Lessons for the Forest Service from State Trust Land Management Experience

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Abstract

This paper argues that state trust land management experience is potentially a source of valuable insights and examples for the U.S. Forest Service. The paper sketches historic and current trends in public resource administration to define what constitutes useful new ideas which might aid the agency in its present crisis. In spite of being this nation's oldest approach to public resource management, the state trust lands are an appropriate source of new ideas in an era in which, the paper suggests: (1) the courts are receding as a major source of executive accountability, (2) the legitimacy of federal agencies, particularly those whose authority is rooted in science, is declining, and (3) the institutional framework for public resource management is rapidly fragmenting and diversifying. The Forest Service could fruitfully explore (1) the trust standard of prudence, particularly requirements for trustee accountability and record keeping; (2) the role of the beneficiary in trust accountability and constituency building; (3) the state trust manager's adaptation of the trust notion of a portfolio and risk management; and (4) state trust land agency's different approaches to tying program funding to income without eliminating the legislature's role in appropriations. The trust mandate as embodied in western trust land management organizations also provides (5) examples of institutional flexibility that could be instructive to the agency in this new era of partnerships, and (6) a raft of experience doing the same thing the Forest Service does (e.g., leasing grazing and minerals) which ought to inform Forest Service consideration of alternative management tools.

Key Words: state, trust principles, non-delegation, arbitrary and capricious, prudence, portfolio, risk management, institutional flexibility

JEL Classification Numbers: H41, H39, N5, Q23, Q28

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LESSONS FOR THE FOREST SERVICE FROM STATE TRUST LAND MANAGEMENT EXPERIENCE

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I. INTRODUCTION

> *. . . at the heart of the nation's public land policy one finds a conceptual and operational void. It has existed for at least three generations ... nearly all of contemporary discussion of the lands seems stagnant, unable to move beyond ideas that were already clichés by World War II.*[1]
>
> Frank Popper

This paper is based on the premise that one of the reasons that public and professional debate in the area of public resources is so vacuous is because we have so few words, ideas and visions for discussing them. Accordingly, this paper will do two things. First, it will identify the kinds of ideas that will be of most value in reforming national forest management. It will accomplish that with a brief administrative history of federal resource management with an eye to identifying forces of change to which future public resource management must respond. Second, it will present the state trust lands, in general and with some specific examples, emphasizing its fit with the forces of change identified and what it says us about possible approaches to national forest management. I believe that the trust model has much to teach that is responsive to current pressure for change.

I want to emphasize that although our tools for thinking about public resources have not changed much in a century, our management of them has evolved considerably, particularly in the last thirty years. The whole bouquet of outputs from national forest management has been dramatically rebalanced--shifting from an emphasis on timber, range and minerals to an emphasis on industrial recreation and preservation.[2] While there is no doubt that we are moving in that direction, our vocabulary for discussing public resources remains mired in concepts that were, as Popper notes, outdated and irrelevant when I was a child.

This RFF effort to turn the debate to more fruitful approaches to the national forests seems timely for a number of reasons. The first is the fact that we are in an era of Forest Service centennials. Just last year we enjoyed--with refreshingly little fanfare from the Forest

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1 Popper, "A Nest-Egg Approach to the Public Lands," in Dysart and Clawson, eds., *Managing Public Lands in the Public Interest* (1988), at 87.

2 See, for example, "The Old West Is Going Under," a Special Issue of *High Country News*, 30 *HCN* 1 (April 27, 1998).

Service--the 100th anniversary of the 1897 putative Forest Service "Organic Act." Very shortly we will celebrate the 100th anniversary of the founding of the agency itself. More important, this inquiry is timely because there is a widespread consensus that the Forest Service is quite simply falling of its own weight. Fifty years ago, the agency was generally regarded as one of Uncle Sam's resounding successes.[3] Presently, it is difficult to find many, in or out of the agency, who are willing to protest even feebly the suggestion that the agency will not make it to its 100th birthday--or, sadly, even to find more than a few who think it matters very much whether they do or not. The Forest Service's reputation is marred by scandal, and Forest Service "abuse is a favorite sport on Capitol Hill. . . . Even Smokey the Bear [sic] is blamed for many forest health problems."[4] No bangs, and very little audible whimpering, accompany the agency's lackluster deflation.

It is not clear to me that windy pontifications from academics--even so keen an observer as myself--are just what is called for to rectify the present situation. However, I am delighted to participate in this effort to help move the conversation off dead center by discussing the state trust lands. I and a series of graduate students have been, for the past 15 years, exploring state management of public lands granted to them as part of each accession bargain. The grant program lasted from 1803 (Ohio) until 1959 (Alaska). The general pattern[5] was an explicit bargain--in return for waiving all "right, title and interest" in the public domain lands within its boundaries, and for agreeing not to tax recently patented lands, the Congress granted to the states, *inter alia*, one to four sections in every township for the purpose of supporting public schools. Additional lands were granted to support hospitals, prisons, insane asylums, and similar public institutions depending on the deal that whichever state was joining the Union at the time was able to cut.[6]

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[3] For a little perspective on how far the mighty are fallen, see "Options for the Forest Service 2nd Century: The Draft Report of the Forest Options Group," *Different Drummer* (No. 14), for a précis of a gushy five page *Newsweek* article on the agency from its June 2, 1952 issue, at 30.

[4] Causes for this fall from grace are numerous and complex. Characteristically, Randal O'Toole emphasizes that the agency is no longer making money: in the 1990s, the agency has lost approximately $2 billion annually managing the same number of acres that it managed at a profit when *Newsweek* became nearly breathless with admiration in the early 1950s. O'Toole also notes the centralization of the agency that began in the 1970s as an additional contributing factor. Others have focused attention on the standardless multiple use mandate that grants the agency discretion almost without fetter, but leaves it unable to define their priorities, to do or defend any particular action as comporting with a mandate. [The best discussion of the multiple use act is still McCloskey, "The Multiple Use-Sustained Yield Act Of 1960," 41 *Oregon Law Review* 49 (1961)]. Conversation nevertheless seems to focus on demoralization in the ranks--the agency lacks a "vision" of its mission and its employees are individually and collectively buffeted from one witless paper pushing exercise to another "Options for the Forest Service 2nd Century: The Draft Report of the Forest Options Group," *Different Drummer* (No. 14), at 30. See also Fairfax, "RPA and the Forest Service" in William Shands, ed. *A Citizen's Guide to the Resources Planning Act and Forest Service Planning* (1980).

[5] For a number of reasons Alaska, Hawaii, and California are exceptions to many of the general patterns.

[6] For more detail on the history and current management of these lands, see Souder and Fairfax, *State Trust Lands: History, Management and Sustainable Use* (1996). Hereinafter, *State Trust Lands*.

State trust lands constitute a major, if generally unseen, land management regime in the United States. Twenty-two western states manage approximately 135 million acres, closer to 155 million if you include lands in which the states hold only the mineral estate under the trust mandate. When compared to the holdings of the federal agencies (National Park Service, 80 million acres; Fish and Wildlife Service, 100 million acres; US Forest Service, 192 million acres; BLM, 270 million acres), the state trust lands emerge--let me repeat--as a very significant, and by more than 100 years the oldest, public land holding and management system in this country.

Moreover, the management mandate for those lands is strikingly different from that afflicting the US Forest Service. These state lands are held in trust--not the public trust, *a la* Joe Sax,[7] but a Merrill Lynch type trust. A trustee manages resources for the exclusive benefit of a designated beneficiary under very strict rules of disclosure and accountability enforceable in the courts. This is approximately the same mechanism one encounters when a grandmother designates funds that are to be expended for her heir's college education. The goal is clear, the disclosure requirements detailed, and the process for accountability familiar and, in the presence of an aroused beneficiary, effective. Crucially, when comparing trust management to federal agency programs, there is no deference to the trustee's alleged expertise in this judicial oversight. Trustees must, at a minimum, evince the prudence of an ordinary person. If the trustee possesses or claims to possess any superior talents or abilities, it only inspires the courts to hold the trustee to a higher standard of care.[8]

The trust lands model meets my criteria for a new idea in spite of the fact that it is our oldest land policy. Indeed, the trust is being widely bandied about in a number of settings and permutations as a nostrum to cure at least some of what ails public resource management,[9] and applied in a number of diverse and interesting settings. And while trusts operate on state lands and are occasionally discussed as an alternative on federal lands, trust principles are being applied in diverse contexts. My recent work focuses on the use of trusts and trust principles specifically to accomplish conservation goals. These range from the Exxon Valdez Oil Spill Trustee Council, an organization established to oversee expenditure of the nearly $1 billion paid in damages by Exxon to the federal government and the state of Alaska, to less well endowed but equally interesting family trusts established to preserve particularly cherished parcels of land or similar resources. Trusts are being discussed and used in the context of germ

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[7] Sax, "The Public Trust Doctrine in Natural Resources: Effective Judicial Intervention," 68 *Michigan Law Review* 417 (1970) is, I am told, one of the ten most cited law review articles in history.

[8] Discussed in Souder and Fairfax, "Arbitrary Administrators, Capricious Bureaucrats and Prudent Trustees: Does it Matter in the Review of Timber Salvage Sales?" 18 *Public Land & Resources Law Review* 165 (1997). Hereinafter, "Arbitrary Administrators ..."

[9] See, for example, "Options for the Forest Service 2nd Century: The Draft Report of the Forest Options Group," *Different Drummer* (No. 14); see also Hess, *Rocky Times In Rocky Mountain National Park* (1993).

plasm conservation, a plethora of project mitigation settings, and in protection of indigenous peoples. The flexibility of the trust instrument is impressive and important.[10]

However, if I have learned anything in the last 25 years is that scholars with new and improved theories about policy are probably over-priced at a dime a dozen. Any new thoughts about national forest or public land management will enter a policy arena with all the trump holders fairly well paid off.[11] A new idea must either capitalize on shifts in public mood to reflect a new and applicable consensus, or be able to generate a new constituency that significantly alters the balance of existing power. Accordingly, I am going to begin by discussing three major forces which could alter the current balance of power sufficiently to constitute an "increment" in national forest management.

