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The Forest Service: A Call for a Return to First Principles

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ARTICLES

THE FOREST SERVICE: A CALL FOR A RETURN TO FIRST PRINCIPLES

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The law and federal forest policy are new to each other and the relaticnship is not remotely a comfortable one. Too often the tension is laid to personalities, to national or local conflicts among bureaucrats, developers, and environmentalists. That is unfortunate, for the problem runs far deeper than that and personalizing the issues obscures the true essence of this fascinating corner of jurisprudence. In fact, the ambiguous rule of the law in forest policy traces to a complex mix of deeply-ingrained historic traditions; economic and scientific issues that do not easily lend themselves to legal analysis; and societal value judgments that cannot be quantified. Ultimately, forest policy tests some of the outer reaches of the legal system, and fairly raises questions of the legitimacy of legal incursions into this region of natural resources policy.

The issues are so elusive of legal analysis because of the unique blend of site-specific and national decision-making. Local citizens who question a hardrock mine, grazing allotments, a coal lease, or a dam on public lands are dealing mainly with the propriety of that particular project. There may be a national coal program or a regional power system in the background but usually the local project must rise or fall on its own merit. The issues tend to stay put at the local level.

Not so with timber harvesting in the national forests. There is a national harvesting goal and, in turn, regional and forest targets that are a share of the national goal. So a major part of the justification for the local action is a national program, and the national program is determined by a computerized brew of inventories, soil analyses, slope calculations, growth projections, harvesting schedules, and a host of other statistics, all based on professional silvicultural and economic judgments[1]—the epitome of the

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1. The Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified as amended at 16 U.S.C. §§ 1601-1610 (1982)) [hereinafter referred to as RPA] directs the Secretary of Agriculture to prepare an Assessment of the nation's renewable resources, 16 U.S.C. § 1601(a) (1982), from which a Program for the management of such resources can be prepared and transmitted to the President. *Id.* at § 1601. The Act provides that the Program shall include the development, maintenance, and revision of land and resource management plans for

kind of questions that our society has told legislators to touch lightly and judges to keep their hands off entirely. The technical nomenclature varies—limited judicial review, committed to agency by law—but, when trial judges intrude, appellate courts do not encant "hard look" but rather mutter, somewhat scornfully, words like "Kafkaesque."[2]

That is understandable, and all the more so when we are talking about an old and honored agency that has proven its ability to make these kinds of technical and complex judgments with competence and integrity.

Yet there is pause, tracing ultimately to the fact that a timber cut *is* undeniably local. Wherever the house may be built, local jobs, hiking trails, and animals are affected first, longer, and more directly.[3] Those considera-

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units of the National Forest System. *Id.* at § 1604(a). The Secretary is instructed to use a systematic interdisciplinary approach in the generation of such plans. *Id.*

The National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (amending the RPA) (codified at 16 U.S.C. §§ 1600-1614 (1982)) [hereinafter referred to as NFMA] specifies in detail the methodology of such planning, 16 U.S.C. § 1604(c)-(m) (1982), and requires the plans to provide for multiple use and sustained yield management of the resources obtained from the national forests. *Id.* at § 1604(e)(1). *See generally* Coggins & Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411, 431-36 (1982).

FORPLAN is a linear computer program upon which the Forest Service bases unit forest planning. *See generally* A CITIZENS' GUIDE TO FOREST PLANNING, April 1982, at 30. The model is designed simultaneously to allocate land to management actions and schedule the harvest of timber within a framework of maximizing the present net worth of current and anticipated management activities within the unit forest. For a discussion of the use of computers in land management planning, *see* Bell, *Mathematical Programming in Forestry*, 75 J. FORESTRY 313 (1977); Schuler, Webster & Meadows, *Goal Programming in Forest Management*, 75 J. FORESTRY 320 (1977); Dane, Meador & White, *Goal Programming in Land Use Planning*, 75 J. FORESTRY 325 (1977); Field, *Linear Programming: Out of the Classroom and Into the Woods*, 75 J. FORESTRY 330 (1977).

For a discussion of multiple-use forest planning, *see* Applegate, *The Multiple-Use Planning Process: Descent into the Maelstrom?*, 8 ENVT'L L. 427 (1978); Wilson, *Land Management Planning Processes of the Forest Service*, 8 ENVT'L L. 461 (1978); Coggins & Evans, *supra*; Cortner & Schweitzer, *Institutional Limits and Legal Implications of Quantitative Models in Forest Planning*, 13 ENVT'L L. 493 (1983).

One premise—that existing legislation calls for "top-down" planning, i.e., the setting of regional targets by the national office—will be discussed in an upcoming article, Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 63 OR. L. REV. ____ (1984).

2. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557 (1978). Historically judicial review of decisions made by federal land and resource management agencies has been deferential. *See generally* Udall v. Tallman, 380 U.S. 1 (1965); Dorothy Thomas Foundation, Inc. v. Hardin, 317 F. Supp. 1072 (W.D. N.C. 1970); Hi-Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971); Sierra Club v. Butz, 3 E.L.R. 20292 (9th Cir. 1973). Some recent opinions have been more inclined to impose stricter standards of review. *See infra* note 4.

3. The following appeared in a recent letter to the editor of the Eugene Register-Guard by a writer concerned about an injunction against timber sales in a local district of the Siuslaw National Forest:

> It seems we have many groups calling themselves friends of the forest: National Wildlife Federation, Friends of this and that. . .but I have yet to hear a group calling themselves "Friends of the Working Man and Woman," who, after all, are supporting about 95 percent of these groups that are cutting our throats. . . . We are not the rampant forest savages that our "friends" are trying to imply. We are concerned loggers and lumbermen who are getting

tions have been felt in Congress and, occasionally, in courts who, whatever the national pressures may be, have forced the issue back to a smaller context, one that the law can evaluate in a principled manner. Those courts have eschewed the national goals, demanded a focus on the local level, and muttered things like: it is not giving the Grand Canyon its due to describe it as "Canyon with river, little vegetation."[4]

The same dynamic, then, runs throughout the debate: whether, and on what terms, the law should enter into the realm of federal timber production, a field that has historically, and for good reason, been left to other disciplines[5] but that has recently come to raise concerns of such moment that legal constraints, however general, must sometimes be brought to bear in order to vindicate values that cannot always be evaluated by a balance sheet or a computer. Certainly the time is right to explore the legitimacy and reach of the law in forest policy: the monumen-

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leached to death from one end to the other.

The Register-Guard, Dec. 9, 1983, at 15A, col. 3. *See also "Clear-Cutting" Practices on National Timberlands: Hearings on Management Practices on the Public Lands Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, Pt. 2, 92d Cong., 1st Sess. 570 (1971) (statement of John F. Turner, Wyoming House of Representatives):

> Of special interest to me as an ecologist and ranching-outfitter has been our local hunting and fishing situation. Northwestern Wyoming has been privileged to offer some of the world's finest big game hunting and trout fishing. . . . It seems that this large [resident elk] herd which has been here for centuries before the coming of the white man, and prospered even to modern times—has been greatly reduced in an instant of time by what is essentially a "one shot", temporary industry which brings almost no economic returns to a local community and leaves havoc to a land cherished by all Americans.

See also D. BURK, THE CLEARCUT CRISIS 25 (1970) (" 'We used to stop at this spot at noon and rest our cattle when we were taking them to or from grazing sites up here,' Bell said. 'Now, since the clearcut, the water hole has dried up . . . . That watershed is part of our farms', Bell said. 'Stream flow has greatly declined on the Sleeping Child [area of the Bitterroot National Forest] in recent years, and we believe it is directly attributable to clearcut logging in the area."); *Hearings, supra*, at 613 (statement of Cecil Garland, President, Montana Wilderness Association) ("Finally, must we ignore the dignity of our forests? Cannot we as men come to recognize the character of a great old spike topped ponderosa? I hope that there will always be forests of disorder where the giants stand over the saplings and one may stand in a shaft of leaf filtered light and contemplate a seedling finding life in the moulding crumbling corps [sic] of a fallen ancestor.")

4. California v. Bergland, 483 F. Supp. 465, 486 n.22 (E.D. Cal. 1980), *modified and rev'd in part sub nom.* California v. Block, 690 F.2d 753 (9th Cir. 1982). *See also, e.g.*, Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172 (9th Cir. 1982); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); N.W. Indian Cemetary Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983); Parker v. United States, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). For a discussion of differing models of judicial review of action by federal land management agencies, *see* Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUBLIC LAND L. REV. 1, 23-38 (1980). For a discussion of judicial review under the RPA and NFMA, *see* Coggins & Evans, note 1 *supra*, at 466-69. *See generally* Rodgers, *Building Theories of Judicial Review in Natural Resources Law*, 53 U. COLO. L. REV. 213 (1982).

5. *See* G. COGGINS & C. WILKINSON, CASES AND MATERIALS ON FEDERAL PUBLIC LAND AND RESOURCES LAW 227, 468 (1980) [hereinafter cited as G. COGGINS & C. WILKINSON].

tally important National Forest Management Act of 1976[6]—far and away the most ambitious expedition that the law has ever made into forest policy[7]—has spent little time in court for the better part of a decade,[8] but that haitus is over. The forest management plans mandated by the NFMA are now being released,[9] one by one, and—as I will proceed to discuss—they will raise questions of economics, law, and forest policy of entirely new dimensions.

I will first examine the manner in which law has developed in the Forest Service by looking at three important eras in this remarkable agency's history and by identifying special Forest Service traditions that came to have the force of law under very general statutes. Next, I will analyze the reversal of some of these traditions by modern statutes. Finally, I will discuss some areas of policy that are plainly discretionary within the agency but that should be resolved by looking to the essential traditions of the Forest Service and the general directions set by Congress. This uneasy relationship between the legal system and Forest Service management is not only instructive of both the potential and the limits of the law in public resource policy; beyond that, its resolution will be of considerable significance in shaping the course of society in the American West for generations to come.[10]

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6. *See supra* note 1.

7. *See* G. COGGINS & C. WILKINSON, *supra* note 5, at 527-34. *See generally* Hines, *Monongahela and the NFMA of 1976*, 7 ENVT'L L. 356 (1977); *A Symposium on Federal Lands Forest Policy*, 8 ENVT'L L. 239 (1978); Mulhern, *The National Forest Management Act of 1976: A Critical Examination*, 7 B.C. ENV. AFF. L. REV. 99 (1978); Behan, *RPA/NFMA - Time to Punt*, 79 J. FORESTRY 802 (1981); Giltmier, *In Response to "RPA/NFMA - Time to Punt"*, 79 J. FORESTRY 806 (1981).

8. *See, e.g.*, Texas Committee on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir.); *cert. denied*, 439 U.S. 966 (1978).

9. The NFMA called for an attempt to complete all unit planning by September 30, 1985. 16 U.S.C. § 1604(c) (1982). The National Forest System, *see* 16 U.S.C. § 1609 (1982), consists of 155 separately named national forests, out of which 146 administrative units are classified. *See* G. ROBINSON, THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT 30 (1975). As of this writing, three final forest plans have been published and released to the public (Grand Mesa-Uncompahgre-Gunnison National Forests and San Juan National Forest, all located in Western Colorado; Black Hills National Forest, located in South Dakota). *See* FOREST PLANNING, Oct. 1983, at 2.

