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# Heeding the Clarion Call for Sustainable, Spiritual Western Landscapes: Will the People Be Granted a New Forest Service?

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## I. INTRODUCTION

A long-time preoccupation of westerners is psychoanalyzing the Forest Service.[1] We do that because the national forests are so fundamental to society, both mind and heart, in the West and the Forest Service is the trustee. That is not because its lands, grand though they are, are grander than the national parks or more expansive than the Bureau of Land Management's,[2] but because the national forests are the most contested ground. The parks are not subject to multiple-use management and the BLM lands, while we increasingly appreciate their values, are not as coveted as the forests.

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1. *See e.g.* Randal O'Toole, *Reforming the Forest Service* *1st ed., Island Press 1988); Daniel Kemmis, *This Sovereign Land: A New Vision for Governing the West* (1st ed., Island Press 2001); John A. Baden & Donald Snow, *The Next West: Public Lands, Community, and Economy in the American West* (Island Press 1997); Ed Marston, *It's Time to Clear-Cut the Forest Service*, High Country News, Sept. 6, 1993; Ed Marston, *Now That We've Clear-Cut the Forest Service . . .*, High Country News, Nov. 20, 2004. We, ourselves, admit to being practitioners of this and one of us has written on the subject; *see e.g.* Charles F. Wilkinson, *The Forest Service: A Call for a Return to First Principles*, 5 Pub. Land L. Rev. 1 (1984); Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead*, 68 U. Colo. L. Rev. 659 (1997) [hereinafter Wilkinson, *The NFMA*]; Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West*, 114-74 (Island Press 1992) [hereinafter *Crossing*]; and, Charles F. Wilkinson, *Land Use, Science, and Spirituality: The Search for a True and Lasting Relationship with the Land*, 21 Pub. Land & Res. L. Rev. 307 (2000).

2. The Forest Service manages 193 million acres of land across 155 national forests and twenty national grasslands in forty-four states and territories, nearly thirty percent of all federally managed lands. Forest Service, U.S. Dept. of Agric., *Fiscal Year 2013 Budget Overview* (2012). In contrast, the National Park Service manages more than eighty-four million acres of national parks, including monuments, and historical sites. The National Park Service, *NPS Overview* (2011). On national parks, *see* Wallace Stegner, *The Best Idea We Ever Had*, 46 Wilderness 160 (1983); Joseph L. Sax, *America's National Parks: Their Principles, Purposes and Prospects*, 85 Nat. Hist. 8 (1976); and, John Ise, *Our National Park Policy: A Critical History* (Johns Hopkins Press 1961). Finally, the BLM manages 264 million acres of land. U.S. Dept. of the Interior, *Budget Justifications and Performance Information Fiscal Year 2012: Bureau of Land Management* 1-1 (2011). On the BLM, *see* James R. Skillen, *The Nation's Largest Landlord: The Bureau of Land Management in the American West* (U. Press of Kan. 2009).

So we especially stew over the Forest Service—its people, its policies, and its on-the-ground performance.

And stew over the Forest Service is what we'll do by offering thoughts on the deep changes in the agency over the past two decades and on its performance on some of the critical concerns—the 2012 Planning Rule, collaboration, American Indian sacred sites, and climate change—facing the Forest Service today and asking the question whether we now have, not just a remade, but a *new* Forest Service.

## II. THE REMADE FOREST SERVICE

### *A. Three Forest Service Eras*

The dramatic changes that have swept across the Forest Service during the past generation have led to a remade agency.[3] The history of the national forests can be divided into three eras. The first, from 1891 through 1945, was notable for the shooting-star accomplishments of the Gifford Pinchot-Theodore Roosevelt team,[4] which from 1901 through 1908 gave us some 150 million acres of national forests, fully three-quarters of today's system;[5] the 1906 grazing code[6]—daringly promulgated with no explicit authority from

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3. *See* Martin Nie, *The Governance of Western Public Lands: Mapping its Present and Future* (U. Press of Kan. 2008); Paul W. Hirt, *A Conspiracy of Optimism: Management of the National Forests Since World War II* (U. of Neb. Press 1996); and, *Crossing*, *supra* n. 1, at 114-74.

4. *See* Harold K. Steen, *The U.S. Forest Service: A History*, 69-102 (4th ed., The Forest History Socy. 2004). On Gifford Pinchot, *see generally* Char Miller, *Gifford Pinchot and the Making of Modern Environmentalism* (Island Press 2001); and, M. Nelson McGeary, *Gifford Pinchot: Forester-Politician* (Princeton U. Press 1960).

5. *See* Steen, *supra* n. 4, at 77; Glen O. Robinson, *The Forest Service: A Study in Public Land Management* 9 (Johns Hopkins U. Press 1975). Included in this total are the "midnight reserves," where, on March 1-2, 1907, Roosevelt signed thirty-eight executive orders providing more than sixteen million acres of new forest reserves in western states. Roosevelt and Pinchot created these reserves knowing that as of March 4, 1907, his power to create reserves in these states would be terminated by an appropriations rider drafted by the senators of those western states. *See also Crossing*, *supra* n. 1, at 126-27.

6. On the 1906 grazing regulatory program: *see* Samuel T. Dana and Sally K Fairfax, *Forest Range Policy: Its Development in the United States*, 86-

Congress—that was the first modern natural resource management regime; and a rarely-equaled bully pulpit that took the Progressive Movement's[7] principles to their highest point by announcing to the nation and world what we now call "sustainability," that the best way to manage public natural resources is for "the greatest good of the greatest number in the long run."[8]

After Pinchot and Roosevelt departed the scene, this early era also included a long, quiet time marked by few flare-ups.[9] The Forest Service enjoyed public support seldom accorded to government offices—support similar to the Canadian Mounties and British Bobbies during some stages of their histories. It went beyond respect and lack of conflict. The Forest Service amounted to an independent agency with little oversight by higher-ups in the Department of Agriculture. Decision making stopped with the Chief. The 1905 Pinchot Letter[10] that became gospel in the Forest Service, its real charter, epitomized this: The letter was signed by Secretary James Wilson, but it was written by Pinchot and presented to his boss-in-name-only as a *fait accompli.*

The second era began after World War II. As the United States Court of Appeals for the Fourth Circuit described it in a case involving clear-cutting, with "the post-war housing boom. . .the posture of the Forest Service quickly changed from custodian to production agency."[11] The annual timber harvest—the cut—soared

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89 (2d ed., McGraw-Hill 1980); and, William Voigt, Jr., *Public Grazing Lands: Use and Misuse by Industry and Government* 45-50 (Rutgers U. Press 1976).

7. On the Progressive, or Conservation, Movement: *see* Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (U. of Pitt. Press 1959); and, Steen, *supra* n. 4, at 96-100.

8. The quote comes from the Pinchot Letter quoted in Gifford Pinchot, *Breaking New Ground* 32 (1947).

9. *See Crossing, supra* n. 1, at 131-35. A key reason for the calm period was that there was little demand for federal timber. Only about 125,000 acres of federal land were cut each year, while roughly ten million acres of private land were harvested. *Id.*

10. On the Pinchot letter: *see* James G. Lewis, *The Forest Service and the Greatest Good: A Centennial History* 42 (The Forest Hist. Socy. 2005); and, *Crossing, supra* n. 1, at 127–29.

11. *West Va. Div. of Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975). The case is commonly referred to as "*Monongahela*,"

from the level of one billion board feet (bbf) a year that had prevailed since Pinchot's time, up to six bbf in the mid-1950s and even further to ten-to-twelve bbf in the mid 1960s.[12] Loud citizen objections followed, nowhere more intensively than in the Bitterroot National Forest.[13] Montana forestry school Dean Arnold Bolle[14] played a lead role in proposing more conservative harvesting practices.[15] Congress responded and enacted a reform statute, the National Forest Management Act (NFMA)[16], premised on the words of Senator Hubert Humphrey:

> The days have ended when the forest may be viewed only as trees and the trees viewed only as timber. The

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the West Virginia national forest the case arose on. *Monongahela* challenged the clear-cutting practices of the Forest Service as contrary to the 1897 Organic Act. Pursuant to the Act, the Forest Service was only authorized to sell "dead, mature, or large growth of trees" that had been "marked and designated" before sale. The plaintiffs argued that the Forest Service marked trees only around the perimeter of the cut area and that the agency was cutting physiologically immature trees intended to be excluded from harvesting. The Fourth Circuit agreed, finding for the Izaak Walton League, effectively blocking the clear-cutting program on national forests.

12. *See FY 1905-2011 Natl. Cut and Sold Data and Graph,* Forest Service, U.S. Dept. of Agric., http://www.fs.fed.us/forestmanagement/documents/sold-harvest/documents/1905-2011_Natl_Summary_Graph.pdf (2012).

13. The Bitterroot had undergone nearly two decades of high-yield logging by the 1960s, and the Forest Service had begun terracing the hillsides following a stand cut. Seedlings were then planted on the terrace, creating the appearance of a tree-farm. *See* Dale A. Burk, *The Clearcut Crisis: Controversy in the Bitterroot* (Jursnick Print 1970).

14. On Arnold Bolle, *see e.g.* Donna Metcalf, *Tributes to Arnold Bolle*, 15 Pub. Land L. Rev. 1 (1994); and Charles F. Wilkinson, *Arnie Bolle, 1912-1994: Dean of the Western Forests*, Northern Lights 9 (Summer 1995).

15. *See* S. Doc. No. 91-115 (1970) (titled "A University View of the Forest Service," but commonly known as the "Bolle Report.") The report was written by Bolle and a group of university colleagues at the request of Senator Lee Mecalf, who wanted an independent analysis of the logging in the Bitterroot National Forest; and, Arnold W. Bolle, *The Bitterroot Revisited: A University Re-view of the Forest Service*, 10 Pub. Land L. Rev. 1 (1989).

16. *See* National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1687 (2010); and, Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* (U. of Or. 1987).

> soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is in the forest must become integral parts of resource managers' thinking and actions.[17]

These are complicated matters, and it took time, but the cut began to winch down.

The beginning of the third era, which we are still in, can be set at April 2, 1993. That was the date of the "Timber Summit,"[18] in which President Clinton, the secretaries of both Agriculture and Interior, numerous other high federal officials, and state, tribal, and citizen representatives met in Portland, Oregon, in the expansive, big-tree forest country that produced about one-half of the national cut from the national forests.[19] Resource development had imperiled the traditional mainstays of the Pacific Northwest's economy and society—the old-growth forests and the salmon runs. It was the largest, and most focused, gathering of a president and high-level officials ever held on a public land matter. By then it was clear that the context for federal timber policy had irreversibly changed and it was time for a response even more substantial than the NFMA.

### *B. The Changes*

This section summarizes a number of specific changes that account for the remade Forest Service. Make no mistake, though, that the overarching fact is that public opinion had crystallized in the exact form articulated by Senator Humphrey. Timber harvesting can continue, but it cannot be the dominant use on the national forests; "the soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is in the forest" must all be respected.

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17. Wilkinson & Anderson, *supra* n. 16, at 69–70.

18. *See Seattle Audubon Socy. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996); *Seattle Audubon Socy. v. Lyons*, 871 F. Supp. 1291, 1303 (W.D. Wash. 1994); and, *infra* nn. 27–35 and accompanying text.

19. Region Six, the Pacific Northwest Region of the Forest Service, traditionally produced half of the total national forest cut. *See* Wilkinson, *The NFMA, supra* n. 1, at 677.