All three reflect institutional change in the public resources field. The first is that the courts, which have dominated the public lands policy arena since the late 1960s appear to be exiting the arena. The second force is a decline in federal agency efficacy. As I discuss it below, this decline has two elements. The Forest Service is suffering from the loss of buoyancy in both compartments of its Mae West: science[12] and the federal government are both eroding as sources of authority. With them goes much of the infrastructure of federal legitimacy. My third point, very much related, highlights institutional fragmentation in what has been for most of the century, a Forest Service dominated operation. Government institutions in the conservation field have fragmented, creating enormous openings for states and localities. More interesting, perhaps, is the growing irrelevance of the national environmental groups that have shaped debate since World War II. To the extent that the national environmental groups are an amalgam of preservation and recreation interests, they are probably doomed. Recreation is no longer--if it ever was, Joe Sax notwithstanding[13]--an aesthetic, simplifying undertaking. It is moving rapidly towards a mechanized, industrialized enterprise that has little to share with preservationists. It has never been clear to me that this alliance was a marriage of true interests--I have always thought of it in terms of a very successful kidnapping--but I believe it is over. Community control and economic efficiency--an odd pair of bedfellows if ever there was one--are part of an effort to fill a void created by

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[10] See Guenzler and Fairfax, *Conservation Trusts: Institutional Design for a New Era in Land and Resource Conservation*. Draft on file with author. Hereinafter, Guenzler and Fairfax.

[11] It is common to observe that reluctance to change policy stems in part from the fact that the protagonists are so well paid off that none of them have much incentive to consider alterations. See John Leshy, "Sharing Federal Multiple-Use Lands: Historic Lessons and Speculations for the Future," in Brubaker, ed, *Rethinking the Federal Lands* (1984), at 235, ff. Joseph Sax makes the same point in the same volume, observing that the public lands constitute a "mature" policy system in which all the relevant interests are paid off. See Sax, "The Claim for Retention of the Public Lands," 125, ff, at 128.

[12] Although as Ashley Schiff's *Fire and Water: Heresy in the U.S. Forest Service* (1960) demonstrates, the agency is a fickle friend of scientific method. Newly designated former chief Jack Ward Thomas made the radical suggestion that the troops could improve their stature simply by telling the truth.

[13] I refer, of course to *Mountains Without Handrails* (1980) and the whole array of Sax's parks works, discussed in Fairfax, "The Essential Legacy of a Sustaining Civilization: Professor Joseph Sax on the National Parks," *Ecology Law Quarterly*, 385 (1998).

the multi-faceted decline of the federal government--courts and agencies--as actors in the public resources field.

Having highlighted these three drivers of change in a selective and abbreviated historical review of national forest administration, I will turn in the third section of this essay to discuss the state and trusts as a response to those forces. The trust is interesting in the context I have described for several reasons. The first is that judicial oversight of trustees and the fulfillment of their obligations is on a significantly different track than court's review of agency discretion. The second is the fact that the trust has generally relied upon the market rather than the world of science as a metaphor for what the trustee ought to be doing. Trust principles require an honest assessment of risk and benefit rather than a series of term papers averring a certainty in analysis and outcomes that is not credible. They also rely on issues of profit and loss to define accountability. This business-like element of the trust is what gives it the most appeal to new right economists and the GOPers in Congress. They find it tempting, I fear, to substitute their rather naive catechism about market forces for the Pinchot-Roosevelt ideal of the perfect, scientific government. Beyond allowing us to examine different metaphors, the trust can teach us rather quickly that these tools do not translate easily into improved management. Third, and most interesting given my emphasis on institutional fragmentation, the trust is instructive because of its flexibility. Trustees are not lashed to a mast of one-size-fits-all policies regarding pricing, access, leasing, or even public involvement. The opportunity to observe different concepts and tools in operation in an altered institutional setting is important. It is in the opportunity to find small innovations and incremental changes in activity and attitude I find the trust most valuable as a teacher.

II. DRIVERS OF CHANGE

I have divided the last century into seven periods, each reflecting important elements in the shifting institutional setting of federal agencies.

1. The Rise of National Government and the Administrative State

During the final third of the 19th century, the federal government began to grow in size, relative to indicators of geographic and population explosion, and in scope. Not surprisingly, the growth in size was related to a growth in stature. Confronted with both (1) the emergence of a national economy and national corporations and (2) the need to address the social disarray caused by industrialization and rapid urbanization, the federal level of government displaced a political culture tied to localities and states and emerged as the focus of political action. It began doing things that government at any level simply had not done before.[14]

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[14] See Wiebe, *The Search for Order—1877-1920* (1967). This is not to say that the emphasis on local decision making disappeared either from the politics or the rhetoric of American life. However, after the defeat of William Jennings Bryan in 1896, the effect of the small town mystique receded as the federal government emerged as the dominant force in public lands and most other policy arenas. Discussed in Raymond and Fairfax, "Fragmentation of Public Domain Policy: An Alternative to the 'Shift to Retention' Thesis." Draft on file with author.

A major focus of this reorientation was public domain policy. As Joseph Sax has pointed out, until the 1890s it was a serious question of Constitutional law whether the federal government could acquire land for purposes of Civil War memorials.[15] It was also not until the late 19th century that the Supreme Court held, and rather ambiguously at that, that the federal government was authorized to make regulations regarding the use of federal public land in the western states and territories.[16] A key element of the growing faith in the federal government was a simultaneous emergence of science as a basis for legitimacy in public affairs. Samuel P. Hays' *Conservation and the Gospel of Efficiency* discussion of these changes focuses on the Progressive Era's embrace of science and "organized, technical, and centrally planned" government activities.

2. The Issue of Non-Delegation and Why the Forest Service Prospered Anyway

But, students of the conservation movement are misled if they follow Hays farther than he intended. It is important to underscore that the Progressives were generally not successful in converting the Supreme Court to Progressivism.[17] In the first third of this century, the Courts fairly consistently rejected agency programs and decisions by locating in them an unconstitutional delegation of authority.[18] The U.S. Forest Service successfully dodged the non-delegation bullet. Public domain management was one area in which the Court significantly aided the expansion of federal authority. The Court oversaw a rather rapid expansion of the Article IV property clause of the Constitution to permit the federal government to acquire property within states (as opposed to within Washington D.C. or within territories) and to retain, or decline to dispose of, public domain lands.

The question of why the Forest Service emerged an early winner in the non-delegation terrain is an interesting one. It seems important that the agency presented itself as the premier expression of scientific decision making. It is interesting, for example, to compare the agency's scientific emphasis with the Court's apparent concern for the lack of data supporting the regulations challenged in cases where federal regulation was disallowed.[19] This reliance on science is the core of a fundamental fiction that evolved during the first decades of the 20th century: it was possible in our democratic society to allow executive agencies a large role in

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[15] See Sax, "The Claim for Retention of the Public Lands," at 126. See also, Connick and Fairfax, "Federal Land Acquisition for Conservation: A Policy History." Draft on file with author.

[16] See Camfield v United States, 167 U.S. 518 (1897). The case is not an interpretation of either property clause but in fact a nuisance case: as proprietor, the Federal government has a right to protect itself against nuisance.

[17] Wherhan, "The Neoclassical Revival in Administrative Law," 44 *Administrative Law Review* 567 (1992), at 572.

[18] This fundamental notion of separation of powers is manifest in the Constitution but is even more deeply rooted. In his *Second Treatise of Civil Government*, Locke observed that legislatures "neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."

[19] Compare United States v. Grimaud 220 U.S. 506 (1911) with Lochner v. New York, 198 U.S. 45 (1905). Lochner named the era of judicial hostility to federal programs and is the subject of an enormous literature. Sunstein, "Lochner's Legacy," 87 *Columbia Law Rev* 873 (1987) is a good place to start.

American life and the American economy because they did not trespass on the political arena. The Forest Service was an beneficiary of that idea.

3. The New Deal: Administrator as Expert Translates into the Administrator as the Voice of the Public Interest

The Court's disapproval of administrative agencies and the delegation of legislative authority continued. Early New Deal programs were disallowed until FDR aired his famous "court packing" scheme.[20] Almost immediately, the Supreme Court, and judiciary more generally, began looking less and less carefully at delegations of Congressional authority to executive agencies. This switch in judicial position was justified by two theories which became reflect a growing acceptance of federal administrators: (1) a presumption that the agencies represented both expertise *and* the public interest, and (2) judicial deference to agency expertise in defining broad programs to address broad social needs. The Forest Service parlayed its technical forestry expertise into an enormous role in economic relief during the depression.[21]

4. The Administrative Procedures Act: Process-Based Review

In the late 1940s, much of the Depression Era thinking about the role of public agencies was formalized into the Administrative Procedures Act (APA). That statute provides a formal basis for judicial review of agency action. The APA tells agencies how to write rules for describing programs and defines the relationship between executive agencies and reviewing courts. All of the familiar process--rules about notice-and-comment rule making, maintaining an adequate record of factors assessed during the decision-making process, and the familiar standards of judicial review of agency discretion ("arbitrary and capricious")--were defined in that statute and its early elaboration.[22] Courts under this model "defer" to "agency expertise." And agency expertise, as was demonstrated in early environmental cases such as the classic

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[20] The President would add a sufficient number of judges to the Court to assure a protective majority for his programs. From whence cometh the famous "switch in time that saved nine."

[21] A key element of that role was territorial expansion--particularly under the authority of the Weeks Act--in order to provide the CCC "boys" with places to work. However, the Forest Service lost on two of its most ambitiously aggrandizing projects--the quest to manage the unreserved, unentered public domain as grazing districts, and its Copeland Report--a proposal for Forest Service acquisition of 224 million acres of private timber land. Discussed in Connick and Fairfax.

