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Stories From The Front Lines:

How NFMA Developed and Key Players

In addition to discussing why NFMA came to be, I'll cite examples of sections being violated. Some may wonder why is this significant? NFMA came into existence because for over 7 long decades the Forest Service continuously violated two important restrictions in its charter 1897 Act. Those who worked to pass NFMA thought that the traumatic impacts of the stern upbraiding by the 1975 4th Circuit Court of Appeals would usher in a new era. Obeying laws would become a Forest Service centerpiece. This, regrettably, hasn't been the case. Parts of NFMA, as well as laws on endangered species, watersheds and fisheries have been resulted in Court decisions created by serious and flagrant law violations. Anyone who has read Judge Dwyers' decision in the Spotted Owl cases is struck by the fact that this bedrock principle of administration has been violated too often. Laws are passed to set out courses of conduct, public and private. In assessing NFMA after 20 years, and considering whether changes are desirable, an examination of how faithfully it has been carried out is appropriate.

Some argue that NFMA has defects. No law is perfect. Failure to faithfully carry out a law because one considers it defective, or by overt or covert violation, undermines the foundation of a society. We need to consider whether the broad authority the Act confers has been effectively and wisely used. Matters some may cite can be corrected by public discussion and regulation revision.

Much of the controversy and contentions that the Forest Service faces today result from the view of users, commodity and noncommodity, that the Forest Service isn't following a law, the regulations the agency wrote to implement it, or its precepts of sound practices.

Accidents Of Earlier Times.

The 1891 Act was an accident. It authorized Reserves, which need not be forested land, but made no management provisions. It was the equivalent of the first Wilderness Act created by an

undebated midnight addition to a 23 section public land reform bill. The Senate managers denied they had added it. The House managers admitted it, but said it did nothing. Water for irrigation was a driving force. For the next 6 years Western members thwarted Cong. McRae's efforts to create a management framework. Cleveland refused to add Reserves that couldn't be managed.

The 1897 Act also was an accident. McKinley had just beaten Bryan. Cleveland, a two term President, ended this term with a recession, and widespread unpopularity. In a mood of defiance he doubled the Reserves to 40 million acres a few days before leaving office. This action truly "locked up" their resources on public domain in South Dakota and Montana where 2 major mining firms operated. The Senate adopted rider on an appropriation bill, using much of McRae's approach as "window dressing".

The entire debate was about how Cleveland's "lock up" would destroy the mining industry. The Senate made sure that the mining industry got an unregulated right to cut, free of charge, all the timber needed for mining, and get free minerals. The House added the infamous "in-lieu" selection section. There was no discussion of the wisdom of declaring that, "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." (June 4, 1897, 16 USC 475)

Nor were voices raised about the lack of logic of permitting farmers and miners free use of any size and species of tree while [1] limiting commercial sales to "... the DEAD, MATURED, OR LARGE GROWTH OF TREES..." and [2] requiring all such trees to be marked before being sold (16 U.S.C. 472). Soon after 1905 the Forest Service began violating the 1897 timber sale restrictions. These violations were the basis for the Monongahela decision, which produced the 1976 NFMA.

Even the revered Multiple-Use and Sustained-Yield Act of 1960, had no Senate hearing. Of greater import, the definition of these

key terms, written by the Forest Service, had committee debate or public scrutiny. They became part of the law because the Forest Service was told that no bill would move without them. This occurred only because Associate Chief Crafts told Sen. Phil Hart of Michigan that he couldn't add definition of these terms to the law because he was only a freshman Senator.

How And Why The First Fully Debated National Forest
Management Act Became Law.

Let's look at a few things that shaped this 20 year old law. In contrast with the 1891, 1897 and 1960 Acts, the 1976 NFMA was the product of extensive hearings, numerous, intense open mark-up sessions, full reports and action in both Houses where its merits were discussed. The lengthy open Conference and reconciling report were discussed in each House. There were votes on each key provisions. Despite the one missing ingredient, an executive report endorsing or condemning the bill, it is a textbook example of how Congress should enact a law.

