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WILDERNESS LAND PRESERVATION: THE UNEASY RECONCILIATION OF MULTIPLE AND SINGLE USE LAND MANAGEMENT POLICIES

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I. INTRODUCTION

The preservation of wilderness lands[1] is an issue of particular interest to the United States. The symbolic significance that wilderness carries for Americans has changed through the years in a way which reflects the social and technological achievements of the country.[2] To early Americans, the wilderness stood as an obstacle to be overcome against which man pitted his meager strength.[3] The history of the United States chronicles the expansion of the nation through the wild reaches of the continent. Our growth went hand in hand with the taming of the wilderness. Today, wilderness continues as part of our culture, but now less as a barrier raised in spite of us than as a monument raised because of us. Where wilderness was once to be conquered, it is now zealously guarded.

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[1] For the purposes of this article, "wilderness lands" are those regions within the United States that are roadless and undeveloped to an extent so as to retain a natural and primitive character. One of the concerns of this article will be to determine what degree of naturalness has been required before such an area has been deemed suitable for designation for preservation as part of the National Wilderness Preservation System.

[2] For extensive discussion of the various meanings, symbolic and literal, which have attached to the term wilderness, *see* Robinson, *Wilderness: The Last Frontier*, 59 MINN. L. REV. 1 (1974) [hereinafter cited as Robinson]; McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 ORE. L. REV. 288 (1966) [hereinafter cited as McCloskey, *The Wilderness Act*].

[3] Robinson, *supra* note 2, at 3.

Whether valued as part of our cultural heritage,[4] or as a last stronghold of a simpler way of life—a "symbol of what modern civilization has lost"[5]—wilderness lands are now protected from the very forces which formerly were called upon to bring them under control. But while there is general consensus that wilderness should be preserved,[6] debate continues on how to bring that preservation into effect.

We are now in the midst of a two or three year period that may forever shape our wilderness resource. The federal land holdings which today comprise the source of the nation's wilderness preserves are those administered by the Forest Service,[7] within the Department of Agriculture, and the National Park Service,[8] Fish and Wildlife Service,[9] and Bureau of Land Management,[10] all under the jurisdiction of the Interior Department. The final decision as to whether a given area will be preserved as wilderness is a

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[4] Note, *Wilderness — Retrograde Progress*, 47 U. Mo. Kan. City L. Rev. 55, 57 (1978).

[5] Robinson, *supra* note 2, at 2.

[6] Consensus that some wilderness should be preserved has been evidenced by the enactment of the National Wilderness Preservation System Act, 16 U.S.C. §§ 1131-1136 (1976) [hereinafter cited as the Wilderness Act]. However, conceptions of what wilderness is and how much of it should be preserved vary considerably.

[7] The Forest Service officially came into existence by the Act of Mar. 3, 1905, ch. 1405, 33 Stat. 872, one month after the transfer of the nation's forest reserves from the Department of the Interior to the Agriculture Department. Act of Feb. 1, 1905, ch. 288, 33 Stat. 628 (codified at 16 U.S.C. § 472 (1976)). Today the National Forest System, which the Forest Service administers, is comprised of approximately 188 million acres of federal land, divided into 154 National Forests and 19 National Grasslands. [Fed. L.] Envir. Rep. (BNA) 51-0201.

[8] The National Park Service was created in 1916 by the Act of Aug. 25, 1916, ch. 408, 39 Stat. 535 (codified at 16 U.S.C. § 1 (1976)). Its purpose was "to promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . and . . . to conserve the scenery and the natural and historical objects and the wild life therein . . . " 16 U.S.C. § 1 (1976). The National Park System is currently composed of 327 parks with a total acreage of approximately 72 million. [Fed. L.] Envir. Rep. (BNA) 51-4331.

[9] The Fish and Wildlife Service was formed in 1939 through the consolidation of the Bureaus of Fisheries and Biological Survey. Act of April 3, 1939, Plan No. III, 54 Stat. 1231, § 3 (codified at 5 U.S.C. (app.) (1976)).

Its purpose is to conserve, protect and enhance fish and wildlife and their habitats for the continuing benefit of the public. [Fed. L.] Envir. Rep. (BNA) 51-4201. The Fish and Wildlife Service includes among its holdings the National Wildlife Refuges and Game Ranges and currently comprises approximately 31 million acres. [1980] World Almanac 461.

[10] The Bureau of Land Management was established in 1946 through the consolidation of the General Land Office and the Grazing Service. Act of Dec. 20, 1945, Plan No. 3, 60 Stat. 1100, § 403 (codified at 5 U.S.C. (app.) (1976)). Its broad duties with respect to public land and resource management are set out in the Federal Land Policy and Management Act, Pub. L. 94-579, Oct. 21, 1976, 90 Stat. 2743 (to be codified at 43 U.S.C. §§ 1701-1782 (1976)). Today the Bureau has approximately 417 million acres under its jurisdiction. [Fed. L.] Envir. Rep. (BNA) 51-4251.

congressional one, but the initial responsibility of designating which lands might be suitable for such preservation has been delegated to these administrative agencies.[11]

The Forest Service has recently completed a study which it initiated in order to determine whether certain lands under its jurisdiction should be set aside as wilderness preserves.[12] The study resulted in a recommendation to Congress that over fifteen million acres of national forest land be designated for preservation.[13] The Bureau of Land Management within the Interior Department is currently devising criteria with which it will conduct a similar study of lands under its jurisdiction in order to recommend further preservation of millions of acres of public land.[14]

The import of these decisions now being made is tremendous, because due to the delicate nature of the wilderness resource, a determination to commence development of a given area in lieu of preservation is in all likelihood an irreversible one.[15] It is thus no wonder that the results of the Forest Service's efforts at wilderness designation have met with sound criticism from advocates of both conservation and exploitation and the Bureau of Land Management now experiences similar scrutiny.[16] The conflict is not over whether to preserve wilderness areas, but rather over what constitutes a wilderness and how much of it the nation can afford to set aside.

The federal lands are administered under a policy of multiple use and sustained yield.[17] Briefly, these concepts call for manage-

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[11] The Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976). A more detailed explanation of the provisions of the Wilderness Act follows in the text at notes 50-70 *infra*.

[12] The study was entitled the Second Roadless Area Review and Evaluation (RARE II) and is discussed in depth in this article. See text at notes 141-198 *infra*.

[13] U.S. FOREST SERVICE, FINAL ENVIRONMENTAL STATEMENT—RARE II 96 (1979) [hereinafter cited as FES].

[14] The Bureau's study is considered in depth in the text at notes 199-238 *infra*.

[15] It is clear that any significant commercial development of an area destroys the natural and primitive attributes necessary to any conception of wilderness. However, the possibility has been debated of rehabilitating wilderness areas through removal of unnatural manmade elements, thus permitting reversal of the effects of development. *See* Clawson, *The Concept of Multiple Use Forestry*, 8 ENVT'L L. 281, 307 (1978) [hereinafter cited as Clawson]; Note, *Parker v. United States: The Forest Service Role in Wilderness Preservation*, 3 ECOLOGY L. Q. 145, 165 (1973).

[16] This article will review at length the criticism of administrative efforts at wilderness preservation.

[17] The policy of multiple use and sustained yield land management is congressionally mandated by the Multiple Use-Sustained Yield Act. 16 U.S.C. §§ 528-531 (1976), and the Federal Land Policy and Management Act, 43 U.S.C. § 1782 (1976). More detailed consider-

ment in perpetuity of all surface resources so as to render the greatest benefit to the public. Thus a given tract of land subject to this mandate would ideally produce a combination of resources in varying proportions depending on the needs of the public. Multiple use land management attempts the administration of regions for a variety of uses. In contrast, wilderness by definition would seem to exclude "use" of any kind other than the most temporary and transient of recreation.[18] How then can the necessity of a dominant or even single use policy in the implementation of wilderness preservation be reconciled with a broad multiple use policy of land management? This is a contradiction with which wilderness preservation efforts have continually struggled.

The conflicts between wilderness preservation and multiple use land management have manifested themselves most clearly in two specific areas of the wilderness designation process. The first is in the definition of wilderness, or more specifically, the qualifications required in a given area before it can be considered for designation as a wilderness preserve. The second major manifestation of conflict is in the evaluation of the wilderness resource pursuant to multiple use policies. With these issues as focal points, this article examines the problems which have plagued efforts at wilderness designation in light of the statutory framework which Congress has imposed upon the federal land agencies. The first section discusses the historical, legislative, and administrative origins of the present wilderness designation processes with particular emphasis on the conflicting principles embodied in the Multiple Use-Sustained Yield Act of 1960[19] and the Wilderness Act of 1961.[20] The second and third sections of the article examine the repercussions which the multiple use, single use controversy has had upon Forest Service wilderness designation processes. The current wilderness preservation process being conducted by the Bureau of Land Management will then be considered along with a projection of the administrative difficulties the Bureau is likely to encounter through the remainder of its survey. Finally, the article will con-

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ation is given to these concepts in the text at notes 39-42 *infra*. *See also* McCloskey, *Natural Resources—National Forests—The Multiple Use-Sustained Yield Act of 1960*, 41 ORE. L. REV. 49 (1961) [hereinafter cited as McCloskey, *Multiple Use*].

[18] The restrictions which wilderness preservation places upon other uses of a given area are considered at note 108 *infra*. *See also* Clawson, *supra* note 15, at 304.

[19] 16 U.S.C. §§ 528-531 (1976).

[20] 16 U.S.C. §§ 1131-1136 (1976).

clude with some thoughts on the validity of a multiple use framework for wilderness preservation.

II. BACKGROUND

A. *The Origins of Wilderness Preservation*

The earliest efforts at preserving lands in their natural condition began in the late 1800's and the early 1900's and were concerned less with preservation for its own sake than with securing areas for public recreational use.[21] The nation had not yet attached a value to wilderness, for at this time there was no scarcity of undeveloped lands. The preservation that took place at this early stage was not motivated as much by the urge to protect a vanishing resource as it was by the desire to make that resource accessible to a greater number of people.[22] This desire was the product of an emerging public land use philosophy that would come to dominate American land management, a philosophy with the major tenet that resources should be actively managed to serve the needs of those who might benefit most from their use.[23] This policy conformed to the interests of the lumber and mineral industries who resented any threat to their unlimited access to the nation's resources.[24] Since wilderness recreation was at this time available only to a wealthy

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[21] The first government efforts to protect wilderness coincided with the origins of America's National Park System. Congress first reserved Yosemite National Park, by the Act of June 30, 1864, ch. 184, 13 Stat. 325, and then Yellowstone National Park, by the Act of Mar. 1, 1872, ch. 24, 17 Stat. 32. Wilderness was at this time conceived of as something to be preserved for public enjoyment. *See* Robinson, *supra* note 2, at 3-4; McCloskey, *The Wilderness Act*, *supra* note 2, at 295. Forest areas comprised the greatest source of proposed wilderness preserves and for that reason the discussion of early wilderness preservation necessarily centers around the efforts of the Forest Service. As a pioneer in early conservation efforts, the Forest Service involved the national forest lands in the preservation/development controversy at an early date. *See* Huffman, *A History of Forest Policy in the United States*, 8 ENVT'L L. 239, 267 (1977) [hereinafter cited as Huffman]. Only in the last twenty years have the other agencies responsible for federal land begun to feel comparable pressure for increased wilderness preservation due in part to the public's growing demand for such areas and in part to an expanding notion of what kinds of lands are suitable for wilderness preserves. For example, see note 200 *infra*.

[22] Robinson, *supra* note 2, at 4.

[23] Secretary of Agriculture James Wilson described this philosophy upon the creation of the Forest Service in 1905 as he outlined the principles that would guide the new agency. Land would be managed so as to achieve "its most productive use for the permanent good of the whole people." Conflicting interests were to be reconciled so as to achieve the "greatest good for the greatest number in the long run." Letter from Secretary of Agriculture James Wilson to Chief Forester Gifford Pinchot (1905), *quoted in*, Huffman, *supra* note 21, at 267.

