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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

HIGH SIERRA HIKERS ASSOCIATION, Plaintiff,	)	
v.	)	NO. CV 09-4621 RS
UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants,	)	

San Francisco, California
Wednesday, January 11, 2012

TRANSCRIPT OF PROCEEDINGS

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Wednesday, January 11, 2012

9:33 A.M.

P R O C E E D I N G S

THE CLERK: Calling case CV 09-4621, High Sierra Hikers Association versus United States Department of the Interior, et al.

Counsel, please come forward and state your appearances.

MS. TUCHER: Good morning, your Honor. Alison Tucher from Morrison Foerster on behalf of the High Sierra Hikers Association.

THE COURT: Good morning, Ms. Tucher.

MS. TUCHER: And with me at counsel table today, if I can introduce my colleagues, Jim Garrett and Barbara Barath.

THE COURT: I know Mr. Garrett well. Welcome, Mr. Garrett.

MR. GARRETT: Thank you, your Honor.

MS. TUCHER: And also in the audience today are members of High Sierra Hikers Association, including board member Steve Brown.

THE COURT: Very well. And I think there was an additional introduction I may have stopped you on when I greeted Mr. Garrett.

MS. TUCHER: Ms. Barath -- Barbara Barath.

THE COURT: All right.

MS. TUCHER: Thank you.

MR. SHOCKEY: Good morning, your Honor. My name is Charles Shockey. I'm an attorney with the U.S. Department of Justice. I represent the defendants.

At counsel table I have with me Mr. Greg Lind and Ms. Barbara Goodyear of the Department of Interior Office of the Field Solicitor here in San Francisco, and my colleague.

THE COURT: Good morning.

MR. PYLE: Good morning, your Honor. Michael Pyle.

THE COURT: Good morning.

I have had the opportunity to look through much of what you submitted for me.

What I would request that we do is -- I don't know what order the parties wanted to address things, but I would request that we start with the Wilderness Act, and then talk about NEPA, and do it in that order, and we can have the back and forth rather than have each side go through the entire presentation.

I'm not going to provide a tentative decision. I do in many instances, but I think it's more useful for me just to have you go ahead and address these points to me this morning.

And so let's start with the Wilderness Act. And I don't have a strong view as to who should go first in this, but why don't we start with you, Ms. Tucher?

MS. TUCHER: Thank you, your Honor. In 2004 Dick Martin was the superintendent of the Sequoia and Kings Canyon National Parks, and he received an e-mail from one of his top lieutenants, the man responsible for overseeing all commercial services in Sequoia and Kings Canyon National Parks.

The e-mail starts as follows:

> "For some time we have been stalling on the issue of environmental compliance for commercial stock operations in these parks. We've been waiting to see how the Inyo situation turned out. You will recall that the Inyo was sued by the High Sierra Hikers on the issue of compliance for issuing business authorizations to packers."

The e-mail goes on to explain that the Ninth Circuit has just found that what the Forest Service did violated the Wilderness Act and violated NEPA. And then the e-mail goes on to say:

> "The implications here are hard to avoid. If we follow the precedents established by the Ninth Circuit for the U.S. Forest Service, we should issue no more permits for pack operations in these parks until we have completed major

environmental studies. If we ignore this decision we buy perhaps a little time but only at the eventual cost of being found outside the law and being brought down by court order."

The e-mail chain has the response the SEKI superintendent made to this warning. He decided to ignore the decision and be brought down later by court order.

He said:

"We should stay the course for now, at least until the GMP is final."

THE COURT: My understanding is the government doesn't dispute that the issuance of the packer permits violates the Wilderness Act at this juncture. I mean, it may say that I've gotten that slightly wrong, but that's my understanding.

Their particular issue, as is understand it, with respect to the Wilderness Act is that they say there's a distinction between the issuance of the permits and the GMP, and that there isn't a Wilderness Act violation with respect to the GMP.

So first of all, is that how you understand their position?

MS. TUCHER: That is how I understand their current position.

THE COURT: Okay. And they seem to say that when we

are looking at the GMP and whether or not there's a Wilderness Act problem, they say that I have to make some threshold determination on whether or not that's a programmatic document, the GMP, or it's a site-specific document, that that is -- certainly that's an issue that's going to come up in the NEPA context.

But is it your position that that is not a material distinction for purposes of determining whether or not there's a Wilderness Act violation with respect to the GMP?

MS. TUCHER: That's right, your Honor. Because the challenge under the Wilderness Act is an Administrative Procedures Act challenge, and under the APA we have to say, What is the decision that the government made?

Here the decision the government made was to adopt the GMP and the final environmental impact statement on which it was based. That decision is embodied in the ROD, the Record of Decision, and it is that decision in its entirety that either stands, or, as we maintain, because it is arbitrary, capricious and in violation of the law must be set aside.

The government has no authority for saying that this Court should pick and choose aspects of this decision to be overturned or set aside and aspects of the decision not to be set aside.

And if you would like a Ninth Circuit case that

talks about how it's the ROD itself that has to be reviewed, I would refer you to *Oregon Natural Desert Association versus BLM,* at 625 F.3rd, and it's at page 1118.

We cited that case in our briefs but for a different proposition. But there's a place in that case where they collect cases talking about how it's the ROD that has to be evaluated.

And I think your Honor knows that High Sierra is asking today that your Honor find that the GMP is unlawful and must be set aside. We've proposed to reserve after there's been a subsequent round of briefing the question of exactly what should happen once the GMP is set aside.

THE COURT: After I asked you to compartmentalize the Wilderness Act and NEPA, now I'm merging them together for my question.

But the remedy that you are requesting, does that depend upon the basis on which -- let's say you were to prevail on one but not both of those arguments -- prevail on Wilderness Act, not on NEPA. Does that really affect the remedy that you're going to be seeking one way or the other?

I know that the Wilderness Act arguably doesn't cover the entire expanse. It covers a large percentage of the area in question.

Does it have a particular practical impact on the basis of the decision were you to prevail on one rather than

both?

MS. TUCHER: Yes. There is a practical impact, and your Honor's question touches one of the reasons why, which is the Wilderness Act governs wilderness areas. Congress designated more than 90 percent of Sequoia and Kings Canyon as wilderness to be preserved, "untrampled by man," I think is the Congressional language, and the Park Service has chosen to manage an additional three-and-a-half percent of the parks as if they had been designated Congressionally as wilderness. They refer to those two segments together collectively as the "back country."

But there is also a segment of the park called "front country" that is not governed by the Wilderness Act and that the Park Service doesn't treat as if it were, and it's precisely in those areas that the Park Service's General Management Plan proposes to have a major increase in stock facilities, and therefore one assumes stock activity.

So it is actually very important to my client that we prevail on the NEPA challenge as well as on the Wilderness Act challenge.

So the Park Service has also said with regard to the GMP that it authorizes stock use -- commercial stock use in wilderness areas, but it doesn't permit commercial stock use in wilderness areas, as if there was a difference between those two verbs. They also cited the criminal statute that

prevents third parties from operating commercial services without a permit in wilderness areas of the parks. But we are not concerned here with crimes of third parties, but rather with the lawfulness of the government's decision.

So we think what you have to look at is the entire APA decision, and then also at the language of the Wilderness Act. And the Wilderness Act doesn't say, "You shall issue no permits for commercial enterprises." It says simply, "There shall be no commercial enterprises within wilderness areas unless and until one of these exceptions applies and the necessary finding has been made."

And I don't think there's any question that the GMP allows stock -- commercial stock in the wilderness areas up to existing levels and under existing policies without any additional action.

And in fact, the government in its own briefing has said that the permits could be -- could be lawfully issued without additional NEPA analysis precisely because they tier off of, or depend on, or are authorized by the GMP itself.

So that's why I think the government's admission that the permits are unlawful under the Wilderness Act also requires that the GMP should be set aside.

Unless your Honor has additional questions on that specific issue --

THE COURT: No. I want to hear from the government on

the Wilderness Act Issues.

MR. SHOCKEY: Your Honor, before I begin I omitted introducing my two clients who are here, Ms. Karen Taylor-Goodrich, the superintendent of Sequoia and Kings Canyon National Parks, which we refer to as "SEKI," or S-E-K-I, and also Gregory Fauth, who is the wilderness coordinator at the parks.

THE COURT: Very good.

MR. SHOCKEY: With regard to your initial comment, yes. The government has conceded that the CUA's do require a Wilderness Act finding. We felt there was no reason to deny that. We think it's clear from the *Blackwell* ruling that that is required, and we agreed that it is appropriate for the Court to have a separate remedy hearing with regard to what should be done from this point forward.

We disagree, however, with regard to the other point that the General Management Plan is flawed under the Wilderness Act and must be set aside.

And you alluded to the fact that we have pointed out the programmatic nature of the plan. And the reason why that is important and why the *Blackwell* ruling is limited and does not require invalidation of the GMP is the *Blackwell* plan -- first of all, when the decision came out and was finalized by the Ninth Circuit in December of 2004, that was the first time in the 40 year history of the Wilderness Act

that there had ever been such a ruling that a specific finding of that nature was required. The Ninth Circuit actually reversed an earlier ruling from Magistrate Judge Laporte of this Court.

So it wasn't until 2004 when this GMP process was already underway that the Ninth Circuit announced that a specialized finding would be required.