### 1. The Reduced Timber Harvest

The greatest change for the modern Forest Service has been the reduction in the annual timber harvest by eighty percent or more.[20] There was no single cause—agency implementation of the NFMA and its regulations; lawsuits raising the Endangered Species Act, the NFMA, and NEPA; concern over below-cost sales; the Northwest Forest Plan; and the Roadless Rule all contributed. And looking beyond the national forests to the whole public land estate, nearly 650 million acres, the reduction in cut can be counted as one of the most significant events over the past generation, along with the Bush Administration's aggressive mineral drilling program[21] and the twenty-one national monuments proclaimed by President Clinton.[22]

In understanding the reasons for the freefall of the cut in the third era of Forest Service history, it needs to be said that the high-yield timber program of the second era did not violate good forestry standards as measured by the precepts of traditional silviculture.[23] With the agency's reliable restocking agenda, growth of wood fiber

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20. The cut topped off at a high of 12.71 bbf in 1987 and sat at 2.44 bbf in 2011. In 1990, after averaging over 10 bbf for nearly three decades, the cut dropped below 10 bbf and has remained about 2 bbf since 2000. For historical cut data from 1905-2011: *see FY 1905-2011 National Cut, supra* n. 13.

21. *See generally* Jon Margolis, *Bush's Energy Push Meets Unintended Consequences,* High Country News, Sept. 2, 2002.

22. *See* Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 Harv. Envtl. L. Rev. 535 (2001).

23. "Silviculture" can be defined as "the art of reproduction and managing forests continuously to obtain high yields of forest crops through the application of a knowledge of silvics . . . It is a conscious, intelligent use of man's abilities to assist nature, in contrast to careless cutting and lack of oversight." Charles H. Stoddard, *Essentials of Forestry Practice* 54 (2d ed., The Ronald Press Co. 1959). Alternatively, David M. Smith of the Yale University School of Forestry defined forestry as anything done *in* the woods, and silviculture as anything done *to* them. Karl F. Wenger & Society of American Foresters, *Forestry Handbook* (2d ed., Wiley-Interscience 1984). For silviculture practices, *see* David M. Smith, Bruce C. Larson, Matthew J. Kelty, P. Mark & S Ashton, *The Practice of Silviculture: Applied Forest Ecology* (9th ed., John Wiley & Sons, Inc. 1997); and, Theodore W. Daniel, John A. Helms & Frederick Storrs Baker, *Principles of Silviculture* (2d ed., McGraw-Hill 1979).

per acre remained at the same level or even higher depending on the specific landscape. Forest Service logging in the second era, though much more intensive than in the first, was still far more conservative than logging programs on private lands: The Forest Service cut a much lower percentage of total timber volume and employed a longer rotation period.[24] The agency's on-the-ground practices—roading and removal—were better than on timber industry lands and the Forest Service, far more so than industry, did consider factors other than commercial wood fiber as witnessed by its watershed, wildlife, trail and campsite, and administrative wilderness and primitive-area programs.[25]

But all of that, while relevant, was not the main point. These are public, not private, lands. Citizen expectations are different and higher.

It took many years to shake it all out, but by the twenty-first century it finally became clear that the public expected, and would require, a level of timber harvesting far more constrained than private-land logging, far more conservative even than the agency's traditional practices, exemplary though they were in many respects. That reality is now the central fact about management of the national forests.

### *2. The Northwest Forest Plan*

A dominant feature of the current era is the Northwest Forest Plan,[26] which grew out of the 1993 "Timber Summit" and is

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24. *See* Darius M. Adams, Richard W. Haynes & Adam J. Daigneault, U.S. Dept. of Agric., *Estimated Timber Harvest By U.S. Region and Ownership, 1950-2002* 14 (Jan. 2006) (graph showing national forest as less than twenty percent of total timber cut and nonindustrial private and forest industry at roughly fifty and thirty percent, respectively, over the time period).

25. *See* Wilkinson & Anderson, *supra* n. 16, at 136–54.

26. Forest Service, U.S. Dept. of Agric., U.S. Dept. of the Interior, Bureau of Land Management, *Record of Decision For Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl* (1994) [hereinafter *Northwest Forest Plan*]. A useful resource on the Northwest Forest Plan is the Regional Ecosystem Office's Northwest Forest Plan website, at http://www.reo.gov/general/aboutnwfp.htm (Nov. 28, 2006); s*ee also* Jack Ward Thomas, Jerry F. Franklin, John Gordon & K. Norman Johnson, *The Northwest*

the most ambitious large-landscape management plan ever adopted in this country, and very likely globally as well.[27] The plan's origins trace to the spotted owl hostilities in the Northwest,[28] with subsequent Endangered Species Act designation of many salmon runs turning temperatures up even higher.[29] The plan as finally adopted, designed to afford a high level of protection to federal forests and rivers and anchored on an all-out scientific effort, governs all Forest Service and BLM land in Oregon, Washington, and northern California west of the crests of the Cascades and the northern Sierra—24.5 million acres in all, an area the size of Indiana.[30]

The plan placed nearly eighty percent of the land in late-successional and old-growth reserves that allowed no logging or

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*Forest Plan: Origins, Components, Implementation Experience, and Suggestions for Change*, 20 Conservation Biology 277 (2006); and, Lauren M. Rule, *Enforcing Ecosystem Management Under the Northwest Forest Plan: The Judicial Role*, 12 Fordham Envtl. L. Rev. 211, 222–27 (2000).

27. President Clinton held the Timber Summer on April 2, 1993. Clinton and the Secretaries of Agriculture and Interior established the Forest Ecosystem Management Assessment Team ("FEMAT"), a blue-ribbon, interdisciplinary, interagency team of biologists, sociologists, and other experts, chaired by Forest Service biologist Jack Ward Thomas, future Chief of the Forest Service. Federal courts subsequently upheld the validity of the plan. *Seattle Audubon Socy. v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), aff'd sub nom. *Seattle Audubon Socy. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). *See generally* Daniel S. Reimer, *The Role of "Community" in the Pacific Northwest Logging Debate*, 66 U. Colo. L. Rev. 223, 249–50 (1995). *See also* Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 Minn. L. Rev. 869, 896–99 (1997).

28. For a comprehensive history on the spotted owl debate, *see* Brendon Swedlow, *Scientists, Judges, and Spotted Owls: Policymakers in the Pacific Northwest*, 13 Duke Envtl. L. & Policy Forum 187 (2003). *See also* Katherine Durbin, *Tree Huggers: Victory, Defeat & Renewal in the Northwest Ancient Forest Campaign* 201-06 (The Mountaineers 1996).

29. On the issues breeding controversy in the Pacific Northwest, *see* Houck, *On the Law of Biodiversity and Ecosystem Management, supra* n. 27; Alyson C. Flournoy, *Beyond the "Spotted Owl Problem:" Leaning From the Old-Growth Controversy*, 17 Harv. Envtl. L Rev. 261 (1993); and, on Forest Service-related issues in the northwest fueling reform, *see* Gerald W. Williams, *The U.S. Forest Service in the Pacific Northwest: A History* 258-99 (Or. St. U. Press 2009).

30. *See Northwest Forest Plan, supra* n. 26, at 2.

logging limited to enhancing late-successional characteristics.[31] The remaining twenty percent of lands are managed conservatively and are harvested on an eighty-year rotation.[32] Logging is governed by rigorous standards—most notably the Aquatic Conservation Strategy and "survey and manage" provision[33]—both of which remain in place despite strenuous Bush Administration efforts to weaken or eliminate them.[34] The annual cut from the rich soils of these wet, west-side, big-tree forests, the most commercially productive in the national forest system, had stood at an annual four-to-five bbf but dropped to about one bbf under the plan,[35] serving as one of the primary commitments to a new way of managing the people's lands.

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31. *See Northwest Forest Plan, supra* n. 26, at 29. *See also* Robert B. Keiter, *Breaking with Nature: The Bush Administration and Public Land Policy*, 27 J. Land Resources & Envtl. L. 195, 225 (2007).

32. *Northwest Forest Plan, supra* n. 26, at 29.

33. *Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl* A-1 (Appendix A to the *Northwest Forest Plan, supra* n. 26). On the standards, *see* Randy Molina, Bruce G. Marcot & Robin Lesher, *Protecting Rare, Old-Growth, Forest-Associated Species Under the Survey and Manage Program Guidelines of the Northwest Forest Plan*, 20 Conservation Biology 306 (2006); and, Gordon H. Reeves, Jack E. Williams, Kelly M. Burnett & Kirsten Gallo, *The Aquatic Conservation Strategy of the Northwest Forest Plan*, 20 Conservation Biology 319 (2006).

34. *See* Keiter, *Breaking with Nature, supra* n. 31, at pp. 208-09, 226-29 (stating "Had the Bush Administration's revised diversity provision been in place during the Pacific Northwest spotted owl controversy, it is unlikely that the federal court would have issued an initial injunction halting commercial logging on the area forests.). The Bush Administration issued amendments in 2004 eliminating the Survey and Management standard, designed to protect rare species. Environmental groups successfully challenged the amendments. *See N.W. Ecosystem Alliance v. Rey*, 380 F. Supp.2d 1175 (W.D. Wash. 2005) (finding three NEPA violations in the 2004 rule amendments that eliminated the Survey and Management standard); *Pacific Coast Fedn. of Fisherman's Assns. v. Natl. Marine Fisheries Service*, 482 F.Supp.2d 1248 (W.D. Wash. 2007) (finding the 2004 no-jeopardy biological opinions that allowed timber sales to cause negative short-term, localized effects were arbitrary and capricious under the Administrative Procedures Act).

35. *See* Thomas, *supra* n. 26, at 284.

### *3. Fire*

In 2003, President Bush signed into law the Healthy Forest Restoration Act (HFRA),[36] the first major forest legislation since the NFMA. The statute responded to the memories of the 1988 Yellowstone fire[37] and the immediacy of the catastrophic fire seasons of 2000 and 2002.[38] The context was made all the more pressing by a development external to the Forest Service, the surging population growth that has more than quadrupled the population of the American West since World War II. Many new residents had moved to the edges of, and sometimes within, national forests, creating wildland-urban interface areas.[39] A new approach to fire, long a high-priority issue for the Forest Service, was in order. Broadly writ, the primary emphasis of Forest Service fire policy changed from fighting fires to preventing them. Expenditures for fire have climbed to two billion dollars, forty percent of the total Forest Service budget.[40]

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36. Pub. L. 108-148, 117 Stat. 1887 (codified at 16 U.S.C. §§6501-6591 (2010)). *See* Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 Envtl. L. 301, 344-50 (2006).

37. On the 1998 Yellowstone fire, *see* Rocky Barker, *Scorched Earth: How the Fires of Yellowstone Changed America* (Island Press 2005); and, Micah Morrison, *Fire in Paradise: The Yellowstone Fires and the Politics of Environmentalism* (HarperCollins Publishers 1993).

38. *See* H.R. Rep. No. 108-96, pt.1, at 2-3 (2003) (describing the 2000 and 2002 fire seasons as among the worst in the last 50 years); and, Keiter, *Law of Fire*, *supra* n. 36, at 310-11 (stating that in 2002, more than eight million acres burned, and two years later, wildfires burned another seven million acres, with the worst fire seasons in modern history for Colorado, New Mexico, Arizona, and Oregon, costing over two billion in federal suppression funds).

39. The wildland-urban interface covers 9% of conterminous United States land area and contains 39% of all homes in the United States. V.C. Radeloff, R.B. Hammer, S.I. Stewart, J.S. Fried, S.S. Holcomb & J.F. McKeefry, *The Wildland-Urban Interface in the United States*, 15 Ecological Applications 799, 801 (2005).