[24] HAHN, POST, & WHITE, NATIONAL FOREST RESOURCE MANAGEMENT 7 (1978) [hereinafter cited as HAHN].

few, there was but a small demand for wilderness areas, leaving the needs of the commodity industries to determine the greatest use of national forest lands.[25]

Increased public interest in outdoor recreation provided the impetus for more comprehensive wilderness preservation.[26] In determining the most beneficial use for federal lands, administrative agencies began to designate wilderness as a primary use which in some instances would take precedence over commercial exploitation.[27] In 1929, the Forest Service issued regulatory guidelines for the setting aside of tracts of land to be known as "primitive areas."[28] Management of these areas called for maintenance of primitive conditions but at first this regulation was not so strict as to exclude undeveloped roads and rudimentary shelters.[29] By 1939 the popularity of the primitive areas had grown to such an extent that in the interest of providing them stronger protection, the Forest Service issued revised regulations imposing stricter standards that barred motorized vehicles and commercial timber cutting of any kind.[30] Also, the Forest Service began to redraw boundaries of areas already designated so as to exclude the roads and other non-natural developments previously tolerated.[31]

World War II temporarily retarded the growing interest in wilderness preservation as attention was turned toward the war effort, but following the war, advocates of preservation sought legislation for more secure protection of national forest lands designated as wilderness preserves. There was no statutory basis for the Forest Service's designation of "primitive" areas, and thus the agency could at its discretion modify or even retract a protective designation by simple administrative order.[32] The agency determined which areas would be preserved and whether preserved areas

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[25] Huffman, *supra* note 21, at 252.

[26] Robinson, *supra* note 22, at 6-7.

[27] *Id.* at 8.

[28] McCloskey, *The Wilderness Act, supra* note 2, at 296. Although the forerunners of today's wilderness preserves, areas could qualify as "primitive" even though they contained roads and logging operations. Robinson, *supra* note 2, at 8.

[29] *Id.*

[30] In addition to requiring stricter adherence to primitive conditions, these regulations provided that areas of more than 100,000 acres would be known as "wilderness areas" and those between 5,000 and 100,000 as "wild areas." 36 C.F.R. 251.20-.21 (1939) (now superseded). *See* McCloskey, *The Wilderness Act, supra* note 2, at 297 n.37.

[31] McCloskey, *The Wilderness Act, supra* note 2, at 297.

[32] HAHN, *supra* note 24, at 121; Haight, *The Wilderness Act: Ten Years After*, 3 ENV. AFF. L. REV. 275, 278 (1974).

would remain that way in the face of increasing demand for commercial uses of the forest lands. The boom in population growth following World War II prompted appeals for forest recreational opportunities but also for forest commodities such as timber.[33] The production of the latter was not compatible with the regulations to which wilderness preserves were subjected. Recreationists feared that the Forest Service would succumb to demands of the commodity groups and release previously preserved areas to development. Thus preservation advocates turned to Congress in the middle 1950's seeking legislation which would provide a statutory framework for the protection of wilderness areas.[34] They proposed that Congress endow the Forest Service with statutory authority to bar mining and the construction of dams and other water-related projects. More importantly, they sought a specific statutory underpinning to ensure the permanence of already designated primitive areas and to allow for designation and maintenance of further wilderness areas.[35]

These initial proposals met with heavy opposition from lumber and mining groups, but of more significance was the determined opposition of the Forest Service itself. The Forest Service was concerned that wilderness legislation might subvert the basic principles on which national forest management was based.[36] These were that forest resources should be produced in the proportions that would best serve public need. Legislation which would give priority to wilderness designation would threaten this philosophy which, while without clear statutory authority, had served as the guiding principle behind administration of the national forest lands.[37] In order to placate the Forest Service, the advocates of wilderness legislation modified their proposal so as to include a provision declaring a policy of multiple use and sustained yield with respect to national forest lands. Rather than backing the wilderness version, the Forest Service chose to introduce a substitute bill built around that very multiple use concept.[38]

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[33] McCloskey, *Multiple Use, supra* note 17, at 51.

[34] *Id.* at 52. The first wilderness bill was introduced by Senator Humphrey and others on June 7, 1956. S. 4013, 84th Cong., 2d Sess., 102 CONG. REC. 9772 (1956).

[35] McCloskey, *The Wilderness Act, supra* note 2, at 297-98.

[36] *Id.* at 299.

[37] The provisions of The Forest Service Organic Act of 1897, 16 U.S.C. § 475 (1976) foreshadowed a multiple use policy which soon afterward became the hallmark of the Forest Service upon its creation in 1905. *See* note 23 *supra.*

[38] H.R. 13464, 85th Cong., 2d Sess. (1958). *See* McCloskey, *Multiple Use, supra* note 17,

B. The Multiple Use-Sustained Yield Act

Congress enacted the Multiple Use-Sustained Yield Act[39] in 1960 in affirmation of a policy of managing national forests for a variety of competing uses. After several years of heated debate and evaluation of alternative proposals, Congress had provided the Forest Service with a statutory guarantee that the national forests would be protected from over-utilization and from the pressures of single interest groups.[40] Congress expressly stated specific uses for which the national forests had been established: "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[41] Legislators defined the multiple use policy as "the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people . . .. "[42] "Sustained yield" was defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land."[43] Although the Act provided a clear statement of multiple use policy, it failed to provide guidelines for the implementation of that policy. Thus the primary concern of the Act would seem to have been simply to affirm the validity of existing Forest Service practices.

Wilderness advocates charged that the Multiple Use-Sustained Yield Act was nothing more than a congressional mandate for a continuing policy of absolute discretion on the part of the Forest Service.[44] Except for including a sentence proclaiming that "[t]he establishment and maintenance of areas of wilderness are consis-

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at 52.

[39] Pub. L. No. 86-517, June 12, 1960, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531 (1976)).

[40] In an executive communication to the House of Representatives, Acting Secretary of Agriculture Peterson recommended enactment of the legislation:

> Statutory recognition of multiple use would serve not only to recognize each of the resources named in the bill but also as a protection against advocates of single use. With the growing value of national forest resources, their accelerated use and increased accessibility, the pressures for single use of specific national forest areas are growing tremendously.

H.R. REP. No. 1551, 86th Cong., 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2377, 2382.

[41] The Multiple Use-Sustained Yield Act, 16 U.S.C. § 528 (1976).

[42] *Id.* § 531(a).

[43] *Id.* § 531(b).

[44] McCloskey, *Multiple Use, supra* note 17, at 54.

tent with the purposes and provisions" of the Act,[45] Congress had chosen not to address the conflict with proposed wilderness legislation that had given rise to the Multiple Use-Sustained Yield Act in the first place. It was unclear whether Congress intended wilderness areas to be immune from the multiple use requirements of the Act or whether wilderness was envisioned as a multiple use on par with the other multiple uses enumerated and to be treated accordingly.[46] If the latter, Congress gave no indication as to how the Forest Service was to coordinate the single use demands of wilderness advocates with a broad multiple use mandate. However, if Congress intended wilderness preservation to be carried on without regard to multiple use mandates, it neglected to instruct the Forest Service to depart from its standing policy to the contrary.[47] Thus, by including the conciliating provision declaring the compatibility of wilderness preservation with multiple use, Congress only temporarily concealed the fact that the Multiple Use-Sustained Yield Act provided the Forest Service with a statutory framework in which wilderness preservation had no clear place.

C. The Wilderness Act

Logic would seem to dictate that the multiple use concept mandated by Congress in the Multiple Use-Sustained Yield Act was inherently at odds with wilderness preservation since it advocated managed use for human purposes. But the legislative history of the Multiple Use-Sustained Yield Act reveals that it was passed with

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[45] The Multiple Use-Sustained Yield Act, 16 U.S.C. § 529 (1976).

[46] Confusion as to the role of wilderness within the Act surfaced during debate on the bill in the House of Representatives. 106 CONG. REC. 11722 (1960). The debates are discussed at length in McCloskey, *Multiple Use, supra* note 17, at 73-77.

The ambiguous position of wilderness preservation in the Multiple Use-Sustained Yield Act may be due in part to pressures exerted on the legislators by commodity groups who feared that by placing all the proposed uses on an equal footing, the Act threatened the primary purposes for which the national forests had been created by the Organic Act of 1897, 16 U.S.C. § 475 (1976): "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." *Id.* § 475 (1976). Thus Congress was compelled to include in the Multiple Use-Sustained Yield Act a provision declaring the provisions of the Act to be "supplemental to, but not in derogation of, the purposes for which the national forests were established." 16 U.S.C. § 528 (1976). It is unclear whether wilderness preservation was to be subordinate to the uses mentioned in the Organic Act. For a discussion of the pressures exerted by commodity groups on Multiple Use-Sustained Yield Act legislators, *see generally* McCloskey, *Multiple Use, supra* note 17, at 53.

[47] See note 23 and accompanying text *supra*.

the understanding that it would not preclude subsequent legislation which would provide a statutory underpinning to administrative efforts at wilderness preservation.[48] Having been relieved of the adamant opposition of the Forest Service upon the passage of the Multiple Use-Sustained Yield Act, conservationists[49] continued to apply pressure and were rewarded with the passage of the Wilderness Act[50] in 1964. This Act has served as the basis for all subsequent wilderness legislation and designation.

In the first section of the Act Congress established a National Wilderness Preservation System "to be composed of federally owned areas designated by Congress as 'wilderness areas.' "[51] Congress expressed a two-fold purpose in setting up the system. First, it sought to "assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition."[52] Second, the lands so preserved were to be "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."[53] Congress elaborated on permissible uses of the wilderness preserves by allowing activity for "recreational, scenic, scientific, educational, conservation, and historical"[54] purposes but clearly prohibited commercial and administrative activities which might impair the natural quality of the land.[55] Finally, Congress provided that nothing in the Act should be "deemed to be in interference with the purpose for which the national forests are established as set forth in the Act of June 4, 1897 [Organic Act] . . . and the Multiple Use-Sustained

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[48] See, for example, the remarks of Representative Clem Miller, 106 CONG. REC. 11717 (1960).

[49] The term conservationists is used in this article to refer to any of a large number of groups or individuals who have continually sought protection for the nation's wilderness resource. This would include organizations such as the Sierra Club and the National Wilderness Federation as well as individual private citizens. Where the identity of specific parties is crucial to the significance of an argument, that information is provided.

[50] Pub. L. No. 88-577, Sept. 3, 1964, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136 (1976)).

[51] 16 U.S.C. § 1131(a).

[52] *Id.*

[53] *Id.*

[54] *Id.* § 1133(b).

[55] *Id.* § 1133(c).

Yield Act of June 12, 1960 . . .. "[56]

Congress defined wilderness for the purposes of the Act as land in an undeveloped, primeval condition without permanent man-made improvements or habitations.[57] Areas were to be affected primarily by the forces of nature and were to offer opportunities for solitude and primitive types of recreation.[58] This in turn necessitated a regulation that areas be at least 5,000 acres in size or, if less, still practically manageable as wilderness.[59] Finally Congress suggested that areas should contain features of scientific, educational, and historical value.[60]

In another section of the Act, Congress outlined the extent of the National Wilderness Preservation System and the manner in which areas were to be designated as part of that system. First, those areas which the Forest Service previously had administratively classified as "wilderness," "wild" or "canoe,"[61] comprising some 9.1 million acres,[62] were immediately included in the preservation system, thereby giving statutory authority to the agency's past administrative policies.[63] In addition, Congress instructed the

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[56] *Id.* § 1133(a)(1). This provision, like the compromise provision in the Multiple Use-Sustained Yield Act, 16 U.S.C. § 528, merely attempts to conceal a problem that was left unresolved, namely, how to reconcile multiple use land management with wilderness preservation.

