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## Interest Representation and the Federal Land Policy and Management Act

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## Interest Representation and the Federal Land Policy and Management Act

The Federal Land Policy and Management Act of 1976<sup>1</sup> (FLPMA) effected a fundamental change in the legal premises underlying ownership of the public lands and overhauled Federal land management policy. The theoretical premise underlying governmental ownership of these lands had traditionally been that they were held pending disposition to private interests.<sup>2</sup> In contrast to this premise, the FLPMA proclaimed that these lands are to be held in perpetuity by the federal government and managed to serve the diverse needs of the American public.<sup>3</sup> Although Congress was concerned that previous acts had afforded the Bureau of Land Management (BLM) too much discretion,<sup>4</sup> it was able in the FLPMA to provide only the most general guidelines for balancing those needs.<sup>5</sup> To ensure that the BLM fairly resolved the conflicts among users of the public lands, however, Congress called for widespread public participation in the agency's planning and management activities.<sup>6</sup>

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1. Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 and scattered sections of 7, 10, 16, 22, 25, 30, 40, 48, 49 U.S.C. (1976)) [hereinafter referred to as FLPMA].

2. See, e.g., Homestead Act of 1862, 43 U.S.C. §§ 161-175 (1976) (repealed in 1976 by FLPMA); Desert Lands Act of 1877, 43 U.S.C. §§ 321-329 (1976); Kinkaid Act of 1904, 43 U.S.C. § 224 (1976) (repealed in 1976 by FLPMA); Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1976) (repealed in 1976 by FLPMA). For a brief historical survey of the development of these land disposition acts and others, see G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 65-74 (1981).

3. The Congress declares that it is the policy of the United States that — (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest . . . .  
43 U.S.C. § 1701(a)(1) (1976).

4. See 43 U.S.C. § 1701(a)(5) (1976); 122 CONG. REC. 23,435 (remarks of Rep. Melcher) ("The executive branch has tended to fill in missing gaps in the law. This has not always been done in a manner consistent with a system balanced in the best interest of all the people"). An example of congressional intent to reassert control over the land management process may be seen in FLPMA's repeal of the doctrine of executive withdrawals. The courts had developed a concept of "implied" executive authority over the public lands. *United States v. Midwest Oil*, 236 U.S. 459 (1915); see *Arizona v. California*, 373 U.S. 546, 594-601 (1963) (applying *Midwest Oil* to validate executive withdrawals for Indian reservations). However, FLPMA explicitly repeals, prospectively, *Midwest Oil* and the doctrine of "implied" executive withdrawal powers. FLPMA, Pub. L. No. 94-579, § 704, 90 Stat. 2792 (1976). While this may be an "inartful repealer" with doubt remaining as to its success, G. COGGINS & C. WILKINSON, *supra* note 2, at 206, it clearly is indicative of Congress' intent to reassert its constitutional control over the land management process. So understood, it has important implications for judicial review generally of such actions, regardless of its success as an effective repealer of *Midwest Oil* and its progeny.

5. See 43 U.S.C. §§ 1701(a)(7)-(8), 1713(c) (1976); text at notes 36-45 *infra*.

6. See, e.g., 43 U.S.C. §§ 1701(a)(5), 1712(a), 1739(e) (1976); H.R. REP. NO. 1163, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6181:

Because Congress did not precisely define the timing, nature, or scope of the public participation that it authorized, the BLM and the courts must attempt to give content to its vague mandate. The role of the BLM under the FLPMA, this Note argues, is accurately captured in the "interest representation" model of administrative law;<sup>7</sup> judicial review under this model serves to vindicate the "participation rights" of parties interested in public lands management.<sup>8</sup> Part I places the FLPMA in the context of other recent congressional reform efforts and attempts to justify heightened judicial scrutiny of the BLM's activities. To protect citizens' participation rights, it concludes, courts should recognize a limited right to initiate the planning and management provisions of the FLPMA. The Act, in other words, should be interpreted to comprehend "agenda forcing" by the public. Part II uses the persistent problem of conflicts among recreational users of public lands to illustrate the need for "agenda-forcing" action by citizens to effectuate congressional intent.<sup>9</sup>

# I. PUBLIC INVOLVEMENT, JUDICIAL REVIEW, AND AGENDA FORCING

In a number of respects, the system of administrative law inherited from the New Deal has been significantly transformed during the past two decades.<sup>10</sup> Underlying that traditional system, which

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In subsection (g) the Secretary is directed to allow public involvement and to establish procedures for Federal, State, and local government and public participation in development of public land use plans and programs. In requiring "public participation" the Committee does not intend any diminution [sic] in the authority and responsibility of the Secretaries to make public land and National Forest decisions. It does expect the Secretaries to provide means for input by the interested public before decisions are made. The Secretaries will be expected to respond to public opinion but are expected to make their decisions on the merits of each case and not on counting the numbers of responses pro and con. As to the extent of public participation in each case a rule of reason will be applied so that the cost of input procedures does not exceed the values involved. However, some expenditures will always be justified to insure public exposure of proposed decisions, even though the public may not in all cases respond to the opportunity to comment.

*Id.* See generally, Achterman & Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501 (1979).

7. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723-90 (1975); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 303-11 (1978).

8. Stewart, *supra* note 7, at 1750; see Achterman & Fairfax, *supra* note 6, at 515.

9. The problem of recreational conflicts is used for illustrative purposes only. "Agenda forcing," this Note argues, is required to carry out congressional intent in the FLPMA wherever use conflicts on the public lands are not being addressed by the BLM or where the BLM is allocating use of the public lands without using FLPMA's procedures. See *Mountain States Legal Foun. v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980) (Court finds Secretary's delay in acting on outstanding oil and gas lease applications to be *de facto* withdrawal of the subject lands from the operation of the Mineral Leasing Act of 1920 in contravention of FLPMA's procedures and orders the Secretary either to issue the leases forthwith or to pursue the formal withdrawal mechanism contained in FLPMA).

10. See generally Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Stewart, *supra* note 7.

was typified by broad and unstructured delegations of authority from Congress to administrative agencies,<sup>11</sup> were “three distinct, if interrelated, elements.”<sup>12</sup> Most fundamentally, the system was founded on a belief in the need for expert solutions to pressing social problems.<sup>13</sup> To facilitate the application of agencies’ expertise to these problems, administrative agencies established under the New Deal model were insulated from the control of Congress and the Executive Branch.<sup>14</sup> And to ensure that courts did not attempt to substitute their judgment for the judgment of agency experts, judicial review of agency decisions was limited to review of their procedural propriety.<sup>15</sup>

It is unclear whether the New Deal’s “affirmation of expertise” was ever warranted, but we do know that “[b]y the late 1960s, a generation’s experience had eroded New Deal confidence in expert policymaking.”<sup>16</sup> As a result, proposals to reform administrative agencies, particularly those whose mission included protecting the environment,<sup>17</sup> proliferated.<sup>18</sup> On a number of occasions, Congress responded to the demands for reform with “action-forcing” or “agency-forcing” statutes,<sup>19</sup> which were designed to remove “an issue from the general run of agency discretion and . . . [to guide] policy in a particular direction.”<sup>20</sup> In other cases, the pressure for

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11. See Stewart, *supra* note 7, at 1676-77 (“However, rather than being the exception, federal legislation establishing agency charters has, over the past several decades, often been strikingly broad and nonspecific, and has accordingly generated the very conditions which the traditional model was designed to eliminate.” (footnotes omitted)).

12. B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 4 (1981); see J. FREEDMAN, CRISIS AND LEGITIMACY 32, 44-46, 59-61 (1978); J. LANDIS, THE ADMINISTRATIVE PROCESS 23-24, 68-70 (1938); Stewart, *supra* note 7, at 1676-81.

13. B. ACKERMAN & W. HASSLER, *supra* note 12, at 4-5; see J. LANDIS, *supra* note 12, at 10-16, 46-50, 67-70; Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1057 n.74 (1975).

14. B. ACKERMAN & W. HASSLER, *supra* note 12, at 5-6; see J. LANDIS *supra* note 12, at 70-72.

15. B. ACKERMAN & W. HASSLER, *supra* note 12, at 6; see FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138-45 (1940); S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 288-90 (1979); J. FREEDMAN, *supra* note 12, at 45-46; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

16. B. ACKERMAN & W. HASSLER, *supra* note 12, at 7. See generally L. KOHLMEIER, THE REGULATORS 73 (1969); T. LOWI, THE END OF LIBERALISM 72-93 (1969); PRESIDENT’S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK (1971); J. SAX, DEFENDING THE ENVIRONMENT 52-56, 60-62 (1970).

17. B. ACKERMAN & W. HASSLER, *supra* note 12, at 8; S. BREYER & R. STEWART, *supra* note 15, at 283-85.

18. B. ACKERMAN & W. HASSLER, *supra* note 12, at 8; see H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 13-14, 142-47 (1962).

