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The Relationship between Science and Democracy: Public Land Policies, Regulation and Management

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PUBLIC LANDS IN THE UNITED STATES

Approximately twenty-nine percent of the United States (662.2 million acres) is publicly owned. Eight agencies manage these holdings. The Bureau of Land Management controls most of this land (266.3 million acres), followed by the U.S. Forest Service (190.8 million acres), Fish and Wildlife Service (83.4 million acres), National Park Service (74.2 million acres), and the Department of Defense (26.0 million acres). State and Local Governments own another 155.0 million acres.[3]

Each of these ownerships is managed under laws and regulations that may, to some degree, differ. This discussion focuses on lands managed by the USDA Forest Service—i.e. the national forests and national grasslands. Nonetheless, the principles that emerge will, in general, apply to other public land categories.

DEMOCRACY IN PUBLIC LAND MANAGEMENT

How does "democracy" come to bear in the management of public lands? Democracy is "a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections."[4]

"Democracy" comes to bear in public land management in various forms. These include:

> 1.) The passage of laws that authorize the reservation or creation of public lands, establish the purposes of those

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3. *See* Frederick W. Cubbage et al., *Forest Resource Policy* (John Wiley and Sons, Inc. 1993).

4. *Merriam-Webster's Collegiate Dictionary* 307 (10th ed., Merriam-Webster, Inc. 1997).

public lands, and set forth rules by which those lands are managed;

2.) Budgets (recommended by the Administration and approved by Congress) that determine, usually on an annual basis, what activities land management agencies will perform as prescribed or authorized by law;

3.) Public review and comment on procedures and regulations promulgated by managing agencies;

4.) Appeals of proposed rules and regulations;

5.) Public review and comment on land-use plans;

6.) Appeals of land-use plans;

7.) Public review of Environmental Assessments and Environmental Impact Statements relative to management activities;

8.) Lawsuits challenging adherence to processes and behaviors;

9.) Participation in sanctioned advisory groups; and

10.) Lobbying (i.e., exercise of influence) by individuals or groups of public officials – elected, appointed, and those in the civil service.

THE PUBLIC LAND LAW AND POLICY MORASS

Today's public land management is fraught with conflict. Managers are often unable to put their best foot forward as a culture of self-preservation within Congress and the federal management agencies has taken root alongside of the established "Conflict Industry" — the coterie of stakeholders who work full time within the context of public lands conflict, thus helping to perpetuate a vicious cycle of gridlock and inefficiencies. Though many within the conflict industry are (within their respective value systems) well intentioned, a "Gordian Knot" of contradictory law, policy and precedent holds the public lands captive. In these circumstances, the safest course of action for public managers caught in the political crossfire is to seek cover and wait out the mêlée. In the process, political capital, public morale, local communities, and natural systems suffer the consequences. We must extract ourselves from the vicious cycles, the conflicts, the tautologies, and the expenditures of vast sums in legal battles that could have been spent on sustainability measures on the ground. It is time for a sea-change in public land policy.

THE EVOLUTION OF LAND MANAGEMENT POLICIES

Some understanding of history is necessary to grasp the formulation of current federal land management policies at the nexus of science, technology, and democratic processes. Such matters have changed over the past century and continue to evolve.[5]

The Establishment of Public Lands

Acts of Congress created and variously defined the purposes of the federal lands. Land management agencies supplemented these acts through the issuance of regulations that carry the force of law. In recent times, the regulation promulgation process has come to include opportunities for public input —through notice and comment — both during the regulation formulation process, as well as during that period which follows the proposal of final regulations. Defined processes thus characterize the legal mandates handed down to the agencies and the resulting land-use plans.[6]

Budgeting Decisions

Land management agencies formulate the budgets necessary to carry out pertinent land-use plans. Next, the Administration in power massages and coordinates these budgets through the Office of Management and Budget (OMB). Budget decisions are inherently political decisions, supporting those activities favored by the Administration and Congress. Such favored activities receive funding while those less favored or disfavored receive diminished funding or none at all. This remains true regardless of land-use plans or legal requirements.

The Administration then sends its proposed budget to the Budget Committees in the House and Senate. Within the Budget Committees are sub-Committees that focus on specific areas. For example, the sub-Committee on Interior and Related Agencies (a holdover from the time, prior to 1905, when the Department of Interior administered the forest reserves, before their transfer to the Department of Agriculture) formulates the FS budget. Appropriate sub-committees thus develop budgets and then alter them to suit the House Budget Committee. The House as a whole then debates modifies, and confirms the budgets. Next, the House sends the budget to the Senate Budget Committee.

The Senate Committee (working through sub-committees) considers the Administration's budget proposal and the budget forwarded by the House. The Senate, then, composes its version of the budget. The House and Senate negotiate the "final" budget package, after which the entire House and Senate — with the House first in line — debate the final budget. Lobbying

5. *See* Cubbage et al., *supra* n. 3.
6. *See Administrative Procedure Act*, 5 U.S.C. §§ 551-559, 701-706 (2000).

by individuals and interest groups is — from start to finish — an integral part of this process, with compromises occurring all the while. The process is indeed messy and replete with at an almost unimaginable degree of wheeling and dealing. One observer noted: "Budgets are a lot like sausage. You will enjoy the end result much better if you don't watch it being made."

As there is never enough money to go around, it is the budget process that, within the boundaries of mandates and plans, is the primary means by which, and within which, land management agencies are funded. To further complicate matters, each agency's budget is divided between numerous (often hundreds) of "line items" that guide expenditures. All activities must be conducted within these confines, with limited leeway for managerial discretion.[7]

Citizen Challenges to Management Decisions

Citizens may challenge actions of land management agencies as non-compliant with applicable laws and regulations. The ability of citizens to challenge governmental (i.e., agency) decisions and activities in court is unique among western democracies. Citizen challenges often end up in federal court. Federal courts were at one time more reluctant to substitute their judgment for that of agency experts. That reluctance began to fade in the latter half of the 20th century. The increased involvement of courts in federal land management decisions has, undoubtedly, injected uncertainty and expense into federal land management.[8]

Original Objectives – Forest Reserves

The Creative Act,[9] also called the General Land Law Revision Act, established a national policy of retaining some of the public domain in federal ownership for purposes protecting some uncut forest from the perceived problems of destructive logging followed by catastrophic fire.[10] The Organic Administration Act of 1897 provided management direction for reserved forest lands including the provision of harvesting of some timber.[11] The Act said, in part, "No national forest shall be established, except to improve and protect the forest within the boundaries, or the for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States..."[12]

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7. *See* Cubbage et al., *supra* n. 3.
8. *Id.*
9. Ch. 561, § 24, 26 Stat. 1103 (1891) (repealed 1976).
10. Cubbage et al., *supra* n. 3.
11. 16 U.S.C. §§ 473-475, 477-482, 551(1897).
12. *Id.* § 475; Cubbage et al., *supra* n. 3.