But significantly, the main distinction is that in the *Blackwell* case the plaintiffs had challenged a specific wilderness plan that the Forest Service had adopted. They did not come in when the Forest Service adopted the forest plan, or the counterpart to our GMP on behalf of the Park Service and said at that point, "You must have a specialized finding." And the difference is critical from our point of view.

And if there's one point I want to make more than any other today it is the General Management Plan does a wide variety of things, and I would like to just very briefly tick out some of these, because I think it's important to highlight the difference between what the GMP does and why the park needs to have the GMP kept in place for many purposes versus the GMP as it applies to stock use issues. And I'll get back and talk about the stock use in just a moment.

But the GMP does all of the following things. It

selects a preferred alternative that calls for protection of park resources as a paramount interest. It calls for the protection of the giant Sequoia groves. It directs protection of Wild and Scenics Rivers Act segments in the parks, which had not previously been addressed. It provides cultural resource protection for historic artifacts and cultural landscapes and architectural and site characters of public facility buildings. It provides and calls for increased accessibility under the Americans With Disabilities Act, and it also calls for access to more diverse user groups to come in and visit the park.

It commits to energy and resource conservation and sustainability. It directs the park to improve commercial services for lodging and campground and food services and stores that all the people, the vast majority of visitors to the park engage in and take advantage of. It calls for a future limitation on utilities to an appropriate level, and in some instances it indicates that it may be necessary to acquire some private land to improve user access.

All of these things are integral parts of the General Management Plan.

And from the very beginning, if it's one thing that's clear when the park began this process back in the '90s, it said, "We are adopting this plan and developing this plan to provide general conceptual guidance. We are describing what the desired future conditions are and how we

would like the park to be decades into the future."

And it was -- obviously stock use is one issue. It's the one issue the High Sierra Hikers Association is keenly concerned about and has challenged for the past 15 or so years. It's an important issue for the park, but it is really a -- one subset of the many issues that the park has dealt with, and it's critically important that the GMP be retained.

Even if the Court were to find that the GMP were flawed under the Wilderness Act with regard to the stock use issue, that issue should be carved out and set aside for future --

THE COURT: Isn't that a remedy issue? I mean, in other words to --

MR. SHOCKEY: Yes.

THE COURT: -- the extent the GMP may do all sorts of laudable things, and I for purposes of discussion will agree that I'm sure your characterization is correct.

But the point is, whether or not it is deficient with respect to assessments that it needs to have made in connection to the stock issue -- and if it's defective in that sense all of its other laudable aspects aren't going to result in saying, "Well, then, we'll overlook the defect."

MR. SHOCKEY: No.

THE COURT: It's more an issue that when you get to

the remedy you say, "Don't throw it all out; fashion a remedy that takes into account laudable aspects of the plan," and therefore it's not entirely cast aside.

MR. SHOCKEY: Correct. That's the principal point that I wanted to make.

THE COURT: So the point, though, for today i,s, as I understand it, you are still -- in part it's based upon *Blackwell,* and your argument is that the GMP is not deficient; right?

MR. SHOCKEY: Correct. Because there is no requirement in the Wilderness Act itself and there's nothing in the *Blackwell* opinion or any other court opinion or source of law that directs a general programmatic plan like this to contain this specialized finding. The park has recognized for many years --

THE COURT: It is under though that authority of the GMP that you say permits can still be issued?

MR. SHOCKEY: Yes. And let me address the point that Ms. Tucher was drawing with regard to what the GMP actually does.

And she was -- as they did -- in their response brief she was taking issue with our characterization that the GMP authorizes continuing use up to a certain level but does not permit it.

We view that as a fundamental distinction, just as

it's -- in the legislative sense Congress may authorize certain activities to occur, but until they are appropriated funds a federal agency cannot go ahead and act on them.

Here the GMP may say, as it did, that we will maintain their past practice and the current -- up to the current levels of stock use. But if that GMP were issued, as it was back in 2007, and the park never issued a commercial use authorization permit, there would be no commercial pack stock use in the park. It is only the function of the individual annual permitting process that a packer is legally authorized to come into the park and conduct the commercial services. So to us that's the key distinction.

Ms. Tucher also mentioned the *Oregon Natural Desert Council*, or *Desert Association* case for the proposition that you have to look at what the ROD -- the ROD is the action that's being reviewed, and that is correct as a general proposition. It's the record of decision that we issued in September 2007 that culminated the decision-making process for the GMP.

But you have to look at what the decision was. And the decision was to adopt this general conceptual approach, and it's -- I also want to emphasize, it's not just the wilderness plan. It's not just the stock use plan. But there are a large number of specific implementation plans that must be adopted and that the park is continually working on that include many other aspects of the GMP.

There's bear management, fire management, invasive species, aquatic resources, cave management, resource management, and of course the wilderness stock use plan. All of these individual plans tier off of and follow the GMP.

But the GMP simply set the general direction in place, and then it's up to the park as they go through and address each of these issues to decide, as we will be doing in our Wilderness Stewardship Plan; Are we going to continue to allow stock use? If so, how much, to what extent, where, which meadows, what elevations?

All of these issues are going to be addressed appropriately at the --

THE COURT: What is the timing of the Wilderness Stewardship Plan?

MR. SHOCKEY: The decision to commence the process was actually signed by the regional director in January last year. It was published in the Federal Register in April.

The initial step is to conduct a scoping process in which the public is invited to comment, inform the park as to the issues they think need to be raised. We've attached not only the scoping notice but also the High Sierra letter that was sent in in about August of this year, which was about a 40 page letter going into great detail about the issues that they raise.

All of the scoping process is now concluded. The

park has received I think something like 900 comments. It's reviewing those, and it will come up with a scoping analysis, and the next step is to begin the preparation of a draft environmental impact statement and a draft Wilderness Stewardship Plan.

And one other key point; while we readily concede it would be nice if this process had gotten going, you know, five or ten years ago, as a practical matter SEKI and the Park Service are under very tight budget restraints.

But now the park has gotten the commitment. It has gotten the approval from the national office, and it has the funding in place to continue and complete the Wilderness Stewardship Plan.

Realistically, it's probably going to take a period of a couple of years before that gets done, and it's important that it be done very carefully and that the concerns of High Sierra and others are addressed.

But the process is underway. The park is committed to doing it, and at long last that wilderness plan addressing stock use and other aspects of wilderness will be concluded.

I guess to sum up: The real issue we think is one of timing, whether, as the plaintiffs say, we will be required as a matter of law to have made our specialized finding for the GMP stage, or, as we insist, there is no such requirement. As we have made clear in every document related to the GMP we will be

addressing these issues in a separate wilderness plan, and that's what we are going to do.

So we think that's the appropriate place to have a specialized finding, which we are committed to doing, which we recognize the law requires, and we will do.

I think that addresses --

THE COURT: Let me ask Ms. Tucher if she has any further Wilderness Act comments, and then we'll move on to NEPA.

MS. TUCHER: Just quickly, we do think it's important that the entire GMP be set aside, because the Wilderness Stewardship Plan about which we spoke tiers off of and therefore accepts as appropriate and acceptable the GMP -- accepts as its starting point the GMP, which we think is fundamentally flawed.

THE COURT: Is that the only option that the Court would have, is to either -- to throw it out in its entirety, or to require a remand for certain aspects to be reassessed, or a necessity finding to be made in a particular area?

What are the -- perhaps again, that is for another day.

But let's assume as the government has argued, there are many laudable aspects to the GMP that cover areas other than stock use obviously, and that would be -- wouldn't be a practical approach to toss it all aside. What's the --

MS. TUCHER: I think the practical approach is to set aside the decision, set aside the GMP, but then not enjoin the

Park Service from doing all the other laudable things that the GMP says that they ought to do, if those are their plans and their plans are lawful.

THE COURT: They don't need the GMP to do the laudable things?

MS. TUCHER: Exactly. And we are not going to come to the Court and ask that the Park Service be enjoined from doing things just because they are in the GMP.

THE COURT: Okay. Well, why don't I have you now return to talk about NEPA?

MS. TUCHER: Thank you, your Honor. In talking about NEPA I would like to start with a little bit of historical background.

THE COURT: Okay.

MS. TUCHER: And the reason for that is that as you know, NEPA applies to any major federal action affecting the human environment, and the major federal action here is that the new GMP replaces a 1971 Master Plan.

The 1971 Master Plan is truly a programmatic plan. It sets a strategic direction on stock use. And there are two aspects to it.

The 1971 Master Plan said that the parks should phase out open grazing throughout the parks in order to protect natural resources and that the Park Service should also phase out stock use in the sensitive higher elevation

portions of the park.

Those two separate restrictions were the strategic direction set in the 1971 Master Plan and the strategic direction that the Park Service put a dent into in 1986 with their management plans and proposes now permanently to bury with the new GMP.

THE COURT: In the meantime we had the -- perhaps you could put this into its historical context for me -- the Stock Use and Meadow Management Plan and the Back Country Management Plan, which were in 1980.

MS. TUCHER: Those were the two --

THE COURT: So how do they relate to the overall context?

MS. TUCHER: Those are the two -- 1986, I think -- mid 1980s plans that I meant.

THE COURT: Okay. That's what you were referring to.

MS. TUCHER: They put a dent into it with these management plans.

THE COURT: Okay. So we have the management plan. Then we have the '80 -- mid '80s combination that I've just made reference to, and then we have the GMP.