40. *See* Forest Service, U.S. Dept. of Agric., *FY 2013 Budget Overview*, *supra* n. 2, at B-2 (the Wildland Fire Management appropriations were 40.7%%and 42.5% of the total Forest Service discretionary budget in FY 2012, and FY 2011, respectively. Supplemental funding for fire pushes these figures higher). For comparison, in 1991, the fire budget was 13% of the budget; in 2000, 20%; in 2009, 48%. *See* The Wilderness Society, *Facts About FY 2009 Wildfire Budget* (Apr. 1, 2008), http://wilderness.org/content/facts-about-09-

The HFRA made hazardous fuel reduction—removing trees and brush in areas of heavy fuel loads—the primary strategy.[41] Understandably, communities in wildland-urban interface areas push for fuel reduction projects. Seizing on an opportunity, forces from the timber industry and within the Forest Service pressed for fuel reduction projects to be designed around commercial thinning—cutting large-diameter trees not always necessary for reducing the fuel load—to the exclusion of pre-commercial logging of smaller trees and the use of controlled burns.[42]

The Act prohibits projects in wilderness and other protected areas and puts limitations on projects in ecologically sensitive areas.[43] Congress definitely intended, though, that logging would be employed in carrying out hazardous fuel projects.[44] Though this issue will continue to be active, to date the total national forest cut continues at the much lower level established by the turn of the century and the HFRA has fit comfortably within in the new restoration emphasis of the Forest Service.

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wildfire-budget%20 (last visited June 23, 2012). In 2001, in response to the severe 2000 fire season, the National Fire Plan was created. Immediately the fire budget nearly doubled from $1.5 billion to nearly $3 billion, and fire management budgets have increased since. Following directly behind the National Fire Plan, the Bush Administration launched the Healthy Forests Initiative – an effort to reduce fuel in the forests. *See* 16 U.S.C. § 6512(f) *supra* n. 36. The budgets continued to increase, but could not keep up with costs and the Forest Service transferred money from other accounts—$695 million in 2003—to fund fire suppression efforts. *See* Economics and Ecology Research Dept., *The Federal Wildland Fire Budget: Let's Prepare, Not Just React,* The Wilderness Society (April 2004).

41. The statute is designed "to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fire reduction projects," and to "protect, restore, and enhance forest ecosystem components," including endangered species, biodiversity, and carbon sequestration. Keiter, *Law of Fire*, *supra* n. 36, at 344-45.

42. Though the act prioritizes the cutting of small-diameter trees for thinning purposes and aims to maximize the retention of large trees, large diameter trees may be cut to promote reduction in wildfire risk and other purposes, a key provision that allows for commercial thinning. 16 U.S.C. § 6512(f) (2010). *See* Tom Udall, *Our Publicly Owned Forests are Being Subverted*, High Country News, Nov. 24, 2003.

43. *See* 16 U.S.C. § 6512(d) (2010).

44. *See e.g. id.* (authorized hazardous fuel reduction projects).

### *4. The Roadless Rule*

Like the Northwest Forest Plan and agency fire policy, the Forest Service Roadless Rule, which removes almost one-third of all national forest from timber harvesting and dedicates it to watershed protection and other public benefits, also embodies contemporary values and needs. The program traces to an anomaly in the Wilderness Act of 1964, which required studies of all roadless areas in the National Wildlife Refuge System and National Park System.[45] The Act, however, made no provision for studies of roadless areas in the national forests.[46] In 1972, the Forest Service took the initiative and announced its own voluntary administrative study, the Roadless Area Review Evaluation (RARE), which included 1449 units totaling the extraordinary amount of fifty-six million acres, a figure that proved to be conservative. The RARE land remained roadless throughout the 1970s because the courts rigorously applied NEPA and struck down agency attempts to remove lands from study on the ground that the studies had been inadequate.[47] In 1984, Congress resolved the deadlock as to some of the lands by adding nearly nine million acres in the study to the wilderness system and releasing millions of acres to multiple use management.[48]

By the late 1990s, while the issue had not been as hotly contested since the legislation of the mid-1980s, it became apparent

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45. *See* 16 U.S.C. §1132(c) (2010) (wilderness studies of roadless areas in the fish and wildlife refuges and national parks).

46. The Act did require wilderness studies of those lands that the Forest Service had administratively designated as "Primitive," but did not address the tens of millions of acres that were roadless but not declared "Primitive." *See id.*

47. *See Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972)); *see also California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982) ("[The RARE I] effort ended when a federal court enjoined development pursuant to the plan until the Forest Service completed an EIS.").

48. On these early developments, *see e.g.* Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 Envtl. L. 1143, 1148-51 (2004); Jim DiPeso & Tom Pelikan, *The Republican Divide on Wilderness Policy*, 33 Golden Gate U. L. Rev. 339, 358-65 (2003); George Cameron Coggins, Charles F. Wilkinson, John D. Leshy & Robert L. Fischman, *Federal Public Land and Resources Law*, 1049-56 (6th ed., Foundation Press, 2007).

that the question of how to treat roadless areas remained very much alive. Congress left many areas unresolved and new roadless areas were being identified. In 1999, President Clinton directed the Forest Service to create a rule to govern management and conservation of over fifty-eight million acres of inventoried land that were not designated as wilderness but remained roadless.[49] The draft rule, developed under the leadership of Chief Mike Dombeck and issued in May 2000, generated over one and a half million public responses, ninety-five percent in favor of the proposal.[50] Secretary of Agriculture Dan Glickman formally adopted the final rule on January 5, 2001, to become effective in March.[51]

By any standard, this was one of the most sweeping conservation actions ever taken. The agency adopted the Roadless Rule "in response to strong public sentiment for protecting roadless areas and the clean water, biological diversity, wildlife habitat, forest health, dispersed recreational opportunities, and other public benefits provided by these areas."[52] To achieve that, the Roadless Rule prohibited most road construction and timber harvesting in the 58 million roadless acres, an area nearly the size of Oregon.[53]

The Bush Administration disagreed with the Clinton rule's top-down approach in favor of a rule based on the local forest planning process.[54] The agriculture department, under Secretary

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49. Glicksman, *Roadless Management Under Clinton and Bush*, *supra* n. 48, at 1154 (quoting Memorandum from William J. Clinton, President, to the Secretary of Agriculture (Oct. 13,1999)). *See also*, Jennifer L. Sullivan, *The Spirit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 Alaska L. Rev. 127, 138-44 (2000).

50. Rob Inglis, *Not So Dead on Arrival*, High Country News, Dec. 28, 2008.

51. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).

52. Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,277 (proposed May 10, 2000).

53. The provisions are described in Coggins, *Federal Public Land Law*, *supra* n. 48, at 749-51; *see also* Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 Nat. Res. J. 687, 702 (2004).

54. *See* Juliet Eilperin, *Roadless Rules for Forest Set Asides*, The Washington Post (July 12, 2004).

Ann Veneman, proposed new rulemaking aimed at managing roadless areas under a five-principle approach—a regime that did not address sustainability or the effects of new road construction on forest resources in existing roadless areas.[55]

In 2005, the agency adopted a new regulation, the State Petitions Rule,[56] allowing the states' governors to petition the secretary of agriculture and recommend management requirements for the roadless areas within their states. The secretary would have broad authority to accept or deny state petitions, and impose any restrictions, or not, on roadless areas brought forth in the petitions. Administration of the Bush rule favored development over the protection of ecological resources, as, for example, California and New Mexico's petitions to protect all the roadless areas in their states from development were not approved.[57]

A complex, drawn-out court process followed in the Ninth and Tenth Circuit courts, with the legality of both the Clinton and Bush rules being challenged.[58] Ultimately, the Bush Administration lost out on the roadless issue for the same reason that it lost out in its attempts to adopt a new planning rule and weaken the Northwest Forest Plan—its obdurate refusal to comply with NEPA and ESA procedures. The Clinton roadless rule was upheld in the Ninth Circuit in 2002.[59] As for the Bush rule, in a suit brought by the governors of California, Washington, New Mexico, and Oregon, the Ninth Circuit struck it down in 2009,[60] holding that the rulemaking

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55. National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918, 35,919 (July 10, 2001); *see also* Glicksman, *Roadless Management Under Clinton and Bush*, supra n. 48, at 1166.

56. *Special Areas; State Petitions for Inventoried Roadless Area Management*, 70 Fed. Reg. 25,654, 25,654 (May 13, 2005); *see* David H. Becker, *Changing Direction in Administrative Agency Rulemaking: Reasoned Analysis, the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, Environs: Envtl. L. & Policy J. 65, 88 (2007).

57. *See* Kyle J. Aarons, *The Real World Roadless Rules Challenges*, 109 Mich. L. Rev. 1293, 1313-15 (2011); *see also*, Editorial, *The Roadless Rule Takes a New Turn*, New York Times (Sept. 25, 2006).

58. *See* Nie, *Administrative Rulemaking*, *supra* n. 53, at 704-07.

59. *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

60. *California ex rel. Lockyer v. U.S. Dept. of Agric.*, 575 F.3d 999 (9th Cir. 2009).

violated NEPA and the ESA.[61] Over in the Tenth Circuit, in opinions of 2003 and 2008, a Wyoming District Court Judge enjoined the Clinton rule nationally on the ground that it violated NEPA and the Wilderness Act nationwide.[62] Then, in 2011, the Tenth Circuit Court of Appeals brought its law into congruence with the Ninth Circuit's by reversing the district court and upholding the Clinton rule.[63]

One question for the future is whether the Roadless Rule can hold. The State of Wyoming has petitioned for certiorari to the Supreme Court to reverse the Tenth Circuit's decision that kept the rule in place. More perilous for the Roadless Rule, a future agriculture secretary could, like Secretary Veneman, try to erase the rule and open that vast landscape for development. Even though the future White House, as well as the Secretary would likely be involved, whether the rule will hold has a lot to do with the Forest Service. Under those circumstances, if there really is a new Forest Service—if the agency believes in the Roadless Rule, believes that the rule is a crown jewel of a great conservation land system, believes that the rule takes potentially contentious lands off the table and allows Forest Service professionals at all levels to focus on the agency's mission of restoration, sustainability, and collaboration—that attitude will matter, it will carry weight and might well blunt or block such future efforts.

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61. The department shrugged off the NEPA process as a non-issue, asserting that any NEPA process would only need to be conducted during review of state petitions, not in rulemaking. *See* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654, 25,660 (May 13, 2005) (claiming NEPA analysis was unnecessary since the State Petitions Rule only includes procedural changes that are subject to a categorical exclusion from NEPA).

62. *Wyoming v. U.S. Dept. of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003); *Wyoming v. U.S. Dept. of Agric*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

63. *Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011), *cert. pending.*

### 5. *Women, People of Color, and Professions*

There have been significant changes in the internal demographics of the Forest Service.[64] For its first half century, nearly all professionals in the agency were white males, but the number of people of color has steadily increased, to seventeen percent.[65] This has born fruit in terms of minority people feeling more comfortable relating to the Forest Service. In the Southwest, Hispanics hunt, fish, pasture stock, operate logging operations, and gather firewood in many national forests.[66] In numerous places, national forests are located near Indian reservations and sometimes share borders with tribal lands.[67]

The gender gap has narrowed markedly, going from nearly zero (there was not a female forester until 1957) to thirty-nine percent of agency personnel.[68] There were, though, a few exceptions in the formative years. A handful of women served as fire lookouts as early as 1913. The pioneer, Hallie Mores Daggett, came well recommended as a lookout in the Klamath National Forest in Northern California as she was reputed to be "absolutely devoid of the timidity which is ordinarily [found in women] as she is not afraid of anything that walks, creeps, or crawls."[69]

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64. *See* Jennifer C. Thomas & Paul Mohai, *Racial, Gender, and Professional Diversification in the Forest Service from 1983 to 1992*, Policy Stud. J. 296 (1995).

65. Email from Craig Willis, Equal Employment Manager, U.S. Dept. of Agric., Forest Service, Civil Rights Staff, to Daniel Cordalis (July 29, 2011) (on file with author) (providing workforce data on Forest Service FY 2011).

66. *See e.g.* Pacific Southwest Research Division, Forest Service, U.S. Dept of Agric., *Science Perspectives: The Changing Faces of Forest Recreation*, available at http://www.fs.fed.us/psw/publications/documents/psw_sp012/psw_sp012.pdf (last visited June 22, 2012).

