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"CAN YOU LIVE WITH THAT, CHIEF? -

FORGING NFMA THROUGH CONGRESSIONAL AND
AGENCY GIVE AND TAKE

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1972-1979

THE NATIONAL FOREST MANAGEMENT ACT IN
A CHANGING SOCIETY 1976 - 1996

September 16 - 18, 1996

Natural Resources Law Center
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"CAN YOU LIVE WITH THAT, CHIEF?"

by Jphn R. McGuire

Twenty years ago I was glad to be asked the question. But frankly, considering the alternative, I had little doubt that Forest Service could live with almost any directive that the Congress chose to enact. We had a few suggestions for Congress; none urgent.

Today, I would like to talk about two areas that may be of interest to you. In the Seventies they were of much interest to the Forest Service.

The first reviews the history of planning.

The second area concerns problems with statutory specifications for managing forest lands.

The National Forest Management Act (NFMA) amends the Resources Planning Act (RPA), passed in 1974. The 1976 Act deals with land use planning for the National Forest System. In contrast, program planning is the focus of the RPA -- Federal programs for State and private forestry and forestry research as well as the National Forest System

About every decade since 1909, the Forest Service

has analyzed the forest situation in the United States and then tried to put forth programs to deal with it. That was always the rub. It was always OK to assess the situation -- even to predict catastrophes like timber famine or siltation of navigable rivers. But any program proposal that implied Administration endorsement of plans that required more appropriated funds in future years was forbidden. No President or cabinet officer wants to agree to spending that has not been subjected to the annual budgeting process.

Yet, when it comes to natural resources where the planner's horizon must extend 5 or 10 decades ahead, the annual appropriation process is an awkward vehicle.

That was the problem.

There were two possible solutions: For example, the 1920 and 1933 assessments and plans were published as Congressional Committee reports. The 1948 and 1958 documents were published by the Department with the program proposals abbreviated or generalized enough to evade any hint of funding commitments.

The RPA, we hoped, would get forestry program planning out of this quandary. It would require periodic publication of long range Federal programs for the Nation's forest resources.

As an enrolled enactment, the RPA reached the White House just as President Nixon was leaving. It was accompanied by a strong letter from the Secretary, urging signature and a strong letter from the Office of Management, urging veto.

President Ford signed it.

The NFMA, as I said, was passed by the Congress in 1976 as an amendment to the 1974 RPA. It, too, survived a somewhat unusual relationship with the Executive Branch. Let me explain.

As you probably heard this morning, the need for a new National Forest law arose from Judge Maxwell's 1973 decision, regarding timber cutting on the Monogahela National forest in West Virginia, 367 F. Supp. 422 (N. D. W. Va 1973).

The Forest Service then had two choices: Seek a remedy from the Congress. Hold on in other Circuits, hoping for contrary opinions about the 1897 Law, leading perhaps to a favorable outcome at the Supreme Court.

Our appeal to the Fourth Circuit had gone nowhere, 522 F. 2d 945 (4th Cir. 1975) and our attorneys didn't think much of "wait and see." The Office of Management and Budget, the Council on Environmental Quality and other parts of the Executive Branch never got together on a legal remedy.

Anyway, the 1976 elections were approaching. The Secretary and other high officials had left the Government. Administration concerns were elsewhere. It was impossible to stir up any upper level concern about the problems of the agency.

Thus Forest Service participation in the work of the Legislative Branch was not squelched as it might have been if the usual protocols of Executive Branch behavior had been enforced. As long as we didn't rock the boat, no one complained.

Again, the timing of the enrolled enactment was fortuitous. It was October and the Congress was about to adjourn. The proposed law had some shortcomings. For example, it limited the President's power to change National Forest boundaries. On the other hand it had bipartisan support and this was no time to bring up new issues. In a divided Administration it survived.

So much for historical anecdotes.

Let me turn now to a couple of difficult questions facing the framers of the NFMA.

First, how specific should the law be?

Second, if you can't find it in Congress where can you look for consensus on management of something as complex as the 190 million acre National Forest System?

The bigger issue was reflected in the debate

over how far the law should go with specific forest management directions. For instance, should the law lay down silvicultural prescriptions for cutting and regenerating stands of trees?