MS. TUCHER: That's right. And so the other thing that's important about the master plan is that it shows that 40 years ago the Park Service already understood the damage that stock use causes in the national parks.

To quote from the plan there was a concern about:

-- "damage resulting from livestock foraging for food and the resultant trampling of soils, possible pollution of water and conflict with foot travelers."

Those same issues and more remain the environmental consequences that High Sierra and other members of the public and other conservation groups have been bringing to the Park Service's attention and sought to have evaluated in the NEPA process that should have been undertaken before the Park Service decided in adopting the GMP that they wanted to carry on with their existing policies.

The other thing I want to do in terms of history is to talk about the more than 20 years of promises that we've received from the Park Service that they would engage in the full study of the environmental consequences of stock use that my colleague was just here a minute ago assuring the Court is now finally underway.

It's not the first time we've seen that promise. Twenty-one years ago when I was still a law student the Park Service was promising the Wilderness Management Plan would be completed by the summer of 1992.

Fifteen years ago they went so far as to publish a notice of intent in the Federal Register that they were going

ahead with the Wilderness Management Plan. So the same plan that they now got into the Federal Register was already at the Federal Register 15 years ago.

Later they promised that the plan would be completed before the GMP. At that point they said it would be completed by the beginning of 2000, or the end of 1999.

Then when January of 2000 arrived they said, "Well, it would be completed around the same time as the GMP." Then of course in 2007 we got a GMP, and even still they are only barely -- not until we were well into this litigation did they begin with that plan.

Meanwhile High Sierra became concerned, and so High Sierra approached the Park Service, and they met with us, and they made promises directly to us.

And I actually have put together a binder that includes some of the evidence I wanted to go through today on various NEPA issues. So if I could pass one up for the Court, and if it would be -- if I could take the liberty of --

THE COURT: Sure.

MS. TUCHER: -- delivering that one.

And the first segment of this binder under "promises" has the documentary support for the dates I've just been going through. Rather than looking at every single one of these, let's look at -- Tab Five is the beginning of promises made

directly to High Sierra Hikers Association by the National Park Service about their promise to evaluate stock use.

And if you look down four paragraphs there's the promise that the National Park Service intends to pursue normal NEPA process for the reissuance of IBPs -- that's just the old acronym for these packer permits -- with the goal of completing the process no later than December 31st, 2005.

Then the *Blackwell* decision comes down. We see behind Tab Six the e-mail chain that I began this morning reading from. At the top of the e-mail chain you see William Tweed. He's the Park Service officer in charge of concessions in the park, and he says:

> "In light of the Ninth Circuit decision the Court has pretty well shredded our legal rationale for proceeding with these permits by CE."

That's "categorical exclusion." That means without further NEPA analysis.

So in 2005 the parties --

THE COURT: You know, I suppose -- I don't -- I'm not surprised at all that you would want to have me look at this, and certainly from a lawyer's perspective you want to make sure that the Court sees where officials on the other side have cast some doubt on their positions that they are taking.

But for purposes of my analysis, does this really

matter? I mean, if an individual within the Park Service says, "Boy, this new Ninth Circuit opinion really makes it difficult for us." I mean, the issue is whether or not applying the Ninth Circuit's decision and the Supreme Court's decisions and like, is there or is there not a NEPA violation?

This -- I guess my question, and I should just ask the question, does this -- do you argue this rises to the level of some kind of admission or something else, or is it just sort of a bolstering of the point that you think they've got difficulty in their legal argument?

MS. TUCHER: Your Honor, I think it's -- we don't need it to be an admission. We have no problem with the law explaining that there is no basis for categorical exclusions for the packer permits. And we can get -- that seems like sort of a secondary issue when we focus on the GMP first.

But I definitely think the laws is on our side and they failed to respond to it in their briefing, so we can get into that whenever you're -- whenever you want.

THE COURT: Okay.

MS. TUCHER: But my point here is really to just show the chronology of what the Park Service is doing.

The Park Service is scrambling for an excuse to explain why they haven't done a NEPA analysis yet, and what are they going to tell the public to make up for it?

And so behind Tab Seven they tell us, "Oops. Sorry. We actually are not going to go forward with the NEPA analysis we promised. We don't think we even really need to. We will just say we've already done enough NEPA analysis."

THE COURT: They say that though "sincerely" and "humbly," according to the letter.

MS. TUCHER: And with deep apologies. It is -- the one thing that is sort of funny about that e-mail we were just looking at behind Tab Six, when we filed this lawsuit in 2007 of course the Park Service had to respond to our complaint. And in their answer they did not admit what they had admitted behind closed doors and what they have now finally in their briefing admitted, which is that they knew all along there was a Wilderness Act violation here.

So there are two aspects to the NEPA violation, to return to the NEPA question: The first is whether or not the Park Service considered an adequate range of alternatives; and the second is whether they took the requisite hard look before choosing the preferred alternative.

I'd like to focus first on the question of an adequate range of alternatives. The legal standard here is that they must consider all reasonable alternatives.

I'm going to have trouble reading you the case name, but it's in our briefing, *Iliyo'ulaokalani Coalition versus Rumsfeld*, a Ninth Circuit decision in which the Ninth Circuit

looked at an Army plan in Hawaii to reconfigure brigades there.

And if you look at page 1095 in that decision the Court says:

> "The agency has to look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate."

Well, that's precisely what we have here. You don't have to look any further than the 1971 Master Plan for reasonable but unexamined alternatives; namely, that there be no grazing park wide, and that there be no stock in higher elevations. And yet these reasonable alternatives that the Park Service themselves had adopted as policy in their programmatic plan in 1971 were not considered.

The Park Service didn't look at it either. They didn't look at both. They didn't look at any combination at all that made substantial reductions in stock use of any kind.

Instead they looked at a no-stock alternative. This is a straw man that they came up with themselves. There were lots and lots of public comments from my client, from other conservation groups, from members of the public saying, "You need to do something to regulate stock use more effectively in

the parks." There was no public outcry that there should be a no-stock policy.

Why did they come up --

THE COURT: I was under the impression -- I'd have to go back -- that they did look at five -- weren't there five alternatives that were considered?

So it wasn't only the absolute prohibition on stock use. There were some other alternatives.

MS. TUCHER: There were. But those other alternatives by and large allowed for more stock use, or more here and less there, or -- so there were adjustments, but none of them were significant constraints on stock use.

And we will look at some of the language, because I think it's helpful to look at the decisions that the Park Service was making with regard to stock use.

But the point that I want to make about this straw man, is that I think there were two reasons that the National Park Service came up with this alternative. One reason is they knew it was an alternative they could easily reject, because they could easily explain that it wasn't workable because it would prohibit not just commercial stock use, not just certain administrative stock use, but all administrative stock use. It wouldn't allow ranger patrols. It wouldn't allow stock for rescue missions or for resupply of remote areas or any of that.

So they established a straw man that they could then reject as unworkable. And they did it so that they could then also say that any more reasonable but serious constraint on stock was unnecessary because they already had a no-stock alternative.

Remarkably that strategy continues in their briefing before this Court where in a footnote they say, "There was really no need for the Park Service to consider the alternatives that were the bedrock of the 1971 Master Plan because they had a no-stock alternative." As if somehow those were equivalent.

THE COURT: Can I ask you again sort of the standards question?

When I am assessing this, going back to that initial divide between the programmatic document and the more site-specific document, when I'm assessing the adequacy of the environmental impact statement accompanying the GMP, is that going to be a critical question? Or from your perspective is it deficient regardless of whether or not I determine that the GMP is a general programmatic document or it's something site specific?

MS. TUCHER: I think the terminology gets in the way here. I think the Park Service is using the terminology as a crutch. They were using "tiering" as a crutch.

There is no problem with a strategy of tiering, a

strategy that says we will adopt a programmatic plan, evaluate it at a programmatic level and later make site-specific decisions.

But I would say first of all, what they have done here is not a programmatic plan because it includes many site-specific decisions; and second of all, they haven't evaluated it. And I guess this is really the nub of it. They haven't evaluated it at a level that's appropriate for the decision that they've made.

So whether you want to characterize the decision they've made as programmatic with site-specific aspects, or whatever language you want to use, what really matters is, What is the decision they have made?

The way to figure that out is to look at what are the alternatives that they considered.

THE COURT: What I think they assert flows from the distinction is -- as I understand the standard, if I word it to a view the GMP from the perspective of a programmatic document, when I'm looking at the EIS that goes with it, really, all I need to find there is is there sort of sufficient detail for -- I think the language is something like for "informed decision making"? Is there enough there?

Whereas, if there is either programmatic with site-specific elements or site specific all the way around, then it's pretty clear you need a detailed review with

respect to the site-specific impacts.

So it does seem to be -- it's a distinction of importance if it's a distinction that I need to wrestle with, because it does look like they are very different standards. And the prism through which I'm going to look at the EIS will be different depending upon the nature of the underlying plan.

But you are saying maybe not; maybe it doesn't matter that much.

MS. TUCHER: I think what I'm saying is, focus on nature of the decision they made and you will find both; that it is not just a programmatic-level discussion, but that involves site-specific --

THE COURT: Well, I guess that answers the question --

MS. TUCHER: -- choices.

THE COURT: -- if a GMP has some specific impact with respect to a particular place and operations in that particular location, regardless of what you call the overall document, you are saying you need a detailed site -- you need detailed assessments of impacts at that --

MS. TUCHER: As to those aspects of the decision that was made that are site specific.

