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Politics and the Columbia Basin Assessment--Learning from the Past and Moving to the Future

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POLITICS AND THE COLUMBIA BASIN ASSESSMENT–LEARNING FROM THE PAST AND MOVING TO THE FUTURE

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INTRODUCTION

Insanity has been defined as doing the same thing over and over and expecting a different result. The entire ongoing assessment effort and the ensuing Draft Environmental Impact Statement involving the Interior Columbia Basin represent a determined effort to expeditiously obey the law. This involves learning from the past and appropriately modifying behavior in moving to the future. The aim is to achieve the objective without repeating the politically induced foibles typical of the decades-long struggle over federal land management in the "west-side" forests (those lands lying west of the Cascade Range) in Oregon, Washington, and Northern California.

LEARNING FROM THE PAST

Revisiting the "forest management train wreck" that occurred, and continues with the consequences of the infamous "salvage rider" on the west-side, is essential to understand current land management planning in the Interior Columbia Basin.[1] It was obvious (at least to some), some 15 years ago, that the inexorable cutting and concurrent fragmentation of old-growth forests on the west-side would lead to a collision with the Endangered Species Act (ESA).[2] The star of the drama was the northern spotted owl—a sub-species that finds its best habitat in forests characteristic of

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1. The Salvage Rider was passed in 1995 as a rider to the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act (Emergency Appropriations Act), Pub. L. No. 104-19, §§ 2001-2002, 109 Stat. 194, 240-47 (1995) (codified at 16 U.S.C. §1611 (1996)). This legislation was highly publicized and widely criticized because it included provisions allowing the harvest of a group of sales which had previously been withdrawn for environmental reasons. *See* Northwest Forest Resource Council v. Glickman, 97 F.3d 1161 (9th Cir. 1996).

2. 16 U.S.C. §§ 1531 - 1544 (1997).

old-growth forests.

There was a series of efforts, over a decade, by federal land management and regulatory agencies to come to grips with the deepening quandary presented by the changing status of the habitat for the northern spotted owl. These early efforts failed due to the unwillingness, or inability, to face up to the social, political, and economic ramifications of even relatively insignificant reductions (as viewed from today's vantage point) in timber coming from cutting of old-growth forests on Forest Service (FS) and Bureau of Land Management (BLM) lands.

THE INTERAGENCY SCIENTIFIC COMMITTEE (ISC)

By 1989, the northern spotted owl was headed for listing by the Fish and Wildlife Service (FWS) as "threatened" under the requirements of the ESA. The agency heads of the FS, BLM, FWS, and the National Park Service (NPS) ordered the formation of an Interagency Scientific Committee (ISC) to develop a plan to address the old growth/spotted owl issue on public lands. This team was afforded autonomy to do its assigned work without the interference that was perceived to have marred previous efforts.

At the team's first meeting, they examined their assignment and informed the agency heads that they were addressing the wrong question. They believed that it was a question of the handling of the old-growth ecosystem and not the status of a single cryptic sub-species of owl. Further, they expressed the belief that it was an error to confine the assessment to public lands. They were overruled. In retrospect, the scientists involved should have "pushed back" harder on the instructions or simply done the job in a manner that was considered technically appropriate. It is clear, again in retrospect, that a "partial" look is a biased look and that there can be political manipulation, intended or not, through restriction of analysis.

Within six months, the ISC completed an underlying assessment of ecological conditions and a management plan applying strictly to public lands. That plan stood up to determined efforts in Congress and within the Bush Administration to fault the effort on technical grounds. Those assaults, particularly from some members of Congress and representatives of the Administration became pointed and personal. The Chief of the FS, Dale Robertson, and the Director of the FWS, John Turner, stood fast behind the team that they had appointed. Others were silent. Later, the team was accorded significant accolades from several learned societies attesting to the team's accomplishments in the arena of application of science to management.

Due to the turbulent political atmosphere, the political handlers of the FS and the BLM did not allow formal adoption of the ISC strategy In-

stead, it was announced that land management would take place in a manner "not inconsistent with" the team's recommendations.[3] Simultaneously, another team assembled by the FWS was considering whether or not to list the northern spotted owl as threatened under the ESA. Within weeks of the release of the ISC report, it was recommended that the northern spotted owl be declared "threatened." The FWS Director concurred.[4]

BIOLOGICAL NECESSITY VS. POLITICAL ACCEPTABILITY

The first plans prior to the ISC report dealing with the issues presented by the spotted owl called for reductions in the annual timber sales levels from the public lands of some four to eight percent. That percentage was considered too big a social/political/economic pill to swallow Technicians were ordered back to the drawing board several times. Each subsequent effort, due to declining options for management and emerging technical information, came at a higher price in terms of timber supply. This, in turn, upped the political resistance to any suggested solution that would stand up to technical and legal muster. By the time the ISC strategy was on the table, the impact had come to about a forty per cent reduction in potential timber sale levels.

