University of Colorado Law School

Colorado Law Scholarly Commons

The National Forest Management Act in a Changing Society, 1976-1996: How Well Has It Worked in the Past 20 Years?: Will It Work in the 21st Century? (September 16-18)

1996

9-16-1996

The Failure of Federal Land Planning

Steven P. Quarles

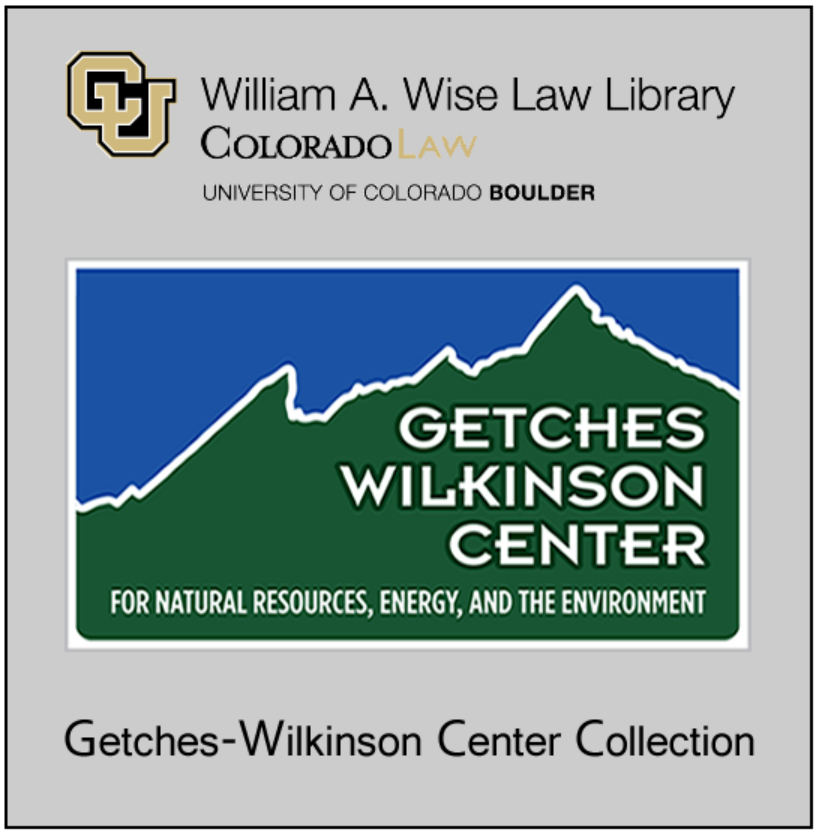
Follow this and additional works at: https://scholar.law.colorado.edu/national-forest-management-act-in-changing-society

 Part of the Administrative Law Commons, Environmental Law Commons, Environmental Policy Commons, Forest Biology Commons, Forest Management Commons, Legislation Commons, Natural Resource Economics Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, and the Natural Resources Management and Policy Commons

Citation Information

Quarles, Steven P., "The Failure of Federal Land Planning" (1996). *The National Forest Management Act in a Changing Society, 1976-1996: How Well Has It Worked in the Past 20 Years?: Will It Work in the 21st Century? (September 16-18).*
https://scholar.law.colorado.edu/national-forest-management-act-in-changing-society/11

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Steven P. Quarles, *The Failure of Federal Land Planning*, *in* THE NATIONAL FOREST MANAGEMENT ACT IN A CHANGING SOCIETY, 1976-1996: HOW WELL HAS IT WORKED IN THE PAST 20 YEARS? WILL IT WORK IN THE 21ST CENTURY? (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1996).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

THE FAILURE OF FEDERAL LAND PLANNING

Testimony of

STEVEN P. QUARLES

Counsel to
American Forest & Paper Association

Before the

SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND LANDS
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

March 26, 1996

A HEARING ON OVERSIGHT OF THE FOREST SERVICE'S DECISIONMAKING PROCESS

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify today on Forest Service decisionmaking.

I am Steven P. Quarles, a partner in the law firm of Crowell & Moring LLP, and counsel to the American Forest & Paper Association. Located in Washington, D.C., AF&PA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. AF&PA represents regional and specialty product associations, as well as individual companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. AF&PA represents a vital national industry which accounts for over 7 percent of the United States manufacturing output. AF&PA has many members who are wholly or partially dependant on timber from the national forests and other federal lands.