THE COURT: But maybe not as to other aspects of the GMP?

In other words, you don't need the entire -- the EIS that was put together in conjunction with making a

determination on whether or not to adopt the GMP, does it have to be entirely comprehensive, or does it only need to -- with respect to the degree to which the GMP is specific, that's the degree to which the EIS has to be specific, if you are following me?

I'm trying to get a handle on all of this.

MS. TUCHER: I think I'm following you, and I think answer is, to the extent the GMP makes a decision there has to be environmental analysis of the decision that was made.

And I guess the Ninth Circuit case that I find most useful here is again *Iliyo'ulaokalani Coalition versus Rumsfeld* --

THE COURT: Let's refer to it as "the Hawaiian case."

MS. TUCHER: The Hawaiian case. Thank you.

And the reason that the Hawaiian case is helpful here is because there was a programmatic EIS that was found to be inadequate in that case because the programmatic -- ostensibly programmatic EIS evaluated re-forming a brigade in Hawaii and said, "We will put off any serious environmental analysis until the site-specific time when we decide where in Hawaii we will put our brigade."

And the court said, "You can't do it that way, because in deciding at the programmatic level that you would re-form the brigade in Hawaii, you made a decision to stay in Hawaii as opposed to move to some other place. So you baked

into the site-specific analysis that some -- something would have to work in Hawaii, and therefore, you need to have decided that there was an environmentally appropriate answer in Hawaii before you -- instead of just pushing off into the later stage the environmental analysis.

So let's look now at the decision that was made -- the set of decisions that were made in the GMP with regard to stock use.

And to do that, again, I would refer you to the binder. This is the second -- behind FGMP -- the second tab -- is a map, because it's always easier when you are dealing with geography to have a sense of where these things are.

This map comes straight out of the GMP. It's a map the Park Service has provided to explain their referred alternative.

The light green areas of the park are the back country. So those are the wilderness areas, or in small bits the parts that are managed as wilderness, even if not designated as that.

And then you'll see the medium green, the dark green and the red areas, which are front country and developed areas. That's where most of the visits are, most of the people are, and where most of the stock developments are.

On the next page we've annotated the map to summarize things that are in the GMP. And so this is sort of the guide for what we are going to be looking at in the pages that follow. And I thought I would just start in the north and move to the south.

So the Cedar Grove Pack Station exists in the park today, and the GMP proposes that we retain it.

If you look -- now the pages -- the rest of the pages that are here in this tab are Exhibit 98 to one of the Barath Declarations in our briefing. Exhibit 98 is a fuller version of the table that is also in Exhibit Two. So when in our opening brief you see references to pages in Exhibit Two, you can find those pages here in the binder. They are also in Exhibit 98.

So looking at -- I guess for line item 170 you are going to turn to page -- pages 124 and 125 of the GMP, and you can see that we are in Cedar Grove in a front country development, and line 170 talks about a specific visit or facility.

The first highlighted language, the words "maintain the pack station" are the preferred alternative. This is what the Park Service chose when they considered alternatives. And if you look across the page to Alternative A, they considered removing the pack station. As between those two alternatives they decided to maintain it.

And we didn't highlight it, but in the other

options that the Park Service considered they also chose to -- they would have maintained the pack station. That's one of the reasons I refer to the fact that the other alternatives are also fairly stock intensive.

So going now to the Grant Grove Corral. Again, this is line 204. Again, this is a facility that exists in the park today, and that in deciding which alternative to pursue for the General Management Plan, the Park Service decided to retain the corral. They decided not to do what's here in Option A -- remove the corral.

Looking now at line number 224, this is the first of several places that you see a discussion of what to do about what used to be the Wolverton Pack Station. The Wolverton Pack Station is no more, but the Park Service has committed in the General Management Plan to building a new pack station to replace the Wolverton Pack Station in one of four places outlined on the map here.

They did tell us in the ROD that they would do further site-specific analysis. As this to this specific decision only, it says, that they would consider not having any pack station at all.

I'm not going to go through every one here because I think you get the picture. The North Fork of the Kaweah River, the Park Service decided that they would build new trail head campgrounds for stock users. On the South Fork of the Kaweah

River they said that they would improve access by putting up new hitch posts and trailer parking.

In the Ash Mountain area they said they would put in new trails and trail heads and campgrounds to accommodate the stock use. Actually, what they said was they would "improve access for stock by having trails and trail heads and camp grounds," and there are none there now. So they intend to put in something new. And then in Dillinwood similarly they are going to put in hitch posts and trailer parking.

One other pack station you see here at Mineral King, "a new pack station to replace Mineral King." Again, this is a pack station that used to exist that exists no longer and in the General Management Plan they undertook that they would replace.

In addition to these specific facilities that the General Management Plan makes a decision with regard to, there are two other places that I want to look at the General Management Plan, because they have more general characterizations about how the Park Service has decided they will regulate stock use.

The first one is line 22. If you look at the very beginning of this chart right above line one you will see that these are park-wide visions and concepts.

And if you look at the park-wide vision and concept

as it affects stock use, that's line 22. And you'll see that the preferred alternative that they decided for in the GMP is "to continue administrative, commercial and private stock use under current NPS policies."

And then there's some vague language about improvements and changes to those policies that we don't know about yet. And then there are the other alternatives that there be no stock use at all, letter A, and then -- this one actually talks about reducing stock use under Category C, but when you look at the specifics it isn't very much reduced.

And then Category D, "increase commercial and private stock use."

And then these are park-wide policies, but there's also a line item specifically for the back country, and that's line item 160. So the back country, that means --

THE COURT: Let me stop you, and just to use this particular stock use example, the line 22 example, you had said earlier that -- kind of suggesting that these alternatives were not real alternatives because it was the one, as you characterize, "straw man" alternative, and then several more which really don't do anything other than either involve additional stock use or -- they are just not alternatives.

But looking at Alternative D, just by way of example, I understand you are saying this isn't a reduction of use. But in terms of trying to come up with alternatives

that address the concerns, shifting the location of the use such that this is saying in certain hiking areas stock use might be reduced.

Isn't that an alterative? That is at least -- it's not one maybe that you want to agree to, but it's trying to address the concern that there are certain areas that may be more sensitive to stock use than others.

Isn't that precisely the kind of analysis that you want them to undertake?

MS. TUCHER: It would have been good if they had actually undertaken the analysis. It is true that there is at least in a few words the idea that there would be a somewhat different approach.

THE COURT: Well, I guess my question is, is for an alternative to be a valid -- from your perspective a valid, viable alternative, it isn't -- I assume it doesn't necessarily have to start from the premise that every such alternative is reduced stock use. It could be, one would assume, a legitimate alternative to say shifting where the use can occur could well be a legitimate alternative to consider, couldn't it?

MS. TUCHER: That's true. And one of the things that High Sierra has consistently asked for and not yet gotten any real satisfaction on is the suggestion that there be areas of the park accessible to visitors that don't allow any stock use. And the only trails for no stock use are in remote areas of the

park that you have to go through trails that have stock use, and you have to be willing to climb Mr. Whitney, for example, to get there.

But you are right. There is some level of differentiation in these alternatives, suggesting that there was a real decision that at least on paper was being made. But the environmental analysis shows that they weren't really considering at a concrete level the differences.

And the same is true, just to finish this up, if you look at line 160 with regard to stock use. This is in the back country in particular, and this is where the language comes from that "there will be administrative, commercial and private stock use up to current levels."

In the preferred plan -- and I confess when we first started this case we thought this "up to current levels" language applied to the preferred alternative park wide, but it's not, in fact, what the GMP provides for, because the GMP uses this limit of current levels only with regard to stock use in the back country.

When you look at park-wide stock use there is no restriction that it be only up to current levels, and that's significant because of all the increased facilities for stock use in the front country areas.

So having looked at the decision that the Park Service actually made and noticing that it includes continuing with

existing facilities, adding new facilities, continuing with an existing we would say highly inadequate regime of regulating stock use, I put to the Court that in fact the GMP makes a conscious decision to choose one alternative over other alternatives, however inadequate those alternatives were, and that for that reason the Park Service is wrong when they say, "We should just wait for a Wilderness Stewardship Plan to take a hard look at the consequences of the environmental decisions that we've made."

We think the "let's just wait for the Wilderness Stewardship Plan" is wrong for three reasons. The first is a practical reason: Because of the history of broken promises; the more than 20 years of promising they would do this; the fact that 15 years ago they already got as far as they are now and yet that never happened.

What the Park Service is really doing is asking this Court to sanction a policy that might be characterized as "buy now, pay later." Let us choose our alternative now, and later we will figure out whether it complies with the environmental laws.

That is not consistent with NEPA, and frankly, given the history here their credit isn't very good. So I don't think that policy is appropriate here.

The logical problem with their argument, which is that the Wilderness Stewardship Plan isn't -- by their

characterizations in their briefing isn't going to reach front country so it isn't going to reach the entirety of the decisions that they've made in the General Management Plan.

And we have a legal problem, and that's going back to the Hawaiian case with what the standard is; the requirement that they evaluate the decision when they make the decision rather than baking in a bias that will then promulgate into later tiers of analysis.

So the government has essentially -- on the question of whether there's a hard look, the government has mostly relied on this analysis -- on this argument that they should be allowed to put off analysis, but they've also attempted to justify the adequacy of the existing regime.

