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MONTANA GRIZZLY BEARS PROTEST EXPLORATORY DRILLING IN WILDERNESS AREA

ENVIRONMENTAL LAW—WILDLIFE LAW: The District of Columbia Circuit Court of Appeals held that the U.S. Forest Service need not prepare an environmental impact statement to grant approval of mining company's exploratory drilling project in Montana wilderness area and that such approval did not violate the Endangered Species Act due to impact on grizzly bears. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson,* 685 F.2d 678 (D.C. Cir. 1982)

INTRODUCTION

Factual Background

The Cabinet Mountains Wilderness Area is a 94,272 acre tract located in the Kanisku National Forest in northwestern Montana. Long recognized as a wild, untrammeled region worthy of preservation, it was classified as a "primitive area" in 1935 and became a "wilderness area" with the enactment of the Wilderness Act in 1964.[1] The Cabinet Mountains Wilderness is currently managed by the United States Department of Agriculture, Forest Service, under the supervision of William E. Morden, Forest Supervisor, Kootenai National Forest.

The Cabinet Range supports a small, but potentially viable population of about twelve grizzly bears (*Ursus arctos horribilis*).[2] The historical distribution of grizzlies may have extended across the North American continent,[3] with a population as high as 1.5 million.[4] Today there are only about 1,000 bears south of the Canadian border in six scattered populations in parts of Idaho, Montana, Washington and Wyoming.[5] These bears require vast areas for their natural ranging habits (up to 280 square miles per bear),[6] and thrive best when isolated from humans.[7] But the continued encroachment of man, with increased recreation, logging,

1. COGGINS & WILKINSON, FEDERAL PUBLIC LAND LAW AND RESOURCE LAW at 791 (1981).
2. U.S. FOREST SERVICE, ENVIRONMENTAL ASSESSMENT, CHICAGO PEAK PLAN OF OPERATIONS 46 (July 17, 1980).
3. J. CHAPMAN & G. FELDHAMER, WILD MAMMALS OF NORTH AMERICA at 516 (1982).
4. Robbins, *Grizzlies in Glacier: A Question of Territory,* SIERRA 113 (1982).
5. *Id.*
6. Juback, *Only Teamwork Can Save the Yellowstone Grizzly,* 55 NAT. PARKS 25 (1981).
7. J. Chapman and G. Feldhamer, *supra* note 3, at 530.

mining and energy development, has reduced the bears' natural habitat until it is in danger of extinction. Experts have estimated that the grizzly bear could disappear from the contiguous forty-eight states in the next thirty to forty years.[8] In 1975 Congress recognized the precarious future of the grizzly, and listed it as a threatened species under the Endangered Species Act (ESA).[9]

In addition to grizzly bears, the wilderness contains deposits of copper and silver. The American Smelting and Refining Company (ASARCO), a mining corporation, holds 149 unpatented mining claims totalling 2,980 acres, most of which are located within the wilderness area.[10] The Wilderness Act permits mineral exploration and mining in wilderness areas, but the right to appropriate mineral claims terminates January 1, 1984.[11] Thus, ASARCO must prove the economic viability of its claims as required by the 1872 Mining Law[12] by the beginning of 1984 in order to develop those claims after that date.

In 1979, ASARCO submitted a proposal to begin exploratory drilling in the wilderness. The Forest Service reviewed and approved this proposal, and ASARCO drilled four holes from July to November, 1979. In February, 1980 ASARCO submitted another exploratory drilling proposal to be conducted during 1980–83. The 1980 program proposed to drill 36 holes on 22 sites, with a similar level of activity expected for the following three years.

The National Environmental Policy Act (NEPA)[13] requires the Forest Service to complete an environmental analysis for any action which might affect the environment. This analysis is documented in an environmental assessment (EA). The Forest Service prepared such an EA for ASARCO's proposal,[14] and in its biological evaluation section indicated that the impact of drilling, along with other uses of the area, such as logging and recreation, could adversely affect the bears. The evaluation made fourteen recommendations to reduce the potential effects of these activities, and suggested the adoption of compensatory measures to positively influence grizzly bear habitat.[15]

In addition to NEPA requirements, the Endangered Species Act[16] requires the Forest Service to consult with the Fish and Wildlife Service

8. Schneider, *Yellowstone*, 56 NAT. PARKS 24 (1982).

9. 50 C.F.R. § 17.11(h) (1981). "Threatened species" is defined at 50 C.F.R. § 81.1(1): "Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, as determined by the Secretary [of the Interior]."

