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Discussion Paper: The Changing Management Philosophies of the Public Lands

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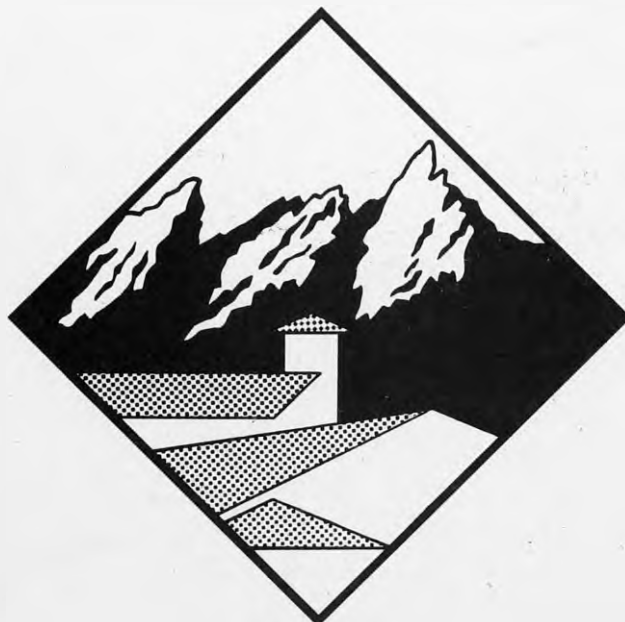
**DISCUSSION PAPER:
THE CHANGING MANAGEMENT
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PREFACE

The Natural Resources Law Center was established at the University of Colorado School of Law in 1982. Its primary goal is to promote the wise use of natural resources through improved understanding of natural resource issues. The Center pursues this goal through three program areas: research, public education, and visitors.

In January of 1993, the Natural Resources Law Center convened a workshop of approximately 30 public lands experts to discuss priority issues in western lands and resources and to develop an agenda for the Center's new Western Lands Program. In preparation for this workshop, Center staff prepared five discussion papers, each dealing with a broad theme critical to the future of public lands policy. This discussion paper reflects the valuable comments received from workshop participants.

The following individuals attended the Western Lands Workshop in Boulder: Michael Anderson, Sarah Bates, Richard Behan, Ralph Benson, Melinda Bruce, Jo Clark, Robert Davis, Dennis Donald, Sally Fairfax, Maggie Fox, David Getches, Frank Gregg, Martha Hahn, Gary Holthaus, Ken Hubbard, Robert Keiter, Ed Lewis, Dan Luecke, Lawrence MacDonnell, Daniel Magraw, Guy Martin, Jim Martin, Jerry Muys, Robert Nelson, Jim Noteboom, Randal O'Toole, Teresa Rice, Hal Salwasser, Debbie Sease, Karin Sheldon, John Wilkes, and Charles Wilkinson. Their enthusiastic participation and assistance with the preparation of these papers is greatly appreciated.

These are discussion papers, intended to inform and to stimulate thinking about policies for the western public lands. We welcome and encourage your comments and participation in an ongoing dialogue intended to facilitate improvement in these policies that are so important to the West and the United States.

INTRODUCTION

Since the late nineteenth century, the majority of America's public lands have been managed under a philosophy that has come to be called "multiple use."¹ Today this is the underlying tenet for management decisions on lands administered by the U.S. Forest Service and the Bureau of Land Management (BLM), although within each of these agency's lands are specially-designated tracts (wilderness areas, for example) that have a more restricted range of activities.

The Forest Service and BLM have long viewed the multiple use concept as a mandate for satisfying the broadest possible range of public interests. As recently stated in the Forest Service's Rocky Mountain Regional Guide: "Multiple-use management involves the balancing of the needs and desires of the American people, consistent with basic land stewardship responsibilities."² In combination with the concept of sustained yield (an objective that calls for maintaining constant production of renewable resources from the public lands), multiple use theoretically promises an optimum allocation of resources:

Multiple use is a balancing of the competing public demands for use of the resource. Sustained yield is a balancing of these same demands against the sustainable productive capabilities of the land. In a theoretical setting the combination of multiple use and sustained yield will always produce the desired outcome.³

A public land manager operating under the multiple use mandate "must try to accommodate all resource uses to the extent possible, giving priority to none -- at least on the broad scale -- and consideration to all."⁴

¹National parks and national wildlife refuges are managed under more restrictive mandates, generally emphasizing preservation and visitor access; they are not considered "multiple use" lands in this discussion.

²U.S. Forest Service, Rocky Mountain Regional Guide 6-1 (May 1992).

³James H. Magagna, Is the Multiple Use Sustained Yield Management Philosophy Still Valid Today? Yes, in Congressional Research Service, Multiple Use and Sustained Yield: Changing Philosophies for Federal Land Management?: The Proceedings and Summary of a Workshop Convened on March 5 and 6, 1992 89, 91 (Dec. 1992).

⁴George Cameron Coggins, The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate, 14 Environmental Law 1, 64 (1983).

As the diversity of public interests has grown and the West (where most of the multiple use public lands occur) has become more populated and more heavily visited, land managers have found it increasingly difficult to meet the many demands for resources on the public lands. As one historian of Forest Service management observes: "The public lands have become a battleground in which numerous groups with conflicting conceptions of the good society and proper land management have fought to achieve management on their terms."⁵ Some have called for more concise definitions of public land policy⁶; others have recommended that the concept of multiple use be modified into an approach that recognizes primary (or "dominant") uses of particular parcels of land, with secondary uses allowed to the extent to which they are consistent with the primary uses.⁷ Those who favor the continuation of a broad range of uses (particularly grazing, timber harvest, and mining) have adopted the banner of "multiple use" as their rallying cry.

This paper describes the development and codification of the multiple use management philosophy in the Forest Service and BLM, the criticism that has emerged in the last several decades, changes that are taking place within the agencies, and proposed alternatives to multiple use.

HISTORY OF THE MULTIPLE USE PRINCIPLE

What we call "multiple use" today began as a concept of scientific conservation in the late nineteenth century. During this period, an emerging doctrine of public administration gained favor. Samuel Hays later called this the "gospel of efficiency." Hays described early conservationists' belief that natural resources issues were fundamentally technical in nature, and thus should be handled by technicians (foresters,

⁵Thomas G. Alexander, The Rise of Multiple-Use Management in the Intermountain West: A History of Region 4 of the Forest Service, U.S. Forest Service Report No. FS-399 248 (May 1987).

