

Upper Yellowstone Defense Fund, et al. v. Department of Health and Environmental
Sciences, et al.
Cause BDV 89-261, 1st Judicial District
Judge Sherlock
Decided 1989

MEPA Issue Litigated: Was the MEPA Analysis (an EIS) adequate?

Court Decision: Yes

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

RECEIVED

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LEGAL DIVISION

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UPPER YELLOWSTONE DEFENSE FUND, INC., *
a nonprofit corporation registered in *
the state of Montana, THE MONTANA *
CHAPTER OF THE SIERRA CLUB, a nonprofit *
corporation, GREATER YELLOWSTONE COA- *
LITION, a nonprofit Montana corporation, *
NATIONAL PARKS CONSERVATION ASSOCIA- *
TION, a nonprofit corporation, and *
JULIA PAGE, an individual, *

Cause No. BDV 89-261

Plaintiffs, *

v. *

PROPOSED FINDINGS OF
FACT AND CONCLUSIONS
OF LAW

MONTANA DEPARTMENT OF HEALTH AND ENVI- *
RONMENTAL SCIENCES, and STEVEN PILCHER, *
in his official capacity as head of *
the Montana Water Quality Bureau, a *
division of the Department of Health *
and Environmental Sciences, *

Defendants, *

CHURCH UNIVERSAL AND TRIUMPHANT, *

Defendant-Intervenors. *

* * * * *

This matter was tried before the court, without a jury, in
Lewis and Clark County, Montana on April 14-16 and May 1, 1989,
Honorable Judge Jeffrey Sherlock presiding. The Court, based on
the testimony of the witnesses and upon review of the evidence and
affidavits, makes the following Findings of Fact and Conclusions
of Law:

FINDINGS OF FACT

BACKGROUND

1
2 1. Plaintiffs Upper Yellowstone Defense Fund, Greater
3 Yellowstone Coalition, Montana Chapter of the Sierra Club and
4 National Parks and Conservation Association are all nonprofit
5 organizations with an interest in protecting the environment.
6 All have members who live, work and/or recreate in the Upper
7 Yellowstone Valley and are adversely affected by the
8 action of the Department of Health and Environmental Sciences
9 (Department). Plaintiff Julia Page is an individual who
10 lives in Gardiner, Montana and operates a rafting company. She
11 will also be adversely affected by the proposed action. Plaintiffs
12 have standing to bring this action.

13 2. The Upper Yellowstone Valley stretches from Livingston
14 to Gardiner, Montana in Park County, Montana. It is a sparsely-
15 populated rural area. The Yellowstone River flows through this
16 valley, which is surrounded by the mountainous terrain of the
17 Gallatin National Forest.

18 3. The unincorporated town of Gardiner, Montana is situated
19 at the head of this valley, also known as the Paradise Valley.
20 Gardiner is the historical north entrance for Yellowstone National
21 Park, the world's oldest national park.

22 4. Yellowstone National Park is home to the greatest
23 concentrations of ungulates in the lower 48 states (testimony of
24 Dr. Meagher). Among these ungulates are herds of elk, bison,
25 pronghorn, bighorn sheep and mule deer. This animals range
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between the Park and adjacent private and National Forest Lands (Dr. Meagher).

1 5. In 1981, the Church Universal and Triumphant (CUT)
2 purchased the 12,000-acre Forbes Ranch, which it named the Royal
3 Teton Ranch South (RTR-S). This property lies adjacent to
4 parts of the northern boundary of Yellowstone National Park.

5 6. Subsequent to the purchase of the RTR-S, CUT purchased
6 additional properties in Park County, Montana, including the OTO
7 Ranch, a 3,400-acre ranch across the Yellowstone River from the
8 RTR-S; the community of Glastonbury, two tracts totalling 4,500
9 acres near Emigrant; the 15,000-acre North Ranch, about 15 miles
10 south of Livingston; and commercial property in Livingston and
11 Corwin Springs (FEIS at 10).

12 7. In the summer of 1986, CUT sold its California
13 headquarters and announced plans to establish its world
14 headquarters in Montana (FEIS at 8). CUT also announced plans for
15 development at RTR-S. These plans included establishment of work
16 camps to house staff and students, construction of CUT world
17 headquarters and Summit University, a school, gymnasium, church,
18 offices and attendant sewer and wastewater systems. FEIS, maps
19 3-6. These developments were to take place according to a master
20 plan developed by CUT (DEIS at 5).

21 8. In the summer of 1986, CUT applied for permits from the
22 Department that were necessary for CUT to develop its properties.
23 These included permits for a work camp license and residential
24 water and sewer systems for East Gate Work Camp, a work camp
25 license and the construction of the Spring Creek Church
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Headquarters, including water and sewer systems, a water and sewer system for slaughterhouse and food processing facility at the Ranch Office, and expansion of the water and sewer systems at Ranch Headquarters (DEIS at 1).

9. The issuance of permits by the Department is necessary for CUT to establish its world headquarters and other developments as planned in the RTR-S.

10. The issuance of permits by the Department as requested by CUT is a major state action significantly affecting the quality of the environment. MDULMDNM CUT voluntarily submitted itself to review by the Department under the Montana Environmental Policy Act (MEPA) by applying for wastewater and drinking water permits and work camp licenses.

11. The northern portions of Yellowstone Park, the private lands adjacent to Cardiner, Montana extending for several miles down the Yellowstone River, and low-lying portions of surrounding lands on the Gallatin National Forest constitute an ecological gem (Dr. Meagher). This area provides winter range for the great herds of ungulates that migrate from their summer ranges in Yellowstone Park to the winter range described above (Dr. Meagher; S. Gilbert; DEIS at 12).

12. Yellowstone's northern winter range provides critical winter forage for the migrating ungulates (Dr. Meagher).

13. Portions of the RTR-S are included in Yellowstone's northern winter range, comprising 35% of all winter range outside Yellowstone National Park (DEIS at 12; Dr. Meagher; S. Gilbert). In a normal year, 500 - 1000 elk use the RTR-S for winter range

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3 (DEIS at 12). Pronghorn, mule deer, bison and the entire Cinnabar
4 Mountain bighorn sheep herd utilize portions of the RTR-S for
5 winter range (FEIS at 12 - 21).

6 14. The grizzly bear is listed as a threatened species under
7 the Endangered Species Act, 16 U.S.C. 1531 et seq. The entire
8 population of grizzly bears in the Greater Yellowstone Ecosystem,
9 including the Park's northern winter range, consists of 200 bears
10 (G. Brown; S. Gilbert). The survival of the grizzly bear in the
11 Greater Yellowstone Ecosystem is tenuous (G. Brown). 15.

12 Portions of the property provide spring, summer and fall habitat
13 for grizzly bears (DEIS at 23). Portions of CUT property adjacent
14 to Yellowstone are in the highest density zone for grizzlies based
15 on sightings and radio telemetry locations (DEIS at 51).

16 16. The Yellowstone River provides habitat for the
17 Yellowstone cutthroat trout, a species of special concern for the
18 Montana Department of Fish, Wildlife and Parks. This species of
19 fish uses creeks on the RTR-S for spawning habitat. In
20 particular, Mol Heron and Cedar Creeks are important spawning
21 streams (DEIS at 33-34).

22 EIS PROCESS

23 17. In the fall of 1986, Dan Frazier, employee of the
24 Department, indicated that a comprehensive EIS would be prepared
25 on CUT developments throughout the Paradise Valley, including the
26 Royal Teton Ranch North (RTR-N), Glastonbury and the RTR-S
27 (Plaintiffs' Exhibit _____, Newspaper article from Livingston
28 Enterprise).

1 18. A draft environmental impact statement (DEIS) was
2 published in February 1988. The DEIS did not discuss any of CUT's
3 proposed developments at Glastonbury or the RTR-N (S. Pilcher).

4 19. The entire wildlife section in the draft was a verbatim
5 copy, with editing changes, of a study prepared for CUT by OEA
6 Associates, a wildlife consulting firm in Helena, Montana (S.
7 Gilbert; T. Ellerhoff). Much of the other information was
8 supplied by the applicant, CUT (T. Ellerhoff; DEIS at vi).

9 20. The Department held a public hearing on the DEIS in
10 Gardiner, Montana on March 12, 1988. The Upper Yellowstone
11 Defense Fund, the Greater Yellowstone Coalition, and officials
12 from Yellowstone National Park, along with 30 other individuals or
13 organizations, testified against the proposed development (FEIS
14 at 4).

15 21. The Upper Yellowstone Defense Fund, Greater Yellowstone
16 Coalition, Yellowstone National Park and other individuals and
17 organizations also presented the Department with written comments
18 concerning the DEIS. State and Federal agencies also provided
19 written comments. Those comments raised the following specific
20 concerns:

21 a. General information and data about wildlife was
22 inadequate to address impacts on the property itself (FEIS at
23 35-36, Yellowstone Park Comments).

24 b. The impacts on grizzly bears were not fully
25 addressed. There was insufficient information in the
26 DEIS upon which to base its conclusion of minimal
27 impact, and additional data, including the cumulative
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1 effects model, should be collected (FEIS at 37-38).

2 c. Because of the propensity of the grizzly bear for sheep,
3 it would be desirable to replace sheep with cattle (FEIS at 49,
4 U.S. Fish and Wildlife Service Comments).

5 d. The discussion regarding Reese Creek (fishery) is
6 inadequate (FEIS at 51, U.S. Fish and Wildlife Service Comments).

7 e. Impacts upon migratory ungulates were not
8 adequately addressed (FEIS at 37).

9 f. The environmental impact statement failed to include
10 impacts associated with CUT projects outside of the RTR-S
11 including Glastonbury and the RTR-N (FEIS at 77, Comments of
12 Greater Yellowstone Coalition).

13 g. The DEIS contained inadequate information about
14 the proposed developments (FEIS at 78, Comments of Greater
15 Yellowstone Coalition).

16 h. Additional discussion of the relationship between permit
17 approval and additional development by CUT (FEIS at 26-27,
18 Comments by Montana Environmental Quality Council).

19 i. The DEIS contained no description of the type of
20 sewage/wastewater facilities to be built, nor their capacity, nor
21 their flow rates (FEIS at 90-92, Comments of Bear Creek Council).

22 j. The DEIS lacked baseline data on water quality, fisheries
23 and wildlife (FEIS 35-41).

24 k. The DEIS contained no discussion of Glastonbury or North
25 Ranch (FEIS at 92).

26 22. The Final Environmental Impact Statement was issued on
27 March 15, 1988. The FEIS incorporated by reference the material

1 in the draft (FEIS at 1).

2 ADEQUACY OF THE FEIS

3 23. The FEIS did not provide additional information, data,
4 or follow-up studies from the DEIS with respect to impacts on fish
5 and wildlife (S. Gilbert).

6 24. The FEIS included no new alternatives, no additional
7 discussions of direct, secondary, or cumulative impacts of the
8 proposed action, and no additional discussions on growth-inducing
9 aspects of the proposed action.

10 25. The EIS does not adequately address impacts of the
11 proposed action on ungulates (Dr. Meagher). The EIS does not
12 contain a map of migration corridors and how those corridors may
13 be affected (Dr. Meagher). It does not contain adequate
14 information on the ecological significance of the northern winter
15 range or potential disruptions to migration or loss of habitat
16 associated with the proposed development (Dr. Meagher).

17 26. The FEIS contains no map or discussion of ungulate
18 migration routes. There is no indication of where and how fences
19 will be built and how many miles will be built. It is impossible
20 to ascertain directly from the EIS what the impact on migration of
21 ungulates might be (Dr. Meagher).

22 27. The potential adverse impact of the proposed action on
23 ungulates extends beyond the actual acreage lost by the actual
24 developments (Dr. Meagher).

25 28. The migration of pronghorn is impeded by the jackleg
26 fence erected by the Church, because they cannot crawl under it
27 (S. Gilbert, Dr. Meagher). The fence may serve as a barrier to

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3 migration if the gates are not open. For substantial periods of
4 time this past winter, the gates were not open (Dr. Meagher). The
5 fence extends high into the mountains, and thus wildlife cannot
6 move around its upper reaches (J. Varley).

7 29. Pronghorn are especially susceptible to impacts of deep
8 snow. Interruption of pronghorn migration patterns, which may
9 cause additional stress to the animals, is not adequately
10 discussed in the EIS (Dr. Meagher).

11 29.(a) There may be adverse environmental impacts on bighorn
12 sheep. The EIS does not evaluate and disclose impacts on these
13 animals with respect to interference with their winter range and
14 potential to be affected with disease from CUT's domestic sheep
15 (Dr. Meagher).

16 30. The EIS does not adequately discuss the impacts of the
17 proposed action on grizzly bears (G. Brown). The EIS does not
18 provide support for its conclusion that "direct impacts to grizzly
19 bears will be minimal." (FEIS at 30; G. Brown).

20 31. The loss of one grizzly bear is a significant impact on
21 Yellowstone's grizzly bear populations (G. Brown, S. Gilbert).
22 Already one bear has been killed and 2 have been relocated from an
23 incident in 1988, constituting a significant impact (G. Brown).
24 This incident was not discussed in the FEIS, even though it
25 occurred 8 months prior to the publication of the FEIS.

26 32. The EIS does not adequately discuss impacts of CUT's
27 activities in Mol Heron Creek on grizzly bears. Those impacts may
28 be more serious than the loss of 60 acres of habitat.
Displacement may extend far beyond actual activity sites (G.

1 Brown). The Upper Mol Heron drainage is classified as Situation 1
2 Habitat essential to the survival of the grizzly bear (DEIS at
3 23). The Mol Heron drainage is the site of an annual multi-day
4 gathering of over 3,000 people held in the summer months (E.
5 Francis). In addition, hiking trails throughout the drainage are
6 used by CUT members for recreation purposes (Intervenors' Exhibit
7 ___, the Recreational Pamphlet).

8 33. In addition, survival seminars involving several hundred
9 people are conducted in the Mol Heron Drainage (E. Francis).

10 34. The true extent of possible impacts on grizzly bears as
11 a result of CUT activities in Mol Heron Drainage is not adequately
12 discussed and disclosed. The EIS does not contain adequate
13 information with which to make conclusions about those impacts (G.
14 Brown).

15 35. The DEIS does not discuss the term "population sink" as
16 it relates to grizzly bears. This concept is important to
17 understand problems posed by developments such as those on the
18 RTR-S (G. Brown). The DEIS does not discuss the significance of
19 cub production in this area (G. Brown).

20 36. The DEIS does not discuss impacts on wildlife from
21 recreation activities by CUT members on the RTR-S (S. Gilbert).
22 Church members, including those not living on the RTR-S, can use
23 the property for recreation (E. Francis). Recreation activities
24 such as hiking, camping and fishing are permitted on the RTR-S (E.
25 Francis). CUT provides a brochure to those attending events at
26 the RTR-S outlining recreation activities on the RTR-S and
27 surrounding national park lands (Intervenors' Exhibit___).

1 37. There have been 2 additional relocation incidents with
2 grizzlies on the RTR-S in the past 7 years. These have resulted
3 in relocations. Relocated bears often end up as mortalities
4 because they continue to be involved in bear/human conflicts. (S.
5 Gilbert G. Brown). This problem is not adequately disclosed.
6 Instead the relocations were termed "successful" (DEIS at 30).

7 38. The location and nature of specific bear attractants,
8 both current and proposed ,on the RTR-S are not discussed in the
9 EIS (C. Brown; S. Gilbert). This information is necessary in
10 evaluating the impacts of the proposed action (G. Brown).

11 39. The Cumulative Effects Model was suggested for use in
12 evaluating impacts of the proposed development on bears nearly a
13 year prior to publication of the FEIS (FEIS at 37). Most of the
14 mapping and digitizing necessary to run the model was completed
15 (J. Varley). One component of the model was completely
16 operational, and the other could have been operational within 4 -
17 8 months (J. Varley). Use of either or both components could have
18 provided the Department with important additional information
19 about impacts on bears (J. Varley).

20 40. The failure to include the information discussed in
21 Proposed Finding of Facts Number 30 to 39 renders the EIS
22 inadequate.

23 RESPONSE TO COMMENTS

24 41. The FEIS, in addition to incorporating the draft,
25 included an 8-page section entitled "Response to Substantive
26 Comments" (FEIS at 16-24).

27 42. This section did not mention or in any way respond to
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1 comments specifically enumerated in Proposed Finding of Fact No.
2 21 (a)-(k) (T. Ellerhoff; FEIS at 16-24).

3 43. The consulting firm that prepared the wildlife study
4 that was incorporated into the DEIS did not review or respond to
5 substantive comments on wildlife issues (S. Gilbert).

6 44. The failure of the Department to actually respond to
7 substantive comments renders the FEIS inadequate.

8 ALTERNATIVES

9 45. Discussion of alternatives includes only alternatives
10 addressed on the Royal Teton Ranch South (DEIS at 123-126).

11 46. The church, between the issuance of the draft EIS and
12 final EIS, agreed to move its slaughterhouse and root crop
13 production areas from the RTR-S to the RTR-N in order to lessen
14 adverse impacts on wildlife (S. Francis).

15 47. The Department could have examined the environmental
16 costs and benefits of moving portions of the proposed development
17 to CUT properties other than those discussed in the EIS. This
18 would have provided the Department and the public with information
19 about the consequences of the proposed action.

20 GLASTONBURY/NORTH RANCH

21 48. The Community of Glastonbury totals 4,500 acres, which
22 have been subdivided into 20-acre parcels and can be sold only to
23 CUT members by declaration of Covenants (E. Francis). The church
24 actively promotes the sale of property at Glastonbury (E.
25 Francis).

26 49. Of the 170 parcels at Glastonbury, over 130 have been
27 sold. There are multiple dwellings on some of the parcels (E.
28

1 Francis).

2 50. Residents of Glastonbury work, recreate, attend
3 conferences and services at the RTR-S (E. Francis).

4 51. The development at Glastonbury is proximately caused by
5 the relocation of the Church to Montana and establishment of its
6 world headquarters on the RTR-S. The development of Glastonbury
7 is a growth-induced result of developments under review in the
8 FEIS.

9 52. The FEIS does not consider developments or impacts
10 associated with CUT activities on the North Ranch, even though
11 such developments are proposed (FEIS at 9).

12 53. The FEIS is inadequate because it fails to consider
13 Glastonbury, the North Ranch, and other growth-inducing aspects of
14 the proposed action.

15 OTHER PROPOSED FINDINGS OF FACT

16 54. The discussion of potential growth-inducing impacts of
17 the proposed development is inadequate. Those impacts will extend
18 beyond the boundaries of the RTR-S. They are only discussed in
19 the EIS in 6 paragraphs (DEIS at 120-121). There is no specific
20 information or attempt to make any growth projections for numbers
21 of Church members that may settle in the Paradise Valley or for
22 the Church's future development plans. The FEIS states that one
23 can only guess whether growth will remain the same, increase, or
24 decrease (FEIS at 18).

25 55. The only additional studies conducted or information
26 gathered after the DEIS was a plant study and a sampling of
27 buildings for radon gas. (T. Ellerhoff).

1 56. The existing and proposed developments on the RTR-S will
2 represent a significant change on the landscape in the vicinity of
3 Corwin Springs.

4 CONCLUSIONS OF LAW

5 1. This is not a contested case under the Montana
6 Administrative Procedures Act, 2-4-601 et seq. There was no
7 hearing on the record before a hearing examiner, or formal
8 findings adopted by the Board of Health and Environmental
9 Sciences.

10 2. The standard of review for MEPA's procedural requirements
11 is whether or not the statutory and administrative procedures were
12 followed. 2-4-704 (2)-(C); 5 U.S.C. 706 (2) (D); Lathan v.
13 Erinegar, 506 F.2d 677, 693 (9th Cir. 1975).

14 3. The standard of review for the Department's decision to
15 issue the requested permits is a stricter standard; that
16 determination is made by the court only if the decision was
17 arbitrary and capricious, or clearly erroneous. State etc. v.
18 Board of Natural Resources, 648 P.2d 734, 740-41 (Mont 1982).

19 4. The procedural aspects of MEPA must be strictly followed,
20 to the fullest extent possible.

21 5. Under MEPA, it is the continuing policy of the State of
22 Montana to use all practical means and measures in a manner
23 calculated to foster and promote the general welfare and maintain
24 conditions under which man and nature can exist in productive
25 harmony and fulfill the social, economic and other requirements of
26 present and future generations of Montanans. (75-1-103 (1)).

27 6. It is also the policy of the State of Montana to use all
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1 practical means consistent with other essential considerations of
2 state policy to approve and coordinate state plans, programs and
3 resources to the end that the state may:

4 fulfill the responsibilities of each generation as trustee of
5 the environment for succeeding generations

6 assure for all Montanans safe, healthful, productive, and
7 esthetically and culturally pleasing surroundings, and

8 attain the widest range of beneficial uses of the environment
9 without degradation, risk to health or safety, or other
10 undesirable or unintended consequences (75-1-103(2)).

11 7. Under MEPA, an EIS must be a detailed statement that
12 discusses:

13 a. The environmental impact of the proposed action

14 b. Any adverse affects which cannot be avoided should the
15 proposal be implemented,

16 c. Alternatives to the proposed action.

17 d. The relationship between local short-term uses of man's
18 environment and the maintenance enhancement of long-term
19 productivity,

20 e. Any irreversible and irretrievable commitments of
21 resources which would be involved in the proposed action should it
22 be implemented 75-1-201(b)(3i)(A)-(E).

23 8. The Department has adopted administrative rules under
24 MEPA and is bound by those rules in preparation of environmental
25 impact statements.

26 9. Both the statutory language and the Department's
27 administrative rules require that MEPA be complied with to the

1 fullest extent possible. This sets a very high standard for the
2 agency in compliance with its procedural duties under MEPA.
3 75-1-201 (1); ARM 16.2.601.

4 10. An EIS must include a reasonably thorough discussion of
5 the probable environmental consequences of the proposed action.
6 Oregon Environmental Counsel v. Kunzman, 817 F.2d 484 (Intervenors'
7 Brief at 15)

8 11. The issuance of permits by the Department as requested
9 by CUT is a major state action significantly affecting the quality
10 of the environment.

11 12. The purpose of an EIS is to both inform the
12 decision-maker about the potential adverse consequences of a
13 proposed action and make information available to the public and
14 encourage public participation in the development of that
15 information. Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th
16 Cir. 1975) quoted in State etc. v. Board, 648 P.2d at 741.

17 13. MEPA requires than an EIS evaluate all reasonable
18 alternatives. State etc. v. Board, 648 P.2d at 741-742.

19 14. Reasonable alternatives may include the examination of
20 alternatives even if they are beyond the agency's statutory
21 authority.

22 15. The administrative rules of Montana require that the
23 contents of a draft EIS shall include: a description of the
24 impacts on the quality of the human environment of the proposed
25 action, including an evaluation of the immediate cumulative and
26 secondary impacts on the physical environments of terrestrial and
27 aquatic life and habitats ... aesthetics, endangered species and
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1 an evaluation of the immediate cumulative and secondary impacts on
2 the human population in the area to be affected by the proposed
3 action. 16.2.605(3)(a). Quoting portions of the factors listed in
4 16.2.604(1)(b)(c).

5 16. An EIS also requires discussion of primary, secondary
6 and cumulative impacts; potential growth-inducing or
7 growth-inhibiting impacts; additional or secondary impacts at the
8 local or area level and a description of reasonable alternative
9 actions that could be taken by the Department.
10 16.2.605(b)(c)(g)(4).

11 17. The Department, in the FEIS, shall respond to
12 substantive comments raised by individuals and organizations on
13 the Draft EIS including an evaluation of the comments received and
14 a disposition of the issues involved. ARM 16.2. 607 (3). The
15 Department shall include information, data and explanations
16 obtained subsequent to the DEIS. ARM 16.2.607 (4).

17 18. Department has responsibilities under the Montana
18 Environmental Policy Act to make environmentally informed
19 decisions (DEIS at 125).

20 19. Reasonable forecasting and speculation is implicit in
21 preparing Environmental Impact Statements. City of Davis v.
22 Coleman, 521 F.2d 661, 667 (9th Cir. 1975) (Plaintiffs' Brief at
23 12).

24 20. The inclusion in the FEIS of the applicant's response to
25 written comments does not fulfill the Department's obligation to
26 respond to those comments.

27 21. The FEIS is inadequate because the Department failed to
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1 respond to and evaluate substantive comments as outlined in
2 proposed Finding of Fact Number 21 (a)-(k) in the FEIS in the
3 section on Substantive Comments, FEIS 16-24. The FEIS is further
4 inadequate because it did not include data, information and
5 explanations it should have sought based upon those comments as
6 required by ARM 16.2.607 (4).

7 22. The FEIS is inadequate because it did not include a
8 reasonable alternative of locating developments with adverse
9 environmental consequences on other CUT property, because such a
10 comparison, even if not implemented, could provide useful
11 information in understanding the environmental impacts of the
12 proposed actions.

13 23. A reasonable range of alternatives includes
14 consideration of alternative sites for development on other CUT
15 property, even if the Department does not have the statutory
16 authority to implement such alternatives. A reasonable
17 alternative may include one that cannot be implemented. Methow
18 Valley v. Regional Forester, 833 F.2d at 815 (9th Cir. 1987).

19
20 24. The discussion in the FEIS of the impacts on grizzly
21 bears is inadequate for the reasons enumerated in Proposed
22 Findings of Fact Number 30-39. The discussion of impacts on bears
23 does not include a reasonably thorough discussion of probable
24 significant consequences.

25 25. The conclusion that the impacts on grizzly bears will be
26 minimal is clearly erroneous and arbitrary and capricious. The
27 loss of one bear which is significant, and has already occurred,

1 demonstrates that impacts are not minimal as concluded in the EIS.
2 The conclusion that impacts to ungulates will be minimal is also
3 clearly erroneous in view of the inadequate information in the
4 DEIS.

5 26. The discussion in the FEIS with respect to impacts on
6 bighorn sheep is inadequate because it is not a reasonably
7 thorough discussion of probable significant consequences, as
8 stated in Proposed Finding of Fact Number 29(a).

9 27. The discussion with respect to impacts on ungulate
10 migrations in general is inadequate because it does not contain a
11 reasonably thorough discussion of probable significant
12 environmental consequences as stated in Proposed Finding of Fact
13 Number 25-27.

14 28. The discussion with respect to impacts on pronghorn is
15 inadequate because it is not a reasonably thorough discussion
16 probable significant consequences as stated in Proposed Finding of
17 Fact Number 28-29.

18 29. The EIS is inadequate because it fails to provide enough
19 information about the type of proposed projects, their size and
20 design.

21 30. The EIS is inadequate because it fails to adequately
22 discuss the environmental consequences of the proposed action with
23 respect to its growth inducing impacts, secondary impacts and
24 cumulative impacts because it fails to examine CUT activities at
25 Glastonbury and the RTR-N.

26 31. The EIS is inadequate because it fails to include
27 information about the Church's growth inducing impacts on the

1 Upper Yellowstone Valley.

2 32. The proper scope of the FEIS should have included all
3 impacts proximately caused by CUT's decision to locate its world
4 headquarters on the RTR-S.

5 33. The Department has predicated the issuance of permits to
6 CUT on the basis of an approved environmental impact statement.
7 Because this environmental impact statement is inadequate,
8 allowing the issuance of permits would violate MEPA because the
9 decision would be predicated upon an inadequate environmental
10 impact statement.