10. Wallace Stegner made the following observation about the role of the public lands in the American West:

> Say of the West, too, that it has been plundered and has plundered itself, but that little by little whole communities and districts have learned how to manage their environment and have made superb living places out of their oases. Say that the West is everybody's romantic home, for we have all spent a part of our childhood there. And say that in its territory, as in its legendry, much of the west is public domain. Next to aridity, that may be the most important fact about it.

W. STEGNER, THE SOUND OF MOUNTAIN WATER 33 (1969). *See also* M. FROME, THE FOREST SERVICE 200 (1971):

I would like first to trace the development of certain basic Forest Service policies—that is, laws—that are especially relevant to today's disputes. I do not seek to retrace the well-travelled path of the history of the Forest Service.[11] Rather, my aim is to identify three crucial eras in the agency's history and to focus on specific policies that developed during each of those times.

The first era is the formative years, from the passage of the Organic Act of 1897,[12] through the transfer of the Forest Reserves from the Department of the Interior to the Department of Agriculture in 1905,[13] through the forced resignation of Gifford Pinchot as Chief in 1910.[14] Pinchot, of course, is the storied leader of the formative years who engineered the land transfer to Agriculture and who collaborated with President Theodore Roosevelt to set aside over 148 million acres as forest reserves, over three-quarters of today's National Forest system of about 190 million acres.[15] We moderns are fond of celebrating the set-aside of lands in Alaska in 1980,[16] but I wonder if the conservation movement has any hour finer than March 4, 1907. On that day, Roosevelt, perhaps with Pinchot at his side, signed the Agriculture Appropriations Act, which contained a provision prohibiting the President from setting aside any

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The Forest Service is more than a Federal agency; it is an institution of American life. Consider that in large portions of the West the histories of community development and forest protection are intertwined—forest ranger stations were often among the earliest, if not the first, buildings erected in many towns and counties. Over a period of decades the Forest Service evolved as a social force in the cause of common man.

11. *See* S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY (2d Ed. 1980); H. STEEN, THE U.S. FOREST SERVICE: A HISTORY (1976); G. ROBINSON, note 9 *supra*; D. BARNEY, THE LAST STAND (1974); H. KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (1960).

12. 16 U.S.C. §§ 473-482, 551 (1982) (§ 476 repealed by NFMA, Pub. L. No. 94-588, § 13, 90 Stat. 2958 (1976)).

13. 16 U.S.C. § 472 (1982). The Transfer Act "constituted the crucial step in the reservation and management of public forests in the United States. . . . [T]he foresters and the government forestland were brought together under one administrative head." S. DANA & S. FAIRFAX, *supra* note 11, at 81. An impetus for the transfer was the exposure of widespread fraud and misdealings in the General Land Office. *Id.*

14. William H. Taft succeeded President Roosevelt in 1909 and appointed Richard Ballinger to replace James Garfield as Secretary of Interior. Garfield and Pinchot had gotten along "famously. . .[and] Garfield's cooperation rounded out whatever executive needs Pinchot may have had." H. STEEN, *supra* note 11, at 100-01. Ballinger promptly foreclosed Pinchot's access to Interior personnel upon assuming office. *Id.* Pinchot's frustration led to his public criticism of Ballinger and Interior regarding the letting of "exploitative" coal leases in Alaska. P. CULHANE, PUBLIC LANDS POLITICS 47 (1981). Pinchot's aim was to discredit both Ballinger and Taft. S. DANA & S. FAIRFAX, *supra* note 11, at 95. President Taft responded by dismissing Pinchot from office. *Id.* For a detailed account of this battle, *see* J. PENICK, JR., PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR (1968).

15. *See* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 580 (1968).

16. The Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of titles 16, 43 and 48 U.S.C.). *See* R. NASH, WILDERNESS AND THE AMERICAN MIND 296-307 (3d ed., 1983).

further forest reserves in six western states—a bill Roosevelt signed just after executing proclamations designating new forest reserves totalling 16 million acres in those very states.[17]

During the formative years the national forests were intended for commercial use, primarily timber production. Upon the day of the transfer of the lands to Agriculture, the Secretary of Agriculture sent a letter to Pinchot detailing the agency's mission concerning the new land.[18] It is called "The Pinchot Letter" because Pinchot wrote it to leave no doubt that a tradition of management for timber production was being born.[19] Pinchot's letter to himself remains standard reading in the agency today. It stated that the national forests were to be managed "for the benefit of the home-builder first of all" and, invoking conservation as a means to achieve utilitarian ends, ordered that the "water, wood, and forage" of the forests shall be used "for the greatest good of the greatest number in the long run."[20] The 1907 Forest Service *Use Book* clearly reflects this tradition: "The National Forests occupy high mountain lands, rough and rocky, and which will always be of value chiefly for the production of timber and wood."[21]

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17. The Agriculture Appropriations Act of March 4, 1907, ch. 2907, 34 Stat. 1271, provided that "hereafter no forest reserve shall be created nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress." Prior to the bill's signing, a backlog of boundary survey data was quickly translated, in "grueling, round-the-clock sessions," H. STEEN, *supra* note 11, at 100, into 32 presidential proclamations that either enlarged, modified, combined, or created new reserves in those six states. *See* 34 Stats. 3279-3310 (1907). President Roosevelt signed the bill after executing these proclamations. H. STEEN, *supra* note 11, at 100. Remembering the congressional uproar that ensued, he later gleefully recounted how "the opponents of the Forest Service turned handsprings in their wrath." *Id.* The establishment of these so-called "midnight reserves" has been termed the last really flamboyant act of the conservation movement. *Id.*

18. The Pinchot letter can be found in G. PINCHOT, BREAKING NEW GROUND, 261-62 (1947). *See also* S. DANA & S. FAIRFAX, *supra* note 11, at 82; U.S. DEPT. OF AGRICULTURE, AGRICULTURE HANDBOOK NO. 20, THE PRINCIPAL LAWS RELATING TO THE ESTABLISHMENT AND ADMINISTRATION OF THE NATIONAL FORESTS AND TO OTHER FOREST SERVICE ACTIVITIES 67 (rev. ed. 1964).

19. G. PINCHOT, *supra* note 18, at 260 ("The letter, it goes without saying, I had brought to the Secretary for his signature. . . .").

20. *See supra* note 18. Pinchot commented that "Secretary Wilson's letter, signed on the very day of the transfer, was proof enough that the Bureau of Forestry had worked out in advance the general principles upon which the administration of the National Forests, to be successful, would have to be based." *Id.* at 264. These requisite "general principles" were outlined in the 1908 Report of the Chief of the Forest Service:

> Full utilization of the productive powers of the Forests, however, does not take place until after the land has been cut over in accordance with the rules of scientific forestry. The transformation from a wild to a cultivated forest must be brought about by the ax. Hence the importance of substituting, as fact as practicable, actual use for the mere hoarding of timber.

U.S. DEPT. OF AGRICULTURE, REPORT OF THE CHIEF OF THE FOREST SERVICE 15 (1908). *See also* G. ROBINSON, *supra* note 9, at 258.

21. U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, THE USE OF THE NATIONAL FORESTS 17

For our purposes, the essential point of the Pinchot Letter, of its tradition of management for timber production, is that it became law. We too often forget that numerically there are more laws made in administrative agencies than anywhere else.[22] The setting for making agency law is especially welcoming when a broad statutory mandate is coupled with an old, respected, and aggressive agency.[23] All of those factors are present here. The Organic Act of 1897 is the broadest of charters,[24] an invitation for the Forest Service to "fill up the details"[25] with its own laws. True, the Organic Act did include some highly specific and limiting language—that trees must be "marked and designated"[26] before harvest and that only "dead, matured, or large growth of trees"[27] could be cut—but that language was atypical and had no influence on policy for three-quarters of a century, until the *Monongahela*[28] litigation. The 1897 Act was a blank check, made out to the Forest Service, to manage these lands as it saw best.

Much later, the Supreme Court in *United States v. New Mexico*[29] validated the early tradition of management for timber production and for watershed purposes. The Court was probably correct in its reading of the 1897 Act.[30] Although later scholarship has shown that the intent of Congress was not as clear as five Justices thought it was,[31] the meaning of

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(1907).

22. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TEXT 4, 26 (1972).

23. One early and respected report observed that courts on judicial review look to many factors including "the character of the administrative agency" and "the confidence which the agency has won." U.S. DEP'T OF JUSTICE, REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 91 (1941). *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW 584-86 (2d ed. 1984); K. DAVIS, *supra* note 22, at 552-54.

24. *E.g.*, 16 U.S.C. § 551 (1982) (The Secretary. . .may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. . .).

25. United States v. Grimaud, 220 U.S. 506, 517 (1911). For a discussion of broad grants of authority to administrative agencies, see K. DAVIS, *supra* note 22, at 34-36. *See also infra* note 33.

26. 16 U.S.C. § 476 (repealed by NFMA; *see supra* note 12).

27. *Id.*

28. West Virginia Div. of Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975).

29. 438 U.S. 696 (1978).

30. The Court strictly construed the 1897 Organic Act against the United States on the question whether the reservation of land for the Gila National Forest in New Mexico impliedly reserved instream flows in the Mimbres River for wildlife preservation, recreation, aesthetic purposes and stock watering. In holding against the Forest Service's asserted claim, the Court found that the two "primary purposes" of the 1897 Act were to furnish a continuous supply of timber to the nation and to maintain national forests as watersheds to insure favorable conditions of stream flow. 438 U.S. at 707 n.14. The *New Mexico* Court recognized that "Congress intended the national forests to be administered for broader purposes after 1960," when the Multiple-Use Sustained-Yield Act, *see infra* note 47, was enacted. 438 U.S. at 715.

31. *See, e.g.*, Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 511, 534 (1979) ("Our reading of the debate over forest policy between 1865 and 1897 and the legislative background of the two Acts [Creative Act of March 3, 1891,

the Organic Act was explicated by its early administrators, many of the same people, including Pinchot, who participated in its passage.[32] The formative years gave content to the charter. These were lands mainly for timber production and that was law.[33]

The major tradition just discussed gave rise to an extraordinary second tradition, management of the Forest Service mainly by foresters.[34] The domination of a major federal agency by a single profession is very rare; indeed, the only rough parallel I know of is staffing of the Justice Department and agency general counsel's offices mainly by lawyers. The comparison probably explains the phenomenon: just as law agencies are essentially "single-use" offices, so too was the Forest Service conceived of as a single-use office in the formative years.[35] The business of the office was silviculture and it was only natural that that science's professionals would staff the office.

The new agency quickly developed another precept in its early years, the tradition of decentralization.[36] Pinchot, like many others since, extolled the virtues of management in the field, close to the ground; the national forests, not headquarters in Washington, D.C., were viewed as the key points for decision-making.[37] The Forest Ranger has become a part of

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§ 24, 16 U.S.C. § 471 (repealed 1976); Organic Act of June 4, 1897, *supra* note 12] as well as subsequent ones, suggests that Mr. Justice Rehnquist's construction of the Act does not comport with their history.").

32. *See supra* text accompanying notes 20-21.