10. Environmental Assessment, *supra* note 2, at 4.

11. 16 U.S.C. § 1133(d)(3) (1976).

12. 17 Stat. 91, ch. 152, § 1 (May 10, 1872); 30 U.S.C. ch. 1 (1976).

13. 42 U.S.C. § 4321 (1976).

14. Environmental Assessment, *supra* note 2.

15. Some of those recommendations included restricted logging, no overnight camping, restricted use of helicopters, restricting the period of drilling, and rehabilitating drill sites.

16. 16 U.S.C. § 1131 (1976).

(FWS) to determine potential effects of drilling on the grizzly bears. In its biological opinion dated June 18, 1980, the FWS concluded that the drilling proposal would "jeopardize the continued existence of the grizzly bear"[17] by restricting the bears' habitat, impairing reproduction, displacing the "bears from seasonally critical ranges, or cause human-induced mortality."[18] The opinion went on, however, to outline mitigation measures which would "completely compensate" adverse effects. Those measures included: (1) no drilling or helicopter flights after September 30 of each operating season, (2) rescheduling or eliminating timber sales, and (3) ordering seasonal or permanent road closures.[19]

In May, 1980 the Forest Service completed the final EA. The assessment included the recommendations made in the FWS's biological opinion and recommended additional measures. Those additional measures included: (1) a prohibition on overnight camping by ASARCO personnel except in emergency situations, (2) daily and seasonal retrictions on helicopter flights to avoid disturbing the bears during important denning and feeding periods, (3) restrictions on helicopter usage to specified flight corridors, (4) reclamation of drilling sites, (5) seasonal restrictions on drilling activity in specified areas of the Wilderness, and (6) monitoring of the project by Forest Service personnel.[20]

In June, 1980 the Kootenai National Forest Supervisor, William E. Morden, issued a "Decision Notice and finding of No Signficiant Impact" thereby avoiding a more in-depth analysis of the proposal through the preparation of an Environmental Impact Statement (EIS). An EIS is required only when a project significantly affects the environment.[21] The Supervisor determined that an EIS was unnecessary because he believed the project, incorporating the mitigation measures, would not create any significant impact on grizzly bear habitats and the wilderness area in general. Thus, ASARCO's drilling proposal was approved subject to the mitigation measures contained in the final EA.

Environmental groups[22] made an unsuccessful administrative appeal within the Forest Service and then filed suit in U.S. District Court.[23] On April 15, 1981 the District Court granted summary judgment upholding the Forest Service Supervisor's decisions not to prepare an EIS and to permit the drilling. The Court of Appeals affirmed.[24]

17. Environmental Assessment, *supra* note 2, at 46.
18. *Id.* at 47.
19. *Id.* at 46.
20. *Id.*
21. 42 U.S.C. § 4332(2)(c) (1976).
22. Plaintiffs included the Grizzly Bears, Western Sanders County Involved Citizens, Defenders of Wildlife, Sierra Club and Cesar Hernandez.
23. Cabinet Mountains Wilderness v. Peterson, 510 F. Supp. 1186 (D.D.C. 1981).
24. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

Legislative Background

There are primarily three statutes that are pertinent to this case: The Wilderness Act of 1964,[25] the Endangered Species Act of 1973,[26] and the National Environmental Policy Act of 1969.[27] The controversy involved in this case exemplifies the inherently schizophrenic nature of these statutes in particular, and U.S. environmental law in general. Congress, while on the one hand attempting to protect the few remaining remnants of our natural environment, also seeks to encourage the exploitation of natural resources within those areas. The obvious incompatibility of these competing policies becomes especially apparent in environmentally sensitive situations such as the one presented in this case.

The Wilderness Act establishes a National Wilderness Preservation System whereby Congress may designate primitive, undeveloped, federally owned land as "Wilderness Areas." The system was created to preserve "an enduring resource of wilderness" by administering these lands "in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness. . . ."[28] The act prohibits the use of motorized vehicles or boats, landing aircraft, or structures and installations within these areas.[29] Notwithstanding these protective measures, Congress went on to ensure that such designation would not impair exploration and mining of existing claims.[30] The act does require, however, that mineral claimants satisfactorily establish their claims in accordance with applicable mining laws[31] by December 31, 1983, or face federal withdrawal of those claims.[32] After that date, no new claims may be acquired, but claims already established may be developed into the future. Holders of unpatented mining claims located within wilderness areas are consequently eager to validate their claims as quickly as possible.