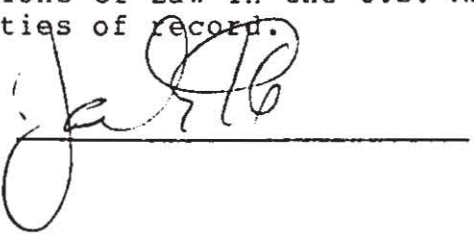
11 34. Allowing the projects to proceed based on an inadequate
12 FEIS would violate both the policy and procedural requirements of
13 MEPA.

14 35. A permanent injunction is the only remedy to permit
15 compliance with MEPA .

16 Dated this 9th day of May, 1989.

17
18 
19 Jack Tuholske

20 CERTIFICATE OF SERVICE

21 I, Jack Tuholske, hereby certify that on the 9th day
22 of May, 1989, I placed a true and correct copy of the foregoing
23 Findings of Fact and Conclusions of Law in the U.S. Mail, postage
24 prepaid, addressed to all parties of record.
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PROPOSED FINDINGS OF FACT SUBMITTED BY
DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

RECEIVED

MAY 10 1989

MDHES
Environmental Sciences Div.

1 Frank C. Crowley
2 Special Ass't Attorney General
3 Department of Health and
4 Environmental Sciences
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8 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
9 THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK

10 UPPER YELLOWSTONE DEFENSE)
11 FUND, INC., a nonprofit)
12 corporation registered in the)
13 state of Montana, THE MONTANA)
14 CHAPTER OF THE SIERRA CLUB, a)
15 nonprofit corporation,)
16 GREATER YELLOWSTONE COALITION,)
17 a nonprofit Montana corpora-)
18 tion, NATIONAL PARKS CONSERVA-)
19 TION ASSOCIATION, a nonprofit)
20 corporation, and JULIA PAGE,)
21 an individual,)

22 Plaintiffs,)

23 v.)

24 MONTANA DEPARTMENT OF HEALTH)
25 AND ENVIRONMENTAL SCIENCES)
and STEVE PILCHER, in his)
official capacity as head of)
the Montana Water Quality)
Bureau, a division of the)
Department of Health and)
Environmental Sciences,)

Defendants,)

23 CHURCH UNIVERSAL AND)
24 TRIUMPHANT,)

25 Intervenor-Defendant.)

Cause No. BDV-89-261

PROPOSED
FINDINGS OF FACT
SUBMITTED BY
DEPARTMENT OF HEALTH
AND ENVIRONMENTAL SCIENCES

1 The Defendant Department of Health and Environmental
2 Sciences (DHES), pursuant to the Court's bench ruling on
3 May 1, 1989, hereby submits the following Proposed Findings
4 of Fact summarizing the evidence before the Court in this
5 matter.

6
7 FINDINGS OF FACT
8

9 I. Process and Procedures

10 1. The Draft Environmental Impact Statement (DEIS) and
11 the Final Environmental Impact Statement (FEIS) followed the
12 outline of the DHES rules at ARM Title 16, Chapter 2, Sub-
13 chapter 6, implementing the Montana Environmental Policy Act,
14 Section 75-7-101, et seq., MCA, (MEPA) and adequately pro-
15 vided available information on the items listed in such rules
16 which were subject to potential impact by the proposed devel-
17 opments.

18 2. The DEIS specifically addressed wildlife, fisher-
19 ies, water quality, traffic, schools, fire, vegetation, farm-
20 ing, ranching, law enforcement, taxes, air quality, aesthet-
21 ics, recreation, archeological and geothermal, and historical
22 features. The DEIS specifically considered the growth-
23 inducing resources and cumulative impacts.

24 3. The DEIS was circulated and distributed in a proper
25 and adequate fashion. In addition, although not required by

(Proposed Findings Submitted by DHES)

1 State law or MEPA rules, the DHES held a public hearing on
2 the DEIS on March 21, 1988 in Gardiner where a large number
3 of persons and concerns were heard.

4 4. Although not required by State law or MEPA rules,
5 prior to preparing the DEIS, the DHES scheduled and held a
6 scoping hearing in Gardiner concerning the issues and con-
7 cerns which the EIS should address. Public notice was given
8 of this scoping hearing. After due consideration DHES deter-
9 mined that there was not a sufficient physical or functional
10 connection among all of the various activities of the Appli-
11 cant in Park County and proceeded to review the projects
12 listed on page 1 of the DEIS.

13
14 II. General

15 5. In the DEIS, DHES recognized the unique environmen-
16 tal and ecological values associated with the northern boun-
17 dary of Yellowstone National Park (YNP) and entered into the
18 Mitigation Plan Agreement to implement and enforce a program
19 of the Applicant to reduce any impacts on such values.

20 6. Much of the proposed development by the Applicant
21 is to occur in areas where structures and population already
22 exist.

23 7. The development will contribute to the existing
24 general pattern of gradual development in the Gardiner-Corwin
25 Springs area. Some increase in population and associated im-

1 pacts are likely to occur.

2 8. It was appropriate to omit the technical plans and
3 specifications for the proposed water and wastewater systems
4 from the DEIS. Relatively detailed narratives of the various
5 systems are provided at pp. 50-55 of the DEIS. The engineer-
6 ing plans and reports were available for public inspection
7 and copying at Park County and DHES offices during the EIS
8 process.

9 9. DHES reasonably considered the number of the Ap-
10 plicant's members proposed to use the proposed water and was-
11 tewater systems. The DEIS (page 51) contains a chart of
12 proposed users of the proposed water and wastewater systems.
13 Testimony from Mr. Fraser and Mr. Melstad of the DHES Water
14 Quality Bureau was consistent with user projections in the
15 DEIS taking into account customary overdesign, and the poten-
16 tial for day use and visitors to the proposed developments.

17 10. DHES has sufficient means at its disposal to assure
18 that the number of users for the proposed water and waste-
19 water systems will not appreciably exceed those contemplated
20 by DHES at the time of its review (and approval) if given.
21 The Montana Public Water Supply Act, Title 75, Chapter 6,
22 MCA, and the Montana Water Quality Act, Title 75, Chapter 5,
23 MCA, provide for monitoring and inspection of public water
24 and wastewater systems by DHES. Similarly ARM 16.20.401
25 requires engineering "as built" certifications from a

(Proposed Findings Submitted by DHES)

1 licensed professional engineer to be submitted to DHES within
2 90 days of completion of approved public water or wastewater
3 systems. The Mitigation Plan Agreement executed by the
4 Applicant and DHES provide for unannounced inspections of the
5 Applicant's public water and wastewater facilities. The Mon-
6 tana Public Water Supply Act, Section 75-6-112, MCA, pro-
7 hibits the extension of any public water or wastewater system
8 without prior written approval from the DHES.

9 11. In receiving information from the Applicant, DHES
10 did not either accept such information as automatically true
11 or rely exclusively on such information for purposes of
12 making its decision. Printing of a substantial portion of
13 the Applicant's comments on the DEIS was appropriate in order
14 to reflect the universe of comment received by the DHES on
15 the DEIS.

16 12. The Environmental Quality Council (EQC) of the Mon-
17 tana Legislature submitted a response to the DEIS which, in
18 general, was commendatory of the scope and nature of the DEIS
19 (pp. 26-28, FEIS).

20 13. No comprehensive planning or zoning which would af-
21 fect land use activities on the Applicant's property have
22 been enacted by local government.

23 14. The record before this Court does not demonstrate
24 that additional studies or further analysis of existing data
25 would lead to a different or more environmentally informed

(Proposed Findings Submitted by DHES)

1 decision on the part of DHES.

2 15. Testimony adduced at the hearing supports DHES'
3 conclusion that no direct significant impacts are likely to
4 occur as a result of the proposed developments if the Mitiga-
5 tion Plan Agreement is implemented.

6 16. As part of its DEIS process the DHES required the
7 Applicant to retain a qualified consultant to compile a re-
8 port for submittal to DHES on potential impacts of the pro-
9 posed development to wildlife. As part of its DEIS process,
10 DHES submitted the OEA report to the Montana Department of
11 Fish, Wildlife and Parks (DFWP).

12 17. In writing its report, OEA contacted the Bozeman
13 Regional Office of the DFWP and spoke with Mr. Arnold Foss
14 the Regional Game Manager for DFWP Region III which includes
15 the area of the Upper Yellowstone River and the Applicant's
16 property. Mr. Arnold Foss and Mr. Jon Swenson reviewed the
17 OEA report and submitted comments back to DHES. The comments
18 of DFWP are set forth, with minor editing, in the DEIS. Mr.
19 Arnold Foss is now deceased and Mr. Jon Swenson who assisted
20 Mr. Foss is studying in Europe. Neither was therefore avail-
21 able to testify.

22 18. Regarding the issue of grizzly bears, the DFWP
23 reviewed the OEA report and made no comment or criticism of
24 the OEA report in DFWP's comments to DHES. Since no testi-
25 mony was provided to the contrary regarding the DFWP com-

(Proposed Findings Submitted by DHES)

1 ments, an inference is supported that DFWP viewed the OEA
2 treatment of grizzly bears as fully adequate, particularly
3 since other species were commented on by DFWP.

4 19. As part of its DEIS process, the DHES required the
5 Applicant to retain a consulting firm to assess impacts on
6 fisheries which were potentially associated with the proposed
7 developments. OEA, a Helena consulting firm, assembled in-
8 formation, contacted experts including Mr. Dan Mahoney of
9 NPS, prepared a study and report of potential impacts of the
10 development on aquatic resources. DHES referred that report
11 to the Regional Office of the DFWP in Bozeman which has man-
12 agement jurisdiction over the Upper Yellowstone River Basin.
13 Mr. Jerry Wells, Regional Fisheries Manager from that office,
14 reviewed the OEA report and submitted comments to DHES.
15 Those comments are set forth in the Draft EIS on page 42.
16 The DFWP recommendations were considered by DHES and certain
17 of the recommendations were addressed in the Mitigation Plan
18 Agreement.

19 20. The DEIS devoted approximately 20 pages to wildlife
20 including individual sections on grizzly bears, bighorn
21 sheep, pronghorn antelope, bison, and elk.

22 21. The United States Department of the Interior, Fish
23 and Wildlife Service, (FWS) was contacted by OEA as part of
24 OEA's investigation. The FWS has management jurisdiction
25 under federal law over endangered species designated by Con-

1 gress, including the grizzly bear and bald eagle. The FWS
2 also submitted comments to DHES regarding threatened and en-
3 dangered species in the area of the proposed developments.
4 DHES reprinted those comments at page 49 of the Final EIS and
5 gave due consideration to such comments. The FWS saw mini-
6 mal direct impacts but recommended mitigation be considered
7 to reduce indirect impacts.

8 22. The grizzly bear cumulative effects computer model
9 referred to by the NPS (page 37 FEIS) was not readily avail-
10 able for the bear management unit of which the Applicant's
11 property is a part. The Interagency Grizzly Bear Committee
12 (IGBC) did not submit the computer model to DHES nor did the
13 IGBC run the model and submit the results to DHES for use in
14 the EIS process. No clear explanation was provided by Mr.
15 Brown or other NPS witnesses as to why the IGBC or any of its
16 constituent members failed to run the model and submit the
17 results to DHES. Nothing in the record indicates that the
18 computer model, if it were utilized, would yield results dic-
19 tating a conclusion different from that reached by DHES in
20 the DEIS or FEIS.

21 23. Every major issue, including initial impacts on
22 grizzly bears, expressed by the NPS to DHES concerning the
23 proposed development is mentioned and somehow addressed in
24 the DEIS. Several of the concerns of the NPS are represented
25 by specific items in the Mitigation Plan Agreement set forth

(Proposed Findings Submitted by DHES)

1 in the DEIS and Final EIS. All witnesses for the NPS at the
2 hearing held before this Court on April 12 to the 14th, 1989
3 and May 1, 1989 agreed that the Mitigation Plan Agreement
4 provides certain beneficial if not excellent methods of re-
5 ducing potential impacts on wildlife in the area of the pro-
6 posed developments.

7 24. Testimony from expert witnesses establishes that,
8 in areas of wildlife management, expert opinion may differ on
9 issues of potential for adverse impact on wildlife, and on
10 the adequacy of and interpretation of technical information.
11 Similarly, they may disagree on the need for additional
12 analysis and studies in order reach a responsible conclusion.

13 25. YNP utilizes a "natural" wildlife management method
14 which entails very little attempt to control migration of big
15 game, whether such migration is on to private or other lands.

16 26. The jackleg fence erected by the Applicant several
17 years ago to keep bison in YNP and cattle out of YNP has
18 sufficient openings to allow reasonable migration of wildlife
19 including the pronghorn antelope.

20 27. Brucellosis is a serious bovine disease potentially
21 spread by bison migrating from YNP. Montana cattle currently
22 enjoy a Brucellosis-free designation within the cattle in-
23 dustry.

24 28. DHES solicited and received appropriate technical
25 and scientific opinion from DFWP in assessing the potential

Page missing

1 IV Commenting Process

2 33. DHES made a substantial and adequate effort to
3 solicit and address substantive concerns on the potential
4 impacts of the proposals.

5 34. DHES technical writer Tom Ellerhoff (an experienced
6 EIS writer) and Water Quality Bureau Chief Steve Pilcher read
7 and considered all written comments submitted to DHES on the
8 DEIS and both employees read the transcript of the public
9 hearing held at Gardiner. In addition Mr. Steve Pilcher at-
10 tended the scoping hearing and the public hearing held
11 respectively on December 18, 1986 and March 28, 1988 at
12 Gardiner. Mr. Pilcher made the decision on the conclusions
13 of the Final EIS in consultation with the DHES Director.

14 35. Olson, Elliott, and Associates (OEA) was retained
15 by the Church Universal and Triumphant (the Applicant) to
16 attend the public hearing on the DEIS to listen for new con-
17 cerns on wildlife and other issues which they had not previ-
18 ously addressed. Had OEA learned of concerns not previously
19 addressed, OEA would have brought those to the attention of
20 the DHES through written comment.

21 36. The comments and concerns of the National Park Ser-
22 vice (NPS) were adequately presented to DHES during the EIS
23 process. NPS submitted a letter outlining its concerns to
24 Dr. John Drynan on October 29, 1986 and then submitted the
25 same comments in writing at the scoping hearing held in

1 Gardiner on December 18, 1986. The NPS was contacted and met
2 with representatives of the OEA consulting firm representing
3 the Applicant and the comments and concerns of the NPS ex-
4 pressed to OEA were addressed in the DEIS. In addition the
5 NPS submitted substantial comments to DHES on the Draft EIS.
6 Such written comments on the DEIS were included in full in
7 the Final EIS at pages 30-47. The NPS also attended and
8 testified at the public hearing on the DEIS on March 22,
9 1989.

10 37. The three witnesses for the Petitioner (excluding
11 adverse witnesses) were all NPS employees testifying on NPS
12 time. The NPS is not a Plaintiff to this action. All three
13 NPS witnesses are research scientists. All acknowledged the
14 EIS is not and was not intended to be an academic or scholar-
15 ly research document. Virtually all of the principle con-
16 cerns expressed in the NPS testimony at the hearing and
17 before this Court had been the subject of comments submitted
18 by NPS during various stages of the DEIS process.

19 38. The Final EIS did consider and respond to substan-
20 tive comments on the DEIS. As examples, in response to com-
21 ments on the DEIS, DHES required the Applicant to conduct two
22 additional studies (see page 4 of FEIS) and it revised its
23 methodology for the linear response model from an average
24 annual flow to a seven-day ten-year flow (see page 23, FEIS).

25 39. The FEIS (pp. 16-24) responded specifically to

1 several comments on the DEIS and also responded broadly to
2 many of the comments on the DEIS as disagreements over the
3 degree of information used and the need for further studies.
4 (See comments I, V, XIV and XV, pp. 16-24, Final EIS.)

5 40. Many commentators on the DEIS submitted comments and
6 concerns which were common to each other. Printing of a
7 representative sampling of such comment was an appropriate
8 method for DHES to reflect the nature and tenor of comments
9 on the DEIS.

10 41. The Department set forth a range of regulatory
11 alternatives for specific proposals to be located completely
12 on private land.

13 Respectfully submitted this 9th day of May, 1989.

14
15 STATE OF MONTANA
16 DEPARTMENT OF HEALTH AND
17 ENVIRONMENTAL SCIENCES

18 By _____
19 FRANK C. CROWLEY, Special
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Telephone: (406) 444-2630

CERTIFICATE OF SERVICE

The undersigned, counsel for the Defendant Department of

(Proposed Findings Submitted by DHES)

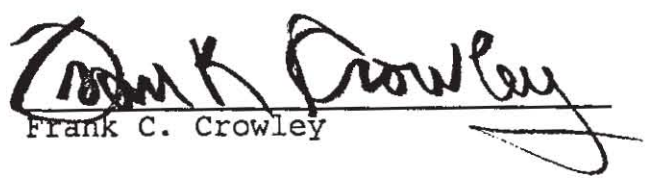
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Health and Environmental Sciences certifies that on the 10th day of April 1989, he caused a copy of the within Proposed Findings of Fact Submitted by Department of Health and Environmental Sciences to be served upon counsel for the parties by forwarding a copy, postage prepaid to:

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DATED this 9th day of May, 1989.


Frank C. Crowley

PROPOSED FINDINGS OF FACT OF INTERVENOR
CHURCH UNIVERSAL AND TRIUMPHANT

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Environmental Sciences Div.

7 MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

8 * * * * *

9 UPPER YELLOWSTONE DEFENSE FUND,)
10 INC., a nonprofit corporation)
11 registered in the state of)
12 Montana, THE MONTANA CHAPTER OF)
13 THE SIERRA CLUB, a nonprofit)
14 corporation, GREATER YELLOWSTONE)
COALITION, a nonprofit Montana)
Corporation, NATIONAL PARKS)
CONSERVATION ASSOCIATION, a)
nonprofit corporation, and JULIA)
PAGE, an individual,)

15 Plaintiffs,)

16 v.)

17 MONTANA DEPARTMENT OF HEALTH AND)
18 ENVIRONMENTAL SCIENCES, and)
19 STEVEN PILCHER, in his official)
20 capacity as head of the Montana)
Water Quality Bureau, a division)
of the Department of Health and)
Environmental Sciences,)

21 Defendants,)

22 and)

23 CHURCH UNIVERSAL AND)
24 TRIUMPHANT,)

25 Intervenor-Defendant.)

Cause No. BDV 89 261

PROPOSED FINDINGS OF
FACT OF INTERVENOR, CHURCH
UNIVERSAL AND TRIUMPHANT

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PROCEDURAL SYNOPSIS

1. The Plaintiffs in this action are the Upper Yellowstone Defense Fund, Inc., the Montana Chapter of the Sierra Club, the Great Yellowstone Coalition and the National Parks Conservation Association, and Julia Page.

2. The Defendants in this action are the Montana Department of Health and Environmental Sciences (DHES) and Mr. Steve Pilcher, the chief of the Water Quality Bureau of DHES.

3. The Intervenor in this action is the Church Universal and Triumphant.

4. On or about March 31, 1989, the Plaintiffs filed a complaint and request for injunctive relief in which they alleged, inter alia, that the Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) issued by the Montana Department of Health and Environmental Sciences were inadequate, and that the Court should therefore enjoin DHES from issuing any licenses or approvals for certain public water and waste water systems which the Church Universal and Triumphant (Church) had applied for to develop a limited portion of property located on the Royal Teton Ranch-South.

5. On or about April 4, 1989, the Church filed a motion to intervene, and this motion was granted on April 5, 1989.

6. The Plaintiffs also filed a motion for a preliminary injunction, and a hearing on that motion commenced on April 12, 1989. This hearing was initially held during a three

1 day period from April 12 to April 14, 1989, and was continued
2 until May 1, 1989 at which time the hearing was concluded.

3 7. During the course of the preliminary injunction hearing,
4 the parties stipulated and agreed that this hearing would serve
5 as the trial on the merits of the question of the adequacy of
6 the EIS and the Plaintiffs' request for a permanent injunction.
7 The parties also stipulated that neither DHES nor the Church
8 would need to file answers to the complaint, and the issues
9 would be fully joined based on the briefs, affidavits, and
10 testimony presented in open court.

11 THE EIS PROCESS

12 8. In the fall of 1986, the DHES undertook a Preliminary
13 Environmental Review (PER) to determine whether it would be
14 necessary to prepare an Environmental Impact Statement (EIS)
15 pursuant to the Montana Environmental Policy Act (MEPA) with respect
16 to the proposed Church development of the public water and
17 waste water facilities for which approvals and licenses were
18 sought from DHES. In the fall of 1986, a determination was
19 made by DHES to prepare a full EIS pursuant to MEPA.

20 9. On December 18, 1986, a public scoping meeting was
21 held in Gardiner, Montana to assist DHES in defining the important
22 issues to be discussed in the EIS process.

23 10. Thereafter, DHES determined that the scope of the EIS
24 should include the proposed developments on the Church property
25 located in the Corwin Springs area, but that Church holdings in

1 other parts of Park County were not sufficiently connected to
2 the proposed developments so as to justify their inclusion in
3 the EIS process. In particular, the Church developments at the
4 Royal Teton Ranch-North and Glastonbury are located 30 and 15
5 miles north, respectively, of the developments for which the
6 Church has sought public water supply and/or waste water treatment
7 approvals and licenses from the DHES.

8 11. At that time, the major areas of study identified for
9 inclusion in the EIS included the following: Wildlife, fisheries,
10 the geothermal well at La Duke Hot Spring, and the archeology
11 in the area.

12 12. Because the DHES did not have expertise in these
13 areas, it requested the Church to fund studies by reputable
14 expert consultants, each of whom had to be approved by DHES and
15 whose work was directed by DHES.

16 13. The process of requiring an applicant, in this instance
17 the Church, to retain and pay for expert consultants approved
18 by DHES has been customary at DHES. As part of this process,
19 DHES referred the reports of the consultants to the appropriate
20 state agencies with expertise in relevant areas for review and
21 comment. The reports on wildlife and fisheries prepared by the
22 consultants here were referred to the Montana Department of
23 Fish, Wildlife and Parks (MDFWP).

24 //

25 //

1 14. In early 1987, pursuant to the procedures outlined
2 above, the Church retained the services of OEA Research (OEA).
3 DHES was familiar with the work of OEA, and approved that
4 organization as a reputable and competent consultant in wildlife,
5 fisheries and vegetation.

6 15. OEA thereafter prepared reports on wildlife, fisheries
7 and vegetation. The wildlife report was authored by
8 Mr. Steve Gilbert, President of OEA, and the fisheries report was
9 prepared by Mr. Chris Hunter, Vice-President and Business
10 Manager of OEA.

11 16. Prior to commencement of work, Messrs. Gilbert and Hunter
12 met with: Steve Pilcher, chief of the Water Quality Bureau of
13 DHES; Tom Ellerhoff, the administrative officer for the
14 Environmental Sciences Division of DHES who was responsible for
15 the preparation of the DEIS and FEIS in this instance; Jim Melstad
16 of the Water Quality Bureau staff, who was responsible for the
17 engineering review of the waste water system plans and
18 specification for the proposed Church developments; and
19 Edward Francis, Vice-President and Business Manager of the
20 Church. At this meeting, the scope of the work to be completed
21 by OEA was discussed. Sometime after the meeting, Mr. Ellerhoff,
22 on behalf of DHES, advised OEA that Messrs. Gilbert and Hunter
23 should restrict their reports to the probable environmental
24 impacts and mitigations associated with the proposed Church
25 development in the Corwin Springs/Gardiner area. This scope of

1 work was reflected in the contract executed between OEA and the
2 Church. When the final report was prepared by OEA, it was
3 reviewed by Mr. Francis for editorial style and accuracy as to
4 factual information concerning Church ownership and developments.
5 The Church, however, did not make any substantive comments as
6 to the conclusions reached or recommendations made by OEA.

7 17. Following its customary procedures, DHES, upon receipt
8 of the reports from OEA, referred these reports to MDFWP for
9 analysis and comment.

10 18. Mr. Ellerhoff incorporated the reports from OEA in the
11 DEIS. The response comments of the MDFWP were also included in
12 the DEIS.

13 19. In preparing the DEIS, Mr. Ellerhoff followed the
14 then-applicable MEPA regulations which, inter alia, defined the
15 various substantive areas to be included within the DEIS.

16 20. The DEIS was issued in February 1988. A total of 600
17 copies of the DEIS were printed, with more than 300 sent to
18 persons who had previously expressed an interest to DHES. The
19 Church reserved 200 copies for distribution to its members, and
20 provided copies to the public upon request. The remaining 100
21 copies were distributed by DHES to members of the public upon
22 request. The DEIS was also sent to public libraries throughout
23 Park County and to the Bozeman Public Library. Additional
24 copies were sent to the State Library in Helena, and the libraries
25 at Montana State University and the University of Montana.

1 21. A properly noticed public hearing was held in Gardiner
2 on March 21, 1988 to enable interested persons to comment on
3 the DEIS. Public comments from 42 individuals and organizations
4 were received at that time, and the meeting lasted from
5 approximately 7:00 p.m. to 1:30 a.m.

6 22. In addition, written comments concerning the DEIS were
7 accepted by the DHES until April 21, 1988. Approximately four
8 hundred and four (404) written comments were received prior to
9 the April 21, 1988 deadline.

10 23. In response to comments received on the DEIS, the
11 Church was directed to complete two additional studies in the
12 area of the proposed projects. The first study was to determine
13 whether any rare plant species existed near La Duke Hot Spring.
14 The second study addressed radon levels in various structures.
15 The study on rare plant species was also conducted by OEA.

16 24. In March 1989 DHES published the FEIS which incorporated
17 by reference the earlier DEIS. DHES again utilized the then-
18 existing MEPA regulations as to the form and content of the
19 FEIS. A.R.M. 16.2.607. The FEIS included a synopsis of the DEIS,
20 alternatives considered with respect to the proposed development,
21 16 specific mitigations recommended by DHES, the description
22 of the proposed development and current environmental conditions,
23 a summary of the substantive comments received by DHES during
24 the EIS process together with the DHES's responses, the results
25 of the two additional studies required by DHES and obtained by

1 the Church, and a compilation of written public comments received
2 from a variety of sources including the Environmental Quality
3 Council, Yellowstone National Park, the U.S. Fish and Wildlife
4 Service, the Montana Department of Fish, Wildlife and Parks,
5 the Montana Department of Natural Resources and Conservation,
6 and Plaintiffs Greater Yellowstone Coalition and Julia Page.
7 Also included were excerpts of the lengthy response of the
8 Church to the various comments, as permitted by A.R.M. 16.2.608(3).

9 25. Also included with the FEIS as Appendix B was a copy
10 of the Mitigation Plan Agreement, a legally enforceable agreement
11 voluntarily entered into between DHES and the Church.

12 26. Each of the substantive comments received by DHES was
13 reviewed at least twice by both Mr. Pilcher and Mr. Ellerhoff
14 as part of their preparation of the DEIS and FEIS. The DHES
15 also considered all the reasonable alternative actions that it
16 could have taken.

17 27. The FEIS included the final recommendation, which
18 reads as follows:

19 Based on the information submitted to the DHES
20 by the applicant [Church] and the material received during
21 the EIS process, the department believes the proposed
22 water and waste water systems are adequate from a
23 public health and engineering standpoint, and will
not have measurable impacts on water quality.
Additionally, the application for work camp licenses
is adequate and issuing them will have no adverse
impact.

24 To address the concerns of the indirect and secondary
25 impacts, the Church and DHES have created a Mitigation
Plan Agreement. A copy of the agreement is in Appendix B.

