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SKI RESORTS AND NATIONAL FORESTS: RETHINKING FOREST SERVICE MANAGEMENT PRACTICES FOR RECREATIONAL USE

JAMES BRIGGS*

Abstract: Skiing, as recognized by Congress, is a popular, healthful, and life-enriching use of National Forest Land. In 1986, Congress passed legislation to make it easier for ski resort developers to obtain permits, but a textual bias in the Forest Service's implementing regulations and attacks by environmentalists both in the courts and literally at the sites has largely defeated that intent. Also, the Forest Service recently proposed new restrictions on Colorado's White River National Forest that, among others, would limit ski resorts to the size of their current permits. This Comment will explore the Forest Service's proposal in the context of the ongoing debate over National Forest resource management. It will compare the current system with EPA's Project XL, which rewards superior performance and innovation in environmental protection. This Comment suggests that an approach to National Forest resource management that incorporates the rationales of Project XL would ameliorate the protection of our National Forests and the relationship between the Forest Service, developers, recreational users, and environmentalists.

INTRODUCTION

For many Americans, downhill skiing¹ is a passion. Every weekend and holiday during the winter months, city dwellers migrate north to Vermont, New Hampshire, and Maine on the East Coast; to the Rockies, the Wasatch Mountains, and the Tetons in the mid-west; and to the Sierras and the Cascades on the West Coast. Downhill skiing, however, can only be done on mountainsides, and a large portion

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¹ This Comment uses "skiing" as a generic term to incorporate traditional skiing, snowboarding, and a variety of other winter sports that use ski resorts for recreation.

of mountain terrain in the United States is public land that falls within the jurisdiction of the United States Forest Service.² Further, downhill skiing requires dramatically changing the landscape of mountain wilderness areas, thus impacting the environment both on and around a ski area. For these reasons, environmentalists (who wish to protect these areas from any further development), ski corporations, recreational users, and the Forest Service (which is charged with managing these resource areas) have all found themselves in an escalating battle over the use and development of mountainous National Forest land.³

This struggle recently came to a head in Colorado when the Forest Service proposed a number of restrictions (known as Alternative D) on recreational use on the 2.27 million acre White River National Forest (WRNF), "which has been battered and abused by a wave of human visitors that has doubled since 1984."⁴ The remedial Alternative D illustrates and exacerbates the confrontational atmosphere surrounding ski resort development, demonstrating the need for a new approach to implementing the Forest Service's nearly century old "Multiple Use and Sustained Yield"⁵ approach to National Forest resource management. Environmental programs such as the Environmental Protection Agency's (EPA) "Project XL"⁶ can be instructive in guiding National Forest management towards a system that rewards stewardship and innovation, incorporates more input from all interested parties in the decision-making process, and ultimately allows for responsible development and use of National Forest lands by ski resorts while preserving the values of those areas.

This Comment will explore the WRNF's proposed Alternative D and examine its impact on the ongoing policy debate over National Forest management. Part I will provide background and context by looking at the ski industry in general and some of the specifics of Alternative D. Part II will examine the Forest Service's Multiple Use and Sustained Yield doctrine and heritage. Part III will outline the current regulatory regime for ski area development, including the National

² See C. Wayne McKinzie, Note, *Ski Area Development After the National Forest Ski Area Permit Act of 1986: Still an Uphill Battle*, 12 VA. ENVTL. L.J. 299, 302 (1993).

³ See, e.g., Michael Romano, *Battle Lines Being Drawn Over National Forest Plan*, DENV. ROCKY MTN. NEWS, Dec. 20, 1999, at A5.

⁴ Deborah Frazier, *White River Blues: Forest Service Plans to Restrict Use of Beleaguered Forest*, DENV. ROCKY MTN. NEWS, Sept. 12, 1999, at A7.

⁵ See 16 U.S.C. § 528 (1985).

⁶ See 64 Fed. Reg. 16,450 (1999).

Forest Ski Area Permit Act of 1986⁷ and examples of both implemented and blocked developments. Part IV will outline Project XL, EPA's new experimental approach to environmental protection. Finally, Part V will demonstrate the applicability and value in taking a similar approach to ski resort use of National Forest land.

I. THE SKI INDUSTRY, THE WHITE RIVER NATIONAL FOREST, AND ALTERNATIVE D

A. *The History of Skiing*

According to the Colorado Ski Museum, evidence of skiing dates back at least 4500 years to the Rodoy rock carvings above the Arctic Circle in Norway where carvings depict a hunter on long runners.⁸ Written accounts of skiing first appeared around 1000 AD in Viking literature describing various kings as being superb skiers.⁹ In 1206, two Norwegian civil war scouts carried the infant heir to the throne to safety, traveling for thirty-five miles on skis; this event is annually commemorated by a race over the same route, which echoes the history of marathon running.¹⁰

Skiing was introduced in the United States in the 1830s by Scandinavian immigrants in the upper Midwest, and soon became a favorite pastime of miners during the California Gold Rush.¹¹ Miners often engaged in downhill racing at speeds of over eighty-five miles per hour on twelve-foot boards, and these races were often won by the camp that came up with the best wax—a highly guarded secret recipe.¹² Many current U.S. ski resorts rest upon former mining sites.¹³

Today, the ski industry, like so many other industries, has undergone a major transformation through consolidation.¹⁴ As of 1998, four companies owned twenty-three percent of North American ski resorts and fifteen of the top thirty-five resorts.¹⁵ These corporations

⁷ 16 U.S.C. § 497b (1999).

⁸ See Pat Pfeif, *How Skiing Started* (visited Mar. 31, 2000) <<http://www.vailsoft.com/museum/historyUS.html>>.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See Pfeif, *supra* note 8.

¹⁴ See Lee Carlson, *Skiing Crossroads*, *SKIING*, Sept. 1997, at 116.

¹⁵ See David Dobbs, *Downhill Racers: As Big-Time Skiing Consolidates, New Environmental Problems Arise*, *E*, Jan. 11, 1998, at 18. These ski resort conglomerates are: The American

are in the process of trying to meet increased demand by recreational users for more and better facilities and amenities, improved quality of snow conditions, and better access from cities, while at the same time competing with golf courses and beaches for recreational time and money.¹⁶ These four companies, known in the industry as the "Big Four," have recently spent nearly one billion dollars on enhancing trail systems, snowmaking, and real estate development in order to remain competitive.¹⁷ This investment appears to be worthwhile for the resorts, as demand is expected to increase due to current demographic trends.¹⁸ According to the most recent census, people are moving away from cities to low-density recreational areas (e.g. mountain and beach communities) like Colorado's I-70 corridor, which cuts right through the WRNF.¹⁹ The improved quality of life along with technological advances allowing people to live anywhere and "telecommute" have made these resort communities the fastest growing counties in the United States.²⁰

B. *The White River National Forest and Alternative D*

1. The White River National Forest

The communities in and around the WRNF in central Colorado are among those booming counties with swelling populations.²¹ The WRNF also lies only a short drive away from Denver and its more than two million residents.²² The WRNF straddles I-70 from the Eisenhower Tunnel to just outside Rifle, Colorado.²³ The WRNF covers approximately 2.3 million acres over nine counties, and includes twelve ski resorts, such as world-famous Aspen and Vail.²⁴ Seventy percent of all of the skiing done in Colorado takes place on WRNF ski areas, which

Skiing Company, Vail Resorts, Inc., Intrawest, and Booth Creek Ski Holdings, Inc. See Carlson, *supra* note 14, at 116.

¹⁶ See Carlson, *supra* note 14, at 116.

¹⁷ See Dobbs, *supra* note 15, at 18.

¹⁸ See Michael Berry, *Corridor of Last Resorts: Sprawling Ski Areas, Wilderness Duel Along I-70*, DENV. POST, Dec. 20, 1998 (2d ed.), at 11.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Frazier, *supra* note 4, at A7.

²² See *id.*

²³ See Penelope Purdy, *Plan for White River National Forest Is Wreaking Trouble in Paradise*, DENV. POST, Nov. 7, 1999 (2d ed.), at H1.

²⁴ See Romano, *supra* note 3, at A5.

consisted of approximately 3.7 million skier days in 1997.²⁵ Ski slopes, however, only occupy three percent of the total area of the WRNF.²⁶

In 1984, recreational visits to the WRNF totaled 4.23 million, of which skiers made up 2.54 million, or sixty percent of all recreational visits.²⁷ Although skiing has accounted for almost twenty-five percent of the total increase in user days on the WRNF between 1984 and 1997 (rising to 8.46 million user days in 1997), skier visits to the WRNF have risen less than fifty percent, as compared to other recreational activities which have increased in user days by up to four thousand percent of their 1984 levels.²⁸ For example, visits by snowmobilers have risen from 37,200 in 1984 to 86,700 in 1997 (an increase of over 130 percent); visits by hikers have risen from 453,400 in 1984 to 896,800 in 1997 (nearly double); visits by mountain bikers have risen from 8100 in 1984 to 167,300 in 1997 (more than twenty times the 1984 level); and visits by motorcycles and all-terrain vehicles (ATV's) have risen from 15,000 in 1984 to 670,900 (nearly forty-five times the 1984 level).²⁹ Not surprisingly, this dramatic increase in recreational visits has had a detrimental effect on the WRNF's environment, and the Forest Service and the environmental community wish to restrict sharply recreational activity in the WRNF with the implementation of its new land-use plan scheduled to take effect in 2001.³⁰

2. Alternative D

The Forest Service's preferred plan, known as Alternative D, contains several key provisions that would dramatically scale back recreational use of the WRNF.³¹ Alternative D would: restrict hikers, bikers, and motorized vehicles to marked trails; limit some trails to specific uses (e.g. mountain bikes on one trail, ATV's on another, and horseback riders on another); return some trails to wetlands, meadows, and

²⁵ See Berry, *supra* note 18, at 11; Frazier, *supra* note 4, at A7.

²⁶ See Berry, *supra* note 18, at 11. Nationally, ski areas occupy less than one-tenth of one percent of all public lands. *See id.*

²⁷ See Frazier, *supra* note 4, at A7.

²⁸ *See id.*

²⁹ *See id.*

³⁰ See Romano, *supra* note 3, at A5. The revision is part of the National Forest Management Act of 1976, which calls for a revised land use plan approximately every 15 years. *See* 16 U.S.C. § 1600 (1994 & Supp. III 1997). Three other national forests in Colorado (Arapaho-Roosevelt, Routt, and Rio Grande) also have new land use plans in the works, but none depart so dramatically from current land-use patterns as that proposed for the WRNF. *See* Romano, *supra* note 3, at A5.