67. The tribes and the Forest Service share over 2500 miles of common border. Intertribal Timber Council, *Proposal for the Tribal Forest Protection Act Analysis*, available at http://www.itcnet.org/ (last visited June 22, 2012).

68. Willis email, *supra* n. 65.

69. James G. Lewis, *The Applicant is No Gentleman: Women in the Forest Service*, J. of Forestry 259, 259 (July/Aug. 2005). When Assistant Fire Ranger M.H McCarthy suggested Daggett's strong application for hire, it was so unprecedented to even consider women for forest positions that he warned

The increased number of female professionals has mattered. Academic research and our collective experience tell us, speaking generally, that women tend to be more environmentally conscious and are more attuned to working collaboratively than are men.[70] Traditionally, two drawbacks in Forest Service culture have been that personnel tended to tilt toward extractive uses and, often subconsciously, wanted to manage lands under their jurisdiction by making decisions free of input from the outside. Female professionals, as a group, contribute, even if subtly, to the remade Forest Service with its increased emphasis on conservation values and collaboration with many outside interests.

As for professions, with the agency's greatly reduced commitment to timber harvesting, the current need is for employees from conservation-oriented disciplines, especially the sciences. Yet, forestry remains the largest professional group, about half of all employees.[71] At the same time, though, engineers (in the past mostly assigned to logging road construction) have declined from being the second-largest employment group, having been overtaken by biological scientists, who make up ten percent of the work force.[72]

There is, however, a saving grace for matching employee philosophy and training with a new agency mission: forestry education has undergone a revolution. Most of the forestry schools have changed their names to include terms such as "Environment," "Ecology," "Natural Resources," and "Conservation," as has the University of Montana.[73] Two generations ago, before the rise in

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his boss that it "may perhaps take your breath away, and I hope your heart is strong enough to stand the shock."

70. *See e.g.* Thomas & Mohai, *Racial, Gender, and Professional Diversification in the Forest Service*, *supra* n. 64, at 297; and, Greg Brown & Charles C. Harris, *The Implications of Work Force Diversification in the U.S. Forest Service*, 25 Admin. & Socy. 85 (May 1993).

71. Willis email, *supra* n. 65 (providing participation rates for major occupations data in the Forest Service for FY 2011).

72. *Id.*

73. The University of Montana's program is called the "College of Forestry and Conservation." College of Forestry and Conservation, University of Montana, *About the College of Forestry and Conservation*, http://www.cfc.umt.edu/About/default.php (last visited June 22, 2012). There are forty-nine academic institutions with forestry programs accredited by the Society of American Foresters nationally. Socy. of Am. Foresters, *SAF*

environmental consciousness, forestry students learned mostly traditional commercial forestry. Today, education in forestry is much broader and includes ecology and the many tangible and intangible values of the forests and other land systems.[74]

So, yes, in several ways, the internal demographics of the Forest Service have evolved toward the new and more diverse mission.

### *6. Unprecedented Tribal Initiatives*

The past two generations have seen another kind of change relating to people of color, an external change, not a matter of agency staff composition. For most of the Forest Service's existence, Indian leaders did not bring their concerns to the agency. The Bureau of Indian Affairs overtly suppressed tribal sovereignty and that agency was the real government in Indian country.[75] The tribes, desperately poor and disorganized in terms of dealing with the United States, brought forth few initiatives until the late 1960s, when the combination of returning military veterans and the first generation of college graduates led to the development and implementation of an agenda to enforce the treaties, protect hunting

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*Accreditation of Educational Programs in Forestry and Forest Technology*, http://www.safnet.org/education/2012_accreditation_list.pdf (Jan. 16, 2012).

74. For example, a Forestry Resources Management focus at the Montana College of Forestry and Conservation requires courses in botany, watershed hydrology, forest ecology, and natural resources administration and policy. College of Forestry and Conservation, University of Montana, *Bachelor of Science in Forestry Forest Resources Management Option: 2009 Semester Curriculum Outline*, http://www.cfc.umt.edu/forestry/Files/FRM.pdf (last visited Mar. 21, 2012). The University of Washington's Sustainable Forest Management Option requires courses in natural resource policy and planning, hi-res remote sensing, and strongly recommends natural resource conflict management and wildland hydrology, and offers courses in forestry-fishery interactions and forest ecosystem protection. School of Environmental and Forest Sciences, University of Washington, *Sustainable Forest Management Option in the Environmental Science and Natural Resource Management Major,*
http://www.cfr.washington.edu/academicPrograms/undergrad/esrm/SMFoption122009.pdf (last visited June 22, 2012).

75. *See generally* Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (W.W. Norton & Co. 2005).

and fishing rights, reestablish tribal sovereignty over their homelands, and protect and enhance tribal traditions and religious freedom.[76]

Tribes can be valuable partners for the Forest Service and relationships are gradually building. The largest tribes, a hundred or so representing 90% or more of all Indian people, have governmental staffs—excluding casinos and other enterprises—of 250, 300, or more employees.[77] Many if not most of these tribal governments are larger than the nearby county governments and even the smaller tribes have substantial governmental operations. In putting together their budgets, tribes put a premium on natural resources and cultural resources and have substantial and committed staffs in those areas. Numerous stream restoration projects in national forests in the Northwest, for example, are funded by tribes or carried out by tribes in cooperation with the Forest Service.[78] Tribes founded the Intertribal Timber Council in 1976 and over sixty tribes actively participate today.[79] Among many other things, the ITC and individual tribes have established relationships with forest professionals in the Forest Service and elsewhere.[80]

These are land-based peoples with profound commitments to the land. They are here to stay. The relationships between the tribes

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76. *See generally id.*

77. *See id.*, at n. 294, and accompanying text.

78. *See e.g.* Press Release, N.W. Indian Fisheries Commn., Skokomish Tribe, Forest Service to Restore South Fork Skokomish River, available at http://nwifc.org/2010/03/skokomish-tribe-forest-service-to-restore-south-fork-skokomish-river/ (last visited June 22, 2012); and, Julie Meka Carter, *Apache Trout Recovery: A Wildlife Success Story*, Az. Game and Fish Dept., http://www.azgfd.gov/w_c/apache_recovery.shtml (last visited June 22, 2012) (discussing partnership between White Mountain Apache Tribe, Forest Service, Arizona Game and Fish Department, and U.S. Fish and Wildlife Service to restore Apache Trout in the White Mountains, AZ).

79. *See* Intertribal Timber Council, *About Us*, http://www.itcnet.org/about_us/ (last visited June 22, 2012). ITC partnered with tribal and agency officials to develop the Tribal Wildfire Resource Guide (2006) to help tribes plan for wildfires and assist in forest management, available at https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/3647/twrg.pdf?sequence=1.

80. Intertribal Timber Council, *About Us*, http://www.itcnet.org/about_us/ (last visited June 22, 2012).

and the Forest Service, and the Park Service and BLM as well, will continue to expand and improve to the benefit of the tribes, the agencies, and the general public.

### *7. Loss of Autonomy and the Imperative of Collaboration*

Inside the Agriculture Department, the Forest Service lost some of its traditional and extraordinary independence in 1977, when President Carter appointed M. Rupert Cutler[81] as assistant secretary for conservation, research, and education and directed that Cutler, a political appointee, would provide policy direction to the Forest Service. From that day on, while chiefs definitely retained considerable independent authority as a matter of practice, politically appointed assistant secretaries, now under secretaries, have wielded considerable power over national forest issues. The tradition of chiefs as being career employees remains in place, but their appointment now has a definite political flavor.

It goes farther than that. As John Leshy, public lands scholar and former interior department solicitor has explained it, the lines between federal agencies have been blurred: "The slow decline of the 'enclave' principle means that federal land managing agencies do not have the distinct, dissimilar missions and cultures they once had. Management of nearly all federal lands has for some time been evolving to serve the broader needs to preserve some measure of biodiversity."[82]

And it goes even farther. In recent years, many of the best advances in resource conservation and restoration have come from collaborative efforts on the ground as opposed to congressional action or even top-down executive programs such as the Northwest Forest Plan. Instead, depending on the specific landscape and interested parties, federal, state, and tribal agencies and interested corporations and citizen groups have worked together to improve

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81. On Cutler's background and appointment, *see* Nicholas Wade, *Rupert Cutler: The Environmentalist in the Farmer's Backyard*, 196 Science 505 (Apr. 1977).

82. John Leshy, *Federal Lands in the Twenty-First Century*, 50 Nat. Res. J. 111, 133 (2010).

conditions in particular landscapes, often watersheds.[83] That movement has accelerated as multi-party, large-landscape approaches to climate change take shape. Ultimately, the land itself has imposed this collaborative approach on us. "Let's face it," former chief of the Forest Service Jack Ward Thomas has pungently declared, "Ecological systems don't come in squares."[84]

### *8. Climate Change*

Many people in this field have had similar recent experiences regarding climate change in their memberships on committees or teams entrusted with crafting conservation and management goals. The late 1990s Committee of Scientists appointed by Agriculture Secretary Glickman was one such group, organized to make recommendations for revising the Forest Service planning regulations.[85] The committee put in a prodigious amount of work, researching, holding ten hearings around the country, and enduring all manner of conference calls. But the final report, completed in 1999, made no mention of climate change.[86]

Twelve years later there is no doubt. Climate change exists, our species contributes to it, and its potential to change our way of life is breathtaking.[87] As Interior Secretary Salazar has declared,

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83. *See* 4FRI, *infra* n. 102, and accompanying text; s*ee generally* Matthew McKinney & William Harmon, *The Western Confluence: A Guide to Governing Natural Resources* (Island Press 2004).

84. Keila Szpaller, *Signs of the Times: What are Plum Creek's Plans for Lolo Pass?,* Missoula Indep. (Jan. 30, 2003).

85. On the late 1990s Committee of Scientists, on which one of these authors served, *see* Charles F. Wilkinson, *A Case Study in the Intersection of Law and Science: The 1999 Report of the Committee of Scientists*, 42 Ariz. L. Rev. 307 (2000).

86. *See* The Comm. of Scientists, U.S. Dept. of Agric., *Sustaining the People's Lands: Recommendations for Stewardship of the National Forest and Grasslands Into the Next Century* (1999).

87. *See* Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report: Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm (2007).

"Climate change is affecting every corner of the American continent."[88]

That, of course, is a declaration, not a strategy, and there are numerous complications in developing a full-blown program. Yet, it is hard to see, given the potential impacts on lands the Forest Service is legally and morally required to protect, how addressing climate change, newly-recognized though it may be, can be anything other than an urgent, top priority for the agency. Even given all the many changes that have swept across the modern Forest Service, the imperative of dealing effectively with climate change stands with the historic drop in timber production as one of the two dominant realities.

## III. PROMINENT ISSUES

This section presents four frontline issues facing the Forest Service. It is only a partial list but it may demonstrate the weighty judgments that the remade Forest Service has been and will be making.

### *A. The 2012 Planning Rule*

Under the NFMA, agency planning regulations have been a major source of law from the beginning.[89] Congress, concerned about the Forest Service's commitment to science and a more moderate timber program, employed a rarely-used legislative device—establishing a group outside of the agency, in this case a Committee of Scientists, to make recommendations on the development of agency regulations.[90] A Committee of Scientists

88. Secretary of Interior Ken Salazar, Keynote Address to United Nations Conference on Climate Change 2009, *New Energy Future: The Role of Public Lands in Clean Energy Production and Carbon Capture* (Dec. 10, 2009). *See* Sec. Order No. 3289 (Sept. 14, 2009) (addressing the impacts of climate change on America's water, land, and other natural and cultural resources).

89. *See* 16 U.S.C. § 1604(g) (2010) (directing the secretary to promulgate regulations for Forest Service planning).