[22] The passage of the statute was not, however, merely a clarification of emerging standards, although it was clearly that; nor was it simply an effort to tidy up unevenness in administrative practice. It was both an acknowledgment that Depression Era agencies would not go away, and a victory for business interests threatened by the New Deal and thwarted in their efforts to roll back the growing role of federal regulators in their affairs. If the business community could not undo the "Roosevelt Revolution," at least they could "reduce the power of regulatory agencies by increasing their own procedural rights." Horwit, "Judicial Review of Regulatory Decisions: The Changing Criteria," 109 *Political Science Quarterly* 133 (1994), at 141.

Scenic Hudson,[23] was manifest in an adequate record of decision. At first, the APA did not apply to land managers--in fact, they were specifically exempted from its provisions.

This immunity was probably not important given the small number of Forest Service cases that found their way into the courts. However, as is familiar, the Forest Service was beginning to cut timber seriously for the first time in its history, and the 1950s also saw the emergence of the wilderness movement and the introduction of the first wilderness bill. Although preservation advocates no longer trusted the agency to protect wilderness areas set aside during the 1920s and 1930s, they rose to defend the agency, in the 1950s protracted and spectacular early Sagebrush Rebellion--the Barrett-McCarran Hearings, discussed by Bernard De Voto and Louise Peffer.[24]

5. The Interest Representation Model

Science emerged tarnished from the *Silent Spring/Structure of Scientific Revolution* era of the 1960s and 1970s. Experts were no longer trusted to speak for the public interest,[25] and the administrative arena emerged "as a forum for interest representation, where the public interest would be arrived at through a decision-making process to which all relevant groups had appropriate access."[26] The notion of "standing" as a constraint on who could bring a suit against an agency all but disappeared during the 1960s and 1970s, and where it did not, Congress wrote specific provisions allowing citizen challenges and occasionally citizen enforcement of agency mandates. The Court also adopted a rather expansive view of its own capabilities and role, sometimes known as the "hard look" doctrine--Courts no longer deferred to agency expertise but quite willingly applied their own notions of reasonableness to create standards for evaluating agency behavior.

These changed standards affected the public lands dramatically. No longer exempt as "proprietors," the Forest Service was constantly in Court. The Ford Foundation led in funding a breed of NAACP-like environmental organizations focused on litigation as a reform strategy. Public attention was expanded by a series of successful efforts to halt projects by imposing a newly elaborated form of the APA's the record of decision requirements as codified in the National Environmental Policy Act.[27] In addition, protest strategies pioneered in the civil

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[23] Scenic Hudson Preservation Council v. FPC (1965).

[24] De Voto, *The Easy Chair* (1954); Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies, 1900-1950* (1951).

[25] Horwit, "Judicial Review of Regulatory Decisions: The Changing Criteria," 109 *Political Science Quarterly* 133 (994), at 148.

[26] Horwit, "Judicial Review of Regulatory Decisions: The Changing Criteria," 109 *Political Science Quarterly* 133 (994), at 144. See also Stewart, "The Reformation of American Administrative Law," 88 *Harvard Law Review* 1669 (1975).

[27] For a discussion of the relationship between NEPA and the APA see Fairfax, "A Disaster in the Environmental Movement," 199 *Science* 743 (1978). Joseph Sax wrote the major text on using the courts in *Defending the Environment* (1960).

rights movement were adopted by post-Earth Day environmental groups and the clear-cutting controversy forever altered the Forest Service's public image and political setting.

6. The New Judicial and Scientific Humility

We are experiencing presently a reformation on a number of fronts. The most familiar is standing--in a number of cases which are complex and difficult to interpret, the basic notions that erased standing as a barrier in the early days of the "environmental era" are being recast. What this means is that fewer environmentally-oriented litigants are finding their way into court.[28] Those that do pass muster will, in addition, find courts less and less likely to overturn agency action. The Courts are abandoning the "hard look" doctrine and returning to the posture of deferring to agency decisions. The issue here is not one of enhanced deference to agency expertise. There is no ennobling or empowering of the agencies involved.

The issue instead is one of separation of powers. Long parked at the side of the administrative law road, basic constitutional questions are returning to the forefront.[29] The Supreme Court concluded that the judiciary's role was restricted to enforcing the "unambiguously expressed intent of Congress." If there is ambiguity, there is not an issue of law but rather of policy. And it is the role of Congress to write legislation and of administrators and the executive to interpret policy.[30] Ironically, having been one of the early successes in gaining court approval at the start of the century, the Forest Service litigation has been slow to experience the ebb of judicial scrutiny.

7. Loss of Federal Agency Legitimacy

One would think that this contraction of the Court's oversight of agency decision making was potentially good news for the Forest Service--at last we can get "forestry out of the courtroom and back into the woods." That is one possible outcome, but not a likely one. Unlike the New Deal era, the current humility of the courts is specifically not accompanied by an embellishment of the agency expertise or authority. Quite the opposite, it is accompanied by two corrosive factors--humility in the ecology profession and a very much related decline of respect for the federal level of government.

Growing doubts about the political potential of scientific findings originate less with members of a skeptical public--who appear, reasonably, to embrace scientific findings that comport with their biases and reject those that do not--than within the scientific community itself. The fly in the ointment is, of course, the ecology profession's rejection of long long-

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[28] Key cases include Lujan v. National Wildlife Federation 110 S. Ct 3177 (1990) and Lujan v. Defenders of Wildlife 112 S. Ct. 2130 (1992).

[29] The key and most discussed case in this area is Chevron v. NRDC 467 U.S. 837 (1984).

[30] Wherhan, "The Neoclassical Revival in Administrative Law," 44 *Administrative Law Review* 567 (1992), at 840-45.

revered models based on concepts of equilibrium in natural systems.[31] The new *dis*equilibrium approach translates into ecologists (1) becoming less and less willing either to attribute specific events or outcomes to particular inputs, or to predict the results of alternative strategies on particular systems in relevant time scales, and (2) appearing less and less credible when they try to do so.[32] One outcome of all this is that the Forest Service can no longer turn to science to trump its critics or define credible technical solutions to complex social problems.

The legitimacy of federal agencies is further undercut by changing thoughts about the federal level of government in general. Part of the reconsideration of the virtues of federal action arises from the fact that the Forest Service is running out of money to spend and/or encountering a growing unwillingness to spend it.[33] The federal lands are eroding a reliable conduit of subsidies to states and localities.[34] This has enormous implications for the acceptability of the federal presence in the western states.[35]

This uncharacteristic emphasis on money is a much related element of the federal decline: the diversification of government policy instruments and a corresponding diversification of private organizations at work in the area. The federal level is no longer viewed as the sole or even necessarily the primary agent of public resource management.[36] It is surrounded by rivals at the state and local level, forced to deal with an increasing array of public and private "partners," and challenged by increasingly legitimate "community" groups

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[31] Two excellent sources on "new ecology" as it effects the law are Meyer, "The Dance of Nature: New Concepts in Ecology," 69 *Chi-Kent L. Rev* 875 (1994) and Rodgers, "Adaptation of Environmental Law to the Ecologists' Discovery of Disequilibria," 69 *Chi.-Kent L. Rev.* 887 (1994). For a deeper background, see Worster, *Nature's Economy: A History of Ecological Ideas* (1977).

[32] See Nelson, *Public Lands, Private Rights* (1996) on the decline of the progressive era. See also Greenwire, No. 4, "Poll: Americans Support Science But Don't Know it Well" 7/2/98, for a brief insight into why science is revered but no longer useful in resolving disputes.

[33] My favorite source on this phenomenon is the only slightly outdated O'Toole, 1 *Different Drummer* 1 (Winter, 1994).

[34] Fairfax, "Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism as if States Mattered," P.O. Foss, ed., *Federal Lands Policy* (1987). But note the current efforts by Mary Landrieu and others to mildly reactivate the Land and Water Conservation Fund in return for allotting 27% of OCS revenues to coastal states. See Greenwire, " No. 9 Royalties: Proposal Would Give States Offshore Revenue," 22 July 1998.

[35] See for example, Greenwire, June 26, 1998, No 5: "Western Govs: Leaders Adopt Resources Manifesto."

[36] In part, it is important to acknowledge, this institutional diversification is the product of long-standing reform efforts, and the goal of many federal programs, in conservation and other arenas. On the eve of the Civil Rights movement, it is important to recall, state government did not seem to have much to offer beyond a tawdry cover for racial segregation. Three decades and a growing number of intergovernmental transfers of financial resources and authority later, the states and some localities are sufficiently resurrected to challenge federal authority in a growing number of arenas. The Air Quality Act, Water Quality Act, RECRA, SMACRA, and environmental era programs too numerous to mention are among those that were designed in part to enhance the capabilities of state and local government. The standard literature is discussed at length in Fairfax, "Old Recipes for New Federalism," 12 *Environmental Law* 945 (1982).

seeking not simply to be heard in federally defined planning arenas, but also to share and exercise authority.

The erosion of federal hegemony is familiar--but, it is accompanied by a number of related institutional changes in the conservation field.[37] *Devolution* of federal authority over federal resources is proceeding at a pace that would likely surprise those familiar with the specific rejection of any transfer of title proposals to come before Congress. Minerals management provides an interesting perspective on the growing state role in federal land management. Devolution does not, in my lexicon, include the dual regulation that has long been an important element of public land management.[38] Devolution means areas where the states or localities are exercising authorities formerly exercised by the federal agencies and transferred more or less officially, to other levels of government.

After almost thirty years of disputation, the states began, in the mid-1980s to take responsibility for oil royalty accounting on federal lands. Following the report of the Linowes Commission in 1982,[39] Congress designed a system under which interested states could assume "primacy" in royalty accounting.[40] Conflict on that front continues and has expanded.[41] Several states are now seeking "primacy" in inspection and enforcement in "management of BLM's oil and gas lease program. . . ." The Bureau position is not to oppose such state participation, but to transfer only authority over inspection and authority. The states maintain that BLM "should transfer substantive authority, *much as the Office of Surface Mining has done for coal mining*."[42] The federal sovereign is undoubtedly supreme, but the

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[37] I am part of a large group that took a small stab at the issue. See Fairfax, Fortmann, Hawkins, Huntsinger, Peluso and Wolf, "The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands," forthcoming, *Ecology Law Quarterly*. Draft on file with author.