³¹ *See* Romano, *supra* note 3, at A5.

forests; log some dead and dying trees to prevent wildfires; reduce the number of acres available to snowmobilers; and limit ski resorts to the size of their current permits.³² The biggest problem cited as the reason why the new restrictions are necessary is not the increased number of visitors, but their behavior.³³ Hikers, bikers, ATV, and sport utility vehicle operators are illegally carving new trails through fragile meadows, wetlands, forest floors, and alpine tundra.³⁴ In the summer of 1999, users created an estimated 500 miles of illegal trails.³⁵ Even more troubling is the fact that these trails do not follow Forest Service standards, which are designed to prevent erosion and protect wildlife and habitat.³⁶ Furthermore, the new trails encourage innocent but ignorant users to follow the new trails, or create their own, thereby exacerbating the damage.³⁷

Ski areas, on the other hand, rarely encounter such problems.³⁸ Avalanche dangers, grooming, and boundary signs warning skiers that areas outside the ski area are not serviced by ski patrols serve to keep all but a handful of the most expert skiers in search of fresh powder from venturing beyond the confines of the resort.³⁹ Even when "powder poachers" venture beyond a ski area boundary, any trace of those skiers and their virtually infinitesimal impact on the terrain vanishes with the next snowfall or the next thaw.⁴⁰ For this reason, Alternative D illogically and unfairly punishes ski resorts for damage done to the WRNF by recreational users when ski resorts are in the best position to control such damage.⁴¹

Alternative D has been fiercely opposed by developers, business groups, key politicians, and recreational users who worry about the impact of the plan's mandate that a "higher priority be given to physi-

³² See Frazier, *supra* note 4, at A7. At the other extreme is the Forest Service's Alternative E, which would allow dramatic growth and linking resorts by aerial tramway. See Steve Lipsher, *Copper Mountain Resort Not 'Naïve' About Plan*, DENV. POST, Oct. 13, 1999 (2d ed.), at B5. Even resorts see this as unacceptable environmental protection. See *id.* Environmentalists critical of ski resorts feel Alternative E is nothing more than a "straw man" for the Forest Service to knock down, ultimately aiding ski resorts by making them look reasonable. See *id.*

³³ See Frazier, *supra* note 4, at A7.

³⁴ See Purdy, *supra* note 23, at H1.

³⁵ See Frazier, *supra* note 4, at A7.

³⁶ See Purdy, *supra* note 23, at H1.

³⁷ See Frazier, *supra* note 4, at A7.

³⁸ Telephone interview with Scott Reeves, Senior Vice-President of Mountain Operations for American Ski Company's Mount Snow Resort (Apr. 15, 2000).

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

cal and biological resources than to human use."⁴² Senator Ben Nighthorse Campbell of Colorado has said he will do whatever he can to stop Alternative D.⁴³ Senator Wayne Allard says that Alternative D alters the fundamental nature of the WRNF whose motto is "land of many uses," and that the WRNF was not designed to be a wilderness area.⁴⁴ Colorado lawmakers, such as Representative Scott McInnis (from the 3rd Congressional District, which includes the WRNF) want to see the Forest Service take more account of the economic impact of its decisions.⁴⁵ McInnis wants the review process to start over, noting that the plan would have a clear impact on jobs, and would change the predominant use of the forest from recreation to a biological preserve.⁴⁶

Ski resorts also obviously oppose restrictions on their future growth. Vail, Keystone, and Breckenridge, in opposing Alternative D, are puzzled about why the Forest Service does not adopt a plan that accommodates expansion when the Forest Service's own estimates project a two percent growth rate per annum in skiing through the year 2010.⁴⁷ Ski resorts note that the restrictions could lead to higher ticket prices and more crowded slopes, thereby creating a lower quality experience.⁴⁸ Crowded slopes can also raise the danger of skier collisions. On the other hand, proponents of Alternative D, such as the Aspen Wilderness Workshop, note that many ski resorts have ample terrain within their current boundaries that are not yet developed, and that overall skier visits have leveled off in recent years.⁴⁹

The posturing and rhetoric of the groups interested in Alternative D demonstrates the evolving nature of the battle waged by environmentalists (who have traditionally targeted timber, mining, and oil and gas industries on National Forest land) and the responses offered by political and corporate leaders.⁵⁰ Therefore, as population and demand for recreational terrain grow, the need for a more cooperative, long-term, forward-looking approach to managing the valuable

⁴² See Romano, *supra* note 3, at A5.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See Michele Conklin, *Three Resorts Oppose White River Planci*, DENV. ROCKY MTN. NEWS, Oct. 19, 1999, at B8.

⁴⁸ See Romano, *supra* note 3, at A5.

⁴⁹ See *id.*

⁵⁰ See *id.* For examples of actual conflicts between environmentalists and ski area development projects, see *infra* section III(C)(2).

resources of National Forests will become of paramount importance if the Forest Service's "Multiple-Use, Sustained Yield" principles are to survive.

II. THE FOREST SERVICE AND ITS MULTIPLE-USE, SUSTAINED YIELD APPROACH TO NATIONAL FOREST MANAGEMENT

A. *The Origin of National Forests*

In the early days of the United States, vast federal land holdings, especially in the west, were given to homesteaders, railroads, and others who desired the low-lying, flat land basins and valleys.⁵¹ Meanwhile, the less-desirable rugged mountains and high country remained under federal control.⁵² Forest reserves were first authorized by Congress and established by presidential proclamation in 1891.⁵³ Substantial pressure to open the reserves for mineral exploration and other development led to the Organic Act of 1897.⁵⁴ The Organic Act gave the President power to establish forest reserves on public domain land to "improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of waterflows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."⁵⁵ The act specifically excluded those lands judged more valuable for mineral or agricultural use.⁵⁶

The reserves were originally administered by the Department of the Interior, but were transferred to the Department of Agriculture under the Transfer Act of February 1, 1905, and were renamed National Forests on March 4, 1907.⁵⁷ The Secretary of Agriculture's authority included protecting the forest reserves from fires and regulating their occupancy and use while preserving the forests from destruction.⁵⁸ All types of uses not specifically listed in the Organic Act were permitted as long as they were not destructive to the forests.⁵⁹

⁵¹ See McKinzie, *supra* note 2, at 302.

⁵² See *id.* In the east, large amounts of unwanted mountain zones were purchased by the Forest Service in the early twentieth century. See *id.*

⁵³ See JOHN FEDKIW, U.S. DEP'T OF AGRICULTURE, *MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905-1995*, at 1 (not dated).

⁵⁴ See *id.* at 2.

⁵⁵ See *id.* at 2.

⁵⁶ See *id.*

⁵⁷ See *id.* at 1.

⁵⁸ See FEDKIW, *supra* note 53, at 2.

⁵⁹ See *id.* Examples of early uses include grazing, summer homes, firewood collection, hunting, flora collection, and rights of way. See *id.*

Gifford Pinchot, the first Chief of the Department of Agriculture's Forest Service, by renaming the forest reserves in 1907 as "National Forests" emphasized that they were not to be withdrawn from productive use.⁶⁰ Pinchot philosophized that multiple uses would secure "the greatest good of the greatest number for the longest time."⁶¹ This notion followed Secretary of Agriculture James Wilson's interpretation of the Organic Act that all forest resources were for *use*, subject only to sustainability.⁶² Land was to be put to its most productive use, and not to be devoted to the temporary benefit of individuals or companies.⁶³ The long-term plan called for "adapting the mix and levels to changing market and social values and sustaining national forest resources and their ecosystems for future generations."⁶⁴ This adaptive management system became the mode for managing multiple uses and was a learning experience for the Forest Service—management adjustments were made to fit changing conditions and uses, standards, and science and art.⁶⁵ The Forest Service also learned that resource use related to the local community and its workers, and therefore local questions concerning each forest's management were to be resolved at the local level.⁶⁶ Thus, all uses compatible with sustainability were to be permitted, and conflicts were to be resolved in the spirit of "the greatest good of the greatest number in the long run," which was the Forest Service's policy until the Multiple-Use, Sustained Yield Act fifty-five years later.⁶⁷

B. *The Multiple-Use, Sustained Yield Act of 1960*

The concept of multi-purpose resource use grew out of a conservation movement of the early 1900s that supported multi-purpose planning for water use and development.⁶⁸ The Inland Waterways Commission, appointed by Theodore Roosevelt in 1907, used this approach in river basin development, coordinating irrigation, navigation, flood control, and hydropower production uses.⁶⁹ In 1917, legis-

⁶⁰ See McKinzie, *supra* note 2, at 305.

⁶¹ *Id.*

⁶² See FEDKIW, *supra* note 53, at 2.

⁶³ *See id.*

⁶⁴ *Id.* at 3.

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ See FEDKIW, *supra* note 53, at 3.

⁶⁸ *See id.* at 1.

⁶⁹ *See id.*

lation established a multi-purpose water resource planning agency, but it was never implemented because of World War I.⁷⁰ The concept, however, became the rule for water resource development for federal river basin developments and eventually included recreation, wildlife, and fishery uses.⁷¹ The concept made its way into Forest Service jargon in the 1920s, and it was formally defined in the Multiple-Use, Sustained Yield Act of 1960 (MUSYA).⁷² The MUSYA emerged at a time marked by growing pressure from single interest groups, such as timber harvesters and wilderness conservationists, and made multipurpose use explicit by requiring equal consideration for all resources in a way best meeting the needs of the American people.⁷³ These needs were not necessarily met by the combination giving the best economic return or greatest unit output.⁷⁴ Despite the Forest Service's reputation as being one of the most professional and least "capturable" of government agencies, many people have criticized the Forest Service as being overly solicitous of extractive interests.⁷⁵ Even the U.S. Supreme Court has criticized the Forest Service as only giving "lip service" to the multiple use mandate in auctioning off millions of acres of timberland under the influence of powerful logging interests.⁷⁶ The Court noted in *Sierra Club v. Morton* that the phrase "occupancy and use" is the cornerstone of multiple uses of National Forests and that policy should incorporate uses other than logging.⁷⁷ In *United States v. New Mexico*, the Supreme Court further noted that the MUSYA was intended to broaden the purposes for which the National Forests were previously administered.⁷⁸

Despite these criticisms, the Forest Service has a long record of allowing a great array of uses on National Forest land.⁷⁹ Today, National Forests occupy about 191 million acres in forty-two states,

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See FEDKIW, *supra* note 53, at 1. MUSYA stated that "National Forests . . . shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528 (1988). This has been reaffirmed subsequently in the National Forest Management Act of 1976. See 16 U.S.C. § 1600 (1994 & Supp. III 1997); FEDKIW, *supra* note 53, at 1.

⁷³ See FEDKIW, *supra* note 53, at 4.

⁷⁴ See *id.*

⁷⁵ See John W. Ragsdale, Jr., *National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities*, 31 URB. LAW. 1, 4 (1999).

⁷⁶ See *Sierra Club v. Morton*, 405 U.S. 727, 748 (1972).

⁷⁷ See *id.*

⁷⁸ See 438 U.S. 696, 713 (1978).

⁷⁹ See generally FEDKIW, *supra* note 53.

