OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: OHIO FORESTRY ASSOCIATION, INC. Petitioner v.

SIERRA CLUB, ET AL.

CASE NO: 97-16 C.2

PLACE: Washington, D.C.

DATE: Wednesday, February 25, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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OHIO FORESTRY ASSOCIATION, INC. :

Petitioner :

v. : No. 97-16

SIERRA CLUB, ET AL. :

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Washington, D.C.

Wednesday, February 25, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondents, supporting the Petitioner.

STEVEN R. QUARLES, ESQ., Washington, D.C.; on behalf of the Petitioner.

FREDERICK M. GITTES, ESQ., Columbus, Ohio; on behalf of the Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 97-16, Ohio Forestry Association v. Sierra Club.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE FEDERAL RESPONDENTS,

SUPPORTING THE PETITIONER

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

The National Forest Management Act requires the United States Forest Service to devise forest plans for each of the units within the national forest system. That the plans are to be revised at 10 to 15-year intervals, and they perform two basic functions.

First, they provide general guidance to Forest Service employees in the management of the affected unit and, second, they serve a public informational function by giving the public general information about the likely management activities within the forest and, while the plans vary widely from place to place, all forest plans contain projections concerning anticipated timber harvesting activities within the national forest, and it's that feature of the plan that's at issue here today.

I'd like to start by saying that in our view it would be misleading to frame the question presented in this case as whether forest plans are reviewable. We're not asking for a per se rule in this case and, indeed, we're really not asking for a special rule for forest plans.

What we're saying is that the Court should examine the particular plan provision that is at issue and ask whether the decision or determination reflected in that provision is reviewable under ordinary principles of administrative law and, in our view, the timber harvesting projections at issue in this case don't meet that test.

The harvesting --

QUESTION: Well then, in most cases the plans aren't unified documents?

MR. STEWART: The plans are unified documents. That is, the plan is bound together. It is a single document, but it contains a variety of provisions and some provisions may reflect decisions having immediate on-the-ground impact, others will not, and the question should be whether the particular plan provision at issue in a case has immediate on-the-ground impact, and --

QUESTION: Can you give me an example of a provision that would have immediate impact?

MR. STEWART: One of the cases we had in the

Ninth Circuit this past summer and fall was a case in which the Forest Service amended the standards and guidelines contained in a plan that regulated the manner in which timber harvesting activities would be conducted and the document that adopted the plan amendment said, these amended standards and guidelines will not apply to ongoing timber harvesting activities.

And we were sued in that case and the plaintiff's contended that the agency had behaved unlawfully in failing to apply the new standards and guidelines to ongoing projects.

In the end we prevailed on the merits in that case, but we conceded that that was a justiciable controversy, because the decision not to make the standards and guidelines immediately applicable would have immediate on-the-ground impact.

QUESTION: Well, I take it you'd agree here that if their claim were that your plan was allowing motorcycles into a bird-watching area or something that like, that would be immediately justiciable on your theory, would it not?

MR. STEWART: That's correct.

QUESTION: Yes.

MR. STEWART: And our view is that --

QUESTION: Mr. Stewart, the respondents have

filed some supplemental affidavits, have they not?

MR. STEWART: They have.

QUESTION: Is there anything -- should we consider those and, if so, is there anything in those that would reflect an immediate actionable matter?

MR. STEWART: I think the Court frankly has discretion whether to consider them or not. They are part of the record below.

I think probably the more normal course would be not to consider them because they were filed after the court of appeals issued its decision and consequently they weren't part of the record that was before the court of appeals.

We don't believe, in any event, that the affidavits affect the justiciability of plaintiff's facial challenge to the plan. That is, the affidavits may suggest that there are individual timber harvesting activities which are having, or did have before they were enjoined, immediate on-the-ground impact and those specific timber harvesting activities would have been subject to judicial review. That wouldn't mean that the plan level projections were suitable for judicial review.

QUESTION: Was this action brought under the Administrative Procedure Act in the district court?

MR. STEWART: That's correct, Your Honor. The

National Forest Management Act doesn't contain its own judicial review provision, so that the suit was brought under the APA.

Now, the harvesting projections contained in the Wayne plan are contingent and uncertain in several important respects.

QUESTION: Would you be saying the same thing if it were the timber companies complaining and saying this plan doesn't reserve enough land for timber harvesting, it gives over too much land to other uses and excludes harvesting?

MR. STEWART: Well, if, for instance, the timber industry contended that particular areas of the forest had been improperly designated as unsuitable for harvesting I think you'd really have a different sort of justiciability problem. That is, that sort of decision would be final in a way that the suitability determination here is not.

That is, if land is designated as off-limits for harvesting there's not some subsequent site-specific decision as to whether timber will actually be harvested. I think, though, that to establish --

QUESTION: The difference is that in the case posited by Justice Ginsburg it is clear that no harvesting will occur.

MR. STEWART: That's correct, and here it's --

QUESTION: Whereas here it is not clear that harvesting will occur.

MR. STEWART: That's correct.

Now, I think the industry plaintiff might still have difficulty establishing the redressibility component of standing, because the plaintiff would have to show that redesignation of the land as suitable for timber harvesting was ultimately likely to lead to a decision actually to harvest timber and to the award of a contract to the particular company, so there would be a different sort of justiciability problem.

Now --

QUESTION: Could I ask just sort of a background question? I'm a little confused about the whole -- as I understand it, about -- most of the land in the national -- in this forest is owned privately.

MR. STEWART: That's correct.

QUESTION: And is the clearcutting and the timber that's cut down, is that all on private land, or is that on public land?

MR. STEWART: No. The only thing we're talking about here, and the only part of this area that the plan regulates is the federally owned land.

QUESTION: It's only federally owned land?

MR. STEWART: That's correct.

QUESTION: So that about 80 percent of the forest, the plan just doesn't apply to?

MR. STEWART: I'm not even sure if you would call that the national forest. It is land within -- this is an odd sort of national forest in that it consists of three or four noncontiguous segments and it's interspersed with privately owned land, but the management plan takes into account uses on surrounding property, but it does not regulate those uses.

QUESTION: So the plan itself just regulates activities on Government-owned property?

MR. STEWART: That's correct.

QUESTION: And that's only about 20 percent of the total forest?

MR. STEWART: It's -- that's correct. It's around 176,000 federally owned acres.

Now, the forest plan contains projections as to the possible aggregate quantity of timber that might be harvested on the forest during the plan period, but those harvesting projections are not binding. It's not uncommon for the Forest Service to harvest substantially less timber than it is allowed to harvest on a particular unit.