Many of the concerns about the planning and management of national forests I will describe today have been raised before. On November 1, 1990, the National Forest Products Association (AF&PA's predecessor) and 78 other organizations petitioned the Forest Service to engage in a rulemaking to amend its planning regulations. We offered additional recommendations in response to the agency's 1991 Advance Notice of Proposed Rulemaking (ANPR) on land and resource management planning and 1995 proposed rulemaking.

The agency's only responses to our petition for rulemaking were contained in the ANPR published in the Federal Register on February 15, 1991 and the preamble to the proposed rules published in the Federal Register on April 13, 1995. The Forest Service stated in those notices that the specific recommendations in our petition will be, and then were, considered as part of the public comment on the ANPR. We still have not seen the agency's substantive response to the specific recommendations in our petition.

Our detailed recommendations from 1990 focused on regulatory changes needed to provide guidance on the implementation of resource management plans, and to establish a more effective, balanced process for amending and revising plans in the future. In keeping with our previous and long-standing effort to seek rational reform of federal land decisionmaking, I will today recommend some specific revisions in law which are necessary to ensure that resource management plans may become meaningful planning documents for the management of the federal lands and that management of the federal lands is accomplished in an efficient and timely manner.

Because this oversight hearing concerns decisionmaking for the National Forest System and because the forest products industry is more active on national forest lands than other federal lands, my comments will focus on the Forest Service. However, many of my comments are equally applicable to the Bureau of Land Management (BLM) and the lands within its jurisdiction.

II. WHY FEDERAL LAND PLANNING AND MANAGEMENT ARE FAILING.

In 1976, when Congress enacted the National Forest Management Act (NFMA) and the Federal Land Policy and Management Act (FLMPA), it made resource management planning the foundation for decisionmaking on the management of federal lands. Today, little doubt remains that the foundation has collapsed and the entire edifice of federal land management is teetering. The Forest Service consumed over 19 years and expended over $250 million to prepare 123 resource management plans. (After two full decades, the BLM is far from completing its resource management planning.) After all of this effort, however, the Forest Service is managing the forests with little or no regard to the plans' guidance. Instead, the agency is embarked on ambitious efforts not only to revise its resource management plans but also to engage in entirely new planning -- ecoregion assessments, watershed plans, etc. -- that is virtually unrelated to the resource management plans. At the very time planning is proving to be a failure, the agency is devoting even more, increasingly scarce personnel and funding to it. The reasons for the inefficacy of planning are many; I will discuss ten of them here.

(a) Planning is never-ending and provides no secure, predictable guidance for land management. Likely contrary to the intent of the Congress when its enacted NFMA and FLPMA in 1976, planning has not been a temporary exercise to guide subsequent management activities; instead, it has become a

never-ending desk-bound process that practically precludes on-the-ground management. Planning has become trapped in a perpetual cycle -- the plan is never stationary; it seemingly at all times is being prepared, amended, or revised, or being overridden by other national, regional, or interim policies. Planning, as a result, has become prohibitively costly in both funds and personnel. And yet, because of its constantly changing, ephemeral condition, instead of providing secure, predictable guidance for management activities, planning heightens the insecurity of, and often paralyzes, managers attempting to make on-the-ground decisions.

(b) New layers of planning are being imposed without statutory license or consistent application. Even as the Forest Service and BLM bemoan the high cost in funds, personnel, and time consumed in preparing the first generation of resource management plans, these same agencies are engaging in a frenzy of additional planning -- watershed plans, landscape plans, ecoregion-based ecological assessments, etc. -- that is not required by statute and that preempts and often contradicts the only planning (resource management plans) Congress has mandated. These new layers of planning seldom display a balance in the treatment of commodity and non-commodity resources; instead, they focus on protection of non-commodity resources, sometimes only a single species of fish or wildlife, to the virtual exclusion of commodity resource uses and even other non-commodity values. These new layers of planning are not consistently applied

throughout the National Forest System or BLM lands. Further, the forest supervisors and district rangers or managers often are not fully apprised of all the planning efforts affecting their forests and districts. Even if those officials are intimately acquainted with this multi-layered, perpetual motion planning exercise, it would be a Herculean, if not impossible, task for them to make any sense out of the resulting babble of planning direction. *The result is management paralysis in the vain anticipation of the completion of a process that is unending.*

Although there is now no statutory or regulatory license for these new layers of planning, the Forest Service would remedy the latter omission by granting this authority to itself in its new proposed planning regulations.

