

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MANUEL LUJAN, JR., SECRETARY OF THE
INTERIOR, ET AL., Petitioners V. NATIONAL
WILDLIFE FEDERATION, ET AL.

CASE NO: 89-640

PLACE: Washington, D.C.

DATE: April 16, 1990

PAGES: 1 thru 58

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----X
MANUEL LUJAN, JR., SECRETARY OF :
THE INTERIOR, ET AL., :
Petitioners : No. 89-640
v. :
NATIONAL WILDLIFE FEDERATION, :
ET AL. :

-----X
Washington, D.C.
Monday, April 16, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:01 a.m.

APPEARANCES:
JOHN G. ROBERTS, JR., Acting Solicitor General, Department
of Justice, Washington, D.C.; on behalf of the
Petitioners.
E. BARRETT PRETTYMAN, JR., ESQ., Washington, D.C.; on
behalf of the Respondents.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JOHN G. ROBERTS, JR., ESQ.	
On behalf of the Petitioners	3
E. BARRETT PRETTYMAN, JR., ESQ.	
On behalf of the Respondents	25
<u>REBUTTAL ARGUMENT OF</u>	
JOHN G. ROBERTS, JR., ESQ.	
On behalf of the Petitioners	54

1 acres had ever been closed to mining, and of those 6,000
2 the BLM decision only opened 4,500 to the staking of
3 mining claims.

4 The court noted that Peterson's affidavit said
5 nothing about using the 4,500 affected acres and,
6 therefore, concluded that she had shown no injury and that
7 Respondent, therefore, had no standing.

8 QUESTION: But she also claimed about lack of
9 access to information, didn't she?

10 MR. ROBERTS: That claim was in the Greenwalt
11 declaration, one of the other of the three original
12 affidavits that were submitted by Respondent. The claim
13 there was that the organization had standing in its own
14 right, without regard to any injury to its particular
15 members.

16 QUESTION: Well, it's in your case?

17 MR. ROBERTS: Yes, Your Honor. And the district
18 court, we believe, correctly concluded that that
19 declaration, the Greenwalt declaration, was completely
20 conclusory and devoid of specific facts. But more
21 important, it's really just Sierra Club against Morton all
22 over again.

23 QUESTION: But the court of appeals thought
24 otherwise?

25 MR. ROBERTS: With respect, Your Honor, no, it

1 did not reach the Greenwalt declaration. It didn't pass
2 on that, choosing to rest its decision entirely on the
3 Peterson affidavit.

4 The district court, however, did address the
5 Greenwalt declaration and found it, as I've indicated,
6 conclusory and devoid of fact.

7 It is, as I've mentioned, the Sierra Club case
8 all over again. In fact, it's -- it's helpful to compare
9 the allegation of standing in the Sierra Club case with
10 that in the Greenwalt declaration. They're really quite
11 similar. Each of them says our organization has
12 experience and expertise in conservation. We're vitally
13 interested in this issue.

14 In the Sierra Club case the affidavit said we
15 responsibly serve and represent our members. In the
16 Greenwalt declaration, Ms. Greenwalt claimed that the
17 organization needed information and public participation
18 in order to represent their members. But this court in
19 the Morton case said that that sort of interest was
20 insufficient to confer standing because it was in no way
21 distinct from the interest any citizen could claim coming
22 in the courthouse and saying I'm interested in this
23 subject.

24 Turning back to the Peterson affidavit, what Ms.
25 Peterson claimed was that she used land in the vicinity of

1 this 2 million acre parcel, the South Pass/Green Mountain
2 area of Wyoming.

3 The District -- the D.C. Circuit on appeal
4 presumed that she meant to say something else. It
5 presumed that she meant to say she used the 4,500 affected
6 acres. The reasoning was that she claimed that she was
7 injured, claimed that she had standing, and she would only
8 be injured and only have standing if she used the 4,500
9 acres and, therefore, she must have meant to say that she
10 used those 4,500 acres.

11 This is exactly backwards. Federal courts are
12 courts of limited jurisdiction. The presumption is that
13 they are without jurisdiction, and the plaintiff must
14 affirmatively prove that he has standing to invoke the
15 power of the court.

16 The court of appeals presumed Peterson meant to
17 say she used the 4,500 acres because otherwise she
18 wouldn't have standing. But what Peterson said is that
19 she was in the vicinity of this 2 million acre area, not
20 even within the 2 million acres, just in the vicinity.

21 Even assuming we can place Peterson somewhere
22 within the 2 million acres, the court of appeals had no
23 basis for drastically narrowing the focus of her
24 allegations on the 0.225 percent of that area that was the
25 only area affected by the challenged decision.

1 QUESTION: Mr. Roberts, does the term South
2 Pass/Green Mountains area have some connotation in the
3 BLM's undertaking or was that just an area designated by
4 Ms. Peterson?

5 MR. ROBERTS: No. It's an area that's familiar
6 to people in central western Wyoming. That's what the
7 area is.

8 QUESTION: Well, I know that, but is it anything
9 more than just a geographical designation selected by the
10 -- by Ms. Peterson?

11 MR. ROBERTS: Yes, Your Honor, it is. It is the
12 term that the -- the Bureau used in the land use planning
13 process. I refer the court to page 132 of the Joint
14 Appendix, the affidavit of Jack Kelly, who's the
15 administrator of the area, in which he refers to the South
16 Pass/Green Mountain area as consisting of these -- these 2
17 million acres.

18 By any token, it is a vast expanse. South Pass
19 is some 55 miles from Green Mountain. So, even taking the
20 allegation as narrowly as possible on its face, what she's
21 referring to is essentially the equivalent of being in the
22 vicinity of the Baltimore-Washington area.

23 And it's important to remember that there's
24 never been any mystery about where these 4,500 acres are.
25 This isn't a case where she alleged a vast area because

1 she didn't know where the government was affecting the
2 lands. Two years before her affidavit was filed the
3 Bureau published in the Federal Register a very exact
4 designation of the parcels comprising the 4,500 acres.
5 Respondent knew this. It cited the Federal Register
6 notice in its complaint.

7 Therefore, if we're going to indulge in
8 presumptions, the more reasonable presumption would be
9 that if Peterson or any other of Respondent's members
10 could have alleged that they used those particular 4,500
11 acres, they would have. But neither Peterson nor anyone
12 else did.

13 Now, the court of appeals compounded its error
14 many times over when it ruled that the Peterson affidavit
15 conferred standing on Respondent to challenge not only the
16 South Pass/Green Mountain order, but hundreds of other BLM
17 orders affecting another 178 million acres of public lands
18 throughout the West -- this, despite the fact that the
19 Peterson affidavit said nothing beyond the confines of
20 South Pass and Green Mountain.

21 Respondent's argument on this score is that it's
22 complaining about a program, that BLM has a program to
23 review land classifications and land withdrawals.

24 In a certain sense this is true. Such review is
25 a very big part of what the Bureau of Land Management

1 does. But saying they have a program to review land use
2 classifications is like saying that NASA has a program to
3 explore space or the Department of Justice has a program
4 to prosecute criminals. Of course they do. That's what
5 the agency does. But it's beside the point so far as
6 standing is concerned.

7 The Respondent relies for its standing on
8 section 10 of the Administrative Procedure Act. That
9 provision gives a right to judicial review to a person who
10 is aggrieved by final agency action. The Respondent
11 cannot be aggrieved by the sort of program it complains
12 about. It may not like the way the BLM is going about its
13 business. It may even think that the BLM is violating the
14 law in the way it goes about its business. But until that
15 program or policy culminates in a final agency action,
16 Respondent is not aggrieved.

17 The final agency actions in this case are the
18 land orders.

19 QUESTION: Mr. Roberts, do we have to know
20 exactly what's challenged by the plaintiffs below in order
21 to answer the question of standing?

22 MR. ROBERTS: Yes, Your Honor. The question of
23 standing focuses on whether this particular plaintiff can
24 raise the particular claims in the complaint. So it's
25 very important to focus on what they're complaining about.