19. B. ACKERMAN & W. HASSLER, *supra* note 12, at 104; R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 371-73 (2d ed. 1978); Diver, *supra* note 10, at 409; Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1442-45, 1468 (1978).

20. B. ACKERMAN & W. HASSLER, *supra* note 12, at 104.

reform led Congress to democratize administrative law by providing expanded opportunities for public participation in agencies' decisionmaking processes.<sup>21</sup> These congressional experiments have profoundly affected the roles of both the agencies and the courts in the formulation and implementation of public policy.

In particular, these reforms, together with the "hard look doctrine" that characterizes modern judicial review of agency policymaking,<sup>22</sup> signal an expanded role for the judiciary in the administrative process. Agency-forcing statutes, for example, "should be read in the light of the *principle of full inquiry* — requiring the fullest possible agency investigation into competing policy approaches consistent with the text of the agency-forcing statute."<sup>23</sup> While these statutes do not authorize courts to "take primary responsibility for the development of substantive policy," the scope of judicial review must be sufficient "to assure a full and focused airing to plausible policy options before officials make decisions of consequence."<sup>24</sup> Similarly, the faith that Congress has recently placed in public participation has led to the development of an "interest representation model" of administrative law, which calls for judicial review to ensure, not the substantive merits of agency decisions, but the fair representation of all of the interests affected by an agency's decision.<sup>25</sup>

These expanded notions of judicial review of agency decisions, of course, should be reexamined in light of the Supreme Court's recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>26</sup> The *Vermont Yankee* Court denied federal courts the authority, except in unusual cases, to impose procedural obligations on agencies beyond those established by the Ad-

21. Achterman & Fairfax, *supra* note 6, at 504-16; cf. Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972) (discussing judicial expansion of public participation).

22. See, e.g., *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 832-33 (D.C. Cir. 1972); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (court should "intervene" in an agency decision "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making" (footnote omitted)); Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1834 (1978); Diver, *supra* note 10, at 411-12 ("More exacting judicial review of substantive agency decisions accompanied greater procedural formality. The very label used to describe modern judicial review of policymaking — the 'hard look doctrine' — captures the spirit of this transformation. Reviewing courts are no longer willing to affirm based on the intuitive plausibility of the link between the policy announced and the statutory standard." (footnotes omitted)); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1804, 1811 (1978).

23. B. ACKERMAN & W. HASSLER, *supra* note 12, at 105 (footnotes omitted).

24. *Id.* at 115.

25. See Stewart, *supra* note 7, at 1688, 1712, 1760-90; Verkuil, *supra* note 7, at 303-11.

26. 435 U.S. 519 (1978).

ministrative Procedure Act (APA).<sup>27</sup> The decision “leaves untouched” the hard look doctrine,<sup>28</sup> but to the extent that the principle of full inquiry and the interest representation model call upon courts to impose innovative procedures on agencies, the theories’ viability has been impaired by the Court’s opinion. In fact, the Court’s decision may have been motivated, in large part, by its discomfort with lower court decisions that have attempted to democratize the administrative policymaking process.<sup>29</sup> *Vermont Yankee*, when read together with recent decisions limiting the availability of the “aggressively participatory”<sup>30</sup> implied right of action,<sup>31</sup> may thus evince the Court’s “quarrel” with the participatory model,<sup>32</sup> at least where broadened participation is not expressly authorized by Congress. But if Congress statutorily embraces a participatory model that transcends the APA, application of *Vermont Yankee* would seem inapposite. The public participation provisions of some recent enactments have clearly gone beyond those of the APA. Where the broadened participation rights are clearly delineated, courts need do no more than enforce those rights; where Congress expresses an intent to involve the public more fully in the administrative process but does not address the timing, manner, or scope of that increased participation, however, courts should be permitted to play a more active role in giving content to those participation rights. Such an approach is consistent with congressional intent and does not violate the mandate of *Vermont Yankee*.

Congress’ recent attempts to guide the management of public lands have gone beyond the requirements of the APA, and the changes that have affected administrative law generally are strikingly apparent in this area. Until recently, the agencies charged with managing public lands were granted virtually untrammelled discretion by Congress.<sup>33</sup> They were heirs, moreover, to a tradition of ex-

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27. 435 U.S. at 548.

28. Diver, *supra* note 10, at 423. See also McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 752 (1979) (“Although the Court in *Vermont Yankee* did not directly address the role of the courts in substantively reviewing agency decisions, it did resolve a longstanding dispute between the two dominant schools of thought on that question. The Court rejected Judge Bazelon’s ‘good procedures ensure good substance’ approach and implicitly favored Judge Leventhal’s more activist ‘hard look’ approach. Whether the Court will explicitly adopt the hard look approach remains to be seen.” (footnotes omitted.)).

29. Diver, *supra* note 10, at 423.

30. *Id.* at 425.

31. *California v. Sierra Club*, 451 U.S. 287, 292-93 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979); *Cort v. Ash*, 422 U.S. 66 (1975). See generally Note, *Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973*, 79 MICH. L. REV. 1093-96 (1981).

32. Diver, *supra* note 10, at 423.

33. A number of commentators pronounced the statutes so vague as to foreclose the devel-

treme judicial deference.<sup>34</sup> In the early 1970's, it became apparent that the public lands were being ineffectively managed and that some limits on the discretion of the Bureau of Land Management (BLM) were necessary.<sup>35</sup> With the passage of the FLPMA in 1976, therefore, "Congress intended . . . to reassert control over the use of federal lands."<sup>36</sup> The Act not only attempted to establish substantive

opment of any standards applicable to particular cases. See G. ROBINSON, *THE FOREST SERVICE* 55-59 (1975); Loesch, *Multiple Uses of Public Lands — Accommodation or Choosing Between Conflicting Uses*, 16 ROCKY MTN. MIN. L. INST. 1, 12-15, 19-20, 24-31 (1971); Miller, *Judicial Control of Forest Service Discretion Under the Multiple-Use Act*, 5 ENVTL. L. 127, 131-37 (1974); Strand, *Statutory Authority Governing Management of the National Forest System — Time For A Change?*, 7 NAT. RESOURCES LAW. 487-93 (1974); Comment, *The Multiple Use-Sustained Yield Act: A Decade of Consideration*, 10 IDAHO L. REV. 105, 114-16 (1973); Note, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L.J. 787 (1973); *Symposium on Forest Policy*, 8 ENVTL. L. 239 (1978).

34. In fact, it could be argued that there was simply no tradition of judicial review of public lands management decisions. See G. COGGINS & C. WILKINSON, *supra* note 2, at 226-27 (1981). Although management of the public lands is constitutionally committed to Congress, see U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2; *Kleppe v. New Mexico*, 426 U.S. 529 (1976); G. COGGINS & C. WILKINSON, *supra* note 2, at 144-47, executive powers in the area are delegated, see 43 U.S.C. § 1701(a)(4) (1976) (overturning *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), and the doctrine of "implied" executive withdrawal powers), and courts have been extremely deferential to administrative decisions. They have used the full panoply of barriers to judicial review — standing, ripeness, primary jurisdiction, nonreviewability, and scope of review — in refusing to review the implementation of this delegated power. For a full discussion of judicial use of these various techniques in the public lands context, see Comment, *The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of Interior*, 68 MICH. L. REV. 1200, 1218-53 (1970). For cases applying these and other avoidance techniques, see *Nelson v. Andrus*, 591 F.2d 1265 (9th Cir. 1978); *Strickland v. Morton*, 519 F.2d 467 (9th Cir. 1975) (applying 5 U.S.C. § 701(a) (1976), and concluding that congressional mandate was so vague as to preclude judicial development of standards); *Ness Inv. Corp. v. Department of Agriculture*, 512 F.2d 706 (9th Cir. 1975) (applying 5 U.S.C. § 701(a) (1976)); Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 23 & n.157 (1980) (extensive citation of administrative review cases supporting proposition that courts, in reviewing public land management decisions, engage in "Deferential Review" within APA framework).

35. Dissatisfaction with the management of the public lands culminated in formation of the Public Land Law Review Commission. Act of Sept. 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (1964). Its report, PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND* (1970), recommended substantial changes in the management of the public lands, see, e.g., *id.* at 1-16, and was the first step towards the drafting and passage of FLPMA. For an analysis of the relationship of the Public Land Law Review Commission's work and FLPMA, see Muys, *The Public Land Law Review Commission's Impact on the Federal Land Management and Policy Act of 1976*, 21 ARIZ. L. REV. 301 (1979).