(c) Planning is labelled as "interim" and is thereby magically freed of all procedural and substantive constraints of either statute or rule and of the direction provided by all previous planning decisions. Both land management agencies, but particularly the Forest Service, have indulged in the convenient practice of adopting one-size-fits-all, generic "interim" policies, guidelines, or screens that apply to management activities on federal lands covered by 5, 10, 15 or more individual resource management plans. By labelling these policies as "interim", the agencies apparently believe they free themselves from procedural constraints. The policies are adopted without, or with only nodding, adherence to any of the procedures required by NFMA or FLPMA for amendments to or revisions of resource management plans, with minimal or no compliance with the

National Environmental Policy Act (NEPA), and with wholly inadequate opportunities for public participation. Indeed, one set of interim policies -- the so-called Eastside screens -- applicable to national forests throughout eastern Washington and Oregon was developed in a closed, one-day "bull session" of Forest Service biologists and formally announced in a press release!

These "interim" policies are often implemented without any effort to amend the underlying resource management plans. If the agency decides to amend the plans, however, it typically does so by fiat, declaring all plans to be amended at once. This gross application of generic "interim" guidance to multiple federal land units gives no consideration to local conditions which have been addressed assiduously in the resource management plans nor does it concern itself with the many resource management plan policies -- the management goals and objectives, land use allocations, and resource output decisions -- it overrides.

Presently, this rage for interim policymaking has no statutory or regulatory license. However, this too the Forest Service intends to remedy; in its proposed new planning regulations, it would grant itself formal authority to issue "interim amendments" without complying with significant NFMA plan amendment procedures.

Congress has taken action to terminate the most prominent of these interim policymaking efforts -- the Interior Columbia Basin Ecoregion Management Project -- and to return to the resource management planning required by NFMA and FLPMA in the fiscal year 1996 Interior and related agencies appropriations

legislation. In their reports on this legislation, the House and Senate Appropriations Committees described well the problems with this new form of "interim" planning:

> The committee does not wish the termination of the Project to be a justification for the continued development and implementation of broadly applicable interim forest management guidelines... These guidelines were (and are being) developed outside of the forest planning process and then applied to a large number of national forests by a generic amendment to all applicable forest plans through a single environmental assessment and decision document -- without consideration of the particular conditions of the individual forest and without forest-specific environmental documentation that analyzes alternative guidelines tailored to those precise forest conditions. The committee believes this new agency reliance on generic guidelines is misplaced. The process of developing them ... is simply not as rigorous as that contemplated in the planning provisions of the National Forest Management Act and the Forest Service's implementing regulations.
>
> Department of the Interior and related agencies appropriations bill, 1996 (H.R. 1977), House Report 104-173, 104th Cong. 1st Sess., June 20, 1995, p. 113-114; see also Senate report 104-125, 104th Cong. 1st Sess., July 28, 1995; pp. 108-109.

(d) Planning is declared to provide no decisions and is thereby rendered virtually meaningless. In an excess of risk aversion, the Forest Service has attempted to insulate its resource management plans from challenge by declaring them to be virtually meaningless. The agency has argued successfully in administrative appeals and litigation that, with few exceptions (e.g., Wilderness recommendations), the resource management plans contain no decisions whatsoever. The argument goes that, because the plans are devoid of final decisions, these is nothing for plan opponents to challenge in court. But since the plans are allegedly decision-less, there is also nothing to compel agency adherence

to them. *Hundreds of millions of dollars and twenty years of extraordinary agency effort and intense public participation to produce documents that contain no decisions!* To further remove any utility or accountability from the plans, the Forest Service has even secured opinions in two federal judicial circuits (the 8th and 11th Circuits) that, because the resource management plans contain no decisions, no one -- not the States, environmentalists, or commodity users -- is permitted -- has standing -- to challenge them in court.

(e) Planning is reduced to nothing more than another layer of environmental "regulations." Whatever significance the resource management plans do have, the Forest Service ultimately gives credence to only one aspect of them. It has reduced the resource management plan to a set of environmental restrictions that read and perform like regulations (liberated, of course, from the provisions of the Administrative Procedure Act that govern the adoption of regulations).

The Forest Service's resource management plans do what most plans do and what Congress must have intended: they do map management areas; they do allocate specific land uses to management areas; they do set management goals and objectives; and they do establish outputs of goods and services. Yet the Forest Service has told its managers that they are free to ignore all these aspects of the plans and follow only the environmental prescriptions -- so-called standards and guidelines. The agency quite literally takes the position that all that truly

matters in the plans are these standards and guidelines. Whenever there is any conflict between any standard or guideline, no matter how obscure, and any other plan guidance -- including any land use allocation or resource output, or even any management goal or objective -- the standard or guideline automatically prevails. And this result -- implicitly changing the offending guidance to comport with the standard or guideline -- occurs without any plan amendment. Yet, the agency will protect the sanctity of the standard or guideline by prohibiting any alteration of it except by the plan amendment process. The result is not planning, but the imposition of detailed, prescriptive environmental regulations that do not reflect specific on-the-ground conditions and eliminate any discretion in the managers to design effective projects.