[57] Section 1131(c) provides:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of Man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] See note 29 *supra*, for an explanation of the origin of the terms "wilderness" and "wild" as used in this provision. "Canoe" was another of the early terms used by the Forest Service to designate natural areas. The term was applied specifically only in 1926 to the Superior National Forest in northern Minnesota (later named Boundary Waters Canoe Area in 1958). Robinson, *supra* note 2, at 7-8.

[62] Robinson, *supra* note 2, at 11.

[63] The Wilderness Act, 16 U.S.C. § 1132(a) (1976).

Secretaries of Agriculture and the Interior to conduct reviews of certain lands within their respective jurisdictions for inclusion in the system. The Forest Service, through the Department of Agriculture, was to review within ten years all Forest Service lands previously designated as "primitive"[64] for their suitability for wilderness classification. These findings were to be reported to the President who in turn was to make a recommendation to Congress.[65]

Congress also gave the Department of the Interior a ten year time-table in which to complete a review of all roadless, undeveloped areas in the National Park System[66] and the National Wildlife Refuges and Game Ranges[67] for the purpose of reporting on the potential of these areas as wilderness preserves.[68] These findings, like those of the Forest Service, were to be forwarded to the President and would ultimately serve as the basis for a final congressional decision.[69] Congress went on to provide in the Act that should a legislative decision to designate an area to the National Wilderness Preservation System be made, the agency that had jurisdiction over the land before its designation would maintain con-

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[64] Thirty-four "primitive areas" had been administratively designated, comprising 5.4 million acres. HENDEE, STANKEY & LUCAS, WILDERNESS MANAGEMENT 94 (U.S. Dep't of Agriculture, Forest Serv. Misc. Pub. No. 1365, 1978) [hereinafter cited as HENDEE].

[65] The Wilderness Act, 16 U.S.C. § 1132(b) (1976). The Forest Service had already begun reclassification of "primitive" areas and had transferred many of them into "wilderness" or "wild" categories before the Wilderness Act came into being. See note 29 *supra*. However, the statute did accelerate the Forest Service review process and by indicating a congressional interest in wilderness preservation, the statute ensured that the Forest Service would look favorably on wilderness classification while reviewing the remaining primitive areas. Robinson, *supra* note 2, at 17-18. Ultimately, the Forest Service recommended that virtually all of the "primitive" areas be included in the National Wilderness Preservation System. HENDEE, *supra* note 64, at 94.

[66] See note 8 *supra*.

[67] See note 9 *supra*.

[68] 16 U.S.C. § 1132(c).

[69] The Wilderness Act, 16 U.S.C. § 1132(c) (1976). The task of the Interior Department was a more difficult one than that of the Forest Service since its review was of lands that had not been previously classified as "primitive." Still, the lands under consideration were in the domain of the National Park Service and the Fish and Wildlife Service and as such were already subject to preservation regulations. *See, e.g.*, 36 C.F.R. ch. I; 50 C.F.R. ch. I, IV (1979). The Interior Department composed relatively flexible criteria for determining which lands would be clearly unsuitable for wilderness designation. Some degree of previous development was permissible if its effect could or would be removed upon wilderness classification, either by human means or through the forces of nature. HENDEE, *supra* note 64, at 107. This study, like that of the Forest Service mandated under the Wilderness Act, has not been the subject of as much controversy as have been the studies which have followed. See text following note 72 *infra*.

trol and be responsible for ensuring the preservation of the area's wilderness character.[70]

The wilderness surveys mandated by the Wilderness Act have been completed and designations have been made.[71] The results have not generated a great deal of controversy. Most of the lands under consideration, such as the Forest Service "primitive" areas, were already subject to some preservation regulations and were also the lands most suitable for wilderness classification. However, these surveys have not by any means comprised all the wilderness studies to date. Both the Departments of the Interior and Agriculture have gone on to review numerous areas of *de facto* wilderness, undeveloped roadless areas which were neither specifically classified under the Wilderness Act, nor included in the areas over which agency review was mandated.[72] It is these latter studies which have generated the most controversy and are of the greatest concern to this article and to wilderness preservation in general. There are several reasons for this. First, the more recent studies will ultimately account for the majority of the acreage in the National Wilderness Preservation System. Second, the mandated studies designated many of the areas of obvious suitability for wilderness classification. Thus, the decisionmakers in subsequent studies have been compelled to make much finer distinctions with respect to numerous areas either less suitable for wilderness or more suitable for other uses. Finally, the later studies, not mandated by the Wilderness Act, have allowed the greater exercise of discretion by agency decisionmakers. The combination of these three factors causes the wilderness surveys with which this article will deal to reflect most clearly the deficiencies for the purposes of wilderness preservation of the statutory framework established by the Multiple Use-Sustained Yield Act and the Wilderness Act.

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[70] The Wilderness Act, 16 U.S.C. § 1133(b) (1976).

[71] The specific designations which resulted from the wilderness studies mandated by the Wilderness Act can be determined by tracing individual recommendations made by the administrative agencies first through the president's consideration of them and then through their legislative treatment in Congress. These determinations are outside the scope of this article. It will suffice for the purpose of this article that the reader be aware that a large percentage of the areas studied were recommended for wilderness preservation.

[72] In the National Forest System, this includes all the lands not previously classified as "primitive," "wild," "wilderness," or "canoe" under administrative policies which preceded the Wilderness Act.

III. RARE I

The first effort at wilderness designation that followed the Wilderness Act not specifically mandated by the Act was the Forest Service's Roadless Area Review and Evaluation (RARE I) of national forest lands, begun in 1967. Although the Wilderness Act and the Multiple Use-Sustained Yield Act clearly conferred authority upon the Forest Service to conduct such a survey,[73] they did not impose any duty to do so. Certainly, the Forest Service was anticipating demands of conservationists for further wilderness preservation.[74] Some critics have also suggested that the Forest Service, mindful of the Wilderness Act's order for a roadless area review by the Interior Department's National Park Service and others, proposed RARE I in an effort to circumvent more comprehensive congressional review of the lands in question which might have further cut into the agency's authority.[75] By taking the initiative in this action rather than awaiting a legislative mandate, the Forest Service sought to maintain as much agency control as possible in determining which lands under its jurisdiction were clearly unsuitable for wilderness and thus available for other uses. The Forest Service hoped to rely on the RARE I results to justify commencing development of those inventoried areas dropped from further study for wilderness classification.[76]

A. Mechanics of the RARE Process

Although the review itself was not the product of legislation, RARE I did have to rely heavily on both the Wilderness Act and the Multiple Use-Sustained Yield Act in formulating the procedure for its survey. The first step in the RARE process required a determination by Regional Foresters of which roadless, undeveloped areas within their regions should be studied for possible wilderness designation.[77] Governed by the mandatory objective under the Multiple Use-Sustained Yield Act to determine the predominant public value of a given area of land,[78] the Forest Service devised three preliminary criteria: "suitability," "availability," and

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[73] 16 U.S.C. § 529 (1976); 16 U.S.C. § 1131 (1976).

[74] HENDEE, *supra* note 64, at 100.

[75] HAHN, *supra* note 24, at 123.

[76] *Id.* at 127.

[77] HENDEE, *supra* note 64, at 102.

[78] The Multiple Use-Sustained Yield Act, 16 U.S.C. §§ 528-531 (1976). See also text at note 42 *supra*.

"need."[79]

In determining suitability, the Forest Service measured the qualities of areas against the definition of wilderness provided by the Wilderness Act.[80] However, Congress defined the term somewhat ambiguously which allowed for flexible interpretations. The first sentence of the definition described an ideal or pure conception of wilderness. "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[81] Ambiguity arose from the fact that the section went on to describe a conception of wilderness for which complete naturalness was not required. Congress qualified the "pure" definition with provisions such as "affected *primarily* by the forces of nature, with the imprint of man's work *substantially* unnoticeable."[82] The Forest Service chose to emphasize the first part of the definition and accordingly adopted a "purist" attitude and required strict adherence to naturalness before an area might be considered suitable for wilderness preservation.[83] In addition, the "suitability" measurement also involved consideration of opportunities presented for challenge, excitement, primitive recreation, and education, all of which contribute to the resource value of wilderness.[84]

The "availability" and "need" criteria both were required by the multiple use framework within which the Multiple Use-Sustained Yield Act dictates any land management plan must operate. Pursuant to the Act, the Forest Service sought to balance the tangible and intangible values of wilderness against the potential value of resources which would be foregone if development of the area was prohibited by wilderness classification.[85] Thus wilderness was required to be the best possible use of the land over an extended

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[79] These three criteria are specified in the Forest Service Manual's directions for wilderness studies. For a thorough description and evaluation of these criteria *see* HENDEE, *supra* note 64, at 100-01.

[80] 16 U.S.C. § 1131(c) (1976). See note 57 *supra*.

[81] *Id.*

[82] *Id.* (emphasis added).

[83] FOREST SERVICE MANUAL 2321.11a (1973). *See* Foote, *Wilderness—A Question of Purity*, 3 ENVT'L L. 255 (1973), for a thorough discussion of the purity controversy.

[84] While these latter factors are not mentioned specifically in the Wilderness Act they are specified by the Forest Service Manual as characteristics which enhance the wilderness experience. See HENDEE, *supra* note 64, at 100-01.

[85] The Multiple Use-Sustained Yield Act, 16 U.S.C. § 529 (1976).

period of time.[86] In order to ensure this, the Forest Service established the "availability" criterion which involved an assessment of an area's social utility as wilderness. With the "need" criterion, the Forest Service measured the demand for wilderness in a given area, taking into consideration whether other wilderness areas were nearby, what nonwilderness recreational opportunities were available, and more generally, national patterns and trends in wilderness use.[87] Combining the measurements of "need" and "availability," the Forest Service reached a determination of the costs and benefits of wilderness preservation.

The regional inventory of roadless, undeveloped lands, begun in 1967, ended in June of 1972. At this time, on the basis of their measurements of "suitability," "availability," and "need," along with extensive public input, Regional Foresters recommended to the central office of the Forest Service which areas under their respective jurisdictions should be considered for wilderness classification. With the aid of these recommendations, the Chief of Forestry proposed to determine which areas would be given further study.[88]

The Forest Service sought to achieve five principal objectives with the RARE process:

> 1) To obtain as much wilderness value as possible relative to the cost and value of the foregone opportunities . . .
> 2) To disperse the future wilderness system as widely as possible over the United States.
> 3) To represent as many ecosystems as possible so that the scientific and educational purposes of wilderness preservation are best served.
> 4) To obtain the most wilderness value with the least relative impact on the Nation's timber product output.
> 5) To locate some new wilderness areas closer to densely populated areas so that more people can directly enjoy their benefits.[89]

To attain these objectives, the Forest Service employed various qualitative measurements in order to determine the potential of every area as a wilderness preserve.

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[86] HENDEE, *supra* note 64, at 101.

[87] *Id.*

[88] *Id.* at 102.

[89] *Id.* at 103. These objectives were apparently chosen by the Forest Service in an effort to take into consideration the various needs and desires expressed by the public. To some extent they treat matters of administrative efficiency as well.

1) Each area was measured for its total acreage.[90]

2) A numerical rating or "quality index" was determined for each area on the basis of scenic quality, isolation and likely dispersion of visitors within an area, and variety of wilderness experiences available.[91]

3) An "effectiveness index" was derived from the product of the acreage times the "quality index."[92]

4) Total opportunity costs were determined from the sum of budget, acquisition, and replacement costs as well as potential mineral, timber, and water values.[93]

Using these measurements the Chief of Forestry designated each area as either a high or low priority wilderness area, giving special attention to those areas recommended by the Regional Foresters.[94] Finally, in January of 1973, the agency prepared a Draft Environmental Impact Statement pursuant to the National Environmental Policy Act,[95] designating certain areas to receive further study and special consideration for inclusion in the National Wilderness Preservation System. After extensive public comment upon the draft, the Forest Service issued the Final Environmental Impact Statement eight months later in October, 1973, and therein designated 12.3 million acres for special wilderness consideration.[96]

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[90] Size was to be considered as an indication of the capacity of a given area for providing wilderness experiences. HENDEE, *supra* note 64, at 103.