The need for the 1976 National Forest Management Act was assured after Judge Clement Haynsworth, deciding for the 4th Circuit Court of Appeals, confirmed that 70 years of Forest Service total disregard for the tight strictures imposed by 7 words in the 1897 Act didn't vitiate their plain meaning. At the same time other Federal Courts were following the 4th Circuits' lead.

When the Izaak Walton League suit in West Virginia was under way, I was working on the Forest and Rangeland Renewable Resources Act of 1974. Sen. Hubert H. Humphrey gave the law its impetus, while the basic idea came from former Chief Richard E. McArdle. "Mac", I, and Sen. Humphrey enjoyed several discussions about his desire to create a mechanism to focus on the NATIONAL natural resource courses needed to benefit future generations. Fully aware that private forest and range were the backbone and dominant part of America's land base, Humphrey's wanted, as he put it, to "get the Forest Service out of the eye of the storm."

When I asked "Mac" about the West Virginia suit he told me that in the 50's his counsel told him that 1897 Act was being

violated. He decided to "let sleeping dogs lie". He now was positive that the Court would agree. My checks confirmed this. The plaintiff's chose the 4th Circuit because Haynsworth's firm conviction was that Congress fixes laws.

In consultation with Sen. Talmadge and Humphrey, Mike McLeod, Committee counsel, and I drafted an amendment to the RPA bill for Sen. Eastlands' subcommittee. It said that the Forest Service could sell timber on an environmentally and economically sound basis, and would mark trees before sale only when necessary (i.e., selection sales). The Forest Service and the Timber Industry, which had filed an amicus brief with the District Court, swiftly asked Sen. Talmadge to remove the provision. Both said they'd win this suit. While Talmadge disagreed with their estimate, he removed it. A few weeks later the District Court held the 1897 law was being violated. Both quickly asked Talmadge that the section be restored. He flatly declined, crisply telling Industry when they visited, "You wanted to be in Court, you stay in Court. You go to the Court of Appeals." The 1974 RPA let the 1897 language stand.

Setting The Legislative Course.

In 1975 after the Court of Appeals unanimously affirmed the District Court, the Forest Service faced a formidable problem. It is notable that the Industry and the Service erroneously trumpeted the Court action as solely a clear cutting ban. They glossed over reality: the 1897 stricture prevented any silviculturally sound cutting. It lacked silvicultural roots. Justice declined to go to the Supreme Court. The timber program would come to a halt.

Sen. Jennings Randolph (D WV) began work on a bill to permit selection cutting and thinning sales, and impose many other restraints. I was asked to participate but soon told that so many issues were closed to discussion that the product would not be silviculturally rational. His bill was introduced Feb. 4, 1976.

Because 1974 efforts to help had been rejected, Senators Talmadge and Humphrey, as well as Chairman Foley were willing to let the Industry, the Forest Service and the Ford Administration live with their miscalculation. A few members introduced "quick

fix" bills, but they were "DOA". The Ford Administration wouldn't let the Forest Service propose a bill.

However, after several talks, Humphrey and Talmadge agreed to take up a bill if it had bi-partisan support. A 8 page bill, half of which was amendments to the 1974 RPA was developed. It outlined Forest Plan content, based on what the Forest Service said was their process. It struck the seven 1897 Act words from the tree sale authority, and changed the marking rule. The bill introduced on Mar. 6th, had 6 Democratic and 7 Republican cosponsors, and quickly had 20. Sharp lines were drawn between protagonists, as well as within the Congress. The Ford Administration stood mute. It was apparent that legislating could be hard and contentious.

Sen. Agriculture Com. Counsel Mike McLeod, Jim Giltmier and I met with Sen. Talmadge to get our "marching orders". He laid down 3 canons. First, the "Interior Committee boys" would participate. Mike objected, pointing out that the Ag Committee would be giving up jurisdiction. Talmadge crisply told us, "I've already invited Scoop" (Chairman Jackson).

Next, Sen. Randolph was to be in the hearings and mark up. When Mike objected because he wasn't on either Committee, Sen. Talmadge dismissed this saying, "I've already invited Jennings."