Now, the Forest Service has announced in its new proposed planning regulations its intent to remove even the pretense that resource management plans contain much more than environmental prescriptions. The General Accounting Office in January 25, 1996 testimony before a Senate Committee noted and expressed concern over this development:

> The Forest Service suggested, in an April 1995 proposal for revising its NFMA regulations, that it remove from the plans the objectives for goods and services. In addition, it would no longer include schedules for producing goods and services or for implementing desired resource conditions. Instead, it would display and periodically update predicted ranges of both goods and services and of resource conditions in an appendix to the forest plans. However, the appendix would not limit nor compel any action by the agency.
>
> Without measurable objectives and/or implementation schedules, the public cannot form reasonable expectations about the health of forests over time or about the future availability of forest uses. For example, companies

and communities dependent on Forest Service lands cannot use the forest plans to plan or develop long-range investment strategies. In addition, under the Government Performance and Results Act of 1993, the Congress expects specific results for a given funding level and actual results are to be compared with established goals and objectives beginning with fiscal year 1999.

In a 1992 report, the Office of Technology Assessment (OTA) stated that, to improve forest planning under NFMA, the Congress could require the Forest Service to specify targets for all uses in its forest plans.

GAO, Forest Service: Issues Relating to Its Decisionmaking Process, January 25, 1996.

We concur with this GAO analysis.

(f) Planned resource outputs are repudiated as soon as they are declared.

The Forest Service has made absolutely certain that one aspect of the resource management plans' guidance -- output levels for goods and services -- can be ignored with impunity by its own officials. After working very hard, but with mixed results, during the planning process to secure reasonable output levels (allowable sales quantities (ASQs)) for timber, we were astonished to hear the Forest Service refer dismissively, even disdainfully, to those ASQs, not as plan requirements, but as nothing more than aspirational goals -- goals to which the agency promptly chose not to aspire at all. The agency's unseemly rush to shed itself of any responsibility to meet the output levels it had so laboriously established in the plans has discredited the entire planning process.

With no adherence to the plans' goods and services output levels, plan implementation is foundering. For example, not even lip service is being paid to meeting the timber output levels -- the ASQs -- and the timber sale schedules

contained in the plans. The aggregate ASQ for the national forests today is 7.560 billion board feet -- yet sale levels for fiscal year 1995 were funded for only 4.075 billion board feet. And for fiscal year 1996, the Administration has requested funding for only 3.6 billion board feet. Other resources are suffering a similar fate.

To make matters worse, the sale program in Oregon and Washington is at an all time low with only 257 million board feet of sawlog timber sold over the last fiscal year despite an annual ASQ of 1.376 billion board feet for Region 6. While President Clinton's Pacific Northwest Forests Plan promised yearly sawlog volume at only a fifth of previous annual timber sale levels, in its first two years it has produced only a quarter of what it promised!

When the Forest Service fails to meet the plans' prescribed output levels, it breaches its NFMA duty that the "resource plans" and implementing actions "shall be consistent with" the applicable resource management plan (16 U.S.C. § 1604(i)). If the unachieved output level involves timber, the agency is also failing to honor the objective of the 1897 Organic Act that national forests "furnish a continuous supply of timber for the use and necessities of citizens of the United States" (16 U.S.C. § 475).

Yet, as previously noted, in its new proposed planning regulations, the Forest Service now intends to drop all pretense that output levels serve any purpose by removing them entirely from resource management plans.

(g) Planning is unconstrained by any effective statutory or regulatory implementation obligation; neither the Congress nor the agencies have ever made the basic connection between planning and management. NFMA and FLPMA were enacted in 1976, during the zenith of planning's popularity. (The Coastal Zone Management Act had been enacted in 1972, the Senate had passed the National Land Use Policy Act in 1972 and 1973, the American Law Institute had published the Model Land Development Code, and States from Oregon to Florida were enacting State planning statutes.) The Congressional authors of NFMA and FLPMA apparently imbued so much faith in planning that they assumed it would be self-implementing; presumably their thinking being that the overwhelming rationality and professionalism of planning's results would be evident to all interests or that all interests would reach consensus by participating together in the myriad public procedures that pervade the process. Accordingly, in NFMA, for example, Congress provided five pages of direction on how to prepare, and what to include in, resource management plans, but not a single line on how to implement the completed plans.