33. When faced with problems of statutory construction, courts have traditionally given substantial respect to a contemporaneous construction of the statute by administrators "charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Devel. Co. v. International U., Etc., 367 U.S. 396, 408 (1961). *See generally*, Udall v. Tallman, 380 U.S. 1 (1965) (construction of executive and public land orders regarding the Kenai National Moose Range in Alaska); Saxbe v. Bustos, 419 U.S. 65 (1974) (construction of the Immigration and Nationality Act of 1952); United States v. National Ass'n Securities Dealers, 422 U.S. 694 (1979) (construction of the Investment Company Act of 1940).

34. Since 1905, when the Bureau of Forestry became the Forest Service, there have been eleven Chiefs. With the exception of the current Chief, R. Max Peterson, a civil engineer by profession, *see* 77 J. AMERICAN FORESTRY 589 (1979), all have been professional foresters. G. ROBINSON, *supra* note 9, at 28. A recent Forest Service personnel report indicates that 5394 of the 10,216 classified professional employees within the National Forest System component of the Forest Service are foresters. Civil engineers (many of whom work primarily on logging road construction) and foresters represent more than two-thirds of the professional employees within the National Forest System. *See* U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, PERSONNEL MANAGEMENT REPORT, FISCAL YEAR 1982 45 (1983).

35. *See supra* text accompanying notes 18-21.

36. *See* H. Kaufman, *supra* note 11, at 83 (" 'The Forest Service,' says the FOREST SERVICE MANUAL, 'is dedicated to the principle that resource management begins—and belongs—on the ground. It is logical, therefore, that the ranger district constitutes the backbone of the organization.' "). The maintenance of this tradition as a contemporary component of Forest Service management philosophy is noted in S. DANA & S. FAIRFAX, *supra* note 11, at 82.

37. *See* G. Pinchot, *supra* note 18, at 267 ("The new regulations [as expressed in the Use Book] made it absolutely clear that the reserves would be handled in the interests of homemakers and small men first, and that local questions would be decided by local officers and on local grounds. The old Land

western lore—a technician, community organizer, outdoorsperson, all in one.[38] Pinchot loved to tell of the test given by Fritz Olmsted to his prospective rangers in the Bitterroot Valley in Montana. It included proof of the ability to run compass lines and other necessary tasks. In addition, the examination "also included two other highly practical tests. The first was 'Cook a meal.' And the second: 'Eat it.' "[39] Norman MacLean adds another dimension to this hardy breed:

> They still picked rangers for the Forest Service by picking the toughest guy in town. Ours, Bill Bell, was the toughest in the Bitterroot Valley, and we thought he was the best ranger in the Forest Service. We were strengthened in this belief by the rumor that Bill had killed a Sheepherder. We were a little disappointed that he had been acquitted of the charges, but nobody held it against him, for we all knew that being acquitted of killing a sheepherder in Montana isn't the same as being innocent.[40]

The emphasis on policy-making in the field went hand-in-glove with another development of the formative years, the tradition of protecting community stability.[41] The reasons for this concern with local communi-

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Office custom of referring pretty much everything to Washington for incubation and ultimate decision was definitely out.").

38. The ranger is captured well in H. KAUFMAN, *supra* note 11, at 194:

> When a ranger takes over a new district, he is generally invited promptly to join local, civic and community organizations—partly because his position as manager of large properties automatically makes him a person of some standing in most localities, partly because the Forest Service is always "represented" in such associations. It is with the rangers that loggers, ranchers, picnickers, and permittees of all kinds do business—both in negotiating agreements with the Forest Service, and when the agreements are supervised. The rangers are therefore shown considerable deference. The rangers are cast in the role of law enforcement officers when trespasses occur; to violators, they often appear, and are treated, as figures of authority. Men engaged for emergency fire fighting see them as fire bosses in full charge of complicated and dangerous operations. They appear before school and college groups, associations of young people (4-H Clubs, Future Farmers of America, etc.), garden clubs, hunting and fishing clubs, and similar groups in fulfillment of their information and education responsibilities (especially for fire prevention purposes). To many local residents, they are employers who provide seasonal employment. In business circles, they appear as executives managing tens—even hundreds—of thousands of acres of valuable land worth millions of dollars and doing thousands of dollars worth of business every year. For most people, in short, they stand for the Forest Service; indeed, they personify the Forest Service. The role is thrust upon them.

39. G. PINCHOT, *supra* note 18, at 281.

40. N. MACLEAN, A RIVER RUNS THROUGH IT AND OTHER STORIES 126 (1976).

41. *See, e.g.*, U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, THE USE OF THE NATIONAL FORESTS 19 (1907):

> On a National Forest the present and future local demand [for timber] is always considered first. The Government tries to see that there shall always be enough timber and wood on hand for use by the home builder, the prospector, the miner, the small mill man, the stockman and all kinds of local industries. If local needs promise to consume it all, nothing is allowed to be shipped out. . . .

See also id. at 22:

ties, which has been traced to 1905,[42] were compelling in every respect. Many western towns are surrounded by national forests. In addition to logging, grazing in national forests was an important economic use, especially early in the century.[43] The Forest Service was an integral and influential part of society in the West, and the agency responded by relying on the ranger's community contacts and by making some adjustments in economic output to account for local needs.[44] The ideal was to make policy around the campfire.[45] A good part of the Service's strength during the early years was due to fulfilling that ideal figuratively if not literally.

All of these traditions can fairly be described as law, especially since Congress chose to affirm them implicitly by not altering them,[46] at least not until 1960[47] and 1976.[48] I will come back to the question of whether, and in what form, these agency laws of the formative years have survived the recent legislation.

A second era of especial impact is what I will call the preservation years. That era dates from 1924, when Aldo Leopold succeeded in setting aside the first governmentally sanctioned wilderness area anywhere in the world,[49] to 1939, when Bob Marshall died.[50] Marshall, who was a founder

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> In allotting the range the small local owners are considered first; then the larger local owners who have regularly used it; then the owners who live at a distance, but who have been regular occupants; and lastly, if there is any room left after these have been provided for, the owners of transient stock.

42. *See* Jackson & Flowers, *The National Forests and Stabilization: A Look at the Factual Record*, 8 WESTERN WILDLANDS 20 (1983).

43. *See generally*, P. FOSS, POLITICS AND GRASS (1960). Professor Coggins has written extensively about public rangeland management. *See generally*, Coggins, Evans & Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Fedeal Power*, 12 ENVT'L L. 535 (1982); Coggins & Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVT'L L. 1 (1982); Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery*, 1934-1982, 13 ENVT'L L. 295 (1983); Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVT'L L. 1 (1983).

44. H. KAUFMAN, *supra* note 11, at 76-80.

45. *See* G. PINCHOT, *supra* note 18, at 286-87:

> But when we showed them that we could throw the single and the double diamond hitch, carry our own packs, and find our own way by day or night as well as they could, when they found that our men could talk to them, each in his own language about his own business, with good will and understanding, the old rancor began to lose its edge.

46. *See supra* note 33.

47. Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-531 (1982)) [hereinafter referred to as MUSYA].

48. *See supra* note 1 (NFMA).

49. The creation of the 574,000 acre Gila Wilderness Area in New Mexico was unprecedented. J. HENDEE, G. STANKEY & R. LUCAS, WILDERNESS MANAGEMENT 35 (1978). It set the pattern for the Forest Service's 9.1-million-acre system of roadless wilderness areas which was given force of law by Congress as "instant wilderness" in the National Wilderness Preservation Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964), 16 U.S.C. §§ 1131-1134 (1982). *See* Flader, *Thinking Like a Mountain: A Biographical Study of Aldo Leopold*, 17 FOREST HIST. 15, 20 (1973).

of the Wilderness Society[51] and who is memorialized by the wonderland of nearly 1 million areas in Montana that is named after him,[52] was Chief of the Division of Recreation in the late 1930's. Fully 5 million of the original 9.1 million acres of "instant wilderness" designated by the Wilderness Act of 1964 can be attributed to Bob Marshall's activism.[53]

The historic preservation work of Leopold, Marshall, and many others[54]—this apparent cross-current within a commodity-oriented agency—was in fact fully consonant with a major Forest Service policy, the tradition of activism in establishing agency conservation authority.[55] This tradition is perhaps most pronounced during this preservation era but the Service had acted aggressively during the formative years to establish its powers to conserve resources. In order to obtain judicial confirmation of its authority to require grazing permits and to levy administrative fines, the Service carefully picked out two test cases involving Fred Light and Pierre Grimaud.[56] The cases went to the Supreme Court, where the Forest Service prevailed.[57] The prosecution of these and other test cases has properly been called "a sophisticated legal program" and an "outstanding achievement. . .of a dogged strategy."[58] This is all the more true because administrative law was then in its infancy and, at that time, the Service's arguments for expansive authority bordered on the radical.[59]

This activist tradition continues today in important respects. During

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50. Marshall died of a heart failure at the age of thirty-eight. See H. STEEN, *supra* note 11, at 212; S. DANA & S. FAIRFAX, *supra* note 11, at 158. Some have speculated that punishing backpacking trips contributed to his untimely demise. *See* R. NASH, WILDERNESS AND THE AMERICAN MIND 206 (3d ed. 1982).

51. *See* M. FROME, WHOSE WOODS THESE ARE: THE STORY OF THE NATIONAL FORESTS 182 (1962).

52. *Id.* at 184-85.

53. *See generally*, J. HENDEE, G. STANKEY & R. LUCAS, *supra* note 49, at 61-69.

54. *See generally*, McArdle & Maunder, *Wilderness Politics: Legislation and Forest Service Policy*, 19 J. FOREST HIST. 166 (1975).

55. The tradition of conservation activism is documented in McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 296 (1966). *See generally* McArdle & Maunder, *supra* note 54, at 169: "[T]he Forest Service was the first government agency to designate large areas for preservation as wilderness. . . . Other agencies had to be prodded into setting aside specific wilderness areas and this was one of the main reasons why legislation [like the Wilderness Act of 1964] was sought." *See also supra* note 49 and *infra* note 80.

56. *See generally* H. STEEN, *supra* note 11, at 88-89.

57. Light v. United States, 220 U.S. 523 (1911); United States v. Grimaud, 220 U.S. 506 (1911).

58. *See* H. STEEN, *supra* note 11 at 89.

59. The Court rejected delegation arguments in both *Grimaud* and *Light* by holding that the Secretary of Agriculture had merely exercised a "power to fill up the details" of a congressional enactment. United States v. Grimaud, 220 U.S. at 517; Light v. United States, 220 U.S. at 534 (citing *Grimaud*). Delegations of authority were struck down in two cases of the era. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schecter Poultry Co. v. United States, 295 U.S. 495 (1935). Today, of course, delegations are routinely approved. *See, e.g.*, B. SCHWARTZ, *supra* note 23, at 33-52.

the 1960's the Forest Service instituted a wide-ranging review, known as the RARE process, of all roadless areas in the National Forest.[60] In the early 1970's, the agency waged a major, though unsuccessful, campaign to establish minimum stream flows in the national forests.[61] Concurrently, the Service entered the emotion-laden field of hardrock mining and imposed conservation requirements on mining activities in the national forests.[62] In 1981, the agency's regulatory authority was upheld by the Ninth Circuit.[63]

Another tradition became settled during the 1920's and 1930's, the political independence of the Chief: the office does not turn over with new administrations.[64] Even today, Pinchot remains the only Chief whose departure was tinged with political overtones.[65] We need, once again, to reflect on just how special some of these traditions are. Although another such federal agency may well exist, I know of nowhere else in our federal system where a presidential appointee is automatically retained—purely by custom, without any statute requiring a fixed term.