Political resistance at both Federal and State levels mounted. There were exceptions such as Congressman Norm Dicks of Washington who represented a district with a considerable constituency dependent on the continued extraction of old-growth from National Forests on the Olympic Peninsula. Dicks recognized the trend and recommended going along with the ISC strategy He felt, correctly, that continued "game playing" by politicians would only exacerbate the situation. Time would attest to his foresight.

Dicks' colleagues in the Oregon, Washington, and California delegations did not agree, and the first of what would be a series of "quick fixes" was enacted in the form of Section 318 of the 1990 Appropriations Act.[5] In order to tide over the dependent timber industry, representatives

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3. 55 Fed. Reg. 40,413 (1990).

4. The spotted owl was officially listed as threatened under the Endangered Species Act on June 22, 1990. 55 Fed. Reg. 26,114 (1990).

5. Department of the Interior and Related Agencies Appropriations Act (Northwest Timber Compromise Act), 1990, Pub. L. No. 101-121, § 318, 1989 U.S.C.C.A.N. (103 Stat.) 745. This bill, enacted in October of 1989 and dubbed the "Northwest Timber Compromise Act," was one of a series of nine riders adopted in the 1980's to circumvent legal injunctions, or limit judicial review of Department of Interior and Department of Agriculture activities in the Pacific northwest. In § 318 Congress directed that federal agencies' compliance with the Section would be "adequate consideration for the purpose of meeting the statutory requirements" that were the basis of the pending litigation. In *Robertson v. Seattle Audubon Society* the Supreme Court held that this quick fix was a legal exercise of

of the timber industry and local "environmentalists" were to work with the FS and the BLM to designate old-growth timber sales on each National Forest and District. These sales, most of which were immediately sold and cut (though some were later withdrawn for environmental reasons), were to leave a legacy of mischief that still reverberates in western Oregon and Washington. More on that later.

A SMALL CRYPTIC OWL BECOMES AN ISSUE IN THE BUSH/CLINTON CAMPAIGN

Not surprisingly, the spotted owl became an issue in the Bush/Clinton/Perot political campaign for the Presidency of the United States. In the midst of that campaign, BLM Director, Cy Jamison, suddenly declared that the BLM would, henceforth, abandon the ISC strategy and instead follow the "Jamison Plan." He declared "his" plan technically superior to the ISC strategy and claimed that the plan could be carried out with much less economic and social impact. It was never actually clear that the Jamison Plan existed as anything more substantive than a news release.[6] But, Jamison's defection caused a federal judge, who had lost patience with the entire political charade, to shut down the timber sales on public lands within the range of the northern spotted owl.[7] What was thought to be good politics turned sour in both political and technical aspects.

That injunction was to stay in place until the Judge's questions were answered as to the efficacy of the ISC strategy sans the BLM's participation.[8] And, almost as an aside, Judge William Dwyer wanted to know the effect of the situation on some 39 other species mentioned in government documents as potentially dependent on old-growth forests. The Judge seemed to know that the underlying questions were larger than concerns about a single threatened sub-species. He understood that the clearly stated purpose of the ESA was "to preserve the ecosystems upon which threatened or endangered species depend."[9]

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authority by the Congress. Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992).

6. Roberta Ulrich, *BLM Chief Seeks Forest Balance*, PORTLAND OREGONIAN, July 13, 1992.

7. Seattle Audubon Society v. Evans, 771 F Supp. 1081 (W.D. Wash. 1991). The Ninth Circuit affirmed the validity of Judge William Dwyer's injunction in December of 1991. Seattle Audubon Society v. Evans, 952 F.2d 297 (9th Cir. 1991).

8. *Id.*

9. 16 U.S.C. § 1531(b) (1997).

