

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)

Getches-Wilkinson Center Conferences,
Workshops, and Hot Topics

9-17-1996

The National Forest Management Act: Managing the Use Out of Multiple Use Lands

Dan S. Budd

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

 Part of the [Administrative Law Commons](#), [Courts 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](#), [Natural Resources Management and Policy Commons](#), and the [Sustainability Commons](#)

Citation Information

Budd, Dan S., "The National Forest Management Act: Managing the Use Out of Multiple Use Lands" (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).

<http://scholar.law.colorado.edu/national-forest-management-act-in-changing-society/14>

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.



Dan S. Budd, *The National Forest Management Act: Managing the Use Out of Multiple Use Lands, 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 NATIONAL FOREST MANAGEMENT ACT:
MANAGING THE USE OUT OF MULTIPLE USE LANDS

BY: Dan S. Budd
Rancher
Big Piney, Wyoming

I. Management of America's Federal Lands

A. Single or Dominant Land Use Management

1. Federal lands managed under a single or dominant land use mandate are to be managed for a specific or dominant purpose as outlined by Congress. Federal lands with single use or dominant use management jurisdiction include:

a. National Park Service Lands

Congress specifically dedicated national park lands "as public park or pleasure grounds for the benefit and enjoyment of the people," and to benefit and protect wildlife and wildlife habitats. 16 U.S.C. §§ 47-1 to 47d.

b. U.S. Fish and Wildlife Service Lands

Lands managed by the Fish and Wildlife Service are to be managed to create wildlife habitat for migratory birds and, in some cases, threatened or endangered species. 16 U.S.C. §§ 715 to 715r.

c. National Recreation Area Lands

"The Secretary shall administer the [lands within the recreation area] in such a manner which, in his judgment, will best provide for (1) public outdoor recreation benefits; (2) scenic, historic, scientific, and other values

contributing to public enjoyment; and (3) such management, utilization and disposal of renewable natural resources in the continuation of existing uses and development as will promote or are compatible with, or do not significantly impair public recreation, and the conservation of the scenic, scientific, historic, or other values contributing to public enjoyment." 16 U.S.C. § 90c-1.

d. Bureau of Reclamation Lands

These lands are to be utilized for dams, flood control areas, and other water projects.

2. Although other uses are allowed on single or dominant use lands, should the managing federal agency determine that these uses conflict with the dominant purpose of the federal reserve, these other uses will be reduced or eliminated.

B. Multiple Use Land Management

Two land management agencies, the U.S. Forest Service, an agency within the Department of Agriculture, and the Bureau of Land Management (BLM), an agency within the Department of the Interior, are bound to manage the lands within their jurisdiction for "multiple use" and "sustained yield."

1. Sustained yield means the land is to be managed so that the productivity of the land is not impaired. Multiple Use, Sustained Yield Act (MUSYA), 16 U.S.C. § 513(b).
2. Multiple use means that the federal agencies must manage their lands so that all uses on those lands are "harmoniously coordinated." 16 U.S.C. § 513(a).

II. History of Federal Land Ownership

With the exception of the land within the original thirteen colonies, initially all land within the United States was claimed and controlled by either Indian tribes or foreign nations. After the Revolutionary War, the United States government began acquiring these lands by purchase, treaty or conquest. Once jurisdiction to these lands was secured, Congress passed a series of laws with the intent of (1) transferring the ownership of these lands to any citizen who would settle the vast uninhabited areas west of the thirteen original colonies and (2) reducing the huge national deficit acquired by the colonies during the Revolutionary War. Some of the statutes used to transfer lands into private hands included:

A. Pre-emptive Rights

1. Doctrine of Pre-emption

Doctrine recognized by the Supreme Court, conveying the right of the individual settlor to exclude all

others from those portions of the federal lands that were settled or cultivated. Pre-emption rights were first granted by presidential decree to western settlers for the great service they performed for the country by settling the western lands. *Nix v. Allen*, 112 U.S. 129 (____).