36. *Mountain States Legal Foun. v. Andrus*, 499 F. Supp. 383, 395 (D. Wyo. 1980). The FLPMA declares that it is the policy of the United States that "the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4) (1976). This provision was intended to repeal the "implied" authority of the President to make withdrawals. H.R. REP. NO. 1163, *supra* note 6, at 29, [1976] U.S. CODE CONG. & AD. NEWS at 6203. FLPMA also changed traditional understanding of the meaning of "withdrawal." Until FLPMA, it was generally understood as referring to the removal of lands from the operation of the public land disposition statutes. PUBLIC LAND LAW REVIEW COMMISSION, *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 1 (1969). FLPMA includes this concept but adds an alternative mean-

guidelines for administrative decision-making,<sup>37</sup> but also provided for greatly expanded public participation in the management process<sup>38</sup> and for "judicial review of public land adjudication decisions."<sup>39</sup> Unfortunately, Congress did not take care to delineate precisely the scope and nature of the public participation or judicial review that it authorized, and these must necessarily be inferred from circumstantial evidence.

While the FLPMA appears, on its face, to contain both agency-forcing and interest representation elements, the interest representation elements predominate on closer examination. From a management standpoint, perhaps the most important task assigned the BLM under the Act is the formulation of land use plans. Congress has, to be sure, attempted to prescribe a systematic methodology and procedure for the development of such plans in section 202.<sup>40</sup> But the "Criteria for Development and Revision" specified in section 202(c) are so open-ended as to afford the agency almost total discretion.

It is difficult, for example, to find any significant limitation on the BLM's discretion in the "multiple use, sustained yield" principle that serves as Congress' primary directive to the agency.<sup>41</sup> This principle

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ing as "reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j) (1976). The Interior Department objected vigorously to this change in the definition:

The definition in Section 103(j) of this bill [43 U.S.C. § 1702(j)] would plunge the law back into the chaotic situation at the turn of the century when no one knew exactly what a withdrawal meant. It would call everything from a land use plan, through a formal designation of use, to a traditional withdrawal, a "withdrawal." This bears little or no relationship to the traditional concept of withdrawal to any Secretarial decision that a particular parcel of land should be used primarily for one purpose. This proposed definition represents a completely new concept, and if it is called a "withdrawal", it will only engender further confusion.

H.R. REP. NO. 1163, *supra* note 6, at 44, [1976] U.S. CODE CONG. & AD. NEWS at 6218 (comments of the Interior Department on H.B. 13,777).

Withdrawals are now, apparently, defined so that they encompass "management decisions," 43 U.S.C. § 1712(e) (1976), by which the Secretary implements land use plans. H.R. REP. NO. 1163, *supra* note 6, at 45, [1976] U.S. CODE CONG. & AD. NEWS at 6175 (comments of the Interior Department on H.B. 13,777).

The very careful circumscription of this authority by Congress, *see* 43 U.S.C. §§ 1712(e)(2), 1714 (1976), represents its attempt to reassert control of the land management process and to limit the heretofore broad discretion granted the land management agencies in this regard. This change was made because

[t]he Executive Branch of the Government has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people. A major weakness which has arisen under these circumstances is instability of national policies.

H.R. REP. NO. 1163, *supra* note 6, at 1, [1976] U.S. CODE CONG. & AD. NEWS at 6175.

37. *See* 43 U.S.C. § 1712(c) (1976).

38. *See* 43 U.S.C. §§ 1701(a)(5), 1712(a), 1739(e) (1976).

39. 43 U.S.C. § 1701(a)(6) (1976).

40. 43 U.S.C. § 1712 (1976).

41. *See* 43 U.S.C. § 1701(a)(7) (1976); H.R. REP. NO. 1163, *supra* note 6, at 3-4, [1976] U.S. CODE CONG. & AD. NEWS at 6177-78. "Multiple use" is defined as follows:

The term "multiple use" means the management of the public lands and their various resources values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for



had its statutory origin in the Multiple-Use and Sustained-Yield Act of 1960,<sup>42</sup> and its efficacy as a guide for administrative policy and a workable check on agency discretion has been questioned by courts and commentators ever since.<sup>43</sup> Even in the face of egregious "single use" management of the Tongass National Forest, one court was unable to find any judicially enforceable limits on discretion in the "multiple use" mandate:

The standards Congress has used to delegate authority over the forests are so general, so sweeping, and so vague as to represent a turnover of virtually all responsibility. "Multiple use" does establish that the forests cannot be used exclusively for one purpose, but beyond this it is little more than a phrase expressing the hope that all competing interests can somehow be satisfied and leaving the real decision to others.<sup>44</sup>

Despite the unkind treatment that the concept had received, the legislative history of the FLPMA reveals that Congress intended nothing new, it accepted and adopted the "multiple use" principle as it had been developed by previous statutes and interpreted by the courts.<sup>45</sup> That Congress adopted this standard in an act designed to reassert its control over public lands management may suggest that Congress believes the phrase has some discernible meaning, but neither the statutory language nor the legislative history offers clear guidance to the BLM or the courts.

Without congressional guidance on substantive issues, the type of

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some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range timber, minerals, watershed, and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return of the greatest unit output.

43 U.S.C. § 1702(c) (1976) (emphasis added).

42. 16 U.S.C. §§ 528-531 (1976). For a detailed analysis of this act, see Comment, *supra* note 33.

43. See, e.g., Behan, *The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management*, 7 NAT. RESOURCES J. 473 (1967); authorities cited in Achterman & Fairfax, *supra* note 6, at 509 n.37; authorities cited in note 33 *supra*.

44. *Sierra Club v. Hardin*, 325 F. Supp. 99, 123 n.48 (D. Alaska 1971) (quoting REICH, BUREAUCRACY AND THE FORESTS 3 (1962)), *remanded for consideration of new evidence*, *Sierra Club v. Butz*, 3 ENVTL. L. REP. 20,292 (9th Cir. 1973). There was no further litigation after the remand because the timber company abandoned the challenged contract. See also G. COGINS & C. WILKINSON, *supra* note 2, at 490. On the lack of standards in the FLPMA generally, see Achterman & Fairfax, *supra* note 6, at 503, 509, 517. These authors conclude that [t]he statutory mandate of FLPMA is so broad that the balance of uses on the public lands is left almost wholly to the BLM's discretion. Public land management issues are so controversial that Congress refused to make judgments about them. Instead, it turned to the procedural requirements epitomized by the public involvement requirements of FLPMA. *Id.* at 517.

45. H.R. REP. NO. 1163, *supra* note 6, at 4-5, [1976] U.S. CODE CONG. & AD. NEWS at 6177-78.

judicial review suggested by the agency-forcing model is unlikely to be effective and may, in fact, hinder administrative policymaking. Courts could attempt to enforce the requirements of section 202, but the need to define those requirements could result in rather intrusive judicial review. In the absence of a clear statement of congressional intent, courts adopting the broad scope of review suggested by the agency-forcing model may be tempted to substitute their own views on the goals of public lands management and their own interpretations of the requirements of section 202 for those of the BLM. On the basis of the FLPMA's substantive provisions, therefore, it is difficult to justify an expanded role for the courts "without presuming a policymaking competence that outstrips judicial capacities."<sup>46</sup>

Although the FLPMA's weak agency-forcing provisions do not justify expanding the scope of judicial review, the Act's lack of clear standards and its broad public participation provisions suggest that courts should apply the interest representation model when reviewing action of the BLM.<sup>47</sup> As articulated by Professors Breyer and Stewart, the

interest representation model attempts to promote the equitable exercise of agency discretion by assuring interested groups and parties the right to participate in formal agency decision making. It acknowledges the "legislative" character of agency choice, and attempts to develop formal, legalistic modes of representation as a surrogate for the political mechanisms of representation applicable to legislatures. In so doing, the interest representative model tends to highlight the multiple trade offs among values and interests that are at the heart of many administrative decisions.<sup>48</sup>

Underlying this model is an assumption that "an enlarged system of formal proceedings can, by securing adequate consideration of the interests of all affected persons, yield outcomes that better serve society as a whole."<sup>49</sup> The validity of this assumption has been seriously questioned,<sup>50</sup> but in the FLPMA, as in other areas, one sees evidence

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46. B. ACKERMAN & W. HASSLER, *supra* note 12, at 104.

47. If the BLM fails to take advantage of this opportunity [to define participation standards], it is likely to confront the application by the courts of an interest representation standard of review. In FLPMA, as rarely before, such a standard would be appropriate. Land use planning, the underlying basis for virtually all other decisions, poses the unique mix of legislative and judicial functions to which this new standard of review is most applicable. The courts should focus both on whether the administrative record shows that all views presented were actually considered by the decisionmaker and whether the agency actually sought out the views of all those who might conceivably be interested in the proposed action.

Achterman & Fairfax, *supra* note 6, at 528-29 (footnotes omitted).