1 QUESTION: Well, I suppose one of the
2 allegations, for example, is that the reclassification
3 requires the preparation of environmental impact
4 statements.

5 MR. ROBERTS: That is one of their claims, yes.

6 QUESTION: And, of course, if the -- if Ms.
7 Peterson did have standing and was able to argue that
8 point, then it would have an effect nationwide, I assume.

9 MR. ROBERTS: Your Honor, the failure to prepare
10 an environmental impact statement is not final agency
11 action. The way that that can be challenged is when the
12 final agency action -- in this case a land order -- is
13 taken, you can then go into court and say I'm affected by
14 what the agency did, its final action.

15 And the wrong is that they took that action
16 without preparing an environmental impact statement. They
17 weren't fully informed as they would be if they had done
18 that. But it still must wait for the final agency action,
19 and the fact that there is a -- a program or policy, which
20 is really just saying this is the way the agency goes
21 about its work, is not enough to confer standing. You
22 need the concrete agency action. And in this case it was
23 the hundreds of land orders entered throughout the West.

24 QUESTION: Well, Mr. Roberts, it -- it would
25 have an effect nationwide, however, if all of the -- if

1 all of the actions taken nationwide were subject to this
2 court of appeals rule of law. *in other districts, and*
3 *obviously* That is to say, if the Court of Appeals of the
4 District of Columbia Circuit were to hold that you had to
5 make the additional publications that are alleged to have
6 been necessary in this case, and if the District of
7 Columbia Circuit had jurisdiction over every order issued
8 nationwide, then presumably the government would have to
9 comply to that -- with that order and -- with that view of
10 the law unless we took cert. of the case, right?

11 MR. ROBERTS: Certainly true, Your Honor, but
12 the key is the second predicate to your question. *applies to*

13 *the case* QUESTION: I understand that. *has jurisdiction;*

14 *and, to the* MR. ROBERTS: If the District of Columbia
15 Circuit had jurisdiction nationwide over all of these land
16 orders. *by way other courts when they are confronted with*

17 *the partic* QUESTION: And if it doesn't, then -- then *from*
18 presumably those that are challenged in the -- in the
19 District of Columbia Circuit will be governed by that *rule*
20 rule, but the government can feel free to use its view of
21 the law elsewhere? *by different.*

22 MR. ROBERTS: Absolutely, and that's -- that's
23 not an unusual result. It's no different than the
24 situation that applies, for example, when in a particular
25 case one district court declares an act of Congress *isn't*

1 unconstitutional. That doesn't mean that the act cannot
2 be enforced against other people in other districts, and
3 obviously the government tries as quickly as possible to
4 get the case to this Court which has nationwide
5 jurisdiction to decide the issue, but the act is not
6 unconstitutional across the board.

7 QUESTION: It's not really harmless error for
8 the court of appeals to say, well, we really only have
9 this one case before us but, nonetheless, it applies to
10 all cases?

11 MR. ROBERTS: Well, the court of appeals can say
12 it, but it doesn't apply to all cases. It only applies to
13 the cases of which the court of appeals has jurisdiction;
14 and, to the extent the court of appeals writes a
15 persuasive opinion, the reasoning of that court will
16 presumably sway other courts when they are confronted with
17 the particular plaintiff suffering particular injury from
18 a particular order.

19 Now, these principles are particularly important
20 in this case because these land orders are not all of one
21 cloth. They're very different.

22 To cite just one example, 31 of the challenged
23 land orders govern some 5 million acres of land in
24 Montana. There were classifications that protected that
25 land against entry under the Homestead Act. You couldn't

1 go in there and set up -- your -- your homestead.

2 In 1976, however, Congress in the Federal Land
3 Policy Management Act repealed the Homestead Act, so these
4 31 classifications were essentially moot. They protected
5 against a threat that no longer existed. They couldn't -
6 - and terminating those classifications, as the BLM did,
7 couldn't possibly aggrieve anyone. It was a paper
8 transaction. And yet, the respondent was given standing
9 to challenge those 31 orders based on the Peterson
10 affidavit, which of course had nothing to do with Montana
11 at all.

12 Respondents' theory on this point seems to be
13 that they can bring within to one lawsuit all the agency
14 actions that they think are vulnerable to the same legal
15 theory on which they hope to prevail in the action before
16 the court, but that has never been recognized as
17 sufficient to confer standing --

18 QUESTION: May I just interrupt for a second?
19 It seems to me that argument goes to the merits, the
20 31 -- I mean, maybe she has no right in Montana, but if
21 she has a right even as to 4,500 acres we don't throw her
22 case entirely out of court, do we?

23 MR. ROBERTS: Oh, no, Your Honor. I
24 wouldn't -- if the Court disagrees with us and agrees with
25 the court of appeals' presumption approach to standing

1 that Peterson has standing --

2 QUESTION: Or if there's some other record basis
3 for standing.

4 MR. ROBERTS: Or any other record basis.

5 QUESTION: Then -- then you lose on the only
6 issue that's before us here. The fact that there are
7 millions and millions of other acres out there somewhere
8 doesn't seem to me to have anything to do with the
9 standing issue, does it?

10 MR. ROBERTS: I think it does, Your Honor. The
11 question is how far Peterson's standing gets the National
12 Wildlife Federation. They have standing to challenge --

13 QUESTION: But if it gets -- your -- your
14 position doesn't get her one inch into the 180 million
15 acres.

16 MR. ROBERTS: That's right. I don't think she -
17 -

18 QUESTION: Well, then why do we have to talk
19 about anything but that one inch?

20 MR. ROBERTS: Well, if -- if -- if the Court
21 agrees with us that Peterson has no standing --

22 QUESTION: Right.

23 MR. ROBERTS: -- and the Court agrees with us
24 further that the supplemental affidavits were properly
25 excluded and the Greenwalt declaration that was discussed

1 earlier also doesn't establish standing, then you are
2 correct. There's no reason to reach whether that --

3 QUESTION: And if we disagree with you on any
4 one of those three theories, then we reverse -- we affirm?

5 MR. ROBERTS: I think not, Your Honor. The
6 court of appeals gave the Federation standing for the
7 hundreds of other land orders affecting all 178 million
8 additional acres. If you disagree with us as to Peterson
9 or any of the others, the Federation has shown standing
10 for those limited orders, those limited parcels.

11 The question then has to be addressed does that
12 limited standing confer standing for the hundreds of other
13 orders affecting the hundred --

14 QUESTION: And we have to sort through all of
15 them and decide which ones --

16 MR. ROBERTS: Well, that's certainly what the
17 trial court would have to do if the case were sent back on
18 that basis.

19 QUESTION: That's the difference between being a
20 trial judge and sitting here.

21 (Laughter.)

22 MR. ROBERTS: But the fact of the matter is,
23 understanding doctrine, the plaintiff has to show that he
24 has been injured by each agency action as to which he
25 seeks relief. The Federation seeks relief, for example,

1 for those 31 land orders I discussed in Montana, but
2 they've not even attempted to show that they've been
3 injured by those, and as I've indicated, I don't think
4 anyone could be injured by those land orders.

5 As the Court noted in Allen against Wright, the
6 standing focuses on whether the particular plaintiff can
7 raise the particular claims asserted. The particular
8 claim that's asserted in this case covers the hundreds of
9 land orders throughout the West, and yet this particular
10 Plaintiff has shown, we think, standing as to none but, at
11 most, standing as to the particular injury claimed in the
12 affidavits.

13 Now the court of appeals' decision in this
14 regard giving the Federation nationwide standing based on
15 one injury to a particular plaintiff under one land order
16 raises the most serious separation of powers concerns
17 because it aggregates in the district court all of the
18 Bureau of Land Management orders since 1981, even though
19 before that district court is one plaintiff complaining of
20 one order. Those types of separation of powers concerns
21 are precisely what the standing doctrine is designed to
22 avoid.