[91] The quality index took the form of a numerical rating from zero to 200. In the computation of the quality index, the three relevant factors were rated on a scale from zero to twenty and then weighed as follows: Quality Index=4(scenic quality score) + 3(isolation score) + 3(variety of wilderness experiences score). *Id.*

[92] *Id.*

[93] The opportunity cost analysis measured the value of the alternative chosen (e.g. wilderness preservation) against the value of an alternative foregone (e.g. timber production). *Id.*

[94] Additional factors such as general public support, location contiguous to an established wilderness area or in the eastern United States, and uncommon or unique features were also balanced into this priority designation. *Id.* at 103-04.

[95] Environmental impact statements are required by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976), which mandates that all federal agencies must give full consideration to potential environmental effects when planning their programs. The statement must include a description of any proposed action, its probable environmental impact, alternatives to the action, relationship between local short term environmental uses and the maintenance and enhancement of long term productivity, and any irreversible or irretrievable commitments of resources from the action. 42 U.S.C. § 4332; *See generally* HAHN, *supra* note 24, at 18-21.

[96] *See generally,* FES, *supra* note 13. The Forest Service hoped to rely on these results to justify commencing development of those inventoried areas dropped from further study for wilderness classification. Those areas designated would continue to be studied by the Forest Service for wilderness classification under its normal land management planning procedure.

B. The Failure of RARE I

RARE I was the first attempt to develop a systematic procedure for allocating roadless lands within the national forests to wilderness preservation. The survey succeeded in highlighting administrative difficulties that the Forest Service would face in future forest management,[97] but it ultimately failed to serve its intended purpose. *Sierra Club v. Butz*,[98] an action brought against the Department of Agriculture by the Sierra Club and other conservationists, put an end to any hopes the Forest Service had to use the RARE I results to justify commencing development of areas dropped from wilderness consideration. This action, brought in August of 1972, challenged the legality of the RARE process under the National Environmental Policy Act (NEPA).[99] The Forest Service had entered into a timber sale contract involving a particular tract of land that had been administratively designated as unsuitable for wilderness. The Sierra Club sought to bar the development of the land on the grounds that such development would violate NEPA. A federal district court of California agreed and granted a preliminary injunction preventing the Forest Service from taking any action which might threaten the wilderness character of a *de facto* wilderness pending the completion of environmental impact statements as required by NEPA.[100] Thus NEPA was judged applicable to all phases of the RARE process and even initial determinations of suitability required environmental impact statements. Ultimately the preliminary injunction was dissolved and the action dismissed without going to trial, but only upon the agreement of the Forest Service to halt development of inventoried but undesignated areas pending the completion of environmental impact statements giving full consideration to the wilderness values of each area.[101]

Sierra Club v. Butz revealed the deficiencies of the RARE I process as each new proposal for development of an inventoried but undesignated area required the formulation of an environmental statement. In addition, it soon became apparent that RARE I had

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HAHN, *supra* note 24, at 127.

[97] HENDEE, *supra* note 64, at 105.

[98] 349 F. Supp. 935 (N.D. Cal. 1972) (preliminary injunction dissolved and suit dismissed without prejudice Dec. 11, 1972). 3 E.L.R. 20072, 20074.

[99] 42 U.S.C. §§ 4321-4361 (1976).

[100] See note 95 *supra*.

[101] HAHN, *supra* note 24, at 128; HENDEE, *supra* note 64, at 105.

failed to include a large number of qualifying areas in its initial inventory.[102] These roadless but uninventoried areas were not covered by the agreement reached in *Sierra Club v. Butz* and the Forest Service continued to develop such areas without formal study of their wilderness attributes.[103] Eventually the Forest Service recognized the need to comply with the spirit of *Sierra Club v. Butz* and institute a procedure for study of all areas.[104] RARE I, while seeking to solve the problems inherent to the wilderness allocation process had only exposed them. The practical effects of the study were all but nullified by the Sierra Club agreement which prevented the Forest Service from treating its RARE I results as conclusive.[105] Concern of environmentalists for immediate and lasting protection of wilderness areas, and concern of commodity users for unencumbered access to forest resources led in 1977 to the decision to implement a second Roadless Area Review and Evaluation (RARE II).

C. *Analysis of RARE I*

The legal challenge levelled at RARE I on the grounds of NEPA marked the ultimate failure of the study but even without the requirements of NEPA, conservationists would have judged the process a failure. Two elements of the Forest Service's wilderness designation process caused particular concern. The first was the agency's stance with regard to the criteria required for an area to qualify as a wilderness, the second with the agency's method of evaluating the costs and benefits of wilderness in its determination of how much wilderness was affordable consistent with multiple use land management policies. These issues became focal points in the RARE I process because they arose from the statutory framework provided by the Multiple Use-Sustained Yield and Wilderness Acts within which wilderness classification procedures operate. A survey of the legislative history of the Multiple Use-Sustained Yield Act of 1960 clearly reveals that the Forest Service in advocating the statute sought to guard against single use policies in forest management.[106] But wilderness preservation was in

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[102] HAHN, *supra* note 24, at 128.

[103] *Id.*

[104] *Id.* at 128-29.

[105] The 12.3 million acres designated by RARE I for further study were ultimately incorporated into the areas studied during RARE II. FES, *supra* note 13, at 23.

[106] This intent was clearly manifested in the Department of Agriculture's communication

direct conflict with conceptions of multiple use management because almost any other "use" can seriously damage the wilderness characteristics of an area.[107] Thus wilderness preservation prohibits the development of numerous other forest land outputs in a multiple use system.[108] The result is a wilderness designation process which struggles against the broad multiple use framework, creating problems of the sort found in RARE I.

The Forest Service, by interpreting in its strictest sense the wilderness definition provided in the Wilderness Act,[109] only considered the most natural of areas suitable for preservation. The agency routinely omitted areas due to the presence of minor developments such as historical structures or rustic roads which might have been found compatible with a less demanding definition of wilderness.[110] For example, numerous areas, especially in the eastern United States where wilderness designation had been sparse, were once harvested for timber and farmed upon but had been allowed to return to a natural state and were thus distinguishable from an untouched forest only to a trained eye.[111] Elimination of such areas from the wilderness designation process due to the "purist" philosophy severely limited the expansion of the National Wilderness Preservation System. This policy reflected a hesitancy on the part of the Forest Service to make too strong a commitment to wilderness preservation at the cost of other forest resources. The "purist" philosophy opened a greater number of areas to multiple use development as it eliminated a larger number of areas from consideration for wilderness designation. While favored by industry and commodity users, this philosophy was opposed by advocates of increased wilderness preservation. They argued that the

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to the House of Representatives during debate on the bill. See note 40 and text at notes 39-47 *supra*.

[107] *See* Huffman, *supra* note 21, at 277.

[108] There are three rival forest outputs which are least compatible with one another: timber, wilderness and active recreation. Of these, wilderness is the least tolerant:

> In this consideration of multiple and dominant use, wilderness plays a special role and presents special problems. A reserved wilderness area is a prime example of dominant use. The integrity of the wilderness area and of the wilderness experience should be the prime objective in the management of such an area. Wildlife, water, scenic qualities, and other outputs will exist but will be subordinate to the wilderness, and developed recreation and timber harvest will be excluded.

Clawson, *supra* note 15, at 304.

[109] See text at note 83 *supra*.

[110] HAHN, *supra* note 24, at 124.

[111] Clawson, *supra* note 15, at 307.

Forest Service's definition of wilderness was an idealistic one and that the Wilderness Act intended a more flexible definition for the practical purposes of the Act.[112]

A number of arguments were made in support of the Forest Service's "purist" stance. First, the inclusion of any "defects" in a preserved area would make it difficult for the agency to manage the area so as to prevent the intrusion of further unnatural elements and thus a greater compromise of the wilderness ideal.[113] Conservationists rejected the notion that such compromises would cumulatively erode the entire purpose of wilderness preservation. They argued for the inclusion of areas in which man's influence was substantially unnoticeable due to restoration by the forces of nature over a period of time.[114] Such a policy they felt would be more in keeping with the language of the Act while not significantly compromising the wilderness ideal.[115]

The purity approach also provided an administratively convenient method for limiting the areas to be considered for wilderness preservation to a reasonable number. By lowering the standards of purity, the Forest Service would greatly increase the areas available to wilderness designation. The purity concept, though perhaps arbitrary, offered a method of drawing a convenient cut-off line.[116] The Forest Service contended that the high cost of wilderness preservation, both in terms of management costs and benefits of developments foregone, required high standards of wilderness quality in a given area before its preservation could be justified.[117]

The District Court of Colorado offered another view of the purity issue in *Parker v. United States*.[118] In that 1970 case, the court granted an injunction to prevent the Forest Service from awarding a timber sale contract on land contiguous to a primitive area. Its holding included the determination that the issue of whether an area possessed the inherent qualities of suitability as wilderness was regulated substantially by objective criteria set forth in the Wilderness Act and Forest Service regulations and

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[112] Foote, *supra* note 83, at 256.

[113] Note, *Parker v. United States: The Forest Service Role in Wilderness Preservation*, 3 ECOLOGY L.Q. 145, 165 (1973).

[114] *Id.*

[115] *Id.*

[116] Robinson, *supra* note 2, at 36.

[117] *See* HENDEE, *supra* note 64, at 68-69, for a comprehensive review of this controversy.

[118] 309 F. Supp. 593 (D.Colo. 1970), *aff'd*, 448 F.2d 793 (1971), *cert. denied*, 405 U.S. 989 (1971).

thus as a matter of law was subject to judicial review.[119] In evaluating the particular area with which this case dealt, the court held that an area with "significant wilderness resources"[120] containing an access road which was "substantially unnoticeable from approximately 100 yards away"[121] met the minimum requirements of suitability for wilderness, thereby rejecting the Forest Service's "purist" stance.[122]

The definitional problems with wilderness designation were underscored further in the methodological deficiencies of the RARE process. RARE I was plagued by a lack of consistency that led to different interpretations and applications of selection criteria in different regions of the country.[123] The inventory process necessarily placed a great deal of responsibility in the hands of Regional Foresters responsible for applying decisional criteria in order to make recommendations as to wilderness suitability of areas within their jurisdictions.[124] Imprecise definitions and a lack of formal guidelines made it impossible to ensure uniformity in the measurement of various criteria.[125] The size of the administrative endeavor in RARE I made some inconsistency inevitable, but the problem was augmented due to inadequate attention to consistency safeguards.[126]

There were also problems with the specific measurements used to determine the wilderness potential of areas. For example, the RARE I "quality index" placed an unwarranted emphasis on primitive recreational experiences and disregarded ecological conditions more indicative of wilderness quality.[127] The extremely important role that size played in the evaluation of the areas also caused mis-

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[119] 309 F. Supp. 593, 600 (D.Colo. 1970).

[120] *Id.* at 601 (footnote omitted).

[121] *Id.*

[122] *Id.* The court also drew a distinction between determining minimum requirements for suitability for wilderness study and actually choosing an area to recommend to Congress for designation. *Id.* at 600. Presumably the latter decision would permit a stricter standard of review but the argument against the Forest Service's purist stance was that areas were eliminated from the process on a perfunctory basis before adequate consideration might be given to their overall qualifications for wilderness designation.

[123] HAHN, *supra* note 24, at 124.

[124] See text at note 88 *supra*.

[125] HENDEE, *supra* note 64, at 104.