The agencies followed Congress' lead: for example, the Forest Service devoted 26 pages of the Code of Federal Regulations to rules governing plan preparation and exactly four sentences within those rules to plan implementation.

Whether this simple faith in self-implementing planning manifested by Congress in 1976 was hopelessly naive or truly visionary (or both), it certainly was

betrayed in subsequent practice. *Implementation of the plans is as likely to be accidental as it is purposeful.* Furthermore, although the laws and the agencies speak frequently of monitoring to determine the effectiveness of environmental standards and guidelines, they neither require nor encourage monitoring (or any other procedures) for the purpose of determining, and ultimately ensuring, that resource management plans are being implemented. Lacking any significant guidance on and requirements for implementation of resource management plans, both NFMA and FLPMA are misnamed; neither law truly addresses the "Management" they both share in their short titles.

(h) Rules and policies that are not found in any law are frequently devised and imposed to frustrate statutory policies. The Forest Service has hamstrung itself with rules and policies that are not contained in the NFMA or any other law. Indeed, on occasion the agency has adopted regulations and guidance that are contrary to existing law. The most visible and perverse example of this behavior is the so-called viability rule (36 C.F.R. 219.19). This regulation requires the agency to manage its lands "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area" -- in fact, "well distributed" throughout the planning area. The rule is absolute; it accords no discretion or flexibility whatsoever to the land planner or manager.

Yet, this extraordinary regulation is derived from a much debated and carefully crafted provision of the NFMA (16 U.S.C. § 1604(g)(3)(B)) in which the

Congress infused great administrative discretion and flexibility. That statutory provision directed the agency in preparing its plans to provide "for diversity of plant and animal communities," *not* preserve the viability of each and every species in the various communities, and only to "provide ... for steps to be taken" to preserve the diversity of tree species, *not* ensure at all costs that the diversity is preserved. To make certain that this direction could not and would not be interpreted as absolute, Congress saturated the provision with qualifying phrases and redundancies: the agency was to strive for this diversity "in order to meet over-all multiple use objectives ... within the [plan's] multiple use objectives ... where appropriate ... to the degree practicable."

Taken literally -- and one federal judge (Judge Dwyer) has done just that -- the agency's regulation, contrary to the express language of the statute, serves no multiple use objectives and admits to no practicality consideration; instead, it preempts all other uses of, and management decisions for, the national forests. It is capable of serving, and has already served, as a convenient nail on which to hang injunctions shutting down the management of national forests. The rule absurdly imposes a more stringent standard for protection of *all* vertebrate wildlife in Forest Service planning units than does the Endangered Species Act for protection of *specific* species in those same units that have been formally designated as endangered or threatened. Indeed, it posits an impossibility: no plan for a national forest can ever identify, let along ensure the viability and proper distribution of, a population of every single vertebrate that may occupy or

visit the forest. Unhappily, although the BLM has no comparable regulation, the Clinton Administration directed the Forest Ecosystem Management Assessment Team to apply this Forest Service rule to all BLM lands in the Pacific Northwest in designing the President's Northwest Forests Plan.

That's not all, though. Now the Forest Service and BLM have embraced ecosystem management -- a term and a concept which cannot be found anywhere in the NFMA or FLPMA. Never mind that there is no commonly accepted definition of an ecosystem, that an ecosystem can be as small as a single spring or plot of ground or as large as a multi-state region (Greater Yellowstone, Upper Columbia Basin, etc.) and every conceivable size in between, that designation of an ecosystem and delineation of its boundaries are as much an art form as science, or that to "manage" properly and effectively an ecosystem of any size likely requires the politically impossible task of removing artificial management designations within the ecosystem such as wilderness, national parks, etc. This concept of ecosystem management is so vague and ephemeral -- so susceptible to subjective judgment or bias -- that the agencies can make of it anything they please and be free of any challenge; it provides no law for the agencies to apply or the courts to enforce. This was brought home by statements of Chief Thomas in a June 1994 Forest Service leadership meeting:

> What is ecosystem management? I will tell you my concept -- which, of course, is only my view. *[Only his view? Does each and every other Forest Service official have "only [his or her] view?"]* ... New efforts by scientists, philosophers, technologists, leaders and managers can be targeted at the sharpening of evolving [ecosystem] concepts and practices. *[Did you catch that? "Philosophers" right after scientists and before "leaders and*

