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INTRODUCTION

INTRODUCTION: FOREST LAW AFTER THE FIRST STAGE OF THE NATIONAL FOREST MANAGEMENT ACT

By
CHARLES F. WILKINSON*

Shortly after the passage of the National Forest Management Act in 1976, the editors of *Environmental Law* correctly identified the milestone that the Act represented. They put together a symposium on forest law and policy, published in 1978, that was notable both for the excellence of its scholarship and for the diversity of viewpoints by leading academics and practitioners in the field.¹ That issue of *Environmental Law* has served as a prin-

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1. See *A Symposium on Federal Lands Policy*, 8 ENVTL L. 239 (1978) which includes the following Articles:

Huffman, *A History of Forest Policy in the United States* at 239.

Clawson, *The Concept of Multiple Use Forestry* at 281.

Behan, *Political Popularity and Conceptual Nonsense: The Strange Case of Sustained Yield Forestry* at 309.

Fraser, *Sustained Yield Management: Economics and Evenflow* at 343.

Krutilla & Haigh, *An Integrated Approach to National Forest Management* at 373.

Stroup & Baden, *Response* at 417.

Krutilla & Haigh, *And a Reply* at 423.

Applegate, *The Multiple Use Planning Process: Descent into the Maelstrom?* at 427.

Wilson, *Land Management Planning Processes of the Forest Service* at 461.

Hagenstein, *The Old Forest Maketh Way for the New* at 479.

Juday, *Old Growth Forests: A Necessary Element of Multiple Use and Sustained Yield National Forest Management* at 497.

Hall & Wasserstrom, *The National Forest Management Act of 1976: Out of the Courts and Back to the Forests* at 523.

Barlow, *Evolution of the National Forest Management Act of 1976* at 539.

Stoel, *The National Forest Management Act* at 549.

cial source on the field of forest law and policy for nearly a decade.

This symposium issue is reminiscent of the earlier effort of this Law Review and, if anything, promises to be even more influential. The time is right for another major gathering of ideas, for we are at another critical junction: the NFMA is about to come to fruition with the release of the national forest plans that are the driving force behind the Act. Although the case law interpreting the NFMA has been negligible because the plans have not been available for judicial review, the NFMA has generated an extraordinary amount of administrative decision making and scientific research, all of which needs to be assessed within the legal framework for that administrative and scientific work will be a primary source of law. And, with the first generation of forest plans mostly completed, it is already time to begin the debate over the proper role of the law in the second generation of plans.

This new field of forest law is a fascinating study in jurisprudence. Our system of laws does not normally intrude into subject areas involving such a high degree of complexity (hundreds of millions of acres and millions of users), expertise (both administrative and cross-disciplinary), and dependency on future projections (a key part of forest law and policy rests on silvicultural, economic, and biological conditions generations hence). In effect, Congress resorted to the NFMA only reluctantly—ultimately because of the peculiar importance of the national forests to the American West and because of perceived shortcomings in existing Forest Service policies.

Modern forest law is a hybrid of diverse forces. Several of them are unlikely candidates as bases for legal doctrine and, in combination, they build a body of law that is quite unlike any other I know. Many of the characteristics of the law are implicitly demonstrated by the content of the articles in this symposium:

1. Forest law germinates in a heavily interdisciplinary context. This symposium issue on law, for example, includes among its authors as many forest economists as lawyers. And, while one may wish that several other relevant disciplines were better represented (would you rather spend a backpacking trip with a group of economists and lawyers or with a group of biologists and historians?), there is a baseline point to be made here: lawyers possess just some of the tools necessary to resolve these legal ques-

tions. To the extent that scholarship contributes to the making of law, nonlawyers such as Con Schallau, Richard Alston, Samuel Hays, John Beuter, Dennis LeMaster, Sally Fairfax, Hal Salwasser, and Roderick Nash will influence the law at least as much as the legal scholars.

2. Forest law tends to be complex. The national legislation has given a legal cast to highly technical subjects that we would not have contemplated as being with the realm of the law a generation ago. Accordingly, this symposium includes several useful pieces that deal with relatively complex legal issues that will have broad impacts on the users of the national forests. These include Dennis Teeguarden's argument on behalf of the use of benefit-cost analysis;² James Morrison's analysis of the nexus between economic suitability and non-declining evenflow;³ the Article by John Shurts on the law applicable to control measures for combating infestation by the southern pine beetle;⁴ and the argument by Kaid Benfield, as experienced in national forest administrative appeals and litigation as any lawyer in the country, that the courts will hold the Forest Service to a high standard in the development of administrative records.⁵

3. The institutional personality of the Forest Service is a key ingredient of forest law. Psychoanalysis of the nation's oldest land management agency is evident in several of the pieces in this issue, but especially in *Forest Values: New and Old*, by Samuel P. Hays,⁶ author of one of the leading works in natural resources policy.⁷ Hays finds that the Forest Service is still dominated by the forestry profession and observes that the forester "learns to observe and describe the world in a particular way, to use the specific concepts and terms, techniques of measurement and anal-

2. Teeguarden, *Benefit-Cost Analysis in National Forest System Planning: Policy, Uses, and Limitations*, *infra* at 393.

3. Morrison, *The National Forest Management Act and Below-Cost Timber Sales: Determining the Economic Suitability of Land for Timber Harvesting*, *infra* at 557.

4. Shurts, *Wilderness Management and the Southern Pine Beetle*, *infra* at 669.

5. Benfield, *The Administrative Record and the Range of Alternatives in National Forest Planning: Applicable Standards and Inconsistent Approaches*, *infra* at 371.