48. S. BREYER & R. STEWART, *supra* note 15, at 1042.

49. Stewart, *supra* note 7, at 1760.

50. A number of courts and commentators strongly believe in the validity of the assumption. The District of Columbia Circuit, for example, has observed that "[i]n recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support." For defenses of the principle of

of an "increasing congressional reliance on public involvement as an alternative to substantive specificity in legislation."<sup>51</sup>

In this respect, the FLPMA constitutes a significant departure from previous approaches to public lands management. Although earlier acts had provided for public participation,<sup>52</sup> the BLM's tradition of professionalism had long led agency officials to underestimate the value of that participation.<sup>53</sup> In enacting the FLPMA, Congress sought to correct this perceived deficiency in the administrative process. References to public participation occur throughout the statute, but the most important provisions are sections 202(a) and 309(e).<sup>54</sup> Section 202(a) directs the agency to involve the public in planning for public lands use; section 309(e) mandates public involvement in the actual implementation of plans and programs. Read together, sections 202(a) and 309(e) call for "the broadest possible participation in every decision. . . . Congress seemingly wants

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interest group representation in agency adjudication, see, e.g., J. SAX, *supra* note 16; Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 573-75 (1977); Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 511-12 (1969); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 527-30 (1972); Gellhorn, *supra* note 21, at 361; Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1092-94 (1971); McLachlan, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 851 (1971). But others have pointed out that the assumptions underlying the citizen participation movement have not been carefully scrutinized. See Achterman & Fairfax, *supra* note 6, at 507 ("Numerous unexamined assumptions were repeated so frequently that they became incantations, and took on the mantle of revealed truth." (footnote omitted)); Wengert, *Citizen Participation: Practice in Search of a Theory*, 16 NAT. RESOURCES J. 23, 24 (1976). It is not clear that increased public participation will actually improve the quality of agency decisions, see Achterman & Fairfax, *supra* note 6, at 508; Stewart, *supra* note 7, at 1776-81; Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489, 546-49, 552-53 (1981), and the interest representation model may impose real costs, see Stewart, *supra* note 7, at 1770-76, 1789, particularly in the area of land use planning, see Achterman & Fairfax, *supra* note 6, at 529-30 (suggesting that the adversarial model is inappropriate in this context, that courts will tend to overproceduralize administrative decisionmaking, and that traditional interest representation concepts developed in civil rights litigation do not apply to land use planning because of demographic factors). For a case study of the shortcomings of expanding interest representation, see Comment, *Representation of the Public Interest in Michigan Utility Rate Proceedings*, 70 MICH. L. REV. 1367 (1972).

51. Achterman & Fairfax, *supra* note 6, at 508.

52. See, e.g., Classification and Multiple Use Act of 1964, Pub. L. No. 88-607, § 1, 78 Stat. 986 (1964) (requires the Secretary of the Interior to hold public hearings on regulations to retain or dispose of the public lands); Taylor Grazing Act of 1934, ch. 865, § 18, 48 Stat. 1269 (1934), as amended by Act of July 14, 1939, ch. 270, 53 Stat. 1002 (1939) (codified at 43 U.S.C. § 3150-01 (1976)) (requires appointment of advisory boards of local stockmen in each grazing district). The FLPMA has not eliminated the opportunity for public participation provided by advisory bodies. In its original form FLPMA authorized the establishment of advisory councils by the Secretary of the Interior. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (current version at 43 U.S.C. § 1739(a) (Supp. II 1978)). In 1978 Congress amended this section of FLPMA to make the establishment of citizen advisory councils mandatory. Act of Oct. 25, 1978, Pub. L. No. 95-514, 92 Stat. 1808 (1978) (codified at 43 U.S.C. § 1739(a) (Supp. II 1978)).

53. Achterman & Fairfax, *supra* note 6, at 506-07; see H. KAUFMAN, *THE FOREST RANGER* (1960).

54. 43 U.S.C. §§ 1712(a), 1739(e) (1976).

the BLM to use all conceivable techniques necessary to obtain the public's views in a particular instance."<sup>55</sup>

Despite this mandate, Congress "has failed to set clear standards about the nature of participation envisioned or its place in public decision making."<sup>56</sup> Its definition of "public involvement" is quite broad,<sup>57</sup> and leaves many pressing questions unanswered. It is clear, for example, that the public has a right to participate in *ongoing* agency proceedings, but the scope of that participation has been left for determination by the BLM and the courts. The agency is, of course, primarily responsible for giving content to Congress' vague mandate. "The courts' role," Professor Stewart has observed, "is limited to evaluating the adequacy of the agency's consideration of affected interests in the light of the statutory scheme and the particular facts."<sup>58</sup> In reviewing the adequacy of the procedures leading to a particular agency decision, however, courts should remember that Congress appears to have required the BLM to "aggressively seek out the opinions of the public."<sup>59</sup> Similarly, since "Congress has explicitly required that the BLM transcend APA and other traditional consultation formats,"<sup>60</sup> courts need not feel that *Vermont Yankee* precludes judicial imposition of procedures designed to elicit more meaningful public participation.<sup>61</sup>

A more difficult question is whether the FLPMA's public participation provisions should be read to allow members of the public to initiate the formal planning process. Although the Act mandates the development of land use plans, it "sets virtually no priorities for agency action."<sup>62</sup> Congress clearly did not envision that the BLM would contemporaneously begin to formulate site-specific manage-

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55. Achterman & Fairfax, *supra* note 6, at 503, 518.

56. *Id.* at 503.

57. The FLPMA defines "public involvement" as:

the opportunity for participation by affected citizens in rulemaking, decisionmaking and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.

43 U.S.C. § 1702(d) (1976); see note 6 *supra*.

The legislative history reveals that the Department of the Interior objected to public participation in the actual management of the public lands. H.R. REP. NO. 1163, *supra* note 6, at 48-49, 53, [1976] U.S. CODE CONG. & AD. NEWS 6222-23, 6227. Congress retained this directive over the Department's objection.

The rejection of the Department's views suggests that Congress had a radical objective; it wanted procedures to be established that would involve the public actively in formulating plans and implementing them through on-going management decisions. Unfortunately, Congress did not indicate how this objective is to be achieved.

Achterman & Fairfax, *supra* note 6, at 521.

58. Stewart, *supra* note 7, at 1750.

59. Achterman & Fairfax, *supra* note 6, at 512; see note 57 *supra*.

60. Achterman & Fairfax, *supra* note 6, at 539.

61. See text following note 32 *supra*.

62. Achterman & Fairfax, *supra* note 6, at 509; see Diver, *supra* note 10, at 424.

ment plans for all of the 350 million acres of land that it controls. As a general rule, a policymaker, to be effective, "must set his own agenda, based on fixed social goals, and not rely on the roulette wheel of private initiative."<sup>63</sup> But where the BLM fails to initiate proceedings to resolve a land use conflict that has been brought to its attention, it may undermine the adversarial decisionmaking process that Congress intended to promote by enacting the FLPMA.<sup>64</sup> Because that process, almost by definition, is likely to work effectively only where there are conflicting groups of incompatible users, the BLM should place a high priority on resolving existing conflicts through the formal planning process.<sup>65</sup>

Failure to recognize a right to initiate agency proceedings, moreover, could vitiate the Act's public participation provisions. "The right to participate in formal agency proceedings or to seek judicial review of agency orders," Professor Stewart has observed, "is of little consequence if the agency develops policy or disposes of controversies by informal processes to which these rights do not attach."<sup>66</sup> As a result, some courts have begun to abandon their traditional reluctance to require that formal proceedings replace informal policy decisions.<sup>67</sup>

In *Environmental Defense Fund, Inc. v. Ruckelshaus*,<sup>68</sup> for example, the District of Columbia Circuit reviewed the Secretary of Agriculture's failure to initiate formal proceedings to suspend the registration of the pesticide DDT under the Federal Insecticide, Fungicide, and Rodenticide Act. The Secretary's contention that the suspension issue was still under consideration was found to be unpersuasive. Although the statute committed the issue to the Secretary's discretion, the court held that the Act's public participation provisions imposed a duty on the Secretary to initiate the adminis-

63. Diver, *supra* note 10, at 419.

64. The process is adversarial in that the BLM sits as a neutral arbiter of the positions articulated through the public participation procedures of FLPMA. "Moreover, the public involvement requirements invite and require the agencies to become brokers among competing political interests, rather than professional managers efficiently achieving social goals expressed through the representative mechanism of Congress." Achterman & Fairfax, *supra* note 6, at 509.

65. This does not mean that the BLM must immediately undertake to resolve every conflict that is brought to its attention. Resource limitations and the press of time could, given such a requirement, force the BLM to resolve petty disputes that do not affect the future productivity of the parcel of land at issue and to disregard other, more important, problems that do not happen to involve a conflict among current users. But the BLM should be forced to justify its ordering of priorities in some manner.

66. Stewart, *supra* note 7, at 1752; see Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAW. 633, 642 (1968); Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485 (1940).

67. See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 675 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Stewart, *supra* note 7, at 1752-56.

