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Planning as a Major Tool of Public Land Management

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The Public Lands During the Remainder of the 20th Century:
Planning, Law, and Policy in the Federal Land Agencies

Natural Resources Law Center
University of Colorado School of Law

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I. Federal Land Planning in the Abstract

A. What is Planning? The differing perspectives of the resource manager, lawyer, economist, ecologist, political scientist.

B. Federal land planning is important. The federal lands dominate the areas occupied by many states. Federal regulatory power is great (especially compared to state and local government land use planning), given broad constitutional powers and the existence of relatively few legally protected private rights. In terms of time and resources expended, land and related resource planning is probably the single most dominant management activity of at least the Forest Service and the BLM, consuming tens to hundreds of millions of dollars. And it has become central to the way these agencies carry out their responsibilities.

C. What kinds of decisions can federal land planning help make? The typical plan serves a variety of decisions, not confined to neat categories, but the following illustrates the range:

1. Fundamental decisions; e.g., disposal vs. retention, preservation vs.

development, management vs. non-management. Generally, only Congress can make relatively permanent decisions on this level.

2. Determination of fundamental uses; e.g., mining versus timber or recreation, livestock grazing versus wildlife enhancement.
3. Secondary use determinations; e.g., primitive versus intensive recreation, cows versus sheep, horses or burros.
4. Protecting other values once uses are decided upon; e.g., where to locate a campground or road, how to lay out a timber harvest, whether to repair or replace a facility.
5. Management needs; e.g., budget levels and personnel requirements.

D. Other benefits from planning closely related to agency decisionmaking.

1. Information gathering -- planning typically requires rather careful, systematic inventorying of existing resources and uses.
2. Public education -- the planning process helps disseminate knowledge about the

values served by the lands and resources involved.

3. Public participation -- involvement by the public (broadly defined to include state and local governments as well as user and advocacy groups) benefits both the public and the federal agency doing the planning.

E. A Suggested Rule of Thumb (not an inflexible truth). The more fundamental the decision, the more political it is likely to be, and the more likely it is to be resolved at higher levels in the agency or in Congress. Similarly, the more fundamental the issue, the less likely agency "expertise" will control. Politics, after all, is an art, not a science. Moreover, the breadth or precision of the federal agency's statutory objectives (for example, whether the agency is to serve single or multiple uses, expressed broadly or narrowly) will often heavily influence both the planning process and, arguably, the utility of the plan.

1. This does not necessarily mean, however, that planning is unimportant on politically sensitive issues. For

example, developing an information base (the inventory) and the values of public education and participation served by planning can be influential even if the final decisions turn out to be made at more political levels of government.

II. A (Very) Short History of Federal Land Planning

(See generally Paul Culhane & H. Paul Friesma, "Land Use Planning for the Public Lands," 19 *Natural Res. J.* 43-74 (1979)).

A. Early calls for rational planning of the uses of federal lands. John Wesley Powell's Report on the Lands of the Arid Region (1878, 1879, reprinted in 1983 by The Harvard Common Press) outlined a sensible, orderly plan for settling the intermountain west. A generation later, Gifford Pinchot's emphasis on rational decisionmaking and his embrace of the utilitarians ("greatest good for the greatest number over the long run") contained the notion of careful planning under government control. See, e.g., Wilkinson and Anderson, "Land and Resource Planning in the National Forests," 64 *U. Oregon L. Rev.* 1, 15-29 (1985); Samuel P. Hays, Conservation

and the Gospel of Efficiency (1959, 1969)

Chapter XIII.