The third era, what I am calling the years of turmoil, ran from the mid-1960's through the passage of the National Forest Management Act of 1976.[66] It was a time of intense public scrutiny and criticism, not all of it warranted. Many of the causes for this upheaval are largely independent of Forest Service policy and it is necessary to place these issues in a broader framework.

The Forest Service came under a microscope after World War II because of a series of societal changes. The nation began to move West. Even residents of the East could now reach the public lands by air or by the newly-constructed system of interstate highways. There was a post-war boom in outdoor recreation: total recreational visits to national forests increased from less than 10 million in 1948, roughly the historical level, to 190 million in 1976, an astonishing twenty-fold increase.[67] There was also a

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60. The RARE studies are generally discussed in S. DANA & S. FAIRFAX, *supra* note 11, at 299-302. *See also* California v. Block, 690 F.2d 753 (9th Cir. 1982); *infra* note 136.

61. *See* United States v. New Mexico, 438 U.. 696 (1978).

62. *See* 36 C.F.R. Part 252 (1981). A discussion of the agency's entrance into this field can be found in G. COGGINS & C. WILKINSON, *supra* note 5, at 373-96.

63. United States v. Weiss, 642 F.2d 296 (9th Cir. 1981).

64. *See* G. ROBINSON, *supra* note 9, at 28; H. STEEN, *supra* note 11, at 328-29; D. BARNEY, *supra* note 11, at 107-08 ("Moreover, 'because of the professional nature of the job', chiefs have been appointed from the senior ranks of the Forest Service itself and have served, not at the pleasure of the Secretary or President, but up to retirement age.").

65. *Id.*; *see also supra* note 14.

66. *See supra* note 1.

67. *See* Baden, *Trees, Waves and Economic Efficiency: A Casual Analysis of the Political Economy of Deadwood Salvage* in INTERMOUNTAIN SCIENCE EXPERIENCE CENTER DEADWOOD SALVAGE PROGRAM SYMPOSIUM 3 (1979).

post-war boom in housing, which of course translates into demand for wood products. In spite of the agency's traditional focus on timber, the national forests had never been subject to intensive harvesting—they were being held for the future. But in the 1950's and 1960's the future became now. Historically, the national forest produced about 1 billion board feet of timber per year, just 2-5% of the country's softwood timber production.[68] The 1 billion became 11 or 12 billion and the 2-5% became a figure in excess of 25% in just two decades.[69] This happened quickly and it happened under the hot glare of a public attention of a wholly new magnitude.[70]

There were concurrent changes in the law. The Administrative Procedure Act,[71] passed in 1946, became a vehicle for "hard looks" by judges in the 1970's.[72] Agency files were declared open by the Freedom of Information Act.[73] The National Environmental Policy Act,[74] which went into effect in 1970, enlarged the role of the public. Congress gradually became more active in public land law with statutes such as the Multiple-Use, Sustained-Yield Act of 1960,[75] the Wilderness Act of 1964,[76] and the Wild and Scenic Rivers Act in 1968.[77] Taken together, these legal developments transformed federal timber harvesting from a private proprietary function to a public and highly visible matter.

The Forest Service reacted inadequately to the criticism and lawsuits. It formed something of a bunker mentality. This is the view of Professor Fairfax, who has written a major history of public land policy:

> Contrary to widespread belief, the Forest Service was not, on the Monongahela or elsewhere, intransigent. At first, however, [its] response was defensive. In the Pinchot tradition, foresters have a calling as well as a profession. Many believed that they knew what was best for the forests and that they were

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68. *See generally* West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz, 522 F.2d 945, 954 (4th Cir. 1975) (commonly referred to as the *Monongahela* litigation).

69. *See generally*, G. COGGINS & C. WILKINSON, *supra* note 5, at 470.

70. *See* D. BARNEY, *supra* note 11, at 41-51.

71. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3334 and 5372 (1982).

72. The so-called "hard look" doctrine, stemming from Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), requires closer scrutiny of the substantive and procedural grounds for federal agency decisions. *See generally*, Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1804 (1978); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979); Davis, *Administrative Common Law and the Vermont Yankee Decision*, 1980 UTAH L. REV. 3.

73. 5 U.S.C. § 552 (1982). The public-interest fee waiver provision of the Act, 5 U.S.C. § 552(a)(4)(A) (1982), is discussed in Bonine, *Public Interest Fee Waivers Under the Freedom of Information Act*, 1981 DUKE L.J. 213.

74. 42 U.S.C. §§ 4431-4361 (1976) (commonly referred to as NEPA). Professor Rodgers labels NEPA the "Sherman Act of environmental law". W. RODGERS, ENVIRONMENTAL LAW 697 (1977).

75. *See supra* note 47.

76. *See supra* note 49.

77. Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. §§ 1271-1287 (1982)).

> doing quite well without public interference. . . . Unfortunately, by the time the Forest Service and the profession began to admit and correct mistakes. . ., the national mood was such that the critics refused to be mollified.[78]

This public mood was reflected in the NFMA, which brought a new generation of legal constraints to federal forest policy.

None of these events, nor my suggestions that will follow, should obscure yet another Forest Service tradition—one of excellence—a factor that continues to be an almost tangible factor in the debate over forest policy. Great conservationists have been considerably lavish with their praise. Stewart Udall called Pinchot "a magnificent bureaucrat. In his time the Forest Service was the most exciting organization in Washington. . . . In the field, around campfires, and in his home GP discussed his next moves and gave his associates the feeling that they served on the general staff in a national crusade."[79] The praise has rightly been directed to times other than the formative years. Bernard DeVoto, writing his Easy Chair column for Harper's, chronicled the Service's staunch battle against an ancestor of the Sagebrush Rebellion during the late 1940's and early 1950's.[80] Wallace Stegner, whom many of us would judge to be one of the wisest observers of the American West alive today, has said that "thanks to growing public comprehension of the issues and the continuing work of federal bureaus, there will always be some roadless back country."[81] Surely Stegner had the Forest Service most prominently in mind. Other writers, speaking as environmental advocates, have made concessions in similar terms.[82] As I say, that tradition of excellence is a real thing, and it is an unescapable part of the debate.

I will turn to the issue of how recent congressional action, especially the NFMA, has affected the main Forest Service traditions, leaving aside, of course, what I have called the tradition of excellence.

The first question is the viability of the tradition of management for

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78. S. DANA & S. FAIRFAX, *supra* note 11, at 227.

79. S. UDALL, THE QUIET CRISIS 103-04 (1963).

80. Some of these columns are collected in B. DEVOTO, THE EASY CHAIR (1955). One article, entitled *Sacred Cows and Public Lands*, *id.* at 257, discusses a series of hearings held in 1947 in several western states by the House Subcommittee on Public Lands. The ostensible purpose of the hearings was to gather information concerning a Forest Service proposal to reduce the number of livestock permitted to graze on the national forests. DeVoto suggests that the subcommittee was less than objective in its efforts and in fact was a front for interests advocating "restoration" of the public lands to the states. When the hearings moved to Salt Lake City, these advocates "ran into the mobilized opposition of a state which had been alarmed by repeated catastrophes resulting from overgrazing ranges. . .and which knew that the only realistic hope of protecting them lay in the Forest Service and its co-operation with other government agencies that direct conservation." *Id.* at 275. For a biography of DeVoto, see W. STEGNER, THE UNEASY CHAIR: A BIOGRAPHY OF BERNARD DEVOTO (1974).

81. W. STEGNER, *supra* note 10, at 38.

82. *E.g.*, D. BARNEY, *supra* note 11; M. FROME *supra* note 10.

timber production. It is an issue that is of the first moment because, although the Forest Service is a changing agency in this regard, it seems plain that many, if not most, senior officials in the agency still view their main mission as being the production of timber.[83] Other resources are, I think, respected but the basic attitude of many is to accommodate the noncommodity resources within a timber regime. This attitude matters for the obvious reason that these senior officials in Washington, the regions, and the forests are the main formulators of policy.

The notion of timber domination does not square with the statutes. The Multiple-Use, Sustained-Yield Act of 1960 listed six coordinated resources.[84] Congress took great care to list them alphabetically and to

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83. *See, e.g.*, California v. Bergland, 483 F. Supp. 465, 492 (E.D. Cal. 1980), *modified and rev'd in part sub nom.* California v. Block, 690 F.2d 753 (9th Cir. 1982) ("In addition to restricting the range of alternatives and focusing on alternatives mainly skewed toward development, the Forest Service failed to discuss two specific types of alternatives [in the Final RARE II EIS] that appear to be not only reasonable, but 'obvious.' " (citation omitted)); Baden, *The New Resource Economics*, FOREST PLANNING, Dec. 1983, at 13 ("[T]he Forest Service, with its emphasis on the physical resource rather than the value of that resource to the people, tries to manage commercial timber in the arid lands whose highest values conflict with intensive timber management."); Fortenbery & Harris, *Public Participation, The Forest Service, and NFMA: Hold the Line*, 4 PUB. LAND L. REV. 51, 66 (1983) ("In 1982, the Forest Service drafted a new 'rule book'. 'Perhaps one of the most significant changes [in the new book] is that the lumber market, not biology, will now determine which lands are to be classified as commercial timber land.' " (footnote omitted)); Nelson, *The Public Lands*, in CURRENT ISSUES IN NATURAL RESOURCE POLICY (P. Fortney ed. 1982) ("Ideology and basic policy principles are not the only areas in which the public land agencies have been slow to respond to change. The original main outputs of the public lands, timber and forage, now occupy disproportionate management time and attention."); Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" For Public Land Management* (Part I), 53 U. COLO. L. REV. 229, 258 (1982) ("No one industry or group or area is given favored treatment by the [Multiple Use Sustained Yield Act of 1960] in the allocation of resources—a standard that many would argue has been violated more often than not."). Not all of the reasons are obvious:

> [T]he Forest Service is an unusually coherent government agency, staffed by individuals who are profoundly committed to the agency and accustomed to team play. Some grouse, some dissent, and some quit, but when a decision is made, the troops generally rally and follow the leader. As an agency the Forest Service is, by tradition, most uncommonly apt to comply with, rather than resist or reformulate, commands. . . . [F]orest Service personnel are (albeit with many notable exceptions) generally naive about the American political system and, more importantly, their role in it. They are less inclined than most to question or challenge Congressional directives. Part of this naivete results from the systematic miseducation of professional resource managers. For decades they have been told that their authority rests on apolitical technical competence. They do not make policy, they have been taught, nor should they become involved in the political process. They simply make technical decisions to implement the will of the people on the nation's forests. Thus misinformed, foresters are unlikely to second-guess a Congressional mandate and are generally unlikely to accept or fulfill their own critical—and highly political—role in defining, fleshing out, and redirecting legislative programs.

Fairfax, *RPA and the Forest Service*, in A CITIZEN'S GUIDE TO THE RESOURCES PLANNING ACT AND FOREST SERVICE PLANNING 210, 211-12 (Conservation Foundation 1980).