And I think, second, even leaving aside the determination as to aggregate quantity of timber, the forest plan leaves the Service with very substantial

latitude as to where within the forest harvesting will occur.

For example, this forest plan designated approximately 126,000 acres within the forest as suitable for timber harvesting, but it projected that less than 8,000 acres within the forest would actually be harvested during the first 10 years of the plan and until we know where within the forest the Service intends to harvest timber, various things remain uncertain.

First, we don't know whether particular people will be hurt, whether their activities within the forest will be impaired by the harvesting that does occur.

QUESTION: What if they claim that they use the entire forest? That would cover that problem, I assume.

MR. STEWART: I think if they literally claimed that they use the entire forest, they -- at least at the motion to dismiss stage, that would take care of it. At the summary judgment stage they would be required to furnish evidence to that effect.

Second, even aside from the uncertainty as to what people will be injured, we really don't know whether logging will be rational until we know on what site it is designated to occur.

That is, it's integral to the Forest Service's implementation of the National Forest Management Act that

the propriety of timber harvesting can vary widely from site to site even within a particular national forest. That's why --

QUESTION: Suppose they said that about 80,000 would be targeted for timber -- out of the 126,000 acres total, and they said, oh, about 80,000 are eligible for timber-cutting. Would the standing calculus, the ripeness calculus here vary?

MR. STEWART: I don't think that it would vary because the 80,000, whatever figure the Forest Service projected would still only be a projection.

We still wouldn't know whether the Forest Service would actually harvest timber up to that amount and until it conducted the site-specific analysis of particular tracts we wouldn't know whether it made sense to harvest timber there, so I think in a sense this is a paradigmatic example of a case in which deferral of litigation until a latter stage in the process would conserve the resources of the court and prevent unnecessary litigation.

QUESTION: Mr. Stewart, your -- the Sierra Club at least has raised one answer to that argument and I'd like you to comment on it.

They say that if, in fact, they have to wait for site-specific decisions they will, in order to maintain

their objection to the plan, have to challenge every single one of them, because part of their argument is that there is just a legally erroneous imbalance here between the timbering decision -- the timbering allocation and the nontimbering allocation, and so they say I think at one point in their brief that if they do what you claim they should do they're going to have to file something like 40 lawsuits and that would not conserve judicial resources.

They're addressing, in other words, the hardship prong both to themselves and, I suppose, to the courts under Abbott Lab.

What is your response to that?

MR. STEWART: I think there are about three different responses.

The first is that if it is, in fact, true that there is a particular plan-level determination that is dispositive with respect to a number of timber sales then, if the plaintiff files suit to challenge an initial sale and persuades the district court or the court of appeals, if the case is taken up on appeal that the plan-level determination is irrational, that determination will be preclusive in subsequent litigation between the same parties, so a single party is not going to have to relitigate the same issue over and over.

The second thing we would point out is that both

the Eighth and Eleventh --

QUESTION: Excuse me. How could you ever come to a determination in a single suit that the overall plan level is irrational? The Government will come in and say, well, even if we did set aside too much for logging activity, had we set aside less, we still might have decided that this was the tract that we were going to log on.

MR. STEWART: I mean, I think one example of a situation in which a plan-level determination might be dispositive is if the plaintiffs came in and said, here is a large area within the forest and the Forest Service should have left that area entirely off-limits to logging, and it was irrational for the Forest Service to permit any logging within that area, and if they persuaded the court that it was indeed irrational to permit logging anywhere within that area, that determination would be preclusive.

QUESTION: It wouldn't go to the whole plan, though, just to allowing that area to be logged.

It would be very hard, it seems to me, in any individual case to challenge the overall determination that X number of acres should be logged.

MR. STEWART: I think -- I think -- well, I think it is certainly true that it's hard to imagine a site-specific activity that would present a suitable

vehicle for the court to review the whole plan, and I think if --

QUESTION: Do you concede that there has to be some mechanism for reviewing the whole plan?

MR. STEWART: No.

QUESTION: That every governmental determination, no matter how high the level of generality at which it is made, must be subject to judicial review?

MR. STEWART: No, we don't. If it were the case that the Federal courts had unlimited time and resources and if it were the case that the role of the Federal courts was to monitor the agency's protection of the public interest, then it would be a strong objection to our theory that there will be no site-specific action that brings the whole plan before the courts.

But, in fact, as this Court noted in Defenders of Wildlife, the role of the Federal courts is to protect the rights of individual litigants and Forest Service employees whose specialty it is to manage the forests spend years devising these plans, and to expect --

QUESTION: Why? Why is it -- why can't you just say, they wouldn't have cut these trees if they'd had a legally correct plan? This plan is not legally correct. We don't know what they would have done with a legally correct plan, but they wouldn't be cutting these trees.

MR. STEWART: I mean, the --

QUESTION: So why wouldn't they be able to challenge it just as an agency which takes action pursuant to a rule? You would say, the rule isn't valid, therefore -- we don't know if they would have done it with some other rule or not, but they can't do it from this rule.

MR. STEWART: Well, I think in a sense this is a familiar sort of problem in administrative law.

That is, it's often the case that a particular agency action will be brought before a court that implicates a narrow, specific regulatory provision, and a court will be told by the parties, in order to understand why this action does or doesn't make sense, you have to have an appreciation of the larger legal context, and the parties will provide the court at least with general information about what that context is.

But to say that you can review a specific action within a larger context is different from saying that you review the context as such.

The plaintiffs are always free to challenge individual site-specific actions.

QUESTION: Well, Mr. Stewart, what they basically, as I understand it, want to attack is a policy of allowing clearcutting, or even-aged forest management,

whatever euphemistic term you want to call it, but clearcutting, and they say that the overall plan envisions clearcutting and that's wrong, and they want to challenge that concept.

MR. STEWART: And our point is that they have not been harmed in any way by the clearcutting projections contained in the plan unless and until clearcutting actually occurs.

I mean, one of the noteworthy things about --

QUESTION: May I ask you, would you take that position if the statute said in so many words, or at least there was a reasonable legal argument for saying clearcutting shall be prohibited, period? Would they have a right to challenge a plan that authorized clearcutting if the statute clearly, or at least arguably prohibited it?

MR. STEWART: No, and I think --

QUESTION: You'd say no?

MR. STEWART: No, and I think this falls squarely within this Court's decision in National Wildlife Federation in which the Court said, absent an instruction from Congress, that review should proceed at a higher level of generality. Ordinarily, we -- the Court entertains challenges to regulations only when the regulation is applied to a particular set of facts.

QUESTION: So if the regulation is unlawful, you can't do the clearcutting, right?

