitted.

21 (Whereupon, at 11:01 o'clock a.m., the case in  
22 the above-entitled matter was submitted.)  
23  
24  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-1703 - F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL.,  
Petitioners V. METHOW VALLEY CITIZENS COUNCIL, ET AL.; and

NO. 87-1704 - JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., Petitioner  
V. OREGON NATURAL RESOURCES COUNCIL, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

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