Gifford Pinchot became head of the Bureau of Forestry in the Department of Agriculture in 1898. He was, and remained, a close friend of Theodore Roosevelt. Roosevelt was then Governor of New York and interested in regional forest management. Following the assassination of President McKinley in 1901, (then Vice-President) Roosevelt succeeded to the Presidency. Almost immediately, Roosevelt and Pinchot began efforts to transfer the forest reserves from the Department of Interior to the Department of Agriculture. A newly created FS within the Department of Agriculture would manage the lands. The Transfer Act of 1905[13] brought Pinchot and Roosevelt's land coup to fruition.[14]

The Transfer of the Forest Reserves

The transfer of the forest reserves was executed, at least in part, to make clear that the national forests were not "preserves" but rather "reserves" from the public domain to be managed to produce goods and services for the American people — with the needs of local people coming first.[15] Some historians argue that Pinchot believed the Secretaries of Agriculture would be so consumed with the agricultural affairs of an agrarian society that forest management would, essentially, be left to the FS — to "professional and apolitical management" by the Chief Forester.[16]

National Forest Management and the Progressive Era

Both Pinchot and Roosevelt were products of the Progressive Era. The Progressive Era of American politics is characterized by a core belief in activist government. Within that context, the "best and the brightest" would be recruited into government service, given civil service status (protection), and would make rational, science-based decisions. Those decisions, when instituted using the best technology, would, in Pinchot's words, produce "the greatest good for the greatest number in the long run."[17]

The "progressive conservation movement," which culminated with the end of Roosevelt's term in 1908, produced three enduring values to guide natural resources management. The first of which was the belief that public resources should be managed to provide multiple benefits. The second was opposition to the special interests ("cattle and/or timber barons") of the Old West. The third was that expert technical and political management of natural resources by public agencies would rectify the errors of past abuse

13. Pub. L. No. 58-34, § 1, 33 Stat. 628 (1905).

14. *See* Gifford Pinchot, *Breaking New Ground* (Harcourt Brace Jovanovich 1947).

15. *Id.*

16. Char Miller, *Gifford Pinchot and Making of Modern Environmentalism* (Island Press 2001).

17. Gifford Pinchot, *Principles of Conservation*, in *Conservation in the Progressive Era – Classic Texts* (U. Wash. Press 1910); Theodore Roosevelt, *Special Message from the President of the United States, Report of the National Conservation Commission* vol. 1 (U.S. Govt. Printing Office 1909).

and set the course for future enlightened management.[18] Oddly, in later decades some would accuse the FS, with some justification, of being "captured" by timber and grazing interests.[19]

"SCIENCE" IN PUBLIC LAND MANAGEMENT

Chief Pinchot believed in "science-based" management. This belief was manifest in his immediate facilitation of direct research by FS personnel or research otherwise supported by the FS. Pinchot referred to research projects as "studies."[20] In order to preclude undue influence on research by managers, the research division was established independently of the National Forest System. This dichotomy survives to this day. The research division was not formally authorized until the McSweeny-McNary Forest Research Act of 1928.[21]

Just what is "science?" How is "science" appropriately applied in land management? "Science" has several definitions. The definition most applicable to this discussion is: "knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method."[22]

It should be clear, that with very rare exceptions, "science" and "scientists" do not make land management decisions. Rather, science and scientists inform and facilitate decisions. Science does not ordinarily come in discrete packages directly applicable to management actions. Scientists provide, through research conducted and interpreted using the rigors of the scientific method, discrete nuggets of knowledge. These nuggets are, then, compiled and synthesized into a body of or system of knowledge that can be applied in the formulation of management approaches, comparing alternatives, and making management decisions. The process is further complicated by the growing necessity for decision makers to consider information from a number of disciplines (ecology, silviculture, soils, hydrology, wildlife biology, conservation biology, et al.) in formulating management approaches and making decisions.

To increase complexity, various laws prescribe processes that must be followed in applying science in public land management. To complicate matters, agencies issue administrative rules and regulations pursuant to those laws, which are then refined in definition by court decisions. Enter political/social scientists. Social scientists have assumed an increasing role in public land management decisions over the past several decades.

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18. Cubbage et al., *supra* n. 3.

19. Paul W. Hirt, A *Conspiracy of Optimism: Management of the National Forests Since World War II* (U. Neb. Press 1994).

20. *See* U.S. Dept. of Agric., *1906 Use Book* (U.S. Govt. Printing Office 1906); Pinchot, *supra* n. 14; and Miller, *supra* n. 16.

21. Pub. L. No. 70-466, 45 Stat. 699-702 (1928).

22. *Merriam-Webster's Collegiate Dictionary* at 1045.

Political science is "a social science concerned chiefly with the description and analysis of political and especially governmental institutions and processes."[23]

PURPOSES OF THE NATIONAL FORESTS

Gifford Pinchot was sensitized to the necessity of considering the needs and desires of citizens — particularly local citizens — in the management of the national forests. First, he worked diligently to dismantle the influence of timber and cattle barons. Soon after taking over as Chief, Pinchot wrote a letter to himself setting out policy for the fledgling agency. Pinchot then sent the self-authored letter to Secretary of Agriculture Wilson, requesting the Secretary sign the letter and send it back to Pinchot as if Wilson was, himself, the author. Dated February 1, 1905, the "Wilson letter" read in part:

> In the administration of the forest reserves it must clearly be borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies. All the resources of forest reserves are for use [...] the permanence of the resources of the reserves is therefore indispensable to continued prosperity [...] bearing in mind that the conservative use of these resources in no way conflicts with their permanent value [...]
>
> [...] In the management of each reserve local questions will be settled on local grounds [...] where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run."[24]

Pinchot expanded upon these instructions in the 1906 Use Book (the first FS manual issued to employees):

> The administration of the forest reserves is not for the benefit of the government, but of the people [...] This force (FS personnel) has two chief duties: To protect the reserves against fire and to assist people in their use [...] Forest officers, therefore, are servants of the people [...]
>
> It is the active policy of the FS to manage the forest reserves upon a sound technical, as well as business basis. Improvement in the standard of the technical management

23. *Id.* at 901.
24. U.S. Dept. of Agric., *supra* n. 20, at 16-17.

> alone can secure steady and constant increase in returns without depleting the forest. To this end careful investigation is essential [...] In these and in many other ways the basis of knowledge necessary for the best forest work will be laid [...][25]

RESEARCH AND APPLICATIONS IN MANAGEMENT

Pinchot saw clearly the need for research, and prompted its establishment in the FS without any clear authorization to do so. Formal authorization would not come until the McSweeny-McNary Act of 1928.[26] Testament to the long-term independence of the research division is the fact that FS research findings have, over the past century, caused the management branch — often unwillingly and with great consternation — to shift course on numerous occasions. As Pinchot put it:

> To sum up, the forest reserves will be studied with reference to their best use for every purpose. These studies will not be limited to the present applications for the use of the reserves. They will be aimed at developing wider uses, not merely meeting the present demand in the most satisfactory way [...][27]

EARLY GUIDANCE FROM LEGISLATION

The early statements of policy were thorough enough, but failed to address our topic: the relationship between science, law, and democracy and how policies, regulations, and management decisions would evolve over the next century. The flood of legislation (and litigation) related to the management of the public lands that would come was unforeseen to Pinchot and his contemporaries. Nor did the early authors of forest policy predict the evolution of the federal courts as a primary player in the evolving drama of public land management.

Over the century following the establishment of the FS in 1905, additional legislation broadened mandates, and permitted management activities, for the agency and the lands that it managed. First among those Acts was the Weeks Law of 1911 that authorized purchase of forested, cutover, or denuded lands within the watersheds of navigable rivers.[28] This was the origin of national forests east of the Mississippi River.

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25. *Id.* at 17-18.
26. 45 Stat. at 699-702.
27. U.S. Dept. of Agric., *supra* n. 20, at 19.
28. Pub. L. No. 61-435, 36 Stat. 961 (1911).

EARLY ADMINISTRATIVE GUIDANCE

Early FS officials emphasized controlled, but facilitated, use (with emphasis on "use") of the national forests. The 1906 *Use Book* begins with this statement.

> Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forest and range [...][29]

THE FOREST SERVICE – THWARTED AMBITIONS

Despite Pinchot's grand ambitions, the established timber industry largely kept the FS out of the timber business until after World War II — except for supplying timber for relatively local uses (e.g., timbers for mines, fencing materials, and construction of houses and barns). Early FS management efforts (1905-1945) focused on "...the continued prosperity of the agricultural, lumbering, mining, and livestock interests..." through appropriate controlled use of the forest reserves.[30] However, most of the FS' field-based efforts went into establishment of boundaries, fire fighting (which accelerated after the 1910 conflagrations in North Idaho known as the "Great Burn"), regulation of livestock grazing, establishment of transportation systems (e.g., roads), and control of trespass.[31]

EVOLUTION OF MANAGEMENT DIRECTION

Aldo Leopold, an early FS employee now widely acknowledged as the "father of wildlife management," saw the potential for recreational use of the national forests and prompted administrative designation of the 574,000 acre Gila Wilderness in New Mexico. He also began to focus FS attention on the increasing value of the national forests for wildlife and for hunting and fishing. This was followed, in 1926, by orders from the Secretary of Agriculture to set aside "not less than 1,000 square miles" in the Superior National Forest in Minnesota as "recreational wilderness" — now known as the Boundary Waters Canoe Area Wilderness.

Robert Marshall joined the FS in 1935. Before his death in 1939, he had successfully shepherded the "U-Regulations" into being. These regulations *led to further designation of wilderness within the National Forest System,* and were the precursor to the Wilderness Act of 1964.[32] Following its ini-

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29. U.S. Dept. of Agric., *supra* n. 20, at 11.
30. *Id.* at 17.
31. *See* Harold K. Steen, *The U.S. Forest Service: A History.* (U. Wash. Press 1976).
32. 16 U.S.C. §§ 1131-1136 (1964).

tial introduction in 1956, the Wilderness Act and required 66 modifications and resubmissions and took 8 years to pass into law.[33]

COMPETITION FOR THE PUBLIC LANDS

Stephen Mather became the head of the National Park System in 1915 and methodically "raided" the National Forest System. These raids successfully targeted lands upon which new National Parks could be established. In 1933, for example, the Park Service received in transfer 63 National Monuments from the FS and the War Department. The Park Service raids continued into the 1950s.[34] The FS brass, as well as the field staff, resented and resisted the Park Service's aggressive tactics. In beating back these "raids," the FS reached out for allies to protect the FS land base. Those allies, understandably, were individuals and entities that profited, or were likely to profit from the laws and mandates for "use" that guided FS activities.

NATIONAL FORESTS ENTER THE "TIMBER ERA"

The timber industry had, working largely through political and budget-related processes, effectively thwarted the FS' efforts to be a more visible supplier of timber for the nation. This continued from the time of the agency's establishment in 1905 until the close of World War II (1939-1945). From 1929 until 1939 the nation began gearing up for war, instituting the "lend lease" program to supply war materials to the British. These were lean years indeed for the American timber industry, which sought to avoid competition from "cheap federal timber." Congress and the Administration sympathized with the timber industry on this issue. Thus, the Second World War was a propitious event for the essentially stagnant North American timber industry. Demand for timber soared and "cost plus 10 percent" contracts assured profits. By 1945, the timber industry had cut deeply into its private timber inventories and was looking desperately for other sources of supply. (It is well to remember that new housing starts had hovered near zero during the Great Depression (1929-1940) and the War years (1940-1945) – a 16-year hiatus.)[35]

In 1945, GIs were returning home from war by the millions. Many had suffered through the Depression and had, by then, spent years in military service. All the while, others who did not serve, improved their economic lot in the booming war economy. The veterans deserved and demanded some measure of recognition for their sacrifice. In one of the most significant social programs in America's history, the GI Bill made it possible for

33. *See* Cubbage et al., *supra* n. 3; Curt Meine, *Aldo Leopold: His Life and Work* (1st ed. Wisconsin 1998); Roderick Frazier Nash, *Wilderness and the American Mind* (4th ed., Yale U. Press 2001).

34. Cubbage et al., *supra* n. 3.

35. Hirt, *supra* n. 19

millions of returning service personnel to purchase homes through subsidized loan programs.[36]

THE TIMBER YEARS

As a result of the post-war surge in construction, the demand for timber soared. The FS stepped into the breech and supplied much of the timber that would sustain the building boom. These actions both reestablished and maintained viable timber and home construction industries for the next three decades.[37]

During the "boom" period 1945-1980, the actions of the "can do" agency were noticed. Congress and the American people bestowed consistent and effusive praise upon the FS.[38] It was a heady time for those who wore FS green. Timber cut from the national forests increased year-by-year from well less than 1 billion board feet per year in 1945 to a peak of some 11.5 billion board feet per year in 1988. The FS was recognized as the "bureaucratic super star" among natural resource agencies.[39]

By the early 1980s, forest roads and clear cut timber harvest units became increasingly conspicuous on landscapes of the western United States. The burgeoning environmental movement, which had lain dormant during the War years, raised alarm flags. The environmental ground swell would eventually come into its own, reaching full force in the environmental decade of the 1970s.

The FS' close association with the timber industry in the Post-War Era led some analysts to assume that private interests had come to wield undue influence. Martin Nie summarized this pit fall well:

> ...when an agency is given a broad and ambiguous mission ...[it] is subject to 'capture' by the interest it is supposed to be regulating...[v]alue free implementation is often a sham and...unelected bureaucrats with personal values and a worldview [that] may be contrary to the public's should not be delegated too much discretionary power.[40]

A BOOM IN RECREATION AND "OTHER" USES

Simultaneously, post war demands for recreation grew, dramatically facilitated by a surging economy. This economic growth was manifest in automobile mass production and plentiful and inexpensive fuels. Recrea-

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36. *Id.*

37. *Id.*

38. *Id.*; Jeane Nienaber Clarke & Daniel C. McCool, *Staking out the Terrain: Power and Performance Among Natural Resource Agencies* (2d. ed., U. N.Y. Press 1996).

39. Clarke & McCool, *supra* n. 38.

40. Nie, *Statutory Detail and the Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, __ J. Envtl. L. __ (forthcoming 2005).

tion trends were influenced by increased leisure time and an ever expanding network of logging roads. In order to retain its land base and fend off the National Park Service's redoubled efforts at appropriation of FS lands, FS leaders realized that it would be necessary to formally expand the agency's original mandate beyond that specified in the Organic Administration Act of 1897.[41] This strategy required a series of new federal laws that would expand the FS mission, enable intensified management, and provide a means to implement long range management plans for the national forests.[42] The conventional wisdom of the Progressive Era lent credence to transfer of such decision making power to the agencies. Furthermore, such delegation simultaneously relieved politicians of accountability and liability should pitfalls arise.[43]

The Multiple-Use Sustained Yield Act (1960)

The Multiple-Use Sustained Yield Act of 1960 (MUSYA) broadened the FS' mission to include fish and wildlife, recreation, grazing, timber, and minerals.[44] Further, the Act gave clear instructions to manage the National Forest System so that desired yields of the multiple uses, in combination, could be sustained over time.[45]

National Environmental Policy Act (1970)

While the FS attempted to enhance its legislative mandates, the National Environmental Policy Act (NEPA) of 1970 established the governmental policy of creating and maintaining "...conditions under which man and nature can exist in productive harmony..."[46] Although the FS neither pushed nor advocated for NEPA, this Act was considered to be generally compatible with MUSYA, the core Act described above. NEPA required land management agencies to prepare environmental assessments of proposed management activities. Initially, the FS and other federal land management agencies considered this common sense requirement insignificant. However, NEPA would, over time, to turn out to be significant indeed. NEPA was a harbinger of the environmental legislation that would arrive en masse in the 1970s.