I mean, if you have a plan that's unlawful and you clearcut in a particular place, how could you do it if the regulation, i.e. the plan, was unlawful?

MR. STEWART: I mean, that's correct in a challenge to a site-specific --

QUESTION: Yes.

MR. STEWART: -- clearcutting determination. That would be a dispositive objection if that's what the statute said.

QUESTION: Thank you, Mr. Stewart.

Mr. Quarles, we'll hear from you.

ORAL ARGUMENT OF STEVEN R. QUARLES

ON BEHALF OF THE PETITIONER

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

I would like to turn to the merits and discuss three of the Sixth Circuit's decisions.

QUESTION: Just before you do that, why was it that you intervened here?

MR. QUARLES: We intervened here because we believed that the respondents, or, rather, the plaintiffs had raised issues which we felt were inappropriate both as to justiciability and as to the merits.

QUESTION: Well, are your clients injured by this plan?

MR. QUARLES: Our clients are clearly injured by the decision in the Sixth Circuit.

QUESTION: So that the plan does have some concrete effect?

MR. QUARLES: The decision gives it concrete effect. The decision said that because the Forest Service was biased the plan was unlawful and, in fact, when the Sixth Circuit decision was remanded to the district court, the district court read the Sixth Circuit decision as saying that the Forest Service could not, in fact, prepare a lawful plan, that the entire plan was unlawful, and enjoined timber sales, so we are clearly injured.

QUESTION: But the redress you seek is the reinstatement of the plan and I assume that's because it gives you some specific advantage. I can't see how you can have it both ways, and to say that the Sierra Club has no standing if they set aside the plan but that you have injury if the plan is set aside, it seems to me is just inconsistent.

MR. QUARLES: Our belief is that neither we nor the Sierra Club typically have standing to challenge a general plan, and that only in very unusual circumstances will a plan be site-specific enough to provide both

ripeness and Article III standing, including redressibility.

QUESTION: You're claiming the ability to challenge the proposition that there can be no plan, which is to say there can be no timber sales in this area.

You're not claiming that this particular plan has to be brought back in -- I mean, the source of your injury is not that the -- every jot and tittle of this plan isn't valid.

MR. QUARLES: No, that's correct.

QUESTION: But rather that the court has held no plan at all, that is to say no timber sales at all --

MR. QUARLES: That is correct, and that's exactly what the district court found on remand, that there could not be a timber sale.

QUESTION: Well, your position is something like that of the petitioner here in that Asarco case that we decided several years ago, where perhaps at the beginning you didn't have standing but once the court rules that there can be no cutting at all, then you certainly do have standing.

MR. QUARLES: That's correct.

The three merits issues that I would like to talk about --

QUESTION: Well, I'll think about it, because I

want to hear about the merits, but it still seems to me that why you're -- the reason you're here is so that there can be logging, and that's the same reason the Sierra Club's here. I don't understand.

MR. QUARLES: We will always prefer to have a plan, because a plan without a plan, nothing can occur. With a plan, something can occur, but our view is that typically we will not be able to challenge a plan either until such time as there is a site-specific decision.

QUESTION: I suppose the Sierra Club would be in the same position as you are if the plan said this entire area will be clearcut. Would you acknowledge that the Sierra Club would have standing in that case?

MR. QUARLES: I would acknowledge that it's clearly ripe.

QUESTION: Okay.

MR. QUARLES: There may be a question as to standing simply because of the redressibility.

QUESTION: And this is the opposite of that --

MR. QUARLES: Because they could wait till the first clearcut sale in order to challenge, but yes, I would believe either of two things. If a plan said there shall be no cutting at all, then we would come very close to being in a position to challenge the plan and also if the plan said that the entire forest will be cut.

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QUESTION: You don't mean you're just close. You could challenge that plan, couldn't you?

MR. QUARLES: Excuse me?

QUESTION: If it said no clearcutting at all you don't think you could challenge that plan?

MR. QUARLES: Well, I think we could -- if they said no clearcutting at all I think it would certainly be ripe for us, but there is still a redressibility question, and that was found against us by the Eleventh Circuit in Region 8 Forest Timber Purchaser's Council, so I cannot be confident that --

QUESTION: But that plan didn't say no clearcutting at all, did it?

MR. QUARLES: Excuse me?

QUESTION: In that case --

MR. QUARLES: No, it did not.

QUESTION: No. But you suggest you wouldn't have standing if they said you could never cut timber in this forest?

MR. QUARLES: If it said no clearcutting it would still allow some other forms of cutting, and if the plan was remanded and the Forest Service proceeded to redo the plan, the Forest Service still has the discretion to offer very little or very much timber, and there is a redressibility question.

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I like to believe we could get to court, but all I'm saying is at least one circuit has found a problem with that.

QUESTION: Of course, on the other side, the -- as I understand it plans do not mandate cutting, plans authorize cutting, so that if a plan said there may be clearcutting on every acre of this property, as far as -- I suppose your position would be that the Sierra Club still would not have a ripe claim because they would still have to wait to see on a site-specific basis whether clearcutting would be allowed on this acre. Wouldn't that be your position?

MR. QUARLES: That is our position. In fact, in their complaint they complained that the plan did not provide a site-specific decision as to optimality and, indeed, that's impossible until a site-specific decision is raised and it is clear --

QUESTION: Optimality?

MR. QUARLES: Optimality.

QUESTION: They really said that?

MR. QUARLES: The National Forest Management Act requires that for even-aged management, clearcutting in particular, that the Forest Service at the time of the sale has to find that clearcutting is the optimum method, or that other even-aged management is the appropriate

method for timber harvesting on that site.

And that's why clearly, in most instances, even if it said clearcutting will be allowed, it's important to see the site-specific analysis to determine whether or not it is appropriate for that site, and that's what the statute says.

QUESTION: Can I ask you a quick question about -- I'm a little nervous about the Government's answer to my last question, which was qualified at the end that it was ripe if that's what the statute provided.

So imagine that 5 years from now, having won this case -- you won it -- then the Sierra Club, at the point when they've actually going to clearcut, the saws are there, I mean, every legal thing is done, the trees are about to come down, at that point they come into court and they say, look, the trees are being cut down. We certainly have standing to complain, and one of our legal arguments is that the plan that led to this particular sale is legally invalid.

Do you know any reason why they would be unable to make that argument?

MR. QUARLES: At the time of the sale?

QUESTION: Yes. Yes.

MR. QUARLES: Absolutely not.

QUESTION: Fine. Thank you.