25. 16 U.S.C. § 1131 (1976).
26. 16 U.S.C. §§ 1531–43 (1976, Supp. IV 1980).
27. 42 U.S.C. § 4321 (1976).
28. 16 U.S.C. § 1131(a).
29. *Id.* at § 1133(c).
30. *Id.* at § 1133(d)(2), (3). The provision allowing mining development in wilderness areas was the result of a compromise between conservationists and industry. The complete prohibition of mining and prospecting in wilderness areas was opposed by the American Farm Bureau, the National Association of Manufacturers, the United States Chamber of Commerce, the American Cattleman's Association, the National Lumber Manufacturing Association, the Independent Petroleum Association, and the American Mining Congress. Foss, *Problems in Federal Management of Natural Resources for Recreation*, 5 NAT. RES. J. 62, 73 (1965).
31. The 1872 Mining Laws generally require mineral claimants to prove their claims contain economically significant bodies of ore. U.S. v. Coleman, 390 U.S. 599 (1968).
32. 16 U.S.C. § 1133(d)(3), 36 C.F.R. § 293, § 252.15 (1981).

The Endangered Species Act conserves "endangered" or "threatened" species. The act, as amended, requires all agencies of the federal government to consider the economic and environmental consequences of their decisions in order to ensure that the federal government does not jeopardize the continued existence of any endangered or threatened species, or adversely modify critical habitat of such species.[33] Under the act, the federal agency must consult with the Fish and Wildlife Service (or the National Marine Fisheries Service, depending on the species) whenever the agency's action might affect an endangered or threatened species.[34] The FWS then conducts an investigation and, within 90 days, issues a biological opinion regarding the effects of the project on the species.[35] If the proposed action will have an adverse effect, the opinion will recommend "reasonable and prudent alternatives" which can be taken in implementing the action.[36] The involved agency is then bound not to "make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. . . ."[37] The act also expressly extends to the general citizenry the right to sue for violations under the act,[38] thereby avoiding standing problems associated with the usual requirement of showing a concrete personal injury.[39]

Possibly the most important statute involved in this litigation is the National Environmental Policy Act. The act establishes the Council on Environmental Quality (CEQ) to administer NEPA and to issue regulations. These regulations are binding on all federal agencies and, therefore, an awareness of the regulations is essential to an understanding of the statute.[40]

NEPA recognizes the destructive impact of resource exploitation on the natural environment and seeks to promote the harmonious coexistence of man and nature.[41] NEPA's procedural requirements effectuate this goal by providing that federal agencies analyze the potential effects of their actions on the environment and incorporate this information into their decision-making process.[42] A formal environmental impact statement must be prepared by the involved federal agency for major actions "significantly affecting the quality of the human environment. . . ."[43] An agency need

33. 16 U.S.C. § 1536(a) (Supp. III 1979).
34. *Id.* at § 1536(a)(2) (Supp. IV 1980); 50 C.F.R. § 402 (1981).
35. *Id.* at § 1536(b) (Supp. IV 1980).
36. *Id.*
37. *Id.* at § 1536(d) (Supp. III 1979).
38. *Id.* at § 1540(g)(1) (1976).
39. *See, e.g.*, Schlesinger v. Reservists To Stop The War, 418 U.S. 208 (1974).
40. Executive Order 11,991, May 24, 1977; 3 C.F.R. 123, 124 (1978).
41. 42 U.S.C. § 4331(a) (1976).
42. *Id.* at § 4332(2)(B).
43. *Id.* at § 4332(2)(C).

not prepare an EIS unless the proposed action has sufficiently significant impact. If the agency official does not immediately recognize the need for an EIS, the agency will prepare an environmental assessment to assist him in determining whether an EIS is required.[44] Although the threshold question of whether to require an EIS is the responsibility of the administrative federal official, his decision is subject to judicial review based on the "arbitrary and capricious" standard.[45] Since judges are hesitant to impose their judgment into the administrative decision-making process,[46] they will defer to the agency's decision if it is reasonable and adequately supported.[47] Thus, an agency official has a considerable amount of discretionary power to grant or deny the preparation of an EIS.

