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Is Something Wrong with the National Forest Management Act?

by

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Is Something Wrong with the National Forest Management Act?

Robert Breazeale*

I. INTRODUCTION

Congress first authorized the setting aside of federal "forest reserves" in 1891,¹ and soon thereafter the United States Forest Service (USFS) was created.² In fact, by 1908 President Theodore Roosevelt had reserved a large part of the current national forest system.³ These lands comprise some 191 million acres, nearly ten percent of the country, one fifth of the American West.⁴ They have produced money, jobs, been a gathering place for communities, the home for significant animals and plants, and supplied solace and spirituality to an ever-changing society.⁵ As public expectations for federal lands have evolved over the years, so has the USFS mandate. Beginning with minimal direction from the Organic Administrative Act of 1897 (Organic Act)⁶ and then increased Congressional direction through the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),⁷ the USFS is now guided by a plethora of laws. One of the most significant of these laws, passed in 1976, is the National Forest Management Act (NFMA).⁸

NFMA requires an institutionalized planning process through which interdisciplinary teams create comprehensive forest plans for each of the 156 national forests and grasslands.⁹ NFMA directs the largest integrated and most complex natural resource planning effort ever undertaken in the world and it has been controversial. Undoubtedly, there is not one natural resource or environmental law journal in the United States that has not carried several articles

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¹ Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (1891).

² Act of February 1, 1905, ch. 288, § 1, 33 Stat. 628 (1905).

³ See generally Paul Russell Cutright, *Theodore Roosevelt: The Making of a Conservationist* (U. of Ill. Press 1985).

⁴ Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 U. Colo. L. Rev. 659, 659 (1997).

⁵ *Id.*

⁶ Act of June 4, 1897, ch. 2, 30 Stat. 11, 34-35 (1897) (codified as amended at 16 U.S.C. §§ 471-481).

⁷ 16 U.S.C. §§ 528-531 (1994).

⁸ 16 U.S.C. §§ 1600-1687 (1994).

⁹ Wilkinson, *supra* n. 4, at 667.

over the last twenty-four years about NFMA and the capability or inability of the USFS to properly implement its provisions.¹⁰ Some people would like to do away with planning; others see it as too elaborate and too expensive. Still others have ideas about how it should be improved. Now, ninety-two years after the creation of the USFS and, twenty-four years after the passage of NFMA, people are still asking: Does Forest Service planning appropriately resolve national forest issues? Does NFMA work?, and Should it be changed?

II. BACKGROUND THOUGHTS

National forests exist because people want them, and the legislation that directs federal agencies exists because people want agencies for a specific purpose. Since people's desires and needs change with time, it is important to reflect on the context when a particular law like NFMA was created.

Scientific management has long been a centralizing vision of the USFS starting with Gifford Pinchot who preached the scientific management of forests.¹¹ The USFS was built on the premise that science and politics were to function in clearly separate domains.¹² With this thinking, it made sense historically that authority should be placed at the federal level and the scope of responsibility to plan and coordinate for national forests across the United States should be centralized. Only the federal government and a large agency had enough resources to bring together the best technical experts to find the correct scientific answers. If forestry is conceived in scientific terms, there is one best answer, and this answer should be applied everywhere in the United States.

Following World War II, the USFS became a major producer of the nation's timber and wood products.¹³ Even with the passage of MUSYA, which broadened the USFS scope to consider multiple resources and uses, timber production remained the primary agency goal.¹⁴ As the general public began to sense an imbalance due to the dominance of timber production, a series of events led to the drafting of NFMA. It was a tumultuous time characterized by the now famous Bolle Report,¹⁵ the Church Guidelines issued by Senator Frank Church's

¹⁰ For a partial list of journal articles discussing NFMA, see generally *The National Forest Management Act: Law of the Forest in the Year 2000*, 21 J. Land, Resources & Envtl. L. 151 (2001); Wilkinson *supra* n. 4; Arjo, *infra* n. 11; Corbin, *infra* n. 22.

¹¹ Tony Arjo, *Watershed and Water Quality Protection in National Forest Management*, 41 Hastings L.J. 1111, 1114 (1990).

¹² Robert H. Nelson, *The Future of the National Forests*, 34 Society 92, 95 (Nov.-Dec. 1996).

¹³ Arjo, *supra* n. 11, at 1115.

¹⁴ *Id.* at 1116.

¹⁵ Select Comm. of U. of Mont., *A University View of the Forest Service*, S. Doc. No. 91-115 (1970).

Public Lands Subcommittee,¹⁶ the *Monongahela* opinion in the Fourth Circuit Court of Appeals,¹⁷ and proposals by Senator Jennings Randolph of West Virginia¹⁸ and Senator Hubert Humphrey of Minnesota.¹⁹ Affected groups wanted change and Congress acted quickly.