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MR. QUARLES: Certainly they could, and I think that's an important issue to raise, because what both -- what respondents and their amici said in their briefs is, they thought that the plan should be challenged before it can be implemented, and I remind you that these are 10 to 15-year plans and we are 10 years from the date on which -- 10-1/2 years from the date on which the plan was first proposed. 40 sales have proceeded.

Under respondent's theory, the Forest Service would have been paralyzed to do anything for these last 10 years until the validity of the plan had been established, and we believe that's inappropriate.

The three bias issues that I would like to talk about are first the -- or the three merits issues, are first the issue of bias in favor of the timber harvesting by virtue, it seems, of the very statutes that require the Forest Service to provide for that activity.

The second is the Sixth Circuit's overturning of the Forest Service multiple use allocations on the basis that the plan overvalued timber, undervalued wilderness recreation, when the agency's broad discretion and technical expertise should have elicited judicial deference.

And third, that they concluded even-age management is restricted to exceptional circumstance when

that very proposition had been addressed and rejected by the Fifth Circuit in an exhaustive opinion which the Sixth Circuit did not even cite or address.

I think at the outset it's worth noting -- observing that the bias and merits rulings and the standing rulings, the justiciability rulings, are cut from the same cloth. Each set of rulings in its own way demonstrates the Sixth Circuit's failure to acknowledge the limited authority of the Federal courts to inject themselves into areas of policy that have been entrusted to the political branches, and this is particularly true in the case of the bias proposal of the Sixth Circuit.

Respondents did not attempt to defend that, but they did say that it's dicta, and that this Court should ignore it. That seems to be very wrong to me as an idea. We don't believe it's dicta, but even if it is, the suggestion that this Court should ignore it seems to be in error.

First of all, the Sixth Circuit clearly gave that dicta for effect, and that effect that they wanted was to have the agency note it and alter their behavior accordingly and to have the district courts in the circuit note it, and that's exactly what happened on remand.

The district court, in a transcript we lodged with this Court, reviewed the bias ruling and found that

it made the entire plan unlawful, and that the Forest Service would be incapable of preparing a lawful plan under that --

QUESTION: Mr. Quarles, you don't have too much more time. Why was the bias ruling wrong?

MR. QUARLES: The bias ruling in my view is wrong for several reasons.

First of all, it was made without any reference to the administrative record. There is nothing in the administrative record to demonstrate that bias and the court, in fact, used the bias ruling to avoid providing any deference to the agency, even though this is the kind of case that requires deference -- broad discretion, technical expertise -- and, as this Court said in Chevron, circumstances where Congress entrusted to the agency to solve competing interests.

This is exactly such a case, because Congress entrusted to the agency to solve competing demands by multiple users of the forest, so in that sense I think it's very wrong.

It's also wrong in the sense that typically there is supposed to be a presumption of agency regularity and good faith, and the only time that I'm aware when they found bias has been in extrajudicial circumstances, and that's not the case here. They just simply said it was

bias.

And the third reason that is so extraordinary --

QUESTION: I don't know what you mean by extrajudicial circumstances.

MR. QUARLES: Circumstances in which it was outside of the legal framework, where somebody had gone on television, a judge had gone on television and made a comment, or something like that.

But the third reason I think is the most extraordinary, and that is, the court found that bias in the statutory mission of the agencies. It found it in three statutes, the first the 1897 Organic Act, which requires the Forest Service to establish forests for purposes of continue -- furnishing a continuous timber supply to meet the needs of the American people.

A second statute that returned 25 percent of the revenues to local communities for use for roads and forests, and a third statute that returned a part of the revenue to the Forest Service for purposes of reforestation.

Without acknowledging that those were statutory provisions, the court pointed to those three reasons as to why there was bias in the Forest Service, and I would maintain the notion that an agency's following the law is

a bias, which allows the court not to provide deference to the agency, is an extraordinary notion that goes well beyond the bounds of judicial behavior.

More importantly, under that bias theory --

QUESTION: I suppose we can't say anything about all this if we agree with your first point, that there's no ripeness here anyway.

MR. QUARLES: That's correct. If there -- if we find there is no justiciability, then this Court need not comment on it.

QUESTION: The district courts in the Sixth Circuit continue to believe it all?

MR. QUARLES: Well, that's an interesting question. Of course, it would say vacated on other grounds, and this was en banc reviewed, and so there's always a question whether they would believe it.

I think that this dicta is so extraordinary that the notion that, because it's dicta this Court can't address it, is a notion that --

QUESTION: You'd like some dicta from us, too, wouldn't you?

MR. QUARLES: Yes.

(Laughter.)

MR. QUARLES: Exactly.

(Laughter.)

MR. QUARLES: The notion that this -- the notion that the farther a circuit court goes in dicta beyond its proper judicial function the more this Court has to stay silent seems to me to be highly inappropriate, and I believe this Court has the supervisory power to inform lower courts when they clearly have violated the separation of powers limitations, so for that reason, yes, I think it is perfectly permissible, but certainly a cautious court would say that once justiciability isn't there, that there's no need to go on to any of the merits, including the dicta.

The --

QUESTION: You wouldn't just say a cautious court, a principled court should do that, shouldn't it?

(Laughter.)

MR. QUARLES: That, too, Your Honor.

The uneven age management issue, I -- well, first of all let me say that the notion about multiple use allocation, the bias toward timber, that was proven wrong.

If the Court had provided deference and looked at the administrative record, the fact is that primitive recreation received 26,000 acres, whereas timber harvesting will only occur on 7,000. That's 15 percent of the forest that went to primitive recreation, 5 percent that would have gone to timber harvesting.

They make much of the fact that 126,000 acres were found suitable for timber harvesting, but the plan is clear that in the life of the plan only 7,800-and-some-odd acres would actually be harvested. I think that's very important.

The second thing is, is that -- thank you.

QUESTION: Thank you, Mr. Quarles.

Mr. Gittes, we'll hear from you.

ORAL ARGUMENT OF FREDERICK M. GITTES

ON BEHALF OF THE RESPONDENTS

QUESTION: Mr. Gittes, do you defend the bias ruling of the Sixth Circuit?

MR. GITTES: Your Honor, yes, I do, because the bias ruling is based on the factual record. If you read the opinion, you'll notice the Court says, this plan was biased, let us give you some examples of why, and then proceeds to discuss the heart of the merits of this case, which is that the Forest Service violated the primary obligation under the act.

That obligation is to come up with a plan that maximizes the net public benefit. They didn't do that in this case, because they only protected 10 percent of this forest for recreational users like the respondents.

QUESTION: Is that a proper bias analysis, to say that the agency here came down in favor of one side

rather than another, therefore it must be legally biased in the sense of just, forever slanted?