- B. Although Congress did not leap at the idea, the influence of Powell, Pinchot and their sympathizers did move the federal agencies, especially the Forest Service, to take steps toward formal planning. See Wilkinson & Anderson, op. cit.
- C. Eventually, Congress came to embrace the idea with enthusiasm for the two largest federal land management agencies. Statutes adopted in the 1970's gave legislative underpinning to the Forest Service and BLM's planning processes, basically ratifying and elaborating on the agencies' existing practices. See 16 U.S.C. §1604(g) (National Forest Management Act of 1976); 43 U.S.C. §1712 (Federal Land Policy and Management Act of 1976).
- D. The two other major federal land management agencies (National Park Service and Fish & Wildlife Service) have no detailed planning mandates embodied in statute. Not surprisingly, these two agencies have more confined management objectives, serve a narrower range of constituencies, and create

less controversy in the political process. Legal authority for their planning processes is implied in broad organic statutes governing their management and, to some extent, in the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq.

- III. Why have the agencies and the Congress embraced the planning process with such enthusiasm? Understanding the various components of the planning impulse is essential for evaluating the pluses and minuses of the agencies' processes. These components are not entirely consistent with each other for, like beauty, the value of planning may largely be in the eye of the beholder. The most important components are, in my judgment:
- A. Planning and the ideal of rational decision-making, legitimizing and rendering credible the commitment of federal lands to particular uses, by gathering and displaying most of the information relevant to the decisionmaking process.
 - B. Planning as a way to enlarge policymaking horizons; i.e., a recognition that the political decisionmaking process in Congress and the agencies concentrates too much on the near-term and, perhaps, too much on single

uses.

- C. Planning as a means of fostering meaningful legislative oversight, to help Congress recapture some measure of legislative control in the face of its broad delegations of authority to the executive branch, especially in the amorphous (and increasingly notorious) "multiple use" management prescription.
- D. Planning as a response to the felt need for democratizing federal land management. See generally Paul J. Culhane, Public Lands Politics: Interest Group Influence on the Forest Service and the Bureau of Land Management (Baltimore, Johns Hopkins U. Press for Resources for the Future, 1981).
 - 1. Some support planning as a means of reducing local influence on federal land uses, for a more formal process better allows input from those with more regional or national concerns. This includes, by the way, influence asserted on federal land management by congressional representatives; i.e., planning may be supported as a way to help insulate federal agencies from informal pressure by members of Congress

with parochial concerns.

2. Others support it, somewhat paradoxically, as a way to allow more input from local sources, especially local and state government agencies. The planning process serves, in other words, a federalism value.

E. Planning as a convenient way to avoid or postpone hard legislative policy decisions. For example, the timber industry's proposal of a "Timber Supply Act" leads to the Resources Planning Act, and the clearcutting controversy leads to the National Forest Management Act, both statutes heavily emphasizing planning more than providing definitive resolutions of many policy issues. See, e.g. S.T. Dana & S.K. Fairfax, Forest and Range Policy (2d ed. 1980) pp. 321-37.

F. Planning as a way to enlarge agency size and influence.

1. This is dominant in the view of the so-called "New Resource Economists" and the public choice school. See, e.g., Baden & Stroup, eds., Bureaucracy vs. the Environment: The Environmental Costs of Bureaucratic Governance (1981).

2. It might also be noted that planning is a way for channeling competition among federal agencies, and even between federal and state/local agencies. There is more competition here than might be suspected, and it influences the agencies' implementation of the planning process.

IV. Exceptions

Not all aspects of federal resource management have succumbed equally to the siren call of planning. Some resources are not fully incorporated into statutory planning processes even though they have important, even dominant, effects on the use of federal and nearby non-federal land.

A. Minerals programs have traditionally been carried out without much governmental planning, principally on the theory that minerals are where you find them. That is beginning to change, as competition increases from other values served by the federal lands. Congress explicitly folded coal development into federal planning systems in the Federal Coal Leasing Act Amendments in 1976, see 30 U.S.C. §201(a)(3)(A), and in

1977 created a generic process for designating lands unsuitable for mining, see 30 U.S.C. §1281. Currently, one of the issues Congress is debating concerning reform of the onshore oil and gas leasing system involves planning, and the Forest Service and BLM are both beginning to pay more explicit attention toward guiding mineral development, rather than simply responding to it, in their planning processes. See Leshy, The Mining Law: A Study in Perpetual Motion (1987) pp. 199-205.