68. 439 F.2d 584 (D.C. Cir. 1971).

trative process whenever substantial questions about a pesticide's safety arise:

[W]hen Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not be lightly sidestepped by administrators . . . . The statutory scheme contemplates that these questions will be explored in the full light of a public hearing and not resolved behind the closed doors of the Secretary. There may well be countervailing factors that would justify an administrative decision, after committee consideration and a public hearing, to continue a registration despite a substantial degree of risk, but those factors cannot justify a refusal to issue the notices that trigger the administrative process.<sup>69</sup>

Similarly, the FLPMA's comprehensive mandate to involve the public in land use planning and management will fail if the BLM can sidestep the statutory planning process and ignore private parties' requests for initiation of formal proceedings.

The lack of an explicit congressional authorization for citizen initiation of formal proceedings is more than a mere theoretical gap in the Act. In several contexts, the BLM's failure to initiate the administrative process contemplated by the FLPMA will result in the de facto allocation of the public lands to certain private interests. Conflicts among recreational users of the public lands, Part II points out, are particularly likely to be resolved in this manner. While the BLM's inaction should not, as a rule, be taken to evince an allocative choice, interpreting inaction as action seems justified under certain circumstances. When the agency ignores a significant conflict among users that has been brought to its attention, it ratifies the de facto allocation that has already occurred. Because these allocative decisions are made without the benefit of the statutorily mandated public participation, they violate both the letter and the spirit of the Act.

The argument for a judicially enforceable right to force the BLM's agenda by initiating the planning process thus proceeds in two directions. First, by acquiescing in a de facto allocative solution to a significant conflict among users that has been brought to its attention in a request for formal proceedings, the BLM has actually made a planning decision that violates the Act. Alternatively, while the BLM's acquiescence does not itself constitute an allocative decision in violation of the Act, the participation rights granted by Congress can be effectuated only by forcing the agency to initiate formal proceedings. Ultimately, both arguments assume that certain users will win out over others if the competition among users is not regulated and that the mix of uses achieved through this competitive process may not be fully consistent with Congress' intent in the

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69. 439 F.2d at 594-95 (footnotes omitted).

FLPMA. Part II attempts to justify these assumptions by considering in depth one type of competition among users of the public lands.

In considering that example, one should keep in mind that the agenda-forcing judicial role advocated in this Note need not be considered the product of recent judicial activism. One can find a corollary to this role in the common-law public trust doctrine,<sup>70</sup> which analogizes the resource managers' duties to those of a fiduciary.<sup>71</sup>

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70. The public trust doctrine is a collection of common-law principles related to governmental ownership of natural resources. These principles articulate governmental responsibility for ownership of certain types of resources in terms of "trust" responsibilities. This formulation of governmental responsibilities emphasizes "the necessity for procedural correctness and substantive care." W. RODGERS, *ENVIRONMENTAL LAW* 172 (1977).

The public trust doctrine developed out of Roman law principles concerning public rights to navigation and use of waterways owned by the sovereign. More recently, it has been used to articulate public rights in governmentally owned natural resources. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). For a survey of the historical development of the public trust doctrine, see Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195 (1980).

The public trust doctrine "is no more — and no less — than a name courts give to their concerns about the insufficiencies of the democratic process." J. SAX, *supra* note 16, at 521. It serves as a means by which courts can democratize bureaucratic decisionmaking, spotlight important resource management issues, and, if necessary, remand them to legislative or administrative bodies for reconsideration in light of the court's articulation of their "fiduciary" obligations. The concept of a "remand" to the legislative or to administrative bodies as an appropriate remedy in natural resource litigation is developed in J. SAX, *supra* note 16:

Here one reaches the central point about environmental litigation: the role of the courts is not to make public policy, but to help assure that public policy is made by the appropriate entity, rationally and in accord with the aspirations of the democratic process.

The job of courts is to raise important policy questions in a context where they can be given the attention they deserve and to restrain essentially irrevocable decisions until those policy questions can be adequately resolved.

71. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269 (1980). Courts and, especially, commentators have debated whether the public trust doctrine "applies" to the public lands. See *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980); *Sierra Club v. Department of Interior (Redwoods III)*, 424 F. Supp. 172 (N.D. Cal. 1976); *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 398 F. Supp. 90 (N.D. Cal. 1974); W. RODGERS, *supra* note 70, at 173 (advocating its application to all public lands); Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions*, 8 WIL-LAMETTE L.J. 135 (1972) (concludes it is not yet applicable to public lands); Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977) (argues in favor of applying "public land trust" to public lands). As a coherent doctrine, this formulation of governmental responsibilities for public resources developed first in water law. See Sax, *supra* note 70, at 475-78; Stevens, *supra* note 70. Courts have extended its application to other public resources, such as the foreshore, see, e.g., *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972), and some commentators have suggested that it "applies" to all public resources.

[I]t has been said that state and federal governments serve as "public guardian[s] of those valuable natural resources which are not capable of self-regeneration and for which substitutes can not be made by man." Perhaps trust protection requires identification of a resource whose natural and primary uses are public in nature and for which there is a public need. It takes no great inferential leap to conclude that public trust protection ought to be extended to all air, water, and land resources, the preservation of which is important to society.

W. RODGERS, *supra* note 70, at 173 (footnotes omitted). The public trust doctrine analogizes the resource manager's duties to those of a fiduciary in private trust law. It serves as a means

The action-forcing character of this doctrine is striking;<sup>72</sup> it demands a zealous commitment to manage public resources for the public good.<sup>73</sup> Compliance with this standard requires foresight — the an-

by which courts can democratize bureaucratic decisionmaking, Sax, *supra* note 70, at 521, spotlight important resource management issues, and remand them, if necessary, to legislative or administrative bodies for reconsideration in light of their "fiduciary" obligations. See note 70 *supra*.

So understood, the question of whether the public trust doctrine "applies" to the public lands misses the point. The issue is not whether private trust principles would find that the public lands were granted "in trust" for the benefit of the American people. Attempts to discover such a theory in century-old Supreme Court cases dealing with issues of federal power, not obligations, are not only attenuated, they are unnecessary. See Montgomery, *supra*; Note, *supra* (both expend a great deal of energy in analysis of old Supreme Court cases in an attempt to determine whether the public lands are held by the federal government "in trust" for the people as a precondition to application of the public trust doctrine). The appropriateness of the public trust doctrine's application in public lands law rests on contemporary understanding of the federal government's role as a land manager as articulated by Congress. The analysis requires scrutiny of the FLPMA to inquire into congressional will — the public trust doctrine serves as a coherent body of developed principles which, if found to correlate with congressional will, offers a means of formulating administrative responsibilities. Its usefulness in this context is not diminished by the absence of the magic words of trust or of an explicit legislative adoption of the public trust doctrine.

The real issue is whether the principles of fiduciary responsibility for public resources which has come to be labelled the "public trust doctrine" accurately reflects congressional intent in the realm of public lands management. And, if so, we must further inquire whether the manner in which the public trust doctrine formulates that intent assists judicial control of administrative discretion through the development of standards by which to judge site-specific management actions. This Note suggests that the public trust doctrine approximates congressional intent with regard to the management of the public lands it is consistent with and fleshes out the procedural planning provision of FLPMA. In this regard it is crucial to note the shift toward a policy of public land retention and management to serve future needs. An analysis of the statutes working these changes reveals a congressional concern which is strikingly similar to the concerns of the public trust doctrine. The mechanistic approach to the issue of whether the public lands are held "in trust" has been rejected by Professor Wilkinson, who sets the analysis back onto the proper course:

The modern statutes [governing the management of the public lands] are premised on the high station that today's society accords to the economic and environmental values of the federal lands and resources. They are rigorous laws designed to protect the public's interest in the public's resources. . . .

The whole of these laws is greater than the sum of its parts. *The modern statutes set a tone, a context, a milieu. When read together they require a trustee's care.* Thus we can expect courts today, like courts in earlier eras, to characterize Congress' modern legislative scheme as imposing a public trust on the public resources.

The fact that the public trust doctrine in public land law must rest on implication should surprise no one. The doctrine has always rested on implication.

Wilkinson, *supra*, at 299 (emphasis added). This Note further suggests that, as a practical matter, the manner in which this doctrine defines administrative responsibilities can assist courts in developing standards applicable to review of specific land management decisions within the framework of FLPMA.

72. See *Sierra Club v. Department of Interior* (Redwoods II), 398 F. Supp. 284, 293-94 (N.D. Cal. 1975) (court using public trust doctrine and National Park Service Act orders Secretary to exercise his legal authority to protect Redwoods National Park from harm resulting from logging on adjacent lands — order includes, if necessary, the Secretary's seeking of sufficient funds to protect the park); *United Plainsmen Assn. v. North Dakota State Water Conservation Commn.*, 247 N.W.2d 457 (N.D. 1976) (Supreme Court of N.D. holds that state official's discretionary authority in water planning is circumscribed by the public trust doctrine which requires, at a minimum, that the officials determine the potential effects of water allocations on present and future needs of the state). Wilkinson, *supra* note 71, at 313-15.