[126] *Id.*

[127] *Id.* See also text at note 91 *supra*. The quality index measures scenic quality, isolation, likely dispersion of visitors, and variety of wilderness experiences available.

leading results.[128] The "effectiveness index"[129] was almost totally determined by the size of a given area,[130] thus mandating weak ratings for small, high quality wilderness areas. This emphasis on size became of special significance in light of the arbitrary subdivision of areas which took place in the early stages of the inventory process under the guise of a "purist" philosophy. In order to eliminate minor developments such as rustic roads from the areas under consideration, the Forest Service fragmented vast expanses of primitive acreage into small tracts which necessarily received weaker ratings under the "effectiveness index."[131]

The other element of the RARE process that was of special concern to advocates of wilderness preservation was its evaluation of the costs and benefits of preservation. The proportions in which the Forest Service produced the various resources of a given area under multiple use policy varied considerably depending on the value of a particular resource to the specific area.[132] For example, where wilderness was designated as the most valuable use, other resources such as timber were produced in significantly smaller proportions because of the incompatibility of wilderness preservation with other activities. Because of the devastating effect that wilderness preservation has on accessibility to other resources, the measurement of relative values of outputs required by multiple use land management is of particular significance with respect to wilderness.[133] But the Forest Service was unable to apply the same kinds of quantitative measurements in valuating wilderness as it used in valuating timber output. Granted that the desired goal of forest management is the most beneficial use for human purposes,[134] the valuation process requires quantifying of intangibles and wilderness does not fare well on such a scale.

While there may be general agreement as to the desirability of preserving wilderness as part of the nation's cultural heritage or in

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[128] *Id.*

[129] See text at note 92 *supra*. The effectiveness index is derived from taking the product of the acreage times the quality index.

[130] HENDEE, *supra* note 64, at 104. Note that this is especially true since size indirectly determines the quality index in terms of the isolation factor.

[131] HAHN, *supra* note 24, at 124.

[132] Clawson, *supra* note 15, at 286.

[133] There is necessarily less room for flexibility and error when wilderness is one of the resources under evaluation since a high valuation of wilderness totally eliminates the timber resource and vice versa.

[134] See text at note 42 *supra*.

the interest of science, such agreement dissolves in the face of direct conflict with local commodity production upon which the economic livelihood of a given area may depend.[135] Thus the inability to quantify wilderness attributes such as scenic beauty requires the economic valuation of wilderness preservation to depend on consideration of recreational opportunities, seasonal habitats for game and non-game wildlife, water quality and supplies, and conservation of fish resources.[136] Economics alone do not create a need for or attach a value to wilderness. Other considerations must come into play and while they cannot be measured as such their influence is substantial. Often the intangible values of wilderness may work themselves into the decisional process only through the subjective outlooks of the decisionmakers.

The administrative efforts at wilderness designation have nonetheless strived to maintain at least a facade of uniformity and regularity in the evaluation process. Thus the RARE I process attempted an objective opportunity costs analysis.[137] But an analytical process of this sort is subject to the justified criticism that wilderness values are necessarily slighted in the analysis since many of them are non-quantifiable.[138] In addition, even in areas where objective economic values were determinable as in the computation of projected timber values, the Forest Service employed estimated bid prices which were unwarrantedly high and led to misleading results.[139] Finally, the Forest Service left but eight months between the publication of the initial list of study areas in the RARE I draft environmental statement and the determination of the final list. It is debatable whether this provided sufficient time for careful evaluation by either agency personnel or interested private citizens.[140]

The RARE I process was deficient in three respects. First, the

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[135] Irland, *Economics of Wilderness Preservation*, 7 ENVT'L L. 51, 66 (1977).

[136] *Id.* at 54. Consideration might also be given to the economic disadvantages of developing areas. The cost of extending public services and of pollution, erosion, and aesthetic blight which accompany the alternative to wilderness preservation also heighten wilderness' value. *Id.*

[137] See text at note 93 *supra*.

[138] HENDEE, *supra* note 64, at 105.

[139] *Id.*

[140] *Id.* at 104. On the other hand it should be noted that commodity users complained that the entire process was too slow in that it held too many high resource areas in limbo for too long. Ferguson, *Forest Service and Bureau of Land Management Wilderness Programs and Their Effect on Mining Law Activities*, ROCKY MTN. MIN. L. INST. 717, 727 (1978) [hereinafter cited as Ferguson].

definition of wilderness for the purposes of the study was very unclear. Granted, the agency had been given little aid in this area by the enabling statute, the Wilderness Act, but the adoption of a purist stance and the subsequent failure to ensure consistency in its application reflected a lack of concern for the entire concept of wilderness preservation. Second, in keeping with the vague definition, the value of wilderness was misconceived. Once again, the statute offered little guidance, but in measuring wilderness potential the Forest Service regressed to an obsolete concept of wilderness as a recreational site and gave scant attention to ecological and cultural values. Third, partly as a result of its second failing, the Forest Service failed to anticipate the difficulties in balancing wilderness values against those of other resources in a multiple use land management scheme. The provisions of the Multiple Use-Sustained Yield Act provided no counsel. Consequently, the agency provided no method by which the intangible qualities of wilderness preserves could be fairly evaluated against the obvious economic benefits of other resources.

The Forest Service is not to bear the sole blame for the shortcomings of the RARE I process. The facility with which legislators drafted conciliatory provisions for both the Wilderness Act and the Multiple Use-Sustained Yield Act, so as to make them compatible, belied the difficulties administrative agencies would have in maintaining that harmony. It was with the benefit of this hindsight that the Forest Service undertook RARE II in 1977.

IV. RARE II

The Forest Service initiated RARE II without any specific legislative impetus. However, like RARE I, the second survey was conducted in accordance with the statutory framework provided by the Wilderness Act and the Multiple Use-Sustained Yield Act. Once again, the Forest Service sought to finalize to as great a degree as possible its contribution to the whole of the National Wilderness Preservation System.[141] This would clear the way for a

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[141] Ferguson, *supra* note 140, at 727. In addition to lands from the National Forest System, the National Wilderness Preservation System consists of Federal lands under the jurisdictions of the National Park System, and the Fish and Wildlife Service, as well as the Bureau of Land Management. The Forest Service's interest in finalizing the contribution of the National Forest and Grasslands stemmed from its desire to allay the fears of conservationists that no preservation would take place. More importantly, the agency sought to permit uncontested development of undesignated areas and thus ensure a continuing flow of

more thorough analysis of the question behind all of forest management—how optimum benefit might be garnered from the multiple use planning system.[142] To reach this goal, the Forest Service realized the necessity of avoiding the pitfalls of RARE I. An evaluation of the success or failure of RARE II requires an examination of what steps the Forest Service took to remedy the defects of the preceding study and whether these remedies served their intended purpose.

A. Mechanics of RARE II

The RARE II process consisted of three basic stages. First, the Forest Service conducted an inventory to determine all the roadless areas meeting certain minimal requirements for wilderness classification.[143] Second, the agency evaluated the prospects of each area for wilderness classification in light of the needs of the National Wilderness Preservation System and the likely social and economic impacts on both the local and national scene.[144] This stage concluded with the assignment of each area into one of three designated categories: wilderness, nonwilderness, or further planning. Finally, in the third stage the Forest Service published a national environmental impact statement and forwarded its recommended allocations to Washington.[145]

The inventory phase of the RARE II process began in June, 1977 and the list of inventoried areas was updated through the publication of the Final Environmental Impact Statement in January of 1979.[146] At that time the Forest Service had compiled 2,919 areas comprising 62,036,904 acres of National Forest and Grasslands which met minimal standards for wilderness classification and thus warranted further study.[147] In the inventory phase, the Forest Service did not concern itself with whether areas should be designated for wilderness in the face of competing demands, but only with whether the areas were suitable for wilderness preservation.[148] In

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nonwilderness values and the fullest possible use of all the Forest System's multiple use resources. FES, *supra* note 13, at iv, viii.

[142] Wilson, *Land Management Planning Processes of the Forest Service*, 8 ENVT'L L. 461, 464 (1978).

[143] FES, *supra* note 13, at 6-7.

[144] *Id.* at 7.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 6.

order to minimize the local variations that plagued RARE I, the Forest Service resolved to deal with the wilderness controversy on a methodical national scale.[149] In order to implement this strategy, project coordinators sought to review roadless areas in large integral units,[150] apparently to avoid the arbitrary fragmentation of roadless areas that took place in RARE I due to overzealous attention to a "pure" definition of wilderness. Larger study areas ensured less regional variation in criteria measurements and helped to soothe widespread dissatisfaction with the purity concept. In the same vein, the Forest Service recognized the need to better define its selection criteria so as to cut down on inconsistency and prevent exclusion from the study of any suitably undeveloped and roadless areas.[151] Working on a national basis, the agency established minimal qualification standards for wilderness which reflected a relaxed and flexible attitude in contrast to the strict criteria mandated by RARE I.[152] For example, RARE II defined a roadless area as "an area exclusive of improved roads constructed or maintained for travel by means of motorized vehicles intended for highway use."[153]

Also in contrast to the purist stance adopted in RARE I was the degree of incompatible human development permissible under the RARE II inventory procedure before a given area would be absolutely disqualified from wilderness classification. Roadless, undeveloped areas under consideration for wilderness designation could include, to varying degrees, evidence of past timber harvesting, mining, some range improvements, minor recreation sites, and water related facilities, as long as the area retained an appearance

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[149] Appearing before the Senate Committee on Energy and Natural Resources, Dr. M. Rupert Cutler, Assistant Secretary for Conservation, Research and Education, Department of Agriculture, had the following to say about RARE II's improvements upon RARE I: "This is a national program looking at all the roadless areas. RARE I was not national in scope. It did not stress consistency in evaluation of areas. That lack of consistency led to a lot of controversy and to appeals of a kind that will be unnecessary as a result of RARE II." STAFF OF SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 2D SESS., ROADLESS AREA REVIEW AND EVALUATION (RARE II) 185 (Comm. Print, 1978).

[150] FES, *supra* note 13, at 6.

[151] *Id.*

[152] Ferguson, *supra* note 140, at 728; HAHN, *supra* note 24, at 130.

[153] FES, *supra* note 13, at 6. In sharp contrast, the region by region standards of the RARE I process allowed one area to define a road as "any parallel wheel track or rut road which remain plainly visible the season following their occurence." SOUTHWESTERN REGION, FOREST SERVICE, ROADLESS INVENTORY PROCEDURE (1971), *quoted in* Ferguson, *supra* note 140, at 728.

of naturalness either through the passage of time or because of low visibility of such developments.[154] The Forest Service employed even more flexible standards in the consideration of potential wilderness areas in the eastern United States where very few areas had qualified for wilderness designation under RARE I's stringent requirements.[155] Since the inventory remained open through the final stages of RARE II, the Forest Service invited the public to suggest additions and deletions to the published inventory list which was continually updated.[156]

In the evaluation stage, RARE II planners sought to determine what an ideal National Wilderness System would consist of.[157] On the basis of this determination they could identify the gaps in the existing system and determine which of the inventoried areas would fill those gaps and at what cost in social and economic impacts.[158] A Draft Environmental Impact Statement issued to the public on June 15, 1978, included ten alternative plans for allocation of the inventoried areas into the designated classifications of wilderness, nonwilderness, and further planning.[159] These alternatives ranged from one in which all inventoried lands were allocated to wilderness to one which allocated all lands to nonwilderness. On the basis of extensive public response,[160] existing laws and regulations, and previous policies, the Forest Service then undertook a ten step procedure by which it arrived at a course of action to be used in its final determination of the figures to be sent to Congress.[161]

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[154] FES, *supra* note 13, at 6.

[155] *Id.* Increased attention to wilderness preservation in the East was congressionally mandated by the Wilderness Act, 16 U.S.C. § 1132 (1976) *as amended by* Pub. L. No. 93-622, 88 Stat. 2096 (1975), which reads in part: "[I]n the more populous eastern half of the United States there is an urgent need to identify, study, designate, and preserve areas for addition to the National Wilderness Preservation System." *Id.*

[156] FES, *supra* note 13, at 7.

[157] Ferguson, *supra* note 140, at 730.