- B. Congress tends to make water resource development decisions without much planning, spurred on by the iron triangle of congressional committees, the Bureau of Reclamation, and local water interests. As nearly all conceivable water projects are already authorized, and nearly all the ones that will be built have been or are now being built, this exception will be less important in the future, although Congress' tendency to authorize now, plan later, is still somewhat in evidence; e.g., Colorado River Salinity Control Project, 43 U.S.C. §§ 1571-99, enacted in 1974 and amended in 1984.

- V. The Federal Land Management Agencies' Planning Systems--An Overview of Common Elements and Issues.
- A. Planning organization: hierarchical (national-regional-local); by subject-matter (e.g., timber management, recreation management); by administrative unit (e.g., region, forest/park/refuge, watershed, planning unit).
 - B. To what extent is the process bottom-up versus top-down? To what extent are special planning teams used? Must the plans (and planners) reflect interdisciplinary skills and techniques?
 - C. Inventory and Documentation: data gathering, display of the relevant base of information, choices of format, description, analysis, level of detail.
 - D. Alternatives: How much are they considered and displayed?
 - E. Public participation (draft-comment-final); giving interest groups access to the decisionmaking process.
 - F. Appeal and Review: agency appeal processes; availability of judicial review.
 - G. Revision: How often are plans to be revised,

and must they be revised by the same process by which they were adopted?

VI. Some Special Issues

A. Planning and the National Environmental Policy Act (NEPA)'s environmental impact statement (EIS) process.

1. The two look in the same direction, although NEPA is a bit more single-minded, aimed at the "human environment" and only secondarily at social and economic factors.
2. After some initial separation and uncertainty, the trend is now sharply toward a merger of the two, satisfying NEPA and the more general planning concerns with one process and one document.

B. Federalism - the role of state and local governments in federal land planning. See 16 U.S.C. §1604 (Forest Service plans must be "coordinated" with state and local governments' planning processes; see also 36 C.F.A. §219.7 (1985)); 43 U.S.C. §1712(c)(9) (BLM plans must "be consistent" with state and local plans "to the maximum extent...consistent with federal law and the

purposes of this Act.")

1. State and local governments have taken surprisingly little advantage of this, although the practice varies widely. See Carole Richmond, State Participation in Federal Land Planning (Wild Wings Foundation/Public Lands Institute, 1983).
2. The federal regulations are a bit vague on what kind of state and local land use planning qualifies for federal coordination/deference. See e.g., 43 CFR §1610.3-2(a) (BLM will give more deference to "officially approved or adopted resource related plans" of other governments or agencies). To the extent the federal agencies demand more formal planning as the price of exerting influence on federal planning, they will of course promote more planning by state, local and tribal governments.
3. The flip side of this issue is also worth mentioning; namely, are federal lands excluded from state and local government planning? Compare Ventura County v. Gulf Oil Corp., 601 F.2d 1080

(9th Cir. 1979) aff'd mem. 445 U.S. 947
(1980) with California Coastal Comm'n v.
Granite Rock Co., 55 U.S.L.W. 4366
(March 24, 1987).

- C. Planning and Regional or Ecosystem Management. How much does the planning process of one agency consider the uses of nearby lands managed by others, and the impacts of the use called for by its plan on these other lands, and vice-versa? Is the planning process a good handle for dealing with these seemingly intractable problems of conflicting ownerships, jurisdictions, and management responsibilities, or does it merely siphon off energy from the search for more meaningful long-term solutions? The agency regulations acknowledge the issue and don't close the door to broader assessments. See 36 CFR 219.7(f) (Forest Service); 43 CFR 1610.30 (BLM).
- D. Legal Effect of Plans. Surprisingly, there is no truly straightforward answer to this, just as there is not one to the closely related question of whether agency commitments in an environmental impact statement are legally binding. See, e.g.,