90. *See* Wilkinson & Anderson, *supra* n. 16, at 43-44, and accompanying notes.

was convened and issued its report in 1979,[91] the heart of which was that the agency must focus on species diversity, a standard ecological concept today but little known at the time.[92] The Committee recommended a system that included these elements: the identification of management indicator species,[93] whose condition indicates the health and viability of species in the planning area generally; requirements that forests "shall" be managed to preserve and enhance diversity of plant and animal species[94] and that the agency will "ensure viable populations will be maintained";[95] and a directive to monitor,[96] presumably by gathering on-the-ground data, to determine the impact of proposed development on the indicator species.

These were not technical, miscellaneous requirements. If you measure the appropriateness of development by the health of indicator species, and if, as is usually the case, the species' health depends on the quality of its habitat, then species diversity often determines which projects can go ahead and which cannot. Further, incorporating the Committee of Scientists' recommendation into the Forest Service planning regulations in 1982 was an historical event, the first time any government had ever adopted a law to protect species diversity, something even the ESA does not do.

Environmentalists and the timber industry squared off, mainly over the Northwest's old-growth forests, in courts, legislative committee rooms, and many other forums during the 1980s and

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91. *Final Report of the Committee of Scientists*, 44 Fed. Reg. 26,599 (May 4, 1979).

92. 16 U.S.C. § 1604(g)(3)(B) (2010) (the "diversity provision" directs to Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives . . .). On the development of the species diversity regulations, see Houck, *supra*, n. 27, at 885-91.

93. The management indicator species selection criteria are at 36 C.F.R. § 219.19(a)(1) (July 1, 1984). *See* Wilkinson & Anderson, *supra* n. 16, at 299-304.

94. 36 C.F.R. § 219.27(g); s*ee also* Wilkinson & Anderson, *supra* n. 16, at 297-99.

95. 36 C.F.R. § 219.19.

96. 36 C.F.R. § 219.19(a)(6); and, *see* Wilkinson & Anderson, *supra* n. 16, at 304-06.

90s.[97] The diversity requirement lay at the heart of the dispute, but attempts to amend the regulations were false starts.

Then, in the late 1990s, came the second Committee of Scientists,[98] whose report contained strong, mandatory diversity provisions.[99] At the end of the Clinton Administration, in November 2000, the Forest Service adopted a new planning rule, largely designed around the committee's recommendations, which emphasized management relying heavily on science and ecological sustainability.[100]

The Bush Administration would have none of it, calling the Clinton rule "unworkable," quickly revoking it with minimal public input and replacing it in 2005 with a system described as a "paradigm shift."[101] And a paradigm shift it was. Forest plans were downgraded—contrary to what we believe Congress intended in the NFMA—and became general, strategic documents rather than requirements and blueprints for future development on the national forests.[102] Protection of species diversity became fuzzy and

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97. *See e.g. Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *Seattle Audubon Socy. v. Robertson*, 1991 WL 180099 (W.D. Wash. Mar. 7, 1991); and, *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988).

98. *See* Wilkinson, *1999 Report of the Committee of Scientists, supra* n. 85, at 307-09.

99. *See* Comm. of Scientists, *Sustaining the People's Land, supra* n. 86, at 151-52 (stating "The decisions of resource managers must be based upon the best available scientific information and analysis to provide ecological conditions needed to protect and, as necessary, restore the viability of focal species and of threatened, endangered, and sensitive species.").

100. *See National Forest System Land Management Planning,* 65 Fed. Reg. 67514 (Nov. 9, 2000), and Wilkinson, *1999 Report of the Committee of Scientists, supra* n. 85, at 311-16.

101. *See National Forest System Land Management Planning,* 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005) ("This [2005] final rule embodies a paradigm shift in land management planning based, in part, on the Forest Service's 25 years of experience developing plans under the 1982 planning rule.") On the Bush Administration's suspension of the 2000 rule, which allowed planning to continue on an interim basis under the 1982 rule, *see* George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle Over the Forest Service Planning Rule*, 44 Nat. Res. J. 1, 19-21 (2004).

102. *See e.g.* Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 Duke Envtl. L. &

discretionary. Science, rather than being a centerpiece, would be "taken into account" at the agency's discretion.[103]

The courts struck down the Bush planning rule for violating NEPA and the ESA.[104] Early in the Obama Administration, the agency once again set out to promulgate a new planning rule. It revived the 2000 Clinton rule and adopted it as a placeholder until new regulations take effect.

The Forest Service adopted a new rule in March 2012.[105] The process was outstanding—open, with extensive public input and a focus on tribal participation.[106] The agency held four national roundtables, thirty-three regional roundtables, and received some 300,000 comments on the draft EIS.[107] This citizen outreach seems to make for a better approach than placing heavy emphasis on a Committee of Scientists' report.

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Policy Forum 105, 153-54 (2007) ("The rule represented a radical shift from NFMA's congressional intent that forest plans were to be meaningful, prescriptive, judicially enforceable documents, prepared with public participation and in a manner consistent with NEPA.").

103. *National Forest System Land Management Planning,* 70 Fed. Reg. 1023, *supra* n. 101, at 1027. *See* Katrina M. Kayden, *Will Paradise Become a Parking Lot? The Debate Over the Bush Administration's Overhaul of Forest Management Regulations*, 17 Vill. Envtl. L.J. 285, 291 (2006) (discussing the potential environmental impacts of the 2005 Bush regulations).

104. *See Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F. Supp. 2d 1059, 1067 (N.D. Cal. 2007). The Forest Service changed the rule, reissuing the new version in 2008. Courts again struck it down, reinstating the 2000 rule. *See Citizens for Better Forestry v. U.S. Dept. of Agric.*, 632 F. Supp. 2d 968, 981-82 (N.D. Cal. 2009) (finding that the rule violated NEPA, and that the biological assessment did not meet the ESA's requirements of analysis of consultation).

105. On March 23, 2012, the Forest Service released its Final Programmatic Environmental Impact Statement for the new planning rule. *See* Press Release, Forest Service, U.S. Dept. of Agric., *USDA Publishes Final Rule to Restore the Nation's Forests Through* Science *and Collaboration*, available at http://www.fs.fed.us/news/2012/releases/03/planning-rule.shtml (last visited June 22, 2012).

106. On public input into new planning rule, *see Collaboration and Public Involvement*, Forest Service, U.S. Dept. of Argic., http://www.fs.usda.gov/main/planningrule/collaboration (last visited June 22, 2012).

107. *See id.*

The 2012 planning regulations have many strengths and in several ways break new ground. The mission is modern and strongly stated—to "promote the ecological integrity" through planning and management practices that are "ecologically sustainable."[108] Planning must be science-based; for example, the agency must use "the best available scientific information to inform the planning process" and "document how the best available scientific information was used to inform the assessment, the plan decision, and the monitoring program . . . ."[109] The 2012 regulations return to the agency's traditional commitment to preserving species viability as originally proposed by the first Committee of Scientists in 1979. In addition to broader ecosystem integrity, plans must assure species-specific viability by maintaining "a viable population of each species of conservation concern within the plan area."[110] The definition of "viable population" sets a high bar: "a population of a species that continues to persist over the long term with sufficient distribution to be resilient and adaptable to stressors and likely future environments."[111] In addition, by way of maintaining a commitment to species viability through the use of surrogate species to provide information about overall ecosystem integrity, the substantial monitoring section in the rule requires the agency to consider the status of focal species.[112] The regulations also contain

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108. *National Forest System Land Management Planning*, 77 Fed. Reg. 21162, 21260 (Apr. 9, 2012) (to be codified at 36 C.F.R. § 219.1(c)).

109. *Id.* at 21261 (to be codified at 36 C.F.R § 219.3).

110. *Id.* at 21265 (to be codified at 36 C.F.R. § 219.9(b)(1)). "Species of conservation concern" is defined as a species "that is known to occur in the plan area and for which the regional forester has determined that the best available scientific information indicates substantial concern about the species' capability to persist over the long-term in the plan area." *Id.* (to be codified at 36 C.F.R. § 219.9(c)).

111. *Id.* at 21272 (to be codified at 36 C.F.R. § 219.19).

112. *Id.* at 21267 (to be codified at 36 C.F.R. § 219.12(a)(5)(iii)). "Focal species" is defined as "A small subset of species whose status permits inference to the integrity of the larger ecological system to which it belongs and provides meaningful information regarding the effectiveness of the plan in maintaining or restoring the ecological conditions to maintain the diversity of plant and animal communities in the plan area. Focal species would be commonly selected on the basis of their functional role in ecosystems." *Id.* at 21271 (to be codified at 36 C.F.R. §219.19).

rigorous protections for riparian areas,[113] directions to restore degraded ecosystems and watersheds,[114] and a requirement to identify and evaluate lands that may be suitable for wilderness.[115]

The way the new regulations came about is nearly as important as the regulations themselves. As already noted, the up-front public consultation was excellent, beginning with the initial open comment period. Then, the Forest Service listened to the public during the drafting stage. A draft rule was released first, as part of the draft EIS in February 2011.[116] Then came a preferred alternative in the final EIS, released in January 2012, which made a number of changes in response to comments.[117] Many people, ourselves included, assumed that the changes from the draft rule to the preferred alternative to the final rule would be few and far between. In fact, numerous significant revisions were made in response to public comments and moved the regulations from the deficient initial effort to the excellent document that the final regulations are. As just one example, the draft rule contained the Bush Administration's much-criticized formulation that science would only be "taken into account," while the final rule replaced this with the directive that the agency employ the "best available scientific information."[118] A few clarifying amendments were then made before the final rule was officially published in April 2012.[119]

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113. *Id.* at 21264 (to be codified at 36 C.F.R. § 219.8(a)(3)(i)).

114. *Id.* (to be codified at 36 C.F.R. § 219.8(a)(1)).

115. *Id.* at 21263 (to be codified at 36 C.F.R. § 219.7(c)(2)(v)).

116. *National Forest System Land Management Planning*, 76 Fed. Reg. 8480 (proposed Feb. 14, 2011).

117. *See* Forest Service, U.S. Dept. of Agric., *Final Programmatic Environmental Impact Statement: National Forest System Land Management Planning* 25-28 (Appendix I-Modified Preferred Alternative A) (Jan. 2012), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5349144.pdf. (last visited June 22, 2012).

118. Compare the 2005 Bush rule, *supra* n. 101, at 1027 ("The final rule requires that the Responsible Official take into account the best available science."), and the 2012 final rule, 77 Fed. Reg. 21162, *supra* n. 108, at 21261 ("The responsible official shall use the best available scientific information to inform the planning process . . .").

119. *See National Forest System Land Management Planning*, 77 Fed. Reg. 21162, *supra* n. 108.

In all, the multi-faceted relationship to the public in the creation of this planning rule serves as a worthy model for any agency going through public consultation on a major initiative.

### *B. Collaboration*

Beyond the specific and high-level case of the 2012 planning rule, the Forest Service has made considerable progress in its collaborative efforts out in the field. Ed Marston, the prize-winning former editor of High Country News, is one of the wisest observers of the American West. Two of Marston's articles, a decade apart, present a fascinating juxtaposition and are revealing snapshots of the agency's evolution.

