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Framework for Understanding NFMA in a Legal Context

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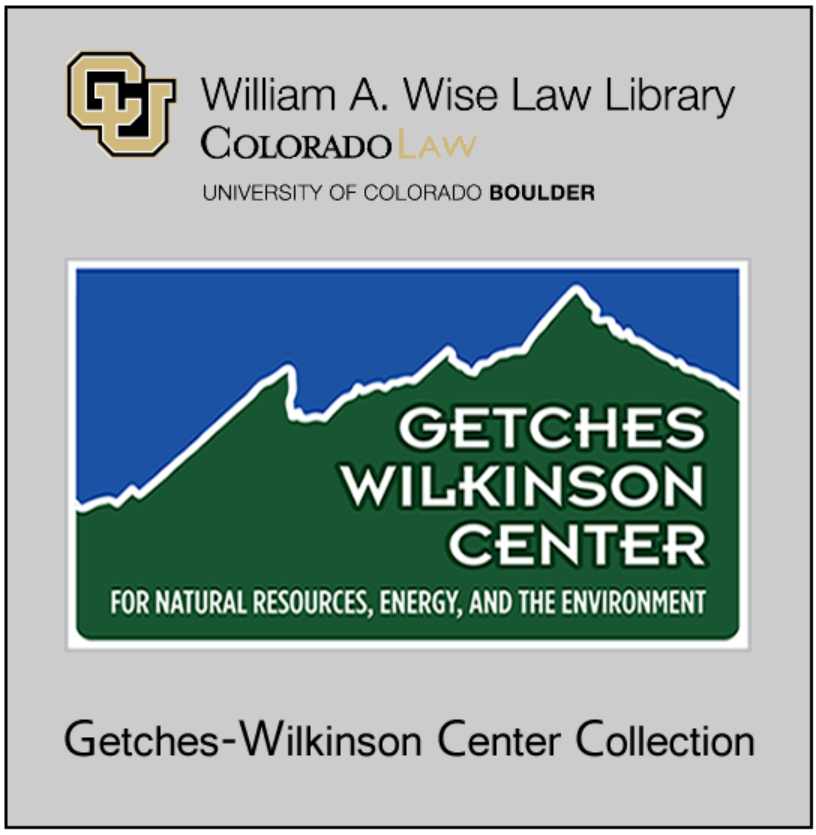

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FRAMEWORK FOR UNDERSTANDING NFMA IN A LEGAL CONTEXT

by

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How Well Has It Worked in the Past 20 Years? How Will It Work in the 21st Century?
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I. General References

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II. Introduction

A. The National Forest Management Act (NFMA) is the core statutory mandate for Forest Service management of the national forests. The pedigree and history of the NFMA bristle with legal conflicts and issues. Before discussing those conflicts, and certainly before suggesting what is wrong or right with the law, it is useful to have a straightforward description of what the law contains.

B. NFMA has three main purposes:

1. to require plans for each national forest;
2. to set the standards for timber sales;
3. and to establish broad, substantive policies for timber harvesting.

C. Although the Forest Service Organic Act of 1897, the Multiple Use-Sustained Yield Act of 1964, and the Resources Planning Act (RPA) still control Forest Service activities, NFMA is the most important statute governing the Forest Service and regulates the majority of decisions made by forest managers. 16 U.S.C. §§ 1600-1614 and other sections of 16 U.S.C..

III. Forest Planning

A. National-scale renewable resources planning under the RPA was reinforced. NFMA amended the 1974 Forest and Rangeland Renewable Resources Planning Act (RPA), which required an assessment of public and private renewable resources throughout the national forests every ten years and a set of long-range planning objectives for all Forest Service activities every five years.

B. Land and Resource Management Plans were required by NFMA for individiual forests.

1. The Forest Service must develop planning regulations for individual forests. Each forest develops ten to fifteen year land and resource management plans (LRMPs), which must satisfy the constraints of NFMA and national timber sales targets. 16 U.S.C. § 1604(a).
2. The plans are to be developed in accordance with regulations based on advice from a "Committee of Scientists." 16 U.S.C. § 1604(h).
3. Local management decisions regarding permits, contracts, and other uses of the resource must be consistent with the LRMP. 16 U.S.C. § 1604(i).
4. NFMA mandates public participation in the development, review, and revision of land management plans. 16 U.S.C. § 1604(g)(3)(E).
5. Although the development of LRMPs is a lengthy and detailed process, the plan is often imprecise for several reasons:
   a. The usually large size of the management area means that the Forest Service may lack complete knowledge as to the exact nature of existing resources such as minerals and wildlife.
   b. Valuation of certain uses of the forest, such as preservation and recreation, are difficult.
   c. Details of the actual terrain, such as fragile soil conditions, may not be known

until the plan is implemented.