In earlier discussions of a basic bill framework, I outlined two routes: (1) A bill with prescriptions, but different than Randolph's, or (2) A bill that set forth concepts that the Secretary would flesh out with regulations. Senators Humphrey and Talmadge had selected the "concept" approach. Fixing a piercing eye on me, he said, "I want a bill that passes the Senate unanimously, and you're going to help me get it." My role was screen all proposals to assure that they were not prescriptive and see that each one fostered improved resource management, as well as develop amendments that gave Members ownership in the final bill. All proposals were first discussed with Sen. Talmadge, Sen. Humphrey, then with whoever they asked me to consult. Additionally, I was to explain all provisions in the Committee mark-up. Chairman Foley and Talmadge later had me do this in the Conference. I also worked with

several House members including Chairman Foley, Bob Duncan, Max Baucus, Jim Weaver, Jim Johnson and "Bizz" Johnson, as well as the several able staff on the Senate and House Committees.

One of the most unique aspects in the process is how Sen. Talmadge intuitively set strategy. He put results above long-standing parochial committee positions. This, in so far as I can recall, was the first joint committee hearing and mark-up. It had the added feature of direct participation by another Senator with a bill before the Committee, but not on it, Jennings Randolph who chaired the Public Works Committee. In addition, Sen. Talmadge wanted the Chief of the Forest Service present and participating in the mark-up. This law is a classic example securing involvement by key people.

Clearly, Chairman Talmadge was expanding his legislative hallmark; the "politics of inclusion". He listened to all ideas as he guided the Committee toward a product that would pass the Senate without amendment. Amendments that were not prescriptive got his approval for presentation.

Cong. Tom Foley, who Chaired the House Committee, decided that he would let the Senate break ground. His task was complicated when Cong. Litton, who started their hearings, was killed in an airplane accident and the mercurial John Melcher became the subcommittee chair.

Some lobbyists had the idea that I had some special influence over Sen. Talmadge. He encouraged this. The fact is that he made every decision on whether an idea had merit, and who should be asked to propose it. He greeted ideas put forward without being first discussed with him with great caution. He wanted proposals evaluated before they were formally put forward. As a real conservative, he was leery of proposals sprung without preliminary discussion, examination and open consideration.

Some NFMA Provisions.

Marginal Lands.

What became Sec. 6 (k), dealing with marginal lands, is an apt example of how he proceeded. Marion Clawson, who was on Nixon's

PAPTE Commission, proposed the concept in the hearing. Sen. Dale Bumpers thought it useful. His staff drafted an amendment, first discussed with Sen. Talmadge. It's core principle was that National Forest lands where financial or environmental outcomes were unsound should be removed from the logging base until cutting was financial sound, and they could be safely logged. Industry strongly objected. They opposed removing any land from the timber base because this would reduce the ASQ. The Forest Service, which claimed this was their practice, also was very cool to the idea, even though the regulation writing process would provide flexibility. The concept made sense to Sen. Talmadge. When Senator Hatfield, seeking reconsideration, asked me to explain it again, Sen. Talmadge stopped me as he looked down the table at Sen. Hatfield, declaring, "Mark, what this section means is only an idiot forester would cut tree where they know they won't grow right." The language was forceful, not eloquent. He then said, "Let's vote", the Joint Committee turned down the proposal to strip the section.

In the House Industry successfully lobbied against 6(k).

Sen. Metcalf decided to give his seat on the Conference to Sen. Bumpers. He let it be known that if the Conference version didn't have Bumpers marginal lands section and his on "Sustained Yield", he'd filibuster the Conference bill to death.

In the Conference Cong. Foley, well aware that adoption of language that addressed this issue was vital offered a substitute late one afternoon. When the Conference broke up Sen. Bumpers invited me, and as I recall staff from Sen. Metcalf's office and Mike Harvey, the Interior Committee's counsel to his office. There was general agreement that the language met Sen. Bumper's goal. The assumption was that Industry would seek to get a member to object and the Forest Service would remain cool. Sen. Bumpers called Chairman Talmadge to notify him he would accepted the language. The next morning Talmadge immediately recognized Bumpers, who said that in the spirit of compromise he accepted the House section. With no hesitation, Sen. Talmadge said, "The Senate recesses.", as he moved to the next matter. Twenty years later it is hard to describe the

chemistry of a situation where two dominant Chairs shape the process without seeming to do so.

Sustained Yield.