1 While implementation of the proposed development
2 will bring change to the Corwin Springs area, the
3 environment will be adequately protected by the
4 review and approval of specific projects by the DHES
5 and the implementation of the mitigation measures.

6 FEIS at 326.

7 THE CHURCH, ITS DEVELOPMENT
8 AND ITS ACTIVITIES

9 28. The Church is a tax-exempt religious organization
10 recognized as such both by the Internal Revenue Service and
11 the Montana Department of Revenue. (FEIS at 232-235.)

12 29. In June 1980, the Church identified the property then
13 known as the Forbes Ranch located north of Yellowstone National
14 Park as a suitable property for acquisition which met the
15 religious and secular needs of the Church to establish a religious
16 retreat and community. Church leaders viewed this property as
17 the "place prepared" for the religious community that had been
18 planned and spoken of in the Church's religious literature for
19 years.

20 30. The Church acquired the approximately 12,000 acres
21 which comprised the Forbes Ranch in 1981, and renamed the
22 property the Royal Teton Ranch. In the context of the EIS
23 process, this property has been referred to as the Royal Teton
24 Ranch-South.

25 31. In 1982, a site in the Mol Heron Creek valley located
on the Royal Teton Ranch-South was consecrated as the international
religious shrine of the Church. It has been the site of the

1 Church's annual international religious gatherings since that
2 time, and a summer conference has been held at the Mol Heron
3 Creek site in five of the last seven years.

4 32. Between 1982 and 1986, the Church acquired additional
5 property, including the Royal Teton Ranch-North (located
6 approximately 30 miles north of the Royal Teton Ranch-South),
7 the present site of the development known as Glastonbury (located
8 approximately 15 miles north of the Royal Teton Ranch-South),
9 Camp Mustang (East Gate), and Cinnabar campgrounds which had pre-
10 existing and already approved mobile home, RV and campsite licenses,
11 and the OTO Ranch. The Church also leases the Big Spur campground
12 (located near the Royal Teton Ranch-North) which has pre-existing
13 mobile home, RV and campground licensing.

14 33. In 1986, the Church sold its former headquarters and
15 school in California, and decided to relocate them to the Royal
16 Teton Ranch. This decision was based on a religious belief
17 that the Church had been divinely "guided" to the Royal Teton
18 Ranch location.

19 34. The Church's religious purpose for its developments
20 under consideration in the EIS process could not be served by moving
21 them to the Royal Teton Ranch-North.

22 35. The Royal Teton Ranch property has been the site of
23 extensive usage and habitation in the 19th and 20th centuries.
24 These uses include the former towns of Aldridge and Electric,
25 the present town of Corwin Springs, various commercial activities

1 associated with the former coal developments, farming, ranching
2 and dairy production, timber production, schools, churches and
3 houses.

4 36. Between 1982 and 1986, the Church undertook and completed
5 a number of additions and improvements, applying for and receiving
6 state and local government reviews and approvals where necessary.
7 These included the Mol Heron campgrounds (the site of the
8 annual religious retreat and conference discussed above), the
9 construction of the "Ranch Headquarters" on a new ten-acre site,
10 and facilities which were added to the pre-existing Forbes
11 Ranch buildings ("Ranch Office").

12 37. In the summer and fall of 1986, several construction
13 projects were undertaken to effect the transfer of the Church's
14 headquarters to Montana. These were a Ranch Headquarters
15 housing addition, an East Gate housing addition for Church
16 staff ("work camp"), and the new Spring Creek Church Headquarters
17 site. During this period, the Church relocated its headquarters
18 into already existing facilities on the Royal Teton Ranch.

19 38. At the Ranch Office site, the Church is requesting
20 approval for a new waste water system primarily to serve a
21 completed, pre-existing and presently operating food processing
22 center for crops grown and to be consumed on the ranch.

23 39. At the East Gate location, the Church, at the commencement
24 of this litigation, was seeking approval for water and waste
25 water systems to serve the new housing, as well as a "work

1 camp" license from the Food and Consumer Safety Bureau of
2 DHES. During the pendency of this litigation, the Plaintiffs
3 stipulated that the DHES could issue the approvals and licenses
4 requested for the East Gate site, and the issuance of those
5 approvals and licenses is no longer an issue in this litigation.

6 40. At the Ranch Headquarters location, the Church is
7 currently seeking DHES approval to replace the existing water
8 supply system which serves the current resident population and
9 other facilities. The Church is also seeking DHES approval for
10 a new waste water system to serve the same current resident
11 population and other facilities.

12 41. As noted in the table found at page 51 of the DEIS, the
13 Church is projecting additional occupancy of 64 persons at the
14 East Gate location, an increase of 24 occupants at the Ranch
15 Headquarters, and no increase in occupancy at the Ranch Office
16 location.

17 42. At the Spring Creek location, the Church is proposing
18 to locate a new church, housing for Church staff, associated
19 offices, a school and dining hall complex with associated
20 housing for school faculty and students. A sewage lagoon is
21 also proposed in the Spring Creek site area for the waste water
22 system. As noted in table 3 found at page 51 of the DEIS, the
23 projected occupancy of the Spring Creek headquarters location
24 will be 264.

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1 43. The proposed water supply and waste water systems for
2 each location have been appropriately sized for the planned
3 occupancy at each respective location.

4 44. The total Church development, both existing and proposed,
5 will occupy only 120-150 acres of the more than 15,000 acres (or
6 approximately 1 percent) owned by the Church in the Corwin
7 Springs area.

8 45. Sites for development of Church buildings have been
9 clustered to avoid and/or mitigate impacts on the environment;
10 and when possible, pre-existing sites of development or occupancy
11 have been chosen as the location of further development.

12 46. The Church has also voluntarily agreed to a number of
13 changes from its original plans as proposed in 1986 in response
14 to various concerns voiced during the EIS process. These mitigation
15 activities include relocating root crop production, a poultry
16 slaughter house facility, and the compost operation to the Royal
17 Teton Ranch-North. Among the other mitigations agreed to in the
18 Mitigation Plan Agreement, included as Appendix B to the FEIS,
19 the Church has already constructed and agreed to maintain a
20 bear-proof fence around the tree farm and orchard area located
21 on the Royal Teton Ranch-South. The Church has also agreed to
22 monitor the groundwater in the vicinity of waste water systems
23 at the Mol Heron Creek conference site, East Gate, the Ranch
24 Headquarters, and the Ranch Office. In addition, the Church
25 has agreed that all waste water systems previously approved by

1 DHES and all systems that will be approved by the DHES for the
2 projects covered by the EIS will be monitored. The Church has
3 also negotiated a tentative instream flow agreement with
4 Yellowstone National Park to establish a minimum instream flow
5 for Reese Creek. (This agreement is subject to the approval of
6 other landowners who also have water rights claims along Reese
7 Creek.) The Church has also agreed to move its domestic sheep
8 grazing to the area north of Mol Heron Creek, and not to allow
9 domestic sheep to use the area along Cinnabar Mountain which is
10 winter range for Bighorn sheep. The Mitigation Plan Agreement
11 also includes numerous other mitigations, none of which were
12 criticized by the Plaintiffs or their expert witnesses.

13 47. The Church, during five of the last seven summers, has
14 held its summer encampment at the Mol Heron campgrounds and
15 conference site. The annual attendance at the religious
16 conferences has varied from approximately 1,500 participants to
17 4,000 participants.

18 48. In connection with the summer conference held at the
19 Mol Heron site, the Church provides to each participant a
20 visitor's Information Guide, which provides, among other things,
21 information concerning conduct of participants in bear country.
22 This material was developed from a variety of sources, including
23 literature provided by Yellowstone National Park. There has
24 never been a human/bear confrontation at any of the five annual
25 religious conferences held at the Mol Heron site.

1 49. In 1986, the Church replaced 2 1/2 miles of pre-existing
2 barbed wire fence bordering Yellowstone Park with a jack-leg
3 fence including approximately 18 gates. These gates are located
4 at approximately 200-yard intervals along the fence line at
5 established game migration trails.

6 50. These gates have been kept open during the migrating
7 season to allow wildlife to pass freely, and are only closed for
8 short periods in the spring and fall when Church livestock are
9 pastured in the fields adjacent to Yellowstone National Park.

10 51. The only apparent exception to this open gate policy
11 was in the period from December 1988 through early March 1989,
12 when five lower gates close to the Yellowstone River were kept
13 closed pursuant to an agreement entered into between the Church
14 and an animal rights organization which was concerned with the
15 migration of bison from Yellowstone Park onto adjacent private
16 lands, and the threat of a depredation hunt of the bison because
17 of the concern with the possible transmission of brucellosis to
18 domestic livestock. The agreement between the Church and the
19 animals rights organization has now expired, and the Church's
20 witness, Mr. Francis, testified that the gates are now and will
21 be kept open, except for the brief time periods when the Church's
22 domestic livestock are pastured in the fields immediately
23 adjacent to Yellowstone Park.

24 //

25 //

1 52. Yellowstone National Park prohibits domestic livestock
2 from grazing in the Park and can fine owners of domestic cattle
3 when their cattle stray onto park property. If the jack-leg
4 fence gates were not closed during those brief periods, and the
5 Church's domestic livestock strayed onto Park land, then the
6 Church could be subject to a fine imposed by the Park Service.

7 53. The Church has reached a tentative agreement for a
8 land exchange with the U.S. Forest Service to provide additional
9 big game winter range land and migrating corridors for Yellowstone
10 Park wildlife along the east side of the Yellowstone River in
11 the Corwin Springs area.

12 54. There are other private residences not connected with
13 the Church ownership of the Royal Teton Ranch South immediately
14 adjacent to and between the Ranch Office area and the Yellowstone
15 Park boundary.

16 PREPARATION AND CRITIQUE
17 OF THE EIS

18 55. Mr. Steve Gilbert is a professional wildlife biologist
19 who has worked for a variety of commercial, public, private, and
20 environmental interests during the last twenty years of his
21 professional career.

22 56. As stated previously, after OEA was retained by the
23 Church subject to the approval of DHES, Mr. Gilbert, together
24 with his associate, Mr. Hunter, met with representatives of DHES
25 and Ed Francis from the Church to discuss the scope of the EIS,

1 scheduling, and the proposed completion date. At that time, it
2 was decided that OEA would submit an outline of the wildlife
3 and aquatic sections of the report to Leroy Ellig, regional
4 director, and Jim Posewitz, Resource Assessment Unit leader, of
5 MDFWP. It was also decided that MDFWP would be asked to review
6 the OEA draft reports and make any comments it deemed necessary
7 prior to inclusion in the DEIS. It was also suggested by the Water
8 Quality Bureau that the MDFWP opinions on impacts and mitigations
9 should be given significant weight since MDFWP is the managing
10 agency for wildlife and fisheries in the state of Montana, and
11 that the MDFWP opinions on impacts and mitigations should be
12 given greater weight than the opinions of the National Park
13 Service or other commentators who do not have the same management
14 responsibilities for wildlife and fisheries as MDFWP.

15 57. Both the expert witnesses for the Plaintiffs and
16 Mr. Gilbert agreed that there is a substantial amount of baseline
17 data already collected and available for the northern range of
18 Yellowstone Park and the Corwin Springs area. Consequently,
19 there was neither a need nor a duty requiring the DHES to use a
20 "worst case" analysis in the EIS.

21 58. Mr. Gilbert testified that there was an abundance of
22 baseline wildlife data available so that the collection of such
23 additional data was neither appropriate nor necessary. In the
24 course of preparing his wildlife report, Mr. Gilbert consulted
25 over 75 publications containing relevant information to his

1 research and made over 30 personal communications with experts
2 on the various species of wildlife addressed in his report.

3 59. During the course of his research, Mr. Gilbert reviewed
4 literature and interviewed experts on the following species:
5 grizzly bears, bison, pronghorn antelope, elk, Bighorn sheep,
6 and other species found in the northern range of Yellowstone
7 Park and the Corwin Springs area.

8 60. Among the experts consulted by Mr. Gilbert were the
9 following: Leroy Ellig and Arnold Foss of MDFWP (Mr. Foss is
10 now deceased); Chris Servheen, David Mattson, and Dr. Richard
11 Knight of the Interagency Grizzly Bear Team; Tom Puchlerz of
12 the Gallatin National Forest; Steve Mealey of the Shoshone
13 National Forest; Jay Summner of the Wildlife/Wilderness Institute;
14 John Varley, Frank Singer, and Don Despain of Yellowstone
15 National Park; Louisa Wilcox and Ed Lewis of the Greater Yellowstone
16 Coalition.

17 61. Mr. Gilbert specifically contacted Mr. John Varley,
18 chief research biologist for Yellowstone National Park, and
19 requested a personal interview with Mr. Varley and other Park
20 biologists who had information concerning the potential impacts
21 on the various species which might be affected by the proposed
22 Church development. Mr. Gilbert specifically requested that
23 Dr. Mary Meagher, one of the Plaintiffs' experts, be available
24 for this meeting. Mr. Varley testified at the hearing that he
25 did not have any recollection of personally contacting Dr. Meagher

1 to determine whether she was available for such a meeting; and,
2 Dr. Meagher specifically testified that she was not invited by
3 Mr. Varley to attend the meeting.

4 62. Mr. Gilbert's meeting with Mr. Varley and his two
5 associates from the Park lasted approximately three to four
6 hours. During that meeting, Mr. Varley and his associates discussed
7 with Mr. Gilbert each of the species which was specifically
8 identified by Mr. Gilbert as being of major concern. These
9 discussions with Yellowstone Park officials included a discussion
10 of the impacts of the proposed development on ungulates, impacts
11 of the jack-leg fence upon migration of pronghorn antelope,
12 bison and elk; a discussion of the impacts of the proposed
13 development on grizzly bears; the impacts on grizzly bears of
14 the annual religious conference held at the Mol Heron Creek
15 site; and, a discussion of the Park biologists' concern with
16 the transmission of diseases from domestic sheep herds to the
17 Bighorn sheep population that winters on Cinnabar Mountain.

18 63. Mr. Gilbert testified, and Mr. Varley recollected in his
19 testimony, that Mr. Gilbert had advised Mr. Varley that he
20 (Gilbert) desired to cover as much ground as possible during
21 the interview with the Park's biologists so that he might have
22 a full appreciation of their various concerns. At the meeting,
23 Mr. Varley represented to Mr. Gilbert that he and the other
24 members of the Park Service in attendance at this meeting could
25 fully express the Park's position on the Church's proposed

1 developments. Mr. Varley did not advise Mr. Gilbert that
2 follow up conferences with individual Park specialists with
3 respect to the various species would be necessary; and, Mr. Varley
4 did not instruct any of the members of his staff to initiate
5 any contacts with Mr. Gilbert following this meeting, although
6 Mr. Varley testified that the Park was particularly concerned
7 with the proposed Church development.

8 64. Mr. Gilbert testified that he told Mr. Varley that he
9 (Mr. Gilbert) would be available by telephone if any Park
10 biologists desired to contact him with any additional information
11 which they believed would be necessary or helpful in his research.
12 Mr. Gilbert received no further communications from any Park
13 biologists or officials.

14 65. During Mr. Gilbert's interview with the Park's biologists,
15 none of the biologists suggested that Mr. Gilbert utilize the
16 "Cumulative Effects Model" to help him in his assessment of the
17 potential impacts on grizzly bears.

18 66. At the hearing, Mr. Varley testified regarding the
19 "Cumulative Effects Model" that he thought that much of the
20 data had been collected and digitized with respect to the
21 relevant bear management unit in Yellowstone National Park and
22 the Gallatin National Forest, but that no data had been collected
23 with respect to private lands, including the approximately
24 15,000 acres of the Royal Teton Ranch-South, which are part of
25 that bear management unit. Mr. Varley estimated that it would

1 take approximately four to eight months to collect, digitize and
2 analyze this data before the "Cumulative Effects Model" could be
3 fully utilized in conjunction with any analysis of the proposed
4 Church development.

5 67. Mr. Gilbert testified, and the record reveals, that no
6 other organization or individual suggested that the "Cumulative
7 Effects Model" be utilized by Mr. Gilbert in the preparation of
8 his report. Mr. Gilbert testified that Mr. Puchlerz advised him
9 that the necessary information had not yet been collected for
10 the subject area. The MDFWP did not suggest that the "Cumulative
11 Effects Model" be utilized, although MDFWP is a full member of
12 the Interagency Grizzly Bear Team which had overall responsibility
13 for the development of the "Cumulative Effects Model." In fact,
14 no member of the management agencies which comprise the Interagency
15 Grizzly Bear Team ever suggested that the "Cumulative Effects Model"
16 be utilized, other than in the comments of Yellowstone National
17 Park made in response to the DEIS. Further, the unrebutted
18 testimony of Mr. Gilbert was that in his opinion utilization
19 of the "Cumulative Effects Model" would not have produced
20 different results or conclusions than those contained in the
21 OEA report and the DEIS.

22 68. At the conclusion of his visit with the Park biologists,
23 Mr. Gilbert was not provided any research publications or other
24 information, nor was he told to contact any specific Park staff
25 biologists.

1 69. In preparing his report, as indicated above, Mr. Gilbert
2 reviewed a significant body of literature and contacted a variety
3 of experts concerning their opinions on the potential impacts and
4 available mitigations with respect to the various species under
5 consideration. In preparing his report, Mr. Gilbert utilized the
6 professional opinions which he heard from a variety of experts,
7 including experts with disparate or opposing viewpoints, as well
8 as his own professional judgment, to conclude that the impacts
9 upon the various species under consideration would be minimal,
10 especially if a number of the mitigation strategies which he
11 recommended in his report were implemented by the Church.

12 70. A preliminary draft of Mr. Gilbert's report was reviewed
13 by Tom Ellerhoff and representatives of the MDFWP.

14 71. Based on the literature, research and interviews he
15 conducted, Mr. Gilbert reached the independent professional
16 opinion that, although there would be impacts to some species,
17 the impacts would likely be minimal and, in most cases, could be
18 mitigated.

19 72. Mr. Gilbert stated that, after reviewing the Mitigation
20 Plan Agreement entered into between the Church and DHES, he
21 concluded that the agreement adequately incorporated his suggested
22 mitigations.

23 73. The record reveals that Yellowstone National Park
24 biologists participated at every step of the EIS process. By
25 letter dated October 31, 1986 (State Exhibit 2) addressed to

1 Dr. Drynan, the then Director of the DHES, Mr. Robert D. Barbee,
2 Superintendent of Yellowstone Park, urged that DHES conduct a
3 full EIS on the proposed Church development. In that letter,
4 Mr. Barbee identified eleven (11) areas of concern to the Park.
5 Thereafter, the Park participated in the public scoping meeting
6 held in December 1986 and again reiterated the same 11 concerns.
7 A representative of the Park was one of the 42 participants who
8 gave testimony at the public hearing held in Gardiner after the
9 publication of the DEIS; and, the Park submitted lengthy written
10 comments on the DEIS, which were included in the FEIS. A
11 comparison of the 11 areas of concern initially raised by
12 Yellowstone Park in the fall and early winter of 1986 with the
13 contents of the DEIS and FEIS reveals that every one of the Park's
14 concerns was addressed in the EIS process.

15 74. Although the Plaintiffs' expert, Dr. Mary Meagher,
16 testified as to her concern that the jack-leg fence located
17 along the Church/Park boundary might be a potential impediment
18 to migration of bison, elk, and pronghorn antelope, she also
19 testified that these species tend to travel along a barrier,
20 such as a fence, until they can find an opening and will then
21 pass through. Additionally, she acknowledged that there were
22 numerous gates in the fence as testified to by Mr. Francis and
23 Mr. Gilbert.

24 //

25 //

1 75. With respect to the shooting of bison which cross the
2 Park boundary into the state of Montana and are subject to the
3 management of MDFWP, Dr. Meagher admitted that the bison herd
4 could drop to as low a number as 50 head, and still survive as
5 a viable population. Both Dr. Meagher and Mr. Varley acknowledged
6 that the bison hunt was sanctioned by the Montana Legislature
7 in order to prevent the spread of brucellosis from the Yellowstone
8 bison herd to Montana domestic livestock.

9 76. With respect to bison, Dr. Meagher also testified that
10 they were not, in her opinion, subject to negative conditioning
11 and thus would not be deterred by development; that is, the
12 Church's developments would not deter the bison from following
13 their chosen migration patterns.

14 77. Dr. Meagher also testified that the areas around the
15 Ranch Office (which has no new proposed facilities with the
16 exception of the addition of the waste water system for which
17 approvals have been requested), the East Gate, and the Ranch
18 Headquarters have little wildlife winter range value and the
19 Church's development at those sites would have little, if any,
20 impact on the available winter range for ungulates found in the
21 northern range of Yellowstone Park.

22 78. Dr. Meagher also admitted that she was not aware of any
23 studies documenting the transmission of disease from domestic
24 sheep to a Bighorn sheep population. Dr. Meagher also admitted
25 the provision in the Mitigation Plan Agreement under which the

1 Church agreed to keep its domestic sheep herd off of the Bighorn
2 sheep winter range located on Cinnabar Mountain, would mitigate
3 the potential impact of any possible transmission of disease
4 from the domestic sheep population.

5 79. Mr. Varley admitted that the Park biologists were
6 still conducting studies and gathering data on the potential
7 effects of the jack-leg fence upon wildlife migration, and that
8 he had no idea when the results of this research would be
9 completed or available.

10 80. Dr. Meagher admitted that more than half of the elk
11 herd in Yellowstone Park follows a migratory path along the
12 east side of the Yellowstone River, and not along the west
13 bank where the Royal Teton Ranch-South is located. Dr. Meagher
14 also testified that it appeared that the elk population could
15 be trained to migrate along the east side of the river, and she
16 was aware of certain studies in which this result seemed to
17 have been obtained.

18 81. Dr. Meagher also testified that her general disposition
19 was to favor the resource over any form of development whatsoever.

20 82. Mr Varley testified that, at present, there are too
21 many elk in the Park's northern range herd.

22 83. Dr. Meagher also testified that many of her comments
23 which she submitted to her supervisors in Yellowstone Park
24 concerning the DEIS were not included in the Park response,

25 //

1 although she did not know and could not explain why they were
2 not included.

3 84. Plaintiffs also called as an expert witness Mr. Gary
4 Brown to testify about the potential impacts of the proposed
5 Church development on the grizzly bear population. Mr. Brown
6 is employed as a bear management specialist in Yellowstone Park.

7 85. Mr. Brown testified that because of the opportunistic
8 nature of the grizzly bear, any human development constitutes a
9 potential bear attractant and can create the possibility for a
10 human/bear confrontation.

11 86. Mr. Brown admitted that the relocation of the root
12 crop production, composting operation, and poultry slaughterhouse
13 to the Royal Teton Ranch-North were "excellent" mitigations
14 undertaken by the Church in the removal of bear attractants.

15 87. Mr. Brown also admitted that, although there are 12
16 National Park Service campgrounds within Yellowstone, 230
17 backcountry campsites, 1,043 hotel rooms, 15 restaurants, and
18 1,159 cabin sites within Yellowstone Park, there were only 23
19 human/bear confrontations in the Park last year even though the
20 Park attracted 2.3 million visitors annually.

21 88. Mr. Brown also admitted that the Park controls habituation
22 and works to avoid human/bear conflict by a system of education
23 of Park visitors which includes, first and foremost, providing
24 to each Yellowstone National Park visitor written educational
25 literature, as to the dos and don'ts of being in bear country.

1 89. Mr. Brown admitted that the entire area around the
2 town of Gardiner was a "population sink" for bears, and that
3 many gardens, root crops and other bear attractants are found
4 in and around the town of Gardiner outside of the Royal Teton
5 Ranch. Mr. Brown also admitted that many of the tourist and
6 campground developments inside Yellowstone Park are similar
7 "population sinks" for bears.

8 90. Although Mr. Brown testified as to his concern with
9 the potential adverse impact of bear relocations as a result of
10 human/bear confrontations, he admitted that such relocations
11 regularly occur inside and outside Yellowstone National Park.

12 91. Mr. Brown also testified concerning an incident occurring
13 in 1988 after the DEIS had been published in which a bear and
14 one cub were relocated, and one cub was accidentally killed by
15 a game warden on Royal Teton Ranch-South property. The unrebutted
16 testimony of Mr. Edward Francis, however, indicates that the
17 sow and her two cubs were first attracted by the fruit orchards
18 on an adjoining neighbor's property, and that the sow and one
19 cub were relocated. The remaining cub was found in the Church
20 truck garden located between the Ranch Office buildings and the
21 neighbor's property, which was approximately 1/2 mile away.
22 The one cub apparently died after receiving an overdose of
23 tranquilizer from a game warden, although Mr. Francis was not
24 aware of the death of the cub at the time of the incident.

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1 92. Mr. Brown, like Dr. Meagher, stated his opinion that he
2 would prefer to see no human development at all so that bears would
3 not be subjected to various attractions associated with human
4 development, and thereby the chances of human/bear confrontations
5 would be further diminished.

6 93. In reviewing the DEIS, it is clear that each of the
7 major species of concern to the Plaintiffs' witnesses were
8 addressed by Mr. Gilbert. For example, elk and elk migration
9 were discussed at pp. 12-14 of the DEIS; status of the Bighorn
10 sheep was discussed at pp. 17-20 of the DEIS; the growth and
11 migration of the pronghorn antelope herd was discussed at pp.
12 20-21; bison are discussed at page 21; and grizzly bears were
13 discussed at pp. 23-26. Likewise, the impact of the jack-leg
14 fence, the proximity of domestic sheep population to the Bighorn
15 sheep, and various forms of bear attractants related to activities
16 of the Church on the Royal Teton Ranch-South are discussed at
17 pp. 28-29. The impact on grizzly bears, in particular, is
18 discussed at pp. 31-32 of the DEIS. Various mitigating measures
19 were also proposed in the DEIS.

20 94. As the Plaintiffs' expert witnesses admitted, professional
21 wildlife biologists can and often do differ in their opinions with
22 respect to the impacts of proposed developments on wildlife.
23 To the extent that the opinions concerning impacts and mitigations
24 contained in the DEIS and/or FEIS are different than those
25 expressed by Plaintiffs' experts as to the adequacy of discussion

1 or impacts, or proposed mitigations suggested by Plaintiffs'
2 experts from Yellowstone Park, the DEIS and FEIS represent a
3 tacit conclusion that the various professional experts have
4 "agreed to disagree" as Mr. Varley stated was often the case
5 in his experience with the EIS process.

6 95. The Park Service and the wildlife management agencies
7 of the State of Montana have different purposes and, consequently,
8 different goals and management philosophies. The State agencies
9 cannot favor environmental resources over human development,
10 but, rather, must attempt to resolve conflicts between the two
11 by mitigating adverse impacts to wildlife. In contrast, the
12 Park's central purpose is to favor environmental resources to
13 the exclusion of human development. This opposition is illustrated
14 by the differing approaches to bison management, which finds
15 the Park nurturing the bison, and the State ordering depredation
16 hunting of them as soon as they enter Montana.

17 96. Both of the Plaintiffs' expert witnesses, Dr. Meagher
18 and Mr. Brown, as well as the Plaintiffs' rebuttal witness,
19 Mr. Varley, are employees of Yellowstone National Park and were
20 paid by the Park to appear and testify at the hearing. However,
21 neither Yellowstone National Park nor the National Park Service
22 are parties to this action.