MR. GITTES: Your Honor, specifically what the Court illustrated is as follows. This plan, they fail to explain or even analyze their own expert's warning to them that they were greatly -- and I use the expert's word -- greatly undervaluing the demand for hiking and recreation in this forest.

Two, the basis -- as pointed out in the court below there was a distorted view of the forest, and that included --

QUESTION: Mr. Gittes, didn't this motivating course for all this begin with a statute that said -- didn't the Sixth Circuit said, under this statute that puts the agency and the logging companies in bed with each other? Isn't that in the Sixth Circuit's opinion?

MR. GITTES: Your Honor, this opinion was not based on that discussion and we know that because of the concurrence. We have a judge below who concurred that this plan was illegal and did not concur in any of the analysis about the statute.

QUESTION: But the opinion of the court is driven by the arrangement under this statute that makes the agency relationship with the regulated party very close, and that's hardly unique to this kind of --

MR. GITTES: Your Honor --

QUESTION: -- to this particular agency.

MR. GITTES: I'm sorry.

I absolutely do not believe the opinion was driven by that language. If you follow the structure of the opinion, first they discuss how they failed to analyze the, or assign any values to the detrimental effect of timbering on other recreational uses.

They discuss the undervaluation, cautioned by their own experts, that they ignored, they talk about how the whole purpose of the plan's timbering program was to generate more animals like deer, skunks, squirrels, possums, of which there is an overpopulation in the area. In fact, it's causing a major problem in southeast --

QUESTION: Well, all of that would prove a very -- if it were all true, a very bad decision, but is every very bad decision biased?

Does -- I mean, my goodness, we really have an awful lot of disqualified judges if every time --

(Laughter.)

QUESTION: -- we found a decision really wrong we said this is a biased judge.

MR. GITTES: Well, Your Honor, the standard under the APA, as this Court knows, it's not enough just to be wrong. It has to be arbitrary and capricious, and

this Court --

QUESTION: -- it's an established bias. That -- I mean, that shows that it's wrong and can be reversed by a court, but every time an agency can be reversed by a court as being arbitrary and capricious, does that mean the agency has been biased?

MR. GITTES: Your Honor, I'm not going to sit here and say that the word bias is always an equivalent of arbitrary and capricious. All I'm trying to emphasize is that what generated that conclusion in this case, and if you read the opinion it's clear, was the factual record, the erroneous assumptions made by the Forest Service, the disregard for their own experts, the absurdity of justifying a timber program to have more deer when all the communities in that area are complaining about --

QUESTION: Do you know of any case of this Court in which, on the basis of the judgment below of an agency or of a court, just on the basis of how wrong the judgment was, this Court has said that the agency or the court was biased?

MR. GITTES: Your Honor, no.

QUESTION: Just on the basis of what they --

MR. GITTES: Your Honor, I do not know of one, and I --

QUESTION: -- I don't either.

MR. GITTES: I believe the Sixth Circuit's intent was to say the plan was biased, and I believe that's their wording.

They did go on in the majority opinion to discuss the statutory framework as to a factor that might have been an explanation which led them to disregard their own experts. That part we don't defend. We do believe that was dicta, and that's highlighted by the concurrence.

But one other point I want to emphasize here, to really understand this whole case the Court needs to understand what it is, the injury that led to this case.

This case arose because Forest Service administrators only protected 10 percent of the only national forest in the State of Ohio, the sixth most populous State in this country, for this kind of back-packing, undisturbed recreational use.

Now, that is the same kind of decision that the Government has conceded in their brief creates an injury, in this respect. The Government has conceded that a decision not to close roads, for example, or as mentioned earlier, a decision to close off a forest area to off-road vehicle use, is an injury that's being inflicted.

This plan inflicted that injury when they basically said, we will not close off more of this forest from a wide range of activities --

QUESTION: But they did not at the same time say, with respect to timbering, we will open it at this moment to timbering now, and isn't that the nub of your disagreement with the Government?

MR. GITTES: No, Your Honor, it's not the nub. It's one of the most graphic features of it, but it's not the nub.

Our con --

QUESTION: -- you said below -- I mean, in your brief you said, well, we have standing because we have some people who watch birds and this plan allows the motorcycle to come through and that disturbs the birds. All right, that might give you standing, as was just conceded. But I didn't notice in your complaint or in the arguments below where this was made a point.

MR. GITTES: Your --

QUESTION: I mean, maybe you'd have a different case. I thought this case was about clearcutting.

MR. GITTES: Your Honor, it's not --

QUESTION: And that's what it seems to have been argued on, so if now it's a question of motorcycles disturbing the hikers, that sounds like a different case, which the Government said you might have standing on that one, so where is, now, that all been argued.

MR. GITTES: Well, Your Honor, this case has

always been about one principal issue: how much of this very small forest, extremely small, one of the smallest in the country, is going to be protected for back-country hiking. In fact, in technical terms this was about designating more of the forest, in Forest Service jargon, 6.2.

Well, that has a specific meaning, Your Honor. That means none of these other activities. That's what it means, and --

QUESTION: My question is, where has this been argued below, or that what you're actually bringing this case for is to protect the interests of hikers and bird-watchers from being disturbed by motorcycles.

MR. GITTES: Your Honor will find it --

QUESTION: Can you cite something in that --

MR. GITTES: Yes --

QUESTION: -- where you've mentioned that?

MR. GITTES: Yes, Your Honor.

QUESTION: Fine.

MR. GITTES: If you take a look at tab 100 of the administrative appeal of the Citizen's Council --

QUESTION: I mean in the courts. I mean, this has been a case in the courts.

MR. GITTES: Yes.

QUESTION: They're saying you don't have

standing.

MR. GITTES: Yes.

Your Honor, in the complaint itself, I believe it is paragraph 25 talks about NEPA violations. That allegation was based upon one principal argument that not enough alternatives made allowances for larger areas of protected 6.2 -- in other words, back-country hiking.

We also specifically address in paragraph 20 of the complaint the failure to consider the road situation properly.

We also in our briefing extensively discuss the problem of undervaluation of the demand for back-country hiking.

QUESTION: Well, I don't see in paragraph 20 anything that says the roads will interfere with hikers or motorcyclists, and I don't see anything in paragraph 25 that says anything like that, either.

MR. GITTES: Your Honor, it does not specifically specify the uses that are interfered with. It specifies that the plan failed to consider the impact of these roads on the uses of the plaintiffs and in the first allegations, early allegations in the complaint we set out the uses of the plaintiff. We describe the --

QUESTION: I mean, I take that to assume, reading this and reading the arguments below, that you're

talking about clearcutting. I --

MR. GITTES: Your Honor --

QUESTION: I mean, I guess I'm pushing this a little bit because I want to satisfy myself that there really isn't this bird-watcher-hiker-motorcycle argument in the case, because I do believe it would make quite a different case out of it.