NFMA, passed in record time, reflected the nation's collective view of the national forests and what was desired as of October 1976.²⁰ As a result of NFMA, democratic politics intruded upon USFS management prerogatives and it was no longer possible to decide the management of the forest simply by an agency view of "scientific management." For the first time significant limits were placed upon USFS authority.

Congress, however, as is common in federal legislation, established policies through NFMA and left the USFS to implement the technical details. NFMA's approach to biodiversity is cited as an excellent example of this process. Congress did not define biodiversity or how it should be managed,²¹ because they recognized that lawmakers did not have sufficient technical expertise to craft such a definition, and that the meaning of diversity would evolve with continued research.²² As a result, broad discretion was granted to the USFS to determine what diversity meant and how to provide for it. It was not a boundless discretion however. It was discretion with a caveat; NFMA required a dynamic planning process whereby scientists and resource managers would continually evaluate forest plans and the USFS would seek advice from an appointed committee of scientists.²³

III. CHANGES SINCE 1976

Charles Wilkinson, in writing about NFMA, recognized that "the situation is surely different today. We have seen waves of changes since then."²⁴ He chronicles ten major changes since the passage of NFMA in 1976: 1) A four-fold population increase in western states since World War II; 2) Higher occurrence of devastating fires; 3) Ecosystems stressed by natural resource extraction; 4) Increased pressure from recreation; 5) Diversified economy

¹⁶ Sen Subcomm. on Public Lands, *Clearcutting on Public Lands*, 92d Cong. (Mar. 1972).

¹⁷ *W. Va. Div. of the Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

¹⁸ Sen. 2926, 94th Cong. (1976).

¹⁹ Sen. 3091, 94th Cong. (1976).

²⁰ George C. Coggins, Charles Wilkinson & John Leshy, *Federal Public Land and Resources Law* 641 (3d ed., U. Casebook Series 1992).

²¹ 16 U.S.C. § 1604(g)(3)(B).

²² Greg D. Corbin, Student Author, *The United States Forest Service's Response to Biodiversity Science*, 29 *Envtl. L.* 377, 380 (1999).

²³ See 16 U.S.C. § 1604.

²⁴ Wilkinson, *supra* n. 4, at 669.

resulting from an influx of tourism and light industry; 6) Greater public opposition to development; 7) Extraction industries play a smaller role in the economy; 8) Increase of environmental statutes; 9) Scientific advancements; and 10) Technological advancements decreasing the demand for wood products²⁵

These are events external to NFMA; however, they are factors that those responsible for the implementation of NFMA must incorporate into their thinking.²⁶ They are factors that influence and shape decision making and the intentions of management on national forests.

Jack Ward Thomas, former chief of the USFS, has often commented about the complexity of legislation affecting the USFS that did not exist at the time NFMA was drafted. Referred to as a “hodgepodge,” a “crazy quilt,” or “a cloak of many colors,” Thomas points out the contradictions, overlaps in authority, and assured conflicts in the legislation that make management activities and planning unpredictable and maybe even unlikely to occur at all.²⁷ Often cited is the conflict between NFMA and the Endangered Species Act of 1973 (ESA),²⁸ an act primarily championed by the United States Department of Interior, Fish and Wildlife Service (USFWS). The ESA has as its stated purpose, “the preservation of ecosystems upon which threatened and endangered species depend.”²⁹ In contrast, NFMA requires “all native and desired nonnative vertebrates will be maintained in viable numbers well-distributed in the planning area.”³⁰ NFMA is actually more stringent than the ESA, but the ESA gives the USFWS more authority. As Thomas has stated: “The Forest Service [often] gains a management partner with veto authority over proposed management actions.”³¹ Thus, the USFWS is now a central player when forest managers make decisions.

The National Environmental Policy Act (NEPA)³² has also matured and added significant complexities to forest planning. In addition, concepts such as conservation biology, ecosystem management, and sustainability were not public discussion items in the 1970s as they are today. In commenting on how science has changed, Greg Corbin writes that “science has progressed and scientific understanding of [scientific] concepts is sharper There is no doubt that

²⁵ *Id.* at 670–72.

²⁶ *Id.* at 672.

²⁷ Jack Ward Thomas, Speech, *The U.S. Forest—What Now?* (D.C., Apr. 30, 1999) (copy of transcript on file with School of Forestry, U. of Mont.).

²⁸ 16 U.S.C. §§ 1531–1544 (1994).

²⁹ *Id.* § 1531(b).

³⁰ 36 C.F.R. § 219.19 (2000).

³¹ Thomas, *supra* n. 27.