73. The agencies' duties as fiduciaries require a heightened sensitivity to possible conflicts



ticipation of threats to the resource before they actually occur — and a willingness to act quickly and effectively where the resource is threatened. Agency inaction in the face of threatened or actual harm to the resource violates trust obligations.<sup>74</sup> Similarly, courts that allow citizens to force the BLM's agenda do no more than ensure that the agency zealously performs the duties imposed by section 202.<sup>75</sup>

## II. RECREATIONAL CONFLICTS ON PUBLIC LANDS

As the popularity of the nation's public lands as sites for outdoor recreational activities has increased,<sup>76</sup> conflicts between groups of

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over resource allocation and a willingness to act zealously to the full extent of their powers to address these problems. The manner in which this concept is translated into judicial review is illustrated by cases dealing with the Secretary of the Interior's responsibility for the management of Indian reservations.

These cases often articulate the Secretary's responsibility as being that of a fiduciary. *See, e.g.,* *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973); *Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN L. REV. 1213 (1975). These responsibilities demand that he act with the "utmost fairness" in protecting the Indians' interest, particularly where a dispute over Indian lands is involved. The Secretary must act zealously and to the full extent of his legal powers in advancing the Indians' interests — it is a breach of this duty for him to fail to take effective action in the face of threats to their lands.

The Secretary . . . was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish [the preservation of the Indians' water rights]. . . .

. . . Failure to take appropriate steps, under the circumstances, by the regulation constitutes agency action unlawfully withheld and unreasonably delayed when viewed in the light of the Secretary's trust responsibilities to the tribe . . . .

354 F. Supp. at 256-57.

Similarly, in public land disputes agencies must act zealously and to the full extent of their legal powers to fulfill congressional objectives. Or, as the federal district court put it in *Sierra Club v. Department of Interior*, 424 F. Supp. 172 (N.D. Cal. 1976), to discharge their obligation, the responsible officials must have "gone as far as [they] legally or practically can go in an attempt to exercise [their] powers and perform [their] duties under existing law." 424 F. Supp. at 175 n.2.

74. *Wilkinson, supra* note 71, at 313-15; *see United Plainsmen Assn. v. North Dakota State Water Commn.*, 247 N.W.2d 457 (N.D. 1976); cases cited in note 73 *supra*.

75. *See Sierra Club v. Department of Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976).

The public trust doctrine recognizes the great public interest in the bureaucratic allocation of publicly owned resources. It merely attempts to balance the influence that private interest groups may have in the decisionmaking process. Fundamentally it is a mechanism by which the judiciary can ensure that the interests of the diffuse majority are adequately considered. *See Sax, supra* note 70, at 560. It is manifested in judicial skepticism toward administrative decisions that allocate public resources to the benefit of small private groups. *Id.* at 484-85. A similar concern is expressed in the procedural provisions of the FLPMA. In that statute, Congress has attempted to equalize access to the decisionmaking process by creating a surrogate legislative process with broad public input. *See text* at notes 33-40 *supra*.

76. Recreational use of the national forests increased 37% between 1970 and 1980. FOREST SERVICE, U.S. DEPT. OF AGRICULTURE, THE 1980 REPORT TO THE CONGRESS ON THE NATION'S RENEWABLE RESOURCES 29 (1980) [hereinafter cited as 1980 REPORT]; *see* OUTDOOR RECREATION RESOURCES REVIEW COMMISSION, STUDY REP. NO. 22, TRENDS IN AMERICAN LIVING AND OUTDOOR RECREATION (1962); Haskell, *Land Use and the Environment: Public Policy Issues*, 5 ENV'T. REP. (BNA) Monograph No. 20, at 6 (1974) (predicts fourfold increase in overall participation in major outdoor summertime activities between 1965 and 2000); H.R.

users seeking to recreate on the same tracts have become a major problem for public lands management.<sup>77</sup> Most of these conflicts pit motorized against nonmotorized activities.<sup>78</sup> Off-road vehicles, for example, compete with hikers for the California desert;<sup>79</sup> power boat enthusiasts allegedly interfere with canoeists' enjoyment of the Boundary Waters Canoe Area;<sup>80</sup> and snowmobilers vie with cross-country skiers for winter in the North Woods.<sup>81</sup> Underlying these controversies are the different, and often incompatible, perspectives that motorized and nonmotorized recreationists bring to the public lands.<sup>82</sup>

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REP. NO. 1551, 86th Cong., 2d Sess. (1960), *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2377, 2381 (Letter from E.L. Petersen, Acting Secretary, Department of Agriculture, to Sam Rayburn, Speaker, U.S. House of Representatives accompanying draft bill of the Multiple-Use Sustained-Yield Act of 1960):

Many millions of people seek the national forests each year for rest, relaxation, and spiritual uplift. Recreationwise, the national forests are increasing in importance because of more leisure time, greater mobility of the average family, increased accessibility of the national forests, and the relatively low cost of a national forest vacation.

77. *See, e.g.,* Warren, *Foreword* to D. SHERIDAN, OFF-ROAD VEHICLES ON PUBLIC LANDS at iii (1979) (A report of the Council on Environmental Quality) ("[T]he Council on Environmental Quality sees the off-road vehicle problem as one of the most serious public land use problems that we face."); COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: CHANGES IN PUBLIC LAND MANAGEMENT REQUIRED TO ACHIEVE CONGRESSIONAL EXPECTATIONS 45-58 (1980) [hereinafter referred to as GAO REPORT]; 1980 REPORT, *supra* note 76, at 29-30.

78. This is not, however, always the case. There has been a heated battle between canoeists and trout-fishermen for several of Michigan's most popular rivers.

During the past several years, certain streams in the State, particularly the Au Sable river system, and to a lesser degree, the Pine, Pere Marquette and Manistee Rivers have become the locale of a highly controversial battle over compatible uses between fishermen and canoeists.

Letter from Director of the Michigan Dept. of Natural Resources to the Michigan Attorney General (Aug. 2, 1971) (copy on file with the *Michigan Law Review*).

Attempts to reconcile this conflict through the "zoning" of these rivers for canoe and fishing use resulted in a Michigan Supreme Court decision. *Westervelt v. Natural Resources Commn.*, 402 Mich. 412, 263 N.W.2d 564 (1978).

79. *See, e.g.,* D. SHERIDAN, *supra* note 77; Steinhart, *Driving Out the Desert*, AUDUBON, Nov. 1980, at 82-86; BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED PLAN: CALIFORNIA DESERT CONSERVATION AREA E-89-90 (1980).

80. *See* Rudd, *Canoe Country Recreation*, NATURALIST, Winter 1977, inside cover (Letter from the Editor); Lime, *When the Wilderness Gets Crowded*, NATURALIST, Winter 1977, at 2.

A similar type of conflict occurring between fishermen and water skiers has been identified by researchers. *See* Gramann & Burdge, *The Effect of Recreation Goals on Conflict Perception: The Case of Water Skiers and Fishermen*, 13 J. LEISURE RESEARCH 15 (1981).

81. *See* Knopp & Tyger, *A Study of Conflict in Recreational Land Use: Snowmobiling v. Ski-Touring*, 5 J. LEISURE RESEARCH 6 (1973).

82. In the conflict between motorized and nonmotorized recreationists, both sides invoke what they feel are their fundamental rights. Nonmotorized recreationists, especially the ones who seek peace and quiet, demand freedom from these machines while motorized recreationists demand a place to enjoy their machines.

The nature of the ORV experience seems to be less contemplative, less aesthetic and more gregarious, more visceral, although ORVers appear to share with hikers and other non-motorized recreationists a desire to get away from confining jobs and . . . into wilderness and open spaces.

Not unexpectedly, perhaps, the failure of the BLM and other responsible agencies adequately to resolve these conflicts often results in a de facto allocative decision.<sup>83</sup> At some point, of course, increased numbers of users unacceptably degrade the quality of the recreational experience for all users.<sup>84</sup> There is, nevertheless, an inequality of competition between motorized and nonmotorized recreationists because nonmotorized users tend to be more sensitive to crowding and to the visual and audio disturbances that accompany motorized activity.<sup>85</sup> Unregulated use can so degrade the recrea-

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D. SHERIDAN, *supra* note 77, at v. 4; see J. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 27-59 (1980) (discussing the "symbolic importance [of] the way people relate to nature" in their recreational activities in the context of National Park management. *Id.* at 51 (emphasis in original)).

83. See GAO REPORT, *supra* note 77, at 45-50; D. SHERIDAN, *supra* note 77; Rosenberg, *Regulation of Off-Road Vehicles*, 5 ENV'T. AFF. 175 199-200 (1976); Steinhart, *supra* note 79, at 82.