23 97. Each of the parties submitted affidavits concerning
24 the adequacy of the EIS process with respect to the impact upon
25 fisheries. Mr. Chris Hunter of OEA collected base line data,

1 reviewed scientific literature, interviewed knowledgeable
2 experts concerning the potential impacts of the proposed Church
3 development upon aquatic life, and prepared a report which
4 Mr. Ellerhoff incorporated in the DEIS. That report, the DEIS
5 and the FEIS address the major concerns articulated by various
6 commentors during the EIS process.

7 98. With respect to the potential impacts upon Reese Creek
8 specifically, both Mr. Mahoney, the Plaintiffs' affiant, and
9 Mr. Hunter agree that the primary issue involves the exercise
10 of competing water rights which has historically resulted in
11 the dewatering of a portion of Reese Creek. As stated previously,
12 the Church and Yellowstone Park have negotiated a tentative
13 minimum instream flow agreement (which is subject to the approval
14 of other water rights claimants) which addresses the issue of the
15 dewatering of a portion of Reese Creek. Further, any dispute
16 between and among water rights claimants is within the jurisdiction
17 of the Montana Water Court pursuant to Montana's comprehensive
18 statutory scheme for the resolution of such conflicts.

19 99. In addition to the Mitigation Plan Agreement, the DHES
20 has the authority to conduct both routine and unannounced
21 inspections of the proposed facilities so as to insure compliance
22 with the terms of the agreement and any approvals or licenses
23 issued to the Church. The DHES' witnesses testified that
24 these measures should insure that the projected Church developments
25 and population estimates contained in the DEIS will be followed

1 and that any significant changes in development or use can and
2 will be detected by DHES.

3 100. Jim Melstad testified that, in all of the applications
4 for water and waste water system approvals he has been aware of
5 during the entire term of his employment with DHES, he could
6 not recall having seen any application subjected to as many
7 conditions and requirements as the Church's systems.

8 101. The DHES' witnesses also testified that any future
9 changes in the developments for which permits are now being
10 sought by the Church will subject the Church to an environmental
11 review process, as has occurred with the pending developments.

12 102. The DHES fairly considered the various views and
13 opinions with respect to the primary, secondary, cumulative and
14 growth inducing impacts associated with the proposed developments,
15 and both the DHES and the public were fairly and adequately
16 informed as to the potential impacts and mitigations associated
17 with the proposed developments under review.

18 DATED this 9th day of MAY 1989.

19
20 BROWNING, KALECZYC, BERRY & HOVEN, P.C.

21 By Stanley T. Kaleczyc

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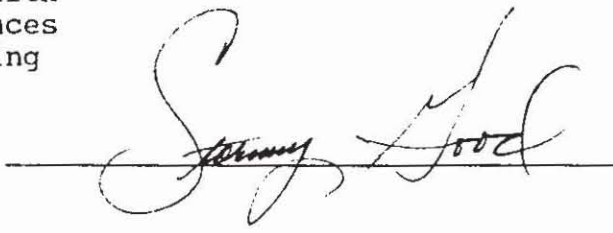
Attorneys for Intervenor, Church
Universal and Triumphant

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 1989
a true copy of the foregoing "Proposed Findings of Fact of
Intervenor, Church Universal and Triumphant" will have been
served by first class mail, postage prepaid, upon the following:

Jack Tuholske
P. O. Box 7458
Missoula, MT 59807

Frank Crowley
Montana Department of Health
and Environmental Sciences
Room 216, Cogswell Building
Helena, MT 59620



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U.S. SUPREME COURT DECISIONS

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RECEIVED

MAY 12 1989

May 11, 1989

LEGAL DIVISION

BY HAND

The Honorable Jeffrey Sherlock
District Court Judge
Lewis and Clark County Courthouse
Helena, MT 59601

Re: Upper Yellowstone Defense Fund, et al. v. Montana
Department of Health and Environmental Sciences, et al.
and Church Universal and Triumphant; Cause No. BDV 89-261

Dear Judge Sherlock:

Late yesterday afternoon I learned that the U.S. Supreme Court, in two opinions issued on May 1, 1989, Robertson v. Methow Valley Citizens Council, No. 87-1703, and Marsh v. Oregon Natural Resources Council, No. 87-1704, reversed previous decisions of the United States Court of Appeals for the Ninth Circuit. Copies of the slip opinions, as reprinted in U.S. Law Week, are enclosed for the reference of the Court.

The Ninth Circuit decisions reversed by the Supreme Court were cited favorably by the Plaintiffs in their brief, and Methow Valley was distinguished both by the DHES and the Church in their respective briefs. Because of the importance of these decisions to the action presently before the Court, we are making these companion decisions available. By copy of this letter, copies of the decisions are also being provided to other counsel of record.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By 
Stanley T. Kaleczyc

/arh

Enclosure

cc: Frank Crowley (w/enc.)

Jack Tuholske (w/enc.)

because it fails to state a claim. The judgment of the Court of Appeals is accordingly

Affirmed.

ROBERT S. SPEAR, Indiana Chief Counsel (LINLEY E. PEARSON, Atty. Gen., DAVID A. NOWAK, Dpty. Atty. Gen., on the briefs) for petitioners; GEORGE A. RUTHERGLEN, Charlottesville, Va., for respondent.

No. 87-1703

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS v METHOW VALLEY CITIZENS COUNCIL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

No. 87-1703. Argued January 9, 1989—Decided May 1, 1989

The Forest Service is authorized by statute to manage national forests for, *inter alia*, recreational purposes. Because its decision to issue a recreational special use permit is a "major Federal action" within the meaning of the National Environmental Policy Act of 1969 (NEPA), that decision must be preceded by the preparation of an Environmental Impact Statement (EIS). After a Service study designated a particular national forest location as having a high potential for development as a major downhill ski resort, Methow Recreation, Inc. (MRI), applied for a special use permit to develop and operate such a resort on that site and on adjacent private land MRI had acquired. In cooperation with state and local officials, the Service prepared an EIS (the Study), which, among other things, considered the effects of various levels of development on wildlife and air quality both on-site and—as required by Council on Environmental Quality (CEQ) regulations—off-site, and outlined steps that might be taken to mitigate adverse effects, indicating that these proposed steps were merely conceptual and would "be made more specific as part of the design and implementation stages of the planning process." The study's proposed options regarding off-site mitigation measures were primarily directed to steps that might be taken by state and local governments. After the Regional Forester decided to issue a permit as recommended by the Study, respondents appealed to the Chief of the Forest Service, who affirmed. Respondents then brought suit to review the Service's decision, claiming that the Study did not satisfy NEPA's requirements. The District Court's Magistrate filed an opinion concluding that the EIS was adequate, but the Court of Appeals reversed, concluding that the Study was inadequate as a matter of law on the grounds, *inter alia*, that NEPA imposes a substantive duty on agencies to take action to mitigate the adverse effects of major federal actions, which entails the further duty to include in every EIS a detailed explanation of specific actions that will be employed to mitigate the adverse impact; that if the Service had difficulty obtaining adequate information to make a reasoned assessment of the project's environmental impact, it had an obligation to make a "worst case analysis" on the basis of available information, using reasonable projections of the worst possible consequences; and that the Service's failure to develop a complete mitigation plan violated its own regulations.

Held:

1. NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other "action-forcing" procedures implement that statute's sweeping policy goals by ensuring that agencies will take a "hard look" at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action. While a reasonably complete discussion of possible mitigation measures is an important ingredient of an EIS, and its omission therefrom would undermine NEPA's "action-forcing" function, there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, and a substantive requirement that a complete mitigation plan be actually formulated and adopted. Here, since the off-site

environmental effects of the project cannot be mitigated unless the non-federal government agencies having jurisdiction over the off-site area take appropriate action, it would be incongruous to conclude that the Service has no power to act until the local agencies have finally determined what mitigation measures are necessary. More significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed mitigation plan before the agency can act.

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

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

833 F. 2d 810, reversed and remanded.

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

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide two questions of law.¹ As framed by petitioners, they are:

"1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to mitigate environmental harm; and (b) a 'worst case' analysis of potential environmental harm if relevant information concerning significant environmental effects is unavailable or too costly to obtain.

"2. Whether the Forest Service may issue a special use permit for recreational use of national forest land in the absence of a fully developed plan to mitigate environmental harm." Pet. for Cert. i.

¹ In the order granting certiorari, we consolidated this case with *Marsh v. Oregon Natural Resources Council*, No. 87-1704. See 487 U. S. ____ (1988). Our decision in *Marsh* appears *post*, at ____.

Concluding that the Court of Appeals for the Ninth Circuit misapplied the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, and gave inadequate deference to the Forest Service's interpretation of its own regulations, we reverse and remand for further proceedings.

I

The Forest Service is authorized by statute to manage the national forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 74 Stat. 215, 16 U. S. C. § 528. See also 90 Stat. 2949, 16 U. S. C. § 1600 *et seq.* Pursuant to that authorization, the Forest Service has issued "special use" permits for the operation of approximately 170 alpine and nordic ski areas on federal lands. See H. R. Rep. No. 99-709, pt. 1, p. 2 (1986).

The Forest Service permit process involves three separate stages. The Forest Service first examines the general environmental and financial feasibility of a proposed project and decides whether to issue a special use permit. See 36 CFR § 251.54(f) (1988). Because that decision is a "major Federal action" within the meaning of NEPA, it must be preceded by the preparation of an Environmental Impact Statement (EIS). 42 U. S. C. § 4332. If the Service decides to issue a permit, it then proceeds to select a developer, formulate the basic terms of the arrangement with the selected party, and issue the permit.² The special use permit does not, however, give the developer the right to begin construction. See 36 CFR § 251.56(c) (1988). In a final stage of review, the Service evaluates the permittee's "master plan" for development, construction, and operation of the project. Construction may begin only after an additional environmental analysis (although it is not clear that a second EIS need always be prepared) and final approval of the developer's master plan. This case arises out of the Forest Service's decision to issue a special use permit authorizing the development of a major destination alpine ski resort at Sandy Butte in the North Cascades mountains.

Sandy Butte is a 6,000-foot mountain located in the Okanogan National Forest in Okanogan County, Washington. At present Sandy Butte, like the Methow Valley it overlooks, is an unspoiled, sparsely populated area that the district court characterized as "pristine." App. to Pet. for Cert. 20a. In 1968, Congress established the North Cascades National Park and directed the Secretaries of Interior and Agriculture to agree on the designation of areas within and adjacent to the park for public uses, including ski areas. 82 Stat. 926, 930, 16 U. S. C. §§ 90, 90d-3. A 1970 study conducted by the Forest Service pursuant to this congressional directive identified Sandy Butte as having the highest potential of any site in the State of Washington for development as a major downhill ski resort.³ App. to Pet. for Cert. 23a.

In 1978, Methow Recreation, Inc. (MRI) applied for a special use permit to develop and operate its proposed "Early Winters Ski Resort" on Sandy Butte and an 1,165 acre par-

cel of land it had acquired adjacent to the National Forest. The proposed development would make use of approximately 3,900 acres of Sandy Butte; would entice visitors to travel long distances to stay at the resort for several days at a time; and would stimulate extensive commercial and residential growth in the vicinity to accommodate both vacationers and staff.

In response to MRI's application, the Forest Service, in cooperation with state and county officials, prepared an EIS known as the Early Winters Alpine Winter Sports Study (Early Winters Study or Study). The stated purpose of the EIS was "to provide the information required to evaluate the potential for skiing at Early Winters" and "to assist in making a decision whether to issue a Special Use Permit for downhill skiing on all or a portion of approximately 3900 acres of National Forest System land." Early Winters Study 1. A draft of the Study was completed and circulated in 1982, but release of the final EIS was delayed as Congress considered including Sandy Butte in a proposed wilderness area. App. to Pet. for Cert. 26a. When the Washington State Wilderness Act of 1984 was passed, however, Sandy Butte was excluded from the wilderness designation,⁴ and the EIS was released.

The Early Winters Study is a printed document containing almost 150 pages of text and 12 appendices. It evaluated five alternative levels of development of Sandy Butte that might be authorized, the lowest being a "no action" alternative and the highest being development of a 16-lift ski area able to accommodate 10,500 skiers at one time. The Study considered the effect of each level of development on water resources, soil, wildlife, air quality, vegetation and visual quality, as well as land use and transportation in the Methow Valley, probable demographic shifts, the economic market for skiing and other summer and winter recreational activities in the Valley, and the energy requirements for the ski area and related developments. The Study's discussion of possible impacts was not limited to on-site effects, but also, as required by Council on Environmental Quality (CEQ) regulations, see 40 CFR § 1502.16(b) (1987), addressed "off-site impacts that each alternative might have on community facilities, socio-economic and other environmental conditions in the Upper Methow Valley." Early Winters Study 1. As to off-site effects, the Study explained that "due to the uncertainty of where other public and private lands may become developed," it is difficult to evaluate off-site impacts, *id.*, at 76, and thus the document's analysis is necessarily "not site-specific," *id.*, at 1. Finally, the Study outlined certain steps that might be taken to mitigate adverse effects, both on Sandy Butte and in the neighboring Methow Valley, but indicated that these proposed steps are merely conceptual and "will be made more specific as part of the design and implementation stages of the planning process." *Id.*, at 14.

The effects of the proposed development on air quality and wildlife received particular attention in the Study. In the chapter on "Environmental Consequences," the first subject discussed is air quality. As is true of other subjects, the discussion included an analysis of cumulative impacts over several years resulting from actions on other lands as well as from the development of Sandy Butte itself. The Study concluded that although the construction, maintenance, and op-

²The developer is chosen based on: (1) "[k]ind and quality of services to be offered"; (2) "[f]inancial capability"; (3) "[e]xperience and qualifications in relation to the proposed use"; (4) "[a]bility to perform according to permit terms including Federal, State, and local laws"; and (5) "[c]ontrol of private lands necessary to develop the proposed use." U. S. Dept. of Agriculture, Forest Service, Final EIS, Early Winters Alpine Winter Sports Study 4 (1984).

³The 1970 report was entitled the North Cascades Winter Sports Study. Its conclusion that Sandy Butte is well suited for development as an alpine ski resort was repeated in the Joint Plan for the North Cascades area, which was issued by the Park Service and the Forest Service in 1974. See App. to Pet. for Cert. 23a.

⁴See 98 Stat. 299. In the Senate Committee Report explaining the decision to exclude Sandy Butte from the wilderness designation in the bill, the Committee made this quite remarkable comment for a legislative committee: "The Forest Service and the Department of Agriculture are directed to allow the evaluation process for the Sandy Butte development to proceed without additional delay . . ." S. Rep. No. 98-461, p. 11 (1984).

eration of the proposed ski area "will not have a measurable effect on existing or future air quality," the off-site development of private land under all five alternatives—including the "no action" alternative—"will have a significant effect on air quality during severe meteorological inversion periods." *Id.*, at 65. The burning of wood for space heat, the Study explained, would constitute the primary cause of diminished air quality and the damage would increase incrementally with each of the successive levels of proposed development. *Ibid.* The Study cautioned that without efforts to mitigate these effects, even under the "no action" alternative, the increase in automobile, fireplace, and wood stove use would reduce air quality below state standards, but added that "[t]he numerous mitigation measures discussed" in the Study "will greatly reduce the impacts presented by the model." *Id.*, at 67.

In its discussion of air quality mitigation measures, the EIS identified actions that could be taken by the county government to mitigate the adverse effects of development, as well as those that the Forest Service itself could implement at the construction stage of the project. The Study suggested that Okanogan County develop an air quality management plan, requiring weatherization of new buildings, limiting the number of wood stoves and fireplaces, and adopting monitoring and enforcement measures.⁴ In addition, the Study suggested that the Forest Service require that the master plan include procedures to control dust and to comply with smoke management practices.⁴

In its discussion of adverse effects on area wildlife, the EIS concluded that no endangered or threatened species would be affected by the proposed development and that the only impact on sensitive species was the probable loss of a pair of spotted owls and their progeny. *Id.*, at 75. With regard to

other wildlife, the Study considered the impact on 75 different indigenous species and predicted that within a decade after development vegetational change and increased human activity would lead to a decrease in population for 31 species, while causing an increase in population for another 24 species on Sandy Butte. *Ibid.* Two species, the pine marten and nesting goshawk, would be eliminated altogether from the area of development. *Ibid.*

In a comment in response to the draft EIS, the Washington Department of Game voiced a special concern about potential losses to the State's largest migratory deer herd, which uses the Methow Valley as a critical winter range and as its migration route. *Id.*, at Appendix D (letter of November 18, 1982). The state agency estimated that the total population of mule deer in the area most likely to be affected was "better than 30,000 animals" and that "the ultimate impact on the Methow deer herd could exceed a 50 percent reduction in numbers." *Ibid.* The agency asserted that "Okanogan County residents place a great deal of importance on the area's deer herd." *Ibid.* In addition, it explained that hunters had "harvested" 3,247 deer in the Methow Valley area in 1981, and that in 1980 hunters on average spent \$1,980 for each deer killed in Washington, they had contributed over \$6 million to the State's economy. Because the deer harvest is apparently proportional to the size of the herd, the state agency predicted that "Washington business can expect to lose over \$3 million annually from reduced recreational opportunity." *Ibid.* The Forest Service's own analysis of the impact on the deer herd was more modest. It first concluded that the actual operation of the ski hill would have only a "minor" direct impact on the herd,⁵ but then recognized that the off-site effect of the development "would noticeably reduce numbers of deer in the Methow [Valley] with any alternative." *Id.*, at 76. Although its estimate indicated a possible 15 percent decrease in the size of the herd, it summarized the State's contrary view in the text of the EIS, and stressed that off-site effects are difficult to estimate due to uncertainty concerning private development. *Ibid.*

As was true of its discussion of air quality, the EIS also described both on-site and off-site mitigation measures. Among possible on-site mitigation possibilities, the Study recommended locating runs, ski lifts, and roads so as to minimize interference with wildlife, restricting access to selected roads during fawning season, and further examination of the effect of the development on mule deer migration routes.⁴

⁴*Id.*, at 76. The Study predicted that development of the ski area would diminish available summer range for the deer by between five and ten percent, depending on the level of development chosen. Moreover, it recognized that although disturbance would be greatest during fawning season, "[f]awning would not be adversely affected with implementation of mitigation measures." *Id.*, at 75-76.

⁵The EIS listed the following opportunities for on-site mitigation:

- "a) Locate runs, lifts, roads, and other facilities to minimize disturbance of blue grouse wintering areas (primarily ridgetops).
- "b) Leave dead and defective trees standing in timbered areas where skier safety can be protected.
- "c) Restrict activities and travel on selected roads during the fawning season (June).
- "d) Locate new service roads away from water sources and fawning cover.
- "e) Evaluate impact to mule deer migration routes in review of Master Plan.
- "f) Design and harvest nearby, off-site timber sales to retain adequate travel corridors, foraging, roosting, and nesting sites for spotted owls.
- "g) Protect other likely migration routes between summer and winter habitats for spotted owls.
- "h) Restrict other activities within the spotted owls home range.
- "i) Springs and riparian areas in the permit area will be protected as water sources and wildlife habitat. . . ." *Id.*, at 16-17.

The Study further noted that additional mitigation measures would be required

⁴The Study recommended the following action:

"1. The County will initiate the formation of an Air Quality Control Authority or similar administrative structure pursuant to Washington State statutes.

"2. The County will develop an airshed management plan that incorporates strategies which will result in ambient air quality standards for the Methow Valley that are stricter than existing State standards. As part of the airshed management plan, the following mitigation measures will be considered:

"—Development of land use codes specifically addressing site development and project design directed at energy efficiency and air pollution control.

"—Requiring all new construction to be fully weatherized to reduce the need for supplemental heating sources (i. e., wood) beyond the central facilities heating needs.

"—Restricting the number of fireplaces and wood stoves. At a minimum, few fireplaces should be allowed in accommodations constructed for tourist use.

"—Encouraging the use of alternative, non-polluting energy sources.

"—Establishing a certification mechanism for wood stoves and fireplace inserts.

"—Establishing an air pollution monitoring system specifically designed to alert local residents to impending pollution episodes and to record long term changes in air quality levels. Such long term data will be used to evaluate the success or failure of the mitigation and impose more stringent measures if standards are violated.

"—Development of enforcement measures to assure that standards will be met." Early Winters Study 68-69.

⁵The Study recommended the following on-site, air-quality mitigation measures:

"1. The Master Plan will require prompt revegetation of all disturbed areas and the mandatory application of dust control measures (e. g., rock-ing and oiling) on unpaved construction roads.

"2. The construction phase will follow established Forest Service/State of Washington smoke management practices identified in the Washington State Smoke Management Plan. The Master Plan will identify opportunities for utilization of waste wood, generated by the project, thereby minimizing open burning." *Id.*, at 76.

Off-site options discussed in the Study included the use of zoning and tax incentives to limit development on deer winter range and migration routes, encouragement of conservation easements, and acquisition and management by local government of critical tracts of land.⁹ As with the measures suggested for mitigating the off-site effects on air quality, the proposed options were primarily directed to steps that might be taken by state and local government.

Ultimately, the Early Winters Study recommended the issuance of a permit for development at the second highest level considered—a 16-lift ski area able to accommodate 8,200 skiers at one time. On July 5, 1984, the Regional Forester decided to issue a special use permit as recommended by the Study.¹⁰ App. to Pet. for Cert. 63a. In his decision, the Regional Forester found that no major adverse effects would result directly from the federal action, but that secondary effects could include a degradation of existing air quality and a reduction of mule deer winter range. *Id.*, at 67a. He therefore directed the supervisor of the Okanogan National Forest, both independently and in cooperation with local officials, to identify and implement certain mitigating measures. *Id.*, at 67a-70a.

Four organizations (respondents)¹¹ opposing the decision to issue a permit appealed the Regional Forester's decision to the Chief of the Forest Service. See 36 CFR § 211.18 (1988). After a hearing, he affirmed the Regional Forester's decision. Stressing that the decision, which simply approved the general concept of issuing a 30-year special use permit for development of Sandy Butte, did not authorize construction

of a particular ski area and, in fact, did not even act on MRI's specific permit application, he concluded that the EIS's discussion of mitigation was "adequate for this stage in the review process." App. to Pet. for Cert. 59a.

Thereafter, respondents brought this action under the Administrative Procedure Act, 5 U. S. C. §§ 701-706, to obtain judicial review of the Forest Service's decision. Their principal claim was that the Early Winters Study did not satisfy the requirements of NEPA, 42 U. S. C. § 4332.¹² With the consent of the parties, the case was assigned to a United States Magistrate. See 28 U. S. C. § 636(c). After a trial, the Magistrate filed a comprehensive written opinion and concluded that the EIS was adequate. App. to Pet. for Cert. 20a. Specifically, he found that the EIS had adequately disclosed the adverse impacts on the mule deer herd and on air quality and that there was no duty to prepare a "worst case analysis" because the relevant information essential to a reasoned decision was available. *Id.*, at 39a-44a. In concluding that the discussion of off-site, or secondary, impacts was adequate, the Magistrate stressed that courts apply a "rule of reason" in evaluating the adequacy of an EIS and "take the uncertainty and speculation involved with secondary impacts into account in passing on the adequacy of the discussion of secondary impacts." *Id.*, at 38a. On the subject of mitigation, he explained that "[m]ere listing . . . is generally inadequate to satisfy the CEQ regulations," but found that "in this EIS there is more—not much more—but more than a mere listing of mitigation measures." *Id.*, at 41a. Moreover, emphasizing the tiered nature of the Forest Service's decisional process, the Magistrate noted that additional mitigation strategies would be included in the master plan, that the Forest Service continues to develop mitigation plans as further information becomes available, and that the Regional Forester's decision conditioned issuance of the special use permit on execution of an agreement between the Forest Service, the State of Washington, and Okanogan County concerning mitigation. *Id.*, at 41a-42a, 45a.

Concluding that the Early Winters Study was inadequate as a matter of law, the Court of Appeals reversed. *Methow Valley Citizens Council v. Regional Forester*, 833 F. 2d 810 (CA9 1987). The court held that the Forest Service could not rely on "the implementation of mitigation measures" to support its conclusion that the impact on the mule deer would be minor "since not only has the effectiveness of these mitigation measures not yet been assessed, but the mitigation measures themselves have yet to be developed." *Id.*, at 817. It then added that if the agency had difficulty obtaining adequate information to make a reasoned assessment of the environmental impact on the herd, it had a duty to make a so-called "worst case analysis." Such an analysis is "formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action." *Save our Ecosystems*, 747 F. 2d, at 1244-45 (quoting 46 Fed. Reg. 18032 (1981)). *Ibid.*

The court found a similar defect in the EIS's treatment of air quality. Since the EIS made it clear that commercial development in the Methow Valley will result in violations of state air quality standards unless effective mitigation measures are put in place by the local governments and the private developer, the Court of Appeals concluded that the Forest Service had an affirmative duty to "develop the necessary mitigation measures before the permit is granted." *Id.*, at

⁹The Study listed the following steps that state and local government might take to mitigate off-site effects:

"(1) Limit development on deer winter range and along migration routes through rezoning options, tax incentives and other means.

"Since loss of winter range and disruption of migration routes are primarily concerns which will cause declines in deer numbers, protection of vital portions will be assured prior to a ski hill development. Rezoning is essential and will occur, to include County rezoning options such as:

"(a) The Methow Review District which is currently applied to obtain certain densities, open space, and design.

"(b) Other optional zone districts such as Conservation Districts which are available for amending existing zoning and protecting environmentally sensitive lands.

"Other measures are probably needed, and which could occur, include:

"(c) Conservation Easements between private individuals and trust agencies (e. g., Washington Department of Game) should be encouraged. Benefits would occur to both the landowner in the form of tax breaks, and the wildlife resource in the form of undeveloped, status quo habitat.

"(d) Acquisition of certain land tracts essential to migrating deer may be needed to insure continued passage. These lands would be administered by a wildlife management agency (e. g., Washington Department of Game).

"(2) Minimize potential road kills of deer and other wildlife by use of warning signs, speed limits, and roadway design where wildlife crossings and high speed driving occur. Responsibility rests with the appropriate agency's road department (i. e., County, State, Federal) in the Methow Valley.

"(3) Protect wildlife from free-ranging dogs through County ordinances that are enforceable.

"(4) Through zoning, discourage development in riparian areas." *Id.*, at 77-78.

¹⁰His decision did not identify a particular developer, but rather simply authorized the taking of competitive bids. App. to Pet. for Cert. 63a. It was not until July 21, 1986, almost one month after the District Court affirmed the Forester's decision, that a special use permit was issued to MRI.

¹¹The four organizations were Methow Valley Citizens Council, Washington State Sportsmen Council, Washington Environmental Council, and the Cascade Chapter, Sierra Club. These organizations, with the exception of Washington State Sportsmen's Council, are respondents herein. MRI, the permittee, is also a respondent in this Court, but since it supports the Government's action, we shall use the term "respondents" to refer only to the opponents of the Early Winters proposal.

¹²Respondents also alleged violations of the National Forest Management Act of 1976, 16 U. S. C. §§ 1600-1614 and the Clean Air Act, 42 U. S. C. §§ 7401-7626. These claims were dismissed on petitioner's motion for summary judgment and are no longer in issue. App. to Pet. for Cert. 22a.