³² 42 U.S.C. §§ 4321–4370 (1994).

scientists understand more today about managing for biodiversity than they did when the Committee [of Scientists] made its recommendations."³³

Robert Nelson points out that the NFMA model of centralized/scientific planning runs counter to a world that is rapidly moving toward greater decentralization.³⁴ The direction of world events today, in many arenas, is toward the significant decentralization of authority.³⁵ Firms in high-tech industries to the breakup of the Soviet Union remind us daily of this change.³⁶ The United States is a very diverse country. Imposing national values on local people in order to determine land-use matters is bound to create major social tension.³⁷ Many arguments for keeping management decisions at a centralized level arise from groups that have mastered the politics of federal control.³⁸

IV. COURTS AND LEGAL CHALLENGES

Citizen access to courts is part of our democratic process, therefore, if people care about some things—and they do care about their national forests—then it is expected that they will use the courts to express their displeasure. Since the passage of NFMA in 1976, the USFS has faced many legal challenges brought by a range of interests. In effect, the USFS has been struggling for twenty-four years to strike a balance between statutory directives and agency discretion.

The path from NFMA to the point where courts actually review a national forest plan is not short or easy. USFS regulations were not in place for the implementation of NFMA until 1979.³⁹ Then, each national forest took from five to six years to develop its plan.⁴⁰ With each completed plan came a requisite public comment period⁴¹ and final environmental impact statements.⁴² Prior to reaching court, plaintiffs protesting the plans had to first pass through legal barriers, such as exhaustion of administrative appeals which often prevented review on the merits. Additionally there were delays on peripheral issues such as

³³ Corbin, *supra* n. 22, at 392.

³⁴ Nelson, *supra* n. 12, at 95–96.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 96.

³⁸ *Id.*

³⁹ Federico Cheever, *Four Failed Forest Standards: What Can We Learn From the History of the National Forest Management Act's Substantive Timber Management Provisions*, 77 Or. L. Rev. 601, 650–51 (1998).

⁴⁰ Coggins, Wilkinson & Leshy, *supra* n. 20, at 668.

⁴¹ 16 U.S.C. § 1604(d).

⁴² *Id.* § 1604(g)(1).

the propriety of injunctions, interlocutory appeals of injunctions, and intervenor appeals.⁴³

Review of NFMA violations has been almost exclusively within the domain of the federal circuit and district courts, although the Supreme Court has ruled on occasion.⁴⁴ Courts have upheld the concept of tiered decision making whereby the forest plan provides direction for all resource management programs, practices, uses, and protection measures.⁴⁵ A second level of planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the forest plan.⁴⁶ Courts have clarified the need for disclosing site-specific impacts later in the planning process when "critical decisions" are made if those impacts were not considered at the forest plan level.⁴⁷ Courts have also ruled that forest plans are not ripe for judicial review until the agency has made a site-specific decision.⁴⁸

NFMA contains thirteen subsections of direction from Congress regarding the promulgation of planning regulations by the Forest Service.⁴⁹ Included in these subsections are the controversial biodiversity provisions.⁵⁰ Judge Dwyer reiterated the intent of Congress when he concluded that the system for providing for diversity "must be designed by the agencies, not by the courts."⁵¹ The Eleventh Circuit Court of Appeals has required the USFS to gather and consider population inventory information prior to permitting a timber sale,⁵² while the Ninth Circuit has required failure to monitor species claims to be brought when challenging specific agency actions.⁵³ Some courts read the "viability" provision as only applying in the context of plan approval and not as a limiting factor in project decision making.⁵⁴

⁴³ See *Sierra Club v. Robertson*, 960 F.2d 83 (8th Cir. 1992); *Citizens for Envtl. Quality v. U.S.*, 731 F. Supp. 970 (D. Colo. 1989).

⁴⁴ See *Cal. Coastal Commn. v. Granite Rock, Co.*, 480 U.S. 572 (1987).

⁴⁵ See *Sierra Club v. Epsy*, 38 F.3d 792 (5th Cir. 1994).

⁴⁶ See *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726 (1998); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754 (9th Cir. 1996); *Sierra Club v. Epsy*, 38 F.3d 792 (5th Cir. 1994).

⁴⁷ See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *Natl. Wildlife Fedn. v. U.S. Forest Serv.*, 592 F. Supp. 931 (D. Or. 1984).

⁴⁸ See *Wilderness Socy. v. Alcock*, 83 F.3d 386 (11th Cir. 1996).

⁴⁹ 16 U.S.C. § 1604(a)-(m).

⁵⁰ *Id.* § 1604(g)(3)(B).

⁵¹ *Seattle Audubon Socy. v. Lyons*, 871 F. Supp. 1291, 1321 (W.D. Wash. 1994).

⁵² See *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

⁵³ *Ecology Center, Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998).