THE SCIENTIFIC ASSESSMENT TEAM—THE MOVE TO ECOSYSTEM CONSIDERATIONS

As a result, Jack Ward Thomas was assigned by FS Chief Dale Robertson to head the Scientific Assessment Team (SAT) to answer the Judge's questions. The SAT asked for permission to expand the assessment to cover nearly 1,000 species that seemed likely to be associated with the old-growth ecosystem. Permission was forthcoming from FS Deputy Chief James Overbay Finally, the SAT was beginning to address the correct question, easily discernable from the purpose of the ESA which was—"the preservation of ecosystems on which threatened and endangered species depend."[10] The SAT concluded that it could not answer the Judge's operative question because it simply could not tell what the "Jamison Plan" entailed.

Later, Jamison ordered the BLM to go to the "God Squad" to gain an exemption from the ESA for a limited number (44) of timber sales.[11] This political gamble gave timber industry intervenors the opportunity to put the ISC strategy, and the scientists involved, on public trial. Mark Rutzick, the timber industry's lead attorney, declared that it was his intention to "defrock the high priests of the cult of biology "

The persons that composed the God Squad were all political appointees of the administration and President Bush had already expressed himself strongly on the issue.[12] The God Squad,. in the end, ruled that a portion of the select timber sales could proceed.[13] But, thereafter, they said that there would have to be compliance with the ISC strategy So, what appeared to be a victory was, in reality, a decision that kicked the props out from under the Jamison Plan—whatever it was. This was a classic phyrric victory if there ever was one. Evidently, that was too much for the BLM Director to swallow and the timber sales in question and the Jamison Plan disappeared from the newspapers. Judge Dwyer's injunction remained in force.

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10. *Id.*

11. In September of 1991 the Secretary of Interior agreed to convene the God Squad. The "God Squad" is a committee authorized under § 7(e) of the Endangered Species Act to create exemptions from the requirements of the Act. 16 U.S.C. § 1536(e) (1997).

12. The members of the God Squad were the Secretary of Agriculture, the Chairman of the Council of Economic Advisors, the Secretary of the Army, The Secretary of the Interior, the Administrator of the Environmental Protection Agency, the Administrator of the National Oceanic and Atmospheric Administration and individuals from each affected state who were appointed by President Bush. 16 U.S.C. § 1536(e) (1997).

13. On May 15, 1992 the God Squad granted exemptions for 13 or the 44 timber sales that the BLM had brought before it.

A FEDERAL JUDGE LOSES PATIENCE

What this political side-show did accomplish was to bring federal Judge William Dwyer to the end of his patience with delay and maneuvers to avoid compliance with the law [14] Judge Dwyer acceded to the requests of the attorneys representing the environmentalists and simply shut down all timber sales on Federal lands that involved habitat for the northern spotted owl—real or potential.[15] That shutdown was to remain in force until the Government convinced him that there was compliance with the ESA and compliance with the "diversity clause" of the federal regulations issued pursuant to the National Forest Management Act.[16] Dwyer was scathing in his criticism of the persistent efforts of the government to avoid compliance with the ESA and the NFMA.[17]

CONGRESS ENTERS THE FRAY—THE GANG OF FOUR

Looking askance at this spiraling fiasco, the Agriculture Committee of the House of Representatives, decided to try their hand by naming a committee of four scientists to provide an array of alternatives that might form the basis for a legislative solution. With some prescience, the Committee instructed the scientist to consider the "old-growth ecosystem" in their recommendations. These scientists were Drs. John Gordon of Yale, Norm Johnson of Oregon State University, Jerry Franklin of the University of Washington, and Jack Ward Thomas of the FS. This team was quickly and disparaging tabbed the "Gang of Four" by a timber industry spokesman in a sound bite for the press. The team, and the press, liked the ring of the name and it stuck.[18]

FISH GET IN THE GAME

As The Gang was departing the conference room in the House Office Building after receiving instructions from the Committee, Congressman Voelkmer of Missouri called out—"And, don't let us get surprised by some damn fish." Clearly, listing of various species and runs of anadromous fish was imminent. The Gang knew it, and Voelkmer's comment was taken as a green light to consider that issue. In response, Drs.

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14. Seattle Audubon Society v. Evans, 771 F Supp. 1081, 1089 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

15. *Id.*

16. The implementing regulations for the National Forest Management Act require the FS to provide habitat to "maintain viable populations of existing native and desired non-native vertebrate species " 36 C.F.R. § 219.19 (1997).