In 1993, the timber cut was in steep decline and it seemed that it would continue. But the Forest Service, to Ed's eye, had hunkered down and was putting its energies into a futile effort to resurrect the old timber-heavy system rather than working with communities and planning for a different future. "The Forest Service has failed to adapt," he wrote. "Therefore it must die."[120] The time had come, he argued, "to clear-cut the Forest Service."[121]

Marston wrote a very different kind of piece in 2004.[122] After attending a large regional meeting in Fort Collins leading up to the agency's centennial celebration the next year, he said that he expected a "grim" meeting, but in fact it was "upbeat." He explained it this way:

> After the obligatory references to the agency's godlike founder, Gifford Pinchot, discussion among the 200 or so attendees moved to a future that involved cooperating with citizens, groups and other agencies both within the national forests and across boundaries. This kind of talk has been a staple for years at Forest Service meetings. But at

120. Ed Marston, *It's Time to Clear-Cut the Forest Service,* High Country News, Sept. 20, 1993.

121. *Id.*

122. Ed Marston, *Now That We've Clear-Cut the Forest Service. . .,* High Country News, Nov. 20, 2004.

> this meeting, it seemed real.
>
> The agency's leaders and staff have come to realize they can't manage the land without help. Most important, they've gone from resenting that truth to welcoming it.
> It's happened because the agency has been clear-cut. Retirements, budget cuts, pressure from lawsuits and more bad press than Saddam Hussein got has resulted in a new Forest Service. Now it is up to us — "people of the public persuasion" — to work with and on behalf of the agency to restore, protect and even do some careful exploitation of the national forests."123

We agree with that. Yes, there are instances where the old tendencies, attitudes, and biases flare up, but the central thrust of the Forest Service today is to reach out and work with other agencies and citizens to achieve common goals. A recent example comes from Arizona.

In 2003, Governor Janet Napolitano created a broad-based Arizona Forest Health Council that in 2007 produced the Strategy for Restoring Arizona's Forests.[124] The key themes of that state report were collaboration, landscape-scale restoration with emphasis on reducing the heavy fuel buildups, and creating industry for the small-diameter woody biomass.[125]

The state strategy document spun off a few initiatives, the most ambitious and promising involving the Ponderosa pine forests that stretch from the South Rim of the Grand Canyon across the Mogollon Rim country to the White Mountains in eastern Arizona, with most of that forested land lying within four national forests – the Kaibab, Coconino, Tonto, and Apache-Sitgreaves. By 2009,

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123. *Id.*

124. Governor's Forest Health Advisory and Oversight Councils, State of Arizona, *Statewide Strategy for Restoring Arizona's Forests: Sustainable Forests, Communities, and Economies*, available at http://azgovernor.gov/FHC/documents/ForestStatewideStrategy.pdf (2007).

125. *Id.* at 5.

more than thirty organizations—state and federal agencies including the Forest Service, counties, conservation groups, and timber organizations—came together to form the Four Forest Restoration Initiative, graced with the snappy acronym "4FRI."[126]

4FRI's goal is to establish a large-landscape restoration program in the four forests over the next twenty years with the heart of it being the reduction of hazardous fuel buildup through thinning small-diameter trees, controlled burns, and natural fire management.[127] A main objective, and key complementary driver of the Initiative, is to create an industry to receive the woody biomass coming out of the forests and to ensure the industry's viability over the twenty-year period.[128]

Launching of the first project stage is expected in 2013 on the Coconino and Kaibab National Forests, with restoration activities on roughly 600,000 acres.[129] It is fair to say that this kind of program is a full manifestation of Pinchot's original vision, and Ed Marston's, too, of the Forest Service working cooperatively with communities to accomplish common economic, conservation, and social objectives.[130]

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126. *See Background Information*, Four Forest Restoration Initiative, http://www.4fri.org/background.html (last visited June 22, 2012).

127. Telephone interview with Ethan Aumack, Restoration Program Director, Grand Canyon Trust (Aug. 2011) (on file with the author); and, Governor's Forest Health Advisory and Oversight Councils, *Statewide Strategy*, *supra* n. 124, at 10-11.

128. Gov.'s Forest Health Advisory and Oversight Councils, *Statewide Strategy, supra* n. 124, at 13, 30-33.

129. *See* Forest Service, U.S. Dept. of Agric., *Proposed Action for Four-Forest Restoration Initiative, Coconino and Kaibab National Forest, Coconino County, Arizona* (2001), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5324204.pdf (last accessed June 22, 2012) (of the 600,000 acres in the initial phase, approximately 361,379 acres on the Coconino National Forest and 233,991 acres would be treated on the Kaibab National Forest). In total, 4FRI plans to treat over 2.4 million acres of forest over twenty years. *See Background Information*, *supra* n. 126.

130. There are other examples of collaborative initiatives, such as the U.S. Fire Learning Network—a collaborative project led by the Nature Conservancy, the Forest Service, and other federal agencies. Implementation of these initiatives has been difficult, however, highlighting the significance of the 4FRI effort. Thomas D. Sisk, *Seeding Sustainability in the West*, 31 Utah Envtl.

### *C. American Indian Sacred Sites*

Indian tribes are the oldest governments in the United States, but tribes are new entrants in national forest policy and law. One side of modern tribal forestry participation is the increasing partnerships in land and river restoration between tribes and federal land agencies.[131] Another side involves tribal use of national forests for hunting, fishing, and gathering, holding cultural ceremonies, and protecting traditional sacred sites.[132] Forest Service policy is uneven

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L. Rev. 79, 88-89 (2011); *See also* Matthew McKinney & Patrick Field, *Evaluating Community-Based Collaboration on Federal Lands and Resources,* 21 Socy. & Nat. Res. 419 (2008); and, Robert B. Keiter, *Keeping Faith with Nature: Ecosystems, Democracy, and America's Public Lands* 219 (2003). 4FRI did see one concern come forward in May, 2012, when the Forest Service awarded the contract for thinning to a company that had not been involved in 4FRI and whose business plan did not seem fully consistent with 4FRI's approach. Of course, how significant this will turn out to be has yet to be told. *See* News Release, Grand Canyon Trust, *Our Response to the 5/18 Contract Decision*, http://www.grandcanyontrust.org/news/2012/05/gcts-response-to-the-518-4fri-contract-decision/ (May 22, 2012); Eastern Arizona Counties Organization, *An Open Letter to U.S. Forest Chief Tidwell* (undated) (on file with authors).

131. *See e.g.* Press Release, N.W. Indian Fisheries Commn., *supra*, n. 78. Tribes have also worked with the National Park Service and U.S. Fish & Wildlife Service on major river restoration projects; s*ee* Natl. Park Service, Elwha River Restoration, available at http://www.nps.gov/olym/naturescience/elwha-ecosystem-restoration.htm (last visited June 22, 2012); Dan Evans, *The Elwha Offers Model of Collaboration and Shrewd Investment*, Seattle Times (Sept. 16, 2011) (on Elwha River restoration on the Olympic Peninsula, Washington); Press Release, U.S. Dept. of Interior, Agreement Reached on Klamath River Basin Restoration, available at http://www.doi.gov/news/doinews/2010_02_18_news.cfm (Feb. 18, 2010) (on the Klamath River restoration agreements, the largest river restoration effort ever in the United States, in Oregon and California); and, News Release, U.S. Envtl. Prot. Agency, *Nisqually Estuary Restoration Receives National Award for Outstanding Coastal Protection* available at http://yosemite.epa.gov/opa/admpress.nsf/0/CC07F56FCF16C1218525796400729C72 (Dec. 12, 2011) (on the fifteen-year restoration effort of over 900 acres of tidal habitat in the Nisqually Delta and Nisqually National Wildlife Refuge).

132. *See e.g. Memorandum of Understanding Regarding Tribal–USDA–Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* (June 11, 1999) (MOU recognizing existing treaty rights of tribes of Lake Superior Chippewa Indians to hunt and fish and to gather wild plants on national forest lands), available at

toward tribes because the agency, traditionally having been accustomed to managing for timber and recreation, was historically unwelcoming to tribal concerns about sacred sites and cultural uses. This has been changing in recent years and the agency has increasingly responded to tribal initiatives by making accommodations on sacred site issues.[133]

There is one serious recent blot on the record, however, as the San Francisco Peaks, or "Snowbowl," controversy set back tribal-Forest Service relations and generated sharp criticism of the agency from many other quarters.[134] For Indian people, the San Francisco Peaks have now become a frightening symbol for the whole spectrum of sacred site issues, which are both simple and complex. Tribes view the land as a sacred, living being to be honored and respected, sometimes to the exclusion of other uses.[135] The complexity comes with determining how to honor this worldview and how to manage for it. And the decisions can be difficult ones from

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http://www.fs.fed.us/spf/tribalrelations/documents/agreements/treaties-of-1837-1842.pdf (last visited June 22, 2012). *See generally* Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Cases of the Aboriginal Lands of the Nez Perce Tribes*, 34 Idaho L. Rev. 435 (1998).

133. *See infra* nn. 151-55; and, The Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, 25 U.S.C. §§ 3051-57 (2011) (last visited June 22, 2012) (the 2008 Farm Bill). The Act, supported by the Forest Service, authorized the reburial of human remains or cultural items disinterred from National Forests; temporary Forest closures to protect the privacy of tribal activities for traditional and cultural purposes; and a provision for free forest products for traditional and cultural purposes.

134. *See e.g.* Joshua Edwards, *Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act*, 34 Am. Indian L. Rev. 151 (2010); Maria Glowacks, Dorothy Washburn & Justin Richland, *Nuvatuka'ovi, San Francisco Peaks: Balancing Western Economies with Native American Spiritualities*, 50 Current Anthropology 547, 555 (2009); and, Ophir Sefiha & Pat Lauderdale, *Sacred Mountains and Profane Dollars: Discourses about Snowmaking on the San Francisco Peaks*, 17 Soc. & Leg. Stud. 491 (2008).

135. Frank Pommersheim, a prominent Indian scholar, writes: "Many Native Americans do not consider themselves as people of the book (i.e., Bible) but rather as people of the land, whose central religious rituals and practices take place at particular sacred places. Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* 189 (2009); *see also* Vine Deloria Jr., *God is Red: A Native View of Religion* 270-85 (1973).

the federal side. The key is to take the time to establish good communications so that both sides see the whole situation. Often accommodations will follow.[136]

The Snowbowl Ski Area in Arizona's Coconino National Forest has been a battleground since the ski area's inception in 1937.[137] Snowbowl is located on the San Francisco Peaks, the most important sacred site to the Navajo and Hopi people and sacred to eleven other tribes as well. Deities live in the Peaks and tribes gather ceremonial items on its flanks. The purity of the Peaks is essential to maintaining the power of these spirits and items.[138] The Forest

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136. "Accommodations" in this context refer to federal and tribal compromise where federal agencies manage federal land in a manner that supports the tribes' cultural needs without running afoul of the First Amendment Establishment Clause. *See* n. 147, infra.

137. *See Wilson v. Block*, 708 F.2d 735, 744-45 (D.C. Cir. 1983) (describing history of Snowbowl and subsequent challenges to expansions). In 1981, an association of Navajo medicine men, the Hopi Tribe, and two nearby ranchers, brought an action to enjoin further development of Snowbowl and for the removal of existing ski facilities. The D.C. Circuit Court found that the Navajo medicine men and Hopi Tribe established that the Peaks as a whole were sacred and that development of the ski area on a portion of the Peaks would severely impair the necessary conditions for prayer and ceremonies, but ultimately held that this would not burden the tribes' beliefs or religious practices and did not constitute an impermissible burden on religion. *Id.*

138. The purity of the Peaks is critical to the Hopi not only because they are the home of the kachinas—spiritual beings—but also because any time a sacred shrine or site is disturbed, the villages will be vulnerable to evil. Hopis emphasize that they have a covenant with the Creator to take care of the land and when they do so, the Creator will similarly take care of them. If the Peaks were desecrated, the sacred ceremonial spruce would be destroyed and the Hopi would not be able to uphold their duty and the kachinas would not bring rain. Drought and famine would ensue and the Hopi would be unable to survive as a people. Similarly the Peaks are a mother to the Navajo people, a spiritual entity representing the birth and continued survival of the Navajos. Frank Goldtooth, a Navajo medicine man explains: "[the Peaks] is my whole medicine . . . this part of the San Francisco Peaks that I have with me is wrapped up in a pouch that I use to cure people with, and it is my medicine of all ways. Without it I cannot be a medicine man or I cannot heal . . . the San Francisco Peaks is a prayer." John. F. Feeney, Jr., *The Sacred Mountain of the Navajo and Hopi Indians: Recreational Expansion and Religious Freedom on the San Francisco Peaks* (Jan. 5, 1979) (unpublished report commissioned by the plaintiffs of *Wilson v. Block*, available *at* Northern Arizona University, Cline Library, Special Collections and Archives, http://archive.library.nau.edu).