⁶See, e.g., Christopher J. Dunsky, Improved Policy Making for the Multiple Use of the Public Lands, 5 Univ. of Michigan Journal of Law Reform 485, 486 (1972).

⁷See, e.g., U.S. Public Land Law Review Commission, One Third of the Nation's Land (1970).

hydraulic engineers, and agronomists, for example): "Conservationists envisaged . . . a political system guided by the ideal of efficiency and dominated by the technicians who could best determine how to achieve it."⁸ Adherents of this approach believed that the public good would best be served through "careful application of scientific principles by experts."⁹

Out of this developing school of thought emerged Gifford Pinchot, a young man from a wealthy eastern family who studied forestry in Germany and returned to the U.S. in 1890 with a passion for forest management. He was outraged at the destructive practices of unregulated timber companies, which had devastated forestlands in the Eastern and Great Lakes states and were moving into the West. Pinchot was not alone in this reaction. In 1891 President Benjamin Harrison began withdrawing timber lands from the public domain and classifying them as national forest reserves. Perry Hagenstein writes that:

The idea behind the concepts of multiple use and sustained yield were an important part of the decisions to keep these lands in federal ownership. The basic idea was that the resources of the national forests and BLM lands would be available for use. Thus, the concepts of multiple use and sustained yield, even before they were defined in law, provided assurances to the West that resources from federal lands would continue to be made available over the long run to support ranches, mills, and other users of the region.¹⁰

Gifford Pinchot served on a presidential commission concerning the forest reserves, and in 1898 became the head of the Department of Agriculture's Division of Forestry.¹¹ It was through his involvement with the forest reserves and the new Forest Service that

⁸Samuel Hays, Conservation and the Gospel of Efficiency 3 (1959).

⁹See John Leshy, Is the Multiple Use/Sustained Yield Management Philosophy Still Applicable Today?, in Congressional Research Service, supra note 3 at 107, 108.

¹⁰Perry R. Hagenstein, Some History of Multiple Use and Sustained Yield Concepts, in Congressional Research Service, supra note 3 at 31.

¹¹Patricia Nelson Limerick, The Legacy of Conquest: The Unbroken Past of the American West 296 (1987).

Pinchot elaborated the philosophy that evolved into multiple use. The following sections describe the development of multiple use management in the national forests and its extension to the lands managed by the BLM.

Multiple Use and the Forest Service

In 1897 Congress passed the Organic Administration Act, which named the General Land Office (within the Interior Department) as the manager of the nation's forest reserves. The Act did not specify how the General Land Office was to balance the uses of these reserves, but provided that a forest reserve could only be established to improve and protect the forest within the reservation for the purpose of securing favorable conditions of water flow, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States¹²

George Coggins interprets this Act as evidencing "a congressional preference for multiple use and sustained yield Timber, water flow, and forest protection are multiple purposes that could translate into multiple uses."¹³ The General Land Office lost authority over the forest reserves in 1905 when President Theodore Roosevelt moved the reserves into the Department of Agriculture. Shortly thereafter, Congress passed the Reorganization Act of 1905, creating the Forest Service and directing it to assume forest management duties. President Roosevelt named his friend Gifford Pinchot as the first Chief of the Forest Service. The forest reserves were renamed national forests in 1907.

Pinchot advocated aggressive management of the national forests. On February 1, 1905, the Secretary of Agriculture (in a statement written by Pinchot) directed the Forest Service to manage the national forests in order to serve "the greatest good of the greatest number in the long run."¹⁴ This utilitarian phrase became a theme for the agency, and remains the underpinning for today's national forest management. The

¹²Now codified at 16 U.S.C. § 475.

¹³George Cameron Coggins and Parthenia Blessing Evans, Multiple Use, Sustained Yield Planning on the Public Lands, 53 Univ. of Colo. L. Rev. 411, 419 (1982).

¹⁴Edward C. Crafts, Saga of a Law, Part I, 76 American Forests 12, 14 (June 1970).

phrase "multiple use" apparently first appeared in 1934, when the regional forester (then called district forester) in Missoula, Montana described the many uses of national forests as including timber production, wildlife habitat, regulating streamflow, and providing recreation; he went on to say that:

Federal foresters are engaged in the intricate technical business of managing such properties for all these purposes. One of the greatest difficulties inherent in this undertaking is the proper correlation of the multiple uses to which forest land can be put in order to accomplish the prime objectives of their management.¹⁵

Richard Behan points out that "the term 'multiple use' rapidly became entrenched in the jargon of professional forestry."¹⁶ By the 1950s, the Forest Service was applying multiple use as a "principle of management," interpreting the concept as requiring some modification of individual uses in order to achieve a "harmonious combination of resources and uses to arrive at maximum overall benefits from the land"¹⁷ In other words, the agency was seeking, through multiple use, to satisfy the rapidly-increasing public demands on the national forest lands. To some extent the Forest Service was assuming a defensive posture, resisting calls for wilderness preservation and expansion of the national parks,¹⁸ as well as pressures to maximize production of certain resources to the detriment of the forests. Eventually Forest Service leaders decided that administrative policy alone would not protect the agency from the growing pressures for change, and thus decided to push for enactment of a congressional statement on multiple use.¹⁹

¹⁵R.W. Behan, The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management, 7 Natural Resources Journal 473, 475 (1967). The quote is from a speech by Major Evan W. Kelley.

¹⁶Id. at 476.

¹⁷Id. at 477 (the latter quoted phrase is from the 1958 Forest Service Manual).

¹⁸Hagenstein, supra note 10 at 33.

¹⁹"We were sure in our own minds [at the Forest Service] that 15 or 20 years from then the Forest Service might not be able to withstand the pressure to overcut timber or over-graze, and we wanted to get a Congressional directive and protection before it was too late. . . . Furthermore, we did not want other resources to be step-children to timber and water as they always had been." Crafts, supra note 14 at 16.