Senator Henry "Scoop" Jackson of Washington State sponsored NEPA. Legend has it that following passage of the Act, Jackson stood on the Senate floor in colloquy and was asked a question suggesting the requirements of this new law could turn into a quagmire of detailed analyses. Jackson

41. 16 U.S.C. §§ 473-475, 477-482, 551.
42. Cubbage et al., *supra* n. 3.
43. Nie, *supra* n. 40.
44. 16 U.S.C. §§ 528-531.
45. Cubbage et al., *supra* n. 3.
46. 42 U.S.C. § 4331(a).

responded by saying, "Gentlemen, I expect the longest environmental impact statement not to exceed ten pages!"

A critic said, twenty years later, "Surely, the Senator misspoke. He probably meant to say, 'Gentlemen, I expect the longest environmental impact statement not to exceed ten pounds in weight'!" As resource professionals, lawyers and environmentalists know, this legislation has brought to bear consequences unforeseen by its sponsors — and, quite likely, by the Congress that passed the Act. NEPA is now synonymous with continual review of agency process by the courts and in-kind responses by the land management agencies.

Forest and Rangelands Renewable Resources Planning Act (1974)

The Forest and Rangelands Renewable Resources Planning Act of 1974 (RPA) directed the FS to assess *all* natural resources in the nation every 10 years in order to determine the best public fund investment opportunities with regard to public land management. Further, RPA called for a strategic plan to guide FS activities to be prepared every 5 years.[47]

National Forest Management Act (1976)

In the early 1970s, for similar reasons, FS timber management activities were met with public backlash in two very different parts of the country. In short, increasingly vocal and politically powerful segments of the American public felt that too much timber had been harvested too fast. Not coincidently, most of that timber harvest was initially manifest in the form of clear cuts.

In Montana, as elsewhere in the United States, the FS steadily intensified its timber harvest operation in keeping with its policy of providing "stability" to the timber industry. Landscape conditions on the national forests made this fact increasingly obvious. On the Bitterroot National Forest, for example, a scheme was instituted whereby hillsides were clear cut, then terraced and replanted. The terracing policy was designed to capture moisture, prevent erosion, and intensify timber production. "Left-brained" technological applications such as terracing and clear cut-silviculture focused on "getting out the cut." All the while, values relating to fish and wildlife, recreation, watershed, and minerals were moved to the FS' "back burners."

Extensive clear cutting was the result of an intensified FS timber program. Such methods were perceived as "double ugly" by ordinary citizens. The "right-brained" public simply did not approve. Some observers presumed the FS was emulating and/or accommodating the practices of a rapacious timber industry. These same critics thought the FS should steer a more sensitive course. A committee chaired by the Dean of the Forestry

47. 16 U.S.C. §§ 1600-1610 (1974); Cubbage et al, *supra* n. 3.

School at the University of Montana, Arnold Bolle, examined the situation and was scathing in its rebuke, delivered in the form of a report and testimony to Congress.

Meanwhile – far across the nation – on West Virginia's Monongahela National Forest, the FS implemented research findings outlining the most efficient means of harvesting and managing hardwood forests. This entailed a policy of even-aged timber management that utilized clear cutting. The "left-brained" technologists imposed their will on a "right-brained" citizenry that abhorred clear cuts for aesthetic and ecological reasons, among them being effects on wild turkey habitat and turkey hunting. These citizens no longer bought the FS line, preached for so many years, of uneven-aged timber management utilizing selective cutting of trees.

By 1910 the Appalachians had been, as Theodore Roosevelt was wont to say, "slicked off" with devastating ecological effects relating in part to erosion and diminished water quality. Back in 1911, citizens had, by and large, supported the Weeks Act.[48] They had watched approvingly as the FS (and the Civilian Conservation Corps), intensively reforested the eroding hillside farms. In the 1970s however, citizens revolted over the FS' clear cutting policy — despite its short-term economic and silvicultural efficiencies.

A crisis arrived when the Izaak Walton League filed suit (1973) claiming that the FS was in violation of provisions of the Organic Act of 1897 which allowed only the harvest of "dead, mature, or large growth" trees and required "individual marking" of such trees.[49] The Government argued that these requirements were outdated, economically infeasible, and that the archaic statutory language should not be taken literally.[50] The court, however, disagreed and imposed an injunction that prohibited clear cutting and required individual marking of trees to be harvested. The Court noted further that if requirements were indeed outdated, Congress should change the law.[51]

Upon appeal two years later, the 4th Circuit upheld the ruling.[52] The injunction prohibiting clear cutting was thereby extended to all states in the 4th Circuit. A District Court in Alaska applied the Monongahela reasoning to stop a timber sale in Alaska that would have utilized clear cutting.[53] The jig was up. The FS predicted a 50 per cent reduction in timber availability if the standard were applied nation wide! That statement drew Congress' undivided attention as well as that of western politicians, the timber indus-

48. 36 Stat. at 961.
49. *Izaak Walton League of America, Inc. v. Butz*, 367 F. Supp. 422, 433 (1973).
50. *Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945, 948 (1975).
51. *Izzak Walton League of America, Inc.*, 367 F. Supp. at 430-432.
52. *Izzak Walton League of America, Inc.* 522 F.2d at 945.
53. Hirt, *supra* n. 19.

try, and the Administration — all of whom feared a shortage of timber, a depression in the construction industry and associated economic harm.[54]

The FS skillfully used this opportunity to lobby for new legislation to accomplish two desired outcomes. The first being that of attaining formal authorization to clear cut where appropriate circumstances existed. The second being congressional direction to proceed with forest-by-forest planning based on agency promulgated standards and guidelines for associated activities.[55]

THE "THREE-LEGGED STOOL" OR "THE IRON TRIANGLE"

Two versions of legislation surfaced. The first was the "Randolph Bill" propounded by Senator Jennings Randolph of West Virginia. The Randolph Bill included specific direction on how national forest management would proceed. The second version was the "Humphrey Bill" propounded by Senator Hubert Humphrey of Minnesota. Importantly, this version was drafted largely by the FS. The FS felt it had dodged a bullet when Senator Humphrey's version became the National Forest Management Act (NFMA)[56] of 1976. The FS believed its professional prerogatives were preserved. Even-aged timber management remained as a viable option, and the agency received forest by forest planning authority.[57] That was to be a short-lived delusion.

The FS hoped NFMA would be the third leg of a "stool" upon which national forest management would rest. This Act required planning for each national forest and set forward the standards and guidelines by which those planning activities would be achieved.[58] With the benefits of such powers came inauspicious liabilities:

> [...] Instead of political representatives taking responsibility for the tough choices that must be made, they can pass them along to agencies who then pass them along to their 'clients' or other self-selected stakeholders whom are accountable to no one besides the special interest they represent. For critics, this is yet another pathology of interest group liberalism that does not meet the public interest [...][59]

While MUSYA provided a broadened mandate, the RPA provided a basis to focus attention on the potential for enhanced production of goods and

54. *Id.*
55. *See generally* 16 U.S.C. §§ 1600-1614; Steen, *supra* n. 31; Cubbage et al., *supra* n. 3.
56. 16 U.S.C. §§ 1600-1614 (1976).
57. Steen, *supra* n. 31; Cubbage et al., *supra* n. 3.
58. 16 U.S.C. §§ 1600-1614.
59. Nie, *supra* n. 40.

service from the National Forest System relative to other land ownerships.[60] In conjunction with RPA, NFMA's compulsory forest by forest planning would yield the individual plans and constituent pressure groups upon which budgets could be formulated.

Legend holds that Senator Humphrey stood on the Senate floor, in colloquy following passage of NFMA, and proclaimed, "Today we have taken the management of the national forests out of the hands of the courts and placed it in the hands of FS professionals where it belongs!" Events of the next three decades would prove otherwise.

Perversely, NFMA proved another instance of legislation evolving, under continued interpretation by the courts and subsequent responses of land management agencies, to produce results unforeseen by its sponsors and, likely, the Act's congressional supporters.