23 Turning briefly to the question of the
24 supplemental affidavits, I'd first point out as I
25 mentioned in response to Justice Stevens that those would

1 certainly not end the case even if they were -- should
2 have been admitted because they go, again, only to
3 particular plaintiffs' particular land orders.

4 If the Court disagrees with us on those and if,
5 in fact, the supplemental affidavits establish standing,
6 it would only be to the limited parcels, the limited
7 orders mentioned in those affidavits.

8 Now, the district court did not abuse its
9 discretion in declining to admit these affidavits more
10 than one month after the deadline set in Federal Rule of
11 Civil Procedure 56(c) and in violation of the court order.
12 Respondent chose as a deliberate trial tactic over the
13 course of several years to rest on its initial three
14 affidavits and to resist at every turn any further
15 development of the factual record on standing. The
16 district court was on the scene and aware of all the
17 circumstances and properly exercised its discretion in
18 refusing to reopen the factual record after the summary
19 judgment hearing.

20 QUESTION: Respondent says, Mr. Roberts, that he
21 had had no reason to believe it would need anything
22 further until the -- until the court at the last minute
23 suddenly decided to take seriously the -- the challenges
24 to standing which hadn't previously been -- been even
25 barely acknowledged by it.

1 MR. ROBERTS: Well, Your Honor, it had our
2 motion on summary judgment specifically directed to
3 standing. Now, it may have been overconfident as to its
4 standing, but our motion certainly put it on notice that
5 we, at least, didn't think the issue was dead.

6 And in addition, the first court of appeals
7 opinion addressed the issue of standing in the context of
8 a motion to dismiss. As this Court noted in the SCRAP
9 decision, the standards on a motion to dismiss and summary
10 judgment, this case, are very different, so they shouldn't
11 have been lulled into overconfidence on the basis of the
12 prior panel decision.

13 Furthermore, the district court had not seen
14 these affidavits when it wrote its preliminary injunction
15 decision. This was the district court's first opportunity
16 to rule on standing with the affidavits before it.

17 QUESTION: Well, suppose we disagree with you
18 and think that there was an abuse of discretion. Do
19 you -- you don't suggest that those additional affidavits
20 were insufficient to establish standing?

21 MR. ROBERTS: Well, we don't know, Your Honor,
22 because we've never had an opportunity to take discovery
23 on them. For example, they claim that certain areas
24 are -- have been open to mining. If we had an
25 opportunity --

1 QUESTION: Well, so you -- you don't say that on
2 their face they were deficient?

3 MR. ROBERTS: Not on their face, no, Your Honor.

4 QUESTION: So -- but you would say that,
5 nevertheless, if -- even if they are sufficient they
6 relate only to the specific area that they mention?

7 MR. ROBERTS: Oh, absolutely. And they cannot
8 give standing nationwide any more than the Peterson
9 affidavit can.

10 QUESTION: Was there an effort to depose the
11 plaintiffs in the first part of the case?

12 MR. ROBERTS: Yes, Your Honor. The
13 government -- in May of '86 they filed these three
14 original affidavits, and the government said, well,
15 Peterson says vicinity 2 million acres, let's find out
16 what she's talking about, let's take her deposition. The
17 respondent resisted that. It said that it would be
18 cumulative and burdensome. And it's difficult to
19 understand how they can prevent the government from
20 developing further facts on standing and then come along
21 later on and claim a right of their own for additional
22 facts after the hearing is over.

23 In addition --

24 QUESTION: Did the -- did the court sua sponte
25 reject the supplemental affidavits, or did you interpose

1 an objection?

2 MR. ROBERTS: We -- if -- I'm not quite certain,
3 Your Honor. I believe that we objected to the submission
4 of them in our reply. They were attached to a legal
5 memorandum that the respondent submitted. My recollection
6 is that we objected to them, but I'm not certain of that.
7 I noted that the district court in ruling that the
8 affidavits were untimely and in violation of its order
9 cited the Federal parties' reply brief, and I believe
10 that's where we did object to the supplemental affidavits.

11 When we moved for summary judgment on standing,
12 that was the opportunity for the respondent, if it wanted
13 to submit additional facts, to do so. That's the standard
14 practice. The party moves for summary judgment, submits
15 its affidavits. The opposing party under Rule 56 is
16 entitled to submit opposing affidavits prior to the date
17 of the hearing.

18 Respondent deliberately chose not to do that.
19 It chose to rest on its original three affidavits, and in
20 its opposition papers it claimed that those affidavits
21 were "far more than is necessary" to establish its
22 standing. It was only at the hearing when it became
23 evident that Respondent's standing was in serious doubt
24 that the respondent changed its tune, and something on the
25 order of a month later submitted these supplemental

1 factual affidavits, as the district court found, in
2 violation of Rule 56(c) and in violation of the court's
3 order which requested additional memoranda.

4 Now, the respondent has cited no case, and we
5 are aware of none, in which a court of appeals has held
6 that a district court abused its discretion in excluding
7 affidavits that it found to be untimely and in violation
8 of the court order. And for the reasons I've mentioned
9 this would be a very curious case to be the first one.

10 Respondent had several years to further develop
11 its standing allegations. For reasons of its own it chose
12 not to, and it can't be given -- I wouldn't call it a
13 second chance -- a third or a fourth chance, after the
14 hearing was over. If this was an abuse of discretion by
15 the trial court, it's hard to imagine when a trial court
16 has discretion to call an end to the development of the
17 factual record.

18 QUESTION: Would you just help me out -- get one
19 fact straight in my mind again? These were filed in the
20 briefs after the hearing? Is that when they were filed?

21 MR. ROBERTS: Yes, Your Honor. At the hearing,
22 the court, although it had no obligation to do so, gave the
23 respondents another chance to submit legal arguments. He
24 said, I want supplemental memoranda addressed to the issue
25 of standing. When the respondent filed its supplemental

1 memorandum --

2 QUESTION: It added these affidavits?

3 MR. ROBERTS: It added these affidavits.

4 QUESTION: What if the respondent had submitted
5 these affidavits at the oral hearing?

6 MR. ROBERTS: That also would have been too
7 late. The district court perhaps had discretion to
8 continue the hearing if it wished, but under Rule 56(c)
9 the affidavits were due prior to the date of the hearing.

10 QUESTION: If they'd come in a week before the
11 hearing, they would have been timely?

12 MR. ROBERTS: There would be no problem if they
13 had come in the day before the hearing, putting aside
14 questions --

15 QUESTION: I had the impression they were
16 several years late, but really they were only about six or
17 eight weeks late.

18 MR. ROBERTS: Well, they had the opportunity, in
19 responding to our summary judgment motion.

20 QUESTION: During which time they apparently
21 thought it wasn't necessary, because they'd been winning
22 on standing up to that point.

23 MR. ROBERTS: That's right. They could have
24 supplemented the record any time along -- several -- two
25 years, in essence, but they waited until a month after the

1 hearing.

2 QUESTION: When they realized they were in
3 trouble.

4 MR. ROBERTS: When they realized they were in
5 trouble, and the principle that the court of appeals
6 endorsed and which Respondents argue for here is just
7 that, the principle that you can come forward with
8 additional facts whenever you think you're in trouble.
9 It's a recipe, as we say in our reply brief, for
10 interminable litigation. Presumably it --

11 QUESTION: Let me ask -- maybe this is a stupid
12 question, but if there's no standing and you throw the
13 whole case out as of now, is that with prejudice or
14 without prejudice? Can they come back and file a new
15 complaint with these new affidavits supporting standing?

16 MR. ROBERTS: I think there would be a serious
17 question of whether they're estopped res judicata.

18 QUESTION: What would they be estopped for?
19 There was no jurisdiction in that first case.

20 MR. ROBERTS: But there was a determination as
21 to their standing, and I don't think they get a second
22 chance to come in and try again after a determination on
23 the merits of the standing question.