819 (emphasis in original) (footnote omitted). The court held that this duty was imposed by both the Forest Service's own regulations and § 102 of NEPA. *Ibid.* It read the statute as imposing a substantive requirement that "action be taken to mitigate the adverse effects of major federal actions." *Ibid.* (quoting *Stop H-3 Assn. v. Brinegar*, 389 F. Supp. 1102, 1111 (Haw. 1974), rev'd on other grounds, 533 F. 2d 434 (CA9), cert. denied, 429 U. S. 999 (1976)). For this reason, it concluded that "an EIS must include a fair discussion of measures to mitigate the adverse environmental impacts of a proposed action." 833 F.2d, at 819. The Court of Appeals concluded by quoting this paragraph from an opinion it had just announced:

"The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement." *Id.*, at 820 (quoting *Oregon Natural Resources Council v. Marsh*, 832 F. 2d 1489, 1493 (CA9 1987), rev'd, *post*, p. —).

II

Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality. 83 Stat. 852, 42 U. S. C. § 4331. To ensure that this commitment is "infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures." 115 Cong. Rec. 40416 (remarks of Sen. Jackson). See also S. Rep. No. 91-296, p. 19 (1969); *Andrus v. Sierra Club*, 442 U. S. 347, 350 (1979); *Kleppe v. Sierra Club*, 427 U. S. 390, 409, and n. 18 (1976). Section 102 thus, among other measures

"directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,
 "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 83 Stat. 853, 42 U. S. C. § 4332.

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. See *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U. S. 87, 97 (1983); *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U. S. 139, 143 (1981). It ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. See *ibid.*; *Kleppe, supra*, at 409. Moreover, the strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies "to respond to the needs of environmental quality." 115 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie).

Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," *Baltimore Gas & Electric Co., supra*, at 97, and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, Science and the National Environmental Policy Act 72 (1982). Thus, in this case the final draft of the Early Winters Study reflects not only the work of the Forest Service itself, but also the critical views of the Washington State Department of Game, the Methow Valley Citizens Council, and Friends of the Earth, as well as many others, to whom copies of the draft Study were circulated.⁸ See Early Winters Study, Appendix D. Moreover, with respect to a development such as Sandy Butte, where the adverse effects on air quality and the mule deer herd are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.

The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "hard look" at environmental consequences,⁹ *Kleppe, supra*, at 410, n. 21 (citation omitted), and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U. S. 223, 227-228 (1980) (*per curiam*); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 558 (1978). If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. See *ibid.*; *Strycker's Bay Neighborhood Council, Inc., supra*, at 227-228; *Kleppe*, 427 U. S., at 410, n. 21. In this case, for example, it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd. Other statutes may impose substantive environ-

⁸The CEQ regulations require that, after preparing a draft EIS, the agency request comments from other federal agencies, appropriate state and local agencies, affected Indian tribes, any relevant applicant, the public generally, and, in particular, interested or affected persons or organizations. 40 CFR § 1503.1 (1987). In preparing the final EIS, the agency must "discuss at appropriate points . . . any responsible opposing view which was not adequately discussed in the draft statement and [must] indicate the agency's response to the issue raised." § 1502.9. See also

mental obligations on federal agencies," but NEPA merely prohibits uninformed—rather than unwise—agency action.

To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.¹⁴ The requirement that an EIS contain a detailed discussion of possible mitigation measures flows from both the language of the Act and, more expressly, from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 U. S. C. § 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. See D. Mandelker, *NEPA Law and Litigation* § 10:38 (1984). More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. An adverse effect that can be fully remedied by, for example, an inconsequential public expenditure is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast public and private resources. Recognizing the importance of such a discussion in guaranteeing that the agency has taken a "hard look" at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).

There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. In this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they

consider necessary.¹⁵ Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. Cf. *Baltimore Gas & Electric Co.*, 462 U. S., at 100 ("NEPA does not require agencies to adopt any particular internal decisionmaking structure").

We thus conclude that the Court of Appeals erred, first, in assuming that "NEPA requires that action be taken to mitigate the adverse effects of major federal actions," 833 F. 2d, at 819 (quoting *Stop H-3 Assn. v. Brinegar*, 389 F. Supp., at 1111), and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action," 833 F.2d, at 819 (emphasis supplied).

III

The Court of Appeals also concluded that the Forest Service had an obligation to make a "worst case analysis" if it could not make a reasoned assessment of the impact of the Early Winters project on the mule deer herd. Such a "worst case analysis" was required at one time by CEQ regulations, but those regulations have since been amended. Moreover, although the prior regulations may well have expressed a permissible application of NEPA, the Act itself does not mandate that uncertainty in predicting environmental harms be addressed exclusively in this manner. Accordingly, we conclude that the Court of Appeals also erred in requiring the "worst case" study.

In 1977, President Carter directed that CEQ promulgate binding regulations implementing the procedural provisions of NEPA. Exec. Order No. 11991, 3 CFR 123 (1977 Comp.). Pursuant to this presidential order, CEQ promulgated implementing regulations. Under § 1502.22 of these regulations—a provision which became known as the "worst case requirement"—CEQ provided that if certain information relevant to the agency's evaluation of the proposed action is either unavailable or too costly to obtain, the agency must include in the EIS a "worst case analysis and an indication of the probability or improbability of its occurrence." 40 CFR § 1502.22 (1985). In 1986, however, CEQ replaced the "worst case" requirement with a requirement that federal agencies, in the face of unavailable information concerning a reasonably foreseeable significant environmental consequence, prepare "a summary of existing credible scientific evidence which is relevant to evaluating the . . . adverse impacts" and prepare

¹⁴See, e.g., the Endangered Species Act of 1973, 87 Stat. 892, 16 U. S. C. § 1536(a)(2) (requiring that every federal agency "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species"); the Department of Transportation Act of 1966, 49 U. S. C. § 303 (Secretary of Transportation may approve "use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge . . . or land of an historic site . . . only if . . . there is no prudent and feasible alternative to using that land; and . . . the program or project includes all possible planning to minimize harm to the [area] resulting from the use").

¹⁵CEQ regulations define "mitigation" to include:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments." 40 CFR § 1508.20 (1987).

¹⁶After the Early Winters Study was completed and distributed, the Forest Service, the Environmental Protection Agency, the State Department of Ecology, and Okanogan County entered into a memorandum of understanding (MOU) committing various parties to take certain actions in mitigation. App. to Pet. for Cert. 45a-46a. In concluding that this agreement did not satisfy the mitigation discussion requirement, the Court of Appeals wrote:

"[T]he MOU offers no assurance whatsoever that the vague mitigation objectives it features—performance of almost all of which would be the responsibility of third parties to the permit process—would ever in fact be achieved or even that effective measures would ever be designed (let alone implemented), if the Early Winters development were to proceed. Cf. *Preservation Coalition v. Pierce*, 667 F. 2d 851, 860 (CA9 1982) ("Since many of the 'mitigations' proposed by the agency were . . . potential actions to be taken by [third parties] reliance on them . . . was improper."). *Methow Valley Citizens Council v. Regional Forester*, 833 F. 2d 810, 819-20 (CA9 1987).

Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures.

an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 CFR §1502.22(b) (1987). The amended regulation thus "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'" 50 Fed. Reg. 32237 (1985).

The Court of Appeals recognized that the "worst case analysis" regulation has been superseded, yet held that "[t]his rescission . . . does not nullify the requirement . . . since the regulation was merely a codification of prior NEPA case law." 833 F. 2d, at 817, n. 11. This conclusion, however, is erroneous in a number of respects. Most notably, review of NEPA case law reveals that the regulation, in fact, was not a codification of prior judicial decisions. See Note, 86 Mich. L. Rev. 777, 798, 800-802, 813-814 (1988). The cases cited by the Court of Appeals ultimately rely on the Fifth Circuit's decision in *Sierra Club v. Sigler*, 695 F. 2d 957 (1983). *Sigler*, however, simply recognized that the "worst case analysis" regulation codified the "judicially created principl[e]" that an EIS must "consider the probabilities of the occurrence of any environmental effects it discusses." *Id.*, at 970-971. As CEQ recognized at the time it superseded the regulation, case law prior to the adoption of the "worst case analysis" provision did require agencies to describe environmental impacts even in the face of substantial uncertainty, but did not require that this obligation necessarily be met through the mechanism of a "worst case analysis." See 51 Fed. Reg. 15625 (1986). CEQ's abandonment of the "worst case analysis" provision, therefore, is not inconsistent with any previously established judicial interpretation of the statute.

Nor are we convinced that the new CEQ regulation is not controlling simply because it was preceded by a rule that was in some respects more demanding. In *Andrus v. Sierra Club*, 442 U. S., at 358, we held that CEQ regulations are entitled to substantial deference. In that case we recognized that although less deference may be in order in some cases in which the "administrative guidelines" conflict "with earlier pronouncements of the agency," *ibid.* (quoting *General Electric Co. v. Gilbert*, 429 U. S. 125, 143 (1976)), substantial deference is nonetheless appropriate if there appears to have been good reason for the change, 442 U. S., at 358. Here, the amendment only came after the prior regulation had been subjected to considerable criticism.¹¹ Moreover, the amendment was designed to better serve the twin functions of an EIS—requiring agencies to take a "hard look" at the consequences of the proposed action and providing important information to other groups and individuals. CEQ explained that by requiring that an EIS focus on reasonably foreseeable impacts, the new regulation "will generate information and

discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision," 50 Fed. Reg. 32237 (1985), rather than distorting the decision making process by overemphasizing highly speculative harms, 51 Fed. Reg. 15624-15625 (1986); 50 Fed. Reg. 32236 (1985). In light of this well-considered basis for the change, the new regulation is entitled to substantial deference. Accordingly, the Court of Appeals erred in concluding that the Early Winters Study is inadequate because it failed to include a "worst case analysis."¹²

IV

The Court of Appeals also held that the Forest Service's failure to develop a complete mitigation plan violated the agency's own regulations. 833 F. 2d, at 814, n. 3, 819, and n. 14. Those regulations require that an application for a special use permit include "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project," 36 CFR §251.54(e)(4) (1988), and that "[e]ach special use authorization . . . contain . . . [t]erms and conditions which will . . . minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment," §251.56(a)(1)(ii). Applying those regulations, the Court of Appeals concluded that "[s]ince the mitigation 'plan' here at issue is so vague and undeveloped as to be wholly inadequate, . . . the Regional Forester's decision to grant the special use permit could be none other than arbitrary, capricious and an abuse of discretion." 833 F. 2d, at 814, n. 3. We disagree.

The Early Winters Study made clear that on-site effects of the development will be minimal and will be easily mitigated. For example, the Study reported that "[i]mpacts from construction, maintenance and operation of the proposed 'hill' development on National Forest land will not have a measurable effect on existing or future air quality," Early Winters Study 65, and that "[t]he effect development and operation of the ski hill would have on deer migration should be minor," *id.*, at 76. Given the limited on-site effects of the proposed development, the recommended ameliorative steps—which, for example, called for "prompt revegetation of all disturbed areas," *id.*, at 69, and suggested locating "new service roads away from water resources and fawning cover," *id.*, at 16—cannot be deemed overly vague or underdeveloped.

The Court of Appeals' conclusion that the Early Winters Study's treatment of possible mitigation measures is inadequate apparently turns on the court's review of the proposed off-site measures. Although NEPA and CEQ regulations require detailed analysis of both on-site and off-site mitigation measures, see, e. g., 40 CFR §1502.16(b) (1987), there is no basis for concluding that the Forest Service's own regulations must also be read in all cases to condition issuance of a special use permit on consideration (and implementation) of off-site mitigation measures. The Forest Service regulations were promulgated pursuant to a broad grant of authority "to permit the use and occupancy of suitable areas of land within the national forests . . . for the purpose of construct-

¹¹ As CEQ explained:

"Many respondents to the Council's Advance Notice of Proposed Rule-making pointed to the limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse 'worst case' by adding an additional variable to a hypothetical scenario. Experts in the field of risk analysis and perception stated that the 'worst case analysis' lacks defensible rationale or procedures, and that the current regulatory language stands 'without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis . . .', Slovic, P., February 1, 1985, Response to ANPRM.

"Moreover, in the institutional context of litigation over EIS(s) the 'worst case' rule has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decisionmakers and divert the EIS process from its intended purpose." 50 Fed. Reg. 32236 (1985).

¹² *Amicus curiae* Center for Environmental Education argues that the Court of Appeals properly applied the "worst case analysis" provision because the new regulation only applies to "environmental impact statements for which a Notice of Intent (40 CFR §1508.22) (was) published . . . on or after May 27, 1986." 40 CFR §1502.22(c) (1987). The grandfather clause of the regulation, however, further specifies that agencies have the option of applying the old or new regulation to EIS's commenced prior to May 27, 1986, that are still "in progress" after that date. *Id.* Because the Court of Appeals ordered that the Forest Service revise the Early Winters Study, and because such a revision is necessary even though we hold today that the Court of Appeals erred in part, the Study remains "in progress" and thus the Forest Service is entitled to rely on the new regulation.

ing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety," 16 U. S. C. §497, and were not based on the more direct congressional concern for environmental quality embodied in NEPA.¹⁹ See H. R. Rep. No. 99-709, pt. 1, p. 2 (1986). As is clear from the text of the permit issued to MRI, the Forest Service has decided to implement its mitigation regulations by imposing appropriate controls over MRI's actual development and operation during the term of the permit.²⁰ It was surely not unreasonable for the Forest Service in this case to have construed those regulations as not extending to actions that might be taken by Okanogan County or the State of Washington to ameliorate the off-site effects of the Early Winters project on air quality and the mule deer herd. This interpretation of the agency's own regulation is not "plainly erroneous or inconsistent with the regulation," and is thus controlling. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). See also *Lyng v. Payne*, 476 U. S. 926, 939 (1986); *Udall v. Tallman*, 380 U. S. 1, 16-17 (1965).

V

In sum, we conclude that NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts and does not require a "worst case analysis." In addition, we hold that the Forest Service has adopted a permissible interpretation of its own regulations. The judgment of the Court of Appeals is accordingly reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, concurring.

I write separately to highlight the Court's observation that "one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." *Ante*, at 17.

CHARLES FRIED, Solicitor General (ROGER J. MARZULLA, Asst. Atty. Gen., LAWRENCE G. WALLACE, Dpty. Sol. Gen., JEFFREY P. MINEAR, Asst. to the Sol. Gen., PETER R. STEENLAND JR., and VICKI L. PLAUT, Justice Dept. attys., on the briefs) for petitioners; DAVID A. BRICKLIN, Seattle, Wash. (BRICKLIN & GENDLER, MICHAEL W. GENDLER, GLENN J. AMSTER, HILLS, CLARK, MARTIN & PETERSON, on the briefs) for respondents.

¹⁹ In October 1986, after the Forest Service issued its special use permit to MRI, Congress substantially revised the process for authorizing use of lands within the National Forest system for nordic and alpine ski operations. See National Forest Ski Area Permit Act of 1986, 100 Stat. 3000, 16 U. S. C. §497b (1982 ed., Supp. V). These new procedures are not in issue in this case.

²⁰ The special use permit provides, in part, that the permittee "shall submit plans to reasonably restore or protect all areas disturbed during construction," and that "[e]ach stage of construction will be considered complete only upon completion and acceptance of the successful seeding and planting in the vicinity of construction," Special Use Authorization 17 (July 21, 1986); that the permittee shall prevent soil erosion "by carrying out the provisions of the erosion control plan prepared by the holder and approved by the authorized officer," *id.*, at 19; that "[p]esticides may not be used to control undesirable woody and herbaceous vegetation, aquatic plants, insects, rodents, etc., without the prior written approval of the Forest Service," *ibid.*; and that "[o]pen fireplaces shall be equipped with spark screens," *id.*, at 20.

No. 87-1704

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
ET AL., PETITIONERS v. OREGON NATURAL
RESOURCES COUNCIL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Syllabus

No. 87-1704. Argued January 9, 1989—Decided May 1, 1989

The Elk Creek Dam is part of a three-dam project designed to control the water supply in Oregon's Rogue River Basin. The Army Corps of Engineers (Corps) completed an Environmental Impact Statement (EIS) for the Elk Creek project in 1971, and, in 1980, released its Final Environmental Impact Statement Supplement No. 1 (FEISS). Since the Rogue River is a premier fishing ground, the FEISS paid special heed to water quality, fish production, and angling and predicted that the Elk Creek Dam would have no major effect on fish production, but that the effect of the Lost Creek and Elk Creek Dams on turbidity might, on occasion, impair fishing. After reviewing the FEISS, the Corps' Division Engineer decided to proceed with the project and, in 1985, Congress appropriated funds for construction of the dam, now one-third completed. Respondents, four Oregon non-profit corporations, filed an action in the District Court to enjoin construction of the Elk Creek Dam, claiming that the Corps had violated the National Environmental Policy Act of 1969 (NEPA) by failing, among other things, to describe adequately the environmental consequences of the project; to include a "worst case analysis"; and to prepare a second supplemental EIS to review information in two documents developed after 1980. The first—the Cramer Memorandum—is an internal memorandum, prepared by two Oregon Department of Fish and Wildlife (ODFW) biologists based on a draft ODFW study on the effects of the Lost Creek Dam, suggesting that the Elk Creek Dam will adversely affect downstream fishing; and the second is a United States Soil Conservation Service (SCS) soil survey containing information that might be taken to indicate greater downstream turbidity than did the FEISS. The District Court denied relief on all claims and held, *inter alia*, that the Corps' decision not to prepare a second supplemental EIS to address the new information was reasonable. The Court of Appeals reversed, holding, among other things, that the FEISS was defective because it did not include a complete mitigation plan and "worst case analysis," and, with regard to the failure to prepare a supplemental EIS, that the ODFW and SCS documents brought to light significant new information that was probably accurate and that the Corps' experts failed to evaluate the new information with sufficient care.

Held:

1. The Court of Appeals' conclusions that the FEISS was defective because it did not include a complete mitigation plan and a "worst case analysis" are erroneous for the reasons stated in *Robertson v. Methow Valley Citizens Council*, *ante*.

2. The Corps' decision that the FEISS need not be supplemented is not arbitrary and capricious and should not be set aside.

(a) An agency must apply a "rule of reason" and prepare a supplemental environmental impact statement if there remains "major Federal action" to occur, and if the new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered. Although not expressly addressed in NEPA, such a duty is supported by NEPA's approach to environmental protection and its manifest concern with preventing uninformed action as well as by Council on Environmental Quality and Corps regulations, both of which make plain that at times supplementation is required.

(b) Court review of the Corps' decision is controlled by the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U. S. C. §706(2)(a). Respondents' supposition that the determination that new information is "significant" is either a question of law or of ultimate fact and, thus, "deserves no deference" on review is incorrect since the resolution of this dispute involves primarily issues of fact concerning contentions that the new information is accurate and undermines the FEISS' conclusions, and that the Corps' review was incomplete, inconclusive, or inaccurate. Because analysis of the documents requires a high degree of technical expertise, this Court must defer to the informed discretion of the responsible agency. However, courts should not defer to an agency without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the new information.

(c) The Corps conducted a reasoned evaluation of the relevant information in a formal Supplemental Information Report (SIR) and

reached a decision that was not arbitrary and capricious. The Corps carefully scrutinized the Cramer Memorandum—which did not reflect the neutral stand of ODFW's official position—and, in disputing its accuracy and significance, hired two independent experts who found significant fault in the methodology and conclusions of the underlying draft ODFW study. Although the SIR did not expressly comment on the SCS survey, in light of in-depth studies conducted in 1974 and 1979, its conclusion that "turbidity effects are not expected to differ from those described in the 1980 EISS" provided a legitimate reason for not preparing a supplemental FEISS to discuss turbidity.

532 F. 2d 1489, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

JUSTICE STEVENS delivered the opinion of the Court.

This case is a companion to *Robertson v. Methow Valley Citizens Council*, ante, p. —. It arises out of a controversial decision to construct a dam at Elk Creek in the Rogue River Basin in southwest Oregon. In addition to the question whether an Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 et seq., must contain a complete mitigation plan and a "worst case analysis," which we answered in *Robertson*, it presents the question whether information developed after the completion of the EIS requires that a supplemental EIS be prepared before construction of the dam may continue.

I

In the 1930's in response to recurring floods in the Rogue River Basin, federal and state agencies began planning a major project to control the water supply in the Basin.¹ See, e. g., ch. 346, 49 Stat. 439. In 1961 a multi-agency study recommended the construction of three large dams: the Lost Creek Dam on the Rogue River, the Applegate Dam on the Applegate River, and the Elk Creek Dam on the Elk Creek near its confluence with the Rogue River. See H. R. Doc. No. 566, 87th Cong., 2d Sess., 7-89 (1962). The following year, Congress authorized the Army Corps of Engineers (the Corps) to construct the project in accordance with the recommendations of the 1961 study. See Flood Control Act of 1962, Pub. L. 87-874, § 203, 76 Stat. 1192-1193. The Lost Creek Dam was completed in 1977 and the Applegate Dam was completed in 1981.

Plans for the Elk Creek Dam describe a 238-foot-high concrete structure that will control the run-off from 132-square-miles of the 135-square-mile Elk Creek watershed. When full, the artificial lake behind the dam will cover 1,290 acres of land, will have an 18-mile shoreline, and will hold 101,000 acre-feet of water. The dam will cost approximately \$100 million to construct and will produce annual benefits of almost \$5 million. It will be operated in coordination with the nearby Lost Creek Dam, where the control center for both dams will be located. Its "multiport" structure, which will permit discharge of water from any of five levels, makes it possible to regulate, within limits, the temperature, turbidity,² and volume of the downstream flow. Although primar-

ily designed to control flooding along the Rogue River, additional project goals include enhanced fishing, irrigation, and recreation.

In 1971, the Corps completed its EIS for the Elk Creek portion of the three-dam project and began development by acquiring 26,000 acres of land and relocating residents, a county road, and utilities. Acknowledging incomplete information, the EIS recommended that further studies concerning the project's likely effect on turbidity be developed. The results of these studies were discussed in a draft supplemental EIS completed in 1975. However, at the request of the Governor of Oregon, further work on the project was suspended and the supplemental EIS was not filed to make it possible to analyze the actual consequences of the construction of the Lost Creek Dam, which was nearing completion, before continuing with the Elk Creek project. Following that analysis and the receipt of a statement from the Governor that he was "extremely interested in pursuing construction of the Elk Creek Dam,"³ the Corps completed and released its Final Environmental Impact Statement, Supplement No. 1, in December 1980.

Because the Rogue River is one of the Nation's premier fishing grounds, the FEISS paid special heed to the effects the dam might have on water quality, fish production, and angling. In its chapter on the environmental effects of the proposed project, the FEISS explained that water quality studies were prepared in 1974 and in 1979 and that "[w]ater temperature and turbidity have received the most attention." FEISS 33. Using computer simulation models, the 1974 study predicted that the Elk Creek Dam might, at times, increase the temperature of the Rogue River by one to two degrees Fahrenheit and its turbidity by one to three JTU's.⁴ *Ibid.* The 1979 study took a second look at the potential effect of the Elk Creek Dam on turbidity and, by comparing the 1974 study's predictions concerning the effects of the Lost Creek Dam with actual measurements taken after that dam became operational, it "increased technical confidence in the mathematical model predictions . . . and reinforced the conclusions of the 1974 [study]." *Id.*, at 33-34. Based on these studies, the FEISS predicted that changes in the "turbidity regime" would not have any major effect on fish production,⁵ but that the combined effect of the Lost Creek and Elk Creek

in straight lines. Turbidity is caused by the presence of suspended matter." *Id.*, App. E, p. 3. This optical property of water is most commonly measured using the Jackson Turbidity Unit (JTU). "A general rule of thumb guideline is that 5 JTU is the limit for drinking water, 10 JTU impairs flyfishing, 20 JTU impairs other fishing methods, and long-term 50 JTU water alters fish behavior." *Id.*, at 21.

³See Letter from Governor Atiyeh of August 1, 1979, reprinted in *id.*, App. F.

⁴See n. 2, *supra*.

⁵The FEISS explained that suspended sediments can reduce fish production by clogging or injuring gill structures, by causing abrasions, by reducing food supply, and by making it more difficult for fish to locate what food is available by reducing visibility. FEISS 37. The Study nonetheless concluded:

"Much of the heavy suspended materials will settle out in Elk Creek reservoir so no downstream effect of siltation is expected. Average annual downstream turbidity will be the same with or without the project.

"No major adverse effect on fish production in the Rogue River is expected as a result of the changes in the turbidity regime as a result of the Elk Creek project. Minor effects on production can be expected in the reach of Elk Creek between the project and its confluence with the Rogue River during normal years when turbidity will be higher than without the project. However, the project will also provide periods when turbidity will be lower than without the project. The multilevel withdrawal capability which will be built into the Elk Creek project will provide the ability to minimize turbidity effects on fish production." *Id.*

¹As described by the Army Corps of Engineers:

"Lying within the southwest corner of Oregon, the Rogue River Basin drains a 5,060 square mile area in Jackson, Josephine, Coos, and Klamath Counties, as well as small portions of Del Norte and Siskiyou Counties in California Rogue River passes through vastly different environmental settings in the course of its journey from its upper reaches near Crater Lake to the Pacific Ocean at Gold Beach, Oregon. The climatological factors and other characteristics of the basin are such that floods are frequently experienced." U. S. Army Corps of Engineers, Portland District, Elk Creek Lake Environmental Impact Statement, Supplement No. 1, p. 1 (hereinafter FEISS).

²Turbidity is an expression of the optical property of water which causes light to be scattered and absorbed rather than transmitted through

Dams on the turbidity of the Rogue River might, on occasion, impair fishing.⁴

Other adverse effects described by the FEISS include the displacement of wildlife population—including 100 black-tailed deer and 17 elk—and the loss of forest land and vegetation resulting from the inundation of 1,290 acres of land with the creation of the artificial lake. *Id.*, at 26, 38, 46. Most significantly, it is perfectly clear that the dam itself would interfere with the migration and spawning of a large number of anadromous fish,⁵ but this effect has been mitigated by the construction of a new hatchery.⁶ *Id.*, at 35. Finally, the FEISS found that no endangered or threatened species would be affected by the project. *Id.*, at 27.

On February 19, 1982, after reviewing the FEISS, the Corps' Division Engineer made a formal decision to proceed with construction of the Elk Creek Dam, "subject to the approval of funds by the United States Congress." App. to Pet. for Cert. 53a. In his decision, he identified the mitigation measures that had already been taken with respect to the loss of anadromous fish spawning habitat, as well as those that would "most likely" be taken to compensate for the loss of other wildlife habitat. *Id.*, at 56a-57a. He concluded that the benefits that would be realized from the project "outweigh the economic and environmental costs" and that completion would serve "the overall public interest." *Id.*, at 58a. In August 1985, Congress appropriated the necessary funds.⁷ Act of Aug. 15, 1985, Pub. L. 99-88, 99 Stat. 314. The dam is now about one-third completed and the creek has been rechanneled through the dam.

II

In October 1985, four Oregon nonprofit corporations⁸ filed this action in the United States District Court for the District

⁴The impact on fishing is described as follows:

"Increases in magnitude and extended duration of turbidity in the Rogue River are expected to result from operation of Elk Creek Dam. These increases could affect angling for salmonids in the Rogue because the ability of fish to see lures or flies is impaired by turbidity. Fly-fishing for resident trout and summer steelhead would be the most vulnerable to effects of turbidity. The fly-fishing season runs from late July into October. According to Rogue River guides and [Oregon Department of Fish and Wildlife] biologists, fly-fishing success declines at a turbidity level of 10 JTU or greater. Other fishing methods are not productive when turbidity exceeds 20 JTU. It is possible that fisheries at other times, such as in the winter, will be affected for short periods. It is not expected that outflow from Lost Creek and Elk Creek Dams would, under the worst conditions, ever cause turbidity in the Rogue River to exceed 13 JTUs during late summer and early fall." *Id.*, at 36.