> *managers."]* ... Under ecosystem management, small scale actions are judged and tracked for their contributions to particular desired future conditions. These conditions are to be nurtured in the constantly evolving pattern that makes up the multi-scale ecosystem tapestry. *[Well now, there is a constantly evolving multi-scale -- but otherwise readily understood and easily applied -- standard the law can get its hands around. In fact, you would need "philosophers" to discern the meaning of the "constantly evolving multi-scale ecosystem tapestry."]*

What is most frustrating is that this policy -- which has no sanction from statute and appears nowhere in the agencies' regulations -- is allowed, indeed expected, to override long standing, truly statutory and regulatory policies such as multiple use and sustained yield. And now, the Forest Service intends to correct its regulatory silence and formalize the investiture of ecosystem management as the autocratic monarch of federal land planning in its new proposed planning regulations.

(i) Planning and management have been paralyzed by multiple, frequently conflicting standards and procedures imposed by numerous other laws. The various environmental and land management laws applicable to the federal lands impose so large a number of procedural hurdles and substantive requirements on the preparation of resource management plans and subsequent plan-implementing management activities that even the most careful agency officials inevitably make mistakes -- mistakes that can be used by opponents to nullify the plan or activity through appeals and litigation. Often the official is not even given the opportunity to correct the mistake because the opponent who has discovered it prefers to withhold disclosing it during pre-decision public comment

opportunities and, instead, use it to ambush the agency in a post-decision administrative appeal or lawsuit.

Worse, often an agency official simply cannot comply with all the various substantive requirements of the applicable environmental and land management laws even if he or she manages to avoid committing even a single procedural error in preparing a resource management plan or project. The reason is that these laws often contain conflicting, even contradictory, mandates. For example, the dictates of the Clean Air Act often complicate, even frustrate, Forest Service efforts to conduct prescribed burning to meet NFMA obligations to protect forest health and reduce the risk of catastrophic wildfires. Even if the official somehow succeeds in complying with all the substantive dictates of the applicable laws, by the time that is accomplished there may be effectively no management decision left to be made -- there will be no discretion remaining to the official to design a plan or project to fulfill the originally intended, legitimate land management objective.

The most recent example of this unfortunate phenomenon of conflicting laws and the resulting paralysis in federal land management is the Pacific Rivers Council lawsuits and the copycat litigation that they have spawned. The courts have ruled in this litigation that, every time a new species is listed or new critical habitat is designated under the Endangered Species Act (ESA), all management activities that might take place in any national forests where the species or habitat exists and that might affect the species or habitat must be halted until the

applicable land management plans undergo consultation with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS). It doesn't even matter whether the specific activities themselves have undergone consultation concerning the species or habitat and were found not to jeopardize the species or adversely affect the habitat. Instead, before the plan becomes effective again and the ban on forest management is lifted, the agency must complete the typically multi-year process of deciding whether the listing or designation warrants a plan amendment and of engaging in consultation on that decision. With the increasing frequency of species listings and critical habitat designations expected to occur when the listing moratorium is lifted, numerous plans may become mired in a semi-permanent state of paralysis undergoing successive ESA consultations and the Forest Service may be prevented for years from meeting even its most basic land management obligations. Let's be clear this is not the fault of the Pacific Rivers Council and their allies, it is a fundamental problem of poorly coordinated lawmaking that can be corrected by Congress.

Unquestionably, NEPA and the ESA have had an environmentally beneficial impact on federal land policymaking. They also have frustrated timely and efficient federal land management. Both statutes require, or have been interpreted to mandate, repetitive procedures and analysis. For example, one management activity -- a timber sale, watershed restoration, etc. -- might be preceded by not one, but multiple lengthy and expensive environmental impact statements (on the regional plan, ecoregion assessment, resource management

plan, and the activity itself) which frequently analyze the very same issues and impacts over and over again. Under the ESA, for both plans and activities, the biologists in the land management agencies prepare biological evaluations, and then the biologists in FWS and NMFS prepare biological opinions, that are fully duplicative. The GAO reported in its January testimony that the Forest Service spends an estimated $250 million each year conducting these environmental analyses and preparing about 20,000 environmental documents to support just activity-level decisions. This work consumes about 18 percent of the funds available to manage the National Forest System and an estimated 30 percent of the agency's field staff resources.