84. 16 U.S.C. § 528 (1982) provides that "It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife

state explicitly that the system was not to be managed for the "greatest dollar return."[85] The NFMA, which was in every respect the "comprehensive" legislation that its legislatitive history said it was,[86] added another noncommodity resource, wilderness,[87] and is laced with statutory provisions and legislative history charging protection of, and equal treatment for, the non-commodity resources.[88] They are laws charting a common

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and fish purposes."

85. 16 U.S.C. § 531(a) (1982):

> "Multiple-Use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

The order in which the resources are listed in the bill is not to be construed as indicating any priority of one of the resources over another. The listing is merely alphabetical. H.R. REP. No. 1551, 86th Cong., 2d Sess. 3, *reprinted in* [1960] U.S. CODE CONG. & ADMIN. NEWS 2377, 2379.

An interesting discussion of the "big squabble" over the listing order of the resources can be found in Crafts, *Saga of a Law, Part I*, 76 AM. FORESTS, June 1970, at 13, 18, 19, 52.

86. *See, e.g.*, 16 U.S.C. § 1600(3) (1982); S. REP. No. 94-893, 94th Cong., 2d Sess. 25, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6662, 6684; H.R. REP. No. 94-1478, Pt. 1, 94th Cong., 2d Sess. 10, *reprinted in* Senate Comm. on Agriculture, Nutrition, and Forestry, 96th Cong., 1st Sess., Compilation of the Forest and Rangeland Renewable Resources Act of 1974, at 576, 585 (Comm. Print 1979) [hereinafter referred to as COMPILATION]; S. REP. No. 94-1335, 94th Cong., 2d Sess. 19, *reprinted in* COMPILATION, *supra*, at 730, 747.

87. 16 U.S.C. § 1604(e)(1) (1982). *Cf.* 16 U.S.C. § 529 (1982) (declaration in MUSYA that the establishment and maintenance of wilderness areas is consistent with its purposes and provisions).

88. The Senate Committee said this:

> Timber production and sale are important aspects of the overall management of the National Forest System lands. However, they are not the sole objectives of management planning . . . . The other resources of the forests, wildlife and fish habitats, water, air, esthetics, wilderness must be protected and improved. Consideration of these resources is an integral part of the planning process.

S. REP. No. 94-893, 94th Cong., 2d Sess. 10, *reprinted in* [1976] U.S. CODE CONG. & ADMIN. NEWS 6662, 6671.

> The rapid, widespread cutting of currently mature trees may well be an advisable practice on privately-held lands where the basic management objective is maximizing short-term economic returns. The Committee believes, however, that such practices are incompatible with the management of the National Forests, where decisions must be based on numerous public values of the forest, in addition to economic returns.

Id. at 27, *reprinted in* [1976] U.S. CODE CONG. & ADMIN. NEWS at 6686. *See also Forest and Rangeland Management: Joint Hearings before the Subcomm. on Environment, Soil Conservation, and Forestry of the Senate Comm. on Agriculture and Forestry and the Subcomm. on the Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong. 2d Sess. 260 (1976) (statement of Sen. Humphrey, chief sponsor of S.3091, eventually enacted as the NFMA) ("The days have ended when the forest may be viewed only as trees and trees viewed only as lumber. The soil and the water, the grasses and the shrubs, the fish and wildlife, and the beauty that is the forest must become integral parts of the resources managers' thinking and actions."); *id.* at 262

sense definition of "resource" as something of value, something that can meet a need.[89] These laws, fairly read, are monuments to humanity in the broadest sense.

Why, then, does the tradition in favor of timber production persist? Part of the answer is habit, an understandable and human attitude of persons who were following very different internal laws before the broad-based societal and legal movements of the last fifteen years. The logic and practicality of the Pinchot Letter ran deep within the Forest Service and it is not easy for veteran employees to believe that such a basic organic document—once demonstrably a source of law—has been repealed.[90]

(statement of Sen. Humphrey) (the Forest Service should "follow the multiple use and sustained yield principles rather than turning the national forests into tree production programs which override other values."); *id.* at 415 (statement of Sen. Church, co-sponsor of S.3091) ("I would like to reiterate the basic purpose of this legislation [S.3091], namely to assure that previous Congressional intent as to the management of *all* the resources of the national forest system is made a reality.") (emphasis in the original); *id.* at 1054 (statement of Sen. Haskell, Chairman, Subcomm. on the Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs) ("[T]he protection of these resources [recreation opportunities, wildlife, watershed, and forage] must be assigned as great a priority in any forest management policy as the production of timber."); *id.* at 362 (statement of Sen. Metcalf) (Congress can formulate guidelines "to provide for renewable resource management and to recognize the various uses including recreation, wildlife management, and above all watershed control."); COMPILATION, *supra* note 86, at 233 (statement of Sen. Humphrey) (excerpted from March 5, 1976 CONGRESSIONAL RECORD) ("Time has demonstrated that we need more than a new prescription for selling timber. We need a fundamental reform in managing all the resources associated with forested land of the national forest system.").

The text of the NFMA reflects these concerns. Each unit plan must provide for multiple use, sustained yield management and include coordination of outdoor recreation, range, timber watershed, wildlife and fish, and wilderness. 16 U.S.C. § 1604(e)(1) (1982). Public participation in the development, review, and revision of unit plans is mandated. 16 U.S.C. § 1604(d); *see also* Fortenbery & Harris, *supra* note 83. Each plan must be prepared by an interdisciplinary team. 16 U.S.C. § 1604(f)(3). Development and revision of plans must follow guidelines that: insure consideration of economic and environmental aspects of various systems of resource management; provide for diversity of plant and animal communities; insure research of the impacts of management systems to the end that land productivity is not impaired; insure that timber will be harvested only where soil, slope, or other watershed conditions will not be irreversibly damaged; insure the protection of fish habitat from timber production; insure that harvesting systems are not selected primarily because of maximum dollar return or unit output of timber; and, limit clearcutting. See 16 U.S.C. § 1604(g)(3).

The organic charter of the Bureau of Land Management, the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified primarily at 43 U.S.C. §§ 1701-1782 (1976)), was enacted contemporaneously with the NFMA. In its declaration of policy, Congress again broadly defined the resources of the public lands by its direction that such lands

> be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8) (1976).

89. *See, e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 2122 (2nd ed. unabridged).

90. The Bolle Report, named after principal author Dr. Arnold Bolle of the University of Montana School of Forestry, addressed Forest Service practices in the Bitterroot National Forest. The

Another reason for the resistance is likely the notion that you can best discover what Congress intends by looking at appropriation measures, not substantive statutes.[91] The President repeatedly submits, and the Congress repeatedly approves, budgets that are heavily weighted in favor of commercial wood products.[92] But that argument is fairly answered by the fact that the value of non-commodity resources can be produced with many fewer budget dollars for management.[93] Further, the congressional economic commitment to noncommodity resources is measured in part by

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report concluded, among other things, that "[t]he heavy timber orientation is built in by legislative action and control, by executive direction and by budgetary restriction. It is further reinforced by the agency's own hiring and promotion policies and it is rationalized in the doctrines of its professional expertise." See S. DOC. No. 91-115, 91st Cong., 2d Sess. 14 (1970).

The irony of the persistence of the timber production tradition is illuminated by Pinchot's own words:

> In other words, our organization and our methods must never be frozen, but always subject to change. Whenever and wherever experience brought better methods or better organization to light, we must be ready to throw off the old and take on the new. . . . The old battle cry of bureaucracy, "We have always done it this way," meant nothing to the men of the Forest Service.

G. PINCHOT, *supra* note 18, at 287.

91. *But cf.* Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-93 (1978) (discussing the limited utility of appropriations measures as indices of congressional intent).

92. The total Forest Service appropriation for fiscal year 1983 was approximately $1.9 billion. *See* Act of Dec. 30, 1982, Pub. L. No. 97-394, Title II, 96 Stat. 1982 (1982); *see also* U.S. Dept. of Agriculture, Forest Service, 1984 Budget Explanatory Notes for Committee on Appropriations 10, *reprinted in Dept. of Interior and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations, Part 2*, 98th Cong., 1st Sess. 1119 (1983). Slightly more than half of this amount, approximately $1.01 billion, was for the "National Forest System" component of the Forest Service administrative structure. *Id.* The timber sales program for fiscal year 1983 was appropriated approximately $579 million, *id.*, at 1250, well over one-half of the "National Forest System" allocation. The timber sales program includes amounts for timber management, harvest administration, road construction (but not including the purchaser credit authorization), and timber "support" (from line items such as recreation, wildlife and fish, minerals, soil and water, range, road maintenance, forest fire protection, and land line location). *Id.*

For fiscal year 1984, the total requested budget for the Forest Service is approximately $1.8 billion. *See id.* at 1119. Slightly less than half of this request, approximately $873 million, is for the "National Forest System" component of the Forest Service. *Id.* The timber sales program for Fiscal Year 1984, as requested, has a price tag of approximately $605 million, *id.* at 1250, over two-thirds of the "National Forest System" allocation. This timber sales program contains the same line item accounts as the 1983 program. *Id.*

Budget figures for prior fiscal years show similar preferences for selling timber and building roads.

93. For example, wilderness areas are to be managed in such a manner "as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness. . ." 16 U.S.C. § 1131(a) (1982). Thus, although wilderness areas are in fact managed, J. HENDEE, G. STANKEY & R. LUCAS, WILDERNESS MANAGEMENT (1978), administration of wilderness requires relatively small amounts of appropriated funds. *See also* Coggins & Evans, *supra* note 1, at 440 ("But the whole point of RPA and cognate legislation is resource scarcity: demand for public resources—which typically have low or zero prices—far outstrips available supply, and resource allocation by pricing alone is inappropriate for the Nation's natural heritage.").

opportunity costs that are incurred by foregoing exploitive development.[94] Opportunity costs do not show up in federal budgets. Beyond that, exclusive reliance on economics is wrong, for this field is rife with values that economics and budgets can never measure.[95] This situation is not like a statutory program to fund special education when the program goes unfunded. Relatively high appropriations figures for timber production cannot extinguish or modify the plain meaning of positive law requiring an equal commitment to the noncommodity resources.

The institutional bias in favor of timber production matters in countless ways, large and small. One example is the RARE wilderness process, where Forest Service recommendations generally have been below the figures contemplated by Congress.[96] In Oregon, the largest timber-producing state, the Forest Service recommended 368,000 acres for wilderness but Congress is about to enact a law far above that level.[97] In this setting, as in others, the tradition of management for timber produc-

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94. *See, e.g.*, Robinson, *Wilderness, The Last Frontier*, 59 MINN. L. REV. 1 (1974); Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).

95. *See, e.g.*, A. LEOPOLD, ROUND RIVER 150 (1953):

> Science has been trying for a generation to classify hawks and owls into 'good' and 'bad' species, the 'good' being those that do more economic good than harm. It seems to me a mistake to call the issue on economic grounds, even sound ones. The basic issue transcends economics. The basic question is whether a hawkless, owl-less countryside is a livable countryside for Americans with eyes to see and ears to hear.