A "salmonid" is a soft-finned, elongated fish that has an upturned final vertebrae. See Webster's Third International Dictionary 2004 (1981). Salmon and trout are two common salmonids. *Ibid.*

⁵"Anadromous fish are those which spend most of their life in the open sea, but which return as adults to freshwater streams . . . to spawn." *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165, 168 (1977).

⁶As described in the FEISS:

"Cole M. Rivers Fish Hatchery was constructed to mitigate the loss of anadromous fish-spawning habitat in Elk Creek, Applegate River, and the upper Rogue River, as well as to provide rainbow trout and kokanee for stocking in the reservoirs as mitigation for lost trout production. The hatchery is located about 0.2 miles downstream of Lost Creek Dam. It has a design capacity of 355,000 pounds of salmon and steelhead and 71,000 pounds of trout and kokanee. Production for Elk Creek would utilize approximately 14 percent of the total design capacity . . ." FEISS 35.

⁷In the Report accompanying this legislation the Senate Appropriations Committee stressed that it "included specific language in the legislation directing the Secretary of the Army, acting through the Chief of Engineers, to award a continuing contract for construction of the main dam for the Elk Creek Lake project." S. Rep. No. 100-82, p. 97 (1985).

⁸The four corporations, which are respondents herein, are the Oregon Natural Resources Council, the Oregon Guides and Packers Association, Inc., the Rogue Fly-Fishers, Inc., and the Rogue River Guides Association.

of Oregon seeking to enjoin construction of the Elk Creek Dam. Their principal claims were that the Corps violated NEPA by failing (1) to consider the cumulative effects of the three dams on the Rogue River Basin in a single EIS; (2) adequately to describe the environmental consequences of the project; (3) to include a "worst case analysis" of uncertain effects; and (4) to prepare a second supplemental EIS to review information developed after 1980.

After conducting a hearing on respondents' motion for a preliminary injunction, the District Judge denied relief on each of the NEPA claims.⁹ 628 F. Supp. 1557 (Ore. 1986). He first held that courts must employ a standard of "reasonableness" in reviewing an agency's compliance with NEPA. Under this standard of review, the court must "make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Id.*, at 1562 (quoting *California v. Block*, 690 F.2d 753, 761 (CA9 1982)). Applying this standard, the District Judge concluded that the Corps had, in fact, taken a sufficiently "hard look" at the cumulative effects of the three dams and at the individual effects of the Elk Creek Dam. 628 F. Supp., at 1563-1565. He also concluded that a "worst case analysis" was not required because the Corps used state-of-the-art mathematical models, thus avoiding scientific uncertainty and the need to fill gaps in information with a worst case scenario. *Id.*, at 1567. Finally, the District Court held that the Corps' decision not to prepare a second supplemental EIS to address new information was "reasonable."

The new information relied upon by respondents is found in two documents. The first, an internal memorandum prepared by two Oregon Department of Fish and Wildlife (ODFW) biologists based upon a draft ODFW study, suggested that the dam will adversely affect downstream fishing, and the second, a soil survey prepared by the United States Soil Conservation Service (SCS), contained information that might be taken to indicate greater downstream turbidity than did the FEISS. As to both documents, the District Judge concluded that the Corps acted reasonably in relying on the opinions of independent and Corps experts discounting the significance of the new information. *Id.*, at 1567-1568. At the conclusion of his opinion, the District Judge directed that the motion for preliminary relief be consolidated with trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2), and thus denied respondents' claim for a permanent injunction as well.

The Court of Appeals reversed. 832 F.2d 1489 (CA9 1987). Applying the same "reasonableness" standard of review employed by the District Court, the Court of Appeals reached a contrary conclusion, holding that the Corps had not adequately evaluated the cumulative environmental impact of the entire project. *Id.*, at 1497. Since the Corps did not seek review of that holding, we do not discuss it. The court also held that the FEISS was defective because it did not include a complete mitigation plan and because it did not contain a "worst case analysis." *Id.*, at 1493-1494, 1496-1497. These holdings were erroneous for the reasons stated in our opinion in *Robertson v. Methow Valley Citizens Council*,

⁹ Respondents' complaint also included claims under the Wild and Scenic Rivers Act (WASRA), 16 U.S.C. § 1273, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552. However, prior to the hearing, respondents withdrew their WASRA claim. In order to facilitate prompt consideration of respondents' motion for a preliminary injunction on the NEPA claims, the District Judge postponed consideration of the FOIA claim for a later date. After considering the NEPA claims, the District Judge directed the entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) to permit prompt appellate review.

ante, p. —, and will not be further discussed. With regard to the failure to prepare a second supplemental EIS, the Court of Appeals concluded that the ODFW and SCS documents brought to light "significant new information" concerning turbidity, water temperature, and epizootic¹² fish disease; that this information, although "not conclusive," is "probably accurate;" and that the Corps' experts failed to evaluate the new information with sufficient care. 832 F. 2d, at 1494-1496. The court thus concluded that a second supplemental EIS should have been prepared. Judge Wallace, writing in dissent, took issue with the majority's analysis of the new information. In his view, it was reasonable for the Corps to have concluded, based on its own expert evaluation, that the information contained in the ODFW document was inaccurate and the information contained in the SCS document was insignificant. *Id.*, at 1500 (opinion concurring in part and dissenting in part).

III

The subject of post-decision supplemental environmental impact statements is not expressly addressed in NEPA.¹³ Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose.¹⁴ NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing government and public attention on the environmental effects of proposed agency action. 42 U. S. C. § 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. See *Robertson, ante*, at —. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. *Ante*, at —. It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to

adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in *TVA v. Hill*, 437 U. S. 153, 188, n. 34 (1978), although "it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment," up to that point, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally 'significant.'"¹⁵

This reading of the statute is supported by Council on Environmental Quality (CEQ) and Corps regulations, both of which make plain that at times supplementation is required. The CEQ regulations, which we have held are entitled to substantial deference, see *Robertson, ante*, at —; *Andrus v. Sierra Club*, 442 U. S. 347, 358 (1979), impose a duty on all federal agencies to prepare supplements to either draft or final EIS's if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."¹⁶ Similarly, the Corps' own NEPA implementing regulations require the preparation of a supplemental EIS if "new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action."¹⁷

The parties are in essential agreement concerning the standard that governs an agency's decision whether to prepare a supplemental EIS. They agree that an agency should apply a "rule of reason," and the cases they cite in support of this standard explicate this rule in the same basic terms. These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized.¹⁸ To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the

¹² An epizootic disease is one that affects many animals of the same kind at the same time. See 832 F. 2d, at 1496, n. 5.

¹³ NEPA provides in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 53 Stat. 853, 42 U. S. C. § 4332.

¹⁴ Cf. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 *Ind. L. J.* 205, 247-248 (1989) (Supplementation is at times necessary because "[t]he entire efficacy of the EIS process is called into question when changes are made to a project after the publication of a final impact statement").

¹⁵ The term "action forcing" was introduced during the Senate's consideration of NEPA, see *Kleppe v. Sierra Club*, 427 U. S. 399, 409, n. 18 (1976), and refers to the notion that preparation of an EIS ensures that the environmental process set out in NEPA are "infused into the ongoing programs and actions of the Federal Government." 115 *Cong. Rec.* 10416 (1969) (statement of Sen. Jackson). See also 40 CFR § 1500.106 (1977) (Section 106.2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act).

¹⁶ In support of this latter proposition, we cited *Environmental Defense Fund v. TVA*, 468 F. 2d 1164 (CA6 1972), with approval. In that case the Court of Appeals upheld an injunction barring the continued construction of a dam on the Little Tennessee River pending the filing of an adequate EIS, notwithstanding the fact that the project was initially approved and construction commenced prior to the effective date of NEPA.

¹⁷ The CEQ regulation provides, in part:

"Agencies:

"(1) Shall prepare supplements to either draft or final environmental impact statements if:

"(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

"(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

"(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 CFR § 1502.9(c) (1987).

¹⁸ The Corps regulations provide in relevant part:

"Supplements. A Supplement to the draft or final EIS on file will be prepared whenever significant impacts resulting from changes in the proposed plan or new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action as discussed in 40 CFR 1502.9(c). A supplement to a draft EIS will be prepared, filed and circulated in the same manner as a draft EIS A supplement to a final EIS will be prepared and filed first as a draft supplement and then as a final supplement. . . ." 33 CFR § 230.111(b) (1987).

¹⁹ Compare *Warm Springs Dam Task Force v. Gribble*, 621 F. 2d 1017, 1024 (CA9 1980) (cited in *Brief for Respondents 42*) and *Ship-Hull Ass'n v. Dale*, 740 F. 2d 1142, 1163-1164 (CA5 1984) (same), cert. denied, 471 U. S. 1105 (1985), with *Chumley v. NRC*, 210 F. 3d 577, 572 F. 2d 972, 975 (D.C. 1974) (cited in *Brief for the Plaintiffs 14*) and *Friends of the River v. FERC*, 231 U. S. App. D. C. 220, 445, 720 F. 2d 1000, 1001 (D.C. 1983).

time a decision is made." On the other hand, and as the Government concedes, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. See Brief for Petitioners 36. Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affect the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.²¹ Cf. 42 U. S. C. § 4332(C).

The parties disagree, however, on the standard that should be applied by a court that is asked to review the agency's decision. The Government argues that the reviewing court need only decide whether the agency decision was "arbitrary and capricious," whereas respondents argue that the reviewing court must make its own determination of reasonableness to ascertain whether the agency action complied with the law. In determining the proper standard of review, we look to § 10e of the Administrative Procedure Act (APA), 5 U. S. C. § 706, which empowers federal courts to "hold unlawful and set aside agency action, findings, and conclusions"

if they fail to conform with any of six specified standards.²² We conclude that review of the narrow question before us of whether the Corps' determination that the FEISS need not be supplemented should be set aside is controlled by the "arbitrary and capricious" standard of § 706(2)(A).

Respondents contend that the determination of whether the new information suffices to establish a "significant" effect is either a question of law or, at a minimum, a question of ultimate fact and, as such, "deserves no deference" on review. Brief for Respondents 29. Apparently, respondents maintain that the question for review centers on the legal meaning of the term "significant" or, in the alternative, the predominantly legal question of whether established and uncontested historical facts presented by the administrative record satisfy this standard. Characterizing the dispute in this manner, they posit that strict review is appropriate under the "in accordance with law" clause of § 706(2)(A) or the "without observance of procedure required by law" provision of § 706(2)(D). We disagree.

The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. Respondents' claim that the Corps' decision not to file a second supplemental EIS should be set aside primarily rests on the contentions that the new information undermines conclusions contained in the FEISS, that the conclusions contained in the ODFW memorandum and the SCS survey are accurate, and that the Corps' expert review of the new information was incomplete, inconclusive, or inaccurate. The dispute thus does not turn on the meaning of the term "significant" or on an application of this legal standard to settled facts. Rather, resolution of this dispute involves primarily issues of fact.²³ Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U. S. 390, 412 (1976). See also *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U. S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential"). Under these circumstances, we cannot accept respondents' supposition that review is of a legal question and that the Corps' decision "deserves no deference." Ac-

²¹In other contexts we have observed:

"Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. . . . If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to re-opening." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 554-555 (1978) (quoting *ICC v. Jersey City*, 322 U. S. 503, 514 (1944)). See also *Northern Lines Meiyer Cases*, 396 U. S. 491, 521 (1970) (same).

²²CEQ regulations define the term "significantly" as follows:

"Significantly" as used in NEPA requires considerations of both context and intensity:

"(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. . . .

"(b) *Intensity*. This refers to the severity of impact. . . . The following should be considered in evaluation of intensity:

"(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

"(2) The degree to which the proposed action affects public health or safety.

"(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

"(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

"(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

"(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future consideration.

"(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. . . .

"(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.

"(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat. . . .

"(10) Whether the action threatens a violation of Federal, State, or local law. . . . 40 CFR 1500.27 (1978).

²³Title 5 U. S. C. § 706(2) provides that a reviewing court shall:

"hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute, or;

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

It is uncontested that the present controversy is not controlled by §§ 706(2)(E) or 706(2)(F), which primarily apply in cases involving either agency rulemaking or adjudication. Nor is there a claim that the Corps exceeded its constitutional authority under § 706(2)(B) or its statutory authority under § 706(2)(C).

²⁴Of course, whenever a court reviews an agency decision or action under the APA, some legal standard is involved. Otherwise, there would be "no law to apply" and thus no basis for APA review. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 410 (1971) (discussing 5 U. S. C. § 706(2)(D)).

cordingly, as long as the Corps' decision not to supplement the FEISS was not "arbitrary or capricious," it should not be set aside.²³

As we observed in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 416 (1971), in making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one." *Ibid.* When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive. On the other hand, in the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors."

IV

Respondents' argument that significant new information required the preparation of a second supplemental EIS rests on two written documents. The first of the documents is the so-called "Cramer Memorandum," an intra-office memorandum prepared on February 21, 1985 by two scientists employed by ODFW. See Cramer Memorandum 3a.²⁴ The Cramer Memorandum, in turn, relied on a draft ODFW study describing the effects of the Lost Creek Dam on fish production. The second document is actually a series of maps prepared in 1982 by SCS to illustrate the composition of soil near the Elk Creek shoreline. The information was provided to the Corps for use in managing the project. Although respondents contend that the maps contained data relevant to a prediction of the dam's impact on downstream turbidity, the maps do not purport to shed any light on that subject. Nor do they purport to discuss any conditions that had changed since the FEISS was completed in 1980. The Corps responded to the claim that these documents demonstrate the need for supplementation of the FEISS by preparing a formal Supplemental Information Report, dated Janu-

²³ Respondents note that several Courts of Appeals, including the Court of Appeals for the Ninth Circuit as articulated in this and other cases, have adopted a "reasonableness" standard of review, see, e. g., *Sierra Club v. Froehke*, 816 F. 2d 205, 210 (CA5 1987); *Enos v. Marsh*, 769 F. 2d 1363, 1373 (CA9 1985); *National Wildlife Federation v. Marsh*, 721 F. 2d 767, 782 (CA11 1983); *Massachusetts v. Watt*, 716 F. 2d 946, 948 (CA1 1983); *Monarch Chemical Works, Inc. v. Thone*, 604 F. 2d 1083, 1087-1088 (CA8 1979), and argue that we should not upset this well-settled doctrine. This standard, however, has not been adopted by all of the Circuits. See, e. g., *Wisconsin v. Weinberger*, 745 F. 2d 412, 417 (CA7 1984) (adopting "arbitrary and capricious" standard). Moreover, as some of these courts have recognized, the difference between the "arbitrary and capricious" and "reasonableness" standards is not of great pragmatic consequence. See *Manasota-88, Inc. v. Thomas*, 799 F. 2d 687, 692, n. 8 (CA11 1986) ("As a practical matter, . . . the differences between the 'reasonableness' and 'arbitrary and capricious' standards of review are often difficult to discern"); *River Road Alliance, Inc. v. Corps of Engineers of United States Army*, 764 F. 2d 445, 449 (CA7 1985) ("we are not sure how much if any practical difference there is between 'abuse of discretion' and 'unreasonable'"), cert. denied, 475 U. S. 1055 (1986). Accordingly, our decision today will not require a substantial reworking of long-established NEPA law.

²⁴ The Cramer Memorandum is reprinted in the Brief for Petitioners. Page references are to the appendix to that brief.

ary 10, 1986. See U. S. Army Corps of Engineers, Portland District, Elk Creek Lake Supplemental Information Report No. 2, p. 7a (hereinafter SIR).²⁵ The SIR explained, "[w]hile it is clear based upon our review that this information does not require additional NEPA documentation, Corps regulations provide that a Supplemental Information Report can be used to disseminate information on points of concern regarding environmental impacts set forth in the EIS."²⁶

The significance of the Cramer Memorandum and the SCS survey is subject to some doubt. Before respondents commenced this litigation in October 1985, no one had suggested that either document constituted the kind of new information that made it necessary or appropriate to supplement the FEISS. Indeed, the record indicates that the Corps was not provided with a copy of the Cramer Memorandum until after the lawsuit was filed. Since the probative value of that document depends largely on the expert qualification of its authors, the fact that they did not see fit to promptly apprise the Corps of their concern—or to persuade ODFW to do so—tends to discount the significance of those concerns. Similarly, the absence of any pretrial expression of concern about the soil characteristics described in the 1982 SCS survey is consistent with the view that it shed little, if any, new light on the turbidity potential of the dam. Yet, even if both documents had given rise to prompt expressions of concern, there are good reasons for concluding that they did not convey significant new information requiring supplementation of the FEISS.

The Court of Appeals attached special significance to two concerns discussed in the Cramer Memorandum: the danger that an increase in water temperature downstream during fall and early winter will cause an early emergence and thus reduce survival of spring chinook fry and the danger that the dam will cause high fish mortality from an epizootic disease. Both concerns were based partly on fact and partly on speculation.

With respect to the first, the Cramer Memorandum reported that the authors of the draft ODFW study had found that warming of the Rogue River caused by the Lost Creek Dam had reduced the survival of spring chinook fry; however, the extent of that reduction was not stated, nor did the memorandum estimate the extent of warming to be expected due to closure of the Elk Creek Dam. Instead, the memorandum estimated that an increase of only one degree centigrade in river temperature in January would decrease survival of spring chinook "from by 60-80%." Cramer Memorandum 3a. The authors of the memorandum concluded that because the Elk Creek Dam is likely to increase the temperature of the Rogue River, further evaluation of this effect should be completed "before ODFW sets its final position on this project." *Ibid.*

The Corps' response to this concern in its SIR acknowledged that the "biological reasoning is sound and has been recognized for some time," but then explained why the concern was exaggerated. SIR 10a. The SIR stressed that because the model employed by ODFW had not been validated, its predictive capability was uncertain. Indeed, ODFW scientists subsequently recalculated the likely effect of a one de-

²⁵ The SIR is reprinted in the Brief for Petitioners. Page references are to the appendix to that brief.

²⁶ Corps regulations provide:

"Whenever it is clearly understood that an EIS supplement is not necessary but where [it] is only necessary to provide supplemental information to a point of concern discussed in the final EIS . . . a supplemental information report will be prepared and filed with EPA." 33 CFR § 230.11(d) (1987).

gree centigrade increase in temperature, adjusting its estimate of a 60 to 80 percent loss downward to between 30 and 40 percent. *Id.*, at 9a. Moreover, the SIR supplied a variable missing in the Cramer Memorandum, suggesting that the Elk Creek Dam would, in most cases, either reduce or leave unchanged the temperature of the Rogue River. *Id.*, at 10a. Discernible increases were only found in July, August, and December of the study year, and even during those months the maximum temperature increase was only 0.6 degrees centigrade. *Ibid.* Finally, the SIR observed that the Cramer Memorandum failed to take into account the dam's beneficial effects, including its ability to reduce peak downstream flow during periods of egg incubation and fry rearing and its ability to reduce outflow temperature through use of the multiport structure.²⁷ *Id.*, at 9a-10a. Given these positive factors, the Corps concluded that any adverse effects of the 0.6 degree temperature increase can be offset. *Id.*, at 10a.

With respect to the second concern emphasized by the Court of Appeals, the Cramer Memorandum reported the fact that "an unprecedented 76% of the fall chinook in 1979 and 32% in 1980 were estimated to have died before spawning" and then speculated that the Lost Creek Dam, which had been completed in 1977, was a contributing cause of this unusual mortality.²⁸ Cramer Memorandum 4a. The Corps responded to this by pointing out that the absence of similar epizootics after the closure of the Applegate Dam and the evidence of pre-spawning mortality in the Rogue River prior to the closing of the Lost Creek Dam were inconsistent with the hypothesis suggested in the Cramer Memorandum. See SIR 10a-11a. In addition, the Corps noted that certain diseased organisms thought to have been the cause of the unusually high mortality rates were not found in the outflow from the Lost Creek Dam.²⁹ *Id.*, at 11a.

²⁷In this respect, the SIR noted that "[t]he reduction in peak floodflows can partially or fully offset the negative effects of temperature increases on fry survival," and any remaining adverse effects can be "further mitigated by the ability of the intake tower to regulate outflow temperatures." SIR 9a-10a. A letter sent from ODFW to the Corps in August 1985 supports the conclusion that the multiport system can be used to regulate temperature. The letter, reporting on an attempt to reduce outflow temperature at the Lost Creek Dam, asserts:

"The experimental reduction in outflow temperatures last October and November, in conjunction with other factors, appears to have improved survival to the fry stage. We had the lowest number on record of wild fish spawning, yet this spring we had the second highest abundance of spring chinook fry on record. The low density of spawners, the absence of floods last winter, and the low incubation temperatures all contributed to the high survival of chinook eggs. We do not know yet what the river temperatures last October-November would have been without the dam, but release temperatures were lower than previous years since dam closure." Letter from Dr. John R. Donaldson of August 15, 1985, Admin. Record, Doc. No. 109.

²⁸The authors made clear that their concern was not based on any identifiable nexus between the dam closure and the epizootics:

"We have not determined the actual cause of the epizootics in 1979 and 1980, but we suspect that Lost Creek Dam contributed to them because no such mortality of fall chinook had been documented previously." Cramer Memorandum 4a.

As Judge Wallace noted in his dissenting opinion, the Cramer Memorandum did not address the possibility that diseased hatchery fish, rather than the Lost Creek Dam, caused the 1979 and 1980 epizootics. See 832 F. 2d 1489, 1501 (CA9 1987) (opinion concurring in part and dissenting in part).

²⁹The Cramer Memorandum also raised concerns about the effect of increased downstream flow on fishing and fish production. The memorandum explained that "[a]nglers and guides have complained that high flows have 'washed out' many of their favorite fishing riffles and that fly angling is no longer effective in most areas because the water is too deep and swift." *Id.*, at 4a. In addition, the memorandum observed that "increased flows during September and October cause spring chinook to spawn higher on the gravel bars and this increases the chances that redds will be dewatered when flows are reduced as the dams fill during Febru-

In thus concluding that the Cramer Memorandum did not present significant new information requiring supplementation of the FEISS, the Corps carefully scrutinized the proffered information. Moreover, in disputing the accuracy and significance of this information, the Corps did not simply rely on its own experts. Rather, two independent experts hired by the Corps to evaluate the ODFW study on which the Cramer Memorandum was premised found significant fault in the methodology and conclusions of the study.³⁰ We also think it relevant that the Cramer Memorandum did not express the official position of ODFW. See SIR 9a. In preparing the memorandum, the authors noted that the agency had "adopted a neutral stand on Elk Creek Dam" and argued that new information raised the question whether "our agency should continue to remain neutral."³¹ Cramer Memorandum 3a. The concerns disclosed in the memorandum apparently were not sufficiently serious to persuade ODFW to abandon its neutral position.

The Court of Appeals also expressed concern that the SCS survey, by demonstrating that the soil content in the Elk Creek watershed is different than assumed in the FEISS, suggested a greater turbidity potential than indicated in the FEISS. 832 F. 2d, at 1495. In addition, the court observed that ODFW scientists believe that logging and road-building in the Elk Creek watershed has caused increased soil disturbance resulting in higher turbidity than forecast by the FEISS. *Ibid.* As to this latter point, the SIR simply concluded that although turbidity may have increased in the early 1980's due to logging, "watershed recovery appears to have occurred to reduce the turbidity levels back to those of the 1970's." SIR 12a. The implications of the SCS soil survey are of even less concern. As discussed in the FEISS, water quality studies were conducted in 1974 and 1979 using computer simulation models. FEISS 33. The 1974 Study indicated that turbidity in the Rogue River would increase by no more than one to three JTU's as a result of the Elk Creek Dam, and the 1979 study verified this result. *Ibid.* These studies used water samples taken from Elk Creek near the proposed dam site and from near the Lost Creek Dam, and thus did not simply rely on soil composition maps in drawing their conclusions. *Id.*, at 18-19, 21-22, 33-34. Although the SIR did not expressly comment on the SCS survey, in light of the in-depth 1974 and 1979 studies, its conclusion that

ary-April." *Ibid.* However, as the SIR observed, the FEISS did indicate that construction of the dam would cause some unavoidable adverse effects to fishing. See SIR 11a. Moreover, the Cramer Memorandum did not suggest that there has been, or will likely be, any significant increase in mortality due to dewatering or that this effect cannot be minimized through control of the dam's outflow. *Ibid.*

³⁰The first of these experts, although agreeing with portions of the ODFW study, indicated that the study "contains considerable statistical inaccuracies, over-extension of statistical methods and undue biological speculation that detracts from an otherwise very laudable professional effort." S. B. Mathews, Critique of Lost Creek Dam Fisheries Evaluation 1, Admin. Record, Doc. No. 112. The second, although providing a generally more positive assessment of the study, indicated that comparisons between pre- and post-dam years "is not likely to yield conclusive results." L. Calvin, Lost Creek Dam Fisheries Evaluation, Phase I Completion Report 2, Admin. Record, Doc. No. 114.

³¹Their memorandum concluded:

"Harry, the spring chinook runs on the Rogue are at an all-time low point. Anglers are becoming increasingly frustrated and upset about low runs, shortened seasons and smaller bag limits. They are also becoming more vocal. We feel the agency stands to lose much of its credibility if we continue to support Elk Creek Dam after knowing what has occurred to the adult spring chinook returns following completion of Lost Creek Dam. The Commission should be made aware of this new information and the possible consequences if they continue to hold to the middle of the road." Cramer Memorandum 5a.

"the turbidity effects are not expected to differ from those described in the 1980 EISS" surely provided a legitimate reason for not preparing a supplemental FEISS to discuss the subject of turbidity. SIR 12a.

There is little doubt that if all of the information contained in the Cramer Memorandum and SCS survey was both new and accurate, the Corps would have been required to prepare a second supplemental EIS. It is also clear that, regardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence. However, having done so and having determined based on careful scientific analysis that the new information was of exaggerated importance, the Corps acted within the dictates of NEPA in concluding that supplementation was unnecessary. Even if another decisionmaker might have reached a contrary result, it was surely not "a clear error of judgment" for the Corps to have found that the new and

accurate information contained in the documents was not significant and that the significant information was not new and accurate. As the SIR demonstrates, the Corps conducted a reasoned evaluation of the relevant information and reached a decision that, although perhaps disputable, was not "arbitrary or capricious."

The judgment of the Court of Appeals is accordingly reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHARLES FRIED, Solicitor General (ROGER J. MARZULLA, Asst. Atty. Gen., LAWRENCE G. WALLACE, Dpty. Sol. Gen., JEFFREY P. MINEAR, Asst. to the Sol. Gen., PETER R. STEENLAND JR., and VICKI L. PLAUT, Justice Dept. attys., on the briefs) for petitioners; NEIL S. KAGAN, Portland, Ore. (MICHAEL D. AXLINE and LORE BENDEL, on the briefs) for respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER

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STUBBINS
CLERK

MARK ROOT

MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

UPPER YELLOWSTONE DEFENSE FUND,)
INC., a nonprofit corporation)
registered in the state of)
Montana, THE MONTANA CHAPTER OF)
THE SIERRA CLUB, a nonprofit)
corporation, GREATER YELLOWSTONE)
COALITION, a nonprofit Montana)
Corporation, NATIONAL PARKS)
CONSERVATION ASSOCIATION, a)
nonprofit corporation, and JULIA)
PAGE, an individual,)

Cause No. BDV-89-261

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Plaintiffs,)

- vs -)

MONTANA DEPARTMENT OF HEALTH AND)
ENVIRONMENTAL SCIENCES, and)
STEVEN PILCHER, in his official)
capacity as head of the Montana)
Water Quality Bureau, a division)
of the Department of Health and)
Environmental Sciences,)

Defendants,)

- and -)

CHURCH UNIVERSAL AND)
TRIUMPHANT,)

Intervenor-Defendant.)