The resulting "three-legged stool" of MUSYA, RPA, and NFMA was, in concept, logical and seemed destined to achieve its purpose — that being the FS' achievement of significant leverage over its own budget as well as provision of some measure of autonomy. The "three-legged stool" was the epitome of the "progressive conservation movement" that had guided the achievements of Gifford Pinchot and Theodore Roosevelt. This effort was, likely the last gasp of the "progressive conservation movement."[61]

A serious flaw remained as an obstacle to the FS, that being the absence of an agreement, by Congress, on the FS' long-term strategic goals.

Scientists to the Front – The Committee(s) of Scientists

NFMA provided for a "committee of scientists" to draft the regulations that would guide actual implementation of the Act. That committee was composed of persons imminently qualified as "scientists." The committee, however, had neither extensive knowledge of nor experience in the management of public lands. And, worse yet, the committee had no charge or responsibility for making the rules and regulations that they were to formulate to function in the "real world" of natural resource management. In the development of proposed regulations there existed no formal requirement that benefit/ cost or any other measure of practicality be considered. Supposedly, the matters at issue were so intricate and complex that only "scientists" could do the job. "...It is worth asking, however, if many of our controversial resource [debates] are all that technical and complex..."[62]

Surprise! Surprise! Regulations Prove Difficult to Change

There was no consideration of likely costs relative to perceived benefits of the regulations. But, initially, that was not an overwhelming concern for

60. 16 U.S.C. §§ 472a *et seq.*
61. Cubbage et al., *supra* n. 3; Hirt, *supra* n. 19; Clarke & McCool, *supra* n. 38.
62. Nie, *supra* n. 40.

FS managers. They simply, and logically enough, assumed that the regulations were not "written in stone" and could, and would, be readily modified on the basis of experience. These initial regulations were assumed to be merely a starting point. They could not, it turned out, have been more wrong. A general rule of thumb emerged from this experience: *Laws or regulations put into action without being subject to rigorous benefit/ cost analysis will, in the end, prove so costly as to routinely produce a "below cost" result for nearly any management activity.*

Environmental activists interested in management of national forests quickly learned to utilize these regulations to achieve their objectives. Therefore, it was to their long-term advantage to assure that the regulations remained intact. And, by and large, they have been successful in that effort over the 28-year period since the passage of NFMA. The best example of such a regulation is the *viability rule*: Plans will assure the viability of all native and desirable non-native vertebrates well-distributed within the planning area.[63]

Two FS biologists in the Washington office initially drafted and recommended the viability rule. The regulation meant to assure that forest planners considered the welfare of all such species in the course of planning operations by individual national forests. In the minds of its drafters, the viability rule suggested nothing more. If taken literally with regard to modern definitions of the terminology employed, it is simply impossible, given current or foreseeable states of knowledge and funding, to satisfy that ostensibly simple requirement. For example, there exist some 379 species of vertebrates in the Blue Mountains of Oregon and Washington.[64] Imagine acquiring and maintaining up-to-date information on each of the 379 species in that one area as would be necessary in order to fully satisfy the viability rule. Then, expand that requirement to the entire National Forest System. Required information would include:

1. Natural history;
2. Spatial distribution;
3. Numbers;
4. Sex ratios;
5. Age distribution; and
6. Reproductive success (i.e., recruitment).

There is not enough money in the entire FS budget to fully satisfy that single requirement, even assuming the technical feasibility of the task. Over

63. 36 C.F.R. § 219.19 (1982).

64. Jack Ward Thomas, *Wildlife Habitats in Managed Forests- The Blue Mountains of Oregon and Washington*, Agric. Handbook No. 553 (USDA Forest Service 1979).

the intervening quarter century, there have been numerous attempts to alter the regulation so as to achieve its original intent in a technologically and economically viable manner. All such efforts to modify that requirement have, thusfar, failed.

Regulations –Frozen in Time

It would be rational to assume that we, collectively, could learn from and rectify mistakes with regard to governance of our public lands... but that is no certainty. When the senior author was Chief of the FS (1993-1996), the agency made one in a long history of such attempts to adjust regulations issued pursuant to NFMA. The purpose was to adjust regulations, based upon experience, so as to facilitate the efficient achievement of planned activities.[65]

Some in the environmental community were successful in delaying the adoption of revised regulations until after the 1996 Presidential elections. When the senior author stepped down as Chief of the FS after the election, whatever influence he wielded was a thing of the past. Three years of time and effort toward revisions of the regulations went into the round file and yet another effort was launched. The keystone of the ensuing effort was creation of a new "committee of scientists" — *sans* managers — to develop new regulations. Three-and-a-half years later, the latest set of "new" regulations were complete, but put on hold until after the 2000 Presidential elections. As that election produced a change of parties, the latest multi-million dollar revision was, as its predecessor, consigned to the round file and a new effort begun — this time without a committee of scientists. Fearful that there would actually be a new set of regulations issued before the 2004 elections, actions are now underway in Congress to forgo the adoption of new regulations until after the election. There is some action in Congress to insist that yet another set of regulations should be drafted by — you guessed it — another "committee of scientists."

We don't know exactly what this story proves except, perhaps, that we are enamored of what *science* and *scientists* might add to the quality, or even appropriateness of regulations for the management of public lands. Perhaps, we have not come to grips with the fact that the primary assumption underlying NFMA was dead wrong. That is, the Act's regulations do not lend themselves to appropriate changes under an "adaptive management" scenario as its creators and practitioners might originally have expected.

After all, regulations developed by scientists should, somehow, be superior to those developed by managers. Scientists, however, have not proven themselves superior to managers at formulating operable regulations.

65. Jack Ward Thomas, *Jack Ward Thomas: Journals of a Forest Service Chief* (Harold K. Steen ed., U. Wash. Press 2004).

Nonetheless, scientists do have the advantage, once the regulations are formulated and adopted, of going back to their day jobs with no responsibility for conducting day-to-day management under regulations they created. Perhaps, the team that formulates regulations should be composed of both scientists and experienced managers — along with a lawyer or two.

PUBLIC CHALLENGES TO AGENCY(S) DECISIONS

The current regulations adopted under NFMA provide for public participation during plan formulation, comments on proposed plans, and appeals of plans. Individual land management activities are conducted under the requirements of the National Environmental Policy Act (NEPA) under rules promulgated by the Council on Environmental Quality (CEQ). Such activities require an environmental assessment (EA) or, if deemed necessary (which is the usual "fail safe" course of action) a full-blown environmental impact statement (EIS). Comments on individual actions are solicited and appeals — at three levels in the case of the FS — can be made.