THE *CABINET MOUNTAINS WILDERNESS* DECISION

In *Cabinet Mountains Wilderness v. Peterson* (*Cabinet Mountains*),[48] the D.C. Circuit considered primarily two issues: (1) whether mitigation measures may be taken into consideration in determining whether or not to prepare an EIS, and (2) whether the Endangered Species Act provision for citizen suits mandates *de novo* review. With respect to the first issue, the court rejected a statement by the CEQ to the effect that mitigation should not be used to avoid an EIS. Instead, the court relied upon previous judicial holdings permitting mitigation to be considered in determining if an EIS is necessary.[49] The court also refused to interpret the ESA's citizen suits provision as requiring *de novo* review. It ruled that the appropriate standard of judicial review is the arbitrary and capricious standard as provided by the Administrative Procedure Act (APA).[50]

Analysis of the EIS Requirement/Consideration of Mitigation Measures

As previously noted, NEPA requires federal agencies to prepare an EIS for activities "significantly affecting the quality of the human environment. . . ."[51] To assist agencies in the determination of what is meant by "significantly affects," the Council on Environmental Quality has promulgated regulations defining those terms.[52] The regulations, how-

44. 40 C.F.R. § 1508.9 (1981).

45. *See, e.g.*, Nucleus of Chicago Homeowners Assn. v. Lynn, 524 F.2d 225 (7th Cir. 1975), *cert. denied* 424 U.S. 967 (1976).

46. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 556 (1978).

47. *Id.* at 558.

48. 685 F.2d 678 (D.C. Cir. 1982).

49. *Id.* at 682.

50. *Id.* at 686.

51. 40 C.F.R. § 1508.27 (1981) ("significantly") and § 1508.8 (1981) ("effects"). *See also* Hanley v. Kleindienst, 471 F.2d 823, 835 (2d Cir. 1972).

52. 42 U.S.C. § 4332(2)(C) (1976), 40 C.F.R. § 1502.3 (1981).

ever, do not address the appropriateness of using mitigation measures to avoid the preparation of an EIS.

A few courts, including the D.C. Circuit, have permitted federal agencies to consider the effect of proposed mitigation measures in determining whether the preparation of an EIS was necessary.[53] CEQ, recognizing the danger of such a practice, issued a statement which interprets its regulations in this area and sets forth a guideline for its use. In "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,"[54] CEQ said:

> Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.[55]

Thus, agencies are restricted in the use of this practice.

Applying the guideline to the facts in *Cabinet Mountains Wilderness v. Peterson,* it becomes apparent that the Forest Service should not have avoided the preparation of an EIS. The mitigation measures were not part of the original proposal nor were they imposed by statute or regulation. Nevertheless, the D.C. Circuit Court upheld the Forest Service's action by rejecting the CEQ's guideline. The court viewed the guideline as an informal statement without binding authority on either federal agencies or the courts.[56]

The court mistakenly rejected the CEQ guideline by relying on *General Electric Co. v. Gilbert.*[57] In *Gilbert,* the U.S. Supreme Court ruled that federal courts could give less weight to guidelines issued by the *Equal Employment Opportunity Commission* (EEOC). The primary basis for this holding was that the EEOC had never been authorized by Congress to promulgate rules or regulations. CEQ, by contrast, was specifically empowered by Congress to interpret NEPA and issue regulations. The court's reliance on *Gilbert* was therefore misplaced.

When Congress has granted to administrative agencies the authority to create regulations, the Supreme Court has consistently given great weight to those agencies' interpretations of laws and regulations. In *Bowles v.*

53. Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029, 1040 (D.C. Cir. 1973); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860 (9th Cir. 1982); City and County of San Francisco v. U.S., 615 F.2d 498, 501 (9th Cir. 1980); Sierra Club v. Alexander, 484 F. Supp. 455, 468 (N.D.N.Y. 1980), *aff'd. mem.*, 633 F.2d 206 (2d Cir. 1980).

54. 46 Fed. Reg. 18,026 (1981).

55. *Id.* at 18,038.

56. 685 F.2d at 682.

57. 429 U.S. 125, 141–42 (1976).