On February 5, 1960, the Department of Agriculture submitted the Forest Service's proposal for a Multiple Use Sustained Yield Act to Congress. In his letter accompanying the bill, the Assistant Secretary wrote that:

The national forests have long been administered under the policies of multiple use and sustained yield. . . . Nevertheless, we believe it to be timely and highly desirable to have a statutory recognition of the multiple-use objectives of the national forests, and to have each of the five major renewable resources referred to specifically and in the same statute

One of the basic concepts of multiple use is that all of the named resources in general are of equal priority, but the relative values of the various resources on particular or localized areas, and viewed in the broadest possible sense, will be considered in the administrative application of management plans.²⁰

The Forest Service bill sought to maximize the agency's flexibility by leaving out any definitions of multiple use or sustained yield.²¹ These definitions were added as the bill made its way through Congress:

(a) "Multiple use" means: the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.²²

²⁰*Id.* at 14.

²¹Edward C. Crafts, *Saga of a Law, Part II*, 76 *American Forests* 28, 31 (July 1970).

²²16 U.S.C. § 531.

Congress enacted the Multiple-Use, Sustained-Yield Act in 1960.²³ The Act directed the Forest Service to manage five major renewable resources (outdoor recreation, range, timber, watershed, and wildlife and fish²⁴) in a manner that will ensure their continued availability for future generations. Congress did not tell the agency how to balance the use of these resources; the Forest Service retained its broad discretion to interpret and apply the multiple use mandate. Thus, the Forest Service emerged with a broad mandate to continue its administrative practices. As Steven Daniels writes:

The [Act] was an important political and public relations coup for the Forest Service. It allowed the Forest Service to operate as it had previously but with the added advantage of being able to claim an increased societal value because of the new-found focus on multiple uses. . . . This freedom to employ the multiple use mandate as a type of managerial *carte blanche* was facilitated by the vague language of the legislation and the deferential attitude of the courts in dealing with legal challenges to Forest Service management practices.²⁵

Dana and Fairfax agree with this observation, noting that:

The passage of the Multiple Use Act was an important victory for the Forest Service, which thereby maintained its discretion over national forest management. Indeed, [the agency's] authority and discretion were clearly expanded by the Act.²⁶

The Forest Service's broad discretion was restricted in the following decade, when Congress enacted the Forest and Rangelands Renewable Resources Planning Act (RPA)

²³P.L. 86-517; 16 U.S.C. § 528 et seq.

²⁴According to Forest Service promoters, these uses were listed in alphabetical order to avoid the implication of priorities. Various interest groups tried to change the phrasing and thus make their preferred use come first; thus, ranchers wanted "range" changed to "forage" or "grazing," and various industry groups objected to the use of "outdoor recreation" rather than simply "recreation." The phrase "wildlife and fish" substituted for the more typical "fish and wildlife" in order to keep that resource from appearing first; the Forest Service wanted to emphasize that primary authority over fish and wildlife belongs to the states, not the federal agencies. Crafts, *supra* note 14 at 18. Dana and Fairfax observe that the order of uses reflects the agency's motivation in obtaining enactment of the bill: to appease recreationists (thus "outdoor recreation" appears first) and to avoid loss of wilderness lands to the National Park Service. Samuel Trask Dana & Sally K. Fairfax, *Forest and Range Policy: Its Development in the United States* 202 (2d ed. 1980).

²⁵Steven E. Daniels, *Rethinking Dominant Use Management in the Forest-Planning Era*, 17 *Environmental Law* 483, 495 (1987).

²⁶Dana & Fairfax, *supra* note 24 at 204.

of 1974²⁷ and the National Forest Management Act (NFMA) of 1976.²⁸ Together, these statutes require extensive interdisciplinary planning throughout the national forest system and, in so formalizing the administrative process, open the door for legal challenges by disgruntled interest groups. With formal plans in place, writes George Coggins, "the agencies will no longer be able to argue that each individual decision is an ad hoc expression of their scientific expertise, beyond the comprehension of judges."²⁹ Other environmental statutes, particularly the National Environmental Policy Act and the Endangered Species Act, imposed additional procedural requirements and required interdisciplinary, interagency consultation by the Forest Service, the BLM, and other federal agencies.

Multiple Use and the Bureau of Land Management

The BLM was created in 1946 to consolidate the land management responsibilities of two agencies, the Grazing Service and the General Land Office.³⁰ The new agency assumed control over the public lands that had not already been set aside for national forests, national parks, national wildlife refuges, or other federal reservations. The Reorganization Plan that created the new agency did not provide a mandate for the management of these lands.³¹ Initially the BLM operated under the guidance of the Taylor Grazing Act of 1934,³² which Sally Fairfax characterizes as having "dedicated the [public] lands to a single-specific use -- grazing."³³ George

²⁷P.L. 93-378; 16 U.S.C. § 1600 et seq.

²⁸P.L. 94-558; 16 U.S.C. § 1600 et seq.

²⁹George Coggins, Public Natural Resources Law 16-18 (1990).

³⁰The consolidation was accomplished through the Reorganization Plan No. 3 of 1946, which President Truman (at the recommendation of Secretary of Interior Ickes) forwarded to Congress. James Muhn & Hanson R. Stuart, Opportunity and Challenge: The Story of the BLM 48 (1988).

³¹Id. at 54.

³²43 U.S.C. § 315 et seq.

³³Muhn & Stuart, supra note 30 at 226.

Coggins, on the other hand, interprets the 1934 Act as implicitly authorized a multiple use approach:

While the primary purpose of the Taylor Act was to regulate grazing practices on the western rangelands, it also expressly recognized the right to use the rangelands for recreational hunting and fishing, propagation of wildlife, erosion and flood control programs, water development, and general land improvements.³⁴

Marion Clawson, director of the BLM from 1948 to 1953, instituted a management policy of multiple use: a "system under which the same area of land is used simultaneously for two or more purposes, often by two or more different persons or groups."³⁵ Later directors pursued the multiple use objective through agency reorganization, expanded staffing, and broader public representation on advisory boards.³⁶

In the 1964 Classification and Multiple Use Act³⁷ Congress explicitly directed the agency to classify the public lands for disposal or retention in federal ownership for such uses as domestic livestock grazing, fish and wildlife development and utilization, industrial development, mineral production, occupancy, outdoor recreation, timber production, watershed protection, wilderness preservation, or preservation of public values that would be lost if the lands passed from federal ownership.³⁸ The Act provided a definition of multiple use as

the management of the various surface and subsurface resources so that they are utilized in the combination that will best meet the present and future needs of the American people; the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; and harmonious and coordinated management of the various

³⁴Dunsky, *supra* note 6 at 487-488.