Interested parties can, in the case their appeals are not successful, file a case in federal court. If the plaintiffs are successful, the government pays their expenses. If they fail — i.e., they lose the case — there is no inherent liability for the cost that the litigants have imposed upon the government (and ultimately, the tax payers). Legal challenge to agency decisions is, at least to some degree, facilitated beyond the norm that existed before the passage of the Equal Access to Justice Act in 1980.[66]

THE 1970S — THE ENVIRONMENTAL DECADE

The 1970s are — for good reason — known as the "environmental decade." During that decade, at least forty-nine acts became law that in some way influenced FS policies and day-to-day operations. Foremost among these acts are: National Environmental Policy Act;[67] Environmental Quality Improvement Act;[68] Mining and Mineral Policy Act;[69] Wild Free-Roaming Horses and Burros Act (Wild Horses Act);[70] Federal Advisory Committee Act;[71] Endangered Species Act;[72] Forest and Rangelands Renewable Resources Planning Act;[73] Freedom of Information Act;[74] Eastern Wilderness Areas Act of 1975;[75] Energy Policy and Conservation Act;[76] National For-

66. 5 U.S.C. § 504 (1980); 28 U.S.C. § 2412 (1980).
67. 42 U.S.C. §§ 4321-4347 (1969).
68. *Id.* §§ 4371-4375 (1970).
69. 30 U.S.C. § 21a (1970).
70. 16 U.S.C. §§ 1331-1340 (1971).
71. 5 U.S.C. App. 2 § 1 (1976).
72. 16 U.S.C. §§ 1531-1544 (1973).
73. *Id.* §§ 1600-1610 (1974).
74. 5 U.S.C. § 552 (1974).
75. 16 U.S.C. § 1132 (1975).
76. 42 U.S.C. §§ 6201-6309 (1975).

est Management Act;[77] and the Public Rangelands Improvement Act.[78] These acts created new agencies, formulated new policies superceding the old, and made myriad new demands without assuring the resources to meet those demands. The budgets passed during those years and since did not, for the most part, address managerial conflicts that these laws created.[79]

The Endangered Species Act of 1973 (ESA) stands out as having the most influence on the management of the public lands.[80] With respect to its impact on public land management, ESA is the "500 pound gorilla" of the environmental laws. ESA has been influential for two reasons. The first being, species will be determined to be "threatened" or "endangered" solely on the basis of the best scientific or commercial data — i.e., there is no consideration of economic or societal impacts. Second, the requirement that all efforts to "conserve" such species is overriding. "Conserve" is defined in the ESA as: "all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary."[81] Pursuant to executive policy, agencies are to assume, where possible, the consequences of management actions on public lands. This, in order to spare private lands the same burdens. Illustrative are instructions to the Forest Ecosystem Management Assessment Team (FEMAT),[82] which was organized according to directions from President William Clinton. These instructions read in part: "The impact of protection and recovery of threatened and endangered species on non-federal land within the region of concern should be minimized."[83]

The second reason ESA proved influential is that adherence to the Act changed the focus of public land management from production of commodities to the preservation of biodiversity, which is now identified as "ecosystem management." The stated purpose of the ESA made this quite clear. Now, however, it is fashionable to argue that the Act means other than what it says. "The purposes of this [Act] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved..."[84]

Judge William Dwyer, in *Seattle Audobon Society v. Lyons*, stated, "[g]iven the current condition of the forests, there is no way the agencies

77. 16 U.S.C. §§ 1600-1614 (1976).
78. 43 U.S.C. §§ 1901- 1908 (1978).
79. Cubbage et al., *supra* n. 3.
80. 16 U.S.C. §§ 1531-1544 (1973).
81. *Id.* § 1532(3) (2000).
82. Forest Ecosystem Management Assessment Team, *Forest Ecosystem Management: An Ecological, Economic, and Social Assessment* (USDA Forest Service 1993).
83. *Id.*
84. 16 U.S.C. § 1531(b) (2000).

could comply with the environmental laws *without* planning on an ecosystem basis."[85]

> The primary lesson from the controversy was clear: federal land managers must be prepared to address and protect ecosystems...The secondary lesson was also clear: science and litigation have the power to reshape the natural resource policy on federal lands.[86]

Ecosystems are not respectful of human-imposed boundaries. In most cases, dealing with ecosystems implies an increase in scale far beyond the traditional norm for planning. This glaring mismatch between the vast scales implied by ecosystem planning and management at traditional (modest) notions of scale — speaking merely to political/social/economic boundaries — produced immediate problems relating to compliance with extant laws. Social and legal acceptability were, and continue to be, in dramatic conflict.

> Congress has passed additional and mostly procedural laws while failing to confront the tough questions regarding forest management. The agency still has its discretion, but now it must take numerous procedural steps to exercise it. It is a case study in inefficient discretion. Until Congress clarifies the central purpose of our national forests and the core missions of the FS, procedural and decision-making inefficiencies will be a fact of life.[87]

WESTERN LEGISLATORS RESIST

Where the FS is concerned, problems emerged and worsened as various administrations came and went over the next 25 years or so. In many cases, the consequences of these new laws did not play well in the less populated western states that contained most of the national forests. Congress members from western states consistently dominate Senate and House committees that deal with public land matters. These representatives have, overall, sympathized with those making their livings in timber, ranching, and mining as opposed to those of the conservationist persuasion.

Congress has, over the years, made several attempts to "get around" the consequences of the laws and regulations that came into being in the 1970s. Nonetheless, Congress has proven, over the past 30 years, unable or unwill-

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85. 871 F. Supp. 1291, 1311 (W.D. Wash. 1994) (emphasis in original) (addressing the legality of the Northwest Forest Plan governing the management of the federal lands in the Pacific Northwest within the range of the northern spotted owl).

86. Robert B. Keiter, *Keeping Faith with Nature: Ecosystems, Democracy, and America's Public Lands* 2 (Yale U. Press 2003).

87. Nie, *supra* n. 40.

ing to change those laws. The best known of these "end runs" is the now infamous Salvage Rider, which was attached to the 1994 budget for Interior and Related Agencies. The Salvage Rider set targets for the salvage of burned and insect/disease affected trees. It also excused land management agencies from legal requirements such as acceptance of appeals and consultation with regulatory agencies regarding threatened or endangered species. The FS Chief had recommended that the Salvage Rider be vetoed; the Clinton Administration ignored this advice.[88]

ADMINISTRATIONS WAFFLE AND WIGGLE

At first, the Clinton Administration held the FS' feet to the fire to encourage efforts to meet the targets for timber salvage. Then, when the environmental community protested vehemently, the Administration promptly reversed course. The Administration made the FS the scapegoat for a policy that had backfired with a key political constituency.[89]

The Healthy Forest Initiative of 2003[90] and the Healthy Forest Restoration Act of 2003[91] will likely set off a similar war between factions of the public and the FS. The FS will find itself, once again, caught squarely in the middle, precluded from either crying foul or fighting back against the assault.

Recent Republican administrations as well as key members of Congress do not like the consequences of adherence to the full body of environmental law and underlying concerns with regard to forest and rangeland management. Thus, key western delegates typically use one mechanism or another to escape the consequences of non-adherence. These same officials, however, dare not attempt to change the law as it stands to justify their ends. Thus, their frustrations are often manifest in highly visible attacks on the land management and regulatory agencies. While such attacks do not ordinarily alter the course of management, they comprise a convenient theatre for mollification of constituencies and political supporters.

Many environmental activists understand the game and demand adherence to the law. The activists respond to their congressional foes by going after the agencies — all the while knowing better, who is truly responsible for clarification of management intent on the national forests.[92] Realistically, however, that is the environmentalists' only short-term course of action. In effect, environmentalists are well aware that the problem resides with the absence of clear intent for the management of the national forests as well as Congress' tacit acceptance of these circumstances. Through all

88. Thomas, *supra* n. 68.
89. *Id.*
90. Pub. L. No. 108-148, 117 Stat. 1887 (Dec. 3, 2003).
91. 16 U.S.C. §§ 6501-6591.
92. Thomas, *supra* n. 68.

this, judges as well as those who get sucked into the end-game are expected to keep a straight face.