C. Litigation arose under the NFMA planning requirements.

1. Forest plans are subject to requirements of the National Envirionmental Policy Act though the planning process is the functional equivalent of an environmental impact statement. *Sierra Club v. Butz*, 3 ENVTL. L. REP. (ENVTL. L. INST.) 20,071, 20,072 (N.D. Cal. 1972), *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 (10th Cir. 1973).
2. NFMA elevated wilderness to consideration equal to other multiple-use resources, and wilderness planning was hotly contested. 16 U.S.C. § 1604(e)(1) (1982). *See California v. Bergland*, 483 F. Supp. 465, 478-79 (E.D. Cal. 1980), *aff'd sub nom. California v. Block*, 690 F.2d 753 (9th Cir. 1982).
3. Plans were routinely challenged in draft form.
4. Forest Service management under the plans is often challenged as inconsistent with plan requirements, although such challenges are rarely successful. *Sierra Club v. Robertson* 845 F.Supp. 485 (S.D. Ohio 1994) (deferring to Forest Service discretion the balancing of factors relating to economic suitability). *Sierra Club v. Marita (Chequamegon)* 843 F.Supp. 1526 (E.D. Wis. 1994), affirmed, 46 F.3d 606, (7th Cir. 1995); *Sierra Club v. Marita (Nicolet)* 845 F.Supp. 1317 (E.D. Wis. 1994), affirmed, 46 F.3d 606 (7th Cir. 1995) (deferring to Forest Service expertise regarding proper size of habitat for endangered species).

IV. Timber Sales

A. Appraised Value

NFMA authorizes the Forest Service to sell timber at no less than appraised value. 16 U.S.C. § 472a(a).

B. Information Requirements

All sales must be advertised unless extraordinary conditions exist or the appraised value is less than $10,000. Advertisements must state the quantity and location of timber for sale. A prospectus with more detailed information must also be made available to prospective buyers.

C. Procedure Requirements

The Forest Service's bidding methods must "insure open and fair competition" and also authorize the Secretary of Agriculture to eliminate collusive bidding practices. 16 U.S.C. § 472a(e)(1).

1. Bidding techniques include sealed bids (used primarily in eastern and southern forests) and oral bids (used primarily in western forests).
2. A court overturned as arbitrary and capricious a decision by the Forest Service to reject all bids on a timber sale in which the Forest Service had inaccurately estimated the number of trees of a certain species. The Forest Service defended its decision to reject all bids on the grounds that the computational error vitiated the bidding results. The court found that the Forest Service cancelled the sale not to insure open and fair competition, but rather to "get even more money for its timber." *Prineville Sawmill Co. v. United States*, 859 F.2d 905 (Fed.Cir.1988).

D. Harvest Contract Terms

The length and terms of timber contracts must "promote orderly harvesting." 16 U.S.C. § 472a(c). The contract usually requires harvesting within a three- to five-year period. In *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992), the court held that the Forest Service breached a timber contract when it failed to authorize logging in areas affected by wilderness designation and caused the contract to expire before the purchaser could commence logging.

E. Road Building

1. The private logging companies may undertake road building necessary for timber harvesting, in which case the Forest Service reimburses the company for the expense. Otherwise, the Forest Service may build the roads.
2. The roads are built to a higher standard than ordinary private logging roads so they can later be used for other purposes such as recreation, wildlife management, and possible future timber sales.

V. Policies Imposing Substantive Constraints on Timber Harvesting

A. Suitable Land

1. NFMA requires the Forest Service to to exclude from possible harvest lands

those lands which are "not suited for timber production, considering physical, economic, and other pertinent conditions to the extent feasible." 16 U.S.C. § 1604(k).