Senator Randolph argued that only all-aged silviculture should be permitted on the Monogahela Forest; even aged treatments should be prohibited. Regeneration of shade-intolerant species such as black cherry and yellow poplar could be left for other ownerships to provide.

The Forest Service -- trying to maintain as much autonomy as possible -- objected to the idea of such a specific directive.

The outcome of the specificity debate was compromise. While the agency might prefer to have its current policies and procedures left optional, it could not readily object if the Congress chose to make them statutory. Examples concern clear cutting, lands submarginal for timber, multiple use, interdisciplinary reviews, reforestation, etc.

I told Chairman Talmadge that the Forest Service could live with the compromise. I didn't tell him that I thought prescriptive laws lead only to trouble. Congress, I thought, should stick with policy and leave execution to the Executive Branch. If it had not been for the urgent need to replace

the 1897 Law, I would have been tempted to hold out for a broader, more deliberate approach to National Forest policy -- in particular, an approach giving more attention to the nontimber resources of water, range, wildlife and fish, recreation and wilderness.

Less controversial was the second question of how to search for consensus. Traditionally, the solution was to set up a statutory commission with power and means to gather information, hear people's opinions and make recommendations. Examples were the National Forest Reservation Commission, the Materials Policy Commission, the Public Land Law Review Commission and so on. It is somewhat intriguing that Senator Humphrey sought, instead, a solution mainly in land use planning. I suppose he felt that a Forest plan would provide information and proposals detailed enough for citizens to get involved with readily.

The Forest Service could hardly object.

It possibly had more plans on the shelf than any other public land agency. Some were written by the Ranger, some by the Forest, some by the Region. Some had to be approved in Washington, but most were coordinated and approved at the Region or Forest level. Some were good plans; some were poor or outdated. Some were detailed; some were skimpy. Land use planning activity was widespread in the agency but uneven.

Typically, Forest plans were little publicized but were readily available to anyone who wanted to see them. One of the main approaches to public involvement was the public advisory committee. Before Jimmy Carter became President, the Forest Service had, as I recall, over 200 such committees. Most were appointed by the Forest Service officer whom they advised. Membership was balanced among interest groups, academics, State government and counties. To reduce the size of government, Carter abolished all but a few of them. Anyway, these rather informal advisory committees never would have met the requirements of the Federal Advisory Committee Act.

The idea of utilizing a group of outsiders is attractive and Congress did retain it in the Act's provision for a Committee of Scientists to advise in the preparation of regulations governing the planning process.

The NFMA was not as prescriptive as some might have liked. Instead, it relied on Forest by Forest planning, with public involvement, to achieve the kind of forest management that society seems to want.

This is a good time to take a fresh look at the 20-year old law. In particular, I think it would be well to consider again the pros and cons of legislative prescriptions for managing the natural resources owned by the public.

In addition to that issue, I hope this conference will consider some other questions as well:

Have more specific management directives come from the courts? Because of a lack of specificity in NFMA? Or maybe because of other laws whose correlation with NFMA is lacking or indistinct?

Has the Act resulted in increased use of the annual appropriation to give more specific direction?

Has NFMA generated more administrative appeals than a more specific law might have tolerated?

How well has forest land use planning been coordinated with national program planning? With other Federal planning? With State, regional, watershed, ecosystem and economic planning?

A Forest plan, you would expect, will reflect consensus or compromise among local interests. But what if local interests are not the same as national interests?

Will planning ever substitute for specific legal mandates when contentious management proposals divide the various publics? Urban interests versus rural, for example. Or consumers versus preservationists.

How substantial are the conflicts between NFMA and other laws? If necessary, how can they be fixed?

Is this the time for the Congress to write a

new law for the National Forests? Or would it be better, perhaps, to go the route of another statutory commission set up to review and to recommend legislative changes? If a commission is desirable, what sideboards should it have?

I'll conclude by emphasizing that the question -- Can the Forest Service live with that? -- is not particularly pertinent today. The important question is: What kind of management does the Nation expect to see in the National Forests? And before that question can be answered, society must reach agreement, somehow, on what it wants from this great public asset.

Without a greater measure of agreement or, at least, a more orderly search for consensus, we seem headed for a prolonged debate.

This conference, it seems to me is a good place to begin.