[158] *Id.*

[159] FES, *supra* note 13, at iv-v.

[160] The Forest Service received 264,093 petitions, letters, and comments carrying 359,414 signatures in response to the draft Environmental Impact Statement. The majority of these supported particular allocations for specific areas. However, many comments were also registered with regard to the ten alternative allocation procedures and various decision criteria. *Id.* at vi.

[161] The following steps are taken largely verbatim from FES, *supra* note 13, at vii-viii. Although the administrative procedure is complex and a bit difficult to follow, it is necessary to acquaint the reader with this information in order to proceed to an analysis of RARE II.

In the first step, the Forest Service, on the basis of public response to the ten initial alternatives, chose a combination of two of the plans which most closely reflected the public viewpoint.[162] The resulting "analysis base"[163] allocated lands to the wilderness, nonwilderness, or further planning categories in such a way as to emphasize both high resource output and wilderness classification for areas with the highest wilderness attributes. The agency further modified the analysis base by allocating to specific categories those inventoried areas supported by at least 71 percent of the public response for specific allocation to one category or another.[164]

In the second step, Regional Foresters reviewed allocations to determine if they were appropriate, based on their perception of public agreement. They then made adjustments where compelling reasons for allocation existed.[165]

At step three the agency made adjustments to ensure that enough areas were included in the wilderness category to meet the predetermined mid-level target for accessibility/distribution and low-level target for landform, ecosystem and wilderness associated wildlife characteristics.[166]

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[162] The two alternatives which most closely reflected public opinion were:

Alternative C—Emphasis is on high resource outputs, but consideration is given areas rated high in wilderness attributes.

Alternative I—Emphasis is on adding areas with the highest wilderness attributes to the Wilderness System, with secondary consideration being given to areas of high resource production potential.

FES, *supra* note 13, at v. Although these alternatives seem somewhat contradictory, the remainder of the ten step procedure modified them so as to make them more compatible.

[163] The "analysis base" as its name indicates was simply a skeletal plan of action based loosely on expressed public desires upon which the Forest Service could build a final and more thorough plan. The allocations that would take place according to this initial plan were then determined and modified as dictated by the succeeding nine steps.

[164] FES, *supra* note 13, at vii.

[165] *Id.*

[166] *Id.* These factors had been identified through comments on the initial RARE II inventory as characteristics the public identified as essential to a National Wilderness Preservation System. *See* FES, *supra* note 13, at 21. The Forest Service goals with respect to these characteristics were defined as follows:

1) Accessibility/distribution targets seek to create wilderness within a day's travel of most of the nation's population.

2) Landform representation seeks to include examples of 40 or so defined landform areas.

3) Ecosystem representation calls for examples of 241 natural ecosystems in the United States.

4) Wilderness associated wildlife are some 29 species the public normally associates with the wilderness environment and which will be represented in the National Wilderness Preservation System.

Step four required National Grassland roadless areas to be withdrawn from the wilderness category unless they were the only areas available to meet any of the four characteristic targets listed in step three.[167]

Step five called for adjustments to be made to ensure roadless areas with high wilderness attribute ratings were proposed to wilderness or allocated to future planning. In making these measurements the Forest Service employed a Wilderness Attribute Rating System (WARS)[168] by which it considered four distinct characteristics identified in the Wilderness Act.[169] These were naturalness, apparent naturalness, opportunity for solitude, and opportunity for primitive recreational experience. When the WARS analysis failed to clearly distinguish between areas, the Forest Service considered supplementary factors of ecological, scenic, geological, and cultural values to further refine their basis for comparison.[170]

In the sixth step, the Forest Service moved roadless areas with proven, producing, or high potential mineral and energy resources to the nonwilderness or further planning categories to guarantee their potential was not foreclosed.[171] Wilderness classification of such an area would in all likelihood be incompatible with the development of these resources. At this point the Forest Service also moved from the wilderness category those areas for which a designation as wilderness would adversely impact local employment and community stability.[172]

In step seven, the agency adjusted allocations in accordance with its ongoing Forest and Rangeland Renewable Resource Planning Act[173] program. By this statute, Congress required the Forest Service to determine the extent of all resources in the national forests and to develop a national program of management and production goals to meet the needs of the American people for forest products.

At step eight, RARE coordinators modified allocations so as to attain a number of goals that the public in its response to the draft

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Id. at 28-29.

[167] FES, *supra* note 13, at vii.

[168] *Id.* at 21.

[169] 16 U.S.C. §§ 1131-1136 (1976).

[170] FES, *supra* note 13, at 21.

[171] *Id.* at 22. A mineral potential numerical rating system was employed for each of six resources: "1) hardrock minerals . . . , 2) oil and gas, 3) uranium, 4) coal, 5) geothermal resources, and 6) low value bulk materials . . . " *Id.*

[172] *Id.* at viii.

[173] 16 U.S.C. §§ 1600-1610 (1976). *See* FES, *supra* note 13, at 63.

statement had indicated were essential to the development of the wilderness system.[174] Also at this step the agency reviewed the allocations resulting from the process to this point in order to determine whether they were appropriate. This step thus provided the Forest Service with a safeguard against allocations that proved unreasonable in light of local, regional, and national issues.[175]

Having been adjusted by the eight previous steps, the analysis base was evaluated in step nine, along with the ten original alternative approaches in the draft statement, against certain primary decision criteria.[176] The purpose of this step was to ensure that the adjusted base plan allocated lands to the three categories in proportions which best satisfied the criteria used in decision making.

As the last and tenth step, Regional Foresters, the Chief of the Forest Service and his staff, and Department of Agriculture repre-

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[174] These goals were to:

1) Consider the existing Wilderness System and the degree to which other Federal lands can contribute to a well-rounded system.

2) Consider existing wilderness study areas from RARE I for either wilderness or further planning allocations.

3) Consider roadless areas with high potential for organized snow related recreation for nonwilderness allocations.

4) Consider development opportunity costs when allocating roadless areas to both wilderness and nonwilderness uses.

5) Give consideration for wilderness to those roadless areas adjacent to existing wilderness, proposed wilderness, or other protected lands.

6) Boundaries should be manageable and sound ecologically. Recommended areas of of [*sic*] sufficient size to be manageable as wilderness.

FES, *supra* note 13, at 23-24.

[175] *Id.* at viii.

[176] The decision criteria used were:

1) Avoid foreclosing Forest Service potential to meet the roadless areas share of 1975 [Resource Planning Act] program goals.

2) Reduce adverse impacts of commodity values foregone and avoid displacement of dependent communities.

3) Utilize national issues such as energy independence, housing starts, inflation, balance of payments, etc. in developing the decision.

4) Assure high quality roadless areas are proposed to be added to the National Wilderness Preservation System by using the Wilderness Attribute Rating System (WARS).

5) Allocate National Grassland roadless areas to wilderness only when needed to meet a specific diversity (characteristic) target.

6) Assure diversity of the National Wilderness Preservation System by improving representations of landform, ecosystem, wilderness associated wildlife, and accessibility/distribution characteristics.

7) Utilize general public agreement for allocation of individual roadless areas to wilderness, to nonwilderness, or to further planning.

Id. at 23. Most of these are already incorporated into the "analysis base" through the first eight steps so that it is not surprising that that alternative satisfies these criteria better than the ten original alternative approaches.

sentatives met as a group in order to ensure quality control of the process results. The various allocations were fully reviewed and modified where necessary on the basis of this group's perceptions of local, regional, and national needs and interests.[177] The result of this decisionmaking step was the proposed action displayed in the Final Environmental Statement published in January, 1979.

Employing this ten step procedure, the Forest Service developed the proposed course of action from the analysis base in the slightly less than seven months between the draft and final environmental statements. The agency recommended that 15,088,838 acres be allocated to the National Wilderness Preservation System, 36,151,558 to nonwilderness, and 10,796,508 acres to further planning.[178] The acreage recommended for wilderness was presented to Congress for legislative action. Along with previous allocations and possible future allocations from the further planning category, these recommendations would constitute the National Forest Service's contribution to the National Wilderness Preservation System.[179] The Forest Service made areas recommended for nonwilderness available in April of 1979 for multiple resource use activities other than wilderness pursuant to general multiple use management policies.[180] Those areas designated for further planning, the Forest Service proposed to maintain so far as possible in their natural condition while study continued on their best possible uses.[181]

B. Analysis of RARE II

Although an effort to remedy the defects of RARE I, RARE II did not manage to avoid much of the same criticism that was levelled at its predecessor.[182] Representatives of the forest industries

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[177] *Id.* at viii.

[178] *Id.* at 96.

[179] *Id.* at 96-97.

[180] *Id.* at 97, vi.

[181] Exploration to determine oil and gas potential is considered by the Forest Service to be essential to this further study but the agency has indicated such exploration will be conducted in full compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976), and will be prohibited where its environmental impact is judged by the Forest Service to be unacceptable. FES, *supra* note 13, at 97.

[182] For extensive comments and criticism of the RARE II process, see the appendix to the Final Environmental Statement wherein the Forest Service published many of the letters it received in response to its draft environmental statement. FES, *supra* note 13, at appendix v. While the Forest Service attempted to incorporate some suggestions into its final results, many of the comments remain applicable to the FES.

complained that the RARE process focused undue attention on only one purpose among the several for which the National Forest System should be used.[183] They complained of an unfair bias in favor of noncommodity uses of forests at the expense of other needs and uses. At the opposite extreme, preservationists argued that the results of the RARE II process allocated too few roadless areas to the Wilderness Preservation System and irretrievably released too many areas to development.[184] Environmentalists have directed most of their criticism at three factors: the haste with which the process was implemented, the inability to effectively evaluate wilderness attributes on a national scale, and a bias against wilderness designation in the formulation of alternatives and evaluation of cost/benefit ratios.[185]

Seven months elapsed between the publication of RARE II's Draft Environmental Impact Statement and the final version. During this period, the Forest Service made the crucial determinations of which areas would be allocated to wilderness. The Forest Service was under justifiable pressure to make immediate and lasting decisions so as both to release lands for development of much needed resources and to guarantee preservation of some wilderness. But given the fact that a decision to release lands for development in lieu of wilderness preservation is necessarily a permanent one, a reasonable extension of the planning process may have been in order. The National Wildlife Federation, in response to the RARE II Draft Environmental Statement, suggested a revised draft statement be issued with the proposed course of action identified so as to allow more focused public comment.[186] As it was, the public responded only to the initial proposed alternatives and was not given the opportunity to comment on the procedure which actually led to the allocations of lands to specific categories. One of the major objections to the hastily conducted RARE evaluation process centered around the fear that too many decisions were made before public input was allowed any effect.[187] Greater flexibility in the RARE II time scale might have answered this objection but it is worth noting that other sources urged a quick com-

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[183] Ferguson, *supra* note 140, at 732.

[184] *Id.* at 732-33.

[185] See notes 186-198 *infra*.

[186] Letter from the National Wildlife Federation to the Forest Service (Sept. 29, 1978), FES, *supra* note 13, at v-132.

[187] Letter from Friends of the Earth to the Forest Service (undated). *Id.* at v-57.

pletion of the RARE study as well as a minimum of allocation to the further planning category for fear of compromising the credibility of the study.[188] The demands which the multiple use planning system placed on the wilderness survey made this controversy inevitable and a compromise to accomodate a more effective wilderness survey would have required a compromise in the agency's basic land management policies.