17. Seattle Audubon Society v. Evans, 771 F Supp. 1081, 1089 (W.D. Wash. 1991).

18. Kathie Durban, *Experts Secretly Map Areas For Old-Growth Protection*, PORTLAND OREGONIAN, June 19, 1991, at A14.

James Sedell and Gordon Reeves of the FS were added to the team. The Gang (plus two) quickly delivered an array of alternatives to the Agriculture Committee who promptly held hearings on the report. The intermediate management option came in with a reduction in anticipated timber cuts of some 50 per cent. By now, the Presidential election was pending and it was, presumably, considered the better part of valor to defer action until after that election. The injunction issued by Judge Dwyer remained in effect.[19]

THE ESA AND THE 1992 PRESIDENTIAL CAMPAIGN

During the 1992 campaign for the Presidency, President George Bush took to the stump in the Pacific Northwest and expressed outrage at the consequences of the application of the ESA, and with the interpretations of that law by federal judges in the Ninth Judicial Circuit. He promised change after the election. Candidate Governor Bill Clinton recognized the economic and social pain caused by the impasse and promised to bring matters to some conclusion, in compliance with extant law, in short order, if he were elected.[20]

THE FOREST SUMMIT—ESTABLISHMENT OF THE FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM (FEMAT)

Obviously, Mr. Clinton won the election and set out to keep his promise. The new President quickly convened a "Forest Summit" in Portland, Oregon, to discuss the problem and possible solutions.[21] Shortly after the Summit, he announced that the Forest Ecosystem Management Assessment Team (FEMAT) was being formed to provide an array of alternatives for solution to the impasse. He expected this task to be completed in 60 days.

This effort would eventually involve nearly 600 people. The team's instructions were to use "an ecosystem approach" with particular emphasis on compliance with the ESA (including aquatic species). The effort was to be conducted under strict security, and the underlying assessment and management recommendations were to be confined to federal lands. Clearly, a new policy had been set. Evolving circumstances produced a situation wherein it was clear that the overriding objective (or overriding constraint) on the management of public lands was to be the preservation of

19. *Evans*, 771 F Supp. at 1089.

20. Eric Pryne, *Clinton Seeks Middle Ground*, SEATTLE TIMES, Sept. 15, 1992, at D1.

21. The Forest Conference was convened in Portland Oregon on April 2, 1993. Timothy Egan, *Clinton in the Middle During One-day Forest Summit*, N.Y. TIMES, April 3, 1993.

biodiversity Furthermore, the brunt of compliance with the ESA[22] and the regulations issued pursuant to the National Forest Management Act (NFMA)[23] was to be absorbed on the public's lands where feasible.

The "diversity clause" of the NFMA is actually more specific and more demanding than that of the ESA.[24] That clause requires that " viable populations of all native and desirable non-native species be maintained well-distributed within the planning area."[25] The team realized that confining the assessment portion of the effort to public lands was ecologically inappropriate. The instructions remained intact and the effort was so executed. Again, in retrospect, the scientists should have "pushed back" on these instructions. These restrictions made sense in the political arena but inappropriately restricted the "scientific approach."

LESSONS LEARNED FROM EARLIER EFFORTS

This effort capitalized on lessons learned from earlier efforts. Among these lessons was that an ecosystem management approach was more appropriate than a species-by-species approach. The assessment should include an evaluation of social and economic effects along with ecological considerations. It was recognized that it was inappropriate to consider only one option, and that scientists should not make decisions. Instead, scientists should provide decision makers with potential management alternatives and appropriate information on which to base a decision. All the agencies involved with the application of the myriad pertinent laws (FS, FWS, National Marine Fisheries Service (NMFS), Environmental Protection Agency (EPA), NPS, and BLM) should be involved from the beginning. It is essential to include an adequate array of technical specialists—including economists and social scientists. It was recognized that ecosystem management is as much about people as anything else.

The FEMAT finished its assignment in 90 days by presenting an overall underlying assessment of ecological, economic, and social factors and 10 options with their associated attributes and risks. These options were incorporated into an Environmental Impact Statement (EIS) by a separate team.[26] The President chose "Option 9" which had been considerably modified from the original Option 9 Numerous "bells and whistles" were added, primarily to meet concerns of the FWS, NMFS, and FS

22. 16 U.S.C. §§ 1531 - 1544 (1997).
23. 16 U.S.C. §§ 1600 - 1614 (1997).
24. *See* 36 C.F.R. § 219.19 (1997).
25. *Id.*
26. DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (July 1993).

biologists and environmentalists, and to "assure" compliance by the land management agencies.[27] Some scientists involved with the development of the original Option 9, were concerned that with the "bells and whistles" appended to the final version, the timber projections could not be achieved due to technical, personnel, budget, and time constraints. Experience over the past four years has shown that concern to be valid.