So I want to close on the NEPA part by walking through some of the government's own documents that show that the government knows and understands the inadequacy of their regime for regulating stock use.

And that's the last segment of the binder here, and I think the easiest way to do it is just to march through the documents as we find them here.

So the first one behind Tab One, we are looking at a memo to the senior science adviser at SEKI from SEKI. It's a comment on the draft GMP before it's final. And it summarizes the GMP in a way that frankly I'd have to agree with. In paragraph eight at the end:

"The GMP comes across" to this SEKI reader "as arguing from the conclusion negative or potentially negative impacts are ignored and beneficial impacts appear to have been embellished."

Also behind Tab Two another what appears to be draft of the GMP. Here there's some language about grazing by pack and saddle stock in wilderness meadows creating localized impacts on the native vegetation, as well as a potential vector for the introduction of exotic plants species into new areas.

I want to talk a minute about what that potential vector for the introduction of exotic plants species is about.

The Park Service is justifiably very concerned about non-native plant species, and they have a big program that includes monitoring and poisoning non-native plants in order to remove them.

I had to get involved in this case before I understood that stock are a major contributor towards the introduction of non-native plants into these natural settings, and some of that is because they bring plant seed in on their coats; some of that is the deposits they leave.

But the result is that stock use is a major vector for introducing non-native plants, which the Park Service then is justifiably concerned about and involves these other

major environmental toxins in order to remove.

But one of the things I liked about this document is actually the handwriting --

THE COURT: I take it there was no discussion of the concept of stock animals as being a conduit for transporting the -- the introduction -- being in part responsible for the introduction of these non-native species, that's never discussed in the EIS or the -- certainly the GMP. There was no discussion.

MS. TUCHER: It's certainly not analyzed. I can't remember if they even used the words. I can check on that.

What I like about the document on Tab Two is the comment of the SEKI reader on the side, "Seems pretty impacty to me." Again, an analysis I share.

But now moving past the GMP-related documents and going back in time some, Tab Three is an example of what we have a number of.

At the end of summer the back country rangers, who are the National Park Service's eyes and ears in the back country, they write reports, or at least they used to, summarizing how the summer had gone and sometimes making recommendations for changes. And there are a number of these that make recommendations about closing meadows.

We included this one so that you could see on page two the recommendation of the back country ranger that:

-- "stock should not be allowed above penned-up meadow and should be allowed only -- allowed up this far only if the trail is maintained."

That's a recommendation that is not consistently enforced. I think maybe sometimes they close that area, sometimes they don't.

But the observation here of the park ranger:

"I do not understand how the park is so strict on general regulations but allows this unchecked commercial use. This double standard is not in the best interest of our park."

There are very stringent regulations on hikers going into these areas, everything from where they can camp and where they can poop, frankly, and those are regulations that the horses not only can't read but of course don't abide by, which is how you end up with not only aesthetic injury but introduction of non-native plant species and pathogens into the water and that sort of thing.

Tab Four we have another one of these end of season reports from a back country ranger who talks about how stock grazing can be very noticeable and damaging. He talks about how deep hoof marks left in the soft lake shore grasses and manure in the inlet streams have been a problem in the area that he was

patrolling this summer, and how the fragile creek banks are susceptible to damage.

Behind Tab Five is another end of season report, again a complaint from SEKI's own eyes and ears that stock is inflicting real resource damages, "all of it legal."

Behind Tab Six another end of season report. One of the reasons I put this one in is because it's from 2004, and the Park Service in their briefing has said, "Oh, well, we can't look at old documents because we have a new policy that we adopted for the summer of 2003."

Well, even by the summer of 2004 we have reports of in Nathan's Meadow -- "It looks far worse for the wear." There's some photos we don't have, but the characterization that "there are large dust baths" -- I think that means the stock lie over and take a bath and kill all the grass to -- when they do so. And "They've closely cropped and trampled the vegetation."

2006, again post-2003, and we see severe impacts in the Junction Meadow area.

Then we have a collection of documents that are not end of season reports but higher level or more programmatic documents.

Behind Tab Eight Charlie Schultz was the plant ecologist hired by SEKI to monitor the health of their meadows, and in 1995 he wrote an analysis of their residual

biomass monitoring program, or how it was or was not protecting wilderness meadows.

He felt the program was inadequate, as you see on the next page where he recommends:

-- "a proactive system be developed that counts the number of stock nights in order to disburse use and close -- and comes up with estimated capacities -- "and closes meadows all year long if they can't do that."

Well, they've made some improvements since 1995 in their program, but they have not reached a proactive system with real-time monitoring.

So, for example, the next tab, Tab Nine there's still a concern expressed by SEKI themselves of a lack of realtime, site-specific tracking system. That's on the second page of this document.

In 2003 we have an analysis commissioned by SEKI but performed by Laurie Abbot and her colleagues at the New Mexico State University. After they looked at this same residual biomass program they recommended changes. Those changes are outlined on the conclusions page of Tab 10. Those changes have not been implemented.

As a result behind Tab 11 you see another end of season report, this after the management directive had been

adopted that spring. And the ranger is saying:

"We should take a close look at stock use throughout Sequoia and King's Canyon back country."

And then talks about a specific lake, the Rae Lakes area where the algae slime is so severe -- this ranger surmises, he offers a common-sense observation that it's "the result of fecal bacteria contaminating the water source from human and from stock," but I think we know where the larger portion came from.

"Unfortunately," the ranger opines, "closure of Rae Lakes to stock grazing was made too late. The algae slime in this lake is irreversible and may continue to get worse."

Behind Tab 12 is a document that I confess is not a SEKI document, although it reflects research that was done in SEKI. This was one of the Derlet studies. It's the most recent one that's in the record, and the conclusion is scientific support from what we just saw from the ranger report.

"The risk for finding coliform bacteria in alpine wilderness water was determined by use of the adjacent watershed. Water in areas used extensively by pack animals or for cattle

grazing was routinely contaminated, whereas water in those areas used exclusively by backpackers or rarely visited by humans was rarely contaminated."

And there's no discussion of these research results in the GMP.

We finally have behind Tab 13 one document of a number that address the -- several kinds of threatened and endangered species in the Sequoia and Kings Canyon area. This one refers to frogs.

You'll see at the top part, not highlighted, of the page that there is a discussion of Sixty Lakes, and this is an area that SEKI has closed to certain kinds of stock use precisely because of the mountain yellow legged frog. But yet the upper Le Conte Lake area, which is also frog habitat, they have not permanently closed to stock use because it is popular. So they rotate closing that area with other areas, and only every once in a while do they actually close it to stock use.

So that's my quick run-through on environmental harm.

THE COURT: Yes. Thank you.

MS. TUCHER: I would like to reserve some time to the government.

THE COURT: Thank you.

MR. SHOCKEY: Your Honor, going back to the initial points from Ms. Tucher about the 1971 Management Plan, which High Sierra continues to promote as the appropriate management directive.

As we pointed out that plan was adopted without public input and without any compliance with NEPA, and I would like to take just a moment, because that's all it will take, to read you the entirety of everything the 1971 Management Plan says about stock use.

This is on page 24 of the Management Plan:

> "Because of the damage resulting from livestock foraging from food and resultant trampling of soils, possible pollution of water and conflict with foot travelers, use of livestock in the higher elevations for any purpose should be phased out as conditions permit. Search and rescue, fire suppression, resource management activities and maintenance and supply functions should be serviced by helicopter instead of livestock. Livestock may be used in the lower elevations and around developed areas where it can be stabled and fed without open grazing on park lands."

That was the general approach -- and that's the end of the quotation.

That was all that the 1971 plan says about stock use. And the park had realized by the mid 1980s that that was not the direction it felt was appropriate and should be maintained. And while High Sierra certainly is free to press that approach in connection with the Wilderness Stewardship Plan as one of the alternatives, that's not the one that the park to date has found appropriate, and surely the park would have to come up with a more thorough and detailed analysis to be able to adopt that kind of general --

THE COURT: I don't think they take a contrary position on that.

MR. SHOCKEY: I'm sorry?

THE COURT: I don't think they take a contrary position with respect to that point. I mean, I understand they like -- they are making reference to the management plan from '71 as being consistent with their view of how things should work going forward. But they are not taking the position that that plan is the one that should be -- replace the GMP. They are saying, "You've got to do something new." So they are not saying to me, "We should operate under that plan."

MR. SHOCKEY: I believe actually that they are. I believe they say you should set aside the GMP, which without that general directive would then revert back to the adoption of

the '71 plan.

THE COURT: With the remedy you have to do something new. You have to do some kind of -- whether it be a Wilderness Stewardship Plan or something else, you've got to go ahead and do the analysis.

If I find that the GMP is wanting in some fashion the remedy would not be, "Just go back to 1971 and utilize that plan." It would be, "Come up with something new."

MR. SHOCKEY: I would hope so, yes.

THE COURT: Yeah. Okay.

MR. SHOCKEY: The plaintiffs have argued that there were many promises made, but I think even the recitation of the language from the several documents, e-mails and letters and whatnot makes it clear that the park said, "We intend to pursue the goal of completing by 2005."

They may construe that as a promise. The park certainly may have had every good indention of living up to that and meeting that deadline. It didn't happen.

We are now committed -- and while I can understand their natural skepticism, we have given assurances we have put before the Court the document showing we are on track, and I can assure the Court that my clients have told me they have the funding committed and are moving forward with that plan.