AGENCY PROFESSIONALS INCREASINGLY IGNORED

Agencies prepare budgets that are, or at least traditionally were, reflective of some attempt by agency professionals to balance appropriate levels of natural resource exploitation with environmental concerns as manifest in planning documents. Increasingly however, the Office of Management and Budget (OMB) and Congress, each in turn, maul these budgets so that activities related to resource extraction are more fully funded and those dealing with activities to enhance compatibility with environmental concerns are significantly reduced and thus underfunded.[93]

In recent times and during the reign of both political parties, Directors of land management agencies are compelled to act and to testify before congressional committees, to the effect that they are fully satisfied with the end result of such "mauled" budgets, whether or not this is the case. In that process, both Congress and the American people are deprived of the views of agency professionals that must carry out activities described under those budgets.[94]

THE LANDSCAPE CHANGES – JUDGES FRONT AND CENTER

Post-1970s, environmentalists simply insisted land management agencies adhere absolutely to the law and quickly learn to adroitly "play" the "new game" that was rapidly evolving as a consequence of the environmental laws passed in the 1970s. Those in the extractive industries, who had long occupied the political catbird's seat, continued to play the "old game" that they successfully applied for so long. Consequently, they missed the point that, with all of the new laws and the rules and regulations being issued pursuant to those laws, it would be federal judges who could, and likely would, be making the critical decisions — if they could be tempted, enticed, or maneuvered to do so.

There was a one-two punch to be employed. There exist so many rules and regulations related to proper process that the first legal move by those who disapprove of a proposed management action is to charge agencies with lack of adherence to the details of prescribed process. Win or lose, this tactic ordinarily causes a significant delay in the proposed action. The second move (usually) addresses the more significant question of adherence to one or more of the requirements of applicable law(s). Win or lose, the costs — in time, money and opportunity cost — of litigation to the involved agency are significantly greater than those to the plaintiff. Moreover, if the

93. *Id.*
94. *Id.*

plaintiff wins, the government pays expenses. If the plaintiff loses, however, there is no financial consequence beyond sunk costs of the litigation.

If a proposed project is delayed significantly in the process of a legal action, it may very well lose its economic/social/ecological viability. Thus, even if the government wins the case, it loses the ability to go forward with the planned action. As a result, particularly in the case of time sensitive projects, there is increased incentive for the agency to negotiate with the plaintiff. Nonetheless:

> Given the myriad of interacting variables, it is time for concerned citizens and leaders to accept the reality that the dream of a stable timber supply from public lands is an illusion.[95]

That realization leads, inevitably, to a significant conclusion as stated by Nie:

> The volatility surrounding public lands politics is at least one disincentive for industries and communities to rely too heavily on the public domain...[96]

A NEW DAY DAWNS – ENVIRONMENTALISTS *CARPE DIEM* !

After 1980, environmental leaders became increasingly sophisticated. They understood that the 1970s' plethora of legislation had cultivated a very different playing field. A new day had dawned in public lands management. These leaders bet on the judges and the courts becoming and remaining increasingly powerful players in public land management. The bet paid off. For those objecting to active land management — especially activities involving construction of roads, commercial logging, or actions that dramatically altered the *status quo* — "victory" is achieved by thwarting proposed action(s). Outright prohibition of the proposed action, dramatic alteration in proposed activities, prohibitive increases in cost or delay of sufficient magnitude may all render a proposed action moot. In this new game, there is more than one way to "skin a cat."

The Rise of the Conflict Industry

These circumstances produced a new industry and a new breed of legal specialists — the public lands conflict industry. This industry grew out of and derived sustenance from continuous social and legal conflict relative to natural resources management on the public lands. The industry has four primary components: environmentalists, exploiters of natural resources,

95. Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 Pub. Land Resources L. Rev. 9, 14 (1996).

96. Nie, *supra* n. 40.

land management agencies and the federal courts. The industry's primary product, if one is a cynic, is sustenance of the conflict itself — i.e., all involved are, after all, gainfully employed. Admittedly, there are foot soldiers of various persuasions who, in their minds, "stand at Armageddon and battle for the Lord." These stakeholders believe, unflinchingly, that the cause for which they fight is just.

If one is an optimist, this legal/social strife produces the best possible decisions and actions under the law(s) as interpreted by the courts. The stream of court decisions, in turn, results in ever-changing rules or guidelines for the public land management game.

Public Land Management Soars in Cost—Monetary and Social

But a flaw, quite possibly fatal, is evolving within this process. The conflict industry becomes ever more expensive to feed in social, ecological, political and monetary terms. This may be economically, socially, and politically unsustainable over the longer term. The confusion resulting from a continuing parade of court decisions providing piece-meal guidance relative to adherence to the plethora of laws passed in the 1970s, and since, grows and changes with each new decision.

Initially, rulings provided clarification and definition. But, as time has passed and decisions have piled up, the potential for clarification has more and more given way to increased confusion.

Increasing Frustration Produces Ad Hoc *Approaches*

The public land management game has become so frustrating for all involved that some judges have, more recently, resorted to "brokering settlements" between agencies and plaintiffs relative to public land management issues. The agency participants, and their political overseers, could not and cannot guarantee that, over time, resources will be available to carry out agreements. And, of course, some citizens are asking pointed questions as to just whom the plaintiffs are and why they should be allowed to reach brokered agreements on public lands. That is to say, who appointed any given plaintiff to be the advocate for the *public* interest —yours or ours?

Administrations in power play increasingly sophisticated games through the Department of Justice (DOJ). The land management agency heads do not make the decisions on what cases will be defended and how vigorously — they, if even asked, make suggestions while DOJ makes the ultimate decisions. This technique can be used to vacate positions taken by previous administrations without garnering significant attention in the body politic. One such technique is referred to as "sue and settle." In this situation, "arrangements" are made for an entity to institute a legal action to achieve a desired outcome. The "government" makes the decision to settle the case and thereby effects a change in policy — well below the radar of public

accountability. If political flack does ensue, the answer is something akin to "the devil (i.e., the courts) made me do it."

THE "TRAGEDY OF THE COMMONS" – OLD AND NEW

Philosopher Garrett Hardin put forth the now famous theory of the "tragedy of the commons," wherein lands owned in common are inevitably over exploited as each additional user gains from each increment of use.[97] "Losses" are thus suffered in common, the result being that the land suffers from overuse. Hardin's suggested solution of "mutual coercion mutually agreed upon" became manifest in the land management agencies and the laws that governed their activities. That "tragedy" is, largely, yesterday's problem.[98]

The "New Tragedy's" Pending Consequences

Today, there is a new "tragedy" emerging public lands conflict. That tragedy is the increasing trend toward stalemate in the management of the public estate—and its increasingly exorbitant direct and opportunity costs.[99]

This stalemate is taking place at a time when our nation, is increasingly meeting our demands for raw and finished materials from foreign sources — wood, metals, agricultural products, and energy being among the most significant imports. We export to nations less well equipped to address the environmental impacts of the increasing consumption rates that define the American standard of living. In order to "do it right," technically and economically, we hemorrhage capital and jobs. In the process, those who derive a living from resource extraction in western public lands states are disproportionately impacted.[100]

All the while our numbers and consumptive demands continue to grow — encouraged by government policies and selectively enforced laws. With regard to both population and consumer demand, a continuing flow of illegal immigrants across our borders intensifies growth. Again, we have chosen not to enforce applicable laws. These issues trigger moral ramifications whose neglect is to our own detriment.[101] Where a government turns its back to violations of its own laws, saying nothing, in effect, says everything.

Our deficits in balance of trade are growing — and rapidly. Our national debt is growing — and rapidly. Investors in other nations, who buy the promissory notes that we will not ourselves buy, increasingly finance that skyrocketing debt.

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97. Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1248 (1968).
98. Jack Ward Thomas, *The "Tragedy of the Commons" Revisited*, 102(2) Forestry 58, 59 (2004).
99. *Id.*
100. *Id.*
101. *Id.*

BUT, TOMORROW IS ANOTHER DAY

In closing, we want those old enough, to recall the old television show *The Six Million Dollar Man.* Certainly, with inflation, he would be "the Multi-million Dollar Man" today. The show's theme featured America's top test pilot being severely and grotesquely injured in a crash of an experimental aircraft. His commander said, "We can rebuild him better than before. We have the technology." And, they did.