Moreover, increasingly Forest Service and BLM activities -- particularly timber sales -- are being delayed, even frustrated, by the intervention of other federal agencies, particularly the Environmental Protection Agency, FWS, and NMFS. These agencies refuse to allow the land management agencies to determine for themselves how they will comply with the environmental laws. Procedurally, these other agencies are not sufficiently staffed to permit timely participation in the timber sale or other activity planning process. Substantively, representatives of these agencies are voicing objections to sales and sale plans without any experience or expertise in land management and scant knowledge of site specific conditions. This interference delays sale planning further, causes the elimination of sales (often not for substantive reasons: instead, the salvage timber simply deteriorates and loses all commercial value in the interim) or the

redesigning of sales to include lesser volume that is more expensive to harvest, or provides grist to the litigation mill of sales opponents.

(j) Appeals and litigation have become almost automatic. Finally, administrative appeals and access to the courts have been made so inviting that virtually every resource management plan has been appealed and most have been challenged in lawsuits. Furthermore, timber sale challenges have become almost automatic, to the point that several environmental groups have sworn to their membership in fund raising appeals that they will sue against every timber sale in their target forests. The GAO reported in its January testimony that the Forest Service receives 1,200 administrative appeals of activity-level decisions annually, and 20 to 30 new lawsuits are filed each year involving various Forest Service decisions and compliance with environmental laws.

The Congress is responsible, in part, for making administrative appeals and litigation so seductive. For example, first, Congress has ensured that the government pays for the privilege of being sued: under the Equal Access to Justice Act (5 U.S.C. § 504), the attorneys bringing these challenges are reimbursed by the government, often even when they do not prevail. Second, Congress has failed to set any meaningful standing requirements -- particularly, the elementary and reasonable responsibility to raise the challenged issue with the agency before the decision becomes final. Third, unlike most recent natural resource laws, Congress

has set no deadline for filing an administrative appeal or bringing suit after the final decision is reached on a plan or management activity.

A beginning was made by Congress three years ago when it enacted section 322 of the fiscal year 1993 Interior and related agencies appropriations act. It places limitations on the lengths of time for appellants to bring administrative appeals of Forest Services activities, for the agency to process those appeals, and for stays to run during and after the appeals. It even enforces these time constraints by providing that, if the agency fails to meet the deadline for completing the processing of an administrative appeal, the appeal is automatically denied. Unfortunately, section 322 applies only to the Forest Service, not to the BLM; only to projects, not to resource management plans; and only to administrative appeals, not to litigation.

III. RECOMMENDATIONS FOR STATUTORY REFORM

Among the reforms to provide for timely, efficient, and effective planning and management of federal lands that we urge this Committee to consider are the following:

1. Set time limits for the processes of preparing, amending, and revising resource management plans.

2. Limit the levels of planning to two -- one layer of truly multiple-use (resource management) planning and another of management activity planning; and proscribe any multiple-use planning for any geographical area smaller or larger than the unit to which a resource management plan applies. Each agency could decide to combine forests or districts into single planning units and could conduct inventories and analyses (but not policymaking) on areas lesser or greater than the

planning units, but resource management planning itself would be limited to those units. To achieve this proposal, the Renewable Resource Program provisions in the Forest and Rangeland Renewable Resources Planning Act would have to be repealed and regional "guides" or plans would have to be eliminated.

3. Provide that no policy or guidance, whether it is characterized as "interim" or long-term, can be applied to a national forest or other federal land planning unit until the resource management plan for that unit has been amended in accordance with the amendment procedures specified by the NFMA or FLPMA, including preparation of a NEPA document which is addressed to that particular unit and which considers alternative policies for, and their specific impacts on, the conditions of that particular unit.

4. Require that resource management plans display how plan implementation will be affected by, and what plan-implementing management activities will be undertaken, at various funding levels.

5. Make the elements of a resource management plan explicit and include among those elements not only environmental standards and guidelines, but also land management goals and objectives, land use allocations, and resource output levels.

6. Make it clear that all those elements of the resource management plans are final agency decisions which are enforceable by interested parties in appeals and litigation.

7. Eliminate the automatic preference for standards and guidelines that are found to conflict with other guidance -- including land management goals and objectives, land use allocations, or resource outputs levels -- in implementing a resource management plan by requiring that whenever such conflict alters implicitly either a standard/guideline or other plan guidance that the plan be amended to reflect the change. But, also allow the agency to waive -- on a one-time basis, with respect to a particular management activity, and without plan amendment -- any guidance in the plan so long as the waiver does not result in significant and permanent adverse environmental effects.

8. Direct the agency to discuss in the NEPA and decision documents accompanying any resource management plan amendment or revision any other land use or management changes, in combination with the change for which the amendment or revision was initiated, that would be appropriate to maintain overall plan balance and meet other plan objectives, and outputs.