³⁵Muhn & Stuart, *supra* note 30 at 62.

³⁶*Id.* at 106.

³⁷P.L. 88-607.

³⁸Note the change in wording (compared with the Forest Service's multiple use mandate), which enabled livestock grazing to appear first in this list.

resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.³⁹

This was a temporary measure; its provisions were to provide interim guidance until Congress could consider the recommendations of the bipartisan 19-member Public Land Law Review Commission (PLLRC), created specifically to review the laws and policies affecting the nation's public lands and to make recommendations for necessary legal reforms.

The PLLRC produced a report called One Third of the Nation's Land,⁴⁰ discussing its findings and recommendations. The Commission looked at all the federal public lands, including those managed by the BLM, Forest Service, and Fish and Wildlife Service. (It did not consider Indian reservations in the study.) Among other concerns, the PLLRC expressed a need for better legislative guidance for these agencies:

Congress has . . . failed, in many cases, to provide a positive mandate to the agencies to engage in land use planning or to provide guidance concerning the matters which they should consider in determining whether or not to dispose of, or retain, Federal lands and in deciding on uses of lands that remain in Federal ownership.⁴¹

The Commission further recommended a number of legislative initiatives through which Congress could more explicitly establish national policy for public lands. In the opinion of BLM historians Muhn and Stuart, the PLLRC's recommendations reflected the genesis of their report, an effort by Congressman Wayne Aspinall to counter agency-initiated resource management policies through stronger congressional mandates and standards.⁴² Dana and Fairfax conclude that the report's recommendations failed to

³⁹P.L. 88-607, Sec. 5(b).

⁴⁰U.S. Public Land Law Review Commission, supra note 7.

⁴¹Id. at 41-42.

⁴²Muhn & Stuart, supra note 30 at 117, 120.

reflect the growing public concerns for environmental protection and thus "were sorely out of tune with the times."⁴³

Responding to the PLLRC's recommendations, in 1976 Congress passed the Federal Land Policy and Management Act (FLPMA),⁴⁴ which elaborated on the directives of the earlier Classification and Multiple Use Act and officially provided the BLM with a mandate for managing the retained public lands. After 30 years of existence, the BLM finally gained an organic act. Among its many provisions, FLPMA called for the continuation of classifications and withdrawals started under the 1964 Act (although it directed the BLM to review these actions in preparing new land use plans), provided for increased public participation in land management decisions, authorized the identification of Areas of Critical Environmental Concern (ACECs) where special management is required to protect natural resources, directed the BLM to review the public lands for their wilderness potential (no BLM lands were included in the original wilderness designations under the 1964 Wilderness Act), and repealed the 1862 Homestead Act and other settlement acts. In addition to the resources identified in the 1964 Act, FLPMA expanded BLM's multiple uses to include scenic, scientific, and historical values. Coggins interprets FLPMA's legislative history as reflecting lawmakers' "belief that permanent multiple use management authority would usher in an era of more balanced and environmentally sensitive BLM decisionmaking."⁴⁵ Congress chose not to adopt a number of the PLLRC's recommendations, particularly one that advocated replacing the multiple use mandate with a system of public land use zoning for dominant uses.⁴⁶

⁴³Dana & Fairfax, *supra* note 24 at 235.

⁴⁴P.L. 94-579; 43 U.S.C. § 1701 et seq.

⁴⁵Coggins, *supra* note 4 at 32, n. 308.

⁴⁶This recommendation is discussed *infra* at pp. 19-23.

MULTIPLE USE AS A MODERN LAND MANAGEMENT PHILOSOPHY

Clearly the Forest Service and BLM have embraced the concept of multiple use resource management. Steven Daniels describes it as "one of the sacrosanct beliefs of modern forestry,"⁴⁷ and Paul Culhane writes of it as a source of identity for land managers, "central to land management training, professional belief, and agency history . . . the cornerstone of administrative control and authority in the Forest Service."⁴⁸ But what, precisely, does it mean to manage for multiple uses on public lands? Does it mean that all statutorily-authorized uses must be permitted on every parcel of land? Or must the agencies demonstrate that all permissible uses occur throughout larger land management units? Under what standards should agencies evaluate proposed and continuing uses to ensure the concurrent goal of sustained yield of renewable resources?

The Forest Service has long taken the position that multiple use does not mean that every acre of land should be used for all the defined uses. For example, in September 1960 (shortly after Congress enacted the Multiple Use, Sustained Yield Act), the Chief of the Forest Service explained that:

Multiple use is not a passive practice. It requires conscious, coordinated management of the various renewable resources, each with the other, without impairment of the productivity of the land. Multiple use must be over a period long enough to experience the cycle of the seasons; that is, a year or more. It does not require that all uses involved must be practiced simultaneously at the same instant.⁴⁹

Thus, multiple use "refers not to single tracts but to large groupings of natural resources, as in a national forest or other administrative management unit."⁵⁰ When pressed, the Forest Service defined multiple use management as involving at least three uses in a

⁴⁷Daniels, supra note 25 at 494.

⁴⁸Paul J. Culhane, Public Lands Politics: Interest Group Influence on the Forest Service and the Bureau of Land Management 128 (1981).

⁴⁹Crafts, supra note 14 at 24.

⁵⁰Harrison Loesch, Multiple Uses of Public Lands -- Accommodation or Choosing Between Conflicting Uses, 16 Rocky Mtn. Min. L. Inst. 1 (1970).

ranger district, thus differentiating multiple use lands from those managed for a presumably more limited range of uses by the National Park Service.⁵¹

Others have interpreted the standard as requiring a more integrated mix of uses -- a pattern that Richard Behan labeled "the succotash syndrome."⁵² Those advocating simultaneous uses pointed out that various uses often are compatible. Samuel Dana, for example, described forests as "communities" and urged managers to consider how maintaining a variety of tree species contributes to soil conservation, wildlife habitat, and scenery.⁵³ Certainly management efforts to protect watersheds can benefit fish and wildlife, scenic, and recreation uses of the same lands.