96. The Forest Service recommended that 900,000 acres be designated as wilderness in California, *see* U.S. DEPT. AGRICULTURE, FOREST SERVICE, RARE II FINAL EIS C-1 (1979) [hereinafter referred to as RARE II]; the wilderness designations in H.R. 1437 (California Wilderness Act of 1983) total some 2,332,000 acres. *See* H.R. REP. NO. 98-40, 98th Cong., 1st Sess. 9 (1983). H.R. 1437 passed in the House, 297-96, on April 12, 1983, see [1983] 2 CONG. INDEX (CCH) ¶ 35,011, and has been referred to the Senate. *Id.* Senator Wilson has introduced a bill that would designate approximately 1,700,000 acres as wilderness. *See* 9 PUBLIC LAND NEWS No. 4, Feb. 16, 1984, at 4. The Forest Service recommended that just 269,000 acres be designated as wilderness in Washington. *See* RARE II, *supra* at S-1. The Washington RARE II bill, S. 837, proposes wilderness designations totalling 363,000 acres, *see* 8 PUBLIC LANDS NEWS No. 24 Dec. 8, 1983, at 10, and hearings will consider the inclusion of at least 12 additional areas. *Id.*

The Forest Service's recommendation for RARE II wilderness in Utah totals some 492,000 acres. *See* RARE II, supra at R-1. The Utah RARE II wilderness bills, H.R. 4516 and S. 2155, would designate more than 700,000 acres as wilderness. *See* 9 PUBLIC LAND NEWS NO. 4, Feb. 16, 1984, at 4. The Forest Service proposed 400,000 acres of RARE II wilderness in Arizona. *See* RARE II, supra at B-1. Sen. Goldwater and Rep. Udall both have introduced bills that would designate almost twice that acreage as wilderness. *See* 9 PUBLIC LAND NEWS NO. 4, Feb. 16, 1984, at 4.

On the other hand, the Forest Service's RARE II wilderness recommendation exceeds the amounts proposed in the Idaho and Wyoming wilderness bills. *Id.*

97. The Service's wilderness recommendations for Oregon was 368,000 acres, *see* RARE II, *supra*, at 0-1; the wilderness designations in H.R. 1149 (Oregon Wilderness Act of 1983) totals 1,128,575 acres. *See* H.R. REP. No. 98-13 Pt. 1, 98th Cong., 1st Sess. 5 (1983). H.R. 1149 passed in the House, 252-93, on March 21, 1983, *see* [1983] 2 CONG. INDEX (CCH) ¶ 35,008, and has been referred to the Senate. *Id.* Sen. Hatfield's Oregon wilderness proposal would designate approximately 780,000 acres as wilderness and 190,000 acres in other protected status. *See* 16 SIERRA CLUB NAT'L NEWS REP. No. 6, March 28, 1984, at 4.

tion simply impedes policymaking for it results in the Forest Service's proceeding contrary to congressional will.

The old tradition is also at the root of a transcendent issue, the deeply troubling fact that in many regions and forests the costs of timber sales may exceed timber sale income. The National Resources Defense Council issued a detailed and extensive report to that effect in 1980.[98] The Department of Agriculture responded on several counts, including a contention that much of the investment in timber sale costs is for roads and that not all road costs should be charged to the individual sale because roads serve many other purposes, such as recreation, restocking of timber stands, and wildlife management.[99] NRDC stuck to its guns. Recently, President Reagan's Private Sector Survey on cost control reached conclusions very similar to NRDC's: many of the Forest Service's programs are subsidies to the timber industry.[100]

The statutes do not expressly require a positive economic return on timber sales, but they strongly suggest it. The NFMA's requirement of "economic suitability" may prohibit harvesting on lands where costs substantially exceed revenue.[101] Further, the statutes seem to require cost-

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98. NRDC alleged that

> Many individual administrative units of the National Forest System appear consistently to be spending more in support of timber sales programs than they receive in proceeds from those programs. For a substantial number of units, costs are more than twice as great as receipts; in some instances, they are more than four times as great.

NATURAL RESOURCES DEFENSE COUNCIL, GIVING AWAY THE NATIONAL FORESTS: AN ANALYSIS OF U.S. FOREST SERVICE TIMBER SALES BELOW COST 2 (1980).

99. *See* Forest Service, U.S. Dept. of Agriculture, Response to "Giving Away the National Forests", June 3, 1980 (copy on file with PUBLIC LAND LAW REVIEW):

> Investments in forestry encompass far more than just the harvest and regeneration of mature stands of trees. Investments in transportation systems, for example, make it possible to manage adjacent timber stands, to salvage dead and dying trees, to improve wildlife habitat, to increase fire protection, and to provide recreation opportunities for the public.

100. *See, e.g.*, The President's Private Sector Survey on Cost Control, Task Force Report on the Department of Agriculture 188 (April 15, 1983) ("The Forest Service (FS) has 190 million acres with over 42,000 employees, but it posts losses of $1 billion per year."); *id* at 192 ("The FS has every reason to be concerned about the level of contracts for uncut timber. . . . Timber sales have been rising much faster than the receipts to the Treasury and the larger the gap gets, the more expensive it is for the Government to hold these contracts . . . [I]f the FS were a business, it would have to borrow money to continue operations and the borrowing charges would be the cost of holding all these contracts. The Government is currently financing the deficit on which the FS is operating."); *id.* at 215 ("The National Forest System grazing program encompasses 102 million acres of land in 36 states. . . . Revenue of 14 cents per acre was generated, compared with a cost of 40 cents per acre to manage the program."); *id.* at 219 ("Because of road construction, timber revenues in 1981 were $190 million below the actual sale value. Road maintenance costs in 1981 were nearly $75 million, bringing the total cost of the road program to $555 million, nearly one-quarter of the entire Forest Service budget. The magnitude of the road program makes detailed analysis necessary if cost-efficiency is to be improved in providing access to the National Forests.").

101. Several factors are involved in the determination of which timber lands should be included in the inventory used to calculate the allowable timber harvest. Lands must be environmentally

effective roads, which are such a large part of the expense of timber sales. The Forest Roads and Trails Act[102] requires that forest roads must be built to "permit maximum economy in harvesting timber." The RPA,[103] supported by legislative history recognizing the delicacy of Forest Service road financing,[104] is even more direct: Forest Service roads "shall be carried forward on an economical and environmentally sound basis."

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suitable. *See* 16 U.S.C. § 1604(g)(3)(E) (1982). In addition, lands are excluded from the inventory lands if they cannot be harvested economically. *See generally* M. CLAWSON, FORESTS FOR WHOM AND FOR WHAT 42 (1975). Traditionally, the Forest Service's principal test for economic suitability has been whether land is capable of producing 20 cubic feet of wood per acre annually. *See, e.g.*, FOREST SERVICE MANUAL § 2412.13 (1972) [hereinafter referred to as FSM]. Under this standard approximately 38 million acres were classified as unsuitable at the time of the NFMA. *See* FSM § 2411.11 (1983). During legislative work on the NFMA, the Senate adopted a provision designed to exclude timber production from land that could produce 20 cubic feet but that could not pass a strict cost-benefit test. *See* S. REP. No. 893, 94th Cong., 2d Sess. 37 (1976). The Conference Committee modified the Senate provision by dropping the cost-benefit test in favor of a general mandate in Section 6 (k) of the NFMA to remove economically unsuitable lands from timber production. *See* 16 U.S.C. § 1604(k) (1982); S. REP. No. 1335, 94th Cong., 2d Sess. 28-29 (1976) (conference report). The Committee of Scientists that was appointed to advise the agency on drafting the NFMA regulations, *see* 16 U.S.C. 1604(h) (1982), *reprinted in* 44 FED. REG. 26,599-26,630 (1979), concluded that "it is fairly clear that the conferees did not want the Secretary to harvest timber on lands where by some rule of reason public benefits were less than production costs." Final Report of the Committee of Scientists 125 (Feb. 22, 1979). Notwithstanding the Committee of Scientists' "rule of reason" interpretation, the current regulations contain no discernible standards for determining economic suitability. The 20-cubic-foot test has been discarded. *See* 47 Fed. Reg. 43033 (1982). Apparently, land is excluded from the inventory as unsuitable only if it is not needed to meet the established timber goals. This is circular reasoning because the timber goals are based on the inventory.

The agency's interpretation of § 6(k) of the NFMA is being challenged by the National Resources Defense Council and others in an appeal of several NFMA plans in Colorado. The appeal of the San Juan National Forest plan alleges that only 8.2 mmbf of the 41.3 mmbf proposed for harvest will generate a favorable economic return. *See* Natural Resources Defense Council, et al, Statement of Reasons in Support of Appeal 2 (Dec. 5, 1983). The appellants state that "it is difficult to conceive of a meaningful interpretation of [§ 6(k)] which would permit the expansion of the San Juan timber program in the face of the economic data." *Id.* at 3.

102. Pub. L. No. 88-657, § 4, 78 Stat. 1089 (1964) (codified as amended at 16 U.S.C. §§ 532-538 (1982)); *see infra* note 104.

103. 16 U.S.C. § 1608(a) (1982).

104. Congress recognized that the timber purchaser credit method of financing roads, *see* 16 U.S.C. § 535 (1982) (provision of Forest roads and Trails act, *supra* note 102, requiring a transportation system that permits "maximum economy in harvesting timber"), was a unique grant of spending authority. *See* S. REP. No. 93-686, 93rd Cong., 2d Sess. 19, *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS 4060, 4077. This is the only Forest Service program where the agency has the authority to "appropriate" revenue without any Congressional control or any standard spelled out in law. *Id.*, *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS at 4078. The lack of accountability was explained this way:

> [W]hen timber purchasers are granted a reduced price to construct a road under a timber sale contract, the amount of reduction is based on the "estimated cost" for a road that may not have yet been designed (in fact the purchaser may subsequently design it under a design allowance in the timber contract), there is no "special account" created into which funds are placed, and thus no accountability on the part of either the Forest Service or the timber purchaser.

Id. at 20, *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS at 4078-79.

There are no reported cases on these economic issues, although litigation is pending in the courts.[105] As already emphasized, this is an area where the courts can generally be expected to be highly deferential since the economic questions are so complex.[106] In addition, there is at least one possible justification for the current Forest Service policies, the tradition of community stability.[107] Nevertheless, the statutes are sufficiently explicit that relief may well be granted on the right record. It goes without saying that such court rulings might work a fundamental restructuring of federal timber sales.

The bias in favor of timber production is involved in another issue that is likely to be of front-line importance, the codification in the NFMA of the non-declining even flow (NDEF) method of timber harvesting.[108] NDEF is a highly conservative variant of sustained-yield harvesting that limits the annual cut to "a quantity equal to or less than a quantity that can be removed in perpetuity on a sustained-yield basis."[109] This restrictive formula, which was voluntarily adopted by the Forest Service in the early 1970's, has little impact on most forests since its effect is felt mainly on the harvest of old growth, which is now mainly concentrated in the forests of the Pacific Northwest.[110] But, because these old growth forests tend to be the most valuable timber resources, the issue has system-wide ramifications.[111] In essence, NDEF stifles the rapid liquidation of old growth stocks

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105. Thomas v. Peterson, No. 82-2056 (D. Idaho, filed July 21, 1982) (submitted on cross motions for summary judgment and argued Dec. 21, 1983); Roush v. Morgan, No. CV 83-140 M (D. Mont., filed Sept. 2, 1983) (on which the author has consulted with attorneys for plaintiffs).