1 animals range between the Park and adjacent private and
2 national forest lands. Testimony of Dr. Meagher.

3 5. On or about March 31, 1989, the Plaintiffs filed a
4 complaint and request for injunctive relief in which they
5 alleged, inter alia, that the Draft Environmental Impact
6 Statement (hereinafter DEIS) and Final Environmental Impact
7 Statement (hereinafter FEIS) issued by the DHES were
8 inadequate, and that the Court should therefore enjoin DHES
9 from issuing any licenses or approvals for certain public water
10 and waste water systems which the Church Universal and
11 Triumphant (hereinafter Church) had applied for to develop a
12 limited portion of property located on the Royal Teton Ranch-
13 South (hereinafter RTR-S).

14 6. On or about April 4, 1989, the Church filed a motion
15 to intervene, and this motion was granted on April 5, 1989.

16 7. During the course of the preliminary injunction
17 hearing, the parties stipulated and agreed that this hearing
18 would serve as the trial on the merits of the question of the
19 adequacy of the Environmental Impact Statement (hereinafter
20 EIS, inclusive of both the DEIS and the FEIS) and the
21 Plaintiffs' request for a permanent injunction. The parties
22 also stipulated that neither DHES nor the Church would need to
23 file answers to the complaint, and the issues would be fully
24 joined based on the briefs, affidavits, and testimony presented
25

1 in open court.

2 THE EIS PROCESS

3 8. In the fall of 1986, the DHES undertook a Preliminary
4 Environmental Review (hereinafter PER) to determine whether it
5 would be necessary to prepare an EIS pursuant to the Montana
6 Environmental Policy Act (hereinafter MEPA) with respect to the
7 proposed Church water facility developments. In the fall of
8 1986, DHES decided to prepare a full EIS pursuant to MEPA.

9 9. On December 18, 1986, a public scoping meeting was
10 held in Gardiner, Montana to assist DHES in defining the
11 important issues to be discussed in the EIS process.

12 10. Thereafter, DHES determined that the scope of the EIS
13 should include the proposed developments on the Church property
14 located in the Corwin Springs area, but that Church holdings
15 in other parts of Park County were not sufficiently connected
16 to the proposed developments so as to justify their inclusion
17 in the EIS process.

18 11. At that time, the major areas of study identified for
19 inclusion in the EIS included the following: wildlife,
20 fisheries, the geothermal well at La Duke Hot Spring, and sites
21 of archeological significance in the area.

22 12. Because the DHES did not have expertise in these
23 areas, it requested the Church to fund studies by reputable
24 expert consultants, each of whom had to be approved by DHES and
25

1 whose work was directed by DHES.

2 13. The process of requiring an applicant, in this
3 instance the Church, to retain and pay for expert consultants
4 approved by DHES has been customary at DHES. As part of this
5 process, DHES referred the reports of the consultants to the
6 appropriate state agencies with expertise in relevant areas for
7 review and comment. The reports on wildlife and fisheries
8 prepared by the consultants here were referred to the Montana
9 Department of Fish, Wildlife, and Parks (hereinafter MDFWP).

10 14. In early 1987, pursuant to the procedures outlined
11 above, the Church retained the services of OEA Research
12 (hereinafter OEA). DHES was familiar with the work of OEA, and
13 approved that organization as a reputable and competent
14 consultant in wildlife, fisheries, and vegetation.

15 15. OEA thereafter prepared reports on wildlife,
16 fisheries, and vegetation. The wildlife report was authored
17 by Mr. Steve Gilbert, President of OEA, and the fisheries
18 report was prepared by Mr. Chris Hunter, vice-president and
19 business manager of OEA.

20 16. Prior to commencement of work, Messrs. Gilbert and
21 Hunter met with: Steve Pilcher, chief of the Water Quality
22 Bureau of DHES; Tom Ellerhoff, the administrative officer for
23 the Environmental Sciences Division of DHES who was responsible
24 for the preparation of the DEIS and FEIS in this instance; Jim
25

1 Melstad of the Water Quality Bureau staff, who was responsible
2 for the engineering review of the waste water system plans and
3 specification for the proposed Church developments; and Edward
4 Francis, vice-president and business manager of the Church.
5 At this meeting, the scope of the work to be completed by OEA
6 was discussed. Sometime after the meeting, Mr. Ellerhoff, on
7 behalf of DHES, advised OEA that Messrs. Gilbert and Hunter
8 should restrict their reports to the probable environmental
9 impacts and mitigations associated with the proposed Church
10 development in the Corwin Springs-Gardiner area. This scope
11 of work was reflected in the contract executed between OEA and
12 the Church. Mr. Francis testified that when the final report
13 was prepared by OEA, it was reviewed by him for editorial style
14 and accuracy as to factual information concerning Church
15 ownership and developments. He also testified that the Church
16 did not make any substantive comments as to the conclusions
17 reached or recommendations made by OEA.

18 17. Following its customary procedures, DHES, upon
19 receipt of the reports from OEA, referred these reports to
20 MDFWP for analysis and comment.

21 18. Mr. Ellerhoff incorporated the reports from OEA in
22 the DEIS. The response comments of the MDFWP were also
23 included in the DEIS.

24 19. In preparing the DEIS, Mr. Ellerhoff testified that
25

1 he structured the table of contents and organizational
2 structure of the DEIS on the then - applicable MEPA regulations
3 which, inter alia, defined the various substantive areas to be
4 included within any DEIS.

5 20. The DEIS was issued in February 1988. A total of 600
6 copies of the DEIS were printed, with more than 300 sent to
7 persons who had previously expressed an interest to DHES. The
8 Church reserved 200 copies for distribution to its members, and
9 provided copies to the public upon request. The remaining 100
10 copies were distributed by DHES to members of the public upon
11 request. The DEIS was also sent to public libraries throughout
12 Park County and to the Bozeman Public Library. Additional
13 copies were sent to the State Library in Helena, and the
14 libraries at Montana State University and the University of
15 Montana.

16 21. A properly noticed public hearing was held in
17 Gardiner on March 21, 1988 to enable interested persons to
18 comment on the DEIS. Public comments from forty-two
19 individuals and organizations were received at that time, and
20 the meeting lasted from approximately 7:00 p.m. to 1:30 a.m.

21 22. In addition, written comments concerning the DEIS
22 were accepted by the DHES until April 21, 1988. Approximately
23 four hundred and four (404) written comments were received
24 prior to the April 21, 1988 deadline.

25

1 23. In response to certain of the comments received on
2 the DEIS, the Church was directed to complete two additional
3 studies in the area of the proposed projects. The first study
4 was to determine whether any rare plant species existed near
5 La Duke Hot Spring. The second study addressed radon levels
6 in various structures. The study on rare plant species was
7 also conducted by OEA.

8 24. In March, 1989 DHES published the FEIS which
9 incorporated by reference the earlier DEIS. In preparing the
10 FEIS, DHES structured the table of contents and organizational
11 structure of the FEIS on the then - applicable MEPA regulations
12 which, inter alia, defined the various substantive areas to be
13 included within any FEIS. Mont. Admin. R., 16.2.607 (1980).
14 The FEIS included a synopsis of the DEIS, alternatives
15 considered with respect to the proposed development, sixteen
16 specific mitigations recommended by DHES, the description of
17 the proposed development and current environmental conditions,
18 a summary of the substantive comments received by DHES during
19 the EIS process together with the DHES's responses, the results
20 of the two additional studies required by DHES and obtained by
21 the Church, and a compilation of written public comments
22 received from a variety of sources including the Environmental
23 Quality Council, Yellowstone National Park, the United States
24 Fish and Wildlife Service, the MDFWP, the Montana Department
25

1 of Natural Resources and Conservation, and Plaintiffs' Greater
2 Yellowstone Coalition and Julia Page. Also included were
3 excerpts of the lengthy response of the Church to the various
4 comments, as permitted by Mont. Admin. R., 16.2.608(3) (1980).

5 25. Also included with the FEIS as Appendix B was a copy
6 of the Mitigation Plan Agreement, a legally enforceable
7 agreement voluntarily entered into between DHES and the Church.

8 26. Each of the substantive comments received by DHES was
9 reviewed at least twice by both Mr. Pilcher and Mr. Ellerhoff
10 as part of this preparation of the DEIS and FEIS.

11 27. The FEIS included the final recommendation, which
12 reads as follows:

13 Based on the information submitted to the DHES
14 by the applicant [Church] and the material received
15 during the EIS process, the department believes the
16 proposed water and waste water systems are adequate
17 from a public health and engineering standpoint, and
18 will not have measurable impacts on water quality.
19 Additionally, the application for work camp licenses
20 is adequate and issuing them will have no adverse
21 impact.

22 To address the concerns of the indirect and
23 secondary impacts, the Church and DHES have created
24 a Mitigation Plan Agreement. A copy of the agreement
25 is in Appendix B.

While implementation of the proposed development
will bring change to the Corwin Springs area, the
environment will be adequately protected by the
review and approval of specific projects by the DHES
and the implementation of the mitigation measures.

FEIS at 326.

1 CHURCH DEVELOPMENT AND ACTIVITIES

2 28. The Church is a tax-exempt religious organization
3 recognized as such both by the Internal Revenue Service, and
4 the Montana Department of Revenue. FEIS at 232-35.

5 29. In June 1980, the Church identified the property then
6 known as the Forbes Ranch located north of Yellowstone National
7 Park as suitable for acquisition to meet the religious and
8 secular needs of the Church to establish a religious retreat
9 and community. Church leaders viewed this property as the
10 "place prepared" for the religious community that had been
11 planned and spoken of in the Church's religious literature for
12 years.

13 30. The Church acquired the approximately 12,000 acres
14 which comprised the Forbes Ranch in 1981, and renamed the
15 property the Royal Teton Ranch. In the context of the EIS
16 process, this property has been referred to as the RTR-S. This
17 property is adjacent to parts of the northern boundary of
18 Yellowstone National Park.

19 31. In 1982, a site in the Mol Heron Creek valley located
20 on the RTR-S was consecrated as the international religious
21 shrine of the Church. It has been the site of the Church's
22 annual international religious gatherings since that time, and
23 a summer conference has been held at the Mol Heron Creek site
24 in five of the last seven years.
25

1 32. Between 1982 and 1986, the Church acquired additional
2 property, including the RTR-N (located approximately thirty
3 miles north of the RTR-S), the present site of the development
4 known as Glastonbury (located on 4,500 acres approximately
5 fifteen miles north of the RTR-S), Camp Mustang (East Gate),
6 and Cinnabar campgrounds which had pre-existing and already
7 approved mobile home, recreational vehicle and campsite
8 licenses, and the OTO Ranch. The Church also leases the Big
9 Spur campground (located near the RTR-N) which has pre-existing
10 mobile home, recreational vehicle and campground licensing.

11 33. In 1986, the Church sold its former headquarters and
12 school in California, and decided to relocate them to the RTR-
13 S. This decision was based on a religious belief that the
14 Church had been divinely "guided" to the RTR-S location.

15 34. Testimony at hearing indicated that the Royal Teton
16 Ranch property has been the site of extensive usage and
17 habitation in the 19th and 20th centuries. These uses include
18 the former towns of Aldridge and Electric, the present town of
19 Corwin Springs, various commercial activities associated with
20 the former coal developments, farming, ranching, and dairy
21 production, timber production, schools, churches, and houses.

22 35. Between 1982 and 1986, the Church undertook and
23 completed a number of additions and improvements, applying for
24 and receiving state and local government reviews and approvals
25

1 where necessary. These included the Mol Heron campgrounds (the
2 site of the annual religious retreat and conference discussed
3 above), the construction of the "Ranch Headquarters" on a new
4 ten-acre site, and facilities which were added to the pre-
5 existing Forbes Ranch buildings ("Ranch Office").

6 36. In the summer and fall of 1986, several construction
7 projects were undertaken to effect the transfer of the Church's
8 headquarters to Montana. These were a Ranch Headquarters
9 housing addition, an East Gate housing addition for Church
10 staff ("work camp"), and the new Spring Creek Church
11 Headquarters site. During this period, the Church relocated
12 its headquarters into already existing facilities on the RTR-
13 S. These projects are located on or near RTR-S.

14 37. At the Ranch Office site, the Church is requesting
15 approval for a new waste water system primarily to serve a
16 completed, pre-existing and presently operating food processing
17 center for crops grown and to be consumed on the ranch.

18 38. At the East Gate location, the Church, at the
19 commencement of this litigation, was seeking approval for water
20 and waste water systems to serve the new housing, as well as
21 a "work camp" license from the Food and Consumer Safety Bureau
22 of DHES. During the pendency of this litigation, the
23 Plaintiffs stipulated that the DHES could issue the approvals
24 and licenses requested for the East Gate site, and the issuance
25

1 of those approvals and licenses is no longer an issue in this
2 litigation.

3 39. At the Ranch Headquarters location, the Church is
4 currently seeking DHES approval to replace the existing water
5 supply system which serves the current resident population and
6 other facilities. The Church is also seeking DHES approval for
7 a new waste water system to serve the same current resident
8 population and other facilities.

9 40. As noted in the table found at page 51 of the DEIS,
10 the Church is projecting additional occupancy of sixty-four
11 persons at the East Gate location, an increase of twenty-four
12 occupants at the Ranch Headquarters, and no increase in
13 occupancy at the Ranch Office location.

14 41. At the Spring Creek location, the Church is proposing
15 to locate a new church, housing for Church staff, associated
16 offices, a school and dining hall complex with associated
17 housing for school faculty and students. A sewage lagoon is
18 also proposed in the Spring Creek site area for the waste water
19 system. As noted in table 3 found at page 51 of the DEIS, the
20 projected occupancy of the Spring Creek headquarters location
21 will be 264.

22 42. The proposed water supply and waste water systems for
23 each location have been sized for the planned occupancy at each
24 respective location. If additional water or waste water
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1 capacity is developed to serve additional persons, such new
2 development would require prior DHES approval. Testimony of
3 Pilcher and Frazier.

4 43. The total Church development, both existing and
5 proposed, will occupy 120-150 acres of the 15,000 acres
6 (approximately one percent) owned by the Church in the Corwin
7 Springs area.

8 44. Sites for development of Church buildings have been
9 clustered to avoid and/or mitigate impacts on the environment;
10 when possible, pre-existing sites of development or occupancy
11 have been chosen as the location of further development.

12 45. The Church has also voluntarily agreed to a number
13 of changes from its original plans as proposed in 1986 in
14 response to various concerns voiced during the EIS process.
15 These mitigation activities include relocating root crop
16 production, a poultry slaughterhouse facility, and the compost
17 operation to the RTR-N. Among the other mitigations agreed to
18 in the Mitigation Plan Agreement, included as Appendix B to
19 the FEIS (see page 345), the Church has already constructed and
20 agreed to maintain a bear-proof fence around the tree farm and
21 orchard area located on the RTR-S. The Church has also agreed
22 to monitor the groundwater in the vicinity of waste water
23 systems at the Mol Heron Creek conference site, East Gate, the
24 Ranch Headquarters, and the Ranch Office. In addition, the
25

1 Church has agreed that all waste water systems previously
2 approved by DHES and all systems that will be approved by the
3 DHES for the projects covered by the EIS will be monitored.

4 46. The Church has also negotiated a tentative instream
5 flow agreement with Yellowstone National Park to establish a
6 minimum instream flow for Reese Creek. (This agreement is
7 subject to the approval of other landowners who also have water
8 rights claims along Reese Creek.) The Church has also agreed
9 to move its domestic sheep grazing to the area north of Mol
10 Heron Creek, and not to allow domestic sheep to use the area
11 along Cinnabar Mountain which is winter range for bighorn
12 sheep. The Mitigation Plan Agreement also includes numerous
13 other mitigations, none of which were criticized by the
14 Plaintiffs or their expert witnesses.

15 47. The Church, during five of the last seven summers,
16 has held its summer encampment at the Mol Heron campgrounds and
17 conference site. The annual attendance at the religious
18 conferences has varied from approximately 1,500 participants
19 to 4,000 participants.

20 48. In connection with the summer conference held at the
21 Mol Heron site, the Church provides to each participant a
22 visitor's Information Guide (see Church Exhibit B), which
23 provides, among other things, information concerning conduct
24 of participants in bear country. This material was developed
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1 from a variety of sources, including literature provided by
2 Yellowstone National Park. There has never been a human/bear
3 confrontation at any of the five annual religious conferences
4 held at the Mol Heron site.

5 49. In 1986, the Church replaced two and one-half miles
6 of pre-existing barbed wire fence bordering Yellowstone Park
7 with a jack-leg fence including approximately eighteen gates.
8 These gates are located at approximately 200-yard intervals
9 along the fence line at established game migration trails.

10 50. These gates have been kept open during the migrating
11 season to allow wildlife to pass freely, and are closed for
12 certain periods during the spring and fall when Church
13 livestock are pastured in the fields adjacent to Yellowstone
14 National Park.

15 51. The only apparent exception to this open gate policy
16 was in the period from December 1988 through early March 1989,
17 when five lower gates close to the Yellowstone River were kept
18 closed pursuant to an agreement entered into between the Church
19 and an animal rights organization which was concerned with the
20 migration of bison from Yellowstone Park onto adjacent private
21 lands, and the threat of a depredation hunt of the bison
22 because of the concern with the possible transmission of
23 brucellosis to domestic livestock. The agreement between the
24 Church and the animals rights organization has now expired, and
25

1 the Church's witness, Mr. Francis, testified that the gates are
2 now and will be kept open, except for the time periods when the
3 Church's domestic livestock are pastured in the fields
4 immediately adjacent to Yellowstone Park.

5 52. Yellowstone National Park prohibits domestic
6 livestock from grazing in the Park and can fine owners of
7 domestic cattle when their cattle stray onto park property.
8 If the jack-leg fence gates were not closed during those
9 periods, and the Church's domestic livestock strayed onto Park
10 land, then the Church could be subject to a fine imposed by the
11 Park Service.

12 53. The Church has reached a tentative agreement for a
13 land exchange with the United States Forest Service to provide
14 additional big game winter range land and migrating corridors
15 for Yellowstone Park wildlife along the east side of the
16 Yellowstone River in the Corwin Springs area.

17 54. There are other private residences not connected with
18 the Church ownership of the RTR-S immediately adjacent to and
19 between the Ranch Office area and the Yellowstone Park
20 boundary.

21 PREPARATION AND CRITIQUE
22 OF THE EIS

23 55. Mr. Steve Gilbert, President of OEA, is a
24 professional wildlife biologist who has worked for a variety

25

1 of commercial, public, private, and environmental interests
2 during the last twenty years of his professional career.

3 56. As stated previously, after OEA was retained by the
4 Church subject to the approval of DHES, Mr. Gilbert, together
5 with his associate, Mr. Hunter, met with representatives of
6 DHES and Ed Francis from the Church to discuss the scope of the
7 EIS, scheduling, and the proposed completion date. At that
8 time, it was decided that OEA would submit an outline of the
9 wildlife and aquatic sections of the report to Leroy Ellig,
10 regional director, and Jim Posewitz, Resource Assessment Unit
11 leader, of MDFWP. It was also decided that MDFWP would be
12 asked to review the OEA draft reports and make any comments it
13 deemed necessary prior to inclusion in the DEIS. It was also
14 suggested by the Water Quality Bureau that the MDFWP opinions
15 on impacts and mitigation should be given significant weight
16 since MDFWP is the managing agency for wildlife and fisheries
17 in the state of Montana, and that the MDFWP opinions on impacts
18 and mitigation should be given greater weight than the opinions
19 of the National Park Service or other commentators who do not
20 have the same management responsibilities for wildlife and
21 fisheries as MDFWP.

22 57. Both the expert witnesses for the Plaintiffs and Mr.
23 Gilbert agreed that there is a substantial amount of baseline
24 data already collected and available for the northern range of
25

1 Yellowstone Park and the Corwin Springs area.

2 58. Mr. Gilbert testified that there was an abundance of
3 baseline wildlife data available so that the collection of such
4 additional data was neither appropriate nor necessary. In the
5 course of preparing his wildlife report, Mr. Gilbert consulted
6 over seventy-five publications containing relevant information
7 to his research and made over thirty personal communications
8 with experts on the various species of wildlife addressed in
9 his report.

10 59. During the course of his research, Mr. Gilbert
11 reviewed literature and interviewed experts on the following
12 species: grizzly bears, bison, pronghorn antelope, elk,
13 bighorn sheep, and other species found in the northern range
14 of Yellowstone Park and the Corwin Springs area. Church
15 Exhibit A is the original OEA report. Pages 30-33 contain a
16 list of literature used and persons contacted by Mr. Gilbert
17 in the preparation of his report. The same information is
18 contained at pages 138-152 of the DEIS.

19 60. Among the experts consulted by Mr. Gilbert were the
20 following: Leroy Ellig and Arnold Foss of MDFWP (Mr. Foss is
21 now deceased); Chris Servheen, David Mattson, and Dr. Richard
22 Knight of the Interagency Grizzly Bear Team; Tom Puchlerz of
23 the Gallatin National Forest; Steve Mealey of the Shoshone
24 National Forest; Jay Summner of the Wildlife/Wilderness
25

1 Institute; John Varley, Frank Singer, and Don Despain of
2 Yellowstone National Park; Louisa Wilcox and Ed Lewis of the
3 Greater Yellowstone Coalition.

4 61. Mr. Gilbert contacted Mr. John Varley, chief research
5 biologist for Yellowstone National Park, and requested a
6 personal interview with Mr. Varley and other Park biologists
7 who had information concerning the potential impacts on the
8 various species which might be affected by the proposed Church
9 development. Mr. Gilbert testified that he requested that Dr.
10 Mary Meagher, one of the Plaintiffs' experts, be available for
11 this meeting. Mr. Varley testified at the hearing that Dr.
12 Meagher was not available for such a meeting. Dr. Meagher
13 specifically testified that she had no recollection of being
14 invited by Mr. Varley to attend the meeting.

15 62. Mr. Gilbert's meeting with Mr. Varley and his two
16 associates from the Park lasted approximately three to four
17 hours. During that meeting, Mr. Varley and his associates
18 discussed with Mr. Gilbert each of the species which was
19 specifically identified by Mr. Gilbert as being of major
20 concern. This included discussion of the impacts of the
21 proposed development on ungulates, impacts of the jack-leg
22 fence upon migration of pronghorn antelope, bison and elk; a
23 discussion of the impacts of the proposed development on
24 grizzly bears; the impacts on grizzly bears of the annual
25

1 religious conference held at the Mol Heron Creek site; and, a
2 discussion of the Park biologists' concern with the
3 transmission of diseases from domestic sheep herds to the
4 bighorn sheep population that winters on Cinnabar Mountain.

5 63. Mr. Gilbert testified that he had advised Mr. Varley
6 that he (Gilbert) desired to cover as much ground as possible
7 during the interview with the Park's biologists. Mr. Varley
8 testified that the Park was particularly concerned with the
9 proposed Church development. Mr. Gilbert would schedule follow
10 up conferences with individual Park specialists with respect
11 to the various species, although Mr. Varley did not instruct
12 any of the members of his staff to initiate any contacts with
13 Mr. Gilbert following this meeting.

14 64. Mr. Varley also testified that he believed this
15 meeting was preliminary, and that Mr. Gilbert should have
16 conducted further interviews with Park specialists. Mr.
17 Gilbert neither initiated nor received any further
18 communications from any Park biologists or officials.

19 65. During Mr. Gilbert's interview with the Park's
20 biologists, none of the biologists suggested that Mr. Gilbert
21 utilize the "Cumulative Effects Model" to help him in his
22 assessment of the potential impacts on grizzly bears.

23 66. At the hearing, Mr. Varley testified regarding the
24 "Cumulative Effects Model" that he thought that much of the
25

1 data had been collected and digitized with respect to the
2 relevant bear management unit in Yellowstone National Park and
3 the Gallatin National Forest, but that data affecting the
4 approximately 15,000 acres of the RTR-S which are part of that
5 bear management unit was available to run only one-half of the
6 model. Mr. Varley estimated that it would take approximately
7 four to eight months to collect, digitize, and analyze this
8 data before the "Cumulative Effects Model" could be fully
9 utilized in conjunction with any analysis of the proposed
10 Church development. Mr. Varley and Mr. Brown both testified
11 that they felt the Cumulative Effects Model should have been
12 used by Mr. Gilbert.

13 67. Mr. Gilbert testified, and the record reveals, that
14 no other organization or individual suggested that the
15 "Cumulative Effects Model" be utilized by Mr. Gilbert in the
16 preparation of his report. Mr. Gilbert testified that Mr.
17 Puchlerz advised him that the necessary information had not yet
18 been collected for the subject area. The MDFWP did not suggest
19 that the "Cumulative Effects Model" be utilized, although MDFWP
20 is a full member of the Interagency Grizzly Bear Team which had
21 overall responsibility for the development of the "Cumulative
22 Effects Model." The only management agency in the Interagency
23 Grizzly Bear Team that suggested that the "Cumulative Effects
24 Model" be utilized, was Yellowstone National Park, in response
25

1 commentary to the DEIS. The testimony of Mr. Gilbert was that
2 in his opinion utilization of the "Cumulative Effects Model"
3 would not have produced different results or conclusions than
4 those contained in the OEA report and the DEIS.

5 68. At the conclusion of his visit with the Park
6 biologists, Mr. Gilbert was not provided any research
7 publications or other information, nor did he visit the Park
8 Library to obtain any.

9 69. In preparing his report, as indicated above, Mr.
10 Gilbert reviewed a significant body of literature and contacted
11 a variety of experts concerning their opinions on the potential
12 impacts and available mitigations with respect to the various
13 species under consideration. In preparing his report, Mr.
14 Gilbert utilized the professional opinions which he heard from
15 a variety of experts, including experts with disparate or
16 opposing viewpoints, as well as his own professional judgment,
17 to conclude that the impacts upon the various species under
18 consideration would be minimal, especially if a number of the
19 mitigation strategies which he recommended in his report were
20 implemented by the Church.

21 70. A preliminary draft of Mr. Gilbert's report was
22 reviewed by Tom Ellerhoff and representatives of the MDFWP.

23 71. Based on the literature, research and interviews he
24 conducted, Mr. Gilbert reached the independent professional
25

1 opinion that, although there would be impacts to some species,
2 the impacts would likely be minimal and, in most cases, could
3 be mitigated.

4 72. Mr. Gilbert stated that, after reviewing the
5 Mitigation Plan Agreement entered into between the Church and
6 DHES, he concluded that the agreement adequately incorporated
7 his suggested mitigations.