84. There is an abundant literature both scientific and otherwise on the effects which increased recreational use has on the enjoyment of recreational activities. See, e.g., R. NASH, WILDERNESS AND THE AMERICAN MIND 235 (1967) ("Having made such remarkable gains . . . in the last century, wild country could well be loved out of existence in the next. The problem, as preservationists are beginning to recognize, is that wilderness values are so fragile that when subjected to heavy recreational usage they disappear.") Clawson, *Economics and Environmental Impacts of Increasing Leisure Activities*, FUTURE ENVIRONMENTS OF NORTH AMERICA 257 (1966):

The impact upon the psychic environment may be as great or greater [than physical impacts of increased recreational use]. A substantial portion of all present outdoor recreation areas was established because those areas offered a certain type of privacy, solitude, or naturalness. This has been lost in all too many cases; the popularity of the area destroyed the qualities that led originally to its establishment.

Several social scientists have adopted the concept of "carrying capacity" from the biological sciences in seeking to describe the upper limits of recreational use on certain tracts before the recreational use of all users is unacceptably degraded. See, e.g., Lime, *Principles of Recreational Carrying Capacity*, in U.S. DEPT. OF AGRICULTURE, PROCEEDINGS OF THE SOUTHERN STATES RECREATION RESEARCH APPLICATIONS WORKSHOP 122 (General Technical Rep. No. SE-9, 1975); Heberlein, *Density, Crowding, and Satisfaction: Sociological Studies for Determining Carrying Capacities*, in FOREST SERVICE, U.S. DEPT. OF AGRICULTURE, PROCEEDINGS: RIVER RECREATION MANAGEMENT AND RESEARCH SYMPOSIUM 67 (General Technical Rep. No. NC-28, 1977). It has been suggested that this concept can be translated into legal controls on the numbers of recreational users. Kuser, *Carrying Capacity Controls for Recreation Water Uses*, 1973 WIS. L. REV. 1.

85. St. Francis of Assissi himself while driving an ORV on wild land could not avoid diminishing the recreational experience of many non-ORV'ers in the same area. . . .

. . . "Silence is a resource. These sounds which man typically associates with the pristine natural environment are perceived by the senses as solitude. The solitude of the desert is one of its . . . valuable resources. . . ." Direct encounters with ORV machines simply are not compatible with the quality of outdoor experience being sought by a majority of Americans.

D. SHERIDAN, *supra* note 77, at 30-31 (footnote omitted).

The fundamental problem is that recreationists have many different, and often conflicting, motives for engaging in outdoor recreation; these range from an aesthetic-religious desire for communion with nature, to "exit-civilization" motives, to the desire to gain a sensation of power and dominance over the physical environment. The preeminent analysis of the differing motives of Americans in seeking outdoor recreational experiences remains THE WILDLAND RESEARCH CENTER, WILDERNESS AND RECREATION - A REPORT ON RESOURCES, VALUES AND PROBLEMS (Outdoor Recreation Resources Review Comm. Study Rep. No. 3, 1962). A more ideological view of the differences can be found in J. SAX, *supra* note 82.

tional experience for nonmotorized groups that they must either seek alternative sites or forgo their favorite activities.<sup>86</sup> Failure to allocate the available public lands among competing recreational users, therefore, reduces the supply of land available for less intensive, nonmotorized activities.<sup>87</sup> This problem is most acute on lands lo-

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Perhaps analyses of recreation so far have insufficiently distinguished between those activities that turn on conquest, with inescapable winners and losers, and those that have the capacity to transcend mastery. While there are many important similarities — such as complexity, challenge, independence, and skill development — there seem also to be important differences, not unlike the difference noted earlier between motorcycling and fly-fishing.

*Id.* at 59 (footnote omitted). See also A. LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 194 (American Museum of Natural History ed. 1968) ("Recreation is valuable in proportion to the *intensity of its experiences* and to the degree to which it differs from and contrasts with workaday life." (emphasis in original)).

From this ideological perspective, the management of public lands for recreational uses becomes part of a much larger social agenda.

These observations are a warning to recreational idealists, implying that no effort to encourage more challenging and "disturbing" leisure activity can hope to succeed unless and until the workplace is reformed. The idea is that we observe in present recreational choices a reflection of profound needs that no mere change of attitude or public policy can affect: that those who already have power in the society (like successful professionals) are attracted to recreation that demonstrates to them that they are above needing power; while those who are powerless need nothing so much as to demonstrate (however pitifully) that they are capable of dominion. Thus the distinguished New York lawyer and fly-fisherman lies by the side of a stream contemplating the bubbles, while the factory worker roars across the California desert on a motorcycle.

J. SAX, *supra* note 82, at 48.

This Note abjures any ideological judgments concerning the social or individual value of recreational choices. Rather, it advocates management to assure an equitable opportunity for *all types* of recreational activities on the public lands. It suggests that this is the result Congress intended from FLPMA's adversarial public participation procedures.

86. Generally, the noisier, more consumptive, and untemperative recreation activities, such as ORV riding, preempt and drive out the activities that are quieter, less consumptive, and more contemplative . . . .

D. SHERIDAN, *supra* note 77, at 32.

[O]ne ORV operator can effectively restrict a large public area to his own use through the emission of loud engine noise, obnoxious smoke, gas and oil odors and dangerously high speeds. Whereas previously many persons of all ages and wealth could observe the beauty of unspoiled land, now a single ORV can reign supreme.

Rosenberg, *supra* note 83, at 176.

87. See, e.g., D. SHERIDAN, *supra* note 77, at 33-34:

In effect, ORVs shrink the amount of land available for non-ORV recreationists. . . .

In this regard, ORVs could not have come at a more inopportune time. Recreational land is an increasingly scarce resource. The supply is dwindling in absolute terms — as the nation paves over land for roads, housing, parking lots, shopping centers, and other urban developments at the rate of more than 1 million acres per year — and in relative terms because of the great upsurge in outdoor recreational demand. *In other words, ORVs are making a scarce resource even scarcer for the growing number of non-ORV recreationists.*

(emphasis added). See also Steinhart, *supra* note 79, at 85:

[ORV use] also causes declines in the number of human visitors. According to BLM figures, only 15 percent of the visitors came to the desert primarily to use vehicles . . . . But motorcycle and dune buggy noise and violence drive the others out. Says a bureau planner, "The two groups cannot coexist, and don't. One set of recreationists will actually drive off another set and take over." Opinion polls show that more than a third of desert visitors object to motorcycles and dune buggies. And because off-road vehicles drive the others out, ORV drivers rarely see competing users and believe that they are the majority of desert visitors.

cated near large urban areas.<sup>88</sup>

Given the ferocity of many of the existing conflicts among recreational users,<sup>89</sup> it is safe to assume that public land managers are aware of the problem.<sup>90</sup> The agencies' inability or unwillingness to resolve these conflicts by initiating the statutory planning process may be traced to several factors. It is possible, for example, that the land managers simply do not recognize conflicts among users of the public lands as a problem that they must resolve; they may instead concentrate their efforts on preventing the physical degradation of the lands. A more likely explanation, however, is that agency officials fear the political ramifications of regulating competing users. Groups of users have, in recent years, become quite well organized. The groups whose activities require the greatest expenditure of money tend to be supported by strong commercial interests and have been very effective in preventing agency regulation of recreational

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88. The relationship between distance and frequency of recreational use has been characterized as a "distance-decay function" by a former BLM director. M. CLAWSON, *THE ECONOMICS OF NATIONAL FOREST MANAGEMENT* 30 (1976) (emphasis added):

For all kinds of outdoor recreation areas, a distance-decay function is strongly operative; that is, the proportion of people visiting an area, and the frequency of their visits, declines rapidly as distance from the area increases. Most city parks draw their visitors from a radius of a very few miles, *most all-day outing areas draw their visitors from less than 100 miles, and it seems probable that the overwhelming majority of the visitors to national forests live within 100 miles of the forest they visit.* This is not to deny that some visitors travel much farther, or that visitors on long trips do not stay overnight in national forests, but it is clear that *most visitors live closer. . . . To this extent, the benefits of national forest outdoor recreation are more regional or local and less national, than are the benefits of either their wood or their forage production, since the consumer products from the latter two outputs move nationally more than does the recreation output.*

89. See, e.g., Steinhart, *supra* note 79.

90. See D. SHERIDAN, *supra* note 77; GAO REPORT, *supra* note 77, at 49-50. In fact, the recreation conflict in the California desert was partly responsible for the special treatment given the California Desert Conservation Area by FLPMA. 43 U.S.C. 178(a)-(j) (1976). Section 178(a)(4) provides:

[T]he use of all California desert resources can and should be provided for in a multiple use and sustained yield management plan to conserve these resources for future generations, and to provide present and future use and enjoyment, particularly outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles. . . .