24 Now, if the issue is complicated, and I -- and I
25 just add --

1 QUESTION: What if the individual affiants were
2 to file a case?

3 MR. ROBERTS: It would be an entirely new case,
4 and the -- and the -- except perhaps maybe not with
5 respect to Peterson. I -- to be honest, I don't think the
6 law is developed on how you treat organizational standing
7 and collateral estoppel in that situation. Is Peterson
8 estopped because her injury was the basis for the
9 organization's standing? It certainly --

10 QUESTION: The thing that's running through my
11 mind, if we take a look at these other affidavits -- I
12 know you say we shouldn't look at them -- and we should
13 conclude -- say, we should conclude that it's perfectly
14 clear these people have standing, are we perhaps
15 generating a new series of lawsuits by saying well, we'll
16 throw this case out and let these other people start all
17 over again, as class action or some -- with a different --
18 not the National Wildlife Federation, but --

19 MR. ROBERTS: Well, certainly a different
20 organization could come in with different complaints and
21 we'd have to deal with that in that situation. But your
22 objection is -- is one that could be made in almost any
23 standing case -- certainly could have been made in the
24 Sierra Club against Morton case. I don't think there was
25 any serious doubt in that case that members of the Sierra

1 Club actually used Mineral King, but they chose not to
2 make that allegation.

3 The fact that another lawsuit could be brought
4 at another time by another party on different allegations
5 is no excuse to circumvent the standing requirements,
6 which focus on the particular case before the Court.

7 QUESTION: I assume you are being logical and
8 saying that standing is res judicata only as to this
9 particular order of the agency, and not nationwide?

10 MR. ROBERTS: To be consistent, we'd have to
11 agree with that, yes.

12 I'd like to reserve the remainder of my time for
13 rebuttal.

14 QUESTION: Very well, Mr. Roberts.

15 Mr. Prettyman?

16 ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR.

17 ON BEHALF OF THE RESPONDENTS

18 MR. PRETTYMAN: Mr. Chief Justice, and may it
19 please the Court:

20 This Court has to reach and resolve two issues
21 before it ever gets to the Peterson affidavit. The first
22 one, of course, is the five supplemental memoranda, and on
23 that issue we have very respectfully suggested to the
24 Court that it might want to dismiss the writ as
25 improvidently granted, because what's going on --

1 QUESTION: Did you raise that point in your
2 memorandum in opposition?

3 MR. PRETTYMAN: No, sir.

4 QUESTION: You're aware of the rule of Oklahoma
5 City against Tuttle, as codified in our new rules, that
6 any point that is not -- does not go to our jurisdiction
7 that should counsel against the grant of certiorari must
8 be raised in the memorandum in opposition?

9 MR. PRETTYMAN: I'm indeed familiar with that,
10 Mr. Chief Justice. I would suggest to you, however, that
11 this kind of suggestion is the same as jurisdiction. That
12 is, that you can raise it at any time yourself. We're not
13 making a motion or anything. We're just suggesting to the
14 Court in using its discretion that it might want to get
15 rid of this case --

16 QUESTION: Well --

17 MR. PRETTYMAN: -- in this fashion.

18 QUESTION: Presumably the best time for the
19 Court to have made that decision would have been at the
20 stage were certiorari was being granted. That's the
21 reason for the rule and for the statement in Oklahoma City
22 against Tulsa -- Tuttle, that if a case doesn't belong
23 here, we would like to find out about it before we grant
24 certiorari and not during the oral argument.

25 MR. PRETTYMAN: Well, the point was made about

1 the five supplemental memoranda, and I'm merely suggesting
2 to you that when you -- when you hear the situation that
3 you're in at the moment, I think that it would be a case
4 that it's not worth this Court's time to hear, because
5 what you're doing is, you're passing in effect on the
6 discretion of the court of appeals to rule that the
7 district court abused its discretion in a matter of local
8 practice.

9 Now what -- what -- these five supplemental
10 memoranda arose in a very peculiar context --

11 QUESTION: I thought they were affidavits, Mr.
12 Prettyman --

13 MR. PRETTYMAN: Affidavits. They -- they were.

14 QUESTION: Accompanying a memorandum?

15 MR. PRETTYMAN: Did I misstate?

16 QUESTION: You said five supplemental memoranda.

17 MR. PRETTYMAN: I apologize.

18 QUESTION: You mean the affidavits --

19 MR. PRETTYMAN: Of course I do --

20 QUESTION: -- that accompanied the memoranda.

21 MR. PRETTYMAN: Absolutely. They accompanied
22 the memoranda that was filed a month after the hearing.

23 The hearing was July 22nd, 1988. Up until this
24 time, two courts for three years had told us that we had
25 standing. So we come to this hearing, and even at the

1 beginning of the hearing the court tells the government
2 lawyer that he's probably on the wrong side of this case.
3 We're feeling very comfortable.

4 In the middle of the hearing, the government
5 lawyer gets up and begins reading these facts about
6 RMPs -- resource management plans -- and about how they've
7 completed all of these plans. We'd alleged in our
8 complaint that they'd only completed nine. Their own
9 affidavit had said they had completed 25, and all of a
10 sudden here he's talking about they've completed 50.

11 QUESTION: That was several years -- when was
12 their affidavit? That -- their affidavit had been some
13 time before.

14 MR. PRETTYMAN: Exactly. That's the Williams
15 affidavit.

16 QUESTION: How -- how much before the time that
17 they were updating it?

18 MR. PRETTYMAN: Well, the Williams affidavit was
19 filed -- September 5, 1986.

20 QUESTION: And the hearing was when?

21 MR. PRETTYMAN: July 22nd, 1988.

22 QUESTION: '76 to '88?

23 MR. PRETTYMAN: '86.

24 QUESTION: '86 to '88, so you were using figures
25 for two years earlier?

1 MR. PRETTYMAN: We were using the last figures
2 that they submitted.

3 QUESTION: Well, and --

4 MR. PRETTYMAN: And all of a sudden they arrive
5 at the hearing and they begin updating, and then they
6 produce this piece of paper which they say back up these
7 new figures.

8 Now, they have the court -- the district court's
9 attention now.

10 QUESTION: Well, Mr. Prettyman, I don't see what
11 that has to do with whether the Peterson affidavit gives
12 adequate standing to the plaintiff. I mean, there is some
13 argument about the extent to which the government had
14 proceeded, but it seems to me that may go to the scope of
15 relief or something of that sort. I don't see why that
16 determines whether the plaintiffs had standing.

17 MR. PRETTYMAN: Well, Your Honor, if we are
18 correct that the district court abused its discretion in
19 not allowing in the five affidavits and the government has
20 just told you that at least looking at the affidavits they
21 would concede that they are sufficient to establish
22 standing, then we never have to reach --

23 QUESTION: Well, what if we disagree with you
24 and think that since the rules don't permit post-hearing
25 affidavits, therefore there was no abuse of discretion and.

1 we're left with the Peterson affidavit?

2 MR. PRETTYMAN: Well, I will move to the
3 Peterson affidavit. I just want to make sure you
4 understand that you don't get there until you do disagree
5 with us on that point.

6 Now here, they say there's a violation of Rule
7 56. They violated Rule 56. They turn up at this hearing,
8 give the district court judge all these figures, turn in a
9 piece of paper --

10 QUESTION: And so if they did, you did, too. Is
11 that it?

12 MR. PRETTYMAN: What I'm saying is it comes with
13 little grace for them to argue that we did --

14 QUESTION: Well, it may. It may. But if they
15 did, you did, too.

16 MR. PRETTYMAN: Well, it may be, Your Honor.

17 QUESTION: The district court held you to the
18 rule, and you say because -- did you object to their
19 factual statements and their argument?

20 MR. PRETTYMAN: No, because we thought we were
21 going to have a chance to respond to them in supplemental
22 affidavits.

23 Now this is a --

24 QUESTION: Did you advise the court at the time
25 of the hearing that you wished to file supplemental

1 affidavits?