Puerto Rico, and the Virgin Islands.⁸⁰ One hundred sixty-five million of these acres are located in the eleven westernmost contiguous states, 3.3 million acres are designated as national monuments, 1.9 million acres are congressionally-delegated National Recreation Areas, and one out of every six acres is designated for special use.⁸¹

C. *Evolution of Multiple Uses on National Forest Land*

1. 1905 to 1945

Any use of National Forest resources other than commercial timber sales, forage grazing, or occupancy established by the Federal Power Commission or U.S. Homestead Laws is deemed a "special use."⁸² Special use permits must be obtained through a formal application specifying the area, time, and management standard to engage in any special use of National Forest resources.⁸³ The Forest Service embraced special uses in the early years as promoting the welfare of individual users and communities living in and near National Forests.⁸⁴

In the early 1900s, recreation on National Forest land generally took the form of hunting, fishing, trapping, and camping, and these uses were managed passively.⁸⁵ As car ownership increased, recreational use near cities grew rapidly, with many people desiring camps and cottages.⁸⁶ Grazing and timbering were adjusted to meet these demands, and the most scenic National Forest lands were withdrawn for National Parks in 1916.⁸⁷ In the early 1920s, two Forest Service foresters in Colorado and New Mexico pushed the idea of setting aside and preserving certain areas in as near a natural state as possi-

⁸⁰ See William E. Shands, *Federal Forests: The State of Our Forests*, AM. FORESTS, Nov. 1989, at 22.

⁸¹ See *id.*

⁸² See FEDKIW, *supra* note 53, at 24.

⁸³ See *id.*

⁸⁴ See *id.* The 1907 list of special uses included: residences, farms, pastures, corrals, apiaries, dairies, schools, churches, roads, trails, telephone and telegraph lines, stores, sawmills, factories, hotels, stage stations, sanatoriums, camps, wharves, miners' and prospectors' cabins, windmills, dipping vats, reservoirs, water conduits, powerhouses and transmission lines, aerial tramways, railroads, and the purchase of sand, stone, clay, gravel, hay, and other products except timber. See *id.* This list has broadened over time. See *id.*

⁸⁵ See *id.* at 20.

⁸⁶ See *id.*

⁸⁷ See FEDKIW, *supra* note 53, at 20. The National Park Service was also established at that time. See *id.*

ble.⁸⁸ The first formally designated wilderness area was dedicated in the Gila National Forest in New Mexico in 1924.⁸⁹ Despite increased usage through the end of World War II, National Forests were still huge, largely undeveloped reserves of natural resources that were remote and difficult to reach by Americans who were mainly concentrated on the East Coast.⁹⁰

2. 1945 to 1970

The period after World War II saw unprecedented growth, as the population grew from 64 million to 205 million (a growth rate of 45 percent) by 1970.⁹¹ As the population moved westward, rapid economic growth put extraordinary demands on National Forests through timber harvesting, which grew five percent per year—twice the rate of national economic growth.⁹² Although cattle grazing increased twenty-five percent during that period, sheep grazing declined significantly, and mineral exploration saw steady, but sporadic growth.⁹³ Recreational visits increased by more than eleven percent per year—more than six times faster than the population—as mobility, income, and leisure time were all increasing.⁹⁴ At the same time, wilderness areas grew from 2 million acres to 9.1 million acres in 1964 under the Wilderness Preservation Act, and an additional 1 million acres were designated by 1970.⁹⁵

Furthermore, the compatibility between multiple uses during this time period was becoming much more complex as demands for National Forest use accelerated.⁹⁶ Reconciling competing and overlapping uses became more challenging, especially as some interests became important to regional and national special interest groups.⁹⁷

⁸⁸ *See id.* at 21.

⁸⁹ *See id.* “Wilderness areas” are classified as areas of 100,000 acres or more, 5000 to 99,999 acres are “wild areas,” areas considered wild but not classified are “primitive areas,” and areas with no road access are “roadless areas.” *See id.*

⁹⁰ *See id.* at 25. In 1905, special use permits totaled 4000. That number grew to 19,000 in 1915, and 44,000 in 1945. *See id.* at 24.

⁹¹ *See id.* at 34.

⁹² *See* FEDKIW, *supra* note 53, at 29.

⁹³ *See id.*

⁹⁴ *See id.* In 1965, the Forest Service officially established the Recreational Visitor Day, consisting of twelve hours of onsite use by one person as the uniform unit for measurement. Recreational Visitor Days grew from 18 million in 1946 to 46 million in 1955, to 132 million in 1964, to 200 million in 1975, and to almost 350 million in 1995. *See id.* at 56–57.

⁹⁵ *See id.* at 29.

⁹⁶ *See id.*

⁹⁷ *See* FEDKIW, *supra* note 53, at 29.

Conflicts between the timber industry and wilderness groups began to reach national proportions. Out of these conflicts between single-use interest groups came the MUSYA of 1960, which sought to strike a balance between these special interest groups and the economic demands that could lead to overuse.⁹⁸

3. 1970 to Today

In the 1970s, the demand on National Forests for timber, energy, water quality, wildlife and fish, beef, recreation, and wilderness continued to increase dramatically.⁹⁹ At the same time, environmental awareness reached the mainstream with the passage of federal statutes such as the National Environmental Policy Act of 1969 (NEPA).¹⁰⁰ This new awareness produced greater pressure on the Forest Service for better management and preservation, and issues such as clearcutting began to polarize environmentalists and commodity producers.¹⁰¹ The Forest Service attempted to resolve these conflicts or avoid them altogether through regional multiple-use guides and district multiple-use management plans which were to coordinate various uses, but these plans did not address the question of the combination of uses that best fit the American people's needs called for in MUSYA.¹⁰² Further problems arose through the public's misperception that multiple-use implied that many different uses could be carried out on every acre, not understanding that this was rarely done or achievable.¹⁰³

In 1973, recognizing that "specific guidelines and standards for integrating the management of uses were very weak or lacking at all levels,"¹⁰⁴ the Forest Service implemented local Unit Plans to provide better integration of national objectives with local land-use priorities and to fit multiple-use planning closely into the requirements of

⁹⁸ See *id.* at 30–31.

⁹⁹ See *id.* at 85.

¹⁰⁰ See generally 42 U.S.C. § 4332 (1988). NEPA, the first major modern environmental legislation, requires federal agencies to prepare an environmental impact statement (EIS) for federal actions, including federal funding or authorization of private actions, which threaten to significantly affect the quality of the human environment. See *id.*

¹⁰¹ See FEDKIW, *supra* note 53, at 85.

¹⁰² See *id.* at 119.

¹⁰³ See *id.*

¹⁰⁴ *Id.* at 125.

NEPA.¹⁰⁵ Multiple-use planning was further strengthened by the passage of the National Forest Management Act of 1976 (NFMA).¹⁰⁶

a. *The National Forest Management Act*

The goal of the NFMA was to take a more holistic approach to National Forest management.¹⁰⁷ The NFMA replaced the unit planning system, which required 1200 "unit" land-use plans on 123 individual National Forests, with regional planning guidelines for each of nine National Forest regions, and forest-wide land use and resource plans for each of the 123 National Forests.¹⁰⁸ The final implementing regulations in 1979 led to a new emphasis on integrated land and resource planning for multiple uses, with nationally-determined goals for the next fifty years.¹⁰⁹ The NFMA required each National Forest to use an interdisciplinary team to develop its forest plan, fully considering physical, biological, economic, social, and other sciences in the long-term planning and management of multiple uses.¹¹⁰ Forest Service officials had hoped that the NFMA would lead to a more informed and scientific approach to planning that also informed and involved the public, leading to more public support and less litigation.¹¹¹ Public participation did grow, but not in the way the Forest Service hoped—disputes over appropriate uses were played out in the press, through demonstrations, and with legal action epitomized by the northern spotted owl issue in the Pacific Northwest.¹¹² Changing values and a maturing environmental movement led to a more confrontational and political planning process.¹¹³

¹⁰⁵ See *id.* at 119.

¹⁰⁶ See generally National Forest Management Act, 16 U.S.C. § 1600 (1994 & Supp. III 1997). "The National Forest Management Act and its implementing regulations require the United States Forest Service to manage the national forests' biodiversity based on a set of science-based management prescriptions." Greg D. Corbin, Comment, *The United States Forest Service's Response to Biodiversity Science*, 29 ENVTL. L. 377, 377 (1999).

¹⁰⁷ See FEDKIW, *supra* note 53, at 189.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 196.

¹¹¹ See *id.* at 193. Senator Hubert Humphrey hoped "forest managers could practice forestry in the forest and not in the courts." *Id.*

¹¹² See FEDKIW, *supra* note 53, at 192. See generally *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992).

¹¹³ See FEDKIW, *supra* note 53, at 193.

b. *The Ecosystem Approach*

On June 4, 1992, F. Dale Robertson, Chief of the Forest Service, announced formally that the Forest Service would take an ecosystem approach to planning and managing multiple uses.¹¹⁴ Robertson planned the timing of this announcement to coincide with the Earth Summit in Rio de Janeiro in the hopes of improving international views of U.S. forestry practices.¹¹⁵ This ecosystem approach attempts to incorporate what has been learned over the past ninety years from the policies of the Organic Act, MUSYA, NEPA, NFMA, the Endangered Species Act, and other laws.¹¹⁶ The ecosystem action plan calls for the protection of ecosystems and the continuation of multiple uses within the capabilities of those ecosystems, with success measured by healthy ecosystems, vital communities, and an effective multidisciplinary, multicultural organization.¹¹⁷ The Forest Service recognizes that this approach is merely a continuing learning experience and that its current understanding of National Forest ecosystems is far from complete or adequate.¹¹⁸

III. THE NATIONAL FOREST SKI AREA PERMIT ACT OF 1986 (NFSAPA)

A. *Background of NFSAPA*

Ski resorts desiring to use National Forest lands must apply to the Forest Service for a Special Use permit.¹¹⁹ Several factors impeding ski resort development led Congress to enact NFSAPA in 1986 to reform the permitting system.¹²⁰ From 1960 until 1975, major ski resorts were developed on federal lands at the rate of about one per year.¹²¹ However, that pace slowed dramatically, and during the late 1980s and early 1990s, only one new resort was built.¹²² In addition, the Forest

¹¹⁴ See *id.* at 275.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 276.

¹¹⁸ See FEDKIW, *supra* note 53, at 275.

¹¹⁹ See *supra* section II(b)(1). Permits are not required for individual recreational uses such as hiking, camping, picnicking, fishing, hunting, horse riding, or boating unless it is a group event. See c934 ALI-ABA 129, 134.

¹²⁰ See generally McKinzie, *supra* note 2.

¹²¹ See *id.* at 299.