Ms. Tucher talked a little bit about what she calls

the "straw man proposal" of no stock, and I think in going through the alternatives the Court did identify at least one other alternative that called for a different variation.

Again, keep in mind that when the park identified alternatives that it was examining for purposes of NEPA compliance it was not just looking at what are alternatives for stock use. It was looking at five different visions of what the park will be like in the future, and this includes all of the other items and elements of the plan and other resource issues I identified before, one of which was stock.

THE COURT: Is it a fair characterization, though -- and I'm not suggesting by the question that there's a NEPA violation necessarily because you didn't consider some additional alternatives. I have to make that decision.

But is she, Ms. Tucher right that the alternatives that were considered were either a complete ban on stock use, and then all other alternatives contemplated at least the same level of the stock use, albeit shifted in some fashion in terms of location of the use, or even additional use; that there was not an alternative between nothing and current level?

Is that a fair characterization?

MR. SHOCKEY: I think it's a fair characterization. And in particular the plaintiffs have said there are two alternatives that they believe should have been looked at as

part of this EIS, and those are no grazing park wide and no stock use above certain elevations.

And this gets right back into the discussion of the programmatic versus the site-specific type of NEPA requirement.

Let's talk for a moment about the *Iliyo'ulaokalani* Hawaii case, and the one that the plaintiffs have said demonstrates why the programmatic approach that we have taken is flawed.

What the Court said, and this is on -- well, it appears to be on page 26, or either it was probably pages 1094 and 1095 of that ruling.

The court said: "Following the programmatic stage is the implementation stage during which individual site-specific projects consistent with the forest plan as proposed" -- and I'm quoting from an earlier Ninth Circuit opinion, *Ecology Center versus U.S. Forest Service*.

> "But an agency need not fully evaluate site-specific impacts until a critical decision has been made to act on site development."

The court then cited the *Friends of Yosemite Valley* case, one of which we have relied upon.

The key distinction, and the reason why the *Iliyo'ulaokalani* Hawaii case does not govern the outcome here

follows from the next sentence in the court's opinion.

"The Army's programmatic EIS reached a deeper level of specificity than is usual in that it names several specific Army units that will transform in the interim phase, and it indicated that such transformation will take place on site."

In other words, the programmatic document that the Army relied on did more than the typical programmatic document did.

THE COURT: And your position is, by authorizing up to current levels of stock use no critical decision has -- we haven't come to the juncture of a critical decision?

MR. SHOCKEY: Yes. And if there's any doubt about that I would strongly encourage the Court to take a careful look at page two of the Record of Decision, because it is, after all, the Record of Decision that is the, quote, "decision" that we have to examine and assess for adequacy under the Administrative Procedure Act and under NEPA.

And again, I would like to read two portions of what I think are really critical language from that Record of Decision.

The first says:

"This General Management Plan is a programmatic plan. The GMP provides

conceptual guidance for park managers about the kind of resource conditions, visitor services," et cetera.

"The listing of categories of appropriate facilities within the individual zone prescriptions serves only to exemplify the types of facilities that may now exist or that the parks may wish to consider at some point in the future.

"For a new facility to be considered, or for an existing facility to be repaired or replaced within the major trails or zones, the parks would conduct the appropriate level of compliance under NEPA."

And then further down on that page the park refers to the fact that the Wilderness Stewardship Plan will be developed with formal opportunities for review and comment as well as informal public meetings. That's the process now underway.

The critical point is this: The plaintiffs have said we have made decisions in the GMP that we will replace a facility at Wolverton -- we just haven't said where -- or that we will take other various activities. I think the Record of Decision flatly refutes that.

It states:

"No installation of new structures nor any new commercial activities will be undertaken until after approval of this plan," referring to the Wilderness Stewardship Plan.

And that is the park's position. We looked at the possibility of future installations and facility decisions within the GMP. We talked about what could be the possible impacts of those in a very general sense. But it's not unless and until we have a specific proposal, which is exactly now the issue being undertaken --

THE COURT: Does the Wilderness Stewardship Plan purport to cover the areas that are -- I forget how they were characterized, but the areas outside of the 90 percent or what have you?

MR. SHOCKEY: The -- I believe the correct number is 96 percent of the park is either designated wilderness or managed as wilderness, because its facilities, such as some corrals, may be a jumping off point.

But the stock users from those areas would take trips into the wilderness. Those areas are managed as wilderness. The Wilderness Stewardship Plan will include all of those areas, including the front country or non-back country portions.

I believe the only exception -- after I make this

statement let me turn to my clients and get a nod or a shake. I believe the only exception to that is the corral at Grant Grove, which is located in the front country area, but which is used, I believe, exclusively for day use rides, so the people who ride are only in the front country areas.

The Wilderness Stewardship Plan would not include that, but it would include most of the other areas that Ms. Tucher mentioned that are being managed as wilderness or on the edge of the wilderness. And we certainly have the discretion in the Wilderness Stewardship Plan to look beyond the wilderness areas.

Let me pause for just a second to make sure I got that right. I see affirmative nods from the superintendent and the wilderness coordinator, so --

THE COURT: Is that a -- is that a -- when you are talking about coverage and percentage area that's covered, is that particular corral area that you say is the one that would be potentially outside the Wilderness Stewardship Plan, is that a location within SEKI, or is that a facility that would potentially move somewhere else and therefore then also because of the nature of it providing day services, or however you've described it, that it would be exempt regardless of where it would be in SEKI, if you follow my question?

MR. SHOCKEY: I believe that that particular facility is one that Ms. Tucher discussed on her map, which is -- this is

under Tab Two F, Final GMP.

I believe what we are talking about there is the Grant Grove area, which is located within. It is part of -- I guess it's Sequoia National Park. It's part of SEKI. But I believe there's no proposal to consider moving that. I believe it's other -- some of the other facilities or other locations that are up for consideration.

For example, I believe the Wolverton and Mineral King pack stations have been closed down, and the question is, Should they be replaced, relocated somewhere?

That's a decision that we talked about as a possibility, but have made no decision and no commitment about that, and whatever we say or do about that will go through the full public review process.

THE COURT: So that decision, using that as an example, you don't think you could make the decision to reinstitute those without going -- unless it's in conjunction with the Wilderness Stewardship Plan, you don't have the authority under the GMP as it's currently constituted to do that?

MR. SHOCKEY: That is correct. And we have specifically said in our record of decision we will not make any decision regarding future facilities or installations until we go through that process.

We did talk briefly -- you and Ms. Tucher talked

briefly about going through that chart from the GMP and discussing Alternative C, which did talk about reducing stock use, and in our view that disproves that the no stock option was a straw man. But --

THE COURT: You talked about shifting, not reducing.

MR. SHOCKEY: Yes. Well, I believe the actual language in the document was "reducing."

THE COURT: I'll take a look at it.

MR. SHOCKEY: In either event, the GMP in its discussion of stock use is going to be supplanted and fleshed out in great detail through the Wilderness Plan. That is the whole point. That is what the NEPA tiering process involves.

And you have this general guidance like the Forest Service does. The forest plans -- and what the Minerals Management Service does for offshore leasing, they say, "This is the general approach. Here's what we are thinking of doing. Now let's talk about specific projects."

And for each of those we have to go through and we will go through --

THE COURT: You candidly acknowledge that you can understand the frustration of the -- having been presented with this notion that we have a general concept of how we are going to operate, and then for years and years that's how it's operating, and then the representation now, "Well, don't worry. We are really going to do this this time," you know.

MR. SHOCKEY: That's understandable.

THE COURT: There's some understandable frustration at that. Certainly, you know, one group or the other isn't entitled to have their views necessarily adopted ultimately if a thorough and appropriate review takes place, but they are entitled to a thorough and appropriate review.

MR. SHOCKEY: We agree with that. It should have happened before now. It hasn't.

You know, if the Court were to find that we were out of compliance with either the Wilderness Act or NEPA as a result, the appropriate remedy would be, "Go do it." Well, we are already doing it.

THE COURT: Well, I suppose, though, that brings up the question which I started with, which was -- or I was asking the timing that you can fill me in on.

Has the process started such that there's a mandated schedule that -- in other words, you've argued to me, made the point to me that, "Well, we've started this process and we've gone out for public comment" and the like.

Does that trigger under the statute some time parameters for you to operate --

MR. SHOCKEY: No. There is nothing under either a statute, Wilderness Act or NEPA that calls for any time frame, and there is no binding deadline.

All I can tell you is we are fully committed to

pursuing it, and this time we have the money and the support from the necessary park staff to do that.

THE COURT: Well --

MR. SHOCKEY: It's going to take some time.

And it's important that we take the time to do it right. We want to do it once, and we want to do it thoroughly, and we don't want to hurry up and then rush, and have the plaintiffs come back in three months or a year from now and say, "Well, it wasn't adequate. There were other alternatives. You didn't carefully enough look at some of the scientific evidence." We want to take the time, do it once, and do it right.

THE COURT: Well, but you were saying you go through some sort of potential remedy phase and the court says, "Well, go do it." When usually a court says "go do it" sometimes a court will put some parameters on "go do it."

Is that something -- under NEPA is it your position courts can do that or not?

MR. SHOCKEY: Yes.

THE COURT: I know we are now getting into the areas perhaps beyond this particular hearing, but one theoretical advantage of a judicial remedy is to be able to mandate some time.