[38] See Cowart and Fairfax, "Public Lands Federalism: Judicial Theory and Administrative Reality," 15 *Ecology Law Quarterly* 375 (1988) Part II, at 408, ff. For example, oil and gas conservation and pool unitization requirements were first defined under state law. Those state laws have never been displaced by federal enactments and virtually all such programs are state defined, state run, and operative on federal lands. See Fairfax and Yale, *Federal Lands* (1987), at 74 and references cited therein. For a brief description of most relevant mineral leasing programs, Section 2 is still a good place to start. The federal land management agencies have for the most part relied upon state standards and capacities for enforcement of air and water pollution on federal land. See also Donahue, "The Untapped Power of Clean Water Act Section 401," 23 *Ecology Law Quarterly* 201 (1996).

[39] U.S., Commission on Fiscal Accountability of the Nation's Energy Resources. *Report of the Commission*, (January, 1982).

[40] FOGRMA, the Federal Oil and Gas Royalty Management Act of 1982 is discussed in Fairfax and Yale, at 73-76.

[41] See, for just one small example, 22 *Public Lands News* 6 (No. 22, November 13, 1997): "Wyoming, IPAA Think Alike on Oil Royalty."

[42] 22 *Public Lands News* 9 (No. 19, October 2, 1997): "Does Shea hold key to state oil and gas role?" Much but not all of this authority shifting comes from Congress. My italics. See Uram, "Trends and Developments in Cooperative Federalism and the Regulation of Coal Mining," 12th Annual Developments and Trends in Public Land, Forest Resources & Mining Law Conference of the American Bar Association Section of Natural Resources, Energy, and Environmental Law, March 6-7, 1998, Scottsdale, Arizona.

growing extent of state regulation and management of federal resources would surprise most casual observers.

Even more surprising to students of Ted Lowi's late 1960s classic *The End of Liberalism*,[43] is the extent to which federal programs on federal lands are proceeding in "partnership" with private groups and corporations. Even a casual perusal of a news source such as Greenwire over a week or ten day period will produce at least a handful of new programs in which federal authorities and resources are being "shared" with diverse non-governmental entities. The Quincy Library Group's proposals are probably the most famous attempt by an outside group to effect control over national forest management. But the QLG's efforts are packaged in legislation and therefore less stunning as an example of what is occurring on the ground than less publicized partnership examples.

Finally, the institutional fragmentation is apparent in the gradual unhinging of one of the most important alliances in natural resource management. The preservationists have, since at least the 1950s, been able to throw their blanket over a broad array of recreation interests and appear as a solid phalanx of public support for wilderness, and more recently, endangered species as a tool of preservation. This alliance is likely to come unstuck under two kinds of pressure. First, recreation is important money--especially to local economies and agencies increasingly looking for user fees. Recreation as a freebie emphasizing a back to nature wanderlust will evolve into the sine qua non of funding public resource management. Second, emergent recreation emphasizes mechanized/industrial pursuits not compatible with the wilderness. My generation, which put its shoulder behind wilderness legislation and designation issues, is now self actualizing in SUVs (sports utility vehicles), while younger and more energetic types are seeking access for all manner of all terrain vehicles, personal marine vehicles, and similar. It was at one time relatively easy for us voluntary (and temporary) simplicists to invoke the proverbial factory worker's recreation need to support our much classier preferences.[44] This will no longer be possible: a new generation of prosperous young professionals is embracing jet skis, Humbees and their functional equivalents. The commodity-wilderness battle of the future will be with mechanized recreationists, not the timber, minerals, and grazing interests.

8. Summary--What Does all This Mean in Terms of Drivers of Change?

This long passage through history and current events identifies fundamental changes afoot in the public resources field that will define the path to successful reform. What will happen as a result of all these changes in the wind? The incrementalist in me responds, with

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[43] Lowi, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority* (1969), in which the author describes and laments the slippage of government authority into private interest group hands.

[44] The division in the environmentalist side of the house was probably at one time a matter of socioeconomic class: Joe Sax has described "the distinguished New York lawyer and fly-fisherman l[ying] by the side of a stream contemplating the bubbles, while the factory worker roars across the California desert on a motorcycle." See *Mountains Without Handrails*, (1976), at 48.

some relief and some sadness: nothing very precipitous. Change during the Progressive Era came very gradually, over a period of 50 years or more and not really succeeding until the New Deal. Thus I do not believe that trust principles I am about to discuss ought to be on the table in order that we can decide next month or year, to turn the National Forests into trusts. What will happen, more likely, is that there will be a little turn on a dozen knobs and dials and a new set of standard operating procedures and standard operating assumptions will gradually displace the old ones, not entirely, but sufficiently so that it will impact policy. I have pointed to some of the more relevant dials:

1. The courts will play a less and less important role in Forest Service decision making. Their ability to enforcing a "single," national, vision emphasizing environmental values, about regional resource and economic management will continue to erode.
2. The Federal level will recede as *the* source of priorities and subsidies. The Forest Service will be reduced in size, importance, and leverage. Similarly, national environmental groups, whose import has been tied to the stature of national agencies, will increasingly be challenged by local and regional groups.
3. Local priorities and processes will increase in legitimacy and in political impact. This means less one size fits all rules and institutions, a more diverse planning and decision-making process, and more catholic values and management goals.
4. Sustaining rural economies will become the goal of public forest management. This concern no longer function primarily as a cover for transfer payments to the timber industry and will be balanced by a continuing insistence on ecological sustainability.
5. Federal lands commodities will be defined less in terms of timber, mining and grazing and more in terms of an economically productive mechanized/industrial recreation. This will exacerbate the split in the preservationist/recreation coalition and will further erode the import of national environmental groups.

III. THE TRUST AS A SPINNAKER TO CATCH THESE WINDS OF CHANGE

These emerging conditions are well suited to the state land trusts and the trust mechanism more generally. In this section, I will describe the trust in as little detail as possible and focus on lessons in three areas of change--a different role for the courts, the emergence of the market as a rival metaphor to science in Forest Service arrangements, and diversification of institutions as the federal level erodes in importance.

State trust lands are structured significantly differently than the federal lands agencies. They bear a superficial resemblance to the federal land managers--historically they have emphasized grazing, the most extensive trust land use, timber, minerals, and recreation. Historically, they have ignored water as a trust resource. And, for most of their history, they have been dominated by lessees seeking subsidies off of publicly held resources. However, law suits beginning in the 1950s have produced relatively rapid reorientation of priorities in

most trust management organizations, and developing programs for sustainable support of the beneficiaries is now the major element of trust land management culture.

The institutions which manage the trust lands vary enormously. Some are headed by an elected commissioner, some commissioners are appointed by the governor, and some selected by a board of trustees or directors; some are one element of a more general resource management and/or regulatory organization and some are free standing trust land organizations. All gather revenues from trust land management activities and distribute them, under very different rules, to the beneficiaries. As a part of that fund distribution, all states have "permanent school funds" into which trust lands receipts are deposited, but only in two cases does the same organization manage the lands and the funds. Generally, revenues from sale of land and non-renewable resources are deposited in the permanent fund and only the interest is distributed while rentals and receipts from sales of renewable resources are distributed annually. It is generally asserted, with only partial accuracy, that the land offices pay expenses with receipts. Some do, but the more general picture is that the state legislature generally appropriates some percentage of receipts to be expended by the land office.[45] In presenting their annual budget request, the trustee is required, among other things, to present expenditures in the context of their contribution to returns, but the state land trusts activities are not typically funded directly from receipts.

The trust is always an appealing organizational option, but in the context I have described, it has particular relevance. It is market responsive, and many of its fundamental elements presume (but do not require) that benefits are going to be described in monetary terms. Nevertheless, the fundamental commitments of the perpetual trust are to (1) the long term sustainability of the productive capacity of the trust corpus and (2) undivided loyalty to the beneficiary. Most of the trust rules work to assure that the trustee does not enrich herself or others at the expense of the beneficiary. The trust is flexible, and can be adapted to structure almost any arrangement of ownership, management and access. Further, by carefully thinking about the beneficiary, it is possible to design an interesting variety of incentives among participants. The trust has limits--observers are frequently tempted to present the trust instrument as a trump on politics--but it is more accurately described as a new and different kind of insulation against the problems that seem most to afflict us now.

1. What is a Trust and How Are the State Trust and Related Lands Different from the Federal Lands

The trust is a species of a fiduciary relationship. That is, a trustee holds and manages property, under very exacting rules, for the exclusive benefit of another. This kind of trust[46] is probably most familiar in the context of a grandmother directing that a bank or other guardian to manage specified resources such as a trust fund to assure that her grandchildren

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[45] For a summary of the precise system in each state, see *State Trust Lands*, pp. 45-47.

[46] Guenzler and Fairfax distinguishes what I have come to call a beneficial trust from other kinds of trusts, such as a public trust, a sacred trust, and a land trust.

have sufficient resources to go to college, or to achieve some similar purpose. The rules for administering a trust are clear, relatively easily summarized, and focused primarily on assuring three things: (1) that the trustee does not enrich herself or others with trust resources; (2) that she does not fritter them away with excessive management manipulations; and (3) that the trustee does not allow trust resources to lie fallow and go to waste. The rules can be summarized around five themes: clarity, accountability, enforceability, perpetuity, and prudence.[47]

Clarity. The purpose of the trust must be clearly and stated includes the fundamental element of "undivided loyalty." The trustee is obligated to use and manage trust resources to achieve trust purposes for the *exclusive* benefit of the designated beneficiary. This rather stark "undivided loyalty" command has genuine appeal when compared to the multiple use mandate that directs both U.S. Forest Service and the Bureau of Land Management to manage the resources under their authority "in the combination of uses that best meet the needs of the American people."[48] This ambiguous mandate gives agencies enough discretion to engage in below cost timber sales, grazing leasing, and recreation programs, basically subsidizing activities that benefit powerful constituencies and create for themselves jobs and enhanced budgets. Such activities would be carefully scrutinized under the "undivided loyalty" standard of a trust.