MR. GITTES: Your Honor, and I don't want to back off of the timber issue because I believe we have clear standing and ripeness on that as well, and we'll get back to it in a moment, but this case was always about one principal issue, how much of the forest was going to be protected from a wide range of activities. The very first --

QUESTION: I thought the guts of your complaint was number -- was paragraph 23 on page 139a, the plan adopted by the defendants is unlawful and arbitrary and capricious because among other reasons, then it goes down A, B, C, D, E, and F, all of which refer to timber harvesting.

MR. GITTES: Your Honor, that is one portion of the allegations in the complaint, but there are other allegations regarding, for example, the NEPA violation that stands in a separate paragraph unrelated to that and that NEPA violation, as briefed in the court below, was

concerned with not having enough alternatives with more land protected for back-country hiking.

There's -- from the very beginning --

QUESTION: I certainly would have been surprised if I had been served with this complaint, you know, to have to come in and defend the exclusion of motor -- the admission of motorcyclists. I mean --

MR. GITTES: Your Honor, I don't --

QUESTION: I would have said, where did this come from?

MR. GITTES: I don't mean to focus on motorcycles. The very first filing in the administrative record of substance --

QUESTION: 25 doesn't deal with -- I don't think it deals with NEPA violations. You may have the wrong number --

MR. GITTES: Perhaps --

QUESTION: That's --

MR. GITTES: I'm sorry, paragraph 47, Your Honor.

QUESTION: Well, Mr. Gittes, if you read 2a at the petition for writ of certiorari, the first part of the court of appeals opinion, which is telling what the quote is about, the second paragraph says we're talking about clearcutting, even -- it doesn't say anything about

anything else.

MR. GITTES: Your Honor, there's no question the court of appeals focused on timbering as being the primary injury here --

QUESTION: Well --

MR. GITTES: -- and then the most graphic injury, because --

QUESTION: Well then, you're in effect asking us to affirm the court of appeals on an alternate ground. You're not really defending what the court of appeals did.

MR. GITTES: No, Your Honor. The one thing the court of appeals did, besides talk about timbering, is how this plan failed to properly consider the demand for recreational uses of the forest.

QUESTION: But it talked about that in the context of timbering and clearcutting, didn't it?

MR. GITTES: It did in terms of timber, but it also talked about it in terms of the Forest Service simply not valuating properly the demand for these other uses.

But even as to the timber program, Your Honor, there clearly is standing in this case. This -- there is no question, under a plan like this, there will be timbering. This is not -- the Government may be correct that -- as to where and when the timbering will occur, but there is no question that there will --

QUESTION: Even if there's standing there's a ripeness issue as well, is there not?

MR. GITTES: Yes, there is, Your Honor, and we believe not only is the plan, the timing of this case the best time for challenging plan decisions which are unlawful, but it may be the only time, because in fact the Government has maintained a mantra in the courts below that goes like this.

It's either not ripe, or it's not relevant. It's not ripe because you're too early, or you haven't exhausted your administrative appeals, the plan isn't finalized.

Now, we waited till we had exhausted our administrative appeals required by the Government's regulations in this case.

Now, when you go to tie up a project the Government's position has been highlighted in the ICL v. Mumma case that, well, wait a minute, this project only has to do with deciding whether this location fits the plan's conditions and serves the objectives of the plan. It does not involve any review of the balancing act, the trade-offs, the multiuse determination which is the core of all plans. Therefore, it's not really raised by the project.

QUESTION: But your -- it seems to me the

premise of your argument is that every governmental decision needs to be reviewable immediately, and that -- let's assume the FCC decides that it's -- we are going to have no more than 5,000 radio stations per State, and let's assume that no State currently has any more than 3,000.

Now, that may be a very stupid policy for the FCC to adopt, but unless there's -- unless there's some special provision for immediate judicial review, do you think that that generalized determination could be immediately reviewable when nobody is affected by it immediately?

MR. GITTES: Well, if no one claims to have wanted to open a station in one of the States that were barred from having a station, you're right, there would be no standing, but in light of someone like --

QUESTION: Even though it may be a very stupid policy.

MR. GITTES: Yes, Your Honor, but here we have a situation where the plan creates the injury.

QUESTION: Well, no, because the -- it seems to me on the analogy with Justice Scalia's hypothesis the injury in your case occurs when the hiker goes to the tract to hike and can't hike in it, or finds that the timber company's saws are waiting to cut, so the injury is

imminent. Isn't that the analogy?

MR. GITTES: Well, Your Honor, our complaint is not just with timber, it's with a wide range of activities, including roadwork, road reconstruction, and many of those --

QUESTION: And if the -- you know, if the road-building equipment is there and they're about to lay the asphalt, no question, I assume, on the Government's part you've got your standing.

MR. GITTES: Well, in -- the plans -- this plan would be purposeless. It would be a meaningless exercise taking years of energy, millions of dollars, if the plan wasn't going to try to accomplish its objectives. Its objectives.

For example, since the Court has focused on timbering, although I think that it's not the heart of this case, which is --

QUESTION: No, but can't you -- I don't mean to cut off your argument, but --

MR. GITTES: That's all right.

QUESTION: -- can't you make the same argument with respect to any prospective governmental determination that has not yet been implemented? You can always say, they wouldn't be saying this, or writing this, or promulgating this unless they intended, in fact, to do

what they say, and so if your argument is sufficient, it seems to me it really cuts the ripeness doctrine out of the law.

MR. GITTES: Well, Your Honor, this is not a typical Government decision, in the sense that number 1 the very purpose of NFMA is served by having review of the plan at the earliest stage possible.

Secondly, this -- by law, this plan is to set the objectives for the forest and these objectives, whether it's having more ORV or timbering to generate more deers, whether it's to have more hiking area, can never be achieved unless what the plan suggests be done be done.

QUESTION: All right, that may be, but isn't the question before you whether your objection to these objectives cannot be raised and fairly litigated until the moment at which they start to implement it? Isn't that the problem before us?

MR. GITTES: Yes, Your Honor, and the reason it's not a problem is for three reasons.

First of all, the first injury is inflicted the moment the plan is finalized, because that injury is, they haven't closed off more of the forest.

QUESTION: But nothing may change from what is, and I suppose this is the problem lurking behind all of this. There may be some things that will immediately

injure somebody in this plan, or -- but you're coming to a court which this abstract challenge. You say, court, go over the whole thing.