2. Pre-emption Act

Under this practice, settlers would stake a claim (although described by some historians as trespass) upon vacant portions of the federal estate. If the settlor could prove that the land was owned by no one else, he could purchase his claim at a modest price, with liberal credit, and without competitive bidding. 43 U.S.C. § 251.

B. Homestead Acts

Under these programs, vacant federal lands were given to settlers and pioneers provided that they could prove that they had lived on the property for a period of six months. Lands granted under the Homestead Acts, and later the Pre-emption Acts, were limited to 160 acres per family. 43 U.S.C. § 161 *et seq.*

C. Stock Raising Homestead Act

The Stock Raising Homestead Act worked in the same manner as other homestead laws, however, the settlor could receive a total of 640 acres, provided that the land was used for livestock grazing purposes. 43 U.S.C. § 224.

D. State Land Grants

Congress also granted lands to the newly created states, reasoning that the state could sell the land and use the proceeds to build schools and roads.

E. Mining Law of 1872

This Act allowed the prospectors of hard rock minerals such as gold, silver, copper, etc., to enter upon the federal lands and upon finding a deposit of minerals, protect his claim from the intrusion of others. The prospector could also apply to have the fee simple ownership of the federal land containing his claim transferred to him. 30 U.S.C. § 239.

F. Railroad Grants

Congress also authorized grants of federal land to the railroad companies, with the thought that the railroads could sell the land to raise the capital to continue to build. Act of July 1, 1862, 12 Stat. 489.

III. Creation of the U.S. Forest Service

A. Creative Act of 1891

This Act allowed the President to withdraw lands normally open to pre-emption and homestead rights from the federal domain and designate those lands as national forests. In 1891, President Cleveland used the power under this Act to withdraw thousands of acres of land from the federal domain, suggesting that these lands should be reserved

for the "people of the nation." 16 U.S.C. § 471. Six years later, Congress, concerned that they had not been consulted prior to these withdrawals, repealed this Act and adopted the Organic Administration Act.

B. Organic Administration Act of 1897

The Organic Administration Act states: "All public lands hereto designated by the President of the United States and . . . all public lands that may hereafter be set aside and reserved as public forest reserves under this Act, shall be as far as practical controlled and administered with the following provisions: No public forest reservation shall be established except to improve and protect the favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States." 16 U.S.C. § 475. Emphasis added. The Organic Administration Act has never been repealed by Congress and remains in full force and effect today.

C. Multiple Use, Sustained Yield Act

In 1960, Congress passed MUSYA and created the concept of multiple use lands. Specifically, that Act stated that it is the policy of Congress that the national forests be established and administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Congress also declared that "the purposes of this Act [MUSYA] are to be supplemental to, but not in degradation of the purposes for which the national forests were

created as set forth by the Act of June 4, 1987 [the Organic Administration Act]." 16 U.S.C. §§ 528 et seq. Emphasis added.

D. National Forest Management Act

In 1976, Congress passed the National Forest Management Act (NFMA). This Act was intended to establish a procedure or process for making decisions regarding National forest lands. It did not repeal the Organic Administration Act or MUSYA. However, in the twenty years since its enactment, it has been used to subvert and diminish the purposes for creation of the National Forest System.

E. United States v. New Mexico

In this case, the U.S. Supreme Court held that the legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrated that Congress intended national forests to be reserved for only two purposes -- to conserve the water flows and to furnish a continuous supply of timber for the people. According to the Court, national forests were not reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes. 438 U.S. 676 (1978).

IV. Community Stability Management Requirements

One of the major problems with the NFMA is that it is used to reduce the Forest Service's commitment to protect community stability. Congress has shown a long history of concern for

the protection of the economic stability of those communities and counties containing and surrounding the federal lands. Specifically, Congress, the courts and agency regulation all require that federal land management agencies, including the U.S. Forest Service, protect the economic or community stability of those communities and localities surrounding the federal lands. As described by the Forest Service:

HISTORY AND OBJECTS OF FOREST RESERVES

Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forest and range . . .