The multiple use standard is far from exact or even enforceable. Agencies have interpreted it as allowing considerable flexibility, including discretion to emphasize certain uses in particular areas. John Leshy observes that "multiple use came into being, and still retains some political currency, to justify a very large amount of executive branch agency discretion over federal lands."⁵⁴ The Rocky Mountain Region of the Forest Service recently described the fluid nature of the doctrine as follows: "In the course of balancing the various multiple-uses demanded by the American people, the actual mix of these uses may change over time, as the desires and expectations of the American public change."⁵⁵ Yet, satisfying all of these many publics can be impossible, as pointed out in a history of multiple use in the intermountain region:

The basic problem is that, as the Forest Service has committed itself to planning and practicing multiple-use management, it must satisfy a potpourri of publics made up of thousands of people with many outlooks

⁵¹Crafts, supra note 21 at 32.

⁵²Behan, supra note 15. "I think we frequently seek multiplicity simply for the sake of multiplicity. We assume that the best use is the most varied use, and if we get all five going we are ecstatic." Id. at 481-482.

⁵³Hagenstein, supra note 10 at 32.

⁵⁴Leshy, supra note 9 at 107.

⁵⁵U.S. Forest Service, supra note 2 at 6-1 to 6-2.

and interests who cannot agree on the dimensions or proper mixture of the management elements.⁵⁶

The writer goes on to describe this dilemma -- trying to please diverse and apparently irreconcilable public interests -- as the "inherent conflict in multiple-use management."

George Coggins has argued forcefully that the multiple use standard is more substantive than others have portrayed it,⁵⁷ but more recently has conceded that "the balance contemplated by the multiple use, sustained yield statutes seldom, if ever, is attained in practice," and predicts its eventual demise.⁵⁸ He thus joins a growing chorus of critics who object to the agencies' interpretation of this broad mandate. Marion Clawson (who, like Coggins, believes that the standard is fundamentally substantive) has noted that, as it is applied, multiple use as "more a slogan than a blueprint for actual management."⁵⁹ Clawson argues for a more rigorous application of the standard using economic principles to optimize production of resources in such a manner that other resource uses are not precluded.

Those calling for a new approach generally focus on the unfettered discretion the present standard places in the hands of public land managers. "Multiple use as a policy has been used to avoid constraints," writes Richard Behan; "anything goes."⁶⁰ Others have derided the various statutory definitions of multiple use as "a collection of vacuous platitudes,"⁶¹ and have complained that the standard has become meaningless in its

⁵⁶Alexander, supra note 5 at 247.

⁵⁷"The multiple use laws contain a series of 'shalls' and 'shall nots' that ought to be binding on public land managers." George Cameron Coggins, Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management, 53 U. Colo. L. Rev. 229, 279. "Multiple use, sustained yield management was meant to be more than a 'succotash syndrome.'" Coggins, supra note 4 at 65.

⁵⁸George Coggins, Trends in Public Land Law, speech presented at the Natural Resources Law Center's symposium Trends in Natural Resources Law, Boulder, Colorado (June 13, 1992).

⁵⁹Marion Clawson, The Concept of Multiple Use Forestry, 8 Environmental Law 281 (1978).

⁶⁰R.W. Behan, The Irony of the Multiple Use/Sustained Yield Concept: Nothing is so Powerful as an Idea Whose Time has Passed, in Congressional Research Service, supra note 3 at 95, 101.

⁶¹Comment, Managing Federal Lands: Replacing the Multiple Use System, 82 Yale L.J. 787, 788 (1973).

breadth. Ironically, the timber industries that opposed the Multiple Use, Sustained Yield Act of 1960 (because they believed that timber was a favored use of national forests under the Organic Act) are now among the most vociferous proponents of multiple use. They interpret it as a mandate for continued production of timber, as contrasted with the preservation statutes such as the Endangered Species Act that increasingly limit resource extraction activities on public lands.

Perhaps multiple use has never lived up to its promise because the Forest Service and BLM have not implemented the principle as Edward Crafts described it in 1960: "conscious, coordinated management of the various renewable resources, each with the other, without impairment of the productivity of the land."⁶² Richard Behan believes that "multiple use has been applied to the several jurisdictions as policy, but not to the land as a practice."⁶³ On the other hand, perhaps the agencies' practices are exactly what Gifford Pinchot and the drafters of the 1960 legislation had in mind; the problem is that public demands today have overwhelmed the ability of the public lands to provide renewable resources in a sustainable manner. William Shands argues that the standard is no longer sufficient:

Multiple use was valid in the days when demands for the forests' resources were much lower and could be far more easily accommodated. As a management philosophy, it has served the nation and the Forest Service well. But for better or worse, multiple use has become a pejorative term that many people believe is synonymous with management that emphasizes timber production to the detriment of the other forest resources.⁶⁴

In either case, many are calling for change -- either substantial refinement of the principle of multiple use, or replacement with a more realistic and sustainable approach. The next two sections introduce these alternatives.

⁶²Crafts, supra note 21 at 34.

⁶³Behan, supra note 60 at 100.

⁶⁴William E. Shands, Beyond Multiple Use: Managing National Forests for Distinctive Values, *American Forests* 14 (March/April 1988).

MULTIPLE USE IN EVOLUTION

American society has changed a great deal since the emergence of multiple use as a management philosophy a century ago. Today, far fewer people are directly dependent on the extraction and development of resources from the public lands, and many more people value these lands for their recreational, scenic, or biological values.⁶⁵ The land management agencies have found their constituencies expanding, their legal mandates becoming increasingly strict and specific, and their own employees reflecting new environmental attitudes. Colorado State University College of Natural Resources Dean Al Dyer describes how forestry students have changed in the past few decades:

Foresters who graduated prior to proliferation of the environmental movement of the late 1960s shared a more common vision of resource management than people who graduated later. Wise use and the Pinchot tradition were fundamental building blocks of professional values for pre-1960 graduates. The environmental movement of the late 1960's, on the other hand, brought many individuals to professional resource management who were looking for an environmental education which emphasized natural systems and preservation.⁶⁶

These students are now professionals assuming influential roles in the Forest Service, BLM, other federal agencies, universities, and elsewhere. Their impact is evident in the creation of organizations such as Association of Forest Service Employees for Environmental Ethics, as well as in new agency priorities for preserving biological diversity. The traditional multiple use mandate appears inadequate to many of these professionals.