9. Require that resource management plans maintain to the maximum extent feasible communities economically dependent on national forest or BLM lands, and direct that the NEPA and other decision documents accompanying any plan amendment or revision: (i) examine the impacts of the planning alternatives and final decision on the community, including its revenues and budget, the level and quality of its public services, the employment and income of its residents, and its social conditions; (ii) explain how resource allocations for the planning alternatives and final decision would comport with or differ from historic community expectations; and (iii) describe how those impacts were considered in selecting the preferred alternative and making the final decision.

10. Require the Chief of the Forest Service to undertake a 6-month study of the ASQs in all resource management plans and determine which are achievable and which are not; direct that any plan which contains an ASQ that the Chief finds unachievable be amended within a year and a haft to provide an achievable ASQ; and require that the agency offer not less than 25 percent of the decadal ASQ in each plan in every 3 consecutive year period during the life of the plan and the full decadal ASQ over a 10-year period (or amend the plan's ASQ and meet the same schedule for the new ASQ).

11. Direct the agency to report in writing as part of each decision to undertake a management activity that the activity contributes to, or, at a minimum, does not preclude the achievement of the objectives or outputs of the applicable resource management plan, and require that the Chief or BLM Director: (i) monitor resource management plans on a set schedule to ensure that each plan is not constructively changed through a pattern of management activities or failures to undertake management activities which is inconsistent with the plan; and (ii), whenever he or she finds such a change, direct that corrective management activities be undertaken to restore plan consistency or that the plan be amended or revised to reflect the change.

12. Explicitly abolish the viability rule and add a proviso to the NFMA biological diversity provision that, except where required by the ESA or other law, the agency is not required to ensure that each and every species that may appear in a planning unit is viable within, and well-distributed throughout, that unit.

13. Provide that the agency may not adopt by regulation or other direction any policy or requirement that would, or could, supersede generally the basic multiple use and sustained yield mandates of NFMA and FLPMA.

14. Refocus NEPA compliance on the resource management planning process by requiring that each management activity's NEPA compliance be tiered to the plan's Environmental Impact Statement (EIS) and that only the plan EIS address certain specific impacts (cumulative impacts, impacts on biological diversity, etc.). With the requirements that certain critical analyses appear only in the plan EIS and that the activity NEPA document tier to the EIS, the management activity's NEPA compliance duties would appear minimal enough to justify limiting activity NEPA documents to Environmental Assessments (or allowing EISs only when the agency determines in writing that the nature or scope of potential environmental consequences of an activity is substantially different from or greater than the nature or scope of the consequences considered in the plan EIS).

15. Sort out conflicting NFMA and ESA mandates by permitting: (i), whenever reinitiation of consultation on a resource management plan is undertaken, individual management activities to proceed on an activity-specific consultation basis until the plan consultation is completed; and (ii), once consultation is completed on a plan and until it is reinitiated, management activities that are consistent with the plan to proceed without further consultation.

16. Allow the land management agency (and not FWS or NMFS) to prepare the biological opinion under ESA, just as that agency prepares the EIS under NEPA.

17. Provide that no agency other than the Forest Service or BLM may make any environmental decision concerning any management activity that is consistent with a resource management plan. Any agency that otherwise would have authority under the Clean Water Act or other environmental law to make a decision affecting such an activity should advise the Forest Service or BLM as to the agency's views concerning the decision in a timely manner, but such advice would be non-binding. Instead, the Forest Service and BLM would be responsible, and accountable in federal court, for compliance with the environmental laws.

18. Set a minimum standing requirement for bringing an administrative appeal or lawsuit against a resource management plan (or amendment or revision) or management activity that the appellant or plaintiff must have raised the issue which is being appealed or litigated prior to the decision to approve the plan or activity, unless the agency did not provide to the public an opportunity to do so.

19. Establish: (i) statutory deadlines after final decisions on resource management plans (or amendments or revisions) and management activities in which administrative appeals may be brought, and after final decisions on administrative appeals in which litigation may be fled; and (ii) a petition procedure (with a similar deadline to sue on the petition decision) for the public and other agencies to seek plan changes resulting from new information received or new conditions occurring after the filing deadlines.

IV. CONCLUSION

Thank you for the opportunity to testify. Federal land planning and management are failing. This oversight hearing should serve as the catalyst for reforming the planning and management processes. After two decades of experience under NFMA and FLPMA, it is time to consider and adopt statutory reform. Indeed, if reform is not accomplished, more drastic remedies will appear more reasonable -- be they abolishing multiple use and embracing dominant use, abandoning planning altogether, or transferring management or ownership of federal lands to the States.

I would be happy to answer any questions you may have.

* * * *