2. In *Citizens for Environmental Quality v. United States*, 731 F.Supp. 970 (D.Colo. 1989) (the *Rio Grande LRMP* case), the district court ruled that NFMA does not prohibit timber harvesting that may cause damage to soil or watersheds, as long as that damage is not irreversible. The LRMP was rejected in this case, however, because it failed to identify the means to prevent irreversible damage. Further, the Forest Service failed to justify placing more emphasis on predetermined timber production goals than on other factors in determining suitability under § 1604(k). The court found the agency to be engaged in a "result-biased decision making process."
3. A more recent and perhaps more typical decision gave the Forest Service more discretion to balance factors relating to economic suitability. The court in *Sierra Club v. Robertson*, 845 F.Supp. 485 (S.D. Ohio 1994), also held that the Forest Service may engage in cost-benefit analysis designed to exclude from timber production lands that do not provide cost-efficient means of meeting plan objectives.
4. The Ninth Circuit has held that NFMA does not prohibit below-cost timber sales. The court agreed with the Forest Service's position that in measuring economic benefits it could consider benefits from costly road-building other than timber access. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir.1985).

B. The Diversity Requirement During Timber Inventory

1. NFMA limits the timber inventory by requiring LRMPs to provide for diversity of plant and animal communities.
2. In *Krichbaum v. Kelley* 844 F.Supp. 1107 (W.D.Va. 1994), the court found the diversity requirement vague and lacking any specific substantive command to consider any particular species.
3. The court in *Sierra Club v. Robertson*, 845 F.Supp. 485 (S.D. Ohio 1994),

characterized diversity as a goal rather than a planning requirement.

4. In reviewing the diversity requirement regarding two Wisconsin LRMPs, a court deferred to the Forest Service's expertise regarding a decision to create numerous small areas of undisturbed habitat versus a few larger areas. The court accepted the argument that diversity of habitat insures diversity of species. *Sierra Club v. Marita (Chequamegon)* 843 F.Supp. 1526 (E.D.Wis. 1994), affirmed, 46 F.3d 606, (7th Cir. 1995); *Sierra Club v. Marita (Nicolet)* 845 F.Supp. 1317 (E.D.Wis. 1994), affirmed, 46 F.3d 606 (7th Cir. 1995).
5. The Forest Service was required to reconsider its spotted owl management plan pursuant to which timber sales were permitted where an environmental impact statement rested on stale scientific evidence, incomplete discussion of environmental effects, and false assumptions regarding cooperation of other agencies. *Seattle Audobon Soc. v. Espy*, 998 F.2d 699 (9th Cir.1993).
6. The failure of the Forest Service to protect the northern spotted owl in the Pacific Northwest resulted in judicial decrees prohibiting timber cutting in spotted owl habitat, despite appropriations legislation that temporarily precluded judicial challenges to timber sales in those areas. *Robertson v. Seattle Audobon Soc.*, 503 U.S. 429 (1992).

C. Sustained Yield Limitations

1. The Forest Service may not allow cutting of trees that have not reached the culmination of mean annual increment of growth, and the number of trees to be cut must be limited to the amount that can be removed annually in perpetuity on a sustained-yield basis. 16 U.S.C. § 1611(a).
2. The sustained yield requirement is consistent with the Forest Service's previous strategy of limiting harvests to nondeclining even-flow levels.

D. Even-aged Management

1. NFMA ratified existing contracts that provided for clearcutting, reversing the *Monongahela* decision and the impasse that it had created (and which led to the NFMA itself). *See* Coggins, Wilkinson, & Leshy, Federal Public Lands

and Resources Law, pp. 666-667.

2. Before authorizing new clearcuts, the Forest Service must conduct a review of the potential environmental, biological, aesthetic, engineering, and economic impacts on each area and determine that clearcutting is the optimal method for meeting objectives set forth in the LRMP. 16 U.S.C. § 1604(g)(3)(F)(i).
3. Clearcuts must be carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources and with timber regeneration. 16 U.S.C. § 1604(g)(3)(F).
4. In *Sierra Club v. Espy* (E.D.Tex.1993), the district court enjoined all clearcutting in Texas national forests, finding that Congress intended that clearcutting be used only in exceptional circumstances. The court found clearcutting to be inconsistent with the biodiversity considerations required by NFMA. The Fifth Circuit reversed and vacated the injunction, deferring to the Forest Service's expertise in making sound determinations regarding alternative harvesting methods, protection of old-growth ecosystems, and biodiversity considerations. *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994).