There's lots of problems with this, and it's sort of a super -- you're putting the court as the superadministrator over an agency when nothing is done, has been done, and courts, you know, are accustomed to thinking small, to having a concrete case where somebody is hurt or is about to be hurt, but this sprawling, what -- first it's clearcutting and then it's the motorcycles and the birds. It's just everything, and that's kind of overwhelming for a court.

MR. GITTES: Your Honor, first of all, the heart of the injury here, I have to emphasize, is not having more area protected. That's the claim.

For the State of Ohio, this is a -- this forest is so small, to give you an idea, it's a -- if you put it all together in a square, it's about 20 by 15 miles square. You can hike this whole forest, across it, in a day.

The respondents, as put out in the administrative record, made clear, live in this area. They use it every day.

Now, let me address the issue of too big a decision. The real decision here and that we're arguing

about is that basic decision, the equation that led to so little of this forest, which is a unique resource for the State of Ohio, being made available for back-country hiking.

QUESTION: Now, even if you were right about that, couldn't a court just say what, essentially, this district court did. The district court didn't throw it out on justiciability. It looked it over and it said, we have to be extremely deferential to an agency at this just-going-in threshold stage.

Now, you have conceded that the bias part, the Sixth Circuit shouldn't have said -- I think you said that -- that this is not a dishonest, corrupt agency, so if you got to the merits at this abstract stage, wouldn't the agency be owed the utmost deference?

MR. GITTES: Your Honor, the agency is owed deference but not absolute deference, obviously, as this Court has emphasized, Motor Vehicles Manufacturing Association being a good example.

A close look at this record, as I was trying to indicate earlier, shows the classic indicators of arbitrariness. When an agency completely fails to explain or even analyze a warning from their own experts, when an agency violates its own regulations and fails to factor in the negative impact of timbering, when an agency justifies

a timbering program to get more deer when their own regulations say you've got to consider what's surrounding the forest and there's a deer problem throughout the private holdings around the forest, that reaches a level of arbitrariness under this Court's standard, even with deference.

And to get back to the injury question on ripeness, the reality of the situation is, this plan is being implemented. We're not dealing with a plan attack where nothing has happened.

Secondly, the plan will be meaningless unless they do do things.

Third, as Justice Scalia emphasized, and I think it's critical in this case, this is not like the NWF case. This is not 2 million acres. This place is so small that literally, as indicated in the --

QUESTION: What is the -- if you'd focus, it would help me. If you'd first assume with me that you didn't clearly argue -- I know you don't want to make this assumption, but let's assume that you clearly -- or did not argue clearly that you're trying to protect the hikers, the bird-watchers, et cetera, from the motorcycles. Assume that all that is at stake is a claim that you made that we are harmed by clearcutting.

All right. Focusing solely on that now, I'm

curious as to why it's ripe.

MR. GITTES: Your Honor --

QUESTION: What they've said, the Government, is it will be ripe at the point when somebody has a definite plan to cut the tree, i.e., the permissions have been granted, this tree will be cut.

At that point you would come in and say, this tree is going to be cut. We think that's unlawful because it flows from an unlawful plan, making just the arguments you make now.

Now, why can't you do that?

MR. GITTES: Your Honor, if literally this Court were to rule that the entire multiuse analysis, which means factoring in total demand for recreation, for hiking, total demand for hunting, total demands for wildlife preservation, total demands for timbering, that whole equation and balancing that goes on in a plan can be reviewed in the context of a single timber project, then that would lead to the review that we're seeking.

The problem is and the reality is that the record concerning the plan has been completed. The siting of a particular timber sale is not what we're concerned about. We're not concerned about that tree over there, or that tree over there. We're concerned with how much of the total area is going to be protected from any

timbering.

And I have to emphasize this. Perhaps I can get this one point across. Timbering is being viewed here --

QUESTION: Excuse me, but if and when they go beyond what you think the amount of the area that should have been allowed for clearcutting, then certainly that whole issue would come up.

For example, if you think it's arbitrary and capricious to allow any clearcutting at all, then the very first logging enter -- attempt would enable you to challenge that portion of the general plan which allows any clearcutting, wouldn't it?

MR. GITTES: Your Honor, that is our position, basically, that this is such a small forest and such a unique resource that there should be none of these kinds of activities --

QUESTION: Well, then you'll be able to challenge it as soon as they allow clearcutting.

MR. GITTES: Your Honor, I could go tomorrow to the courthouse and file a complaint which has added to it a count that project X is -- violates the plan and use it to bootstrap a plan attack.

Here's why that makes no sense, at least to me. Number 1, the factors that go into that siting have nothing to do with the plan decision. All that you do in

a project level is decide, does this meet the plan's standards, will it meet the plan's goal. You don't even consider the big questions that the plan had already decided.

Second --

QUESTION: Well, the administrator doesn't, but it doesn't follow from that that you cannot at that point raise the bigger issue.

MR. GITTES: If this Court clearly and unequivocally were to allow that, that would solve part of the --

QUESTION: Well, why -- you can say, look, you see this tree, it's coming down. You know why it's coming down? Because they had a faulty plan. If they had not put aside 40 acres, or 4,000, or whatever they'd done, they'd put aside some different amount, and we have no way of knowing it would have been this tree. Nobody could say it would have been this tree, and therefore you have to look at the faulty plan. What --

MR. GITTES: Your Honor, but in the context of that project challenge, in order to challenge the plan we're going to have to be discussing a lot more than just timber and even the timber base.

We're going to have to discuss recreational demand, we're going to have to discuss all the cost-

benefit analysis that fill up the whole book of the planning records here, because it isn't just a matter of deciding about the timbering issue that leads to the timbering, because it's a balance of every use of the forest, and the particulars of that sale have nothing to do with that balancing act. It only occurs at the plan level, and the administrative record is complete, and our other --

QUESTION: Okay, but your argument is that if you challenge the point at which the one tree is going to be cut, you're going to have to bring all of these other things in. You want to bring all of those other things in now. The question is, when do you bring them in, and it seems to me it's not an objection to the ripeness suggestion that Justice Breyer made to say, well, we'll have to litigate a lot when we do. That's accept -- that's a wash. That's going to be true whenever you litigate --

MR. GITTES: Your Honor, the --

QUESTION: -- on your theory.

MR. GITTES: The reasons we don't think that ripeness in this case calls for tying it to a particular project is twofold.

First of all, because the project specifics do not illuminate, they aren't really relevant to the larger

plan decisions, secondly the whole purpose of NFMA is to get a plan and get it clarified as early as possible, and third, there are many projects which occur of which we don't even get notice.