106. *See supra* notes 2, 4, 33. *See generally*, Brief of the United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment at 43-46, Thomas v. Peterson, *supra* note 105, where it is contended that: "it was never the intent of Congress that any particular sale pay for any particular road; deficit sales are acceptable insofar as multiple use objectives, not profit, govern analysis of forest management actions . . . . [P]laintiffs' economic analysis is inflated, inaccurate, and transparently result oriented. . . ."

107. *See supra* notes 41-45; *infra* notes 120-121 & accompanying text.

108. 16 U.S.C. § 1611(a) (1982).

109. *Id.*

110. *See generally*, Report of the President's Advisory Panel on Timber and the Environment 78 (1973).

111. Region Six (Oregon, Washington, and a small portion of Northern California), which provides approximately 50% of the annual timber harvest from all national forest lands, FOREST SERVICE, UNITED STATES DEPT. OF AGRICULTURE, IMPORTANT FACTS ABOUT THE PACIFIC NORTHWEST REGION 1 (1982), can be viewed as subsidizing the entire National Forest System. The old growth Douglas-fir areas of Northern California, Oregon and Washington account for at least 97% of the entire National Forest System's excess in receipts from timber sales over costs. Natural Resources Defense Council, *supra* note 98, at 25. This cannot, however, continue indefinitely:

> [A]s the remainder of the old growth stands available for harvest are cut over the next few decades, the harvest from the national forests of the Northwest will increasingly consist of smaller, less profitible trees. Further, many management costs will rise for new stands planted after the harvest of old growth since the old growth occurred naturally and did not require major investment to aid growth. In sum, the high returns to the Forest Service from

by requiring an even cutting schedule; thus NDEF prohibits a short-term, high-level harvest of the old growth with the inevitable "fall down" to a lower level when the big trees are gone.[112] The NFMA allows departures from the rigors of NDEF under certain circumstances.[113]

Apparently just two forests have proposed to depart from NDEF, but we can expect more.[114] Assistant Secretary John Crowell contemplates departures from NDEF to boost the national harvest. He believes that NDEF "makes no sense when applied to an old growth forest."[115] Mr. Crowell's chief advisor, Douglas MacCleery, is even more explicit: in his view, NDEF is a "needlessly rigid perversion of sustained-yield principles."[116] Both of course, are at odds with their source of authority, for Congress knew full well that NDEF would apply to old growth forests.[117]

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the Pacific Northwest are temporary and shrinking.

Id. at 11.

112. *See, e.g.*, G. COGGINS & C. WILKINSON, *supra* note 5, at 531-33; M. CLAWSON, FORESTS: FOR WHOM AND FOR WHAT? 80-81 (1975); S. DANA & S. FAIRFAX, *supra* note 11, at 331-34; Symposium, *Harvest Scheduling and the NFMA*, 75 J. FORESTRY 669 (1977).

113. 16 U.S.C. § 1611 (1982):

> (a) Limitations on removal; variations in allowable sale quantity; public participation
> The Secretary of Agriculture shall limit the sale of timber from each national forest to a quantity equal to or less than a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis: *Provided*, That, in order to meet overall multiple-use objectives, the Secretary may establish an allowable sale quantity for any decade which departs from the projected long-term average sale quantity that would otherwise be established: *Provided further*, That any such planned departure must be consistent with the multiple-use management objectives of the land management plan. Plans for variations in the allowable sale quantity must be made with public participation as required by section 1604(d) of this title. In addition, within any decade, the Secretary may sell a quantity in excess of the annual allowable sale quantity established pursuant to this section in the case of any national forest so long as the average sale quantities of timber from such national forest over the decade covered by the plan do not exceed such quantity limitation. In those cases where a forest has less than two hundred thousand acres of commercial forest land, the Secretary may use two or more forests for purposes of determining the sustained yield.
> (b) Salvage harvesting
> Nothing in subsection (a) of this section shall prohibit the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack. The Secretary may either substitute such timber for timber that would otherwise be sold under the plan or, if not feasible, sell such timber over and above the plan volume.

114. The Klamath National Forest, located in northern California, and the Deschutes National Forest in central Oregon contain alternatives in their draft plans that propose departures from NDEF. *See generally*, O'Toole, *Departures Now Arriving*, FOREST PLANNING, May 1983, at 14.

115. Crowell, *Northwest Forestry: A View from Washington*, in OLD GROWTH FORESTS: A BALANCED PERSPECTIVE 135 (April 1982). Mr. Crowell has also declared that "[m]any seem to believe that non-declining yield remains the policy of the Forest Service. Nothing could be further from the truth." John Crowell, *Economic Policy Statement* (Oct. 10, 1983), *reprinted in* FOREST PLANNING, Dec. 1983, at 19.

116. MacCleery, *Non-declining Yield and Community Stability: The False Connection*, 8 WESTERN WILDLANDS 7 (Winter, 1983).

117. *See, e.g.*, S. REP. NO. 94-89, 94th Cong., 2d Sess. 37, *reprinted in* 1976 U.S. CODE CONG.

There is no point now in trying to predict the development of NDEF law, except to say that departures seem sure to come and that lawsuits will follow close behind. There is much at stake. If the allowable cut is to be raised significantly, it must be accomplished through liquidation of old growth, almost certainly through departures from NDEF.[118] Needless to say, environmentalists will go to great lengths to protect the gene pools, highly specialized plant and wildlife environments, and cool, deep beauty and tranquility that are found in old growth stands.[119]

The Forest Service will likely justify its position on the last two issues—the legality of allegedly uneconomical sales and of questionable departures from NDEF—upon the tradition of protecting community stability.[120] Here, too, one can ask whether that tradition continues to have legal force. It is not mentioned in the comprehensive legislation as a proper consideration of forest policy. In addition, the notion actually works against the concept of departures from NDEF; a high rate of harvest may benefit the economy of a local community in the short- or mid-term. In the longer run, however, community stability is eroded because the bottom may drop out of the local economy when the "fall down" occurs after the old growth is exhausted.[121]

Further, these subsidies in the name of local community stability do not fit comfortably within the larger context of modern public land policy and law. In the 19th century, public land policy was openly premised on subsidies in order to open the West.[122] A central movement in federal land

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& ADMIN. NEWS 6664, 6696 (indicating Committee's awareness of criticisms of NDEF as too conservative). "This issue proved to be the most difficult of the forest policy issues for the 94th Congress to try to resolve." McGuire, *National Forest Policy and the 94th Congress*, 74 J. FORESTRY 802 (1976). Former Chief of the Forest Service McGuire went on to note that:

> [T]he nondeclining even flow policy of the Forest Service has been widely criticized by those who believe it has resulted in a liquidation rate that is either too fast or too slow. But alternative policies were not well analyzed and presented [during the consideration of the NFMA] . . . The compromise finally worked out sets nondeclining even flow as the policy but gives the resource manager flexibility . . . This compromise saved the legislation at the last minute. . .

Id. See also LeMaster & Popovich, *Development of the National Forest Management Act*, 74 J. FORESTRY 806 (1976).

118. *See supra* note 111.

119. *See* D. WALLACE, THE KLAMATH KNOT 72 (1983):

> If waterways mirror youth, then forests reflect maturity. Dry, complex, they stand above the waters as guardians and nurturers. When forests are cut down, silt chokes rivers and sunlight shrinks them. Trees are the pillars of evolutionary society. They don't babble like rivers: they whisper sedately in summer breezes or roar majestically in winter storms. Forests have their youthful moments, their spring flowerings, but they more often seem reticent, aloof.

120. *See supra* notes 41-45 & accompanying text.

121. *See, e.g.*, Shallau, *Departures from What?*, 8 WESTERN WILDLANDS 8 (Winter, 1983).

122. *See* Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D.L. REV. 269, 294-96 (1981).

policy over the last half a century, however, has been to reduce or eliminate those subsidies, whether in the form of free or below-market minerals,[123] forage,[124] water,[125] wildlife,[126] or land itself.[127] Subsidies to local timber companies may under some circumstances be permissible but courts are likely to require that the justification be clear, compelling, and well-documented.

My discussion to this point has dealt with some issues that are at the edges of the law's reach in this field. The following points are more policy-oriented. But I offer them because the policy issues are ones that are implicated by the statutes. That is, the statutes may leave these questions to administration discretion but a principled reading of the statutes would suggest the proper resolutions.

The first is a continuation of the tradition of conservation advocacy.[128] The Service has long engaged in advocating good timber practices on non-federal lands.[129] This advocacy has been abandoned in the key area of water policy. Water, perhaps more than any other single resource, is affected by activities in the national forests. As noted, the Forest Service took what can rightly be called a courageous stand during the mid-1970's by advocating for minimum stream flows.[130] The position was rejected in

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123. *See, e.g.*, Freese v. United States, 639 F.2d 754 (Ct. Cl. 1981) (limitations on right to fee patent); Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3) (1982) (similar limitations on claims located within the National Wilderness Preservation System); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981) (regulation of hardrock mining upheld); Coal Leasing Amendments of 1975, Pub. L. No. 94-377, 90 Stat. 1803, 30 U.S.C. § 181-194 (1976) (diligence standards tightened and preference leasing prohibited).

124. *See, e.g.*, Taylor Grazing Act of 1934, Pub. L. No. 482, 48 Stat. 1269, (codified at 43 U.S.C. §§ 315-315r (1976)); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752 (1982); Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1905(a) (1982).

125. *See, e.g.*, Reclamation Reform Act of 1982, Pub. L. No. 97-293, Title II, 96 Stat. 1261 (to be codified at 43 U.S.C. § 390aa to zz-1 and scattered sections of 43 U.S.C.) (limiting the extent of some existing subsidies for federal reclamation water).

126. The taking of wildlife on public lands is now regulated by a wide range of federal and state laws. *See generally* M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977); Coggins, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59 (1981).

127. The end of homesteading was effectively accomplished in 1934 by the withdrawal of the remaining public lands into grazing districts. *See* Taylor Grazing Act of 1934, *supra* note 124; *see generally*, E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (1951). In the Declaration of Policy in FLPMA, Congress made express its policy of retaining public land in federal ownership:

> The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest. . . .

43 U.S.C. § 1701(a)(1) (1976).

128. *See supra* notes 55-63 & accompanying text.

129. *See* STEEN, *supra* note 11, at 129-31.

130. *See supra* notes 29-33 & accompanying text.

United States v. New Mexico in 1978.[131] More recently, rulings by the Interior Solicitor and Department of Justice have cast doubt on so-called "non-reserved" rights,[132] i.e., the power of federal land management agencies, pursuant to their delegated authority to manage their lands for wildlife and recreation, to set minimum streamflows with modern priority dates. Those administrative rulings, questionable though they may be,[133] are policy during this Administration and seem effectively to bar the Service from asserting non-reserved rights.

But, nothing precludes the Forest Service from advocating in state agencies for minimum stream flows under state law. This does not seem to be taking place, in spite of the clear need to protect streams on federal lands. These issues should be pressed. The Forest Service should use its prestige in taking firm positions for good water practices, just as it does for good silvicultural practices, even though the advocacy may take place in unfamiliar forums.