2 MR. PRETTYMAN: He had told us that we could
3 file supplemental memoranda. We did not ask for
4 supplemental affidavits.

5 QUESTION: And so you did not advise the court
6 at the time of hearing that there would be new factual
7 matters?

8 MR. PRETTYMAN: That's correct. We were totally
9 surprised by this piece of paper. At the very end of the
10 hearing the judge says we'll mark it as an exhibit, and
11 then suddenly it's an exhibit and we're confronted with
12 it. But since we know we're going to be able to respond
13 and the government is going to be able to respond to us,
14 we didn't think that there would be any harm.

15 QUESTION: Well, the government's point had
16 nothing to do with the standing. I mean, it was a totally
17 different point. The government's affidavit had nothing
18 to do with the standing issue we're talking about here,
19 right?

20 MR. PRETTYMAN: Oh, Your Honor, but it had very
21 much to do with RMPs, which the district court --

22 QUESTION: With the case. With the case, but
23 not with the standing issue that we're talking about here.

24 MR. PRETTYMAN: Well, but in ruling on standing,
25 on throwing this out, the district court ruled on the

1 merits on RMPs. If you look at his opinion and you look
2 at page 35a of his opinion and the next page, you'll find
3 that he's talking about the fact that our contention about
4 the fact that we didn't get the hearings and so forth were
5 all rebutted by the government's evidence.

6 QUESTION: How can you rule on the merits in
7 ruling on standing? I --

8 MR. PRETTYMAN: That's exactly one of my points,
9 Your Honor, is that he should not have been ruling on the
10 merits, but he did. It's in his opinion.

11 QUESTION: Well, no, he didn't. I mean, if the
12 case was dismissed on standing he certainly didn't rule on
13 the merits. He might have said something about the
14 merits, but it's just not a ruling.

15 MR. PRETTYMAN: Well, Your Honor, all I can do
16 is read his opinion, and his opinion passed on a number of
17 points that -- that would appear to be on the merits.

18 QUESTION: Well, yes, but we -- we don't review
19 dicta, and if this case was dismissed on standing, you
20 know that that's no precedent.

21 MR. PRETTYMAN: But Your Honor, if he sets forth
22 right here in the opinion as part of his reason for
23 dismissing on standing certain facts that really go to the
24 merits, it seems to me that we are entitled to say he
25 should never have done that, that that's part of the

1 problem here.

2 QUESTION: So to rebut those affidavits. You
3 came in and said there's standing, which is a totally
4 different point.

5 So you're saying there were two wrongs here.
6 Would it suffice to -- to remedy the injustice if, in
7 reversing the court of appeals' decision here, our opinion
8 said, moreover, when this goes back don't let the
9 government's affidavit in, or you shouldn't have let the
10 government's affidavit in?

11 MR. PRETTYMAN: No. I think what --

12 QUESTION: Or you are sanctioned and reprimanded
13 for letting -- and then the inequity would be eliminated,
14 I assume?

15 MR. PRETTYMAN: No. I think what you should do
16 when you send it back is to say that go ahead and allow
17 the defect in standing, if there is any, to be cured the
18 way the court of appeals said that that was the practice
19 in the District of Columbia.

20 Defects in the District of Columbia can be cured
21 by supplemental affidavit.

22 QUESTION: The District of Columbia doesn't
23 practice under the Federal Rules?

24 MR. PRETTYMAN: Of course, it does, Your Honor,
25 but the Federal Rule does not mean that you have to file

1 it at the hearing, because if that were true a district
2 judge could not even have given us permission to file
3 those affidavits afterwards, and that's --

4 QUESTION: Well, but he gave you permission to
5 file memoranda, not affidavits.

6 MR. PRETTYMAN: But suppose he had said you can
7 file affidavits with your memoranda? Under the
8 government's interpretation that would be a violation of
9 Rule 56, and he couldn't have done it.

10 QUESTION: Well, maybe he couldn't.

11 MR. PRETTYMAN: Well, Your Honor, that isn't
12 what the lower courts have said. It may be that's what
13 this Court is going to say, but the lower courts have said
14 that you can -- that you can cure these defects and
15 particularly in the District of Columbia.

16 QUESTION: But that isn't before us here. Here
17 you have a district court judge that did not expressly
18 authorize the filing of supplemental affidavits and that
19 ruled that it wouldn't -- they wouldn't be considered.

20 So the question is whether that amounts to abuse
21 of discretion.

22 MR. PRETTYMAN: The status of the case before
23 you is that the court of appeals has ruled that it was an
24 abuse of discretion of the district court under all of the
25 circumstances here.

1 QUESTION: And that question is before us?

2 MR. PRETTYMAN: That question is definitely
3 before you, and you have to --

4 QUESTION: Right. So we have to look at it
5 as -- as the court of appeals should have looked at it at
6 the time.

7 MR. PRETTYMAN: And consider all the equities,
8 which it did. Absolutely.

9 Now the other thing that you're going to have to
10 face and resolve before you reverse is the problem of the
11 standing of the Federation on its own. That is a question
12 that the court of appeals never had to reach because it -
13 -

14 QUESTION: Why do we have to face it?

15 MR. PRETTYMAN: Because if we had standing on
16 our own, there is standing.

17 QUESTION: Yes, but if -- we don't ordinarily
18 pass on questions that the court of appeals hasn't passed
19 on. If we find there's no standing under the Peterson
20 affidavit and that the court of appeals was wrong on the
21 abuse of discretion point, presumably it would be open to
22 the court of appeals on remand to consider whether there
23 is informational standing or whatever you call it.

24 MR. PRETTYMAN: I agree with you 100 percent.
25 Maybe I -- maybe didn't make myself clear.

1 What I mean was that you should remand. The
2 case isn't over. You don't order it dismissed for lack of
3 standing. You'd have to remand it back to the court of
4 appeals, and the court of appeals would then determine
5 whether we have standing on our own.

6 QUESTION: Yes. If we didn't determine that, we
7 would simply send it back, and it would be an open
8 question?

9 MR. PRETTYMAN: Right. That's exactly right,
10 Your Honor.

11 All right. Now let's get to the Peterson
12 affidavit, finally. First of all, it's not 2 million
13 acres. The 2 million acres is Fremont and Natrona
14 Counties. What we're talking about is 4,455 acres, which
15 are the lands that were open to mining.

16 Now, it seems to me that one of the problems
17 here is that --

18 QUESTION: What you're talking -- I don't know
19 what you're talking about. That -- those are the lands
20 that were adversely affected, in your view, by the order
21 that you're challenging?

22 MR. PRETTYMAN: Correct.

23 QUESTION: But what's relevant is what greater
24 parcel were those lands contained in that were described
25 in the affidavits, isn't that right?

1 MR. PRETTYMAN: No. She was not describing some
2 greater area. She was describing the South Pass and Green
3 Mountain areas, and if you look --

4 QUESTION: And -- and that describes those
5 4,400 --

6 MR. PRETTYMAN: Exactly. The 4,400 are included
7 within the South Pass and Green Mountain --

8 QUESTION: And how many acres is the South Pass
9 and Green Mountain area?

10 MR. PRETTYMAN: It's a total of approximately
11 150,000.

12 QUESTION: Okay.

13 MR. PRETTYMAN: Green Mountain is about 126,000,
14 and the rest --

15 QUESTION: So it's 4,400 acres that are
16 somewhere in 156,000 acres?

17 MR. PRETTYMAN: Right.

18 QUESTION: Well, it's in the vicinity of. I
19 mean, that's an additional qualification.

20 MR. PRETTYMAN: I was going to address that in
21 just a moment. Could I just clear up this one thing?

22 You will see a figure of 1.2 million in the
23 Kelly affidavit, but, believe me, that includes the
24 Crook's Mountain area, and it's like a lot of the
25 government's figures in this case. You can get different

1 results.