There was a lesson to be learned: plans should not be larded with promises that are included to increase the palatability of the plan that may not be possible to execute. This is a poor way to address lack of trust between agencies and technical experts, as "bells and whistles," dramatically increase the costs of management. Experience indicates that there is little likelihood that either the Office of Management and Budget (the administration in power) or the budget committees in Congress will provide the necessary resources to fulfill obligations set out in such plans. In retrospect, the revised Option 9 should have been reviewed by the original science team to assure conformity with the science, use of all pertinent information, the statement of confidence intervals, and projections of results. It is critical that "science" not be used as a shield for political decisions.

The role of science is not to enter the realm of trade-offs that are, of necessity, based on value judgments.

FINALLY—THE NINTH CIRCUIT SAYS THE TEST IS PASSED (JUST BARELY)

Of course, groups on both extremes of the issue immediately took the decision to federal court.[28] Option 9 and the process used in its development were upheld against all challenges by Judge William Dwyer. The judge's response to the challenge regarding the legality of "ecosystem management" is of particular interest. The judge said that, not only was ecosystem management legal, it was necessary if land management agencies had any hope of simultaneously complying with the myriad laws directing their management actions.[29]

MORE LESSONS LEARNED

Improvements could have been made in the process. All deliberations of the FEMAT were conducted under a "closed process" that precluded involvement by elected officials, those charged with management responsi-

27. These "bells and whistles" included provisions requiring the maintenance of buffer zones and other management practices designed to protect habitat and species.

28. Seattle Audubon Society v. Lyons, 871 F Supp. 1291 (W.D. Wash. 1994).

29. *Id.* at 1311.

bilities and other interested parties. The team included non-federal employees, such as university professors with specialized expertise, who were "employees" in that they were compensated for their services by the federal government.

Therefore, the Office of General Counsel advised that there was probable compliance with the requirements of the Federal Advisory Committee Act.[30] The Court ultimately decided otherwise—but without consequence to the outcome of the case. And, by the end of the process, the core team believed that an underlying assessment should have included all the lands within the region, regardless of ownership. This would have given a better view of the overall situation to help guide management decisions for the public lands.

THE PRESIDENT DIRECTS ATTENTION TO THE INTERIOR COLUMBIA BASIN

When President Clinton formally announced the adoption of Option 9, he directed that the land management questions facing Oregon and Washington east of the Cascades be addressed through some similar process. Jack Ward Thomas as the new FS Chief and Dr. Mike Dombeck as Acting Director of the BLM were able to influence the process to be employed based upon experience and lessons learned in dealing with the Pacific northwest old-growth controversy

A REVIEW OF MISTAKES MADE AND LESSONS LEARNED

This opportunity caused a review of the lessons learned over the previous 15 years in dealing with such matters. Among those lessons learned were:

1) It is unwise to delay dealing with the issue of the preservation of biodiversity—no matter how much "politics" comes to bear. Delays exacerbate the ecological situation by "eating up" management options through alteration, removal, or fragmentation of habitat. As options are reduced, adjustments in the status quo to meet requirements of law and technical validity become increasingly severe.

2) Agencies must act in a coordinated and collaborative fashion from the beginning in the assessment and development of alternatives for management. That cooperation must carry through into management. "Splits" between agencies produce lack of management cohesion and provide easy targets for adverse publicity and attack on legal grounds.

3) Any action based on less than a full undergirding assessment of pertinent legal, ecological, social, and economic factors will be subject to

30. 5 U.S.C. app. §§ 1-15 (1994).

continuous—and likely successful—legal and political assault.

4) "New knowledge" such as that which has emerged from the Columbia Basin Assessment or from ongoing research and monitoring cannot be ignored without legal consequences.

5) It is unwise to assume that what agency administrators and their technical and legal advisors consider full compliance with applicable law will not draw legal challenge from some quarter. It is likewise unwise to assume that judges will see things your way—or be logical or consistent in their judgements. That is why we have appeals courts.

6) It is unwise to "pull the tail" of a federal judge. Judges lack a certain sense of humor when it comes to compliance with the law and the respect they believe due to the separation of powers doctrine. Federal judges can and will issue injunctions and court orders that will shut down resource extraction from federal lands until full compliance with the law has been achieved.

7) Those judges, and the advocates that will bring cases before them, are totally familiar with the history of natural resource management disputes. Judges can deal severely with those who insult their intelligence by repeating past mistakes (as already determined by other judges).