¹²² See *id.* at 300. This resort was Silver Mountain in Idaho, which was built on the sight of an existing ski area in an economically depressed area. See *id.* In addition, prior to the 1970s, the process moved much quicker: in 1961, Alpine Meadows filed its application in the spring and was operating by the fall. See *id.*

Service required dual permits for resorts that were often cumbersome and confusing.¹²³ Prior to NFSAPA, resorts sought one permit for its infrastructure (lodges, lifts, and other buildings), with a thirty-year maximum term, and a second permit for ski trails and any other land uses, which had to be renewed annually.¹²⁴ The Forest Service recognized that the insecurity of these annual permits could have a negative effect on loan applications of resort developers.¹²⁵

Congress, in response to these issues, passed NFSAPA based on its findings that:

- (1) Commercial alpine and nordic skiing operations are among the fastest growing and most popular multiple uses of national forest lands;
- (2) Alpine and nordic skiing are healthful activities which promote physical well-being, contribute to the enrichment of the human spirit, and foster an appreciation of the outdoor environment and the aesthetic and other outdoor recreation values which constitute prime uses of national forest lands; and
- (3) Commercial alpine and nordic skiing operations occupy less than five one-hundredths of one percent of all national forest lands, but account for almost six percent of current overall national forest visitor use days.¹²⁶

The stated intent of NFSAPA was to unify and modernize the permitting process, reflect acreage and other physical requirements of ski resort developers in the permits, and provide a permit system more commensurate with long-term construction, financing, and operation needs.¹²⁷ NFSAPA, which passed unanimously in both the Senate and the House, did away with the dual permit system (which courts had upheld as legal),¹²⁸ and allowed for an expanded forty-year term on the permit with no limit on acreage.¹²⁹ Parties obtaining spe-

¹²³ See *id.* at 308.

¹²⁴ See *id.*

¹²⁵ See McKinzie, *supra* note 2, at 309.

¹²⁶ See *id.* at 310–11 (citation omitted).

¹²⁷ See ALI-ABA, *supra* note 118, at 133.

¹²⁸ See *Sierra Club v. Hickel*, 433 F.2d 24, 35 (9th Cir. 1970), *aff'd on other grounds sub nom.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Wilson v. Block*, 708 F.2d 735, 759 (D.C. Cir. 1983).

¹²⁹ See 16 U.S.C. § 497(b)(2), (3) (1988); McKinzie, *supra* note 2, at 311. The normal duration of a special use permit does not exceed thirty years, however ski area permits receive special consideration because of the magnitude of capital investments, provided

cial use permits pay a fee based on the "fair market value of the rights and privileges authorized as determined by appraisal or other sound business management principles."¹³⁰ All or part of the fee may be waived at the discretion of an authorized official when equitable and in the public's interest if the permit holder is a government agency, nonprofit corporation, or provides public benefits.¹³¹ In the case of ski areas, "the permit must contain a clause allowing the Forest Service to adjust and calculate future rental fees to reflect revisions to the existing system for determining fees or to comply with any new system for determining fees."¹³² The Forest Service may not, however, retroactively change the calculation of the fee and assess increased fees for prior years, as the permit is a kind of contract.¹³³ The Secretary of Agriculture may cancel permits for violations of its terms, nonpayment of fees, or a determination by the Secretary that the area is needed "for higher public purposes."¹³⁴ Revocations are rare, but do occur.¹³⁵

B. *The Failings of NFSAPA*

Congress designed NFSAPA to make it easier and more economically feasible for ski areas to obtain permits to operate on National Forest lands, and the ski industry saw the legislation as a victory.¹³⁶ In reality, however, the legislation provided no means for obtaining the new permits because neither NFSAPA nor the Forest Service's handbook limit the discretion of decision-makers to deny permits.¹³⁷

Prior to the enactment of NFSAPA, Forest Service officials were to approve all special use applications that conformed with the relevant forest plan.¹³⁸ "Conform" included both explicitly conforming uses and uses both compatible with other uses that did not conflict with the relevant forest plan.¹³⁹ The revised guidelines in the Forest

those investments are directly related to development and not ongoing operation and maintenance costs. See ALI-ABA, *supra* note 119, at 137-38.

¹³⁰ ALI-ABA, *supra* note 119, at 138 (citing 36 C.F.R. § 251.57(a)).

¹³¹ See *id.* (citing 36 C.F.R. § 251.57(b)).

¹³² *Id.* (citing 36 C.F.R. § 251.57(h)).

¹³³ See *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 602, 609-10 (1st Cir. 1991).

¹³⁴ 16 U.S.C. § 497(b)(5).

¹³⁵ See *McKinzie*, *supra* note 2, at 310 n.66. In 1992, Colorado's Berthoud Pass's permit was revoked for nonconformance with permit conditions despite twenty-eight remaining years on the permit term. See *id.* (citation omitted).

¹³⁶ See *id.* at 299.

¹³⁷ See *id.* at 299, 311.

¹³⁸ See *id.* at 313.

¹³⁹ See *id.*; see also Forest Service Manual § 2703 (1992).

Service Manual, however, no longer contain affirmative language.¹⁴⁰ Instead, in a subsection titled "Denial of Use," the Forest Service Manual directs Forest Service officers to deny proposals for uses that:

- (1) are inconsistent with Forest land and resource management plans;
- (2) are in conflict with other forest management objectives, or applicable Federal statutes or regulations; or
- (3) can reasonably be accommodated on non-Forest Service system lands¹⁴¹

The guidelines further state, "[d]o not authorize the use of National Forest System land just because it affords the applicant a lower cost and less restrictive location when compared with non-National Forest System lands."¹⁴²

Alternatively, the subsection titled "Authorization of Use" gives no substantive guidelines for what circumstances will lead to approval.¹⁴³ It simply directs Forest Service officials to:

[a]uthorize the use of National Forest System lands under proper statutory or regulatory authority with terms and conditions which protect the resource values and the interests of the Federal Government. Limit the use to the minimum area and period of time required to accommodate the use. Establish fees reflecting the fair market value prior to authorizing the use.¹⁴⁴

This section describes how, but not when, to approve, setting up a textual bias by only giving Forest Service officials specific reasons to deny, and not to approve, an application.¹⁴⁵ Although further provisions in the guidelines give a great deal of discretion to decision-makers, which could be used to offset this textual bias, the Forest Service has interpreted even those provisions not biased toward permit denial in favor of environmental caution.¹⁴⁶ Furthermore, one provision states that "special uses which furnish the greater service to the public or contribute to the economic well-being of communities shall receive

¹⁴⁰ See McKinzie, *supra* note 2, at 313.

¹⁴¹ Forest Service Manual § 2703.2 (1992).

¹⁴² *Id.*

¹⁴³ See McKinzie, *supra* note 2, at 314.

¹⁴⁴ Forest Service Manual § 2703.3 (1992).

¹⁴⁵ See McKinzie, *supra* note 2, at 314.

¹⁴⁶ See *id.*

preference over more restrictive uses."¹⁴⁷ Even though ski resorts clearly benefit their local economies, this provision does little to aid approval unless the ski area developers are competing with another proposed use for the same parcel of National Forest land.¹⁴⁸

Even if a proposal meets with Forest Service approval, there are still other roadblocks in its way.¹⁴⁹ The proposal must also undergo a review of the master plan, the operating plan, and the engineering design, and pass a site-specific study.¹⁵⁰ It must also comply with all relevant Federal Environmental regulations, such as NEPA.¹⁵¹

NEPA's Environmental Impact Statement (EIS)¹⁵² often presents the biggest hurdle to ski area development on National Forest land because an EIS is often costly and time consuming, and requires multiple drafts, public comment periods, and hearings leading to likely appeals.¹⁵³ The Forest Service has been criticized for basing its conclusion about an application on the EIS, rather than informing its multiple-use inquiry with the EIS.¹⁵⁴ Whether the Forest Service avoids balancing competing uses by hiding behind the rationales of the EIS and the Forest Service Manual's provisions (that textually bias decision-makers towards denial), courts will review the decision, but only as to whether the proper factors were considered.¹⁵⁵ For the above reasons, NFSAPA has not lived up to Congress's intent to make it easier and more economically feasible for ski areas to obtain permits to operate or to expand on National Forest lands.¹⁵⁶ Additionally, systematic challenges by environmentalists to ski resort development have further exacerbated this problem.

¹⁴⁷ Forest Service Manual § 2712.4 (1992).

¹⁴⁸ See *id.*

¹⁴⁹ See McKinzie, *supra* note 2, at 316.

¹⁵⁰ See *id.* (citation omitted).

¹⁵¹ See *id.*

¹⁵² See *supra* note 100 and accompanying text.

¹⁵³ See McKinzie, *supra* note 2, at 317.

¹⁵⁴ See *id.* at 317-18.

¹⁵⁵ See *id.* at 318; *Methow Valley Citizen's Council v. Regional Forester*, 833 F.2d 810, 814 (9th Cir. 1987), *rev'd on other ground sub nom.*, *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332 (1989). Previously, the grant or denial of a special use permit was considered wholly discretionary, since the Secretary is "authorized," but not required to issue permits. See ALI-ABA, *supra* note 119, at 135 (citation omitted).

¹⁵⁶ See McKinzie, *supra* note 2, at 299.

C. Recent Confrontations over Development Projects

1. Environmentalists' General Concerns About Ski Resorts

Ski resorts unquestionably have a very real impact on the environment.¹⁵⁷ Environmentalists generally take issue with resort impacts on air quality, water quality, and wildlife, as well as increased developmental sprawl.¹⁵⁸

a. Increased Visitors and Air Quality

An increased number of visitors means more cars and more use of snowmaking and grooming equipment, which generally run on diesel engines.¹⁵⁹ Each of these pollution sources contributes to smog and acid rain, thereby affecting air quality.¹⁶⁰ Some resorts operate snowmaking equipment with electricity, or a hybrid of electricity and diesel, using diesel only for peak times.¹⁶¹ In the state of Vermont, Killington Ski Resort's diesel generators have made that resort the single biggest stationary air polluter in the state.¹⁶²

On the other hand, the increased capacity for visitors to an area benefits the local economy and provides recreational opportunities for the general public.¹⁶³ Also, the impact on public land from skiing is highly concentrated, as only one-tenth of one percent of Forest Service Land is currently used for skiing.¹⁶⁴ By contrast, other forms of recreation, such as mountain biking, hiking, horseback riding, ATVs, and camping can create widespread damage by a fraction of the number of users.¹⁶⁵ Furthermore, although summer tourism in most mountain resort areas draws more visitors than winter tourism, it is ski resorts that often take the lead in initiating county-wide busing and addressing other transportation issues.¹⁶⁶

¹⁵⁷ See Dobbs, *supra* note 15, at 18.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ Interview with Susan Briggs, Former Assistant to the Mountain Manager of American Ski Company's Sugarbush Resort (Jan. 7, 2000).

¹⁶² See Dobbs, *supra* note 15, at 18.

¹⁶³ See McKinzie, *supra* note 2, at 323. In Colorado alone, the recreational job base is 4 billion dollars annually. See *id.* at 324.