Another tradition, that of Forest Service independence,[134] has been compromised during each of the last two administrations through no fault of the Forest Service. Presidents Carter and Reagan did not directly violate the practice of allowing the Chief, always a nonpartisan appointment, to remain in office during a new administration.[135] Rather, they politicized forest policy through indirection by allowing the Assistant Secretary, first M. Rupert Cutler under President Carter and now John Crowell under President Reagan, to exercise authority that had not been exerted before at that level.[136]

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131. 438 U.S. 696 (1978).

132. *See generally* U.S. Dept. of Interior, Office of the Solicitor, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, Opinion No. M-36914, 86 I.D. 553 (1979); U.S. Dept. of Interior, Office of the Solicitor, Supplement to Solicitor Opinion No. M-36914, 88 I.D. 253 (1981); U.S. Dept. of Interior, Office of the Solicitor, Non-reserved Water Rights-United States Compliance with State Law, 88 I.D. 1055 (1981); U.S. Dept. of Justice, Office of Legal Counsel, Federal "Non-Reserved" Water Rights (June 16, 1982).

133. *See generally* Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885 (1979); Note, *Federal Non-Reserved Water Rights*, 48 U. CHI. L. REV. 758 (1981); Note, *Federal Non-Reserved Water Rights: Fact or Fiction*, 22 NAT. RES. J. 423 (1982).

134. *See supra* notes 64-65.

135. *See supra* note 64.

136. Historically, the Chief of the Forest Service, not the Secretary of Agriculture or an Assistant Secretary, exercised the highest level of decisionmaking concerning the agency's business. *See* G. ROBINSON, *supra* note 9, at 22. Although the Forest Service is responsible to the Secretary and the Assistant Secretary of Agriculture, the Service has traditionally functioned as a largely autonomous, independent agency. *Id.* at 21.

Dr. M. Rupert Cutler, former editor of the National Audubon Magazine, bucked tradition as President Carter's Assistant Secretary of Agriculture for Conservation, Research and Education. For example, Cutler instituted the wide ranging RARE II process within the Forest Service. *See The Endangered American Wilderness Act: Hearings on H.R. 3454 before the Subcomm. on Indian Affairs and Public*

This strikes me as wrong, as cutting away at an essential aspect of the integrity of the Service. It was wrong in the Carter Administration and it is wrong in this Administration. It has caused lurches in policy and unneeded politicization. The traditional independence of the Forest Service is superior.

I will also contest briefly, but with some vigor, the relevance of another Forest Service tradition, the tradition of dominance by foresters.[137] It seems to me that the age has long passed when it is appropriate to staff the great majority of policy-making positions with foresters. Congress has now delegated to the Forest Service many responsibilities that lie largely outside of the expertise of the forestry profession.[138] This is not in any sense an attack on the profession. Every profession, including my own, gets plenty of that. Foresters get ample criticism from businesspeople who think foresters are too conservative and from environmentalists who think most foresters are timber beasts. Paul Hosmer noted that they even get criticized by loggers:

> After graduating from a forestry school or putting in their training period under government supervision they are referred to as 'foresters.' Amongst loggers. . .they are called—er—well, there's no use bringing *that* up.[139]

I'm not trying to bring *that* up. I'm just going to ask some questions. Why, under what is plainly a multiple-resource and interdisciplinary regime, should any one profession dominate the entire agency? Why should we have an office entitled Regional Forester? Why are virtually all forest supervisors foresters? Why is there not equal time for economists, wildlife biologists, geologists, landscape architects, even lawyers, even just old-fashioned generalists who ably head up so many federal agencies? Is it not true that we have largely resolved the issues of how to harvest timber on national forest lands and that the tough questions today involve land use planning—the uses to which acres will be put—issues on which foresters have no special expertise?

Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 97 (1977) (statement of M. Rupert Cutler). Cutler also reformulated Forest Service policy on wilderness suitability. *See* memo from M. Rupert Cutler to Chief, Forest Service (Nov. 2, 1977) (copy on file with PUBLIC LAND LAW REVIEW).

John B. Crowell, former general counsel to the Louisiana Pacific Corporation, was designated as Assistant Secretary of Agriculture for Natural Resources and Environment by President Reagan. *See* 79 J. FORESTRY 141, 350 (1981). Assistant Secretary Crowell has sought to reformulate Forest Service Policy on several fronts, including a substantial increase in the annual allowable timber harvest. See 7 PUBLIC LAND NEWS No. 5, March 4, 1982, at 5; 8 PUBLIC LAND NEWS No. 1, Jan. 6, 1983, at 5. *See also supra* note 115.

137. *See supra* notes 34-35 & accompanying text.

138. *E.g.*, outdoor recreation, range, watershed, wildlife and fish, and wilderness. 16 U.S.C. § 1604(e)(1) (1982).

139. P. HOSMER, NOW WE'RE LOGGIN' 163 (1930).

Finally, I would like to talk briefly about the tradition of decentralization,[140] a healthy part of the genius that has produced the agency's well-deserved acclaim. There are indications that the Forest Service has slipped away from local control during the last several years. Part of that is due to the additional power assumed by the Office of the Assistant Secretary in Washington.[141] Part of it is due to the new planning process that forces planning to a national level.[142] Increased reliance on computers may also be a factor.[143]

This trend is dangerous for several reasons. The Service may begin to lose its support in the local communities if the ranger cannot deliver. "Top-down" planning may force demands on some ranger districts where the resource cannot produce the assigned allowable cut.[144] And opportunities

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140. *See supra* notes 36-40 & accompanying text.

141. *See supra* note 136.

142. For authorities on "top-down" planning, *see supra* note 1. Professor Sally Fairfax has said this:

> The idea of national goals, disaggregated and parcelled out to regions and forests for achievement, is the perfect embodiment of topdown planning and it was intended to be so. The Forest Service would have us believe that ultimately the national plan will reflect the aggregated potential of the forests and regions, and hence in fact constitute bottom-up planning. That hopeful view assumes that Congress and the President will tailor their programs to Forest Service recommendations, alternatives, and data—an outcome for which there is limited historical precedent. Moreover, it assumes that there will be limited or zero distortion in the data as it is aggregated and disaggregated, which seems an unrealistic hope at best. Thus, although the Forest Service clings to the fond hope that RPA/NFMA will not argue a dramatic geographic shift in power within the agency, much of the political pressure and specific intent of the program is in the opposite direction.

Fairfax, *supra* note 83, at 219.

143. *See, e.g., id.* at 217:

> It seems almost unavoidable that, whether titles and positions reflect the shifts or not, the major decision-making authority within the agency will slip to the computer technicians. They have already become central actors in the planning procedure, since they define the models into which the data must fit. This preordains a more subtle shift: that fundamental program definition is carried out by the youngest and least experienced personnel in the agency, since they are the ones trained in computer and systems analysis skills. Unfortunately, this means that those who have a storehouse of wisdom, experience, and personal contact with the land, and who have lived long enough to have some perspective on their pet theories and enthusiasms, will play a smaller role.

144. For example, Alternative Nine of the Proposed 1985 RPA Program would require many districts to log a substantial amount of acres previously classified as unsuitable for harvest. *See* U.S. DEPT. AGRICULTURE, FOREST SERVICE, DRAFT EIS, 1985-3020 RPA PROGRAM 2-49 (Jan. 1984). One syndicated columnist has observed unrest among field offices due to ambitious timber harvest goals set in Washington, D.C.:

> U.S. Forest Service professionals in the Pacific Northwest have staged a revolt against the growing political influence from Washington, D.C.
>
> It is a quiet, genteel revolt, as befits one of the nation's most decentralized bureaucracies, but it is a revolt with significant political and economic implications.
>
> Last week the Forest Service issued a news release announcing that Regional Forester Jeff M. Sirmon had revised previous timber management policies and was reducing timber sales in Region 6—Oregon and Washington—by some 880 million board feet over the next two

for compromise—a precious resource in itself—may be lost.

In some situations, careful use of consensus-building techniques at the local level have resolved thorny disputes over land use on the national forests.[145] Such an approach is premised on the idea that many of these issues are inherently local and can best be resolved through sensitive mediation among local citizens, without ideologues from either the environmental or industry camp. In other words, it may just be—in some cases, anyway, including some hard ones—that we should look back to the strength and spirit engendered by the process of making decisions on national forest policy around the campfire.

In summary, within just fifteen years we have seen, if not a near-revolution, at the very least deep and fundamental change in Forest Service law and policy. Just a decade and a half ago the nation's oldest and proudest conservation agency stood largely outside the law. There were few statutes or court cases. Since that time public law has made a limited but pronounced entry into Forest Service affairs. My own judgment is that part of the reason for the imposition of the recent laws was that the Service had

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years. . . .

"As we got got more and more of these court decisions preventing us from cutting in roadless areas, it became clear our policy of making up the lost volume from areas where we were already cutting was no longer rational," one veteran forester said.

Some Forest Service employees—biologists and wildlife managers—have been saying this for many months. Their warnings fell on deaf ears until the professional timber managers, the most influential group in the Forest Service, issued similar warnings of potential timber land base abuse if the practice continued. . . .

[Professional timber managers] are alarmed by Washington's continued effort to maintain the current level of timber sales on a dwindling base shrunk by litigation, wilderness studies and high-priced timber sales the industry cannot afford to cut at current market prices. Privately, regional Forest Service officials hope a reduction in Northwest timber sales will spur Congress toward prompt resolution of the wilderness issue and the overbidding controversy.

Sadler, *Forester's Cuts Go Against Political Grain*, Portland Oregonian, Feb. 6, 1984, at B-6, col. 1. I have heard similar comments in several informal discussions with Forest Service employees.

145. *See* Chadwick, *Consensus Resolves Polarization*, FOREST PLANNING Aug. 1981, at 4; Hosticka, *Understanding Consensus: A Participant's Report*, FOREST PLANNING, May 1982, at 10; Mason & Desmond, *Consensus Smooths a Bumpy Road of Skepticism*, FOREST PLANNING, Feb. 1983, at 13.

Bob Chadwick, former supervisor of the Winema National Forest and now special assistant to the Region Six Regional Forester, has played a pioneering role in the use of consensus building techniques to resolve several disputes. Chadwick, then Barlow District Ranger on the Mt. Hood National Forest, was "instrumental" in bringing the Forest Service and the City of The Dalles, Oregon together in the execution of a cooperative agreement concerning management of the city's watershed. Interview with Bill Keyser, Department of Water Supply and Treatment, City of The Dalles, Oregon (April 20, 1983). Chadwick also was responsible for bringing adverse interests together to resolve disputes concerning proposed timber sales on the Blue River Ranger District of the Willamette National Forest adjacent to the French Pete addition to the Three Sisters Wilderness Area. *See* Mason & Desmond, *supra*. *See generally*, Watson & Danielson, *Environmental Mediation*, 15 NAT. RES. LAW 687 (1983); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1 (1982).

become inward-looking, and that it refused to respond to profound national forces. It is my sense that the Forest Service is still too inward-looking and that those same national demands, now merged into laws, may force yet more fundamental change. At the same time, it is my hope that the truest traditions— excellence, independence, conservation advocacy, and decentralization—will force the issues back to where they belong, to the field, around the campfire. I am quite willing to concede that such places are far preferable to capitol buildings or courthouses.