Seminole Rock Co.,[58] in construing the meaning of a phrase in a regulation (the General Maximum Price Regulation), the court relied upon interpretation contained in the bulletin "What Every Retailer Should Know About the General Maximum Price Regulation" issued by the Administrator of the Office of Price Administration. The Court stated:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.[59]

And in *Udall v. Tallman*,[60] the Court stated that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[61] The Court has been especially deferential to the CEQ's interpretations of NEPA.[62] Thus, the D.C. Circuit Court's rejection of the CEQ's guideline in this case represents a departure from U.S. Supreme Court precedent.

Under NEPA, a federal agency prepares an EA in order to make a threshold determination as to the "significance" of an action.[63] An EA involves a general review of the same factors that would be studied in great depth for preparation of a detailed EIS. The CEQ has determined that if the EA concludes that the project, as originally proposed, will have a significant impact, a detailed EIS is required and proposed mitigation measures cannot be used to avoid this responsibility. The agency's preparation of an EIS will therefore ensure that the final decision is based on a complete analysis of all relevant factors. The courts should not substitute their judgment for that of the CEQ as to when an EIS is required.

Judicial Review Under the Endangered Species Act

In addition to possible NEPA violations, the *Cabinet Mountains* court considered whether the Forest Service's approval of the drilling project violated the ESA. Appellants argued that the district court should not have relied merely on the findings and conclusions of the Forest Service, but should have conducted a *de novo* review, basing its decision on all

58. 325 U.S. 410 (1945).
59. *Id.* at 413–14.
60. 380 U.S. 1, 16 (1965).
61. *See also*, Trafficante v. Metropolitan Life Ins., 409 U.S. 205, 210 (1972).
62. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1304 (1974).
63. 40 C.F.R. § 1501.4(e).

evidence presented at trial. The court rejected this argument and ruled that the appropriate standard for judicial review under the ESA was governed by the Administrative Procedure Act (APA) which limited review to the arbitrary and capricious standard.[64] Under this standard, a court is confined to the administrative record, without recourse to independent judicial factfinding, and may only determine whether the agency's decision was reasonable and based on all relevant information.[65]

The D.C. Circuit Court's rejection of *de novo* review is consistent with the rulings of the Fifth,[66] Eighth[67] and Sixth Circuits.[68] All of these courts rely on *Citizens to Preserve Overton Park v. Volpe (Volpe)*[69] for authority. In *Volpe*, the United States Supreme Court considered the appropriate standard of judicial review for actions of the Secretary of Transportation under §4(f) of the Department of Transportation Act and §138 of the Federal-Aid Highway Act. The Court found that federal agencies are generally subject to judicial review under the APA[70] and that the generally appropriate standard of review is the arbitrary and capricious standard.[71] The Court recognized that the APA limits *de novo* review to two circumstances:

> First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.[72]

The Court noted, however, that "the generally applicable standards of §706 [of the APA] require the reviewing court to engage in a substantial inquiry."[73]

The *Cabinet Mountains* court focused on whether the special citizens suit provision in the ESA would require *de novo* review of agency action. Appellants argued that other laws with similar citizen suit provisions, such as the employment discrimination laws, require *de novo* review, and *de novo* review would therefore be appropriate under the ESA. In *Chan-*

64. 685 F.2d at 685. The "arbitrary and capricious" standard of the Administrative Procedure Act is set forth at 5 U.S.C.§706(2)(a) (1976).

65. U.S. Bianchi & Co., 373 U.S. 709 (1963).

66. National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976).

67. Sierra Club v. Froehlke, 534 F.2d 1289, 1304–05 (8th Cir. (1976).

68. Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1074 n. 21 (6th Cir. 1977), *aff'd on other grounds*, 437 U.S. 153 (1978).

69. 401 U.S. 402 (1971).

70. *Id.* at 410.

71. *Id.* at 413–14.

72. *Id.* at 415.