¹⁶⁴ See Ken Castle, *Myth Busting*, SKI, Dec. 1999, at 142 [hereinafter Castle, *Myth Busting*].

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

b. *Water Quality and Wildlife*

Water quality and stream health are affected by withdrawals for snowmaking.¹⁶⁷ Also, runoff from real estate developments or seepage from wastewater can increase microbial, chemical, and thermal pollution in streams, lakes, and groundwater.¹⁶⁸ Poor water quality and stream health can devastate insect and fish populations.¹⁶⁹ Other forms of wildlife can also suffer from expansions of trail systems, real estate development, and year-round resort use, which can all lead to a loss of habitat.¹⁷⁰

However, there is evidence that many species co-exist with ski areas, and some species have even increased their numbers in areas with ski resorts.¹⁷¹ Deer and elk, for example, are not scared away by lifts and people, and the open slopes with nearby forests create a more diverse habitat in many areas.¹⁷² Also, ski resorts generally expend considerable efforts to protect fisheries, watersheds, and wetlands, as is discussed in section IV(b) (3) below.

c. *Developmental Sprawl*

Many environmentalists also worry about developmental sprawl, as condominiums, houses, and strip developments increase traffic and housing inflation, leading to economic, social, and infrastructure problems.¹⁷³ Beyond the confines of the resort, the increased number of visitors raise demands for housing, roads, water, schools, sewage treatment, and trash disposal.¹⁷⁴

These issues have recently led to major disputes concerning expansion at Loon Mountain in New Hampshire, Sugarbush in Vermont, and the I-70 corridor in Colorado where resort booms have displaced local workers and covered large amounts of previously open land.¹⁷⁵ However, even though ski areas in the past often were the driving force behind local economies, that is no longer true.¹⁷⁶ The current trend of population migration away from cities to rural areas

¹⁶⁷ See Dobbs, *supra* note 15, at 18.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See Castle, *Myth Busting*, *supra* note 164, at 142.

¹⁷² See *id.*

¹⁷³ See Dobbs, *supra* note 15, at 18.

¹⁷⁴ See McKinzie, *supra* note 2, at 323.

¹⁷⁵ See Dobbs, *supra* note 15, at 18.

¹⁷⁶ See Castle, *Myth Busting*, *supra* note 164, at 142.

has little to do with skiing, and much to do with overcrowding, crime, pollution, failing public school systems, and the ability to live anywhere and “telecommute.”¹⁷⁷

d. *Corporate Debt*

Finally, environmentalists are concerned by the large amounts of cash that the large ski corporations have borrowed to invest in improvements and expansion.¹⁷⁸ Environmentalists worry that a few bad snow years or a recession could leave these resorts in heavy debt, leading them to compromise the environment in pursuit of fulfilling the ultimate corporate duty: strengthening the bottom line.¹⁷⁹ The relatively new concept of ski resorts as consolidated and competitive corporations has turned environmentalists’ attention away from the declining timber and mining industries.¹⁸⁰ Many environmentalists see ski resorts as eco-villians, and they battle resorts of all sizes over virtually every development project.¹⁸¹

2. Recent Conflicts Between Environmentalists and Resort Developers

The first major battle between environmentalists and ski resort developers arose in the 1960s, when Walt Disney tried to build a ski area in the Mineral King Valley of the southern Sierras in California.¹⁸² Disney’s plan for a \$35 million resort was approved by the Forest Service in 1969.¹⁸³ The most controversial aspect of the proposal arose from Disney’s desire to build an access road and a high-voltage power line through the Sequoia National Park.¹⁸⁴ The Sierra Club, desiring to maintain the Mineral King Valley in its pristine state, sued for a permanent injunction restraining officials from issuing permits for the project.¹⁸⁵ Although the Supreme Court dismissed the Sierra Club’s case,¹⁸⁶ the battle raged on in the media and Disney ultimately

¹⁷⁷ See *id.*; Berry, *supra* note 18, at 11.

¹⁷⁸ See Dobbs, *supra* note 15, at 18.

¹⁷⁹ See *id.*

¹⁸⁰ See Ken Castle, *The End of Skiing as We Know It?*, SKI, Nov. 1999, at 118.

¹⁸¹ See *id.*

¹⁸² See Lito Tejada-Flores, *Green vs. Growth*, SKIING, Dec. 1999, at 150.

¹⁸³ See *Sierra Club v. Morton*, 405 U.S. 727, 729 (1972).

¹⁸⁴ See *id.* at 729–30.

¹⁸⁵ See *id.* at 730.

¹⁸⁶ See *id.* at 741 (holding that Sierra Club lacked standing to maintain the action).

abandoned the project, beginning an era of mistrust and bitter opposition between environmentalists and developers.¹⁸⁷

Environmentalists systematically attacked ski area projects after defeating Disney, often challenging a project's EIS under NEPA.¹⁸⁸ Ski resort proposals have dwindled in recent years, as only very well-funded and brave individuals can withstand the costly and time-consuming process, such as developer Dan McCarthy, who spent more than \$3 million on EIS's in an attempt to develop a resort in Colorado.¹⁸⁹ Also, the proposed Lake Catamount Resort in northwestern Colorado recently abandoned its plan to include a ski area in its development of a \$500 million, 3800 home and condominium resort.¹⁹⁰ The dramatically scaled-back resort will now feature only forty single-family homes and a lake-front clubhouse.¹⁹¹ As of 1994, the proposal had undergone eight years of environmental reviews and over 150 public hearings at a cost of more than \$10 million.¹⁹²

The most heated battle between environmentalists and developers was not over a new resort, but over the expansion of Colorado's Vail Resort. In 1998, eco-terrorists burned down the Two Elk day lodge to protest Vail's category III expansion.¹⁹³ Nine months later, The Coalition to Stop Vail Expansion used civil disobedience and confrontations leading to arrests to protest the fully-approved expansion project after years of administrative and legal challenges failed to halt the project.¹⁹⁴ July 1, 1999, marked the first day crews could begin work; the start date was postponed after the close of the ski season to

¹⁸⁷ See Tejada-Flores, *supra* note 182, at 150.

¹⁸⁸ See, e.g., *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332 (1989). The Supreme Court held that NEPA did not require a fully developed mitigation plan in the EIS, and did not impose a duty on an agency to consider a worst-case scenario in its analysis. See *id.* at 359. This decision has been criticized as weakening the power of NEPA to achieve "significant substantive goals for the nation." See Jennifer Bartlit, *An Adequate EIS Under NEPA: Deference to CEQ: Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy*, 31 NAT. RESOURCES J. 653, 653-54. Recently in Oregon, EPA attacked the proposed \$37 million Pelican Butte Ski Area's EIS as failing to fully detail potential environmental consequences, weakening the chances that the resort would be built. See Beth Quinn, *Facing Federal Snags, Oregon Ski Resort Proposal Takes Big Tumble*, THE OREGONIAN, Mar. 5, 1999, available in 1999 WL 16644258.

¹⁸⁹ See Perri Knize, *Not in My Backyard*, SPORTS ILLUSTRATED, Nov. 28, 1994, at 129.

¹⁹⁰ See John Accola, *Builder Gets First Permits for Lake Catamount Resort*, DENV. ROCKY MTN. NEWS, Aug. 7, 1999, available in 1999 WL 6656963.

¹⁹¹ See *id.*

¹⁹² See Knize, *supra* note 189, at 129.

¹⁹³ See Ken Castle, *Skiing and the Environment, Part I: The Battle Lines are Drawn*, SKI, Nov. 1999, at 118, 120 [hereinafter Castle, *Battle Lines*].

¹⁹⁴ See *id.*

accommodate elk migrations.¹⁹⁵ As the construction equipment moved up an unpaved trail to the expansion site, environmentalists blocked the way with a thirty-foot high tripod of logs from which a protestor precariously dangled by a rope.¹⁹⁶ The Forest Service brought in a cherry picker to get the protestor down, but it was met by a human roadblock, with one protestor crawling under and chaining himself to the vehicle.¹⁹⁷ As soon as he was cut free, another protestor chained himself to the vehicle in similar fashion.¹⁹⁸ The Forest Service backed off from that confrontation, and similar protests continued for several days, with police attempting a pre-dawn raid on July 6, on the protestors' encampment.¹⁹⁹ The raid resulted in a few arrests, but the protestors had advance warning and were waiting for the police.²⁰⁰ Later in the day, after further blockades and statements to the media, the protestors retreated.²⁰¹ The protests continued throughout the summer with "hit and run" tactics designed to slow the project's progress.²⁰²

The major issue surrounding Vail's category III expansion concerned the potential loss of lynx habitat.²⁰³ This issue had been litigated,²⁰⁴ and although not a single lynx had been seen in the area for twenty-five years, the plan contained numerous precautionary provisions to accommodate wildlife in the area.²⁰⁵ Environmentalists also raised concerns that Vail would not stop its expansion there, but would continue to link up an area that would create the potential to develop lucrative real estate.²⁰⁶ Much recent criticism of ski resort development has charged that resorts are shifting their focus to high-

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* These tripods are well known for their use to stop logging trucks in the Pacific Northwest. See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See Castle, *Battle Lines*, *supra* note 193, at 120.

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 120, 122.

²⁰¹ See *id.* at 122.

²⁰² See *id.* A woman, who calls herself "Moonshadow" positioned herself in a tree in such a way that it took Vail security twelve hours to remove her. She brought plenty of cellular telephone batteries and gave live reports to the media throughout the ordeal. See *id.*

²⁰³ See Castle, *Battle Lines*, *supra* note 193, at 122.

²⁰⁴ See Colorado Env'tl. Coalition v. Dombeck, 185 F.3d 1162, 1165 (10th Cir. 1999). The Tenth Circuit held that the NFMA did not require the Forest Service to compile hard lynx population data, and that the project satisfied the requirements of NEPA. See *id.* at 1165.

²⁰⁵ See Castle, *Battle Lines*, *supra* note 193, at 122.

²⁰⁶ See *id.*

impact real estate development around base areas.²⁰⁷ This criticism is unfounded, however, as resorts currently derive the overwhelming majority of their income from lift ticket sales, food and beverage sales, ski school lessons, and accommodations, with real estate making up only 5.9% of resort revenue during the 1997–1998 ski season.²⁰⁸

Environmentalists do not only attack large ski resorts.²⁰⁹ In Oregon, local residents raised money to buy Mt. Ashland Ski Area and make it public, with a condition of their permit mandating the replacement of the sewage system.²¹⁰ Although a new \$600,000 state-of-the-art facility was slated to be built, the Sierra Club claimed that the Forest Service failed to conduct a proper analysis of the project under NEPA.²¹¹ The Sierra Club waited until the old permit expired to file suit and sought an injunction to stop construction, which would prevent the area from opening and possibly even put them out of business.²¹² Although the court upheld the ski area's permit, demonstrations were immediately organized.²¹³

These battles illustrate environmentalists' views of skiing as an extractive industry, as opposed to a socially beneficial form of recreation.²¹⁴ According to one attorney regarding challenges to resort development, "what we've experienced thus far is just the beginning."²¹⁵

3. Environmental Mitigation Techniques Currently Employed by Ski Resorts

Ski resort management is well aware of the fact that the environment is the source of its business and of the practical appeal of environmental stewardship.²¹⁶ It also recognizes that one of the reasons people travel from cities to recreational areas is to get away from man's incursion on nature.²¹⁷ For many people, skiing is often the only contact they have with relatively wild lands, and it may help to promote an appreciation of nature and wildlife values, leading to a

²⁰⁷ See *id.* at 126, 128.