Service, however, has continued to approve expansions, including, recently, the use of reclaimed water for snowmaking.[139]

The tribes seemed to have prevailed at one point, but ultimately lost in the Ninth Circuit, which ruled that the project did not impermissibly interfere with tribal religious rights.[140] In his dissent, Judge Fletcher remarked, "in [holding for the Forest Service], the majority misstates the evidence below, misstates the law. . ., and misunderstands the very nature of religion."[141] The same can be said about local Forest Service personnel who misunderstood the significance of the Peaks to the tribes and resolutely stuck to a profoundly questionable decision.

The law on sacred site issues on public lands was set in *Lyng v. Northwest Indian Cemetery Protection Association,* a 1998 decision of the United States Supreme Court.[142] The Yurok, Karuk, and Tolowa tribes of the north California coast challenged a Forest Service decision to construct a logging road in the Six Rivers National Forest. The High Country, the sacred area at issue, is a stunningly beautiful and raw forest, full of majesty and power – the kind of place that we need. To the tribes, the High Country contains medicine needed to pray, cure the sick, and to conduct ceremonies needed to keep the world in balance.[143] Construction of the logging road would destroy the healing power the High Country's medicine and the tribes' religious practices.[144] Nevertheless, the Forest Service pushed forward and Justice O'Connor, writing for the Court,

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139. *See Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024, 1030 (9th Cir. 2007), *rev'd by* 535 F.3d 1058 (9th Cir. 2008) (en banc).

140. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc) (holding that the only effect of the use of reclaimed water on the Peaks would be on the plaintiffs' "subjective spiritual experience" and their "feelings about their religion).

141. *Id.* at 1081 (Fletcher, J., dissenting).

142. 485 U.S. 439 (1988). *See generally* Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protection Association, in* Indian Law Stories 489 (Carole Goldberg, Kevin K. Washburn, and Philip P. Frickey, eds., 2011); Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* 325-56 (2010).

143. Bowers & Carpenter, *supra* n. 142, at 505.

144. *Id.*

ruled for the Forest Service, holding that Federal agencies have broad authority on Indian sacred site cases.[145]

The *Lyng* opinion made it clear that the federal authority goes both ways and that federal officials have wide discretion to recognize sacred sites and indeed are encouraged to do so by federal law. Justice O'Connor stated that "the Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."[146] Justice O'Connor's "accommodation" reasoning, long a staple in Establishment Clause doctrine,[147] shows a way forward by encouraging the agency and religious practitioners to work through the issue with the flexibility to come up with practical solutions that meet both sides' needs without rising to the level of an establishment of religion. Further, Justice O'Connor clarified the proper federal approach by writing that the Forest Service should show "solicitude" toward tribal religious needs and that Congress has given the Forest Service and other agencies policy direction through the American Indian Religious Freedom Act,[148] providing that it is congressional policy to "protect and preserve for American Indians their inherent right of freedom to . . .exercise the traditional religions, including. . .access to sacred sites."[149]

The approach of accommodating access to sacred sites on public lands is taking hold. The Forest Service closed Cave Rock, a sacred site of the Washoe on the shore of Lake Tahoe, to climbing in order to protect Cave Rock's cultural heritage.[150] In addition, the

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145. *Lyng*, 485 U.S. at 453 (finding that "[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the government of its right to use what is, after all, its land.").

146. *Id.* at 453-54.

147. On the Establishment Clause, *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see generally* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673 (2002).

148. The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2003); *see generally* Ellen M.W. Sewell, *The American Indian Religious Freedom Act*, 25 Ariz. L. Rev. 429 (1983-1984).

149. *Lyng*, 485 U.S. at 454-55.

150. *Access Fund v. U.S. Dept. Agric.*, 499 F.3d 1036, 1039-40 (9th Cir. 2007) (finding the climbing ban had a secular purpose of cultural preservation and did not endorse Washoe religious beliefs).

agency crafted its policy on the Medicine Wheel in Wyoming to accommodate tribal religious needs at that sacred site.[151] And the Federal District Court in Montana recently upheld a Forest Service travel management plan in the Lewis and Clark National Forest that prohibited motorized use in most of the Badger-Two Medicine area, a sacred area to the Blackfeet.[152] The Park Service and BLM have also taken actions to accommodate sacred sites.[153]

The San Francisco Peaks dispute could have been resolved in a way consistent with the tribes' religious needs if local officials had just taken the time to truly understand the meaning of the Peaks to the tribes. Deep understanding matters. After all, after the Forest Service's Supreme Court victory in the *Lyng* case, the agency decided not to build the logging road.[154] A main reason was an

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151. In 1996, the Forest Service and tribal representatives signed a Historic Preservation Plan, requiring the Forest Service to consult with the Medicine Wheel Alliance and the Medicine Wheel Coalition, both American Indian groups, and other agencies on projects planned within the roughly 18,000 acres visible from the Medicine Wheel. *See Wyoming Sawmills Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004); and, Kristen Carpenter, *Real Property and Peoplehood*, 27 Stan. Envtl. L.J. 313, 333-34 (2008).

152. *Fortune v. Thompson*, ---F. Supp. 2d.---, 2011 WL 206164 (D. Mont., Jan. 20, 2011).

153. The Park Service placed voluntary rock climbing restrictions on Devil's Tower—known as "Bear Lodge" to some Plains Indians—during the month of June, when most religious ceremonies are held. The management plan also called for educational programs on Indian religious and cultural uses and mitigation of climbing's effects on the environment through reduced use of pitons and closure of routes near raptor nests. The ban was upheld in *Bear Lodge Multiple Use Assn. v. Babbitt*, 175 F.3d 814, 815 (10th Cir. 1999). In 2001, the BLM rejected plans for mining operations in southern California that would detrimentally affect the cultural resources of the Quechan Indian tribe. *See generally* Sandra B. Zelmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. Colo. L. Rev. 413, 466-71 (2002). The Glamis mining company challenged the decision in a NAFTA tribunal, claiming that the United States must compensate Glamis for not allowing the proposed development. In 2009, a three-member NAFTA panel held for the United States, rejecting Glamis's claim. *See also* Press Release, U.S. Dept. of State, NAFTA Tribunal Dismisses Glamis Claim, available at http://www.state.gov/r/pa/prs/ps/2009/06a/124527.htm (last visited June 9, 2009).

154. The High Country became designated for permanent wilderness protection under the Smith River National Recreation Area Act. 16 U.S.C. § 460bbb (2010); *see* Pommersheim, *supra* n. 135, at 195.

understanding, gained by the Forest Service over the years, of the meaning of the sites to the Yurok, Hoopa, and Karuk religious practitioners.

The Forest Service is now listening, building relationships, and being proactive in its treatment towards tribes. Over the last year the agency has been conducting a comprehensive review of its American Indian sacred sites policies and procedures, no doubt in response to the backlash from the San Francisco Peaks controversy.[155] Hopefully, the current sacred sites policy review will push the agency forward—the draft report makes promising recommendations to build trust between the Forest Service and tribes and to give land managers greater confidence in making sacred site protections.[156] As the draft report states, "If we do not act responsibly to protect the sacred values associated with [sacred sites], we may fall short of the Forest Service's fiduciary obligations to tribes, and we are all diminished."[157]

For tribes, the stakes are even greater. Sacred sites are fundamental underpinnings of a tribe's existence and, without access and protection of the sites, the cultural unity of the tribe may be wounded or lost altogether. We should honor the tribes and their religions and treat the sacred areas as if they were our own collective sacred sites, because they are.

### *D. Climate Change*

We are early in our regulatory responses to climate change and the Forest Service has articulated the magnitude of the threat and begun laying the foundations for an action program.[158] Chief

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155. *See supra*, nn. 133-141, and accompanying text. *See also* Michael Wolcott, *The Snow War*, InsideOutside (Feb. 2009); Randal C. Archibold, *Commerce and Religion Clash on a Mountainside*, New York Times (Oct. 23, 2005).

156. *See* Forest Service, U.S. Dept. of Agric., Draft Report to the Secretary; USDA's Office of Tribal Relations and Forest Service Policy and Procedures Review: Indian Sacred Sites 7–12, 14–17 (2011) http://www.usda.gov/documents/OTR-Report-Sacred-Sites.pdf (last visited June 12, 2012).

157. *Id.* at 1.

158. *See* Memorandum from Forest Chief Tom Tidwell, Responding to Climate Change: Developing Integrated Plans for Landscape Conservation, to

Tidwell's speeches discuss mitigation and adaptation as priorities.[159] The agency's 2008 Strategic Framework for Responding to Climate Change[160] and 2010 National Report on Sustainable Forests[161] both identify climate change as one of the three overarching issues and the 2011 Guidebook for Developing Adaptation Options[162] describes adaption approaches for national forest lands.

Following the 2008 Framework's call to action, the 2010 Climate Change Roadmap[163] and 2011 Guidebook built a sturdy climate-response structure for national forest land managers. The Climate Change Roadmap is particularly pertinent. This well-thought-out document sets out an impressive program, putting forth many actions that the agency "will" take. As just one example, the Roadmap calls for assessments of "the vulnerability of species,

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Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors (Nov. 20, 2009), available at http://www.fs.fed.us/sustainableoperations/documents/tidwell-climate-change-memo-112009.pdf (last visited June 12, 2012).

159. *See e.g.* Forest Chief Tom Tidwell, Addressing Climate Change Adaptation: Think Big! Remarks at Forest Service Manager Workshop, Stevenson, WA (Apr. 20, 2010), available at http://www.fs.fed.us/news/2010/speeches/04/adaptation.shtml (last visited June 22, 2012); Forest Chief Tom Tidwell, Climate Change Mitigation in a New Management Environment, Remarks at National Forest System Climate Change Workshop, D.C. (Jan. 28, 2010), available at http://www.fs.fed.us/news/2010/speeches/01/environment.shtml (last visited June 22, 2012).

160. Forest Service, U.S. Dept. of Agric., Forest Service Strategic Framework for Responding to Climate Change (2008), available at http://www.fs.fed.us/climatechange/documents/strategic-framework-climate-change-1-0.pdf (last visited June 22, 2012).

161. Forest Service, U.S. Dept. of Agric., National Report on Sustainable Forests – 2010 (2011), available at http://www.fs.fed.us/research/sustain/2010SustainabilityReport/documents/2010_SustainabilityReport.pdf (last visited June 22, 2012).

162. Forest Service, U.S. Dept. of Agric., Responding to Climate Change in National Forests: A Guidebook for Developing Adaptation Options (2011), available at http://www.fs.fed.us/psw/publications/millar/Peterson%20et%20al.%20(Adaptation%20Guidebook)%20(Feb.%202011).pdf (last visited June 22, 2012).

163. Forest Service, U.S. Dept. of Agric., National Roadmap for Responding to Climate Change (2010), available at http://www.fs.fed.us/climatechange/pdf/roadmap.pdf (last visited June 22, 2012).

ecosystems, communities, and infrastructure and [identification of] potential adaptation measures."[164] Those words and its explanatory text—words of the Forest Service—set standards and call for specifications. Building on the Roadmap is the Guidebook, essentially a "how-to" manual on using climate change science to develop adaptation and land management plans.[165] The Guidebook takes the next step beyond the Roadmap and aims to give national forest managers the tools and information to take the actions the Roadmap and Framework describe. The Guidebook is a clear bridge between the Research & Development branch and the National Forest System branch of the Forest Service.