2 The best we can figure from the government's
3 own -- own evidence is 150,000 acres.

4 Now, all right, let me say what I think happened
5 here, because we're not just looking at the Peterson
6 affidavit. You're looking at the record as a whole. The
7 government's evidence is most important here.

8 Mrs. Peterson swore that she recreated in the
9 vicinity of South Pass and Green Mountain, where the lands
10 have been open to mining and -- and this mining threatens
11 the aesthetics and the wildlife, which in turn harms her.
12 Now that's essentially what she said.

13 Then the government comes along and shows that,
14 indeed, 4,455 acres were open to mining in the South Pass
15 and Green Mountain areas, and that has resulted in 406
16 mining claims being filed and some operations being
17 started, and the government also shows that the mining was
18 not only -- not only can but will -- has hurt the wildlife
19 and aesthetics in these very same areas.

20 I mean, I can read to you here where the
21 government both in '82 and in '85 and '86 said
22 specifically, for example, in South Pass, these activities
23 -- they're talking about dredging and underground tunnels
24 for mining -- have an adverse impact on crucial moose
25 habitat, deer habitat, some elk habitat and a variety of

1 small game species. Improvements at campgrounds, as well
2 as land in the immediate vicinity could either be damaged
3 or destroyed. This is not the government talking about -
4 -

5 QUESTION: In the whole 150,000 acres, Mr.
6 Prettyman, or just --

7 MR. PRETTYMAN: They're talking about --

8 QUESTION: -- in whatever particular one of the
9 4,400 acres that these activities were going -- going on
10 in?

11 MR. PRETTYMAN: What they are talking about,
12 Your Honor, is the mining in the 4,455 that's in South
13 Pass and Green Mountain.

14 QUESTION: Right. But we don't know where that
15 is among --

16 MR. PRETTYMAN: Of course we know where it is.

17 QUESTION: We know that it's somewhere in those,
18 you say, 150,000 acres.

19 MR. PRETTYMAN: Oh, I'm sorry, Your Honor. But
20 if you look at the --

21 QUESTION: In the vicinity of which this -- this
22 affiant said she recreated.

23 MR. PRETTYMAN: Well, I'm sorry. I respectfully
24 disagree. If you look in the Federal Register you can
25 tell exactly where these places are within the 40 --

1 within the --

2 QUESTION: What's relevant is not whether we can
3 tell from the Federal Register but whether we can tell
4 from her affidavit. All she says is that she is in the
5 vicinity of the 150,000 acres, and you're telling me that
6 the government has acknowledged that somewhere on 4,400
7 acres in those 156,000, all of which she may not have been
8 near, there has been an adverse impact.

9 MR. PRETTYMAN: No. I'm saying that the
10 government is talking about the exact area that she's
11 talking about.

12 QUESTION: Well, I thought -- go ahead and
13 finish your answer to Justice Scalia.

14 MR. PRETTYMAN: The government is talking about
15 the harm that will come to aesthetics and wildlife from
16 the opening of the mining and where the opening of the --
17 opening to mining occurred was in the 4,455 which she
18 says she's in the vicinity of.

19 QUESTION: It doesn't say she's in the vicinity
20 of the 4,400 acres. She says she's in the vicinity of the
21 150,000 -- where does she say that she's in the vicinity
22 of the 4,400?

23 MR. PRETTYMAN: She said --

24 QUESTION: Read the portion of her affidavit
25 that indicates that.

1 QUESTION: Where will we find her affidavit, Mr.
2 Prettyman?

3 MR. PRETTYMAN: Sure. Yes. Look in the
4 petition appendix at page -- the best part is 191a.

5 QUESTION: 191a.

6 QUESTION: Not of the joint appendix, but of
7 the --

8 MR. PRETTYMAN: No, of the petition appendix.

9 QUESTION: -- the petition appendix.

10 QUESTION: What page?

11 QUESTION: 191a.

12 MR. PRETTYMAN: 191a and let's take, for
13 example, paragraph 6.

14 QUESTION: Well, let's -- before we take
15 paragraph 6 take paragraph 3. "I use the Federal lands
16 including those in the vicinity of the South Pass/Green
17 Mountain area of Wyoming for recreational purposes."

18 MR. PRETTYMAN: Right.

19 QUESTION: And you say that the -- the Federal
20 lands that would be embraced within that area are no more
21 than 150,000 acres?

22 MR. PRETTYMAN: I'm saying that the -- yes, that
23 the South Pass/Green Mountain area -- you take the
24 resource areas that encompass those. That would be
25 something on the order of 150,000 acres.

1 QUESTION: Those are the Federal lands that are
2 included within that area?

3 MR. PRETTYMAN: Yes, that's right.

4 Now, let's go to paragraph 6. "My recreational
5 use and aesthetic enjoyment of federal lands, particularly
6 those in the vicinity of South Pass/Green Mountain,
7 Wyoming, have been and continue to be adversely affected,
8 in fact, by the unlawful actions" -- she's now talking
9 about the terminations -- "of the Bureau and the
10 Department. In particular, the South Pass/Green Mountain
11 area of Wyoming has been opened to the staking of the
12 mining claims and oil and gas leasing, an action which
13 threatens the aesthetic beauty and wildlife habitat
14 potential of those lands."

15 Now, the government's evidence comes in and says
16 in the South Pass/Green Mountain areas the area that has
17 been opened to mining is 4,455 acres.

18 QUESTION: Suppose I said the -- the Bureau is
19 allowing mining in the United States. My -- and then I
20 track this -- my recreational use and aesthetic enjoyment
21 of the United States is affected by that mining that has
22 been allowed. Would that -- would that establish a
23 standard?

24 MR. PRETTYMAN: Of course not. Of course not.
25 There obviously has to be a good judgment here, and it's a

1 question --

2 QUESTION: But it's -- you're saying it's the
3 other side of 150,000 acres?

4 MR. PRETTYMAN: No. What I'm saying is that
5 -- that when she says that she is using two areas that the
6 government concedes were open to mining and the government
7 concedes were harmed -- have been harmed by the mining and
8 that's precisely what she says that she's being harmed by
9 the aesthetics and wildlife that that's enough.

10 Now, obviously, if she just says I'm in the
11 vicinity of Arizona or I'm in the vicinity of the West
12 Coast or I'm in the vicinity of the United States, it's
13 not enough. But you know, it -- to parse this down so
14 that she has to set forth each tract like you do in the
15 Federal Register -- you can't do that with people who are
16 swearing to this. They don't know -- they don't know what
17 these tracts are.

18 What she's saying is that I go up there in this
19 area, and there's the mining, and it's harming me, and the
20 government comes in and says well, yeah, we're mining
21 there, and we'll tell you exactly where it is, and it is
22 doing some harm, but you don't have any standing.

23 What happened to SCRAP, for example, where the
24 people --

25 QUESTION: SCRAP -- SCRAP was on a motion to

1 dismiss.

2 MR. PRETTYMAN: Well, nevertheless you said that
3 it was sufficient that the people were in the area of
4 the -- Wildlife Federation.

5 QUESTION: Well, SCRAP was a five -- five to
6 four opinion. It was on a motion to dismiss, and the
7 court said that the standard might be different on summary
8 judgment.

9 MR. PRETTYMAN: Well, what about Japan Whaling,
10 Your Honor, that Justice White wrote, where you'll recall
11 that the -- the -- the -- they said just because the
12 conservation group's members enjoyed watching whaling and
13 studying whaling that that was enough to give them
14 standing to challenge the Secretary of Commerce's refusal
15 to condemn Japan for whaling. I mean, that -- I mean,
16 there are all kinds of cases from this Court where -- what
17 about -- what about the Brock case, for example?
18 International Union v. Brock.