Sen. Metcalf's "Sustained Yield" section was drafted by Mike Harvey, and discussed with Talmadge. When put forward Industry vociferously objected. Their interest was in having the highest possible ASQ set regardless of Government cost or impacts.

The Forest Service was peculiarly cool, despite the fact that the concept was what the Service said was their policy. The Forest Service was torn by two conflicting internal factions: One held that the older stands were growing slowly. Cutting them, even more rapidly than current growth, would quickly spur future growth, thus producing a larger "sustained yield". Others held the Service position of the '50's - the National Forests should be "Old Growth Reservoirs". The Service should not only keep cut in balance with growth, but also retain some stands based on natural life cycle rotations. In the Pacific Northwest this could put some land on 400 year rotations - quite at odds with those arguing for 60 year rotations. This view was rooted in the position that private owners could not and should not be expected to forego the profits from their forests. The law chose the conservative concept.

One aspect that was telling to me was a visit John Walker of Simpson arranged through a Southern timber firm with Sen. Talmadge. At this 8 AM meeting he launched into such a technical discussion of why rapid old-growth liquidation was financially sound that Sen. Talmadge interrupted John to ask if he's like the Senator's view. He forcefully said that if he owned the National Forests he'd cut them all down. John beamed. Talmadge continued " But I didn't own them, American people own them - and they didn't want them cut down. John's face fell. Talmadge closed with, "And we ain't going to do it!" Walker, and I think others, really didn't comprehend that Sen. Talmadge was succinctly describing the difference between public resource management and private management, because Walker continued to try to press his point to no avail.

When the Committees got to Conference there was considerable

contentious debate on whether to adopt the Senate language. This is lost because no record of the Conference discussion was made. An amended Senate provision was adopted. Some wanted community stability and other matters added in law as reasons to cut beyond sustained yield limits. Accepted at first, as conferees sought to add more reasons the 2 Chairs said, lets not do this - we will list in the Conference report a few examples of where cutting may be above SY levels for a time. By vote the language just added was stripped. Page 33 of the Conference report says the ASQ can be varied to improve age-classes, facilitate future SY, or reduce mortality losses.

A notable addition was made by Sen. Church. The conferees had decided that volume in excess of a 10 year ASQ could be sold as salvage. The Conferees accepted Sen. Church's language requiring salvage be counted against the regular green ASQ, unless the need developed late in the Plan cycle. The Conferees were aware that even if the ASQ was exceeded then, the next Plan would have to take the overcutting into account. The basis for this was that the salvage timber actually comes from recently green trees which, absent this catastrophic loss, would be in the regular ASQ. The Conferees were concerned that salvage not be an excuse to overcut.

The law directs in Sec. 13. "(a) The Secretary... shall limit the sale of timber from each national forest to a quantity EQUAL OR LESS THAN a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis." (emphasis added).

"(b) Nothing in subsection (a) ...shall prohibit the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect and disease attack. The Secretary may either substitute such timber for timber that would otherwise be sold under the plan or, if not feasible, sell such timber over and above the plan volume." (16 USC 1611).

Sec. 6(g)(3)(D), provides that if ASQ increases based on intensive management procedures don't work, or aren't funded, the next Plan's ASQ must be reduced.

Sen. Hatfield pursued to his efforts to weaken the sustained yield section in the Senate debate on the Conference but no change was made. As Chairman Foley observed later, individual floor statements about desires have no standing. This topic remains a contentious issue as damage to watersheds, fisheries and endangered species from road and clearcuts have come into prominence.

Monitoring And Research of Problems - An Early Warning Concept.

Sec. 6(g)(3)(C) provides for continuous monitoring and assessment of actions and research on problems. The provision recognized evidence presented in the hearing that great pressure was on current tasks, especially "getting out the cut". Far too little was done on measuring the impact of actions, or key research on observed problems. The section was adopted with warm agreement because it made good sense. In reality, it didn't take a law to direct that good stewardship prevail. However, it was 14 years before Monitoring Reports began to be issued. More seriously, the reports are largely, "We planned to sell 50 MMBF and sold 51 MMBF". They don't identify the cause of problems or the action and research that will correct them. A July 1996 U.S.D.A. OIG report finds that, "CONTROLS OVER PROGRAM PERFORMANCE MEASURES DATA CONTINUE TO BE INADEQUATE". Numerous deficiencies were found in when and what to count, accuracy, and corrective action.