The new planning rule took strong cues from the agency's climate change progress, but the regulations failed to make the quantum leap a truly new Forest Service would. Fairly, climate change is a named priority in the rule and the agency is not trying to sidestep the issue. At the outset of the regulations, the Planning Framework section states "The intent of this framework is to create a responsive planning process that informs integrated resource management and allows the Forest Service to adapt to changing conditions, including climate change, and improve management based on new information and monitoring."[166] Climate change is then specifically referenced and mandates are issued to account for climate change in the key sections: Assessment, Sustainability, Multiple-Use, and Monitoring. The regulation language isn't soft – it

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164. *Id.* at 11.

165. The Guidebook states that it is "is a summary of current knowledge on climate change adaptation from educational syntheses, specific tools, facilitated dialogues, workshops, and case studies. . . . It is our hope that the tools and approaches presented here will help focus adaptation on the needs of resource managers and planners. The guidebook is intended to assist the transition to 'climate-smart' approaches in resource management. It is not intended to be a comprehensive accounting of all scientific and management efforts on climate change adaptation, but rather a compilation of information and lessons learned that will inform adaptation planning and practice on national forests." Forest Service, U.S. Dept. of Agric., Guidebook for Developing Adaption Options, *supra* n. 162, at 3–4.

166. National Forest System Land Management Planning, 77 Fed. Reg. 21162, 21262 (Apr. 9, 2012) (to be codified at 36 C.F.R. § 219.5(a)).

requires that planning include climate change.[167] The Preamble also addresses climate change, describing agency climate change activity and the rule's complement to existing policy.[168]

As progressive as the rule is, however, the rule should have made a more forceful policy statement to put the world on notice that the Forest Service is fully acknowledging the significance of climate change and that it intends to incorporate the best climate science in national forest planning. The regulations themselves, not the Preamble,[169] should have included a formal, numbered and titled section, such as "Role of Climate Change in Planning" to put it in the company, for example, of sustainability, diversity, multiple-use, and timber management. This would have elevated climate change, brought it to the forefront of public land planning, and set a tone for other agencies to follow.

What is missing in the rule, then, is a sense of urgency toward climate change. There is no ringing statement about this crisis, no clear identification of climate change as a top priority, no promise to bring all possible creativity and determination to this matter of overarching concern. The audience for this rule—Forest Service employees and the broad public that uses the national forests—knows a call to arms when they see it and they will not see it here.

There is reason to believe that the Forest Service is in fact clear that a call to arms is needed and will quickly develop and implement appropriate management strategies. This would include bridging the gulf that has long existed between the Research & Development branch and the National Forest System branch so that the exceptional work the Research & Development branch has done

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167. For example, the Sustainability section reads: "The plan must include plan components, including standards or guidelines, to maintain or restore the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area, including plan components to maintain or restore structure, function, composition, and connectivity, taking into account . . . [s]ystem drivers, such as climate change." *Id.* at 21264 (to be codified at 26 C.F.R. § 219.8(a)(1)(iv)).

168. *Id.* at 21176.

169. The preamble's section doesn't guide the agency into innovative or progressive planning, but limits planning to the agency's "present capability of the agency to address climate change." *Id.*

on climate change[170] will become an organic aspect of on-the-ground management. The Forest Service may have missed an opportunity to bring the issue front and center, but the rule does have useful climate change provisions, will not affirmatively hold back the kind of committed, agency-wide effort that top-level priorities receive, and can support break-through advances. In that sense, there is reason for optimism on climate change.

## IV. CONCLUSION: LEARNING FROM THE PROCESS

How do we assess how far the Forest Service has come in adapting to new realities and priorities for the national forests? One way is to return to the evolution of forest planning, which offers a useful lens.

Over the course of some thirty-five years, the planning regulations have been the crucible for reform of the Forest Service. We have seen four stages: the rules of 1982, 2000, 2005, and, now, 2012. By examining the broad contours of how each of those successive internal bodies of law came about, coupled with events external to the agency, we can gain insight into how old attitudes gradually lost ground and new ones emerged. Also, that progression displays the different dynamics that characterized the key intradepartmental relationship—between the Forest Service and the Under Secretary's office—when these rules were adopted.

The 1982 regulations were distinguished by power-packed language protective of species diversity and viability: "forest planning shall provide for diversity of plant and animal communities. . . .;[171] Inventories shall include quantitative data. . .";[172] the agency must "[e]nsure that viable populations are

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170. The Forest Service Research and Development branch has been studying climate change and its effects for over twenty years and contributes to the U.S. Climate Change Science Program and the federal government's Global Change Research Program. *See* Forest Service, U.S. Dept. of Agric., *Global Climate Change Research*, http://www.fs.fed.us/research/climate/ (last visited June 22, 2012).

171. 36 C.F.R. § 219.26. *See also supra*, nn. 91-96, and accompanying text.

172. 36 C.F.R. § 219.26.

maintained."[173] Under this legal and policy regime, with the annual timber harvest surging, species diversity and viability effectively became the principal goal of the national forests and both must be "ensured." Management indicator species—the spotted owl was one—were selected as surrogates for land health, and detailed, time-consuming inventories were required to determine the viability of the indicator species. Forest Service employees believed that it was beyond their ability—or anyone else's—to "ensure" viability, and they were right. But the regulations continued in force and the Forest Service, which had rarely been sued before 1970, now regularly faced lawsuits.

The Preamble to the 2012 regulations made a penetrating point about why this extreme situation came about and persevered: "Much of the planning under the 1982 rule procedures focused on writing plans that would mitigate negative environmental impacts. The protective measures in the 1982 rule were important . . . ."[174] In other words, the Forest Service had generated public objections to clear-cutting and spotted owl management and a brake was needed. Through the rest of the 1980s and the 1990s, the timber industry and many in the agency urged a change in the rules but, unworkable or not, the environmental community had public opinion on its side and kept the protective rules in place. It was a matter of reining in a timber program that had spun out of control.

Agriculture Secretary Dan Glickman convened the second Committee of Scientists in 1998.[175] Jim Lyons, Under Secretary for Natural Resources and Environment, took the lead for the Clinton Administration in working with the committee and had a strong vision of a new planning rule that would move away from the overly restrictive language in the 1982 regulations, put lighter but appropriate limits on discretion and, above all, institute a state-of-the-art, science-based planning rule.

The resulting 2000 rule gained little favor with the Forest Service. For too long, the Forest Service had strived to stay clear of citizen involvement in what it views as decisions to be made by the

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173. *Id.* at § 219.19.

174. 77 Fed. Reg. 21162, 21163 (April 9, 2012).

175. *See generally* Wilkinson, *The 1999 Report of the Committee of Scientists*, *supra* n. 85.

agency alone, certainly beyond the reach of citizen suits. Encouraged by its lawyers, the agency has sought to make its plans "bullet proof," wholly within its discretion and immune from scrutiny by judges. Viewed from that perspective, the 2000 regulations were milder than the 1982 version, but still had too many mandates.[176] At least as important from the Forest Service side was an additional affront to agency discretion: this planning rule had been developed in a top-down process with too much involvement from the Under Secretary's office and too little input from the Forest Service itself.

As noted, those unhappy with the 2000 regulations, which took effect in November 2000, did not have long to wait. Within weeks, the incoming Bush Administration suspended the rule and began work on a new one. Now there was an alignment between the agency and the Under Secretary, Mark Rey, whose career had been spent in the timber industry: both wanted extremely broad agency discretion. The Forest Service took the lead in developing the regulations with Rey's office giving support. The resulting 2005 regulations, which may well have been the last major product of the old Forest Service, placed essentially no restrictions, scientific standards or otherwise, on Forest Service planning and management authority.

With the courts striking down the Bush administration efforts, the Obama administration came in with a blank slate and began work on the ambitious project recounted above, which differed in many ways from what had come before. By all accounts, the offices of Forest Service Chief Tom Tidwell and Under Secretary for Natural Resources and the Environment (NRE) Harris Sherman,[177] a natural resources attorney and former head of the Colorado state natural resources department, worked well together. They agreed to do extensive collaborative and NEPA processes.

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176. *See* Nell Green Nylen, *To Achieve Biodiversity Goals, The New Forest Service Planning Rule Needs Effective Mandates for Best Available Science and Adaptive Management,* 38 Ecology L.Q. 241, 266–67 (2011).

177. On Harris Sherman, *see* News Release, U.S. Dept. of Agric., President Obama, Secretary Vilsack Announce Intent to Nominate Harris Sherman as USDA Under Secretary for Natural Resources and Environment (Sept. 10, 2009); and, Sherman's biography, at http://www.usda.gov/documents/HSherman_Bio.pdf (last visited June 22, 2012).

Sherman believed in deferring to Forest Service professionals in drafting the regulations to assure that they would be workable in the field; he also was determined, not necessarily to avoid, but to withstand, legal challenges.

There was continuing back-and-forth between the Forest Service and NRE, but the agency displayed a high degree of ownership in developing the draft rule. Some professionals held on to the idea of broad discretion through "bullet proof" regulations (agencies generally don't want their hands tied and the Forest Service has been especially adamant). Others argued against species viability on the ground that the NFMA referred to species diversity but not to viability. Another argument for broad discretion was more compelling. By now, the overriding reality had become clear: the national timber harvest had plummeted to twenty percent of the cut during the halcyon years from the 1950s through the 1980s and it was not going to come back. No longer, it followed, should the emphasis be protection against environmental destruction. Instead, the Forest Service needed discretion to develop creative and effective programs to carry out a restoration agenda and address climate change, a visionary plan to sustain the forests under uncertain future conditions.

The 2011 draft rule, influenced both by old biases and worthy new thinking, included some valuable approaches, but it came up short. The protections for wildlife were weak and poorly drafted, and employing the Bush-era formula that science would only be "taken into account" put a bulls-eye on the draft rule. As the process moved toward a final rule, the conservation community's views were presented often and persuasively. The timber industry, which had been exceedingly active in all the past rulemakings, pulled back in light of the low harvest rate. Forest Service and NRE staff worked together regularly and respectfully; during the last stages of completing the final rule, they met almost daily. The result of their collaboration and, of course, many other individuals and factors, is a truly worthy public initiative.

So, do we have a new Forest Service? Some signs point in opposite directions. The problem is not that the old attitudes are represented in the agency. Some of those values—including an insistence on quality and ethical conduct—are rightly enduring. Others, such as dedication to commodity production, deserve to be

represented and can contribute to good results, what Ed Marston calls "some careful exploitation." But on some occasions, those values—necessarily minority voices in the less commodity-driven remade agency—control transcendent issues and throw the Forest Service off track. We saw that at San Francisco Peaks. And, as recently as 2005, the agency signed off on a radical planning rule that was an embarrassment to the land management profession.

Still and all, we are willing to believe that there is a new Forest Service. The agency is settling in to new realities, including the realization that the era of commodity production has passed. It has adopted a new mission, based on restoration and sustainability, and most agency employees support it. The Forest Service is reaching out more. The agency is serious about science-based planning and management. In one of the critical decisions in developing the 2012 planning regulations, Chief Tidwell himself made the final call in dispensing with the short-sighted provision that the agency would "take science into account" and adopted the requirement that the agency would use "the best available science." He probably disregarded the advice of departmental lawyers and probably knew that most Forest Service people were behind him. In total, the Forest Service is no longer a multiple-use agency in the traditional sense. Best understood, the cardinal elements of its mission are now sustainability, protection of biodiversity, and restoration.

The Forest Service has lost some of its standing with the public but can win it back. While these are complicated times, the people will respond and give proper due to good and pure results. Maybe it is time to re-remember that the sweeping, spiritual landscapes of the national forests are some of America's greatest blessings, gifts for all time from the visionary and daring Progressives led by Gifford Pinchot and the United States Forest Service.