In the case of our public lands we have experienced a crash — or, certainly, a dramatic change of course. But, we can rebuild those lands, clarify the missions of their management, make them better, and manage them better and more sensitively than ever before. We have the technology. Better yet, we have the people equipped to put that technology to use — and more are in the pipeline. We have scientists ever improving upon that technology and the understanding of how the world works. And, our demands for the resources that come from those lands are steadily increasing.

ARE WE ETHICALLY OBLIGATED TO MEET OUR OWN RESOURCE NEEDS?

Citizens of the United States, to the extent we can do so in an ecologically and socially responsible manner, have some ethical responsibility to supply their own needs and meet their own natural resource demands. Doing otherwise shifts demand, jobs, and money to other nations in the course of obtaining the resources and materials we consume.

Berlik et al. stated the problem clearly.

> Affluent countries consume vast quantities of global natural resources, but contribute proportionately less to the extraction of many raw materials. This imbalance is due, in part, to domestic attitudes and policies intended to protect the environment. Ironically, developed countries are better equipped to extract resources in an environmentally prudent manner than the major suppliers. Thus, although citizens of affluent countries may imagine that preservationist domestic policies are conserving resources and protecting nature, heavy consumption rates necessitate resource extraction elsewhere and oftentimes under weak environmental oversight. A major consequence of this 'illusion of natural resource preservation' is greater environmental degradation than would arise if consumption were reduced and a larger portion of production was shared by affluent countries. Clearly, environmental policy needs to consider the

> global distribution and consequences of natural resource extraction.[102]

Revamped Governance is a Need That Must Be Met

Lagging science and inadequate technology are not significantly impeding our capabilities to exploit our resources in a more sustainable fashion — though continued progress is essential. Our most glaring problem in dealing with public lands lies in their governance — how to make the management of these lands sustainable, better and more efficient. Any exploitation of public lands, for whatever purpose, has deteriorated into semi-chaos, or, there is at least, a high degree of volatility involved.

We must exploit our environment in order to live — that is a given. Certainly, we can temper our demands on natural resources, but cannot eliminate that dependence. The challenge lies in how to carry out tempered exploitation in a sustainable fashion under some, reasonably amicable, democratic process. This is no simple task. Where is the appropriate equilibrium point between empowering natural resource professionals to sustainably manage our lands, and satisfying the will of the people as spelled out by environmental law and jurisprudential interpretations thereof?

There Is No Solution in More "Add On" Legislation

Our current means of managing the public lands is, in our opinion, badly broken — and, getting worse. This situation will not, and cannot be, corrected by more piecemeal court decisions that confuse as much as they clarify. The morass will not, and cannot be, corrected by palliative legislation piled onto the existing unstable and trembling pile.

The Courts Have Merely Made Matters Worse

There is not a judge alive that can make sense of this mess. If we expect litigants and judges to lead us out of this swamp we, simply, expect too much.

Our impression is that many judges, have grown weary of being the *de facto* managers of public lands. But, to paraphrase Caesar, "They, collectively, have crossed the Rubicon."[103] And, to mix metaphors, they seem firmly stuck to a "tar baby" from which they cannot free themselves.

> Judicial oversight is not the most appropriate venue for resolving some political conflicts. However, given the amount of administrative discretion provided to the public

102. Mary M. Berlik et al., *The Illusion of Preservation,* Harvard Forest Paper No. 26 (Harvard U. 2002).

103. *See Merriam-Webster's Encyclopedic Unabridged Dictionary* 1679 (2d ed., Merriam-Webster, Inc. 1996).

> land agencies, and [given] our hyper pluralistic and litigious political culture, the courts have [now] become dominant players in public land governance.[104]
>
> There is a dominant sequence in public land politics: (1) vague, ambiguous or contradictory laws leave many central political questions unanswered, (2) land management agencies try to answer these questions using less-than-perfect administrative rule making process, (3) they are sued, (4) courts implicitly and explicitly answering the political questions avoided by Congress, (5) depending on the court's interpretation, they are either championed as guardians of democracy or vilified as judicial activists. This recurring pattern raises an important question of when judicial oversight becomes judicial control.[105]

Public Land Management Is a "Wicked Problem"

The state of public land management is a social/legal/economic/political/technical mess. It is a vicious cycle in which each attempt at solution simply exacerbates matters. There are so many requirements for planning; assessment; reassessment; consultation; review; re-review; public involvement and court related activities — that it is essentially impossible to carry out any significant land management activity without exacting costs that are unjustifiable given the product expected.

We have reached the point, where all too often, the only economically and politically rational decision is to do nothing, and accept the consequences of inaction. We simply cannot afford this worsening state of affairs to dictate management on one-third of our nation's lands.

We seem more and more incapable of being able to accept even small and short-term risks to attain longer-term benefits. There is, after all, some degree of risk in all human endeavors — and only a fool ignores risk. However, we have, in too many instances of natural resource management, taken the precautionary principle derived from the practice of medicine ("first, do no harm") to paralyzing extremes.

The present state of affairs has been called a "Gordian Knot" which describes a problem that is insoluble in its own terms. Gordius, the King of Phrygia, devised the knot as a test to determine the rightful ruler of Asia. He who undid the knot was the rightful King. When Alexander the Great was presented with the knot he did not puzzle over it — nor pick at it, he simply drew his sword and cut it in half.[106] In this case, only Congress has the blade to sever the tightening "Gordian Knot" of present day public land

104. Nie, *supra* n. 40.
105. *Id.*
106. *See Merriam-Webster's Encyclopedic Unabridged Dictionary* at 503.

management, but that blade remains sheathed. An *Alexandrian* solution is overdue.

A New Public Land Law Review Commission?

It is time — once again — to charge a Public Land Law Review Commission to consolidate and streamline the laws that influence public land management. Yes, we have been down this path before — several times and with little to show for the effort. Nonetheless, we need not remain mired in the present state of affairs.

The charges to previous commissions were too cautious and too constrained when they should have encompassed all federal lands. Prior commissions were simply constrained to apply band-aids in their prescriptions when radical surgery was required. Prior commissions were timid when they should have been bold. They dawdled when then they should have forged ahead. They confounded when they should have simplified. As a result, their efforts produced little beyond just another study to go on sagging shelves alongside the government studies that went before. To be fair, they were most likely so constrained by their mandates that they could do little else than that which occurred.

But, now, the situation has grown worse—to a degree that justifies unprecedented boldness.

The Commission's report should not dwell on detailing problems. A simple introductory chapter should do for that purpose. Rather, the report should take the form of recommended legislation — including several rational options. That legislation should, first, clarify — in crystalline clear terms — the mission for each land management agency. Then, those attributes of current law that aid in the achievement of that clarified mission should be incorporated into new legislation. That which confuses or detracts from mission achievement should be culled. Overlaps in responsibility and authority should be identified and eliminated. Lines of authority and responsibility should be fewer and shorter — i.e., currently, there are too many layers of political appointees — too often with few or no credentials for positions they hold — influencing land management decisions. There are too many agencies involved at too many levels in land management decisions and execution. Consolidation of agencies and responsibilities is necessary.

Congress, using such draft legislation as a starting point, could then work its will. Certainly, this is a frightening thought — but, realistically, it is the "only game in town."

PLEASE, NO MORE PATCHES!

The public land management morass now looms so large, and has become so convoluted, that neither Congress nor the Administration (read "any Administration"), using standard operating procedures of the day can

muster the will, vision, wisdom, or capability to even visualize a solution. The best these entities can muster is the placement of one patch on top of another. In the end, this approach only makes federal land management more confused, more expensive, less efficient, more politically volatile, and less predictable. The time for "patches" is long past — land management agencies are running on four flat tires festooned by patches on top of patches. It is time for a new set of tires.