Partly in response to upheaval within its ranks, in 1990 the Forest Service launched a self-examination process called New Perspectives. The former director of the national program describes it as "not just a new way of taking trees out of the woods, but

⁶⁵See Lawrence J. MacDonnell, Discussion Paper: The Changing Economics of the Public Lands, Western Lands Report No. 2, Natural Resources Law Center, University of Colorado School of Law (1993).

⁶⁶Al Dyer, Human Dimensions in Natural Resource Management, in Rocky Mountain New Perspectives: Proceedings of a Regional Workshop U.S. Forest Service Gen. Tech. Rep. RM-220 20, 21 (Sep. 1992).

a different way of thinking; an ecological basis for land and resource management."⁶⁷ He calls for a commitment to sustainable resource management, consideration of long-term and global impacts of human actions, and changes in agency practices to encourage integrated management efforts. Gary Cargill, formerly the regional forester for the Rocky Mountain Region, describes that region's New Perspectives program as including four principles: sustainability, integration, public participation, and collaboration.⁶⁸

The New Perspectives program culminated in mid-1992 with the Chief's announcement of a new Forest Service policy of "ecosystem management," under which the agency intends "to produce desired resource values, uses, and products in ways that also sustain the diversity and productivity of ecosystems."⁶⁹ In the words of a Forest Service task force charged with developing the new policy, ecosystem management differs from traditional multiple use approaches as it

strives to sustain the vitality and diversity of ecosystems . . . provides a variety of benefits . . . allows options for future generations . . . reflects a land ethic centered on sustainability . . . assures that threatened and endangered species, cultural resources, recreation, long-term site productivity, old-growth forests, and commodity production are all considered.⁷⁰

What does this lofty rhetoric mean? Today, some Forest Service employees claim that the agency is operating under vastly different assumptions. "We're not managing for multiple uses anymore," said one; "we're managing for multiple values."⁷¹ Yet the Forest Service has not written such widespread changes into its official policy. While the agency appears to have acknowledged changing societal values and new ecological

⁶⁷Hal Salwasser, The Challenge of New Perspectives, in Rocky Mountain New Perspectives, *supra* note 66 at 3.

⁶⁸Gary Cargill, Some Thoughts on New Perspectives, in Rocky Mountain New Perspectives, *supra* note 66 at 22.

⁶⁹James C. Overbay, A Bias Toward Diversity: The Meaning of Ecosystem Management on the National Forests, 13 Forest Watch 19, 20 (Sep. 1992).

⁷⁰*Id.* at 21.

⁷¹Personal communication, Bob Dettmann, rural development specialist, U.S. Forest Service, Lakewood, Colorado (October 16, 1992).

understanding, these initiatives are as yet little more than guidance for land managers implementing the same multiple use management principles.⁷² Indeed, today the Forest Service's stated mission is "to achieve quality land management under the sustainable multiple use management concept to meet the diverse needs of people."⁷³

The New Perspectives or ecosystem management programs are difficult to pin down. Perhaps it is easier to see the changes that are occurring in timber harvesting through the advent of "new forestry." Developed by Dr. Jerry Franklin, of the H.J. Andrews Ecosystem Research Group in Oregon, new forestry places primary emphasis on perpetuation of forest ecosystems -- not timber production or wilderness preservation.⁷⁴ New forestry proponents argue that forest ecosystems are naturally complex, and that traditional management practices in which single tree species or single-aged trees dominated made the forests more susceptible to natural catastrophes such as fires, storms, and insects. Thus, under new forestry, timber harvest plans may stipulate that some snags, green and fallen trees, and woody debris be left on the site after the trees are cut. "In new forestry, what's left behind on the site is more important than what is taken out," says Franklin.⁷⁵ New forestry also calls for new patterns of timber harvest to more closely resemble natural processes such as fire; it urges use of "partial cutting" rather than the traditional clearcutting or selective cutting.

Not everyone agrees that this is a new idea; one forestry professor argues that "there is nothing [in new forestry] that is in any way significantly different from good, sound multiple-use forest management."⁷⁶ And environmentalists are wary of what they

⁷²This observation is supported by the author's discussions with Forest Service employees and review of draft policy guidance documents related to the agency's concept of ecosystem management. To date, the new policy appears to be little more than a sensitive and publicly inclusive adaptation of existing management philosophies.

⁷³Memorandum from Chief F. Dale Robertson to all Forest Service employees (March 3, 1993).

⁷⁴Jerry Franklin, Toward a New Forestry, 95 *American Forests* 37 (November-December 1989).

⁷⁵Anna Maria Gillis, The New Forestry, 40 *BioScience* 558 (Sep. 1990).

⁷⁶Timothy O'Keefe, Holistic (New) Forestry: Significant Difference or Just Another Gimmick?, 88 *Journal of Forestry* 23 (April 1990).

see as "warmed over forestry," and worry that the new approaches are little more than excuses to continue old practices in a slightly improved manner.⁷⁷ Andy Kerr, of the environmental organization Oregon Natural Resources Council, writes that the Forest Service need not look for "new" approaches:

Perhaps America needs to go back to the older forestry of Gifford Pinchot. The nation's first forester suggested that we conserve the principal of the forest and only log the interest. Pinchot's management strategy was a very conservative one, long since abandoned by the agency he created.⁷⁸

This debate illustrates the challenges facing land managers trying to interpret, reinterpret, and apply the venerable multiple use principle. As Kerr points out, new forestry is a response to "a public relations problem" and "the internal revolution raging inside the Forest Service and, to a lesser degree, the Bureau of Land Management."⁷⁹

ALTERNATIVES TO MULTIPLE USE

Among the 137 recommendations proposed by the Public Land Law Review Commission in 1970, none was received with such outcry as its call for fundamental changes to the multiple use principle. The PLLRC concluded that the multiple use mandate "has little practical meaning as a planning concept or principle," although it can be useful "as a general expression of land use policy."⁸⁰ The Commission recommended that the overall standard by which public land management should be evaluated is one of "maximization of net public benefits," and then recommended that specific land management decisions should be based on a principle of primary, or dominant, uses: "Management of public lands should recognize the highest and best use of particular areas of land as dominant over other authorized uses." More specifically, the PLLRC recommended that Congress establish a dominant use zoning system, which would then

⁷⁷Andy Kerr, New (Age) Perspectives: Glossy Dogma to Hide Old Habits, 11 Forest Watch 22 (Oct. 1990).