43 U.S.C. §§ 178(a)(4) (1976).

The findings listed in Sec. 401(a) outline the necessity of a multiple-use plan for the California Desert Conservation Area. When the plan is being developed, the Secretary of the Interior should keep in mind that there are many users of the desert resources, some of whom have ideas which are in direct conflict with those held by other users. One of the most critical and immediate areas of public disagreement is in the matter of off-road vehicle (ORV) activities. . . . There is a widening breach between those citizens who favor more ORV restriction and those who favor less. The California Desert Conservation Area Advisory Committee located in Section 401(g) can play a key role in bringing these two important groups together as part of its work in helping to develop the final comprehensive, long-range plan for the protection, use and management of the natural resource lands within the California desert.

H.R. REP. NO. 1163, *supra* note 6, at 229-30 (Supplemental Views of Rep. Pettis), *reprinted in* STAFF OF SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95TH CONG. 2D SESS., *LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976*, at 431, 656-57 (Comm. Print 1978).

use.<sup>91</sup> These groups' strength, moreover, has been enhanced by a long history of unregulated recreational use of the public lands, a tradition that allows opponents of regulation successfully to employ the rhetoric of excessive governmental interference with historic individual freedoms.<sup>92</sup> In the face of this organized opposition to regulation, the land management agencies have on occasion yielded to the loudest voices and have not acted effectively.<sup>93</sup>

By endorsing, in effect, the de facto allocative decisions that result from unregulated competition among recreational users, the BLM also biases future planning initiatives.<sup>94</sup> If existing use patterns are relied upon to project future recreational demand, the final allocation of the public lands to various recreational uses will be biased in favor of motorized and other space-intensive users. This deficiency in recreational planning has been studied by BLM Recreational Planner Robert Badarracco, who labels it the "ISD syndrome."<sup>95</sup>

The irony of the ISD syndrome . . . is that administrators and managers tend to measure recreational demand on the basis of current partic-

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91. See, e.g., *Westervelt v. Natural Resources Commn.*, 402 Mich. 412, 263 N.W.2d 564 (1978) (commercial canoe livery owners challenged Michigan Department of Natural Resources' attempts to regulate canoe use on prime trout-fishing streams). The emphasis on physical impacts in the debate over certain uses of public lands is often a politically more palatable way of dealing with the problem of conflicting user groups.

[The preservationist's] vocabulary is principally directed to the land and to physical resources, and when he objects to off-road vehicle use or to plans for an urban-style resort in the mountains, his complaint is routinely phrased in terms of adverse impacts on soil, water resources, or wildlife. These are certainly authentic concerns, but they are often viewed as a disingenuous, politically neutral way of objecting to the kind of recreation other people prefer.

J. SAX, *supra* note 82, at 50.

One commentator has criticized the California Desert Conservation Area Management Plan in this regard, noting that the plan allows motor vehicles in approximately 80% of the desert. Steinhart, *supra* note 79, at 84. See also, Comment, *Protecting the Public Lands: BLM Stuck in Low Gear On Regulating Use of Off-Road Vehicles*, 8 ENVTL. L. REP. (ENVTL. L. INST.) 10,178 (1978).

92. Some cyclists hold that they are, pure and simple, champions of individual liberty against government restraint, wheel-rut rebels carrying aloft the tattered banner of the independent man. . . . BLM has fallen for the line. Steinhart, *supra* note 79, at 86.

93. The bureau's [BLM's] half-heartedness about enforcing rules can be explained by its history of trying to please clients before defending resources. It allowed off-roaders to establish a habit of free use of the desert, and now is unable to break that habit.

*Id.* at 85; see Comment, *supra* note 91.

94. The need for good data upon which to base management planning was recognized by Congress in its provisions for inventories of the public land resources. The acquisition and proper use of data underlies the entire land management planning process. "The need for good data is greatest when resource conflicts are being identified and mitigated and when initial land use and natural resource allocations are being made. Inadequate data increases the potential for making poor allocations which are difficult or impossible to reverse." GAO REPORT, *supra* note 77, at 38-39.

95. "ISD" stands for the Impairment of user satisfaction (because of differential sensitivity to conflicts), the Suppression of the more sensitive uses, and the eventual Displacement of those uses through planning techniques that rely on existing use patterns.

ipation rates . . . . If a resource supervisor sees a given recreational activity prevailing at a certain site, he interprets this as a reflection of public demand. . . . If the site he observes is used to capacity, he may plan additional sites or programs for the same purpose, even though the previous users have been displaced. Thus the administrator may allocate additional opportunities to a group which has suppressed or displaced a former traditional group. In effect, the administrator, perhaps unwittingly, assists in the suppression and displacement of additional traditional users. Enough managers following the same course could well set into motion recreational evolutionary processes which change the character of outdoor recreation despite the intense feelings of a broader public.<sup>96</sup>

At least one court has recognized the powerful distorting effect of the status quo on future land management planning. In *National Wildlife Federation v. Morton*,<sup>97</sup> the court pointed to the creation of an "inertial presumption in favor of ORV use" to justify its reversal of a BLM directive that classified all BLM lands as open to ORV use pending a study of those lands to determine which should be restricted to nonmotorized activities.<sup>98</sup>

The BLM's policy of open access management is seriously undermining its ability to achieve the future-oriented goals established by Congress in the FLPMA.<sup>99</sup> By allowing citizens to place significant

96. Quoted in D. SHERIDAN, *supra* note 77, at 32-33.

97. 393 F. Supp. 1286 (D.D.C. 1975).

98. [D]esignation as "open" [to ORV use] does not truly maintain the status quo. As plaintiff notes, this designation, being an official governmental act, changes the character of the land use policy, tilting it in favor of ORV use. Future designations will not be made in the context of applying the required criteria to decide whether specific areas and trails should be opened or closed to ORV use. Instead, authorized officers will be required to employ the criteria in determining whether a specific area or trail's existing "open" status should be *changed* to "closed" or "restricted." This distinction creates a subtle, but nevertheless real, inertial presumption in favor of ORV use.

393 F. Supp. at 1292.

The court applied APA review of the BLM's compliance with Executive Order 11,644. By the preemptive classification of the study lands as "open" the BLM, according to the court, had undermined future public participation in the designation process — the decision to be made became the changing of lands classified as "open" to "closed" status — contrary to the Order. The BLM's subsequent response to this decision has been one which leaves most lands in undesignated status which, in effect, leaves them open to ORV use. The impermissible presumption no longer exists on paper, just in fact.

[B]y essentially continuing the status quo, the [post-*NWF v. Morton*] regulations appear to be utterly unresponsive to the spirit or urgency concerning the prevention of continued deterioration of resources embodied in the Executive Order and the district court's opinion.

. . . . BLM has not aggressively and affirmatively addressed the environmental problem of ORV usage on its lands; rather, it has simply made a minimal response to the Executive Order and court decision with the apparent intent to protect as much as possible the recreational interests of the ORV users.

Comment, *supra* note 91, at 1018.

99. It is widely accepted that demand for resource-based outdoor recreation will continue to rise. It follows that, by maintaining an open-access management policy, we will find that our ability to sustain the quality of user benefits is gradually diminishing. The outlook for the use of unique recreational resources therefore appears to be gloomy in-

conflicts among recreational users on the BLM's planning agenda, courts make the ultimate effectuation of Congress' intent more certain. While the agency must retain substantial discretion over its agenda, courts should be willing to scrutinize its reasons for according the resolution of particular recreational conflicts a low priority. If an adequate explanation is not forthcoming from the agency, courts should also feel free to order the agency to initiate the planning process to ensure that the rights of citizen participation guaranteed by Congress are not vitiated by de facto planning decisions.<sup>100</sup>

### CONCLUSION

In enacting the FLPMA, Congress attempted to substitute for substantive specificity by providing for broad public participation in the public lands management process. To vindicate those participation rights, this Note has argued, the courts must be prepared to recognize a limited right of citizens to initiate the statutory planning procedures. Particularly in the area of recreational conflicts, agency inaction may result in a de facto management decision that deprives some citizens of the use of the public lands without allowing them an opportunity to contribute to the decisionmaking process. Only by granting requests by citizens for formal proceedings can the BLM and the courts end this affront to Congress' intent.

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deed. Unless we institute such management policies as price or administrative restrictions (including spatial and time use-redistribution schemes) to restrict visitors' inflow, benefits to future users will decline or disappear altogether.

FOREST SERVICE, U.S. DEPT. OF AGRICULTURE, OUTDOOR RECREATION: ADVANCES IN APPLICATION OF ECONOMICS 38 (General Technical Rep. No. WO-2, 1977).

100. For an example of the type of judicial review of the BLM's recreational planning appropriate under the "action forcing" mandate, see *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979) (noncommercial river rafters' of the Grand Canyon challenge to the Secretary of the Interior's allocation of rafting permits between commercial and noncommercial rafters under, *inter alia*, the National Park Service Act).