²⁰⁸ See *id.*

²⁰⁹ See *id.* at 124.

²¹⁰ See Castle, *Battle Lines*, *supra* note 193, at 124.

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See *id.* at 128.

²¹⁵ See Castle, *Battle Lines*, *supra* note 193, at 128 (citation omitted).

²¹⁶ See Tina Gianquitto, *Ski Industry Puts Green Schemes into Practice*, STN, Jan. 1993, at

²¹⁷ See *id.* (citation omitted).

heightened awareness of environmental issues among the general public.²¹⁸

Even though ski areas occupy less than one-tenth of one percent of all National Forests (roughly equal to the land cleared for power line easements), the imprint of a ski resort on a mountain is very large.²¹⁹ Ski resorts employ a number of techniques to combat and minimize environmental degradation, such as moving building equipment over snow or by helicopter instead of cutting new roads.²²⁰ Also, computer modeling for trail design, slope reseeding and tree planting, and walls of indigenous rock all serve to combat erosion and runoff that pollute streams.²²¹

Most resorts also help protect fisheries and public water supplies through active watershed management.²²² Killington Resort in Vermont uses extensive wastewater treatment programs in three of its base lodges, saving 30,000 gallons of fresh water per day by recycling wastewater back into the sanitary facilities.²²³ Resorts with snowmaking reservoirs often use them for irrigation in the summer, which can save trees, plants, and wildlife during drought years.²²⁴ Also, by maintaining snowpack for as long as possible, ski resorts help local water agencies replenish reservoir and groundwater supplies through a gradual runoff.²²⁵

Ski resort management is also beginning to be more forward thinking, viable stewards of the land that they occupy.²²⁶ Three years ago, Aspen Resort created the position of Environmental Affairs Director, the first administrative position of its kind in the industry.²²⁷ Aspen hired Chris Lane, a staunch member of the Sierra Club and an active critic of the ski industry to fill the position.²²⁸ In his brief tenure, Lane has stopped the resort from serving the struggling swordfish in any of its restaurants, and has required the use of local (and chemical-free) beef to combat the bulldozing of open grazing

²¹⁸ See McKinzie, *supra* note 2, at 325.

²¹⁹ See Gianquitto, *supra* note 216, at 44.

²²⁰ See Castle, *Myth Busting*, *supra* note 164, at 142.

²²¹ See *id.*

²²² See *id.*

²²³ See Gianquitto, *supra* note 216, at 44.

²²⁴ See Castle, *Myth Busting*, *supra* note 164, at 142.

²²⁵ See *id.*

²²⁶ See Castle, *Mitigation Over Litigation*, SKI, Dec. 1999, at 134 [hereinafter Castle, *Mitigation*].

²²⁷ See *id.*

²²⁸ See *id.*

areas for homes and condos.²²⁹ He has converted the Snowmass Lodge into eco-friendly high-occupancy timeshare units while incorporating 90 percent of the building materials from the old lodge in the new units.²³⁰ He has also overseen the building of the first ever wind-powered lift and created an environmental fund, to which employees donate one dollar per week, which is matched by the corporation and the Aspen Foundation.²³¹ The Aspen Wilderness Workshop has praised Aspen's actions not as a "cynical greenwashing ploy," but rather a strong indication of an evolving corporation.²³²

Similarly, Keystone Resort in Colorado is one of many ski resorts that has made concerted efforts to act as environmental steward for the lands the resort occupies.²³³ The resort recently won the Forest Service's Partnership Award for Environmental Sensitivity for a recent expansion project.²³⁴ In completing the project, the resort moved equipment by helicopter to avoid making service roads, and built special bridges over wetlands and drainages to prevent skiers from disturbing stream flow.²³⁵ Keystone's expansion also included cutting fewer trees than normal, leaving flora and planting new trees to promote eco-diversity, and adding fencing to prevent erosion.²³⁶ The resort also built on-mountain sewer systems, wells, and water treatment facilities.²³⁷ Furthermore, developers limited construction to ten hours per day while not allowing workers to bring dogs or stereos so wildlife in the area would not be disturbed.²³⁸

Resorts are also beginning to recognize the importance of communication with stakeholders before submitting plans to public agencies for review.²³⁹ Stowe Resort in Vermont recently went to great lengths to involve every level of the community in creating a regional master plan.²⁴⁰ The resort laid out the water and air quality issues and asked for help in creating a vision, which led to scrapping plans for a new lodge on public land in favor of upgrading and conserving an

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See Castle, *Mitigation*, *supra* note 226, at 134.

²³² See *id.*

²³³ See *id.*

²³⁴ See Gianquitto, *supra* note 216, at 44.

²³⁵ See McKinzie, *supra* note 2, at 322-23.

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See Castle, *Mitigation*, *supra* note 226, at 134.

²⁴⁰ See *id.*

historic existing lodge.²⁴¹ Stowe also sought input from the Green Mountain Club (a conservation club) to help protect the Long Trail in the resort's development of new ski trails, lifts, and other structures.²⁴² Furthermore, Stowe gave up some of its expansion plans in the spirit of collaboration.²⁴³

Similarly, Stratton Resort collaborated with Vermont state biologists to protect a black bear habitat.²⁴⁴ Likewise, the American Skiing Company entered into a land swap with the state of Vermont that preserved 2500 acres of prime bear habitat that Killington Resort, the state, and environmentalists had been bitterly fighting over for nearly a decade.²⁴⁵

Finally, the National Ski Area Association, at its spring 1999 Sustainable Summits Conference, committed to drafting an environmental code of ethics for the ski industry.²⁴⁶ These efforts would likely be matched by other resorts and go much further, however, if there were some tangible incentives offered by the Forest Service to surpass required environmental mandates.

IV. EPA'S PROJECT XL

A. *The Impetus for Project XL*

Much of the environmental protection legislation in the United States is in the form of "command and control."²⁴⁷ The command and control system imposes rules, enforceable limits, conditions, and affirmative requirements on various industries based on either a health-based standard or a technology-based standard.²⁴⁸ In recent years, however, EPA has been sharply criticized for the shortcomings of this approach, which can be difficult to implement, costly to enforce, may not achieve optimum results, and may force industry "to spend disproportionate amounts on insignificant risks to human

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *id.* The Long Trail is a hiking trail that runs the length of Vermont from the Massachusetts border to the Canadian border. See *id.*

²⁴⁴ See *id.*

²⁴⁵ See Dobbs, *supra* note 15, at 18.

²⁴⁶ See Tejada-Flores, *supra* note 182, at 156.

²⁴⁷ See Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 103 (1998).

²⁴⁸ See *id.* at 104, 113-14.

health and the environment."²⁴⁹ Since the 1970s, these command and control laws have improved public health and environmental quality, but the regulations often have the unintended results of causing greater costs for smaller returns, and of discouraging technology that is cleaner and cheaper.²⁵⁰ This single medium, "end-of-the-pipe" approach to environmental protection not only fails to encourage innovation, but often requires multiple, costly, and complex permits, without looking at the environment as a whole.²⁵¹

In 1995, in response to the shortcomings of the command and control approach, President Clinton and Vice-President Gore charged the federal government with finding improved environmental management techniques.²⁵² EPA responded with Project XL, which stands for eXcellence and Leadership.²⁵³ Through Project XL, EPA offers to cooperate with facilities, sectors, states, and communities—"[i]f you have an idea that offers better results than what would be achieved under current requirements, then we will work with you and other interested parties to put those ideas to the test."²⁵⁴

Three principles of Project XL directly address the criticisms of the command and control regulatory system: (1) focusing on environmental outcomes and innovative ways of achieving them; (2) encouraging innovation by considering all proposals with some probability of success for the environment; and (3) providing market incentives that allow cost savings by escaping from expensive and burdensome regulations through the implementation of more and efficient compliance strategies that achieve acceptable pollution levels.²⁵⁵ Through this approach, EPA hopes to shift to more of a pollution prevention system and less of a pollution control system.²⁵⁶

Project XL addresses command and control shortcomings through a "multi-media" approach to environmental protection, rather than treating air, land, water, and other resources as unrelated

²⁴⁹ See *id.* at 144; Rachael Salcido, Note, *Project XL and the South Coast Air Quality Management Proposal*, 22 ENVIRONS ENVTL. L. AND POL'Y J. 3, 5 (1998).

²⁵⁰ See PROJECT XL: FROM PILOT TO PRACTICE 2 (Envtl. Protection Agency Office of Re-invention ed. 1999).

²⁵¹ See Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 ECOLOGY L.Q. 1, 8 (1998).

²⁵² See PROJECT XL: FROM PILOT TO PRACTICE, *supra* note 250, at 1.

²⁵³ See 64 Fed. Reg. 16,450 (1999).

²⁵⁴ PROJECT XL: FROM PILOT TO PRACTICE, *supra* note 250, at 1.

²⁵⁵ See Thomas E. Caballero, *Project XL: Making it Legal, Making it Work*, 17 STAN. ENVTL. L.J. 399, 402-03 (1998).

²⁵⁶ See PROJECT XL: FROM PILOT TO PRACTICE, *supra* note 250, at 2.

systems.²⁵⁷ Furthermore, Project XL allows communities and corporations to customize and innovate based on their unique facilities, as opposed to requiring a one-size-fits-all approach.²⁵⁸ The Clinton administration has called Project XL a critical component in the administration's attempt to re-invent environmental regulation.²⁵⁹

B. *Elements of Project XL and Their Benefits*

The Federal Register lists three elements that are key to Project XL: (1) superior environmental performance; (2) meaningful stakeholder involvement; and (3) flexibility in EPA regulations, policies, and procedures.²⁶⁰ EPA has developed a two-part method to determine whether an XL project provides better environmental results than if the project had not been implemented.²⁶¹ First, EPA develops a quantitative baseline estimate of what would happen to the environment without the project, and then EPA compares the anticipated results under the project with that baseline.²⁶² Second, EPA considers quantitative and qualitative measures to determine if the baseline will be exceeded by superior environmental performance under the project.²⁶³

The stakeholder involvement aspect of Project XL is a product of the Common Sense Initiative launched in 1994 to find cleaner, cheaper, and smarter sector-based approaches to protecting human health and the environment, and has since become a primary component of EPA's regulatory re-invention efforts.²⁶⁴ In an attempt to foster trust among all stakeholders as well as EPA, EPA currently embraces the value of opening up the decision-making process, especially to those most affected by its decisions.²⁶⁵ Furthermore, even

²⁵⁷ See Mank, *supra* note 251, at 3.