MR. SHOCKEY: Correct. Yes. The Court does have the authority to do that.

I've been at this business for the Justice Department for 25 years, and it's my experience that most often which when the court sets a time parameter it happens -- you have the ability to do that now. It happens more often and we believe more appropriately if there has been some shortcoming.

I've had cases where courts have remanded a plan to an agency. The agency has gone about doing a compliance or a new revised plan, and the plaintiffs come in and say, "It's still not right." The court agrees and the court says, "Okay, now we are now going to set deadlines. You must get the new plan completed."

That is much more frequent. But there is nothing that would prohibit you from putting some strictures on us. I guess my only plea on behalf of the Park Service is our resources are not without limitation, and it's -- I think we will all be a lot happier if the park is given enough time to do the job well instead of being rushed prematurely.

And I have to make this point. I mean, the plaintiffs have come in now and said, "You haven't complied under the Wilderness Act, because under the *Blackwell* opinion you need a specialized finding."

Well, that Wilderness Act language has been around for decades. When they sued the Park Service back in 1994 and 1995, and the NPS versus, or the *HHSA versus Kennedy* case

before Judge Wilken, which involved a question of whether to increase stock size, and plaintiffs said "no" and the court said "no," there was no suggestion then that there was a Wilderness Act violation and we needed a specialized finding.

So I think the plaintiffs are certainly free to press that argument here. We recognize there is a statutory need for the finding, but I don't think they can fairly or credibly say this is a matter of such urgency that we need to have it done immediately.

But anyway, we think those are issues that the remedy should address, we hope, and we believe that that would be appropriate in terms of looking at the commercial use authorizations, the packer permits for this year and the next year.

THE COURT: I thought your position was I shouldn't even look at Judge Wilken's opinion because it's been -- it's no longer something I can consider. It's been vacated.

MR. SHOCKEY: Well, that is our opinion. But I think you might want to look and certainly can look at Judge Laporte's rulings on remand in the *Blackwell* case, and we'll get into that when we get into the remedy issue.

THE COURT: Okay.

MR. SHOCKEY: I guess I am probably not inclined to address the 13 tabbed exhibits that Ms. Tucher walked the Court through. I think almost without exception each one of those was

a document that they had cited as an exhibit, and most of them we have responded to in our briefing --

THE COURT: I have gone through the different -- what plaintiffs have identified as the inadequacies in the environmental impact statement. And I'm aware of the different issues with respect to animal populations and invasive weeds and all the list. So I don't propose -- it is all in the briefs, and I have looked through it so you don't have to.

MR. SHOCKEY: There is one point I would like to make, however, and that is with regard to the recommendations for the proactive system of monitoring the meadows.

There was a lot of discussion in the briefing and a fair amount of documentation regarding the residual biomass monitoring plan. That was something that was put into place in the '90s.

That's something -- we take issue with the plaintiff's characterization. We think that that program has improved greatly. That monitoring program is not by itself a tool that will determine whether meadows are opened or closed, or the timing is one of many tools.

The park has on-site rangers that constantly monitor in real-time conditions on the ground. If they determine that conditions warrant delaying opening they will make that recommendation. All of the data from the prior years's stock use, including not only the results of the

quantitative residual biomass monitoring, but also all the rangers' reports, the end-of-the-year reports -- all of that is brought together.

A meadow management committee gathers together over the course of the winter. They review that. They make recommendations to the superintendent about proposed opening dates, proposed closure of certain meadows, and as the season goes on the rangers and the park ecologist make recommendations and decisions as authorized under Management Directive Nine adopted in 2003 as to actual on-the-ground decisions.

So we think it is a good program. Is it perfect? No. Does it cover every issue in every meadow all the time? No. But it's a very good program. It's something we are constantly working to improve, and we think it does give the park a legitimate, science-based method of analyzing meadow protection, and we don't think it's a purely reactive system. We think that the recommendation process of the meadow management committee in advance of each season is a proactive and protective system that is valid and should be upheld.

I think those are the points under NEPA I wanted to address. If the Court has further questions I will attempt to answer them.

THE COURT: I'll go ahead and let Ms. Tucher make any further comments, and then we'll go on to a couple of other --

well, the issuance of the packer permits. We've talked about that issue.

And I take it the Organic Act claim doesn't seem to have been advanced any further. Is that right, Ms. Tucher?

MS. TUCHER: Your Honor, that's true.

THE COURT: Right.

MS. TUCHER: I think the NEPA and Wilderness Act covers it.

THE COURT: Okay. And the other small housekeeping issue that I wanted to mention is that I understand there was some objection to Judge Spero's decisions with respect to the state of the record, and I was just going to tell you that I'll take those -- I will fold those into the work that I do with respect to giving you a decision on this, and I don't want to have any further discussion about those issues.

So Ms. Tucher, if you want to address anything further on the NEPA issues.

MS. TUCHER: Yes. Thank you. On NEPA on the GMP, I believe I heard my colleague say that the NEPA analysis should have been done before now. If, in fact, that's what he said, we completely agree with that.

I want to be careful not to jump ahead right now to questions of remedy, but I want to be careful to address what the implication of that concession means for the NEPA case here. Because he certainly argued, "We are doing the NEPA

analysis now. Let us do it."

THE COURT: In conjunction with the Wilderness Stewardship Plan.

MS. TUCHER: In conjunction with the Wilderness Stewardship Plan.

So for the reasons that I previously mentioned, that's inadequate because of the scope. He said, "Well, we have the discretion to go beyond Congressionally managed wilderness."

But if you look at the scoping document they have already promulgated -- and it's behind Tab Two in the front of your binder -- the only mention of the scope there is the Congressionally managed wilderness. There's nothing from the scoping document they've already promulgated that suggests that they are going to get into anything beyond that, and for the reasons we've previously discussed, that's not adequate.

Then there's the question of the baseline. When they do to Wilderness Stewardship Plan, is it indeed going to be tiered off the GMP?

I submit that it can't be. It shouldn't be. And this highlights the importance of setting aside the GMP, because NEPA is all about bringing democratic participation into state government decision-making, and if my client and other members of public want to be heard and want to make sure that the government is doing its job to do environmental

analysis of the decisions it's actually making, what are they going to say is the decision being considered?

THE COURT: Well, if they do --

MS. TUCHER: What to do --

THE COURT: If they do have a, you know, a fulsome, appropriate process in conjunction with the Wilderness Stewardship Plan there's nothing that precludes your clients or any other group to say, "You shouldn't" -- if there are aspects of the GMP you think are misguided, to say "You shouldn't use this as your building-block document."

So the idea of formally striking it as an operative document versus arguing that it's not something that should be provided, anyone should take -- you know, place any reliance on it, I'm not sure I understand the distinction.

The issue that you bring up is that the process should be such that everyone gets to weigh in and say what their views are, and I don't see why that necessarily means that the GMP has to be struck down in some fashion.

MS. TUCHER: So let me answer that by going to the point that the Park Service made with regard to the ROD. Because he directed you to language where after finishing the GMP before adopting it in the ROD they said, "Let's add something that says the new facilities won't actually get constructed until we've done additional environmental analysis."

The problem is that that's about new facilities.

There's nothing there that says that the existing program of stock use won't be adopted, embraced and accepted as our -- as our general management goal, plan and activity without further environmental analysis.

THE COURT: Well --

MS. TUCHER: And there's nothing about retaining existing facilities. This is just about environmental analysis for new facilities, or for rebuilding or repairing existing ones.

But we started out by looking at the decisions actually made in the GMP with two things that were really about, Should we retain or should we remove stock facilities that have serious environmental consequences?

THE COURT: If in the process of Wilderness Stewardship Plan formulation, if it takes into account the issues that you think need to be taken into account, and the ultimate discussion nonetheless is not favorable to the side that you are speaking for, that doesn't mean by definition it is defective. It just means that -- your beef, if you will, is the process hasn't taken into account -- hasn't done the assessment that they need to do to really make a reasoned, appropriate determination on stock use going forward.

If they do that and they decide to allow for the use that is now authorized or indeed to increase it, you don't have a right, in other words, to have the process come out your way.

You have a right to have the process take into account your considerations and make a reasoned, appropriate and thoughtful determination; right?

MS. TUCHER: That's right. We are not entitled to any ultimate response.

THE COURT: Correct.

MS. TUCHER: The thing that's so frustrating for my client here is the sort of buy-now-pay-later strategy that the government has put forth in the GMP a whole explanation of how it intends to run the park, then said in the ROD, "Well, but we'll do more environmental analysis before we actually implement pieces of this, like Wolverton, or pieces of this that involve specific new facilities, and don't worry; you will get a chance later to tell us what your views are."

But later when we tell them what our views are they will say, if the GMP has not been set aside, "Oh, but that was already decided in the GMP. We have already decided that our strategic direction is X, Y and Z, so don't cause us to revisit those issues."

That's why it's so important to my client to set aside the GMP before accepting any of the decisions, but before -- let me start again.

That's why it's important for my client that the Park Service undertake an environmental analysis on a clean slate and not on a slate that's already littered with these

decisions made in the GMP without environmental analysis before.

THE COURT: Of course the view, as you want to characterize it as a view espoused in the GMP is it's legitimate for that to be part of the process. In other words, someone can say, "The grand vision, the macro vision that's put forward in this GMP is one that the Park Service should take into account"; right?