8) Politicians who promise their constituents that they can get around the consequences of statutes, case law, and the precedents set in Pacific northwest old-growth debate, by manipulations of budget or budget language are likely to do those constituents significant harm in the long run. Such manipulations through the means of the "quick fix" will only delay compliance. Experience shows that delays will increase the impact on those who rely on resource extraction. This will force reliance on Recovery Plans, for threatened species as the drivers for land-use planning. Experience, again, demonstrates the consequences of that approach.

9) The process should be as "open" or "transparent" as possible. There is, after all, nothing but technical work in progress. Of course, in observing such a give-and-take process, it is well to remember the old adage that "this is a lot like sausage, you will enjoy it a lot more if you don't watch it being made." Such a process will take longer and cost more but the alleviation of associated paranoia is adequate justification. This open approach should be considered a significant contribution to democratic processes.

10) State and local officials should be kept fully informed and fully involved. At best, this will enhance opportunities to achieve consensus. At worst, there is the opportunity to fully understand what is going on and to remove the mystery from the process.

11) The actual "hired hands" doing the day-to-day work should all be federal employees to avoid any potential conflicts with the Federal Advisory Committee Act. Routine consultation with other State or local

governmental entities is acceptable and should be encouraged.

12) Peer review of "scientific" assessments should be carried out and all files concerning such reviews made available.

13) "Science" assessments and reviews should be conducted separately from other parts of the process such as EISs, decision documents, and records of decisions.

DEALING WITH NEW KNOWLEDGE—WHAT IS THE BEST WAY TO DO THAT?

Some advisors to industry realize that "the cat is out of the bag" in the form of the Columbia Basin assessment and that new knowledge must be addressed in new or altered land management plans. The National Environmental Policy Act (NEPA),[31] NFMA[32] and other federal laws require the consideration of significant new information in the revision of land use plans and environmental impact statements. This new information cannot, therefore be ignored. However, some advisors to industry believe that there will be a better result for their constituents if the ongoing broad-scale Draft EIS is terminated through instructions in the budget authorization language or as a rider to the budget bill. That language would, presumably, include instructions to terminate the ongoing process and, instead, start with individual forest and district planning efforts. That would have one or more negative consequences.

No matter which way the planning process proceeds, top down or bottom up, it will be essential in the final analyses that plans "add up" to some coherent whole. The "bottom up" approach will, inevitably, be a more expensive and more time-consuming way to achieve a coherent whole. That approach also produces enormous technical difficulties in dealing with questions of cumulative effects—inevitably producing underestimates of those effects. We have been there and done that—do we never learn?

Whether federal judges, considering an almost certain legal challenge to a bottom up approach, will tolerate the associated delay is a question to ponder. There is already probably serious judicial aggravation over slowness and/or inappropriateness of actions of federal agencies in the listing process for bull trout, various runs of steelhead trout and salmon, wolverines, lynx, fisher, and other species, and it seems likely that judges will exhibit little patience. In addition, numerous other species will come to the forefront of attention for the FWS and the NMFS for consideration for declaration as "threatened" and "endangered." Of course, grizzlies, wolves,

31. 42 U.S.C. §§ 4321-4370(d) (1997).
32. 16 U.S.C. §§ 1600-1614 (1997).

spotted owls, marbled murrelets and other high profile species will continue as part of the picture.

The "bottom up" approach is bad strategy for those dependent on resource extraction and good strategy for those who desire, ultimately, the institution of the maximum possible preservationist approach. Experience has shown that delay only makes the situation worse in the long run for those interested in resource extraction. This results from rapid diminution in "decision space" and possible management options.

CONSIDERING THE TRACK RECORD OF ADVISORS

It is well to consider the track record of those who advise "quick fix" solutions. Nearly all of the twists, turns, and legal actions instituted upon such advice in the course of the forest management disputes on the westside of Oregon and Washington backfired. Those evasive actions turned out to have severe negative long-term impacts on resource extraction and those that relied on extraction activities for their daily bread and the feeding of their county government and schools. Telling folks for political purposes what they desperately want to hear often produces severe consequences.

A MORE APPROPRIATE COURSE OF ACTION

Without dramatic immediate alteration in the ESA and the regulations issued pursuant to the NFMA that deal with retention of biodiversity—which seems highly unlikely within the next several years—the most rational course of action for those interested in resource extraction from the public's lands is to expeditiously comply with the extant laws. Fortunately, in the case of the Interior Columbia Basin, this course of action can be facilitated by the best underlying assessment of ecological, social, economic, and legal factors that has ever been compiled. It should be considered an opportunity to be seized and not as a threat to be resisted.