²⁵⁸ See *id.* at 4.

²⁵⁹ See Caballero, *supra* note 255, at 401.

²⁶⁰ See 64 Fed. Reg. 16,450 (1999).

²⁶¹ See *Project XL: Frequently Asked Questions* (visited Feb. 23, 2000) <<http://www.epa.gov/ooaujeag/projectxl/faqs.htm>> [hereinafter Project XL: FAQ].

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See EPA, *Project XL: 1999 Comprehensive Report*, 65 n.13 (Env'tl. Protection Agency Office of the Administrator ed. 1999).

²⁶⁵ See *id.* at 64. There are three categories of stakeholder involvement: (1) direct participants, who are involved at the day-to-day level, and who strongly influence the details of a project and EPA's ultimate decision to approve the project; (2) commentators, who have interest, but participate through written or oral communications to EPA; and (3) the general public, including local citizens and national interest groups, who are involved by hav-

though Project XL is a federal program, EPA will not approve a project without the approval of State and tribal regulatory agencies as full partners, and EPA is more amenable to projects developed together with local government, environmental groups, and citizens organizations.²⁶⁶ However, EPA has found stakeholder involvement to be one of the most challenging features of Project XL.²⁶⁷ Critics call for EPA to better define the roles and responsibilities of project sponsors, stakeholders, and EPA, and to identify stakeholders' needs early in the process to help protect against stakeholders feeling disconnected later in the process.²⁶⁸

The third key factor of Project XL, regulatory flexibility, is simply a means of allowing a project to go forward and achieve its goals.²⁶⁹ EPA offers flexibility through site-specific rules, alternative permits, and waivers on a case-by-case basis.²⁷⁰ In addition, EPA offers flexibility in its policies and procedures when resultant cost savings are re-invested directly or indirectly to produce superior environmental results.²⁷¹

C. Implementation and Results

Those entities interested in participating in Project XL must first meet a "good actor" requirement, in which EPA seeks to choose leaders of a given industry, while closely scrutinizing facilities subject to ongoing enforcement actions or that have a history of environmental violations.²⁷² A project proposal "must also develop alternative environmental management strategies that:" (1) produce superior environmental performance; (2) reduce costs and paperwork; (3) achieve innovative pollution prevention; (4) are supported by stakeholders; (5) produce lessons or data transferable to other facilities; (6) are feasible; (7) establish accountability through monitoring, reporting, and evaluations; and (8) avoid shifting risk burdens, such as worker safety or environmental justice.²⁷³ Projects showing promising innovations

ing full access to project designs and environmental results. See Project XL: FAQ, *supra* note 261.

²⁶⁶ See Project XL: FAQ, *supra* note 261.

²⁶⁷ See PROJECT XL: FROM PILOT TO PRACTICE, *supra* note 250, at 10.

²⁶⁸ See *id.*

²⁶⁹ See Project XL: FAQ, *supra* note 261.

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See Salcido, *supra* note 249, at 12.

²⁷³ See Project XL: FAQ, *supra* note 261. While Project XL covers individual facilities, sectors, or government agencies, Project XLC covers community applicants, which are

are evaluated by EPA and a broad array of stakeholders to determine whether the results warrant adjusting EPA's rules, regulations, policies, or guidance on a particular matter.²⁷⁴

As of August 1999, fourteen projects had been fully implemented under Project XL, thirty-one ideas were in development or negotiation, and a number of others were in discussion.²⁷⁵ According to EPA, all implemented projects have shown "noteworthy" benefits thus far to the environment, project sponsors, and stakeholders, and have exceeded as a whole their commitments to environmental goals.²⁷⁶ EPA finds the greatest value of Project XL in its ability to reveal improvements that can be made to the overall system of environmental protection, and EPA has already incorporated flexibility and some successful innovations in its regulations, permits, and other core functions.²⁷⁷

One major component of change emerging from the program is permit reform.²⁷⁸ Permits, the main way statutes and regulations are translated into facility-wide ordinances, have been one of the most successful methods of protecting the environment for the last thirty years.²⁷⁹ Through Project XL, EPA is attempting to move away from focusing on single factors, and to move toward performance-based permits that shift the focus to measurement and assurance of performance, while providing flexibility if the regulated entity meets the performance standards.²⁸⁰ EPA's theory is that this system will be more beneficial to the public and to the environment, and less prescriptive to the facility.²⁸¹

Another vital component of change resulting from Project XL is a growing recognition of the benefits of environmental stewardship.²⁸²

local government, regional area consortia or governments, neighborhood and community organizations, empowerment zones and enterprise communities, community development corporations, and other local entities. Under Project XLC, an applicant must also develop strategies that present economic opportunity, and incorporate community planning with full support of state, local, and tribal governments. *See id.*

²⁷⁴ *See* Project XL: FAQ, *supra* note 261.

²⁷⁵ *See* PROJECT XL: FROM PILOT TO PRACTICE, *supra* note 250, at 3.

²⁷⁶ *See id.*

²⁷⁷ *See id.* EPA also says that Project XL is changing its internal culture. *See id.*

²⁷⁸ *See* EPA, *Project XL: 1999 Comprehensive Report*, *supra* note 264, at 48.

²⁷⁹ *See id.* Permits usually contain some combination of limits on emissions and effluents, rules for monitoring, reporting, and record keeping, rules for treatment and control technology, management practices, and pollution prevention requirements. *See id.*

²⁸⁰ *See id.*

²⁸¹ *See id.*

²⁸² *See id.* at 59.

“Environmental stewardship is a way of identifying and pursuing good business strategies consistent with environmental protection while reducing impacts and increasing economic efficiency. . . . In effect, stewardship allows facilities to derive economic value from environmental excellence.”²⁸³ Facilities can demonstrate their commitment to environmental stewardship through effective environmental management systems, pollution prevention tools and techniques, and recycling.²⁸⁴ Environmental management systems can also have the added advantage of giving consideration to matters not covered by regulations.²⁸⁵ The benefits of environmental stewardship seem to support recent environmental policy studies, which conclude that our system of environmental protection should “promote high levels of environmental stewardship and continuous improvement in environmental performance.”²⁸⁶

D. *Reactions to Project XL*

Although feedback generally has been positive, Project XL has received its fair share of criticism.²⁸⁷ Some environmental groups find it, at best, suspicious, and, at worst, a sell-out to polluters.²⁸⁸ Some have even said that XL stands for “eXtra Leniency.”²⁸⁹ Critics point to a weakening of monitoring and reporting requirements and a shift away from uniform national standards as detrimental to environmental protection.²⁹⁰ A shift to more individual, or site-specific agreements between entities and permitting agencies could create the risk of weakening the public’s ability to challenge industry, thereby producing inconsistencies, and opening the door for “sweetheart” deals.²⁹¹ Another source of controversy concerns enforcement of project terms.²⁹² EPA itself anticipates that, even though overall performance is expected to be superior, certain practices may lead to non-compliance with certain regulations, such as the Clean Air Act.²⁹³

²⁸³ *Project XL: 1999 Comprehensive Report*, *supra* note 264, at 59.

²⁸⁴ *See id.*

²⁸⁵ *See PROJECT XL: FROM PILOT TO PRACTICE*, *supra* note 250, at 10.

²⁸⁶ *Project XL: 1999 Comprehensive Report*, *supra* note 264, at 59.

²⁸⁷ *See Caballero*, *supra* note 255, at 451.

²⁸⁸ *See id.*

²⁸⁹ *See id.*

²⁹⁰ *See Mank*, *supra* note 251, at 4–5.

²⁹¹ *See id.* at 88.

²⁹² *See Salcido*, *supra* note 249, at 12.

²⁹³ *See id.* at 13.

EPA, however, has stated that participants are not fully immunized from enforcement.²⁹⁴ The greater flexibility given to participants implies that they will be held to a higher standard of accountability for demonstrating negotiated results.²⁹⁵ EPA is willing to accept noncompliance in certain areas, as voluntary commitments are not legally enforceable, but violations of these commitments can lead the EPA to cancel a project and require compliance under applicable regulations.²⁹⁶ Others argue, however, that because Congress did not enact Project XL, EPA lacks authority to offer flexibility-granting variances and exemptions in the first place.²⁹⁷ Lastly, although businesses generally commend Project XL, some see it as too bureaucratized and rigid.²⁹⁸

Despite these criticisms, EPA sees Project XL as a positive step in the search for improved environmental protection and management.²⁹⁹ The money saved by corporations in avoiding production delays and design reviews, through recycling, and by eliminating repetitive permit reviews for changes or additions to operations can be applied to better technology and innovative process changes, leading to a better overall system of environmental protection.³⁰⁰ The cost savings, consolidated permitting, and reduced bookkeeping also benefit businesses by improving their competitiveness.³⁰¹ Businesses further benefit from industry recognition, improved relationships with their community and regulators, and better use of employee expertise.³⁰² Communities benefit from Project XL by increasing understanding between facilities and the citizens that they affect.³⁰³ Furthermore, meaningful stakeholder involvement and open reporting by project participants will help promote trust between EPA, industry, environmentalists, and the general public, leading to a more cooperative and positive atmosphere for addressing future environmental concerns.³⁰⁴

²⁹⁴ See Project XL: FAQ, *supra* note 261.

²⁹⁵ See *id.*

²⁹⁶ See Salcido, *supra* note 249, at 13.

²⁹⁷ See *id.* at 13, 17. For a more detailed description of Project XL's legal status, see generally Mank, *supra* note 251; Benjamin Starbuck Wechsler, *Rethinking Reinvention: A Case Study of Project XL*, 5 ENVTL. L. 255 (1998).

²⁹⁸ See Caballero, *supra* note 255, at 452.

²⁹⁹ See EPA, *Project XL: 1999 Comprehensive Report*, *supra* note 264, at 7.

³⁰⁰ See *id.*

³⁰¹ See PROJECT XL: FROM PILOT TO PRACTICE, *supra* note 250, at 6.

³⁰² See *id.*

³⁰³ See *id.* at 7.

³⁰⁴ See *id.*

V. APPLYING THE RATIONALE AND POLICIES OF PROJECT XL TO SKI AREA USE OF NATIONAL FOREST LAND

Environmental challenges to ski resort development are an important safeguard to our National Forests. In some cases, intervention may be the only way to stop what would be a truly detrimental project, such as Disney's arrogant attempt to build the Mineral King Resort.³⁰⁵ When, however, environmentalists attack small, community-run and community-beneficial ski areas like Oregon's Mt. Ashland, which has made concerted efforts to minimize environmental impact, their attacks demonstrate "a total lack of proportionality."³⁰⁶ Even worse are eco-terrorist attacks such as those on Vail, which burned down one of the Resort's lodges and greatly impeded the progress of a fully approved and conclusively litigated project.³⁰⁷ This sort of behavior will only serve to further polarize environmentalists, the Forest Service, and Ski Resort operators.