Accountability. A second element of the trust mandate--again one that clearly distinguishes it from most federal government agencies--is the notion of accountability. The rules for disclosure of accounts are extensive. Trustees must produce data about investments and returns that make it possible for the beneficiary to evaluate the trustee's management of the corpus. Period. The requirements are so strict that they are frequently described as tantamount to a "rebuttable presumption of fraud or undue influence."[49]

Enforceability. And it is clear that these duties are enforced. Trust principles are not merely hortatory expressions of good intentions. Unlike the "whereases" at the beginning of legislation, and the lofty aspirations expressed in a Memorandum of Understanding, the trustees' duties are *obligations*. It is important to keep in mind that classic trust enforceability presumes and depends upon a beneficiary that will be vigilant in monitoring the trustee to protect her interests in the trust.

Perpetuity. Trusts are not necessarily perpetual. There is little reason to extend the college student's trust beyond her matriculation. However, the state trust lands, and most of the trusts I have studied under the general heading of "conservation trusts" are perpetual,[50] intended

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[47] The first four solidified into a mantra in *State Trust Lands* and Souder, Fairfax and Ruth, "Sustainable resources management and state school lands: The quest for guiding principles," 34 *Natural Resources Journal* 271 (1994).

[48] 16 U.S.C. SS 531-4(a). Discussed in *State Trust Lands*, note 74, at 348.

[49] Discussed in Bogert, *Trusts*, 6th ed., (1987), at 348-49. Hereinafter, Bogert.

[50] The normal "rule against perpetuities" does not operate against charitable trusts. Discussed with probably illegal brevity in Guenzler and Fairfax.

to produce benefits forever. Thus, the trustee is not allowed to prefer any generation of beneficiaries over any other. The commitment to perpetuity in the context of land management, given the clear obligations of the trustee, comes fairly close to a legally enforceable sustained yield requirement.[51] Simply to create an environment where the present statutory direction regarding sustained yield were enforced would move national forest management in radically different directions.

Prudence. The Courts evaluate trustee behavior against a standard of prudence.[52] It requires trustees to do different things in exercising judgment than does the arbitrary and capricious standard.[53] Rather than turning "explicitly on the volume of data accumulated to support a specific decision, when alternative courses of action are available," the rules of prudence require the trustee to incorporate analysis of risks and benefits.[54] Modern prudence emphasizes the trust as a portfolio as a tool for achieving risk management.

This summary does not obviate the need to consult an attorney if you are going to establish a trust, but it gives us a place to start in thinking about how the trust land manager's mandate is different from the multiple use mandate that afflicts the Forest Service.

2. Trusts in the Courts

a. Trustees have a significantly different relationship to reviewing courts than administrators

The relationship between the Courts and the Forest Service has, generally speaking, been a polarizing and frustrating one. It is important to understand, therefore, that trustees have a significantly different relationship to the courts than do administrators. The distinction arises principally from two sources. First, the trust is best understood as an element of private law--it is a special kind of contract enforced in the courts. Thus when reviewing trustees' actions the Court is not required to consider its judicial role as against those of the more "political" branches, and there is little attention paid to issues of appropriate delegation of authority. Because I have argued that standing doctrine is contracting in the administrative arena, it ought to be of interest to note that in the state trust lands, standing is almost never an issue.

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[51] See Souder, Fairfax and Ruth, "Sustainable resources management and state school lands: The quest for guiding principles," 34 *Natural Resources Journal* 271 (1994).

[52] Trust law is of sufficient complexity and importance that it is one of the legal fields in which members of the bar periodically compile recent case law and commentary and "restate" the basic principles in an allegedly concise, readable format. Trust law generally is on its second restatement--published (adopted and promulgated) in 1959 under the umbrella of the American Law Institute. Significantly, the definition of what constitutes prudence has changed in such important ways that the ALI has recently published a third restatement of trust law covering only the issue of prudence. See Restatement (Third) of Trusts SS 277 (Prudent Investor Rule).

[53] It also requires them to do things quite different from the Second Restatement, and long prior. Under the earlier construction, trustees were given a list of investments which were approved. Trustees investing in those listed investments were "unquestionably" acting prudently. "Arbitrary Administrators . . .", at 180.

[54] "Arbitrary Administrators . . ." at 180.

Any school child, parent of a school child, or tax payer has, in most jurisdictions,[55] achieved standing without any debate. Were trust principles to bleed into federal land management they would, in this context, tend toward a continuation of the status quo ante, giving potential Forest Service litigants perhaps a bit of breathing room in the present ebb in the standing doctrine. This alone might inspire litigants to push public land litigation into the mode of trust principles. To suggest how judicial standards of review for trustee decisions work in practice, it is useful to compare them to the standards that the courts use for evaluating agency behavior under the Administrative Procedures Act.[56] Court review of executive agency decisions is focused on four questions: does the plaintiff have standing to sue; was the action authorized by law; were proper procedures followed; and was the agency's decision reasonable? Although the government loses a disappointing number of cases either because there is no statutory basis for the action, or because the agency failed to follow the announced procedures, the issue of reasonableness--or arbitrary and capricious as the APA styles it--ought to be most important.

Administrators accustomed to discussing capriciousness have much to learn from the courts' application of the prudence standard to trustees. First, the trustee bears the burden to demonstrate that she has acted *prudently*. Let me repeat, the burden of proof regarding proper behavior is on the trustee, not on the plaintiff. Second, evincing prudence is not the same as avoiding arbitrary and capricious behavior. As noted above, the prudence standard invites the trustee to explore and understand the risks in a decision, and to make judgments designed to minimize them. The trustee is not invited, as the administrator appears required, to collect data to support a feigned certainty that is not justifiable by the facts. The trustee is, however, pushed to suggest how the decisions made minimize risks.

Third, trustees' expertise is not a shield which requires judicial deference. Quite the opposite, it is an invitation to the Courts to demand that the trustee meet a more exacting standard. A trustee is expected to use ordinary skill in managing trust resources--the same as she would employ in managing her own business of like character and objectives as the trust. However, if the trustee is an expert in a field, or has represented that she possesses "unusual capacities," then she will "be expected to use them in the performance of the trust."[57] Finally, the trustees do not enjoy deference on their reading of the trust documents. Courts are extremely familiar with trusts, the duties of the trustees, and the legitimate expectations of the beneficiary. They have no difficulty in defining the duties of the trustee without much guidance from her.

When thinking about this as a whole--review of trustees appears to proceed on three different feet than review of administrators: under the trust (1) standing is not typically an issue and contracted standing would not likely affect trust litigation; (2) the burden of proof is

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[55] But not all. For the implications of the restricted notion of standing in Idaho see Fairfax, "Grazing Leasing on State Trust Lands: Four Current Cases," in Hill and Anderson, ed., *Environmental Federalism* (1997).

[56] This comparison is treated in *State Trust Lands*, at 277-78 and in more detail in "Arbitrary Administrators . . ."

[57] Bogert, at 334-35.

shifted from the plaintiff to the defendant; (3) demonstrating prudent decision making requires the trustee to do slightly different and yet considerably more productive things. The goal is not to defend a "preferred alternative" as the right one, as against all others, but to explore the risks and benefits surrounding a decision, and choose a *mix* of policies that are responsive.

b. So What Could the Forest Service Learn from the Courts Review of Trust Land Managers?

As an opening bar it is worth considering that trust principles ultimately may have some very direct relevance to national forest management. Martin Shapiro has been suggesting with considerable reasonableness in my opinion, that the next place to which the courts will turn for guidance in crafting a working relationship with administrative agencies is the trust standard of prudence.[58] This would be analogous to the court's embrace of interest representation as a standard in the 1970s. The judicial withdrawal I have described is well under way, but it is possible that such a prudence trend could develop simultaneously. Indeed, it is possible that the withdrawal that I have discussed could force environmental litigants to explore this path.

It is also worth noting that if Shapiro is to be right anywhere, it seems to me that the public lands present an excellent opportunity for a gradual shift in emphasis in the court's standards for review. There is no question that the courts frequently discuss the public lands as a form of a trust and a fiduciary relationship. As a broader range of attentive interest groups become familiar with state trust land management, and get shut out on more familiar routes of appeal, they will have an incentive to try new lines of argument that could provide a vector for carrying the vocabulary and the expectations from one field of public land law to another. I would not dismiss that possibility. Indeed, I would entertain it seriously. I would do so not because I expect trust review criteria as a whole to supplement or displace the APA--although I would not underestimate the importance of carrying more or less discrete expectations from one field of public land law to another. Rather I would concentrate on what I could learn in the process about trust principles and how they might, as indicated above, help me think about federal public land management and reform.

It is useful to note that concepts have rolled across the boundaries from federal to state trust land management fairly readily in the past. Resource planning is one area where federal requirements have bled unmistakably into the realm of trust land management. Recently the GAO did a comparison of timber management on federal and state trust lands in Washington and Oregon and concluded, completely wrongly in my opinion, that one reason that the states were so much more cost effective than the federal agencies was because the states were not subject to the wildly elaborate and inefficient planning requirements that afflict the federal land managers.[59]

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[58] See Shapiro, "Administrative Discretion: The Next Stage," 92 *Yale L. J.* 1487 (1983), and *Who Guards the Guardians* (1988). Discussed in "Arbitrary Administrators . . . . "

[59] GAO, "Public Timber: Federal and State Programs Differ Significantly in Pacific Northwest." Report to the Chairman, Committee on Resources, House of Representatives, GAO/RECD-96-108.