GAMES THAT PEOPLE PLAY—OR WHEN ELEPHANTS FIGHT

There is a sophisticated social / political / legal game in play The players are the "elephants" that fight on behalf of their sponsors that represent the polar extremes in the debate. They are experienced and skilled fighters seasoned by previous conflicts. They fight hard and they fight to win—through whatever means are available. But it is well for those who do not strongly identify with either of these "war elephants" to heed an old Indian proverb. That proverb's wisdom is that, "When elephants fight it is the grass that suffers most." It is important to ask just who are the

"elephants" and who represents "the grass."

CAN MORE AND BETTER "SCIENCE" DELIVER STABILITY?

This is not an issue about science. While science has a role to play in developing and describing the consequences of management options and estimating risks, it cannot deliver stability Listen carefully to those that pick at the science involved in a decision. They are not so much upset with the science as they are with the changes that are in the wind.

To want "stability," to want things to stay the same, is a common human longing. For years the story of the regulated forest that would provide forest products was told and retold in such a sustained and predictable fashion that "community stability" became a beacon for federal land managers—and for foresters in general.

This vision was a dream that faded slowly—and, then, collapsed, in the glare of reality We now recognize that we are one drought, one insect or disease outbreak, one dramatic fire season, one law, one court case, one election, one budget, one press campaign, one propaganda blitz, one shift in demographics, one change in public opinion, one shift in market demand, one shift in price, one loss of a management tool (say DDT or clearcutting), or one piece of "new information," away from stability at all times. These influences do not emerge one at a time. They ripen in bunches much like bananas.

The only communities that exhibit stability over the long term are those significantly diversified in terms of ability and willingness to change. Yet, there are isolated rural communities that have been, and are, almost totally dependent on resource extraction from public lands for sustenance. And, there lies the rub. Many of these communities have little desire for, or willingness to accept, change.

CHANGE—SCARY BUT INEVITABLE

For those caught in change not of their desire nor of their making--particularly change that strikes at the foundation of one's "life style" and livelihood--there is real fear and a resultant visceral reaction. It is, then, a natural reaction to go to elected officials and ask that they stay the forces of change--if only for a little while. It is only natural for those elected officials to be sympathetic to those concerns. But, unless they are students of what has gone before in such situations, the politicians are apt to repeat past mistakes and their constituents suffer the same consequences of those same mistakes.

THESE ARE HUMAN NOT TECHNICAL ISSUES

In fact, the guts of this controversy are not primarily technical in nature. These are human issues rooted in differences in morality, ethics, belief, political position, and, most of all, dependent on whose ox is getting gored. These human factors sometimes become embodied in law But, when these expressions of national will embodied in law are applied in regional and local arenas where there is deep concern with the consequences of the compliance to those laws there is, commonly, reluctance, and even resistance. Initially, there is room and reason to argue exactly what the law requires and what constitutes compliance. But, as the case law piles up higher and higher, there is less and less room for arguing these matters.

There is little that agency administrators can do to alter that situation except to learn from the past and modify approaches to ensure compliance with the law in a manner that produces the least social disruption and the most overall efficiency Such conflicts cannot be solved through science—ecological, social or economic. Clearly, the costs of compliance with the laws have escalated to the point that is becoming more and more unlikely that "harvesting" of natural resources from public lands can be achieved in an "above cost" fashion. While there are always some efficiencies that can be captured, this is an insidious problem of the extant "crazy quilt" of law and regulations that requires attention from Congress if there is to be resolution.

The question that Congress will soon be called upon to answer is whether or not "multiple use" that includes extraction of resources is to continue as a significant aspect of the mission of the Forest Service. If so, a reform of pertinent laws to enhance the compatibility of those laws seems mandatory

CONGRESS MAKES AND UNMAKES THE LAW—BLESSED BE THE NAME OF THE CONGRESS

The legislative process executed by the Congress sets out the playing field and defines the rules of the natural resource management game. That is done through the formulation, passage and modification of the law Designated officials then carry out those laws. Then, only regulators, or if the regulators fail in their duties, judges can call fouls and impose penalties on the players. If the results of the application of law and pursuant regulatory action and related court decisions are judged intolerable, the law can and should be changed. That is the purview and solemn duty of members of Congress.