Public Participation and Advisory Boards.

Both bills had several public participation instructions, including creating broad-gauged advisory boards. This has never been implemented. Whether these would have helped solve the confrontations the Service has faced remains an open question. Committee of Scientists.

This was in the Senate bill. The House accepted it with little debate. The members were to review the Forest Plan regulations the Service was to develop. The Chief nominated an outstanding group of people. Then, remarkably they were given the task of developing the regulations, which they did very competently. The regulations weren't developed internally, then examined, proposed for adjustment and ratification by the Committee. In my view, the

Service failed to secure the wide internal discussion that would have helped employees to feel that these were their regulations.

Plant and Animal Diversity.

The language requiring guidelines to provide for the diversity of plant and animal communities was common to both bills. It was strengthened in Conference by incorporating the stronger procedural aspects of the House bill. The struggles the Service has had with this issue stem from their regulations, not weaknesses in the law.

Purchaser Sale Operating Plans and Contract Extension Limitations.

Both versions required purchasers to file operating plans that were to be followed, although they had slight differences. Here the Conferees tightened the requirement by combining the strongest part of each bill. The purpose was to eliminate the practice of some firms that left sales uncut until a contract was almost ready to expire and then seek and get an almost automatic extension. Often delayed purchaser road construction and operation required costly revision of planned sales.

The other part of this was the limitation on extensions. The Conference report specified that extensions should be granted only when "the purchaser has performed diligently...and that extension would be in the public interest." In the last 2 years, sweeping extensions have been given despite the design of the law around dealing with each purchaser as an individual.

The Salvage Fund.

I drafted the Salvage provision for Sen. Bellmon. The House bill picked it up. It was intended to be a small revolving fund that captured specified costs, which might not be all that the sale required. Sen. Bellmon's idea was that if at least the specified costs could be recovered the timber could be sold. The Forest Service has never shown the volume and value of "salvage" sales. Thus it never has been possible to evaluate whether the law is being followed, or the results of annual salvage sales. For the 10 years, 1979-1988 the total collections were reported at \$166 million. For 1989-1995, the total was \$1.1 billion, as the program grew, but reporting was avoided.

The Church Guidelines - Reforestation And Clear Cutting.

In 1972, after extensive hearings, the Interior Committee had devised, with Forest Service help, a set of guidelines to apply to timber sales. The hope and expectation was that this would resolve the growing controversies over timber sale practices, including clearcutting. Chief Cliff announced these guidelines would be policy. This did not stem the controversies, which in fact increased.

As the bill proceeded, Sen. Metcalf asked that the guideline be put in the bill. I'll mention two of the 4 guidelines. On reforestation, with the assent of the Chief the rule that stands not be cut that could not regenerate within 5 years was accepted. A few years ago the Shoshone decided 7 years was O.K. and the Chief agreed. A suit was filed that held that 5 meant 5. The Service went to the Court of Appeals which, interestingly, found that 5 years could be 7 years. In so far as I am aware monitoring has never established the on-the-ground reality.

The need to use clearcuts so extensively, and their size was a most contentious issue. It nearly produced a strict size limit in law. Page 30 of the Conference report gives a good account of what was decided. The guideline was strengthened by requiring that clear cuts be used only where needed to meet management objectives. Further, an interdisciplinary team was to set size limits using the 5 principles set forth in the law, and apply special safeguards when fire or other catastrophe called for larger cutting areas.

The size and impact of especially post-fire salvage sales, continues to be a source of debate among silviculturists, general contention, confrontation with concerned citizens. Land slides on recent clearcuts and road washouts following major storms have fueled the debate. Laws and regulations can only set the framework. On-the-ground actions determine outcomes.

The Conference.

Each bill, when reported, had 35 or more pages. For the Conference Staff put together a huge document: each bill, side by side clearly showing at least 34 differences. Because of the

differing bill structures, parts didn't mesh, which was an added complication. In addition, even when the two bills agreed some Members wanted to discuss where the matter should be placed. My job in the Conference was to be sure every point was covered. As we reached the end, I had missed three House provisions.