This is only in part true. We looked in considerable detail at the planning process in Washington, which we consider to be the best government run timber management organization in the nation, and concluded that in spite of the fact that the Washington State DNR is not under any statutory obligation to engage in elaborate land use planning, it does so anyway.[60] Participants in the forest policy arena have come, over the last thirty years, to expect a certain kind of process, and a certain kind of openness in public resource planning. It would not be prudent, the Washington DNR has concluded (correctly in my opinion), to attempt extensive timber harvest without investing in a similar process. What is different, as I have tried to indicate, is the kind of analysis that the trustee undertakes, and the way it is reviewed in court. Nevertheless, the costly and cumbersome planning process has carried over from national forest to state trust lands. This suggests to me that it would be prudent for the Forest Service to expect some carry over in the opposite direction. Let me go one step further--the agency might consider it prudent to foment some carry over from trust principles to national forest law.

Where would I look for--indeed seek--that carry over from trust lands to federal lands? First, in the concept of prudence I believe that there are important thought patterns which would be useful to the Forest Service. I refer specifically to the prudent trustee's embrace of risk balancing. It provides a significantly different frame for developing and presenting alternatives in planning and management discourse. Much of what the agency does in this area is defined in statute and regulation, and therefore would change gradually. Nevertheless, a greater emphasis on exercising judgment, presenting risks, and addressing not a single "preferred alternative" but rather a spectrum of strategies that balance them would, I believe, enhance both the thought processes underlying management and the usability and the credibility of agency plans.

A second area where I would recommend the Forest Service both anticipate and seek a cross fertilization between trust land and public land law is in identifying the kinds of data are necessary in order to meet the trustee's obligation regarding full disclosure to the beneficiary--what I have called accountability. A friend recently attended a conference at which Wes Jackson was quoted, by Wendell Berry I believe, as describing the coming century as "the age of accounting." So be it. The Forest Service has been hiding the ball on cash flows, returns to investments, income foregone, and similar for most of this century. The cat is coming out of the bag now. The agency will be under considerable pressure to devise improved methods of disclosure--not simply for economic indicators, but for ecological ones as well. If it were my call, I would look very hard at state trust land experience--their annual audits, their annual budget presentations to the legislature, their internal documents and accounting procedures, and challenges to their audits--for guidance. The courts and a whole range of decision makers are familiar with trust procedures in this area. Rather than make up something out of whole

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[60] Souder, Fairfax, Rice and MacDonnell, "Is State Trust Land Timber Management 'Better' Than Federal Timber Management? A Best Case Analysis," *West/Northwest Hastings Review of Environmental Law and Policy*, forthcoming.

and self serving cloth, I would adapt practices from the more successful state programs. The state trust land managers know how to keep books and make them public, even while operating on appropriated funds. I do not think it will take interested observers long to make the cross walk and I believe it would be an important area for the Forest Service to take the step first.[61]

The third area the Forest Service should look to Court interpretation of trust principles is for guidance in making the sustained yield aspect of the Forest Service mandate operational. Most people I know have long written off the MUSY of 1960 and similar statutory and policy calls for sustaining the yield on national forests as unenforceable boiler plate.[62] It is useful to note, therefore, that in the trust context the courts have found ways to hold trustees accountable to this clear requirement.[63] This has typically a monetary cast to it, the standard trust rendering of sustained yield might not satisfy all ecological health enthusiasts. However, the requirement is both far from a nullity and quite adaptable.

The case law on this is not extensive in the trust land context because the issue is only recently emerged. However, the response of courts in Idaho and Washington suggests that the tool is potentially a potentially important one. In Idaho, an environmental group seeking to restrain harvest in a watershed was turned back on standing issues, but the framing of the case is instructive.[64] In Washington, timber interests/beneficiaries attempting to force the trustees to harvest more aggressively lost a preliminary but significant battle. The strategy was to demonstrate that conservative harvest regimes on the Loomis State Forest both risked catastrophic fire and were illegally designed to protect the non-beneficiary lynx . The state argued that in areas of scientific, economic, and political ambiguity, it is prudent to manage conservatively in order to protect future benefits for future generations. When operating under a mandate to maintain the productive corpus of the trust, the trustee is obligated to

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[61] Jon Souder and I have actually planned for many years to pursue this precise issue. One interesting way to get a handle on the issue is to observe problems auditors have encountered in federal government expense reporting procedures where the agencies are involved in the Exxon Valdez Oil Spill Trust. Because EVOS is a trust and the Forest Service is among its subcontractors and trustees, the Forest Service books are subject to a standard audit. The auditor is not impressed and has trouble following expenses, allocation of time to projects and a host of minor details. The Forest Service could use EVOS experience for lessons on reputable bookkeeping, if such there be. Discussed in Guenzler and Fairfax.

[62] Jan Laitos, University of Denver Law School is particularly insightful on this matter. See, his keynote address at the Rocky Mt. Mineral Law Institute, "The New Dominant Use Reality on Multiple Use Lands," July 22, 1998.

[63] For a lengthy but preliminary discussion see Souder, Fairfax, and Ruth, "Sustainable Resources Management and State School Lands: The Quest for Guiding Principles," 34 *Natural Resources Journal* 271 (1994).

[64] Regarding standing, Idaho is a pesky jurisdiction that does things differently and fouls up any generalization. Idaho courts define beneficiary narrowly and take a very narrow approach to citizens who can sue to vindicate trust principles. See Selkirk-Priest Basin Association, Inc. v. State of Idaho, 96.11 ISCR 431 (1995). Similar efforts in the grazing area have also been turned back. See a long line of cases named Idaho Watershed Project v. State Board of land Commissioners, starting with CV 94-1171 (1994).

maintain a full range of management options by protecting species of unknown but potential value,[65] and also to manage conservatively.

The Court supported the state's management program and wrote emphatically that the manager of a perpetual resource is not allowed to prefer any generation of beneficiaries to any other. Not to put too fine a point on the importance of sustainability, this is the only case of which I am aware in which a beneficiary challenging a trustee has lost. This line of reasoning ought to be of special interest to the Forest Service as it attempts to move to a more ecologically based management regime.

The forth area I would anticipate--and seek vigorously--some cross over between trust law and public land law is in the whole notion of a beneficiary. If I were the Forest Service, I would be looking for ways to define beneficiaries that would create effective, diverse, local support. The agency has done so, indirectly perhaps, in the past, with its payments to county governments. If the Forest Service is going to move away from timber harvest and is looking for a local embrace of more ecologically oriented management, it is probably prudent not to rely on Congress to continue to provide revenue shares in timber harvests that do not exist. I would instead give some thought to establishing management trust funds which can be monitored in a way that will give user groups some stake in protection of future national forest ecosystems. Exploitation for school children is not wildly popular among opponents of trust land programs, but the school children give the operation some appeal. Can a national forest address differing local priorities by agreeing to put some receipts or fees into an endangered species or a land acquisition trust fund? Could the Forest Service take steps to interpret the K-V funds as a trust, with trustees who would manage the funds not as a slush pot for the agency but with the legislator's purpose to guide them?[66] These steps are very much worth thinking about.

Trust principles could be transferred more or less en gross by courts and litigators seeking a new model for review of administrative decisions. The better point, however, is that it is reasonable to anticipate and even to seek increased blending of APA and trust review standards. The four areas where review of the trustee could usefully expand Forest Service thinking--prudence, accountability sustained yield, beneficiaries--could provide important new ways for approaching very basic management issues.

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[65] The state pointed to the growing markets for conifer bough sales, pole sales, mushroom harvesting leases and small diameter timber sales which did not appear promising until recently. See State Respondent's Brief in Opposition, at 29, citing FRP, Appendix A at 18-19 in Okanogan County v. Belcher, No. 95-2-00867-9, Superior Court for Chelan County. Discussed in "Is State Trust Land Timber Management 'Better,' . . ., forthcoming.

[66] Forest Service Employees for Environmental Ethics, *Who Says Money Doesn't Grown on Trees?* (1996), occasional paper, afseee@asfeee.org.

3. Trust Lessons for Responding to the Collapse of Science and the Rise of the Economics Metaphor

The progressive era model, as elaborately discussed above, has provided the Forest Service with a model for organizing its relations with the outside world. As noted above, the agency's legitimacy began with its embrace of science, and has suffered enormously from its eroding credibility. The trust has built less on scientific models than on economic ones. Most obviously, unlike the Forest Service, the very purpose of trust land management is to make a profit to be used in running "common schools" within the states. I have argued, most frequently in concert with my co-author on most trust matters, Jon Souder, that this market orientation is, all by itself, sufficient to transform many of the agency's current ills. We have not gone so far as to argue that it is also necessary, but others have. It has become the commonplace of most contemporary discussions of public land reform to embrace market mechanisms, fees for services, full cost pricing, proper incentives, and so forth. I have little to add. Thus, while one does not want to ignore the role of economic incentives, how they operate in the state trust lands, and what they could teach the Forest Service, it would be a little silly, at this point in the debate to present them is if I had just discovered something.

To strike a hopefully useful balance between familiar notions of markets and what the state trusts specifically might teach us, let me bypass the bulk of what I take to be the normal range of discussion in this area and focus instead on two elements peculiar to the trust lands which seem to have special relevance to adapting general market theory to land management in what continues to be a distinctly political arena and an imperfect market place to boot: first, the emphasis in trust law on thinking in terms of a trust portfolio, particularly the importance in trust land management of thinking about permanent funds; second, I shall touch briefly on the trust land experience in program funding as a possible antidote to current thinking about sources of funding for Forest Service programs.

The Portfolio

The most interesting trust element in my opinion is the idea of the trust as a portfolio of assets. I believe that the Forest Service is deeply hard wired against thinking in portfolio terms. Putting the portfolio mentality and some standard trust activities into the FS mental hopper would considerably enhance the agency's capacity for adaptive responses to local conditions and priorities.