19 There -- you remember those were the benefits
20 given to union members to -- to -- to help them against
21 import competition. And the Secretary of Labor there
22 issues a policy handbook, and the union comes in -- not
23 all members of the union were affected, and not all those
24 affected were members of the union, but the union comes in
25 and says we represent these people. You didn't require

1 that you go back and show for each union member what wage
2 and what pay and how many hours he worked and so forth.
3 You said that so long as some union members were affected,
4 even though the state agencies were making the decision in
5 that case, that there was standing.

6 In Watt v. Energy Foundation, the -- you
7 remember the case where the Secretary of the Interior was
8 -- was using different bidding systems, which affected
9 everybody differently. All the parties were affected
10 differently. And you said that there was standing for
11 California to challenge the issue of the regulations and
12 tell him he had to follow the act even though everybody
13 was affected differently.

14 I just don't understand in the context of these
15 other cases why this case is any different. The -- Mr.
16 Roberts says -- in effect I think what he's saying is that
17 a -- that somebody would have to come in and show -- all
18 of our members would have to come in and show for each
19 tract, for each little area throughout the United States
20 that they were harmed. That's not -- that isn't what you
21 all have said.

22 In Sierra Club v. Morton you said so long as one
23 person can establish standing, they can represent the
24 public interests, represent the --

25 QUESTION: Yes, but all the one person would

1 have to say -- I mean, all -- all that would have been
2 necessary is that paragraph 3 of the affidavit instead of
3 saying generally I use the Federal lands, including those
4 in the vicinity -- in the vicinity of the South Pass/Green
5 Mountain area, she could say I use the Federal land
6 adjacent to and then just name one of the sites in this
7 150,000 acres that -- that has been opened for mining.
8 That's all she had to say. That -- that's really not a
9 big deal.

10 MR. PRETTYMAN: Well, I must say I don't see the
11 -- the difference between "in the vicinity of" and
12 "adjacent to." I mean, in vicinity of seems to me --

13 QUESTION: No.

14 MR. PRETTYMAN: -- it means around and about.

15 QUESTION: The difference is in the vicinity of
16 150,000 acres.

17 MR. PRETTYMAN: No, it's in the vicinity --

18 QUESTION: And in the vicinity of or adjacent to
19 the particular acre of those 150,000 where mining claims
20 have been filed or that have been opened for the filing of
21 mining claims. That's the difference.

22 MR. PRETTYMAN: Well, Your Honor, it's -- it's
23 in the vicinity of the 4,455, and -- and to say that she
24 has to do it tract by tract is different than anything
25 I've ever read in any of this Court's opinions.

1 QUESTION: But it -- it's -- vaguer than that, I
2 think, Mr. Prettyman, because the -- the distance between
3 South Pass and the Green Mountains in Wyoming is many --
4 you know, what, 50 miles, something like that?

5 MR. PRETTYMAN: Well. it's -- yes, it's 50
6 miles. It's only -- it's 150 miles from her house to
7 Green Mountain and then it's about 185 -- a little bit
8 more than that to South Pass. She can get down there in a
9 couple of hours. That's not in the record, but I mean she
10 can get down there in a couple of hours.

11 I mean, you all -- you would be requiring laymen
12 who are hunters and fishermen to swear to something that
13 they aren't prepared to swear to when -- when you're going
14 to require them to name these particular tracts that they
15 happen to have been on.

16 Normally when you fish and camp and hunt you're
17 not on any one tract anyway; you're around a whole area.
18 And if she's being harmed by mining, which the government
19 admits -- the government concedes a mining is causing harm
20 to aesthetics and -- and the kinds of things that she
21 does, you can't just take her affidavit alone. You've got
22 to look at the record as a whole.

23 And I think -- the court of appeals never had to
24 do that because it said the Peterson affidavit is all
25 right. But if you're going to look at this Peterson

1 affidavit, you have to look at the -- at the -- under Rule
2 56 you have to look at the record as a whole. And the
3 record as a whole, when you throw in the government's
4 evidence, will show you not only that any minor lapses
5 that she left out are filled in, but also that what she
6 claims is going on is going on. The government says it.
7 It says as late as --

8 QUESTION: Well, are you defending the court of
9 appeals' rationale in finding standing or not?

10 MR. PRETTYMAN: The only thing that I -- that I
11 part company with on the court of appeals is that I don't
12 think they had to rely on any presumption because they --

13 QUESTION: But they did.

14 MR. PRETTYMAN: They did because they didn't
15 look at the government's evidence.

16 QUESTION: Well, they did, though, so -- so they
17 -- on that basis you're saying you concede that they were
18 in error --

19 MR. PRETTYMAN: No.

20 QUESTION: That they applied the wrong rule of
21 law in deciding standing.

22 MR. PRETTYMAN: No, I'm sorry, Your Honor. I
23 don't concede that they're in error. All I'm saying is
24 they didn't have to say presumption. They could
25 easily --

1 QUESTION: Well, they did and relied on it.

2 MR. PRETTYMAN: If the record as it stands
3 before this court fully supports Mrs. Peterson in every
4 respect, where she recreated, what she saw, the harm that
5 was done --

6 QUESTION: Well, why should we have to do all
7 that? If the court of appeals was wrong in -- in -- in
8 arriving at its conclusion, why shouldn't they have to do
9 the job that you are now suggesting we should do?

10 MR. PRETTYMAN: Well, then send it back to them
11 and let them do it, because that's what they were supposed
12 to do under Rule 56, and that's what this Court said
13 in --

14 QUESTION: So you do part company with the court
15 of appeals in that?

16 MR. PRETTYMAN: Only in that one instance, that
17 they didn't -- they didn't --

18 QUESTION: Well, that's a pretty big instance,
19 isn't it?

20 MR. PRETTYMAN: They didn't -- no, I don't think
21 so, Your Honor. They -- they simply took an easy shortcut
22 when I would have said to them look, look at the whole
23 record the way you're supposed to and you won't even have
24 to deal with any presumptions.

25 QUESTION: How did you argue it in the court of

1 appeals? Like you're doing now?

2 MR. PRETTYMAN: I didn't argue it in the court
3 of appeals, Your Honor.

4 QUESTION: Well, how did -- how was the case
5 argued in the court of appeals, like you're doing it now?

6 MR. PRETTYMAN: I must tell you in all candor, I
7 don't know how it was argued in the court of appeals.

8 Well, in -- in terms of this so-called
9 presumption, I mean I am happy to try to uphold the court
10 of appeals on a presumption. All I'm saying is I don't
11 think they had to do it.

12 But if -- so far as they did do it, I mean if
13 you look at Gladstone Realtors, for example -- and that,
14 incidentally, was not a motion to dismiss, that was a
15 summary judgment case -- and the Court said that the
16 complaints were conclusory in that case, but we're going
17 to construe them favorably to the Village of Elwood in
18 that case, just as I think you should do here, because
19 after all the other side is the moving party, not us.
20 We're the nonmoving party, and therefore this -- these
21 affidavits --

22 QUESTION: What is the government's evidence
23 that you say showed that these activities of Peterson were
24 definitely affected?

25 MR. PRETTYMAN: In terms of the harm, I would

1 refer you to Defendant intervenor's Exhibits 7 -- Exhibit
2 B of that exhibit -- which has a whole lot of things in
3 it. It's not -- it wasn't very well put together, but it
4 includes the mineral report --

5 QUESTION: I thought you said it was the
6 government's evidence?

7 MR. PRETTYMAN: Yes. That's what I'm referring
8 to.

9 QUESTION: All right.

10 MR. PRETTYMAN: It includes a mineral report and
11 a geologist's report and so forth. Those -- and in
12 addition to that I'd refer you to Exhibit 12 to the Kelly
13 exhibit.

14 QUESTION: Excuse me, do these show that Miss
15 Peterson was harmed? I don't understand what they show.
16 How can they show that she was hanging around these mining
17 claims?

18 MR. PRETTYMAN: No, it doesn't, Your Honor.
19 What I've just referred to shows that in the South
20 Pass/Green Mountain area there is mining going on and
21 there's -- causing it harm.