MS. TUCHER: Absolutely. That can be one of the things they consider.

But what -- where we are, if you don't set aside the GMP for a NEPA violation, is that it's not just a view that could be considered or an alternative that could be considered. It is the General Management Plan of the Park Service adopted without environmental analysis.

THE COURT: Let me ask you also just on that point that I was asking Mr. Shockey about, the -- I recognize that your position is the prospect of a Wilderness Stewardship Plan doesn't address all your concerns. I understand that.

But do you have the additional concern with respect to the scope of the Wilderness Stewardship Plan in terms of the geography of it all?

We had that discussion right at the end about the one corral area that might potentially be outside the Wilderness Stewardship Plan and the day use, stock use issue.

Is that a concern for you?

MS. TUCHER: That is a concern for me. Partly he said that one corral which exists so there wouldn't be any other reason to do environmental analysis before it was built. Partly because he exempted that, and partly because I don't see in his own scoping documents anything that supports his representation that the front country analysis would really be included.

THE COURT: Included.

MS. TUCHER: Just to go back to a couple of specific questions that you asked earlier this morning.

When we were talking about how the alternatives other than the no-stock alternative and the preferred alternative seemed to suggest that there was some real play there, I appreciate Mr. Shockey's agreement that I had fairly characterized it.

But I also wanted to bring to the Court's attention that all of the other alternatives say, "same as the preferred alternative" when you look at the specific facilities. So that's part of where I was getting my point about expanding stock use in the other alternatives as well.

And also your Honor asked about whether there was discussion of the GMP over moving invasive plants, and so I wanted to revisit that and say that it does acknowledge that this is an environmental issue. It does list one mitigation

measure that it will study and consider. I'm sorry. It lists removing invasive plants as a mitigation measure that it will study and consider to address the consequences of stock use, but it doesn't analyze the problem or discuss how it would actually do that.

And then I don't know if you want to have me address now the NEPA issues as they affect the packer permits themselves.

THE COURT: That was the next thing that we were going to do, so why don't you go ahead?

MS. TUCHER: Okay. Given that -- well, in addition to saying that the packer permits satisfy NEPA because they rely on the General Management Plan, the government had argued before the Court that the packer permits don't need to satisfy NEPA because they fit into these categorical exclusions.

If you look at the packer permits themselves, that is the legal justification for them. So I think that is the justification that this Court needs to really evaluate.

And the authority for striking down the packer permits under NEPA is right there in *Blackwell*, where *Blackwell* talks about how the Forest Service couldn't rely on categorical exclusions because the Forest Service policy said you cannot have -- you cannot use categorical exclusions in any of several different circumstances. And we have in this case of the Park Service exactly analogous internal Park Service rules.

The document, and we cite it in our brief, says:

"Categorical exclusions are improper when" -- and then there are some specific categories -- "when you are looking at wilderness areas, when you are looking at actions that will affect endangered or threatened species, when you know an action will be politically, or particularly controversial."

And we know that the Park Service knew that because we have in their documents an acknowledgment that there was a possibility of a suit here, plus they have been talking to High Sierra for a number of years.

So any of these exceptions would be enough to take the packer permits outside the realm of categorical exclusions. We have three or four of them that would do the job.

We put that into our reply brief, into the second brief that we filed here. In the brief that -- that the Park Service filed after that, they didn't discuss those exemptions at all. They just cited the more general language saying, "Well, you can have categorical exclusions." We don't quarrel with that. We just say these exemptions say you can't have them here.

THE COURT: All right. You want to, Mr. Shockey,

address that point?

MR. SHOCKEY: First, on the point that whether or not we have conceded that NEPA should have been done before now, I don't believe that was an accurate statement of what my position was.

We believe that the plan should have gotten underway and ideally would have been completed. But we are not conceding that there was a violation of NEPA from the fact that we don't have it in place now.

With regard to that plan, the -- Ms. Tucher expressed a continuing concern that we will not address the front country issues outside of the wilderness.

She is correct that NEPA is a public process and it is done in part to democratize the process and let the people speak. It's also done to make sure we have informed decision-makers, and the scoping notice that we issued was the first step. But that invited the public to come in and tell us, What should we discuss?

High Sierra took advantage of that opportunity and gave us 40 pages plus 40 exhibits telling us what we should discuss, and it may well be when we complete the scoping analysis and come up with our draft EIS, who knows what it will be?

But the point is, it's premature now, and the Court really should not get in the business of putting constraints

upon how we design or what alternatives we come up with in the EIS that's being prepared for the Wilderness Stewardship Plan. That's what the park has to take a look at. The public has the right and the opportunity to weigh in on that.

THE COURT: Well, I interpreted her point as saying that if the starting point of the process is to view the GMP as on operative document as the statement of the direction, if you will, that that has consequences for how the process is going to play itself out, so --

MR. SHOCKEY: And I am presuming that before too terribly long we will get the Court's ruling on the status of the GMP, and that will no doubt have some influence on how we design the baseline, the no-action alternative, and the other alternatives we are going to look at.

But I will say this: If the Court agrees with the plaintiffs that the appropriate step is to set aside the GMP, then in all likelihood we are going to need to first address and remedy whatever GMP flaws the Court may find, and it could well be that that has to be done first before we can get on with the business of giving our implementation step.

We think far better to leave the GMP in place. If there is some specific direction that you believe the Park Service needs to take into account, provide that in your order, and we will go ahead and address that in the Wilderness Plan EIS.

On the commercial use authorization, the packer permits, we do not rely exclusively on the categorical exclusion process. We pointed out in our briefing that the park has relied upon the 1986 -- the Stock Use Meadow Management Plan and Back Country Management Plan.

I would like to quote very briefly from a July 24th, 2006, memorandum to the files from the superintendent. This appears in the record at CUA SEKI, page 2296. And it states from the superintendent:

> "Park staff continues to regulate stock use and has done so for the past 20 years under the direction of the Back Country Management Plan and Stock Use Meadow Management Plan and their supporting environmental assessments."

So we use those environmental assessments as part of the NEPA compliance that the individual permits would then steer off of.

Then when we get around to the business of looking each year as to whether to issue permits, we then look and say, "Is there any new difference or any change in environmental impacts?" And then if not, then under Park Service policies and guidance it is appropriate in our view to issue categorical exclusions.

But those don't stand by themselves. They rely

upon the 1986 and the 1980s environmental assessments as well as the additional EIS discussion of stock use impacts, although on a general level, in the programmatic document.

We did not specifically address in our reply brief the four -- the several exceptions. The reason why we don't believe that they take us out of our ability to use the categorical exclusion process is we are not just relying on the "cat X's" themselves. We are relying on our earlier environmental assessments. We believe that is a valid approach under NEPA, especially when on a year-to-year basis basically we are looking at the same level of activity. We are looking at individual packers who are doing a number of trips into typically the same areas.

And if you look -- I know we've made this point in the briefing -- the overall stock use has declined from back in the '40s and '50s tremendously, and even from the early 1990s until now there's been a fairly steady decline to about 40 percent less than it was.

So while no one questions that having animals walk through areas of the park is going to have some impacts including a number of undesirable environmental impacts, those -- the overall use and the overall impact we believe has declined, and we think our ability to manage through that meadow management process has greatly improved.

So those are the comments on that. If I could just

have one second to confer and make sure there's nothing else I've missed or misstated.

THE COURT: Sure. Sure.

MR. SHOCKEY: Well, I have. I guess I'm stuck with it. That rests our case.

THE COURT: Well, thank you. Anything further? Go ahead.

MS. TUCHER: Can I just very briefly address the categorical exclusions for the packer permits?

THE COURT: Sure.

MS. TUCHER: It sounds to me as though we've now moved off of categorical exclusions and back to the idea that the 1986 documents -- the SUMMP and the BMP -- support the packer permits. So I want to point out Exhibits 89 and 88 in support of our papers where the Park Service acknowledged that those documents were outdated.

If I can read just the one from Exhibit 88. This is a National Park Service briefing paper entitled, "Wilderness Management Plan Status." The first bullet point:

> "The existing park Back Country Management Plan and Stock Use and Meadow Management Plan approved in 1986 are outdated."

That was in February 2002, 10 years ago.

So it -- that and other documents showing that the

Park Service knows that those -- that the 1986 documents and the environmental analysis for them is inadequate means that any decision to allow continuing stock use based on that outdated information is the height of arbitrary and capricious.

Thank you.

THE COURT: Thank you. Very well. Well, I will take the matter under submission and do my homework and give you an order.

I'm trying to recall in the case management conference that we had, the telephonic conference, if there had been any discussion with respect to ADR process in this case. I mean, it does strike me, as I listen to it, that there would be areas where a skilled neutral could do something.

Remind me. I don't have the scheduling order in front of me. I'm sure I bothered you all about that at the time.

MS. TUCHER: Actually, you didn't need do. We went with the Court's mediation program --

THE COURT: Yeah.

MS. TUCHER: -- through a number of sessions, and ultimately found them not adequate, not helpful.

MR. SHOCKEY: We did have a mediation with Howard Herman. I think both sides felt it was helpful to understand one another's views well. Both sides were hopeful we could resolve it. We didn't. So we tried.

THE COURT: So without burdening you further with that

process I will take your representation that you've given it a real shot. That's all I ask. So okay. I'll go ahead and do my work and get you an order. Thank you.

(The proceedings adjourned at 11:25 a.m.)