73. *Id.*

dler v. Roudebush,[74] the Supreme Court analyzed §717(c) of Title VII of the Civil Rights Act of 1964. Section 717(c) provided that a federal employee could file a civil action against an agency head after a final administrative action. The court found that the plain meaning of the statute and congressional intent required that judicial review should be *de novo*.[75]

In analyzing the ESA, the *Cabinet Mountains* court noted that Congress had not expressed an intention that judicial review should be *de novo*.[76] According to the court, the citizen suit provision "merely provides a right of action to challenge the agency action alleged to be in violation of the Act or to compel agency compliance with the requirements of the Act. It does not direct trial courts to conduct *de novo* review in adjudicating such actions. . . ."[77] The court then concluded that since the ESA did not specify a standard of review, the APA would govern, thereby dictating the arbitrary and capricious standard.[78] Applying this standard, the court found the Forest Service's decision to permit the drilling reasonable and based on a consideration of the relevant factors.[79]

Although a search of the ESA's legislative history is not informative on this issue, *de novo* review may be implied from a careful examination of the language of the act. A provision within the civil penalties section[80] specifies judicial review when there is a failure to pay a penalty. That section specifically limits judicial review to the administrative record: "such court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole."[81] It seems unlikely that Congress intended such a standard to be applicable to the act as a whole when it provided for it solely in the civil penalties section.

Regardless of the appropriate standard for judicial review under the ESA, courts will generally give substantial weight to an agency's views regarding environmental impacts. The evaluation of environmental impacts involves an analysis of scientific data as well as subjective value judgments. Judges feel ill equipped to make such evaluations and consequently rely on the expertise and resources of federal agencies. Thus, citizen and public interest group challenges to agency determinations regarding environmental impacts are limited to showing procedural defects in the decision-making process.

74. 425 U.S. 840 (1976).
75. *Id.* at 862.
76. 685 F.2d at 687.
77. *Id.* at 685.
78. *Id.*
79. *Id.* at 687.
80. 16 U.S.C. § 1540(a) (1976).
81. *Id.* at § 1540(a)(1).

CONCLUSION

The *Cabinet Mountains* decision illustrates the great deference courts will give to administrative decisions concerning environmental impact. The case is also indicative of the widespread and persistent pressure by industry to develop natural resources in wilderness areas, and the permissive policies of the Administration to permit such development. The judiciary should not take over the managerial functions from the federal government. But when the Forest Service's management policies wreak havoc with the environment, the courts should become more active in enforcing the spirit of American environmental laws.

Congress, in enacting the ESA, NEPA and the Wilderness Act, responded to substantial public interest in the protection of animals threatened with extinction, such as the grizzly bears, and in the preservation of the remaining vestiges of America's natural environment. The provision in the Wilderness Act providing for federal withdrawal of wilderness lands from mining claims after December 31, 1983 was intended to eventually terminate mineral exploration, keep mining to a minimum, and leave wilderness areas unimpaired for future generations. Unfortunately, that very provision has combined with a management policy receptive to increased exploration and development to create a situation which is highly conductive to private exploitation of natural resources in wilderness areas.

Mining is occurring today in wilderness areas. Sludge ponds, pipelines, water tanks, drill sites and mining excavations supplant irreplaceable natural wonders. Seismic blasting, the roar of earth-moving equipment, the pounding of diesel-powered drill rigs, and the clatter of helicopters invade tranquility and solitude. The odor of diesel fuel takes the place of the sweet, fresh smell of the mountains, and construction crews replace threatened life forms, such as the grizzly.

These changes are not going unnoticed, however. Public interest groups and concerned citizens, such as the plaintiffs in this case, continue to monitor the injury to natural areas and to bring their concerns to the attention of the courts and elected representatives. Although the courts have been reserved in their involvement, Congress continues to respond. For example, on December 20, 1982 Congress passed legislation[82] which was designed to designate as wilderness the Apalachicola, Ocala and Osceola National Forests in Florida, to prohibit phosphate mining in the Osceola National Forest, and to compensate mining companies for their interests in the phosphate.[83] Unfortunately, President Reagan vetoed this

82. H.R. 9, 97th Cong. 2d Sess. (1982).

83. Cost of compensation estimated to be approximately $74 million by Sen. Paula Hawkins, R-Fla., 40 Cong. Q. 3135 (Dec. 25, 1982).

legislation on January 14, 1983. Congress also passed a law[84] which bans oil and gas leasing in both wilderness and wilderness study areas until September 30, 1983. Such legislative action by Congress, coupled with the continued surveillance of federal agency actions by public interest groups provide a source of resistance to the wholesale despoilation of America's great natural areas and limit injury to those rare species that inhabit them.

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84. H.R. 7356, Pub. L. No. 97-394 (Dec. 30, 1982).