Representative Costs Versus Receipts.

The House bill had what became Sec 6(1), a provision authored by Cong. George Brown, even then a senior member. Its core requirement is that representative samples will be in annual reports for reforestation and stand improvement costs, as well as on timber sales made where expenditures exceed the Governments' return (i.e. below-cost sales).

As the Conference drew to a close Cong. Brown asked what had happened to his section on tracking ALL sale and reforestation costs. When the Senate Conferees suggested using A REPRESENTATIVE SAMPLE, it was quickly accepted.

Meaningful displays of units costs of producing various National Forest outputs has been a consistent weakness. The Service never produced facts on sale costs, revenue and returns (i.e. profit or loss). In fact, its annual report on timber still shows only volume sold and cut in MBF and dollars, with no discussion of unit costs or trends. A full financial picture on timber offered versus sold, unsold timber, appraised versus bid prices, uncut timber under contract (volume and value) and many post-sale facts, are omitted or glossed over.

From 1977 to 1991 the annual report foreword dutifully recited the Sec. 6(1) requirement for reforestation, stand improvement and below-cost timber sales representative samples. None were provided. In 1992 the Service solved this failure by dropping the citation that this is required by law. Deep sixing continues with a Service erroneous claim that their accrual accounting by Forests, despite its total absence of samples, meets the law. Their claim is further undercut in the July USDA OIG Audit 08401-4-AT, which says:
"In our opinion, the [Forest Service] Financial Statements do not present fairly, in conformity with applicable Government accounting

principles, the[ir] financial position.... Our audit identified pervasive errors , material or potentially material misstatements, and/or departures from applicable Government accounting principles..." The Service continues to violate Sec.6(1).

Bid Monitoring and Anti-Competitive Behavior.

Cong. Krebs had a provision in the House bill to deal with a persistent problem, collusive bidding and other anti-competitive behavior, which are hard to prove and tough to erase. It was watered down in the House bill to cover only sales less than 1 million BF. Sec. 14 (e) also required monitoring systems to identify patterns of noncompetitive bidding, and a reports. When Cong Krebs asked about this provision, Sen. Talmadge suggested that it should not be limited to sales less than 1 million BF. He found agreement on requiring sealed bidding on all sales EXCEPT WHERE THE SECRETARY DETERMINES OTHERWISE BY REGULATION . The Conference report instructed the Forest Service to use "public participation in developing such regulations and that such regulations shall accord the Secretary the discretion top employ oral bidding or a mix of bidding..." (emphasis added).

The Forest Service totally ignored that instruction. Without any public participation, a few weeks after NFMA became law the field was to make sealed bidding universal, which was not what the law required. This overt violation of the intent of the law and the Conference instructions stoked an Industry campaign to repeal it. A 1978 revision substituted a weak monitoring and collusion control mechanism, which has been badly administered, as is cited at page 23 of the OIG report of July 18, 1996, and their special audit on theft of March 1996. The Service persists in relying on oral bidding, which it couples with appraisals that reduce advertised prices by as much as 1/3 below expected prices. The contrast is their vigorous actions against timber sale protesters.

Stands Must Reach Culmination of Mean Annual Increment Before Cutting.

My third lapse was on Cong. Brown's provision that culmination of mean annual increment of growth must generally have been reached

to cut stands. He raised this in the late afternoon of the final day as it appeared that all points had been covered and everyone was tired. Sen. Talmadge, looked down the table at his colleagues and said, "The Senate recesses". The full import of this section was never discussed.

Where To Go and How To Get There.

There are many other parts of the NFMA that could be discussed at length. One need only add up all the pages of hearings, mark-up reports and floor debate to realize that even the CMAI provision has roots. In addition, there are the voluminous regulations and internal handbooks that chart agency direction.

Norm Johnson at OSU, and Maggie Shannon at Maxwell have had their classes critique sections of the law. A most useful action before undertaking revisions would be a much more detailed review that can be completed in these 3 days.

I think that the right course was chosen when it was decided to use departmental regulations to specify how the broad authority in NFMA would be implemented. One of the missing ingredients is a system of biennial re-evaluation and change that has real monitoring data as a basis, and uses a genuine broad-gauged committee of citizens and government people who meet openly.

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