Note, NEPA, Theories for Challenging Agency Action, 1982 Ariz. St. L.J. 665-688. The Forest Service planning statute allows that "permits, contracts, and other instruments for the use and occupancy" of the national forests "shall be consistent with the land management plans" although "valid existing rights" are to be protected. See 16 U.S.C. §1604(i). See Wilkinson and Anderson, op. cit., 74-75. FLPMA has somewhat similar language. 43 U.S.C. §1732(a) (secretary to manage BLM lands "in accordance with the land use plans developed by him under section 202 of this Act when available, except...where a tract of such public land has been dedicated to specific uses according to any other provisions of law...")

VII. A Thumbnail Agency-by-Agency Review

A. National Park Service

1. One level, park-wide plans; agency tradition of decentralization.
2. Few federalism implications.
3. Concern with external threats.
4. Weak, almost non-existent statutory base for planning, but does anyone care?
5. Statutory management objectives are

relatively narrow, which means fewer conflicts and a narrower range of constituencies. Thus, for example, public input tends to be predominantly supportive of the agency.

B. Fish and Wildlife Service

1. Generally the same as Park Service, though not as advanced in time; analogous to Park Service in early 1970's. Even weaker statutory base, but ~~FWS~~ ostensibly has broader management authority; i.e., all multiple uses are permitted, if compatible with the primary purpose of the refuge.

C. Forest Service

1. The Resources Planning Act and the National Forest Management Act, 16 U.S.C. §§ 1601-1613, implementing regulations at 36 C.F.R., part 219. A planning hierarchy carried to an extreme.
 - a. National program and national goals--a long-term assessment of supply and demand, a recommended program, and a Presidential statement.

- b. Forest-wide plans
- 2. Lots of statutory detail, but how much is agency discretion limited?
- 3. How comprehensive must these plans be?
The Island Park geothermal example.
 - a. The peculiar niche occupied by mineral development on national forests.
 - b. Effect of national forest management on areas adjacent to the forests.

D. Bureau of Land Management (BLM).

- 1. Title II of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1711-1714; implementing regulations at 43 C.F.R., part 1600.

Special features include

- a. "Priority" to areas of critical environmental concern; §§ 1712(c)(3); areas defined in § 1701(a).
- b. Federalism; see § 1712(c)(8) and (9).
- c. Are the plans binding? See §§ 1712(e); 1732(a).
- d. Public involvement processes. See

§ 1712(f).

e. Congressional oversight, a two house veto, see § 1712(e)(2), and cf. § 1714(e). Compare INS v. Chadha, 462 U.S. 919 (1983). See Glicksman, "Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions," 36 Hastings L.J. 1 (1984).

f. Relationship between planning process and withdrawals, see § 1714(c)(2), and special land designations; e.g. areas of critical environmental concern (and varying definitions of "critical"-- does it mean rare and endangered, threatened, special, or simply nice?).

VIII. Other Statutes Implicating Federal Land Planning Statutes

A. A host of statutes bear on the federal agency planning processes, either by requiring some form of planning themselves, or by mandating

certain kinds of considerations in the agency planning process. The most important of these, NEPA, has already been discussed in section VI(A), above. And see section IV(A), mentioning certain minerals provisions.

Other examples include:

1. The withdrawal provisions of FLPMA, 43 U.S.C. §1714.
2. The Endangered Species Act, 16 U.S.C. §§1531-43.
3. The National Historic Preservation Act, 16 U.S.C. §§470-470 w.
4. The Archeological Resource Protection Act, 16 U.S.C. §§470 aa-11.

IX. The Usefulness and Effectiveness of Federal Land Planning - some preliminary observations on whether it really is a "stupefying mess." (The term is Richard Behan's, perhaps the most thoughtful critic of forest service planning, in "The Problems of Planning and the Public Alternative," address to conference on natural resources economics and policy, Big Sky, Montana, July 1982.)