⁷⁸Id. at 23.

⁷⁹Id.

⁸⁰U.S. Public Land Law Review Commission, supra note 7 at 45.

be implemented by the Forest Service and BLM. These agencies would identify land areas in which certain uses are of primary importance, and would designate these as dominant use zones. Other, secondary uses would be allowed to the extent that they are compatible with the dominant use. Lands not zoned for dominant uses would continue to be managed under the multiple use principle.

Looking back on the debate, Jerry Muys (chief of the PLLRC's legal staff) notes that the Commission's recommendations "engendered immediate opposition from some national environmental organizations who were apparently apprehensive that market-oriented use designations would predominate over other resource values and, where made dominant, would in practice become exclusive."⁸¹ Coggins concurs, pointing out that: "It was widely believed that the PLLRC was advocating increased attention to economically measurable production"⁸² Dana and Fairfax conclude that the report is both disposition- and commodity-oriented.⁸³ And Leshy writes that the recommendation "was perceived as an assault on wildlife, recreation, and preservation values"⁸⁴ Articles in LIFE and Sports Illustrated magazines claimed that the PLLRC's recommendations were written by commodity interests and were produced through secretive deliberations.⁸⁵ Dana and Fairfax criticize the PLLRC's dominant use proposal as follows:

Although there is considerable logic and appeal in the idea that good timber production sites ought to be used for growing timber, many questionable assumptions lie behind the dominant use concept. The first, largely untested as yet, is that production of a chosen commodity can be significantly expanded by more intensive management in defined areas. Implicit in such an assumption are the ideas that intensively managing an area for commodity A necessarily precludes intensively managing the area

⁸¹Jerome C. Muys, The Unfinished Agenda of the Public Land Law Review Commission, unpublished paper 21 (1992).

⁸²Coggins, supra note 57 at 242-243.

⁸³Dana & Fairfax, supra note 24 at 233.

⁸⁴Leshy, supra note 9 at 113.

⁸⁵Muhn & Stuart, supra note 30 at 120.

to produce B, and that intensifying the management of B will reduce the production of A. The dominant use concept also implies a clear ecological distinction between timberland and land that is more suitable for other uses, and that the distinctions occur in large, easy to identify and manage areas. This concept is at odds with reality, in which many values -- fish, wildlife habitat, minerals, or cultural resources -- frequently appear in close proximity with each other and "high timber value."⁸⁶

In the more than twenty years since the PLLRC published its conclusions, however, the debate appears to have shifted. Several leading public lands scholars have concluded that multiple use gradually is disappearing -- replaced by a system of congressional or administrative "zoning" of public lands for primary or dominant uses.⁸⁷ In most instances, the primary use generally is not one of the historical extractive uses. Instead, an increasing percentage of the public lands are now designated as wilderness areas, Wild and Scenic River corridors, Areas of Special Ecological Concern, and other categories that denote restrictions on the uses to which the lands may be put.⁸⁸ William Shands points out that "the new forest land management plans effectively zone the forests, with management prescriptions for various zones that favor some activities and values and de-emphasize or exclude other uses."⁸⁹ Constance Brooks, formerly of the Mountain States Legal Foundation, agrees that the Forest Service and BLM are managing large areas of their lands under a dominant use philosophy, at the expense of

⁸⁶Dana & Fairfax, supra note 24 at 234.

⁸⁷"Multiple use as a management guideline . . . is doomed That demise is occurring piecemeal, sort of like being nibbled to death by little ducks, and the process seems irreversible." Coggins, supra note 58; "In short, classic [multiple use, sustained yield] is withering away, mostly because of congressional decisions." Lesby, supra note 9 at 108.

⁸⁸Congressionally-designated land management classifications include the National Wilderness Preservation System, the National Wild and Scenic Rivers System, the National Trails System, national recreation areas, national monuments, wildlife preserves, scenic areas, national conservation areas, and national recreation areas. As discussed previously, Congress has authorized the BLM to designate Areas of Critical Environmental Concern.

⁸⁹Shands, supra note 64 at 15.

mineral development.⁹⁰ U.S. Department of the Interior economist Robert Nelson says this about the "zoning" of public lands:

There are still large areas of public lands not zoned for any specific uses. On these "multiple use" lands, agency managers have wide discretion to decide the best use. Although the principle of multiple use is sometimes said to provide an actual basis for making decisions, most students of public land management have concluded that it is in fact amorphous and offers little substantive guidance. Multiple use management is really management by agency administrative discretion in response to individual proposals. The lands managed under multiple use can be considered the public-land equivalent of the industrial or unrestricted zones commonly found in municipal zoning ordinances.⁹¹

The idea of dominant use ("an unfortunate term," according to Jerry Muys, who now prefers "primary use") is to consider the attributes of each public land management unit and determine which uses are most appropriate to the available resources; secondary uses are then allowed on those lands to the extent to which they are compatible with the dominant use. Shands describes how this might result in very different management approaches in different parts of the country:

[T]he challenge for the Forest Service is to develop a distinctive and unifying approach to management of the National Forests -- an approach that clearly distinguishes the National Forests from the management of other public lands and lands in private ownership. . . . In other words, each forest would emphasize its distinctive characteristics and provide forest environments, recreation, wildlife, and timber not otherwise available in its area. I call this "management for distinctive values."⁹²

Former Arizona Governor (now Secretary of the Interior) Bruce Babbitt also has argued for this approach, calling for a new philosophy of "public use." His model, however, specifies the dominant uses as watershed, wildlife, and recreation:

The time is at hand to go beyond multiple use. Mining entry must be regulated, timber cutting must be honestly subordinated to watershed and

⁹⁰ Constance E. Brooks, Multiple Use Versus Dominant Use: Can Federal Land Use Planning Fulfill the Principles of Multiple Use for Mineral Development? 33 Rocky Mtn. Min. L. Inst. 1 (1988).

⁹¹ Robert H. Nelson, The Public Lands, in Current Issues in Natural Resource Policy 14, 35 (Paul R. Portney, ed. 1982).