Problems with evaluating wilderness attributes crippled the RARE I process and it must have been of special chagrin to the designers of RARE II that it also was criticised for these flaws. The inventory process in RARE II was considerably more flexible than that in RARE I and thus avoided criticism of unwarranted purity requirements, but the measurement of the wilderness quality of the inventoried areas in the evaluation or allocation phase was unsatisfactory.[189] The Wilderness Attribute Rating System employed in RARE II, similar to the "Quality Index" employed in RARE I,[190] allowed for too much personal discretion on the part of decisionmakers, and thus failed to avoid regional variation.[191] In defense of RARE II, it demonstrated a genuine attempt to employ standards defined on a national scale. In addition, the formulation of the final course of action included several "quality control" steps in an attempt to ensure that proposed allocations were appropriate.[192] It may be the Forest Service could have done little more to ensure consistency in a program conducted on as broad a scale as was RARE II. Although measurements of the wilderness quality of a given area should not be influenced by multiple use considerations, it is difficult to separate the one step from the broader process which overshadows it. Multiple use policies exert pressures for development of alternative resources, pressures which vary from region to region depending on local needs. Regional variations in measurement of wilderness qualities will fluctuate

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[188] Letter from the Department of the Interior to the Forest Service (Nov. 2, 1978). *Id.* at v-4.

[189] *See* Letter from the National Audubon Society to the Forest Service (Sept. 27, 1978). *Id.* at v-90 to v-91; Letter from Friends of the Earth to the Forest Service (undated). *Id.* at v-57; Letter from the Sierra Club and the National Resources Defense Council to the Forest Service (Sept. 29, 1978). *Id.* at v-145.

[190] See text at note 91 *supra.*

[191] Letter from Friends of the Earth to the Forest Service (undated). FES, *supra* note 13, at v-57. This letter notes an inexplicable variation in score between two areas located near each other.

[192] See text at notes 165, 175, 177 *supra*, (steps 2, 8, 10).

accordingly.

The most troublesome product of the Multiple Use-Sustained Yield framework for wilderness preservation is the requirement that the Forest Service measure the value of the wilderness resource against that of commodity production. RARE II proposed to quantify and evaluate to the degree feasible the potential physical, biological, social, and economic effects of the allocations that would result under each of the alternative courses of action, including the preferred plan by which final recommendations were made.[193] Critics argued that not only were the range of alternatives too narrow and inexplicably biased against wilderness designation, but the assessment or evaluation of the benefits of wilderness designation was inadequate.[194] In answer, the Forest Service strove between the draft environmental statement and the final statement to give greater consideration to the positive benefits of wilderness,[195] but defended the range of proposed alternatives as a product of an effort to build a quality wilderness system at the least possible resource output cost. According to the Forest Service, that this goal led to alternatives which tended to produce more nonwilderness areas than wilderness only represented a realistic tradeoff of the values involved.[196]

Once again, it is difficult to fault the Forest Service's logic. Subject to multiple use mandates, the agency was compelled to measure the value of wilderness on a scale that predetermined the result. Not only did the qualities of wilderness defy quantification, but in a multiple use system in which compatibility with other resource outputs was rewarded since it allowed for greater flexibility, wilderness was the least compatible. However, in one respect the Forest Service made an inexcusable error in the valuation process. A nonwilderness designation did not automatically determine how a given area would actually be used since the area would still be

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[193] FES, *supra* note 13, at v.

[194] Letter from the National Audubon Society to the Forest Service (Sept. 27, 1978). *Id.* at v-90. The Forest Service also received comments on its RARE II Draft Environmental Statement suggesting it was slanted in favor of wilderness designation. *Id.* at 106.

[195] *Id.* at 101.

[196] *Id.* at 102. Critics of the RARE II policy must face the distinct possibility that the weights the Forest Service assigned to various resource values accurately reflect the desires of the nation. The RARE II Final Environmental Statement notes that public response to the draft statement in favor of nonwilderness designation exceeded that in favor of wilderness by three to one. *Id.* at vii.

subject to further multiple use planning determinations.[197] In light of this, it is unclear why RARE II apparently assumed maximum potential uses of competing multiple resources when such outputs were not guaranteed.[198] This would indeed seem to have created an unwarranted bias in favor of nonwilderness commodities.

The RARE II process will not suffer the fate of its predecessor. The Forest Service ensured the validity of the study by giving thorough, if not the most effective, consideration to the wilderness values of the areas it considered, and it will withstand an attack on the grounds of the National Environmental Policy Act.[199] But nonetheless, the process was not without flaws, and since, for the most part, it was true to its statutory framework, those flaws necessarily lie in that framework. Thus any challenge to the RARE II results is more likely to be on a political than a legal front. In this respect, the Forest Service is fortunate that the eyes of many wilderness advocates are upon the study currently being done by the Department of the Interior and the Bureau of Land Management.

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[197] *Id.* at v. In other words, the mere fact that an area is not slotted for wilderness preservation does not automatically indicate that it will be open for total exploitation of its commodity resources.

[198] *Id.* at v-58.

[199] *But see*, California v. Bergland, 13 ERC 2203 (D.Cal. 1980), in which a United States District Court in California found the RARE II Final Environmental Statement inadequate to satisfy NEPA requirements and consequently enjoined the Forest Service from developing areas designated for nonwilderness use pending further study of their wilderness values. The court based its finding on three factors: 1) RARE II failed to provide site specific environmental impact statement analysis for designated nonwilderness areas. 2) The range of alternative actions in the RARE II FES was too narrow and inexplicably biased toward nonwilderness. 3) The Forest Service failed to provide opportunity for meaningful comment and failed to respond adequately to comments it did receive.

The Forest Service defense was based largely on the administrative impossibility of conducting site specific analysis and answering each individual comment in a process with the breadth of the RARE II survey. The agency unsuccessfully contended that the RARE II FES was a programmatic statement concerned with broad policy determinations and as such needn't meet the standards of specificity for which the plaintiffs argued. The court responded that "the breadth of the action undertaken is committed to the sound discretion of the agency. When the exercise of that discretion, however, makes it impossible for the agency to comply with the law, then courts must find that exercise of discretion unsound." (2226) The case is now under consideration in the Court of Appeals and if affirmed will render any wilderness survey attempted on the scale of RARE II administratively impossible.

The criticisms of the RARE II process suggested by the court in California v. Bergland are valid and this article notes similar faults in the RARE II study. However, this author would disagree with the California District Court's interpretation of the specificity requirements of NEPA and thus views RARE II as being statutorily correct, in spite of flaws in its methodology.

Whether challenges to the sufficiency of the latest Forest Service wilderness review will force the implementation of a RARE III must certainly depend in part on the quality of the wilderness additions forthcoming from its fellow agency.

V. Bureau of Land Management Wilderness Survey

A. Statutory and Historical Framework

The Department of the Interior, like the Forest Service, has engaged in wilderness preservation efforts which were not specifically mandated by the Wilderness Act. The Wilderness Act, while calling for studies of the National Park System and the National Wildlife and Game Refuges,[200] made no provision for the extensive public land holdings of the Bureau of Land Management (BLM) which is also under the jurisdiction of the Interior Department.[201] Nevertheless, the BLM did provide for a loose substitute for wilderness preservation in its designation of "primitive areas" to be managed so as to maintain their natural quality.[202] The Bureau first employed the designation in 1969, intending it to serve the same role for the BLM as the National Wilderness Preservation System did for those areas covered by the Wilderness Act.[203] But like the informal classifications employed by the Forest Service before the enactment of wilderness legislation in 1964, these administrative designations lacked the permanence and uniformity that is characteristic of the National Wilderness Preservation Sys-

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[200] 16 U.S.C. § 1132(c) (1976).

[201] This omission must certainly have been of grave significance to environmentalists but the legislative history of the Act reveals no clear reason for it. Undoubtedly the Bureau would have been reluctant to submit its lands to wilderness preservation because of the extensive livestock grazing interests in public lands which require improvements of the sort that may conflict with the wilderness resource. Note, *Wilderness—Retrograde Progress*, 47 U. Mo. Kan. City L. Rev. 55, 62 (1978). Also, Bureau officials must have argued successfully that the rugged, semi-arid public lands were not the type desired by the public for wilderness preservation. *Id.* at 63. *See* Ferguson, *supra* note 140, at 741, for a theory that Bureau of Land Management lands were not included in the Wilderness Act mandate because proponents of the bill wished it to apply only to those areas already set aside for some measure of recreation and thus in part already withdrawn from multiple use policies.

[202] 43 C.F.R. § 2071.1 (1979); These are not to be confused with Forest Service "primitive" designations discussed earlier. *See* text at note 28 *supra*. The Bureau of Land Management areas require that "the natural environment has not been disturbed by commercial utilization and that the areas are without mechanized transportation." 43 C.F.R. § 2071.1(b)(1)(v) (1979). For a full discussion of this early designation process by the Bureau of Land Management, *see* Foster, *BLM Primitive Areas—Are They Counterfeit Wilderness?*, 16 Nat. Resources J. 621 (1976).

[203] *Id.* at 622.

tem. Too much emphasis was placed on recreation rather than on preservation for its own sake and as a result the natural character of the "primitive" areas was endangered. The flexibility of management maintained by the Bureau defeated the purpose of preservation.[204]

Recognition that more stringent control was needed led to the extension of the Wilderness Act's provisions to the BLM lands in the Federal Land Policy and Management Act (FLPMA).[205] The significance of FLPMA to wilderness preservation lies not only in its provision for a BLM wilderness survey[206] but in its broad declaration of a multiple use and sustained yield policy with respect to BLM lands.[207] Thus Congress imposed upon the Bureau a statutory framework for its wilderness study very similar to that with which the Forest Service had struggled. It seems likely that the BLM wilderness review process, like its Forest Service counterpart, will exhibit the signs of the conflict between preservation and multiple use land management.

B. The Mechanics of the BLM Study

The Federal Land Policy and Management Act directs the BLM to report to the President by July 1, 1980 its recommendations as to whether areas previously administratively designated by the BLM as "primitive" should be included in the National Wilderness Preservation System.[208] As for the remainder and vast majority of BLM lands, recommendations as to their suitability for wilderness designation are not required before October of 1991.[209] The review process employed by the BLM consists of three phases: an initial inventory, an intensive study of inventoried areas, and a report to Congress recommending allocations. The inventory phase is designed to designate those public lands which meet minimum wil-

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[204] Note, *Wilderness—Retrograde Progress*, 47 U. Mo. Kan. City L. Rev. 55, 63 (1978).

[205] The Federal Land Policy and Management Act 43 U.S.C. §§ 1701-1782 (1976) provided much needed legislation to clarify and solidify the authority of the BLM to administer its extensive land holdings. FLPMA provides the Bureau with an organic act while eliminating the need for numerous outdated regulations. Basically the Act declares a multiple use and sustained yield policy with respect to BLM lands, *Id.* § 1732(a), and its provision for a BLM wilderness review, *Id.* § 1782, is but a small part of its overall impact.

[206] *Id.*

[207] *Id.* § 1732(a).

[208] *Id.* § 1782(a).

[209] *Id.*

derness requirements under the Wilderness[210] and Federal Land Policy and Management Acts[211] as wilderness study areas.[212] The BLM utilizes the following definition of "roadless" established during legislative debate on the FLPMA: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road."[213] The BLM's *Wilderness Inventory Handbook*[214] which outlines the administrative procedure the Bureau will follow in its wilderness study, clarifies that "improved" does not necessarily mean that any formal construction need have taken place, and that "maintained" need not signify annual maintenance.[215]

The characteristics that the BLM will consider in evaluating an area's suitability for wilderness study are its size, naturalness, solitude, opportunities for primitive or unconfined types of recreation, supplemental values, and potential for returning to a natural condition.[216] The size criterion can be satisfied in several ways. Roadless areas with over 5,000 acres of contiguous public lands or any roadless islands of less than 5,000 acres qualify for further study.[217] In addition, roadless areas of less than 5,000 acres can qualify if contiguous to another agency's lands already designated for wilderness or capable of being so designated.[218] Also, if the public evinces strong support for the wilderness study of such an area and it is clearly of sufficient size to make management practicable, it may also be reviewed.[219]

Areas must appear "generally natural" to qualify for wilderness

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[210] 16 U.S.C. § 1131(c) (1976). See note 57 *supra*.

[211] 43 U.S.C. § 1782 (1976).