The Forest Service seems to tie its own hands by thinking fairly consistently in terms of managing acres, frequently sacred acres, which are entrusted to it. For work that I am doing on conservation land acquisition, I have just reviewed in some considerable detail, a number of the forest-to-park land transfer battles of this century--starting with the shifts that occurred with the passage of the NPS organic act in 1916, continuing through the Roosevelt reorganization of monuments and battlefields, and capped probably by the protracted dispute

over the evolution of Grand Teton National Park.[67] I am deeply aware that the Forest Service has fought the NPS for "*its*" *sacred* acres for most of this century, and that it regards repositioning its acres, ignoring some, or emphasizing others as some kind of defalcation.

This mind set is not at all a part of the state trust land experience. In Washington State, by comparison, the trust land managers view the lands they hold as a part of their trust portfolio. Perhaps because Washington State is not one of the two trust organizations that manages the land and the permanent fund, I think it is fair to say that the state DNR considers the money to be a less important resource than the land. This kind of thinking causes some amusement when financial managers, auditors and other private firms make presentations to trust land managers--why so much focus on thousands of acres that lose money when you could focus on the permanent fund and radically increase the funding for the schools? The trust land managers do not consistently "get it." But, the state trust is happy to reposition itself off of politically difficult to manage and/or environmentally sensitive areas--it trades them or sells them to the state park program. The only constraint is that the trust be compensated.

The Forest Service does not easily consider repositioning itself. Nor does it think easily of investing in the development of resources that will produce returns--or of *not* investing in resources that will not produce returns. Finally, it does not appear to think in terms of achieving acceptable levels of risk by spreading investment or techniques across resources, or spreading management techniques or investments across resources differently. One reason for this is quite clear--until relatively recently, no one has seriously considered that the Forest Service ought to think in terms of producing returns or spreading risks. The Forest Service way was right for every acre. The Forest Service could gain considerable mental flexibility if it opened its mind to thinking in terms of a portfolio rather than sacred acres to be managed according to a catechism. The portfolio concept is the first step towards identifying valuable resources to manage, analyzing opportunities and resources for local economic development, and experimenting with tools and techniques.

For some shock therapy, let me share with you some important trust land resource management decisions, all taken from *State Trust Lands*. From the mid-1970s to the early 1990s, significantly a period in which land prices were increasing many times more rapidly than inflation, the Idaho State Land Board reduced its agricultural land holdings from about 55 thousand acres to about 6 thousand acres. Their rental income declined accordingly from about $475 thousand per year to about $100 per year in the early 1990s. Proceeds from the land sales were placed in the permanent school fund. Idaho sold approximately 90 percent of its agricultural lands, lost only 79 percent of its agricultural revenues, and produced three to six times the previous revenues.[68]

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[67] The Grand Teton story is probably the most familiar, but it is repeated throughout the country on many occasions. See Connick and Fairfax.

[68] Discussed in *State Trust Lands*, 103-04.

Washington took a significantly different approach to its agricultural lands than Idaho--beginning in the late 1950s it made a decision to invest in irrigation to raise the value of selected lands. When the program started, Washington leased less than 500 acres of irrigated land. Today, they lease nearly 34,000 acres of irrigated agricultural parcels. They invested approximately $10 million in the conversion and raised their per acre revenues from 50 cents per acre for dry land to $50-$500 per acre for irrigated row crops, orchards and vineyards.

Perhaps the most breathtaking trust land programs of all involve the "transitional lands" programs in many states. Basically the idea is that as towns grow out to meet trust holdings, the trustees increasingly engage in commercial real estate developments. Virtually every state has at least managed some commercial properties, at a minimum parcels that have come to the trust for tax losses or parcels that are astride a major roadway and are leasable for gas stations, warehouses, or similar facilities. Washington has also developed a "land bank" that temporarily holds land sales receipts pending purchase of replacement properties. The money eventually makes it into the permanent fund, but not before it is used to improve commercially viable properties. The grandpappy of the commercial developers is clearly the Arizona trust. It runs an Urban Lands Program which works to improve selected holdings for residential and--gasp--golf course developments so that the state can enjoy a larger return than simply just bare land value.

I mention these trust examples not to suggest that the Forest Service should go into real estate development, but rather to suggest that the spectrum for what is done and doable on public lands in the west is far broader than the Forest Service model suggests. Coming to grips with this broader spectrum of uses would enable the agency to think more in terms of a portfolio.

What would the agency get out of doing that? The portfolio perspective would help the Forest Service think critically about which resources in any region are the most important elements for management emphasis. The agency would be well advised to think both in terms of their own portfolio of assets in a region, and in terms of the region's portfolio of assets. If the Forest Service is going to play an effective role in regional economic development it must be able to see which of its resources are most worth managing and, not always the same, how national forest resources fit into a regional economic picture. Increasingly, the agency must have an eye on both those sparrows.

Let me give you one example of the results of this perspective that is so obvious that we overlooked it for years. I now consider it instructive to point out that of 22 western states that own and manage trust lands, only four--Washington, Oregon, Idaho, and Montana--run a serious timber program. Yet, the Forest Service tries to manage timber in virtually every state where its acres are located. Even while allowing for differences in land location and quality, this disparity is striking. Because they are required to make money or break even, state trustees are considerably less enthusiastic about marketing timber in places where the Forest Service persists. This suggests to me strongly that the Forest Service could learn a lot about setting priorities if it experimented with thinking of its role and its resources in terms of agency and regional portfolios.

Even if the Forest Service is not ultimately responsible for producing returns, simply thinking about what is in their portfolio in terms of productive and unproductive assets--however defined--would be an important new view of agency lands. Thinking of different assets in a portfolio rather than acres to be managed ought to be of major value to the agency in setting priorities in a resource constrained environment. This does not necessarily mean that the Forest Service would engage in a serious disposition program. However, it might assist them in developing areas of management emphases. I am quite taken with the Washington model on irrigated lands. It comes up in my mind with the program that the Bureau manages under the Recreation and Public Purposes Act--and the Forest Service could productively meditate on those examples.

Funding Mechanisms

The second element I want to discuss under the heading of a general shift from a scientific metaphor to a market one is the issue of funding trust land programs. The state trust land model is frequently the focus of undeserved attention as many casual observers attempt to present the state trust lands as funded from revenues, hence embodying the most obvious feature of business like operations. The truth is, as I have indicated, slightly different, and potentially more useful.

What you *can* find in the trust land context is a number of different models for approaching that businesslike mode of operation without actually cutting the legislature completely out of the appropriations process. This Congress is understandably reluctant to do. Therefore the various models adopted in the several states for solving the same problem might be instructive to the agency--for reshaping individual programs or parts of programs. Or, the Congress might experiment with some of the forms that states have used. Washington State's is perhaps the most interesting approach: up to 25 percent of the revenues from both renewable and nonrenewable resources, including land sales, are deposited in the DNR's account for its operations on state trust lands. However, the funds must be appropriated before they can be expended. Moreover, any unexpended funds are retained in an account by the trustees for subsequent expenditure until the amount in an unexpended appropriations account fund until after a several years lapse they are distributed directly to the beneficiaries.

This pattern of operations funding mechanisms is not always as Randal O'Toole would prescribe. Moreover, it is worth considering that we were not able to discern any reliably correlation between the trustee's funding mechanism and policy outcomes. Nevertheless, funding mechanisms and processes are two areas in which reformers have recently focused a great deal of attention. State trust land management agencies have adopted a number of variations of two dominant themes. This diverse experience ought to be part of the conversation when thinking about funding mechanisms for the Forest Service, National Forests, and Ranger Districts. The states provide many models to explore.

4. Flexibility in Response to Institutional Diversification

If it is true, as I have suggested, that we are in for a period of diversification in conservation institutions, one that requires the Forest Service to tailor make programs and partnerships in different regions and communities, then it is probably also true that the state land trusts have the most to teach the agency in terms of institutional flexibility. I will emphasize two kinds of flexibility. First, as partnering with public and private organizations emerges as a commonplace method for coping with budget shortfalls, political pressures, and the demand for landscape level decisions, the trust provides a wonderful vehicle for rapidly organizing entities to share access, control over and benefits from resources. A trust is basically a means for organizing title, control and benefit. Understanding this flexible, adaptable model could be very useful to the agency in a number of settings. Second, as the agency tries to work in ways that are more responsive to the peculiarities of place and region, it may allow itself to consider the possibility that management technique which are perfectly adapted to one region or setting are inappropriate for another. One way to diversify the agency is to diversify its management tool kit. The state trust lands do many similar things quite differently from the Forest Service and on any specific topic, reference to their experience is likely to be a source of useful insights.

Regarding institutional diversification, it is important to note that our work suggests that much of the details of administrative set up of an agency do not matter very much. When I first began working on trust lands I was quite anxious, as any good political scientist ought to be, to delve into differences in outcomes which might be attributed to the type of Commissioner (elected, appointed, civil service), the type of board (active, appeals only, or moribund), the funding mechanisms, and so on. It may be comforting, as we plunge into a period in which institutions are forming and changing rather rapidly, that none of that seems to matter very much for policy outcomes. A lot of the theory, including, as I have just suggested, how programs get their money, have limited discernible impact on outcomes.

My more recent work on conservation trusts more generally has shown, however, that trusts have the virtue of being very easy to establish. It is quite simple to set up a trust organization to manage lands, funds, organize a shared distribution of mitigation funds, protect habitat and endangered species, and a host of other purposes. Even in the most contentious situations, such as the unraveling of the Grayrocks Dam litigation or the Garrison Diversion, interested parties were able, within a matter of weeks, able to establish fairly successful organizations to address mutual concerns.[69]

In *Land Conservation Through Public/Private Partnerships,* Eve Endicott has a wonderful profile of a land acquisition transaction which involved the Forest Service, the Nature Conservancy, a conservation buyer, a seller, and 15 people signing 21 documents. Another tale involves a Gallatin National Forest tract in which three separate foundations and the Montana Land Reliance raised the purchase price and held back mortgages on separate

[69] Discussed in Guenzler and Fairfax.

parcels of land which the agency is intending to buy.[70] These complex acquisition and management transactions beg for the clarity of the trust instrument.