8 73. Yellowstone National Park biologists participated in
9 the EIS process. By letter dated October 31, 1986 (see State's
10 Exhibit 2) addressed to Dr. Drynan, then Director of the DHES,
11 Mr. Robert D. Barbee, Superintendent of Yellowstone Park, urged
12 that DHES conduct a full EIS on the proposed Church
13 development. In that letter, Mr. Barbee identified eleven
14 areas of concern to the Park. Thereafter, the Park
15 participated in the public scoping meeting held in December
16 1986 and again reiterated the same eleven concerns. A
17 representative of the Park was one of the forty-two
18 participants who gave testimony at the public hearing held in
19 Gardiner after the publication of the DEIS; and, the Park
20 submitted lengthy written comments on the DEIS, which were
21 included in the FEIS. A comparison of the eleven areas of
22 concern initially raised by Yellowstone Park in the fall and
23 early winter of 1986 with the contents of the DEIS and FEIS
24 reveals that each of these concerns was addressed in the EIS
25

1 process.

2 74. The northern portions of Yellowstone Park, the
3 private lands adjacent to Gardiner, Montana extending for
4 several miles down the Yellowstone River, and low-lying
5 portions of surrounding lands on the Gallatin National Forest
6 constitute an ecological gem, according to the testimony of Dr.
7 Meagher, a biologist employed by Yellowstone National Park for
8 twenty-nine years. This area provides winter range for the
9 great herds of ungulates that migrate from their summer ranges
10 in Yellowstone Park to the winter range described above.
11 Testimony of Dr. Meagher and Steve Gilbert. See also DEIS at
12 p. 12.

13 75. Yellowstone's northern winter range provides critical
14 winter forage for the migrating ungulates. Testimony of Dr.
15 Meagher.

16 76. Portions of the RTR-S are included in Yellowstone's
17 northern winter range, comprising thirty-five percent of all
18 winter range outside Yellowstone National Park. DEIS at 12;
19 Testimony of Dr. Meagher and Steve Gilbert. In a normal year,
20 500 - 1,000 elk use the RTR-S for winter range. DEIS at 12.
21 Pronghorn, mule deer, bison, and the entire Cinnabar Mountain
22 bighorn sheep herd utilize portions of the RTR-S for winter
23 range. FEIS at 12 - 21.

24 77. The grizzly bear is listed as a threatened species
25

1 under the Endangered Species Act, 16 U.S.C. 1531 et seq. The
2 entire population of grizzly bears in the Greater Yellowstone
3 Ecosystem, including the Park's northern winter range, consists
4 of 200 bears. Testimony of Mr. Gary Brown and Steve Gilbert.
5 The survival of the grizzly bear in the Greater Yellowstone
6 Ecosystem is tenuous. Testimony of Mr. Brown.

7 78. Portions of the property provide spring, summer and
8 fall habitat for grizzly bears. DEIS at 23. Portions of
9 Church property adjacent to Yellowstone are in the highest
10 density zone for grizzlies based on sightings and radio
11 telemetry locations. DEIS at 23.

12 79. The Yellowstone River provides habitat for the
13 Yellowstone cutthroat trout, a species of special concern for
14 the MDFWP. This species of fish uses creeks on the RTR-S for
15 spawning habitat. In particular, Mol Heron and Cedar Creeks
16 are important spawning streams. DEIS at 33-34.

17 80. One of the major concerns raised by the Plaintiff and
18 their experts was that the EIS process did not adequately
19 discuss impacts on wildlife, specifically impacts on grizzly
20 bears and ungulates. Plaintiffs produced Dr. Mary Meagher who
21 testified that she did not feel that the EIS was adequate since
22 it did not adequately address the fact that the Church property
23 comprises part of the critical northern winter range of
24 ungulates. Dr. Meagher further testified that the EIS did not
25

1 adequately disclose migration routes of ungulates across the
2 church property and the fact that a jack-leg fence along the
3 church-park boundary interfered with the animals migration.
4 The Court, however, would note that at p. 4 of the FEIS it is
5 noted that this area is a migration route. Further, from pp.
6 11-32 of the DEIS wildlife is discussed. Specifically, at p.
7 12 of the DEIS it is noted that the Church property comprises
8 thirty-five percent of the elk winter range outside Yellowstone
9 National Park.

10 81. Dr. Meagher testified as to her concern that the
11 jack-leg fence located along the church-park boundary might be
12 a potential impediment to migration of bison, elk, and
13 pronghorn antelope. She also testified that these species tend
14 to travel along a barrier such as a fence, until they can find
15 an opening and then will pass through. She acknowledged that
16 there were numerous gates in the fence as testified to by Mr.
17 Francis and Mr. Gilbert. It is important to note that this
18 fence was not installed as part of the development here under
19 consideration and will remain in its present location whether
20 or not this Court approves the EIS. The Court also notes that
21 this fence was installed with the advice of area wildlife
22 experts to assist wildlife migration as an improvement over an
23 existing barbed wire fence. Further, it also appears that the
24 problems concerning closure of certain gates during the winter
25

1 of 1988-1989 will be corrected in the future. See Finding of
2 Fact No. 50.

3 82. With respect to bison, Dr. Meagher also testified
4 that they were not, in her opinion, subject to negative
5 conditioning and thus would not be deterred by development;
6 that is, the Church's developments would not deter the bison
7 from following their chosen migration patterns.

8 83. Dr. Meagher also testified that the areas around the
9 Ranch Office (which has no new proposed facilities with the
10 exception of the addition of the waste water system for which
11 approvals have been requested), the East Gate, and the Ranch
12 Headquarters have little wildlife winter range value and the
13 Church's development at those sites would have little, if any,
14 impact on the available winter range for ungulates found in the
15 northern range of Yellowstone Park.

16 84. Dr. Meagher testified that she was not aware of any
17 studies documenting the transmission of disease from domestic
18 sheep to a bighorn sheep population. Dr. Meagher also
19 testified the provision in the Mitigation Plan Agreement under
20 which the Church agreed to keep its domestic sheep herd off of
21 the bighorn sheep winter range located on Cinnabar Mountain,
22 would mitigate the potential impact of any possible
23 transmission of disease from the domestic sheep population.

24 85. Mr. Varley testified that the Park biologists were
25

1 still conducting studies and gathering data on the potential
2 effects of the jack-leg fence upon wildlife migration, and that
3 he had no idea when the results of this research would be
4 completed or available.

5 86. Dr. Meagher testified that more than half of the elk
6 herd in Yellowstone Park follows a migratory path along the
7 east side of the Yellowstone River, and not along the west bank
8 where the RTR-S is located. Dr. Meagher also testified that
9 it appeared that the elk population could be conditioned to
10 migrate along the east side of the river, and she was aware of
11 certain studies in which this result seemed to have been
12 obtained.

13 87. Dr. Meagher also testified that her general
14 disposition was to favor the resource over any form of
15 development whatsoever.

16 88. Dr. Meagher also testified that many of her comments
17 which she submitted to her supervisors in Yellowstone Park
18 concerning the DEIS were not included in the Park response,
19 although she did not know and could not explain why they were
20 not included.

21 89. Plaintiff also introduced the testimony of Mr. Brown.
22 Mr. Brown is employed as a bear management specialist in
23 Yellowstone Park and is an expert in the area of grizzly bears.
24 Mr. Brown also testified that he did not feel that the EIS was
25

1 adequate. One of his specific concerns was that the cumulative
2 affects model was not used to determine impacts on grizzly
3 bears. He is further concerned that the draft EIS did not
4 address the tenuous hold of grizzly bears in the Greater
5 Yellowstone Ecosystem, bear habituation and attractants, and
6 bear displacement.

7 90. Mr. Brown testified that because of the opportunistic
8 nature of the grizzly bear, any human development constitutes
9 a potential bear attractant and can create the possibility for
10 a human-bear confrontation.

11 91. Mr. Brown testified that the relocation of the root
12 crop production, composting operation, and poultry
13 slaughterhouse to the RTR-N were "excellent" mitigations
14 undertaken by the Church in the removal of bear attractants.

15 92. Mr. Brown also testified that the Park controls
16 habituation and works to avoid human-bear conflict by a system
17 of education of Park visitors which includes, first and
18 foremost, providing to each Yellowstone National Park visitor
19 written educational literature, as to the dos and don'ts
20 of being in bear country.

21 93. Mr. Brown testified that the entire area around the
22 town of Gardiner was a "population sink" for bears, and that
23 many gardens, root crops, and other bear attractants are found
24 in and around the town of Gardiner outside of the Royal Teton
25

1 Ranch. Mr. Brown also testified that many of the tourist and
2 campground developments inside Yellowstone Park are similar
3 "population sinks" for bears.

4 94. Although Mr. Brown testified as to his concern with
5 the potential adverse impact of bear relocations as a result
6 of human-bear confrontations, he also testified that such
7 relocations regularly occur inside and outside Yellowstone
8 National Park.

9 95. Mr. Brown also testified concerning an incident
10 occurring in 1988 after the DEIS had been published in which
11 a bear and one cub were relocated, and one cub was accidentally
12 killed by a game warden on RTR-S property. The unrebutted
13 testimony of Mr. Edward Francis, however, indicates that the
14 sow and her two cubs were first attracted by the fruit orchards
15 on an adjoining neighbor's property, and that the sow and one
16 cub were relocated. The remaining cub was found in the Church
17 truck garden located between the Ranch Office buildings and the
18 neighbor's property, which was approximately one-half mile
19 away. The one cub apparently died after receiving an overdose
20 of tranquilizer from a game warden, although Mr. Francis was
21 not aware of the death of the cub at the time of the incident.

22 96. Mr. Brown, like Dr. Meagher, stated his opinion that
23 he would prefer to see no human development at all so that
24 bears would not be subjected to various attractions associated
25

1 with human development, and thereby the chances of human-bear
2 confrontations would be further diminished.

3 97. In reviewing the DEIS, it is clear that each of the
4 major species of concern to the Plaintiffs' witnesses were
5 addressed by Mr. Gilbert. For example, elk and elk migration
6 were discussed at pp. 12-14 of the DEIS; status of the bighorn
7 sheep was discussed at pp. 17-20 of the DEIS; the growth and
8 migration of the pronghorn antelope herd was discussed at pp.
9 20-21; and bison are discussed at page 21. Likewise, the
10 impact of the jack-leg fence, the proximity of domestic sheep
11 population to the bighorn sheep, and various forms of bear
12 attractants related to activities of the Church on the RTR-S
13 are discussed at pp. 28-29. The impact on grizzly bears, in
14 particular, is discussed at pp. 30-32 and pp. 23-26 of the
15 DEIS. Various mitigating measures were also proposed in the
16 DEIS.

17 98. As the Plaintiffs' expert witnesses admitted,
18 professional wildlife biologists can and often do differ in
19 their opinions with respect to the impacts of proposed
20 developments on wildlife. To the extent that the opinions
21 concerning impacts and mitigations contained in the DEIS and/or
22 FEIS are different than those expressed by Plaintiffs' experts
23 as to the adequacy of discussion or impacts, or proposed
24 mitigation suggested by Plaintiffs' experts from Yellowstone
25

1 Park, the DEIS and FEIS represent a tacit conclusion that the
2 various professional experts have "agreed to disagree."

3 99. The Park Service and the wildlife management agencies of
4 the State of Montana have different purposes and, consequently,
5 different goals and management philosophies. The State
6 agencies cannot favor environmental resources over human
7 development, but, rather, must attempt to resolve conflicts
8 between the two by mitigating adverse impacts to wildlife. On
9 the other hand, the Park's central purpose is to favor
10 environmental resources to the exclusion of human development.
11 This opposition is illustrated by the differing approaches to
12 bison management, which finds the Park nurturing the bison, and
13 the State ordering depredation hunting of them as soon as they
14 enter Montana.

15 100. Each of the parties submitted affidavits concerning
16 the adequacy of the EIS process with respect to the impact upon
17 fisheries. Mr. Chris Hunter of OEA collected base line data,
18 reviewed scientific literature, interviewed knowledgeable
19 experts concerning the potential impacts of the proposed Church
20 development upon aquatic life, and prepared a report which Mr.
21 Ellerhoff incorporated in the DEIS. That report, the DEIS and
22 the FEIS address the major concerns articulated by various
23 commentators during the EIS process.

24 101. With respect to the potential impacts upon Reese
25

1 Creek specifically, both Mr. Mahoney, the Plaintiffs' affiant,
2 and Mr. Hunter agree that the primary issue involves the
3 exercise of competing water rights which has historically
4 resulted in the dewatering of a portion of Reese Creek. As
5 stated previously, the Church and Yellowstone Park have
6 negotiated a tentative minimum instream flow agreement (which
7 is subject to the approval of water rights claimants) which
8 addresses the issue of the dewatering of a portion of Reese
9 Creek. Further any dispute between and among water rights
10 claimants is within the jurisdiction of the Montana Water Court
11 pursuant to Montana's comprehensive statutory scheme for the
12 resolution of such conflicts.

13 102. Although Plaintiffs' expert, Dan Mahoney, felt that
14 the fisheries discussion was not adequate, Chris Hunter, the
15 OEA expert disagreed and he stated indicated that his research
16 included contacts with Mr. Mahoney, Yellowstone National Park
17 officials, the Great Yellowstone Coalition, and the MDFWP. He
18 also researched the records of the National Resource
19 Information System, a branch of the Montana State Library, and
20 reviewed various scientific papers on fish in the area. Here
21 again, we seem to have a dispute between experts.

22 103. As to both fish and wildlife impacts, it is crucial
23 to note that the OEA report, Church's Exhibit A, found its way
24 into the DEIS from pp. 11-41. This report was reviewed by
25

1 officials of the MDFWP. The Court recognizes that the MDFWP
2 is entrusted with the management of fish and wildlife in the
3 area here under consideration. An affidavit was submitted by
4 Mr. Jerry Wells, the regional fisheries manager for the MDFWP.
5 He stated that he reviewed the fisheries issue and had read the
6 OEA report. He found that the comments of the MDFWP were
7 presented in the EIS process and most of their recommendations
8 were addressed in the final report. Further, the parties
9 stipulated that the affidavit of Mr. Leroy Ellig could be
10 admitted into evidence. Mr. Ellig is the regional supervisor
11 of the MDFWP in the area in question. For twenty-six years,
12 he has been a wildlife biologist. He stated that he had looked
13 at the OEA report and that the comments and concerns of the
14 MDFWP had been noted and addressed and most recommendations had
15 been addressed in the FEIS.

16 Page 41 of the DEIS contains this statement from the
17 MDFWP: "The OEA reports were reviewed by DFWP personnel in the
18 DHES's Bozeman and Helena offices . . . The general description
19 of the existing environment and associated wildlife species was
20 adequate and reasonably well supported by existing information
21 sources." Further, the United States Fish and Wildlife
22 Service, the agency charged with regulating grizzly bears gave
23 comment. See p. 49 of the FEIS. That department, while
24 stating that direct impacts to threatened and endangered
25

1 species are expected to be minimal, expressed some concerns
2 with cumulative, indirect impacts.

3 104. In addition to the Mitigation Plan Agreement, the
4 DHES has the authority to conduct both routine and unannounced
5 inspections of the proposed facilities so as to insure
6 compliance with the terms of the agreement and any approvals
7 or licenses issued to the Church. The DHES' witnesses
8 testified that these measures should insure that the projected
9 Church developments and population estimates contained in the
10 DEIS will be followed and that any significant changes in
11 development or use can and will be detected by DHES.

12 105. Jim Melstad testified in all of the applications for
13 water and waste water system approvals he has been aware of
14 during the entire term of his employment with DHES, he could
15 not recall having seen any application subjected to as many
16 conditions and requirements as the Church's systems.

17 106. The DHES' witnesses also testified that any future
18 changes in the developments for which permits are now being
19 sought by the Church will subject the Church to an
20 environmental review process, as has occurred with the pending
21 developments.

22 107. Page 51 of the DEIS provided details as to number
23 of people who are expected to occupy the various projects under
24 development here. Also, concerning the water and waste
25

1 projects, the Plaintiffs complained that the plans and
2 specifications were not produced. However, DHES witnesses
3 testified that these plans and specifications were very
4 technical and voluminous. They were always made available both
5 at DHES headquarters in Helena and at the local health office
6 in Livingston, Montana. This availability was noted on pp. 19-
7 20 of the FEIS.

8 108. The Plaintiffs also complained that the DHES failed
9 to respond to substantive comments on the DEIS in the FEIS.
10 However, reference to the FEIS does show that responses were
11 made. See pp. 16-25 of the FEIS which contains the DHES's
12 responses to comments received on the DEIS. DHES witnesses
13 also testified that they felt it unnecessary to reiterate
14 statements that were already made in the DEIS. Examples are
15 helpful. Response Number one at pp. 16 and 17 of the FEIS
16 responds to the complaint: "The EIS process did not solve many
17 of the issues raised by various persons and groups. Also why
18 didn't DHES say how it would monitor mitigation issues and why
19 wasn't there a wide range of alternatives."

20 Next, Response Number four at p. 19 of the FEIS addresses
21 why Glastonbury and the North Ranch were not addressed in the
22 EIS. Response Number five at p. 19 of the FEIS addresses the
23 question why the proposed developments have not been considered
24 in the context of the Greater Yellowstone Ecosystem. Next, on
25

1 p. 24 of the FEIS, comment fourteen addresses whether or not
2 the DHES failed to adequately incorporate existing information
3 from the national park service and other knowledgeable
4 individuals concerning wildlife, plants, and fisheries.
5 Response Number fifteen, also at p. 24 of the FEIS, discusses
6 why DHES allegedly failed to analyze individual and cumulative
7 effects of ongoing and proposed activities. Contained at pp.
8 139 et seq. of the FEIS are the Church's responses to comments
9 made on the DEIS.

10 109. The Court also notes that the State of Montana's
11 Environment Quality Council read the DEIS and provided comments
12 at pp. 26-29 of the FEIS. The Council is not part of the DHES.
13 One of its functions is to oversee the State's response to
14 environmental matters. At p. 26 of the FEIS, the Council notes
15 that the DEIS "provides a thorough picture of the proposed
16 developments and their potential impacts." The Council goes
17 on to note at p. 26 of the FEIS: "The DEIS review of secondary
18 impacts seems thorough and, notably, the secondary impacts
19 identified are closely tied to the mitigation measures
20 recommended." Finally, at p. 29 of the FEIS, the Council
21 notes: "Overall, the Department appears to have properly
22 reviewed the direct and indirect impacts of the proposed
23 development and has developed an appropriate series of
24 mitigation measures."
25

1 110. The Court also notes that the author of this EIS,
2 Mr. Thomas Ellerhoff, an employee of the DHES, has written
3 twenty-five environmental impact statements and testified that
4 he felt that the DEIS and FEIS together adequately disclose the
5 potential environmental impacts.

6 111. In reviewing the DEIS and FEIS, it is important to
7 note that every item to be considered under Section 75-1-201,
8 MCA, is somehow addressed in those documents. Further, every
9 item to be addressed pursuant to Mont. Admin. R., 16.2.101, et
10 seq. (1980), is somewhere addressed in either the DEIS or the
11 FEIS. The Plaintiffs and Defendants disagree as to whether the
12 discussions are adequate under the various categories, but it
13 cannot be said that every item to be considered under the
14 aforementioned statute and administrative rules has not been,
15 to some degree, addressed in this process.

16 CONCLUSIONS OF LAW

17 Scope of Review

18 1. The duty of this Court in this case is to determine
19 whether Montana state law on the preparation of environmental
20 impact statements was followed: See Section 75-1-201, MCA.
21 This Court is not to determine whether or not the proposal of
22 Church is a good idea.

23 2. The standard of review under the MEPA is whether or
24 not the statutory and administrative procedures were followed.
25

1 See Section 2-4-704(2)(c), MCA; Trout Unlimited v. Morton, 509
2 F.2d 1276 (9th Cir. 1974).

3 [A]n EIS is in compliance with MEPA when its form,
4 content, and preparation substantially 1) provide
5 decisionmakers with an environmental disclosure
6 sufficiently detailed to aid in the substantive
7 decision whether to proceed with the project in light
8 of its environmental consequences and 2) make
available to the public, information of the proposed
project's environmental impact and encourage public
participation in the development of that information.
(Emphasis added)

9 Morton, supra, at 1283. Wilderness Association v. DNRC, 200
10 Mont. 11, 23-24, 648 P.2d 734, 741 (1982)

11 This Court concludes that this EIS meets this standard.

12 3. This Court, in the interests of judicial economy, must
13 recognize the expertise of administrative agencies in the field
14 of their responsibility. Wilderness Association, at 21.

15 4. An EIS need not discuss remote and highly speculative
16 consequences of proposed action. What is required is a
17 reasonably thorough discussion of the significant aspects of
18 the probable environmental consequences of a proposal. Morton,
19 supra, at 1283. Restricting the scope of the EIS to impacts
20 on the RTR-S was reasonable.

21 5. An EIS cannot be held to be invalid on the basis of
22 inconsequential technical deficiencies. Oregon Environmental
23 Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987).

24 6. An EIS will not be invalidated by differences of
25 opinion between experts over conclusions reached or methodology

1 used. Kunzman, supra, at 496.

2 7. Studies supporting conclusions in an environmental
3 impact statement need not be attached to the EIS. It is enough
4 if they are available. However, if an EIS does not inform the
5 reader of whether supporting studies can be found, than an EIS
6 must stand or fall on its own. Coalition for Canyon
7 Preservation v. Hodell, 632 P.2d 774, 782 (1980). As noted in
8 Findings of Fact No. 58, the OEA report contains pages of
9 reference materials and sources used in preparing the report.

10 Alternatives

11 8. Montana statutes and administrative regulations
12 concerning the issuance of environmental impact statements
13 require that alternatives be discussed. However, the
14 alternative discussion requirement is subject to a construction
15 of reasonableness. Wilderness Association v. DNRC, supra, at
16 24. There is no need for an EIS to consider an alternative
17 whose effect cannot be reasonably ascertained and whose
18 implementation is deemed remote and speculative. Id. It is
19 not required that an agency perform an exhaustive study of
20 every possible alternative; what is required is information
21 sufficient to permit a reasoned choice of alternate so far as
22 environmental aspects are concerned. Id. at 30-31.

23 9. The range of alternates discussed need not extend
24 beyond those reasonably related to the purposes of the project.
25

1 Trout Unlimited v. Morton, supra. at 1286. The purpose of this
2 project is to install the headquarters of the applicant on the
3 RTR-S. This purpose would not be met if the various facilities
4 here under discussion were placed on other Park County land
5 owned by the applicant.

6 10. When the purpose of a proposal is to accomplish one
7 thing, it makes no sense to consider an alternate way by which
8 another thing might be accomplished. City of Angoon v. Hodell,
9 803 F.2d 1016, 1021 (9th Cir. 1987).

10 11. As noted by the applicant, The Church feels that the
11 RTR-S property is divinely inspired for their purpose.
12 Therefore, it certainly does not make any sense to consider
13 locating their proposal on their other Park County properties.
14 The Court holds that the discussion of alternates contained on
15 p. 123 of the draft environmental impact statement and p. 6 of
16 the final are adequate. Those alternatives included a proposal
17 to deny all licenses, unconditionally approve all license,
18 modify or conditionally approve the licenses, and, approve all
19 licenses subject to implementation of a mitigation plan. This
20 last alternative was selected by the DHES.

21 Cumulative Impacts

22 12. An EIS requires discussion of all significant impacts
23 proximately caused by the proposed action, whether they, by
24 convenience, are termed primary or secondary. Any such impact
25

1 which has a significant impact on the environment should be
2 discussed. Methow Valley Citizens' Council v. Regional
3 Forester, 833 F.2d 810, 816 (9th Cir. 1987) (overturned on
4 different grounds 57 Law Week 4497).

5 13. An EIS shall evaluate the cumulative and secondary
6 impacts of a proposal. Mont. Admin. R., 16.2.605(3)(b) (1980).
7 An EIS also requires discussion of potential growth inducing
8 or growth inhibiting impacts and additional or secondary
9 impacts at the local or area level. Mont. Admin. R.,
10 16.2.605(3)(c)(g) (1980). These matters were adequately
11 discussed pp. 119-121 of the DEIS. This Court again holds that
12 the DHES made a reasonable choice when it decided to limit its
13 review to the RTR-S area and did not include examination of
14 Church activities at Glastonbury and the RTR-N properties.

15 Response to Comments

16 14. The DHES is under an obligation to respond to
17 substantive comments raised by individuals and organizations
18 on the DEIS, including an evaluation of the comments received
19 and a disposition of the issues involved. Mont. Admin. R.,
20 16.2.607(3) (1980). It must be noted that the DHES did respond
21 to a representative sample of comments at pp. 16-25 of the
22 FEIS. These responses, although not of heroic proportions, are
23 adequate. Many of the complaints of the Plaintiffs were
24 addressed. There is no need for the DHES to restate all
25

1 portions of the DEIS. This Court's job is to determine if
2 there has been substantial compliance with the regulations.
3 See Conclusion No. 2. A hypertechnical, grudging review is not
4 appropriate.

5 From pp. 139 of the FEIS onward, the DHES has let the
6 Church respond to substantive comments that were made on the
7 DEIS. There has been no authority shown to the Court that
8 would require that all comments be actually penned by the DHES
9 as opposed to the applicant. What seems to be important is
10 that the substantive comments be addressed by someone in the
11 FEIS, so that an open and thorough discussion may be had before
12 the policy makers and public. This was indeed done in the
13 FEIS. This Court will not rule that allowing an applicant to
14 respond to comments to a DEIS is, as a matter of law,
15 inappropriate.

16 15. It appears to the Court that this EIS
17 process has complied with the provisions of Section 75-1-201,
18 MCA, concerning the preparation of environmental impact
19 statements. Specifically, the process has provided a detailed
20 statement on environmental impacts of the proposed action,
21 adverse environmental effects which cannot be avoided, and
22 alternatives to the proposed action.

23 16. It also appears to this Court that the EIS process
24 in this matter has complied with Mont. Admin. R., 16.2.101, et
25 seq., (1980). Specifically, the draft EIS has included a

1 statement concerning the primary, secondary, and cumulative
2 impacts of the projects, potential growth inducing or growth
3 inhibiting impacts, and an evaluation of the immediate,
4 cumulative and secondary impacts on the physical environment.
5 See Mont. Admin. R., 16.2.605(3)(b)(c) and 16.2.604(1)(b)
6 (1980). Further, it appears to the Court that this EIS process
7 has contained the DHES's responses to substantive comments.
8 See Mont. Admin. R., 16.2.607(3) (1980).

9 Conclusion

10 To close, suffice it to say that this has not been an easy
11 decision. True, more could have been included in both the DEIS
12 and the FEIS. However, the Plaintiffs must prove by a
13 preponderance of the evidence that the EIS process was flawed.
14 Plaintiffs' wildlife experts were countered by those of the
15 Defendants, especially by evidence that the MDFWP reviewed and
16 approved the wildlife portion of the EIS. Next, claims of
17 procedural flaws in the EIS process were also countered by the
18 Defendants. The Defendants introduced expert testimony by an
19 experienced EIS writer that this EIS process went by the book.

20 This Court concludes that the form, content, and
21 preparation of the EIS substantially provided decision makers
22 with an environmental disclosure sufficiently detailed to aid
23 in the substantive decision whether to proceed with the project
24 and made available to the public information of the project's
25

1 environmental impact and encouraged public participation.

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3 ORDER

4 For the foregoing reasons, the request for the permanent
5 injunction is DENIED. The attorneys for the Church are
6 directed to prepare a judgment in conformance with the above
7 findings and conclusions.

8 DATED this 12 day of May, 1989.

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10 
DISTRICT JUDGE

11 pc: Frank Crowley
12 Stanley Kaleczyc
13 Jack Tuholske

14 cut.ord
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