[212] BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, WILDERNESS INVENTORY HANDBOOK 4 (1978) [hereinafter cited as WILDERNESS INVENTORY HANDBOOK]. The Bureau also created some "Instant Study Areas"—those lands designated as "primitive" or "natural" under the pre-FLPMA BLM policy are exempt from this present inventory process and are now under early study for possible designation to the National Wilderness Preservation System. 43 U.S.C. § 1782(a) (1976).

[213] H.R. REP. No. 94-1163, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 6175, 6191; WILDERNESS INVENTORY HANDBOOK, *supra* note 211, at 5.

[214] The Handbook was published on September 27, 1978 and provides "policy, direction, procedures, and guidance for conducting wilderness inventory on the public lands." *Id.* at i.

[215] WILDERNESS INVENTORY HANDBOOK, *supra* note 211, at 5.

[216] *Id.* at 12.

[217] *Id.*

[218] *Id.*

[219] *Id.*

study. Certain imprints of man such as trails, bridges, fire control structures, and certain scientific equipment may be allowed in some circumstances if the overall impact of the intrusions is "substantially unnoticeable."[220] Opportunities for solitude in an area are to be measured in terms of the possibility of avoiding the sights, sounds, and evidence of other people in a given unit. Obviously the size of an area is of significance here but the terrain and natural screening also are considered.[221] The BLM will evaluate opportunities for primitive and unconfined recreation in terms of activities not requiring facilities or motorized equipment such as backpacking, fishing, and hunting.[222] The agency will consider both the number of such activities and their individual degrees of availability when making this determination. The agency treats scientific, educational, scenic, and historical values as supplemental to the wilderness character of an area and considers them in the assessment of wilderness potential.[223] Finally the Bureau will complete the inventory process by estimating whether an area where man's impact is substantially noticeable may either by natural or human processes regain its wilderness character. Where such a transformation is foreseeable, the area may be given further consideration for wilderness designation.[224]

The entire BLM inventory phase involves two stages. In the initial stage, now completed, the Bureau eliminated those areas clearly and obviously lacking in wilderness characteristics from the review process. In the subsequent intensive stage the agency makes its more delicate decisions with regard to areas whose wilderness or nonwilderness character is less clear.[225] As of January 31, 1980, 120,811,000 acres had been dropped from the wilderness review as clearly lacking wilderness characteristics; 43,989,000 acres were still in the inventory phase; and 8,954,000 acres had been officially

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[220] The exact standard that this term represents is not specified in either the WILDERNESS INVENTORY HANDBOOK, *Id.* at 12, or the Wilderness Act, 16 U.S.C. § 1131(c) (1976).

[221] WILDERNESS INVENTORY HANDBOOK, *supra* note 211, at 13.

[222] *Id.*

[223] *Id.* at 14. The Handbook makes it clear that wilderness designation is but one of the methods available to protect environmental values. *Id.* at 6. Thus supplemental factors such as cultural and historical resources, endangered species, critical wildlife habitats, environmental education areas, etc. may under FLPMA be identified as "Areas of Critical Environmental Concern," 43 U.S.C.A. §§ 1701(a)(11), 1702(a), and be afforded that protection necessary to preserve such values when necessary characteristics for wilderness classification are absent.

[224] WILDERNESS INVENTORY HANDBOOK, *supra* note 211, at 14.

[225] *Id.* at 9.

designated as Wilderness Study Areas to be considered during the BLM study phase.[226] These allocations were made from the approximately 174 million acres of BLM land in the contiguous western states.

C. *Analysis of the BLM Survey*

The study phase of the BLM wilderness review process is not yet underway. The Bureau is currently drawing up a final set of criteria to be considered in evaluating the inventoried areas and guidelines will soon be issued.[227] Thus a final evaluation of the BLM wilderness review process is premature. However, the parallels between the BLM study and the Forest Service RARE efforts are already apparent and since the BLM project is slated to be a long one, it is helpful to underline some of the major issues which previous wilderness preservation experiences suggest will surface during the BLM survey.

Like the Forest Service before it, the BLM is finding it necessary to address in its inventory stage the degree of naturalness or purity required in an area before it can be considered for wilderness designation.[228] Many of the BLM lands have been tainted with some human activity, particularly in the form of low standard roads.[229] Whether the Bureau will exclude such lands from the review process will naturally be a source of contention. However, time and hindsight have remedied many of the defects in the wilderness definition that plagued the RARE I study. Administrative efforts at wilderness classification in RARE II employed much more flexible definitions in the face of growing pressure for preservation.[230] Also, the Endangered American Wilderness Act of 1978 mandated a liberal approach to wilderness designation inconsistent with stringent definitional requirements.[231]

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[226] 45 Fed. Reg. 9,799 (1980).

[227] Projected dates for the completion of the criteria and guidelines for the study phase are June 1 for the release of a draft to the public, and following evaluation of public comment upon the draft the final procedural guidelines are expected to be completed by November 1, 1980. Telephone conversation with Jim Edwards, Bureau of Land Management, Wilderness Division (February 15, 1980).

[228] See text at notes 207-23 *supra*.

[229] HENDEE, *supra* note 64, at 125.

[230] See text at note 152 *supra*.

[231] The Endangered American Wilderness Act of 1978 provides in part:

> [M]any areas of undeveloped national forest land possess and exhibit outstanding natural characteristics giving them high value as wilderness and . . . certain of these undevel-

An example of the care the BLM has taken to avoid ambiguity in its review standards is the concern it has shown for establishing a definition of "roadlessness" in its *Inventory Handbook*.[232] The agency has adopted the definition provided during the legislative history of the Federal Land Policy and Management Act[233] and has also outlined principles by which the BLM will be guided in the event of confusion.[234] Because the formulation of definitional requirements and wilderness attribute criteria necessarily requires subjective judgments, the Bureau has also employed public comment to further refine its standards.

There are several areas in which the BLM can improve upon the methodology of its RARE counterparts. For example, it is important that the BLM study be of such duration so as to avoid the charges of undue haste.[235] The fifteen year deadline established in FLPMA should ensure that this will not be a problem. The multiple use planning process has been slowed so that pressures to release lands for development will not compromise the public's opportunity for meaningful participation in the allocation process.

The BLM can also take note of the Forest Service's continued inability in the RARE studies to effectively evaluate wilderness attributes on a national scale. In RARE II the Forest Service sought to remedy the deficiencies of RARE I by employing quality control steps.[236] Still, the RARE II WARS[237] permitted the exercise of a great deal of personal discretion on the part of administrators. Increased efforts to subject regional judgments to a centralized review standard will help to bolster the credibility of the BLM survey.

The BLM will face its most difficult decisions in weighing wilderness values against those of competing resources pursuant to the multiple use land management mandate. While the RARE ex-

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oped national forest lands, meet all statutory criteria for suitability as wilderness . . . but are not adequately protected and lack statutory designation pursuant to the Wilderness Act . . .. Among such immediately threatened areas are lands not being adequately protected or fully studied for wilderness suitability by the agency responsible for their administration.

Pub. L. No. 95-237, 90 Stat. 40 (1978) (to be codified at 16 U.S.C. § 1132 (1979)).

[232] See text at note 212 *supra*.

[233] WILDERNESS INVENTORY HANDBOOK, *supra* note 211, at 5.

[234] For example, the Handbook calls for "[w]ise, unbiased, and careful use of the road definition as adopted, with full public involvement . . . " *Id.* at 6.

[235] See text at notes 185-88 *supra*.

[236] See text at notes 165, 175, 177 *supra*.

[237] See text at note 168 *supra*.

periences provide the BLM with useful information, absent a clearer statutory mandate the difficulties will remain. The Multiple Use-Sustained Yield Act instructs the federal land agencies to manage resources so as to "best meet the needs of the American people"[238] but fails to instruct how to determine those needs. Thus the multiple use mandate endows the Forest Service and the BLM with large scale discretion to measure and fulfill the nation's demands.[239] The Wilderness and Federal Land Policy and Management Acts merely ensure that a need for wilderness will be among those given consideration. Neither Act suggests a method for determining that need. Consequently, the wilderness studies struggle to attach quantitative criteria to aesthetic concepts in an effort to balance wilderness against economically valuable resources.

VI. Conclusion

Multiple use land management has in many respects proved a useful tool for both the Departments of Agriculture and the Interior, but its validity as a framework within which to build a wilderness preservation system must be questioned. The incompatibility of wilderness with other multiple use resources poses a special problem for multiple use land management in that wilderness allocations necessarily implement something close to a single use policy. This conflict is further magnified in efforts to subject wilderness to the value balancing process by which multiple use land management allocates certain lands for certain uses in order to best satisfy the public's needs.

Wilderness is not a resource in the sense that water, timber, and minerals are resources. The economic benefits of the latter three seem more concrete and indispensable and significantly easier to evaluate on an objective basis. There is no scale upon which to balance the cultural, intellectual, and aesthetic qualities of wilderness against the values of these other resources. Consequently, the wilderness allocations which result from such a balancing process, as has been attempted in the RARE studies and will soon be attempted by the BLM, are necessarily arbitrary and misleading. While these allocations may ultimately please either conservation-

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[238] Multiple Use-Sustained Yield Act, 16 U.S.C. § 531 (1976).

[239] For a discussion of the administrative discretion sanctioned by the vague legislative use of the term "multiple use," *see* Mulhern, *The National Forest Management Act of 1976: A Critical Examination*, 7 B. C. Env. Aff. L. Rev. 99, 100-06 (1978).

ists or commodity users depending on the particular proportions designated to wilderness and nonwilderness, they fail to reflect any logical basis for decision.

The failure of RARE I is the most obvious example of this conceptual inconsistency as that survey simply neglected to give adequate consideration to the wilderness values of numerous lands which were summarily slated for development. But while those results were assailable through the provisions of NEPA, the RARE II product is not.[240] Yet, RARE II is subject to much of the same criticism as was levelled at its predecessor. It too suffered inconsistencies in applying decisional criteria and stumbled upon valuations of wilderness qualities. However, unlike RARE I, RARE II was the consummate product of the statutory framework in which it was conducted. Congress passed the Multiple Use-Sustained Yield Act and the Wilderness Act upon the premise that they were compatible. The inaccuracy of this premise is evident in the RARE II process. RARE II did improve upon the RARE I format by combining increased flexibility with greater consistency. However, at least a part of that improvement was only cosmetic and RARE II succeeded in the face of RARE I's failures only in its ability to better conceal the methodological contradictions in its decision-making process.

The only way wilderness preservation can be rescued from the illogic and inconsistencies of the RARE processes is through a revision of its statutory framework. Congress need either amend the wilderness legislation so as to release it from the confines of multiple use policy or take steps to ensure that the wilderness resource is not slighted by a conceptual framework with which it is incompatible. However, the likelihood of such legislative action is small, particularly in light of the thorough and statutorily correct administrative efforts evidenced in RARE II. The multiple use philosophy is too ingrained in the history of federal land management for either Congress or the administrative agencies to exempt wilderness preservation efforts from its provisions.

Absent statutory revision, future wilderness designation, particularly that presently underway by the BLM, must resort to whatever administrative steps can be taken to improve the wilderness allocation procedure. The weaknesses of the RARE studies were primarily in their inability to ensure either a consistent appli-

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[240] *But see* note 199 *supra*.

cation of decisional criteria or an unbiased consideration and evaluation of wilderness attributes. The BLM might authorize a final board of review, composed of agency personnel and perhaps also representatives of commodity and environmental groups, to administer a quality control check of all land allocations whether to wilderness or nonwilderness. Such a board could guarantee greater consistency and more adequate attention to the interests of both sides of the controversy.

The history of the RARE studies proves that there can be an uneasy reconciliation of the conflicting principle of wilderness preservation and multiple use land management. Confined to an unwieldy statutory framework which appears unlikely to change, the BLM can only take heed of the efforts at wilderness preservation that have preceded its own and garner what knowledge is to be had in order further to ease an unresolvable conflict.