6. Hays, *Forest Values: New and Old*, *infra* at 705.

7. S. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959).

ysis as a way of establishing firm relationships with one's own piece of reality. That small piece becomes the specialized prism through which the wider world is observed and understood."⁸ Hays's Article shows that the national forests cannot be left just to foresters, any more than they can be left just to economists or lawyers, and that the Forest Service must continue to bring in professionals from other disciplines before the agency can fully integrate the new values that the author identifies.

4. Forest law implicates traditional "bread and butter" socio-economic issues. In *The Commitment to Community Stability: A Policy or Shibboleth?*,⁹ Schallau and Alston analyze the role of community stability in decision making for the national forests. They conclude that "community stability has a legitimate role to play in the Forest Service planning process,"¹⁰ and offer up authorities to fuel the debate over whether, and under what circumstances, current law allows subsidies to be extended to timber-dependent communities. The Article also, of course, provides fodder for the larger question of whether such subsidies ought to continue in the future.

5. Strict administrative procedures in forest law are not always writ in green. Two timber industry representatives, W. Hugh O'Riordan and Scott Horngren, examine the minimum management requirements (MMRs) adopted by Region Six (Pacific Northwest) of the Forest Service in order to protect wildlife, watershed, and recreation. They argue in *The Minimum Management Requirements of Forest Planning*,¹¹ that the Forest Service has circumvented the NFMA's "new way of managing forest lands through rule making, public participation, interdisciplinary analysis and integrated planning" and that the MMRs are therefore "illegal constructs." There is, of course, delicious irony here: after all, it has long been industry that has argued that the NFMA should be construed to allow the Forest Service to get "out of the courts and back into the woods." In any event, industry's intensive attack on the minimum management requirements

8. Hays, *supra* note 6, at 708.

9. Schallau & Alston, *The Commitment to Community Stability: A Policy or Shibboleth?*, *infra* at 429.

10. *Id.* at 479.

11. O'Riordan & Horngren, *THE MINIMUM MANAGEMENT REQUIREMENTS OF FOREST PLANNING*, *infra* at 643.

seems to have left everyone more than a little bit nervous: the environmentalists, wondering whether industry's born-again arguments for strict procedural regularity will be used to increase the annual harvest in the region that produces nearly half of the cut from the national forest system; industry, wondering whether perhaps its plea for rigid procedures on the MMR appeal might not return in some haunting fashion in the future; and the Forest Service, wondering when at long last it will manage to get its Region Six plans "out on the street."

6. Forest law deals with more than the national forests. Among the federal lands, the Oregon and California Railroad Grant Lands (O&C lands), located in western Oregon and administered by the Bureau of Land Management, hold some of the finest commercial timber stands in the world. Paul Dodds's Article¹² discusses the continuing uncertainty about the governing legal standards for the O&C lands which are, of course, outside of the NFMA. In *Oregon Forest Practices Act: Unenforced or Unenforceable*,¹³ Peggy Hennessy examines the applicable law governing timber harvesting on private lands. State regulation of private timber lands is sure to be an increasingly volatile issue in future years, for environmentalists, legislatures, and state forestry agencies have begun to scrutinize much more closely the adverse impacts of timber harvesting accruing from private lands as well as public lands, where most of the remedial legislation to date has been directed.

7. Forest law encompasses water, animals, and soil as well as trees. Federal and state regulation of pollution from nonpoint sources has moved exceedingly slowly in general, and especially so in regard to nonpoint pollution from timber harvesting. Michael Anderson, in *Water Quality Planning for the National Forests*,¹⁴ analyzes a number of developments in the courts, under the NFMA, and under the recent amendments to the Clean Water Act. This increasing focus on the waters as well as the trees is a leading manifestation of the "new values" that Hays¹⁵ and many

12. Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, *infra* at 737.

13. Hennessy, *Oregon Forest Practices Act: Unenforced or Unenforceable*, *infra* at 715.

14. Anderson, *Water Quality Planning for the National Forests*, *infra* at 591.

15. See generally Hays, *supra* note 6.

others see as inexorably working themselves into forest law and policy.

8. Forest law is still in its formative stages and fundamental theoretical questions have yet to be finally resolved. There continues to be much ferment in this field, as is well evidenced by the Articles in this symposium. Several pieces are policy pieces oriented toward future decision making. The Articles by Steven Daniels,¹⁶ arguing for a blend of dominant use and multiple use, and Paul Mohai,¹⁷ arguing in support of the planning concept embodied in the NFMA, are plainly of that genre. But nearly all of the writers here, even if overtly presenting their views on the NFMA, are also looking down the road. Should the NFMA be amended and, if so, how? Is the NFMA model, with its heavy reliance on detailed planning, the best approach in the future? What ought to be the role of the courts? Should the national forests be used to subsidize their neighboring communities? What should be the controlling philosophy in the national forests—multiple use, dominant use, or former Arizona governor Bruce Babbitt's formulation of "public use," which would favor watershed, wildlife, and recreation uses?

Thus even now, as we just begin to learn the results of the first stage of plans, one can sense the burgeoning community of participants in forest law and policy beginning to shift a sizable part of its collective attention to the second generation of plans. Whatever the specific results turn out to be, the field of forest law promises to become even more diverse and challenging. Law may often be an abstraction, but the forests of the American West are not. The stakes are high here and this young, distinctive body of law has become so intriguing precisely because of the size of those stakes.

16. Daniels, *Rethinking Dominant Use Management in the Forest-Planning Era*, *infra* at 483.

17. Mohai, *Rational Decision Making in the Planning Process: Some Empirical Evidence from RARE II*, *infra* at 507.