We know that the welfare of every community is dependent upon a cheap and plentiful supply of timber; that a forest cover is the most effective means of maintaining a regular stream flow for irrigation and other useful purposes, and that the permanence of the livestock industry depends upon the conservative use of the range.

Forest Service, U.S. Department of Agriculture, *The Use Book*, 13 (1906 ed.).

A. The Forest Service's Duty to Manage its Lands to Protect Community Stability

The first Congressional mandate that the Forest Service manage its lands with a concern for the stability of local economies arose during the debates regarding the Organic Administration Act of 1897. The legislative

history surrounding the Act illustrates that the Congress wanted to give the federal agencies the authority to fight fire on the forest lands. Additionally, the record indicates that the government was receiving criticism from what the National Academy of Sciences claimed to be a policy of allowing individuals to cut timber from the forest lands without monetary charge. S.Rept. No. 105, 10, 19. For example, after describing the conditions of the forests, one Senate report concluded:

A study of the forest reserves in relation to the general development of the welfare of the country, shows that the segregations of these great bodies of reserved lands cannot be withdrawn from all occupation and use; that they must be made to perform their part for the economy of the nation. According to a strict interpretation of the rulings of the Department of the Interior [the department managing the national forests at that time], no one has the right to enter a forest reserve, to cut a single tree from its forests, or to examine its rocks in search of valuable minerals. Forty million acres of land are then theoretically shut out from all human occupation or enjoyment. Such a condition of things should not continue, for unless the reserved lands of the public domain are made to contribute to the welfare and prosperity of the county, they should be thrown open to settlement and the whole system of reserved forests be abandoned.

S.Rept. No. 105, 22.

Congressman Safroth echoed this concern:

The forestry question is not a matter of great concern from a national standpoint, because

the purposes for which these reservations are set aside are merely local. It is a matter of interest to people in the West only as to whether these reservations are properly established. It is on account of the waters which are to irrigate our agricultural lands that we are interested in forest reservations. The timber question can never be a matter of national concern in connection with these reservations . . . although it may be of great interest to the people of that particular locality - the people of Colorado, Utah and other Western communities.

30 Cong.Rec. 984 (1897).

Congress has never changed its concern for local communities. Eleven years following the passage of the Organic Act, Congress passed the Twenty-Five Percent Fund Act (16 U.S.C. § 500), under which 25 percent of the revenues generated from the commodity use of the national forests are returned to state and county governments. In 1913, Congress directed that an additional ten percent of the revenues generated from timber, mining and livestock use on the national forests be returned to local counties as funding for schools, road construction and road maintenance. 16 U.S.C. § 501. In 1976, Congress again amended the Twenty-Five Percent Fund Act to provide that the disbursement of revenues to state and local governments be calculated from gross revenues, rather than from stumpage prices. 16 U.S.C. § 500.

B. The Reality of Forest Land Management Under the NFMA

To the detriment of forest management, the days of the

horse-back rancher are over. Computers and paperwork have replaced common sense and on-the-ground decision making. Environmental protection has been replaced. In fact, it is now rare that you even see a Forest Service employee in the National Forest.

The NFMA has caused other problems in the use of forest lands as well. For example, the Forest Service claims that the NFMA and its companion act, the Federal Land Policy Management Act (FLPMA), gives the agency the authority to demand water bypass flows of private water rights from private reservoirs, simply because they are located on or across Forest Service lands. I believe this amounts to a taking of private property prohibited by the Fifth Amendment of the U.S. Constitution. The Forest Service also claims that these statutes give it the right to trespass on private property unpatented mining claims, without notice or probable cause in violation of the guarantees in the Fourth Amendment. Although when passed 20 years ago, the NFMA was considered simply a planning procedure statute, agency interpretation has changed it to a statute that destroys rural communities, local on-the-ground decision making and sound environmental management. Through the NFMA, the use is being managed out of multiple-use lands.