Current demographics indicate that the demand for ski resorts is expected to increase.³⁰⁸ Also, Congress, in passing NFSAPA, has recognized the popularity of the sport, its healthful and life-enriching qualities, and the low proportion of land used to the number of visitor days on National Forests.³⁰⁹ At the same time, however, environmental challenges are also expected to increase, as ski resorts have replaced logging and mining as the eco-villain of National Forests in the minds of many environmentalists.³¹⁰

Forest Service responses, such as the WRNF's proposed Alternative D, do nothing to bring the two sides together and do not adequately address future needs.³¹¹ Alternative D resembles the command and control approach to resource management by setting strict limits on recreational use and by cutting off future ski resort expansion altogether.³¹² Recreational demand for use of the WRNF continues to grow, and Colorado lawmakers recognize the potential economic impact on the area whose motto is "land of many uses."³¹³

³⁰⁵ See Tejada-Flores, *supra* note 182, at 150.

³⁰⁶ See Castle, *Battle Lines*, *supra* note 193, at 124 (citing Steve Odell, specialist in resource law and former member of the Justice Department).

³⁰⁷ See *id.* at 120.

³⁰⁸ See Berry, *supra* note 18, at 11.

³⁰⁹ See McKinzie, *supra* note 2, at 310-11.

³¹⁰ See Castle, *Battle Lines*, *supra* note 193, at 118, 124.

³¹¹ See Frazier, *supra* note 4, at A7.

³¹² See Romano, *supra* note 3, at A5.

³¹³ See *id.*

Therefore, it would be prudent for the Forest Service to begin shifting to a management style that incorporates greater stakeholder involvement and flexibility similar to the goals and practices to EPA's Project XL in the Forest Service's self-proclaimed evolution towards a more sophisticated and eco-system based approach.³¹⁴

The three key elements of EPA's Project XL (stakeholder involvement, superior environmental performance, and regulatory flexibility) would not only improve the relationships between all parties concerned with ski resort use of National Forest lands, but would also lead to improved environmental protection of those resources.³¹⁵ As Stowe Resort in Vermont has learned, stakeholder involvement in the earliest stages of a project can create a vision shared by the community that embraces both a resort's desires to expand and various conservation efforts.³¹⁶ Similarly, American Ski Company's land swap with the state of Vermont at Killington Resort, which preserved 2500 acres of prime bear habitat as a result of stakeholder involvement, may have avoided nearly a decade of confrontation if stakeholders had been involved from the outset.³¹⁷ Like EPA's Project XL, the Forest Service should incorporate in its planning and decision-making process those stakeholders who will be most affected by its decisions.³¹⁸ Ski area projects and Forest Service plans like Alternative D would benefit greatly from the insights and experience of ski resort management, local environmental interest groups, and local community leaders by incorporating them at all levels of the planning and decision-making process, not just at preliminary public comment hearings.

Stakeholder involvement can also bring innovative ideas to a development or expansion project, thus furthering the goals of Project XL's key element of superior environmental protection.³¹⁹ Ski resorts already follow many practices that mitigate environmental damage, but these practices would likely be augmented by ideas from other sources, as Aspen Resort has learned from hiring Chris Lane as the ski industry's first Environmental Affairs Director.³²⁰ Lane has instigated environmental policies such as protecting swordfish populations and

³¹⁴ See FEDKIW, *supra* note 53, at 275-76.

³¹⁵ See 64 Fed. Reg. 16,450 (1999).

³¹⁶ See Castle, *Mitigation*, *supra* note 226, at 134.

³¹⁷ See Dobbs, *supra* note 15, at 18.

³¹⁸ See EPA, *Project XL: 1999 Comprehensive Report*, *supra* note 264, at 64.

³¹⁹ See 64 Fed. Reg. 16,450 (1999).

³²⁰ See *supra* section IV(B)(3); Castle, *Mitigation*, *supra* note 226, at 134.

local open land, building a wind-powered lift, and creating an employee-funded and corporation-matched environmental fund, all of which have been praised by the Aspen Wilderness Workshop.³²¹

There would also be more reason for Resorts to undertake such practices resulting in superior environmental performance if there were more of an incentive to do so. As Project XL recognizes, regulatory flexibility and superior environmental performance are closely tied together.³²² Regulatory flexibility provides incentives that lead to superior environmental performance, and superior environmental performance can lead to even greater flexibility, which benefits a facility through cost savings and fewer monitoring requirements.³²³

Many resorts already recognize the values of environmental stewardship and of protection of the resources that are the bases of the ski industry.³²⁴ Resorts such as Keystone that go to considerable effort and expense to protect wetlands should be rewarded not only with awards such as the Forest Service's Partnership Award, but also with a greater ability to receive permits for future expansion projects.³²⁵ Also, environmentally conscious resorts should not be forbidden from future expansion because of the damage done mainly by other forms of recreation, such as ATV's, mountain bikes, snowmobilers, and motorcyclists, the likely result under the WRNF's proposed Alternative D.³²⁶ Ski resorts are in a far better position to control damage by recreation users, and therefore they should not be subject to the same restrictions imposed on recreational uses that disperse users over a far wider range of territory with little, if any, supervision.³²⁷ Unlike recreational users who carve illegal trails through National Forests, ski resorts use computer modeling and reseeded in the designing and creation of trail systems to prevent erosion and runoff pollution.³²⁸

Project XL's reformed permitting programs can also be instructive to the Forest Service. In passing NFSAPA, Congress recognized the need to reform the cumbersome, confusing, and financially insecure permitting process for ski resorts.³²⁹ However, the new system did

³²¹ See Castle, *Mitigation*, *supra* note 226, at 134.

³²² See Project XL: FAQ, *supra* note 261.

³²³ See *id.*

³²⁴ See Gianquitto, *supra* note 216, at 44.

³²⁵ See McKinzie, *supra* note 2, at 322-23.

³²⁶ See Frazier, *supra* note 4, at A7.

³²⁷ See *supra* section I(B)(2).

³²⁸ See Frazier, *supra* note 4, at A7; Castle, *Myth Busting*, *supra* note 164, at 142.

³²⁹ See McKinzie, *supra* note 2, at 308-09.

not lead to a more streamlined permit process.³³⁰ Rather, it led to the even more difficult task of proposing a ski resort development project in a system with a textual bias against granting applications written into the implementing provisions of the Forest Service Manual.³³¹ Permits under Project XL, however, focus more on measurement and assurance of performance, with flexibility for facilities meeting or exceeding performance standards.³³² This is not to say that ski resorts with strong environmental records should be allowed to forego the permitting process for development projects. However, sound environmental practices and excellent environmental performance should carry some weight for existing resort expansion proposals, and a sound environmental plan with strong assurances of compliance should factor into the decision of whether to grant a new resort a permit.³³³ This small amount of flexibility on the part of the Forest Service would go a long way in carrying out Congress's intentions in passing NFSAPA and in following its own long-standing tradition of embracing National Forest uses that provide "the greatest good for the greatest number for the longest time."³³⁴ Furthermore, a certain amount of permit flexibility for resorts demonstrating strong environmental performance could save those resorts millions of dollars in redundant EIS's, litigation, and other costly impediments, which could be reinvested in better technology and environmental process changes, as has been demonstrated by Project XL.³³⁵

Although both the Forest Service and Project XL have been criticized as being vulnerable to leniency and "sweetheart deals" for certain businesses,³³⁶ stakeholder involvement at every step of the process would serve to mitigate these dangers by adding environmental "watchdogs" to the decision-making process. Similarly, the criticism that the flexibility Project XL provides for facilities weakens the public's ability to challenge industry is unfounded in the context of ski resorts.³³⁷ Not only would stakeholder involvement again serve to abate this problem by assuring project results from the outset, but the

³³⁰ See *id.* at 314.

³³¹ See *id.*; see also *supra* section III(A).

³³² See EPA, *Project XL: 1999 Comprehensive Report*, *supra* note 264, at 48.

³³³ See *id.*

³³⁴ See ALI-ABA, *supra* note 118, at 133.

³³⁵ See *Project XL: Comprehensive Report*, *supra* note 264, at 7.

³³⁶ See *Sierra Club v. Morton*, 405 U.S. 727, 748 (1972); Mank, *supra* note 251, at 88.

³³⁷ See Mank, *supra* note 251, at 88.

Forest Service would also retain the ability to cancel a ski area's permit for noncompliance with its terms, as has been done in the past.³³⁸

Finally, EPA has stated that the greatest value of Project XL comes from its ability to reveal improvements that can be made to the overall system of environmental protection.³³⁹ Clearly, innovative and successful ideas about managing National Forest resources for recreational use are greatly needed, as is evident by the WRNF's proposed Alternative D. Recreational users and government officials have made it clear that they will not tolerate drastic reductions in available recreational areas in the WRNF.³⁴⁰ Therefore, better techniques to mitigate damage done by recreational users is a necessity for the survival of the WRNF; many of the mitigation techniques currently in use by ski resorts could greatly reduce the damage done by other recreational users of National Forests.³⁴¹ The financial incentives under a management system like Project XL, as well as a ski corporation's simple desire to stay in business, will likely lead it to find new and innovative ways to protect the resources of National Forests more quickly than the well-intentioned, but under-funded, Forest Service.

CONCLUSION

The sport of skiing is widely embraced in the United States, and for many communities, has become an integral part of the economy. Also, Congress has recognized the popularity and life-enriching qualities of skiing. However, there are very real costs to the environment of areas occupied by and surrounding a ski resort, and efforts must be taken to ensure the preservation of these areas for their continued vitality and for the enjoyment of future generations. Current efforts to manage National Forest lands that host ski areas do not strike an adequate balance between the competing interests of conservationists, recreational users, and the Forest Service's mandate of Multiple Use and Sustained Yield.

Environmental protection reinvention efforts such as EPA's Project XL could be instructive to the Forest Service in its quest to shift toward a more holistic and eco-systemic approach to resource management. National Forest resources will be better protected by incorporating ideas from as many different stakeholders as possible, and by

³³⁸ See McKinzie, *supra* note 2, at 310 n.60.

³³⁹ See Project XL: From Pilot to Practice, *supra* note 250, at 3.

³⁴⁰ See Romano, *supra* note 3, at A5.

³⁴¹ See *supra* section IV(B)(3).

providing ski areas with incentives to develop new and innovative environmental policies. These incentives, in the forms of regulatory flexibility and future expansion ability, will encourage environmental stewardship by ski resort operators, who can be an extremely useful partner to the Forest Service in its task of protecting National Forest resources from degradation by various forms of recreational use.