I guess since the Court wants to focus on the timbering, which I have to emphasize again is -- it's the collection of activities that's the injury here, many of which happen instantaneously when the plan's adopted.

But a timbering example. In this plan, there is provided for what are known as wildlife openings. It sounds wonderful, but really what it is about is doing three --

QUESTION: Wildlife what? I didn't --

MR. GITTES: Openings.

QUESTION: Openings.

MR. GITTES: Openings, and under the plan the Forest Service is going to go in and cut all the threes in 3 to 5-acre areas, up to 17 cuts in a 1,000-acre area through the designated areas. The purpose is to promote deer and other wildlife associated with it.

Now, the Government has suggested to you there's some big, formal decision-making process, and appeals, and a real clear opportunity to challenge all this. That's not the way it works.

A forest ranger one day will decide, hey, the

plan calls for wildlife openings. Under their own regulations and rules, that is categorically excluded from any further formal analysis and any appeal process, so the forest ranger decides, okay, I'm going to go over here, I'm going to cut down 5 acres, and we're going to have a wildlife opening, and the next day he'll pick another area.

QUESTION: Okay. I think you're making a pretty good argument for the fact that you can go in before the moment of the cutting, and maybe you can go in now, because you're saying, I won't get notice and, in fact, the hardship of waiting until they start cutting will in practice mean we'll never get to challenge them, but that's a very different thing, I think, from the challenge to clearcutting as such.

MR. GITTES: Well --

QUESTION: I mean, that -- I can see the -- your argument there, whether it wins or not, is much stronger than your argument with respect to clearcutting tracts which will require further administrative action, which you will have notice of.

MR. GITTES: Well, Your Honor, timber cuts -- the timbering program is much more than just the big sales. For example, a lot of prep work goes in before the first tree is cut, even for a big sale. They have to

build trails, some of which may be a short couple of miles, which are categorically excluded from any appeal process or further assessment.

QUESTION: Yes, but do they build those trails before the timber cut is approved?

MR. GITTES: Your Honor, they build trails both for timber cuts, in which case they would not build them before they're approved.

They also build trails to do what is known as timber management, which is to do things to the timber to make it grow faster. They also for the purposes of wildlife openings -- and again, if we're talking about openings just to create more deer habitat.

They will go in -- these rangers are making these kinds of decisions under a plan every day, and a good percentage of those decisions are not subject to any formal decisionmaking process, and I'm not even mentioning now the whole issue of roads and ORV trails and, you know, the other things the Court is uncomfortable with, although I assure you they were raised in the administrative record and have been a subject of discussion below.

The real issue here is, how much of this forest is going to be available for the millions of Ohioans who want to go hiking somewhere and not run into a motorcycle and not watch timber being cut and not have huge openings,

and not have too many deer running around causing accidents on the road on the way in.

QUESTION: If we wanted substantiation for the argument that you're now making, is it contained in any other decisions of any other courts, or in the record here?

MR. GITTES: Your Honor, I'm not sure if I understood what you're referring to. In terms of the issues being raised --

QUESTION: Well, you want us to write an opinion in this part of your argument saying that these decisions are being made all the time, the forest is being affected even as we sit here, et cetera. How do I know that --

MR. GITTES: Well, you can --

QUESTION: -- other than your submission?

MR. GITTES: Your Honor, the Forest Service's own regulations, and their own Forest Service handbook, which is certainly available to the Court, talks about projects being categorically excluded.

They have fire-break limitations, they have a whole list of certain kinds of things that are excluded from formal decisionmaking and appeals.

So it is true that on the large timber sales we get a notice, but even there, Your Honor, they are certainly impending.

QUESTION: Did you come in and say, we want no clearcutting at all, zero clearcutting, we want zero wildlife openings, we want zero -- zero roads?

MR. GITTES: Your Honor --

QUESTION: I mean, if you came in with all of that, then I suppose any plan would immediate -- and your people used all of the forest, I suppose any plan would immediately affect you. Was that your -- you really think that they couldn't have provided for any timbering at all, or any wildlife --

MR. GITTES: Your Honor, timbering in this forest is ridiculous. It is so small, and even if you do timber, at its peak of timbering in the Wayne it was providing barely over 1 percent of the timber that comes out of Ohio.

QUESTION: Was that your contention below, that no timber --

MR. GITTES: Your Honor --

QUESTION: -- at all should be allowed here?

MR. GITTES: Your Honor, I didn't use zero, but our contention was the timbering program was illegal, and the reason clearcutting came up is because, since the forest plan chose as its objective trying to create habitat for more deer, which nobody needed, that automatically meant clearcutting, because the Forest

Service's own analysis says, if you want to clear the forest the cheapest and fastest way to do it is to cut everything. Therefore, that's why the plan said 80 percent of all cutting's going to be by clearcutting.

But it's the timber program that was the complaint here, and the heart of the complaint wasn't even that. It was, give us more of this forest, if not all of it, so the people of Ohio can have one place --

QUESTION: And where -- the paragraphs in the complaint that show its heart are which paragraphs?

MR. GITTES: Your Honor, I would focus on, in terms of that part of it, the NEPA claims, and if you --

QUESTION: But that -- it's -- now you're telling us is not that part of it. You say, this is the heart -- if I were to look at this entire complaint, I would find the heart, the heartbeats, so I want to know where I'm going to find the heart of, not this part, because you're shifting. Is it the heart of the whole case, or just part of the case?

MR. GITTES: Your Honor, it's the heart of the whole case. The reason we challenged timbering is because --

QUESTION: Okay. Where do I find in this complaint the heart of the whole case?

MR. GITTES: Your Honor, if you look at the NEPA

arguments below, in the appeal court and the trial court, you will find discussion about not enough recreational lands being protected.

QUESTION: Excuse me --

CHIEF JUSTICE REHNQUIST: Thank you --

QUESTION: Chief Justice, could I ask --

CHIEF JUSTICE REHNQUIST: Yes.

QUESTION: What paragraph of the complaint, because you first said the NEPA thing was 25. It wasn't --

MR. GITTES: It's 47, Your Honor. I got the --

QUESTION: 47? Is there a 47?

QUESTION: No, there isn't.

MR. GITTES: There isn't? Then I had written down the wrong --

QUESTION: I end at 42.

CHIEF JUSTICE REHNQUIST: Well, you can file it with the Clerk, perhaps.

MR. GITTES: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)

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:

OHIO FORESTRY ASSOCIATION, INC. Petitioner v. SIERRA CLUB, ET AL.
CASE NO: 97-16

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