22 QUESTION: Oh, well that's not controverted. I
23 mean, that isn't the point. The point is whether it was
24 causing harm to her, whether she was using those
25 particular areas.

1 MR. PRETTYMAN: Look at joint appendix 119, Your
2 Honor, if I may ask you to.

3 QUESTION: Joint appendix 119?

4 MR. PRETTYMAN: Now, you see the W 6228?

5 QUESTION: Yes.

6 MR. PRETTYMAN: Action Number W 6228.

7 QUESTION: Right.

8 MR. PRETTYMAN: The areas opened, 4,455, that is
9 South Pass/Green Mountain. Claims located after opening,
10 406 claims have been after -- opened after -- after they
11 opened it up, 406 mining claims were opened up, and that's
12 only in the period between the -- prior to the injunction.
13 So I mean a lot of claims came in --

14 QUESTION: But you made the statement that the
15 government's own evidence showed that all other lands, or
16 substantial other lands, I interpreted your comment to
17 mean, were affected. This again refers just to the 4,400
18 acres.

19 MR. PRETTYMAN: I didn't mean to say that the
20 government evidence shows that throughout the --

21 QUESTION: We're right back to where we're
22 started.

23 MR. PRETTYMAN: -- throughout the United States.
24 I don't understand your point, Your Honor. This -- this
25 and other evidence shows, if I may just make myself clear,

1 that the South Pass/Green Mountain area, the 4,455, the
2 very area that she says she recreated in, were in fact
3 opened to mining. And the other evidence I have just
4 cited shows that that area was not only opened to mining
5 but adversely affected by mining, which is precisely what
6 she claims, so you put together these various tidbits from
7 the government's evidence, which you have to do under Rule
8 56, and it's clear, she recreated there, that mining was
9 there --

10 QUESTION: Well, the question is whether we can
11 assume that her recreational use was on or in the 4,500
12 acres. That's the question.

13 MR. PRETTYMAN: Well, she says "in the
14 vicinity." In mean, do you -- do you -- does she have to
15 say that she walked right on a particular -- over a mine?

16 QUESTION: Well, it's a little vague. That's
17 the question before us.

18 QUESTION: She doesn't say in the vicinity of
19 the 4,500 acres. She says, in the vicinity of the Green
20 Mountain/South Pass area --

21 MR. PRETTYMAN: Correct.

22 QUESTION: -- which is a much larger area.

23 QUESTION: Whatever -- whatever lands she was
24 talking about, she did allege that her use of those lands
25 was adversely affected.

1 MR. PRETTYMAN: She sure did. Yes, Your Honor.
2 Thank you very much.

3 QUESTION: Thank you, Mr. Prettyman.

4 Mr. Roberts, do you have rebuttal? You have
5 four minutes remaining.

6 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

7 ON BEHALF OF THE PETITIONERS

8 MR. ROBERTS: Just a few brief points, Your
9 Honor.

10 QUESTION: You don't really contend that she
11 must have alleged that she used the 4,500 acres in order
12 to establish standing?

13 MR. ROBERTS: Well, she has to get a lot closer
14 to the 4,500 acres --

15 QUESTION: Just answer my question. You do not
16 say that?

17 MR. ROBERTS: I think she could well have
18 standing if she said she camped next to one of the parcels
19 that was opened. That I'd be willing to concede.

20 QUESTION: Well, if -- you know, if there's a
21 mining going on in 4,500 acres and in order to mine there
22 are a lot of -- they have to build some more roads,
23 there's a lot of trucks going back and forth all the time,
24 it can certainly affect a very wide area.

25 MR. ROBERTS: Well, the Court --

1 QUESTION: Well, isn't that right?

2 MR. ROBERTS: Mining can affect a very large
3 area, but a number of points: the 4,500 is not one
4 parcel. It's several discrete parcels, many of which are
5 quite small, so you wouldn't have --

6 QUESTION: Well, that makes it even tougher for
7 you, doesn't it?

8 MR. ROBERTS: No, I think not, Your Honor,
9 because --

10 QUESTION: Well, they could be scattered all
11 over that 150,000 acres, and trucks going back and forth
12 to every one.

13 MR. ROBERTS: I think Your Honor's assuming
14 we're talking about some large mining operation.
15 Typically what's involved here, given the size of the
16 parcels, very small and in many cases what you call
17 recreational miners --

18 QUESTION: How do we know that?

19 MR. ROBERTS: We know it from the size of the
20 parcels, in the first place.

21 QUESTION: Well, are we talking about discrete
22 mining parcels in a single area, 4,400 acres, or are we
23 talking about 4,400 acres, sum total, scattered over 150?

24 MR. ROBERTS: They're scattered well beyond the
25 150, Your Honor. They are clustered --

1 QUESTION: So even greater than the 150?

2 MR. ROBERTS: It's in the 2 million acre area.
3 They -- they're not dispersed evenly. There are vast
4 expanses of the 2 million acre area that Miss Peterson can
5 use.

6 QUESTION: Well, Mr. Prettyman says we should
7 look at only 156,000 acres, I thought.

8 MR. ROBERTS: I don't know where the number
9 comes from. The district court read South Pass/Green
10 Mountain area to be 2 million acres, and the court of
11 appeals also looked at it that way. That was one of the
12 things they got right.

13 The affidavits establish that we're talking
14 about a 2 million acre area. And it's interesting, the
15 150,000 doesn't work. It doesn't work because if you're
16 talking just about Green Mountain and South Pass, that's
17 not where all the 4,455 are. Some of them are elsewhere
18 in the area.

19 I'd like to mention briefly -- oh, and in
20 addition --

21 QUESTION: May I ask just one question? Can we
22 tell by looking at the record if we find all the right
23 pieces of paper where the 4,455 areas are?

24 MR. ROBERTS: Absolutely, and in the Federal
25 Register it's -- it's listed --

1 QUESTION: So you agree we can look at the
2 material your opponent described?

3 MR. ROBERTS: I agree you can look at the
4 Federal Register and see there --

5 QUESTION: Is there a map in these papers, or
6 not?

7 MR. ROBERTS: There are a variety of maps in --
8 in --

9 QUESTION: Well, can we tell there's -- can we
10 get the answer to Justice Stevens' question looking at
11 these maps?

12 MR. ROBERTS: You have to know how to read the
13 Federal Register notice. It's done by the township and --

14 QUESTION: Well, we can certainly read.

15 (Laughter.)

16 MR. ROBERTS: I couldn't until I was told --

17 QUESTION: Does it tell you -- does it tell
18 you -- can we plot it out on a map from what it says?

19 MR. ROBERTS: Absolutely. Absolutely, and
20 there's no doubt about it. The Federal Register will give
21 you those exact coordinates.

22 My brother referred you to joint appendix page
23 119, to classification W 6228. Classification W 6228
24 covers more than 2 million acres. It's the South
25 Pass/Green Mountain area.

1 With respect to the supplemental affidavits, the
2 government lawyer at the hearing responded to correct
3 reliance on some stale data in noting how far they'd
4 gotten in the RMP process. The court told us to mark it
5 as an exhibit. We did so. It had nothing whatever to do
6 with standing. You can read the supplemental affidavits
7 from the beginning to end. You'll see no mention of the
8 RMP exhibit that the court added to the record to make
9 sure it was not relying on stale data.

10 The was some discussion earlier about sending it
11 back to the court of appeals to look through the record to
12 see if Peterson had standing. That's not a court's job.
13 That's the plaintiff's job. They have the obligation to
14 affirmatively establish their standing. They failed to do
15 so in this case.

16 Thank you, Your Honor.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Roberts.

19 The case is submitted.

20 (Whereupon, at 11:01 a.m., the case in the
21 above-entitled matter was submitted.)

22
23
24
25

CERTIFICATION

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

No. 89-640 - MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL., Petitioner:

V. NATIONAL WILDLIFE FEDERATION, ET AL.

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

BY *Lona M. May*

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'90 MAY -1 P3:11