The Forest Service has in fact has participated in a one of the most interesting we are studying--the Exxon Valdez Oil Spill Trustee Council--which with relatively little difficulty melded six state and federal agencies into a group that has been astoundingly successful at spending almost $1 billion dollars--not so simple a task as you might imagine. One of the handy things about a trust is that while the framers can control whatever they set out to control, the general principles and long familiarity of the trust provides a default position for things that the framers forget or fail to address. As the Forest Service is also increasingly likely to get drawn into institutional settings that are partnerships--receive, manage and expend damages, mitigation funds, participate in community planning and consensus groups--it could be important to have this ready format up the agency sleeve.

And, as institutions diversify, it is helpful to know that the state trust land managers have developed a tool kit that is sufficiently closely related to the Forest Service's own that there may be some fruitful options and overlap. Basically, as noted above, the state trust lands managers do many of the same things that the Forest Service does--they lease grazing lands, they sell timber harvest rights, rights to access and develop minerals, they just, because of the different mandate we are talking about, do it differently. What I am suggesting is a wrench hunt--looking for tools that work in a particular set of circumstances--longer handle, shorter, wider mouth. Some state trust land manager has probably tried it--and it is probably more efficient and responsive to market imperatives than the "Forest Service way," and it is probably worth considering.

The Forest Service ought to be looking for a number of options for dealing with expiration, renewal, transfer, and improvements on grazing leases, consequences for different approaches to subleasing, resource and land appraisal and fee setting schemes, different ways to structure payment schedules on oil and gas leasing. You can find many of these options detailed in our book or in numerous compilations that the state trust land organization puts together. Sometimes the agency might want to consider adopting a different approach. Other times it is just useful to know that processes that lessees insist would put them flat out of business if adopted by the federal government run without a hitch on state lands. State land managers, for example, charge fair market value for telecommunications sites, actually run a grazing *leasing* program, and have devised numerous very different ways to charge for recreation.

A few examples will have to suffice. Although the management of trust land public minerals on state lands is deeply colored by federal categories and concepts, they all charge for all minerals resources extracted--hard rock and energy minerals. Second, several states have extensive programs for not only managing water quality but charging for water that arises on state lands. Montana and Colorado, for example, have made extensive efforts to gain control over water put to use on state trust lands. Normally, those rights are filed for by

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[70] Endicott, *Land Conservation through Public/Private Partnerships* (1993), at 199-202.

the lessee--which then limits the marketability of the lease. The Board of Land Commissioners (BLC) in Colorado is applying procedures in oil and gas leasing to groundwater management on a few parcels where they cannot get title outright. The state charges 12.5 percent royalty on water sales for nonutility use and 10 percent on water used by public utilities. The Colorado program is a small one--approximately 30,000 acre feet are involved. However, the experience is worth looking at.

Probably of more import, given the direction in which commodity development on the national forests appears headed, the state trust land managers have taken a variety of approaches to recreation access. Their experience could broaden the Forest Service's thinking on the subject. The Forest Service lands are, as I understand it, generally open with unrestricted access to recreationists. Most state trust land managers surrounded by federal lands under those circumstances simply adopt the federal posture--because the state parcels are not separately fenced, anything else would not be prudent. Where the trust lands run into controversy is where they are surrounded by private lands which are posted. In that context, the state lands are the "public" lands and they are under pressure to provide access for general public recreation and hunting. They of course encounter just the opposite pressure from the lessees who want the state lands closed.

The interesting issue is how states have attempted to gain some recreation returns in areas where they are under pressure to provide general access and it is not efficient to collect fees at a gate. Four different approaches are taken. The first is what we might call the Forest Service approach--except where a lease specifically allows the lessee to exclude recreationists, the state simply allows free recreation access. This is most typical. However, three other approaches are worth considering. At the other extreme, some states simply close their lands to recreation. This would allow the state to make a recreation lease with either an existing lessee or with a supplemental lessee who could then manage the recreation use on the site and pay an agreed upon return to the trust. This policy occasionally is implemented when the trustee learns that an ag or grazing lessee is coincidentally leasing recreation access to the state parcel. Typically, the state will rewrite to existing lease to include a charge for recreation access or release the parcel for recreation uses to another lessee.

Montana undertook a study to learn how to maximize returns for recreation access to state trust lands. It has been charging $5 for an unlimited number of annual recreation permits issued for state lands. Following the recommendations of an economic consultant, the state adopted a policy of charging $35 for a restricted number of annual recreation permits. This allows them, if sales goals are met, to maximize returns while allowing only 12,000 recreationists access to trust lands. Colorado took a different approach to hunting access working in cooperation with the State Division of Wildlife. The trustees allow the Division to specify up to 500,000 acres of trust land which will be opened annually to hunting. For this access, the Division of Wildlife pays the trust $500 thousand per year. No camping is allowed on any of the state trust lands, and they are only open during hunting season. Colorado receives approximately the same annual income from hunting access as Montana, but they allow much broader public access.

As the Forest Service enters an era in which recreation access is increasingly controversial, and potentially increasingly profitable, the state's experience with access and returns policy is important. At a minimum, it ought to suggest that some things now considered in many circles to be politically impossible or otherwise unthinkable are neither. The states have broad experience in a number of recreation programs which ought to help the Forest Service conceive of alternatives.

Finally, trustees have developed a variety of public involvement programs which would enrich the exercise for the agency and perhaps build better connections with increasingly important local and regional publics. I find most interesting the developments undertaken in that area by EVOS. Their program has evolved from and is presently way beyond what you might characterize as notice and comment involvement that typifies the federal agencies. Whereas most state trust management organizations have stayed fairly close to the Forest Service example on public involvement, that is protective of their authority to make decisions, hence clear that they are seeking advice and "input" from the public, not actual participation in management--several of the land conservation trusts we have been studying are not so constrained.

The EVOS trust is particularly relevant here because the programs are responsive to the growing emphasis on community participation, and because the Forest Service plays a major role in the EVOS council.[71] The EVOS staff has been aggressive about devising ways to involve affected groups and individuals as deeply as possible in EVOS programs. Although not all of the EVOS efforts are effective or efficient, they provide a small library of tools and concepts for others to experiment with.

This elaborate program for involving villagers in the spill affected areas is particularly relevant. It has evolved into a self-conscious effort to develop routines for bringing local ecological experience and agency science together. The program has self consciously adapted programs initiated by Alaska Native Science Commission (ANSC). The founding of the new group was supported with funding from the National Science Foundation. Initial goals of the ANSC were to focus research on issues that were of interest to native communities and involve them in research design; to integrate traditional knowledge into research and science, facilitating native participation and training for native young people; to assure that results of research were usefully disseminated to native villages while protecting their cultures and their intellectual property. Some of this is reasonable in the context of cross cultural and native subsistence issues. But it provides an excellent starting place to a more local/regional interactive approach to forest management. In the now familiar areas of soliciting comments and participation in planning processes, the EVOS program goes far beyond what has become routine for the agencies and is worth study for that reason alone. But in the field of local involvement in science and management, EVOS is truly a pioneer, developing both programs and protocols for working with local publics in the management of resources. The Forest Service ought to be learning from programs in which it is already a key participant.

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[71] Guenzler and Fairfax discusses the EVOS trust in detail.

In all these areas the Forest Service has much to learn from the state trust land managers. The agency likes to think of itself as the touchstone of efficient, effective public agency and the best resource management institution in the United States and the world. From the perspective of a trust lands student, I see a slightly different story: the best predictor of bad trust land management, particularly in the grazing context, is the presence of extensive federal lands near by. When the federal agencies establish the expectations, it is very hard for the states to transcend the culture and the rate structure designed to benefit the established commodity users. This is worth thinking about when contemplating what Smoky could learn from the states.

IV. CONCLUSIONS

Americans are rethinking ideas about federal government, and its relation to science, markets, states, local government, and private groups. Because the Forest Service embodies the values and assumptions of the model now faltering, it is particularly important for them to think comprehensively about new tools, vocabularies and stories about what they are doing and why. Trust principles, and the experience of the state trust land mangers have much to teach in this context because the broad social changes under way put an emphasis on the core principles and virtues of the trust--a market rather than a scientific metaphor of organization, an enormous flexibility and adaptability in the face of institutional diversification, and a relationship to the courts that is significantly different from the one defined in the APA.

It is appropriate therefore, that as we look for ideas and experience to revitalize the long moribund vocabulary of public resource management, that trust principles should occupy a significant place in the discourse. Thinking in terms of portfolios, undivided loyalty to specified beneficiaries, and expertise as a goad to higher standards of performance rather than deference could radically reorder the Forest Service's pantheon. For example, because of its emphasis on accountability to clearly defined beneficiaries, the trust would provide an especially sharp razor in addressing the question of what uses/users should be subsidized and which should pay their own way or produce a return to the treasury.

However, looking to the trust lands for experience and evaluation of different tools for such activities as basic accounting, allocating and reallocating grazing *leases*, appraising improvements, and running a public involvement program is probably more attractive to the agency, and likely to be more productive in the near term. We do not have to speculate or theorize wildly to explore the possible impacts of proposed reform approaches--much of what is considered as progressive and/or impossible to achieve in the Forest Service arena is standard operating procedure somewhere on state trust lands. Some of the institutional and mechanical variation does not seem to make much difference in terms of policy. That is useful data. Moreover, simply understanding what the traffic would allow would strengthen the Forest Service's hand in revising programs. Many procedures which the agency's constituents complain would put them out of business are routinely accepted by the same operators dealing on state lands. The trust lands are not perfectly managed, and trust

principles are not a silver bullet. But they do give a library of experience to those who are looking for alternatives to the present Forest Service approach.

Trust principles will not transform the agency into a perfect organization for the new millennium. However, the Forest Service is presently hoisted on a number of petards to which trust principles are particularly responsive. The state trust lands are an important source of insight for reformers of all persuasions.