A. Congress is increasingly making fundamental decisions concerning uses of specific tracts of federal land; i.e., the lands are

increasingly being zoned by legislation. Therefore, planning will, over time, be decreasingly concerned with fundamental issues.

- B. Does the planning process paralyze the bureaucracy by creating multiple levels of vetoes?
- C. Is it too expensive? (A sizeable portion of each agency's budget is being spent on planning today. Perhaps, in some areas, the amount spent on planning exceeds the market value of the land.)
- D. Does it produce useful inventory data, and must such inventories be repeated, i.e., will costs lessen over time?
- E. Are the results binding, as a legal or a practical matter; i.e., does the outcome of the planning process really control what happens on these lands?
 - 1. Do these plans really constrain the executive from making massive changes in public land management? Cf. the coal leasing imbroglio, round three, and other Reagan/Watt attempts to privatize federal mineral mineral and other resources on a vast scale.

2. Do they constrain the Congress? Cf. National Wildlife Federation v. United States, 626 F.2d 917 (D.C. Cir. 1980) and Utah's massive federal-state land exchange proposal, Project BOLD. Should Congress ever bypass the process? When it does, why does it? Cf. water project decisionmaking, wilderness designation, Project BOLD. For a thoughtful defense of the BLM planning process in the latter context, see Frank Gregg, "Federal Land Transfers in the West under the Federal Land Policy and Management Act," 1982 Utah L. Rev. 499-524.
3. To what degree are the plans actually carried out in practice? (Can that question ever be answered?)
- F. Are there cheaper or easier ways to achieve the same ends, or are the ends too ambiguous, various and/or inconsistent?
- G. Should the process of political bargaining that frequently underlies the process be acknowledged and formally ratified? Is the next step formally negotiated planning, like formally negotiated rulemaking now being

experimented with by EPA and some other federal agencies?

X. Planning in the Long Sweep of the History of Federal Land Management - The End of Multiple Use. One way to explain the current emphasis on planning is as the political system's response to the deterioration of support for multiple use as a management goal. Though a gross generalization, there are more than a few grains of truth in the idea that the more we learn about resource development and ecosystem management, the more incompatible most multiple uses seem to be with each other. Gifford Pinchot and Teddy Roosevelt first endorsed multiple use as a brake on the unrestricted exploitation that had previously characterized federal resource policy. Today, multiple use is advocated by miners, graziers and loggers as a brake on the trend toward more environmentally sensitive, preservation-oriented management.

2. Prediction: Multiple use will within my lifetime come to be viewed as a transitional phase in the shift from exploitation to preservation as the dominant theme of federal land management. More specifically, the Forest Service and BLM planning processes

will come to be viewed as one vehicle for phasing out multiple use, for zoning the federal lands for specific dominant uses that will mostly be oriented toward preservation rather than exploitation. Increasingly these zoning schemes are being, and will continue to be, embodied in legislation.

3. FLPMA captures this evolution rather well. After 200 years as a nation, the manager of most federal lands (the BLM) finally received both explicit multiple use management authority and a statutory base for land and resource planning. Yet the same statute also contains seeds for destroying the first and lessening the utility of the second. I have in mind here such features as the wilderness review program of 43 U.S.C. § 1782, the priority given to designating areas of critical environmental concern in § 1711(a), the firming up of the withdrawal authority in § 1714, the command to "prevent unnecessary or undue degradation" of the public lands in § 1732, the special protective measures for the California desert in § 1781, and even the encouragement of rights of way corridors in § 1763.

4. The planning process will eventually help produce outcomes that comport with this dominant emphasis on preservation. While planning will not disappear, it will eventually lessen substantially in importance as a federal land management tool. Just as planning began slowly and gradually gained strength as most constituencies' second- or third-best solution to the problems of managing the federal lands, it will not end abruptly, but rather gradually fade as a focal point for decisionmaking on many important matters of federal land management.