⁹² Shands, supra note 64 at 15.

wildlife values, and grazing must be subordinated to regeneration and restoration of grasslands. Many of the forest and BLM plans now being circulated ignore the primacy of public values. It is now time to replace neutral concepts of multiple use with a statutory mandate that public lands are to be administered primarily for public purposes.⁹³

This articulation of the dominant use model appears certain to appease environmentalists (who once opposed the concept) and anger resource developers (who now are forming "multiple use" coalitions to oppose further restrictions on public land use).

Although Secretary Babbitt's proposal has yet to be debated in the form of national legislation, large areas of the nation's public lands are now being managed for a more limited range of values than the multiple uses articulated in the Multiple Use, Sustained Yield Act of 1960 or the Federal Land Policy and Management Act of 1976. (Recall the land classifications discussed above: wilderness areas, ACECs, etc.) Some commentators have suggested that this trend is not actually a repudiation of multiple use, but rather a broader view of the land units upon which multiple use is practiced. Steven Daniels takes this position, arguing that dominant use is simply multiple use over a larger land area: "The key question about multiple and dominant use regards scale: what is the appropriate land area to devote primarily to specialized production?"⁹⁴ Thus, as multiple use does not require every use to occur on every land parcel, multiple use over very large areas (national forests or regions) would result in a selection of uses that are most appropriate for the resources available locally: "The difference between dominant and multiple use is therefore not one of fundamental philosophy, but of emphasis."⁹⁵

Dominant use is not the only proposed alternative to multiple use management. Richard Behan promotes an approach to professional forest management (presumably

⁹³Bruce Babbitt, speech to 1985 meeting of the Sierra Club, reprinted in George Cameron Coggins and Charles F. Wilkinson, Federal Public Land and Resources Law 1055-1056 (2d ed. 1987).

⁹⁴Daniels, supra note 25 at 499.

⁹⁵Id. at 502.

applicable to other areas of natural resource management), which he calls "multiresource forest management."⁹⁶ He argues that a new, integrated approach is necessary because the compartmentalized, resource-specific practices of the past have failed to deliver the "harmonious and coordinated management of the various resources, each with the other" promised in early mandates. Multiple use, he asserts, "has always held more promise than [professional foresters] could deliver."⁹⁷

Behan's approach would view each forest as a "single, interactive system of plants, animals, soil, water, topography, and climate."⁹⁸ Managers would use computer simulation to predict system-wide impacts of management decisions, and would also evaluate economic responses by linking these simulations to optimizing models. They might even attempt to factor in social and political responses to management decisions; social scientists have complained that even the most ecologically-enlightened approaches to resource management (such as new forestry) fail to consider public acceptability.⁹⁹

This, then, is a call for a management focus on resources and resource systems rather than on uses of (and, thus, sustained production of goods from) those resources.

As Behan concludes:

Sustained-yield multiple-use management is market-oriented, an exercise in rationing determined by the economics of consumption. Multiresource management is land-oriented, an exercise in husbandry determined by the ecology of production. The difference is profound.¹⁰⁰

Like Babbitt, Behan argues that public lands policy should emphasize certain "public" uses (he lists scenic beauty, wildlife habitat, watershed protection, carbon sinking,

⁹⁶R.W. Behan, Multiresource Forest Management: A Paradigmatic Challenge to Professional Forestry, 88 *Journal of Forestry* 12 (April 1990).

⁹⁷*Id.* at 13.

⁹⁸*Id.* at 15.

⁹⁹Matthew S. Carroll and Steven E. Daniels, Public Land Management and Three Decades of American Social Change: Thoughts on the Future of Public Lands and Public Demands, paper prepared for the Congressional Research Service, *supra* note 3 at 45.

¹⁰⁰Behan, *supra* note 96 at 16.

biological diversity, cultural and historical opportunities, and open space preservation) rather than the traditional, primarily "private," multiple uses.¹⁰¹

Others have advocated that market mechanisms be integrated with public land management practices, or that selected public lands be divested to the states or the private sector. These issues are addressed in a companion discussion paper.¹⁰² Advocates of this approach point to the fact that the historical multiple use mandate has lacked economic criteria to measure whether the diverse public lands interests are being satisfied.¹⁰³

CONCLUSION

It seems that public land management is moving away from multiple use and toward aspects of the alternatives discussed here. Congressional "zoning" has designated large portions of the public lands for dominant "public" uses. (George Coggins contends that multiple-use lands have declined by more than half since 1934 due to new classifications.¹⁰⁴) On these lands, the multiple use standard no longer applies. And on the remaining lands the Forest Service and BLM are modifying their management practices to achieve "ecosystem management." Although this goal is still poorly defined, it promises at least an attempt at the integrative, sustainable practices promoted by ecologists. Finally, grim federal fiscal realities are forcing new consideration of market mechanisms and opportunities to reduce subsidies for public land uses.

In March 1992, the Congressional Research Service convened a workshop to discuss the changing understanding of multiple use-sustained yield management on the federal public lands. The papers commissioned for that workshop and the discussion that occurred during the two-day program demonstrate that historical management

¹⁰¹Behan, *supra* note 60 at 106.

¹⁰²MacDonnell, *supra* note 65.

¹⁰³*See, e.g.* Robert H. Nelson, *supra* note 91.

¹⁰⁴Coggins, *supra* note 29 at 16-19.

philosophies have taken on quite different meanings to the federal land managers, natural resources professionals, academics, public interest groups, and resource users who continue to be responsible for and affected by their implementation. Four participants prepared "vision papers," proposing alternative approaches to incorporating private lands, market mechanisms, ecological understanding, and community concerns in federal public land management processes. Interestingly, those participants scarcely spoke of whether multiple use-sustained yield would survive as a management philosophy, or how it might be adapted by congressional or administrative action. Rather, they appeared to accept John Leshy's view that the historical concept gradually has been overcome by subsequent congressional enactments in response to new public values, legal constraints, and scientific understanding of human impacts on the environment.¹⁰⁵ Consequently, they imply, we are moving beyond multiple use-sustained yield, although the direction of future public land management philosophies remains unclear.

Given this apparent agreement among observers that multiple use is a relic, it may seem odd to focus on the history and continuing viability of this philosophy. Yet, as demonstrated by the persistence of multiple use in agency vocabulary and thought, it clearly would be impossible to talk of change without starting here. The Center will continue to explore the implications of changing philosophies of public land management as part of its Western Lands Program.

¹⁰⁵Leshy, *supra* note 9.