In the meantime, attempts to evade the law—no matter how politically expedient in the short term—are bad medicine and, based on past expe-

rience, can be expected to produce an unanticipated and unwelcome result in the longer term. For those most concerned with resource extraction, constraints are apt to be more severe, and for those interested in environmental protection, considerable additional alterations in the environment will have occurred. For both groups, there is a significant loss of management options.

THE TEMPTATIONS AND CONSEQUENCES OF SHORT CUTS AND QUICK FIXES

If one were to compose a set of laws of natural resource management, a key law would be that "Quick Fixes to Real Or Perceived Problems Resulting From Compliance with Natural Resources Laws Lead Inevitably to Insanity"

There are, of course, a number of corollaries to this "law" They are as follows:

Corollary 1. The interactions of numerous laws (formulated in different congressional committees and passed by different Congresses) and regulations (issued by different agencies with different missions) with little or no consideration of the interactions of those laws and regulations, when simultaneously executed, produce undesirable effects. These effects result from overlaps in agency jurisdiction and the inevitably of clarification (i.e., confusion) from sometimes conflicting and always evolving case law These problems are confounded by the unacceptability of the management outcomes which vary by geographic locale and constituency This, inevitably, produces a situation that is unacceptable to some members of Congress.

Corollary 2. These members of Congress, if powerful enough, will propose a "quick fix" to the perceived problem. Knowing that the proposed quick fix would never receive approval if introduced and debated as a bill, the member inserts the quick fix as a "rider" to some piece of legislation that must be passed—or where it will not be noticed.

Corollary 3. The quick fix will inevitably cause more problems than it solves.

Corollary 4. The problems caused by the quick fix will, more often than not, produce the need for a quick fix of the quick fix.

Corollary 5. The ramifications of the interactions of a series of quick fixes are multiplicative as opposed to additive.

Corollary 6. At every iteration of the quick fix syndrome, it is possible to search for, address, and bring forth a solution to underlying problem.

Corollary 7 Addressing underlying problems, such as conflicting and overlapping laws, requires understanding, the power to influence and persuade, and hard work over a prolonged period with small chance of suc-

cess. These, of course, are most excellent reasons to avoid this approach.

Corollary 8. Therefore, another try at a quick fix will evolve as "the answer."

Corollary 9. Doing the same thing over and over and expecting a different result is insanity.

First, remember just what a "rider" is. This is an expeditious means of getting something into law that would be highly unlikely to occur under a normal legislative process. Examine the sad story of the now infamous "salvage rider."

This rider to an emergency appropriation gave instructions to the Forest Service and the Bureau of Land Management to accelerate the salvage of fire and bug-killed or damaged timber, to reduce fire hazard.[33] As part of that process, such sales were exempted from appeals. And, as an afterthought, it was directed that the "318 Sales" (remember that quick fix from a rider to the 1990 Appropriations Bill) and all other sales within the area that had been withdrawn for environmental reasons were to be released to the original buyers under original conditions. The results were a public relations disaster for the timber industry, the Clinton Administration, and the land management agencies that carried out the requirements of the law

As Dr. Jerry Franklin (an acclaimed forest ecologist at the University of Washington) noted verbally, the results of the salvage sales were of minor ecological significance. The results in terms of salvage timber offered for sale by the Forest Service and the Bureau of Land Management were probably little different than would have resulted from the aggressive salvage programs already underway

Inclusion of the "318" sales and other sales that had been withdrawn for environmental reasons were used by opponents to paint the salvage efforts as an excuse to cut green timber. These sales had nothing to do with salvage. These were "green sales" ordered by law as part of the salvage rider. In fact, this was a rider to the rider. The effect was devastating as the TV footage of old growth logs from the "318" and other previously withdrawn sales on trucks headed to the mills graced the evening news night after night.

Such are the results of a quick fix modified by a second quick fix with a third quick fix tacked on just for good measure. There may yet be other consequences as hard core environmentalists question whether the President's Plan for the west-side has now been undermined to the extent that re-evaluation is in order.

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33. Pub. L. No. 104-19, §§ 2001-2002, 109 Stat. 194, 240-47 (1995) (codified as amended at 16 U.S.C. §1611 (1996)).

CONCLUSION

If you do not like the current law or its consequences, change the law In the meantime what should be done? Recognize that change is inevitable. Do not fight change. Instead, work to guide change. Obey the law Do not delay Do not try to play head games with a federal judge. Avoid the temptation of the quick fix. Look at the situation in the Columbia Basin as an opportunity to speed compliance and resolution. Get involved so as to be part of the solution—which will come sooner or later. Sooner will be better all around.