⁵⁴ *Sharps v. U.S.*, 28 F.3d 851, 855 (8th Cir. 1994); *Environment Now! v. Epsy*, 877 F. Supp. 1397, 1422 (E.D. Cal. 1994) (citing *Tulare County Audubon Socy. v. Epsy* CV-90-628-OWW); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760-61 (9th Cir. 1996); *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

Other major court decisions have responded to monitoring and evaluation, determination of allowable sale quantity and regional planning, procedural requirements such as amendments, inclusion of “new information,” application of ecosystem management concepts, and interim direction.⁵⁵ It is important to recognize that forest planning is an integrated activity requiring responses to a range of environmental laws such as NEPA, the ESA, the Clean Water Act (CWA),⁵⁶ and the Clean Air Act (CAA),⁵⁷ to name just a few. Therefore it is rare that a court decision singles out just the implementation of NFMA. Usually along with NFMA discussion, court decisions have ruled on the adequacy of USFS compliance through planning with a range of other laws (such as NEPA, ESA, CWA, CAA and others).

In response to numerous decided cases on NFMA, the USFS has made minor amendments or revisions to particular plans. In most cases these changes have been for clarification or a tightening of definition and interpretation.

V. TRANSFORMING PUBLIC EXPECTATIONS

NFMA was written with the intent to enhance existing legislation. It was not written as a stand-alone directive irrespective of both the Organic Act and MUSYA. The Organic Act announced the purposes for which the national forests were established: “to improve and protect the forest” or secure “favorable conditions of water flows, and to furnish a continuous supply of timber . . .”⁵⁸ Sixty-three years later, MUSYA directed the secretary of agriculture to develop and administer the renewable surface resources of national forests for multiple uses and sustained yield of products and services.⁵⁹ Pursuant to MUSYA, the USFS must give the various resources “due consideration” when managing national forest lands.⁶⁰ While MUSYA recognized the validity of multiple uses of forest resources, its broad language provided no concrete guidelines for resolving disputes between interest groups. In 1978, the United States Supreme Court held that Congress established national forests for only two purposes: “[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.”⁶¹ The Court further determined that the “[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation

⁵⁵ See *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360 (1989); *Sierra Club v. Glickman*, 974 F. Supp. 905 (E.D. Tex. 1997).

⁵⁶ 33 U.S.C. §§ 1251–1376 (1994).

⁵⁷ 42 U.S.C. §§ 7470–7492 (1994).

⁵⁸ 16 U.S.C. § 475.

⁵⁹ 16 U.S.C. § 531.

⁶⁰ *Id.* § 529.

⁶¹ *U.S. v. N.M.*, 438 U.S. 696, 707 (1978).

purposes.”⁶² In the Court’s view, MUSYA mandated that resources like wildlife and fish are to be considered, but the national forests are to be managed first and foremost for water conservation and timber production.⁶³

In spite of these rulings, public lands have experienced a fundamental shift in their emphasis since the passage of NFMA. Logging on national forests is down from twelve billion board feet to less than four billion board feet per year.⁶⁴ Livestock grazing has dropped to two million head, oil and gas wells have dropped by a factor of four since 1983, and hardrock mines have dropped by a third.⁶⁵ This decrease in commodity use parallels an emerging fact about public lands—they are chiefly valuable for nonconsumptive uses.⁶⁶ At the same time commodity uses are decreasing, recreation and preservation have been the fastest growing uses of public lands.⁶⁷ No longer is the production of resource commodities dominant on national forests. As pointed out in the magazine *Sierra*, society now has a different vision of what constitutes an ideal community than it did at the beginning of the century, or even when MUSYA and NFMA were drafted.⁶⁸ These days preservation has become another one of the dominant public land “uses.”

Some wonder, since recreation and preservation are becoming dominant uses, about the continued viability of multiple-use as a management policy. Does MUSYA, combined with NFMA as we know it, still apply? It seems contradictory to apply multiple-use strategies to only two dominant uses.⁶⁹ The problem is further aggravated by the reality that multiple-use was historically grounded in commodity exploitation,⁷⁰ the complete opposite of recreation and preservation. Jan Laitos and Thomas Carr point out that current land use changes suggest that further “conflicts pertaining to public use will not be fought along the traditional lines of commodity versus noncommodity use.”⁷¹ Instead, conflicts will form around two former allies—recreation and preservation interests.⁷² The latter favors low-impact human-powered mobility, the former favors higher impact motorized mobility.⁷³

⁶² *Id.* at 708.

⁶³ *Id.* at 713–15.

⁶⁴ Jan G. Laitos & Thomas A. Carr, *The Transformation in Public Lands*, 26 *Ecology L.Q.* 140, 144 (1999).

⁶⁵ Peter Chilson, *An era ends: old industries fail reality*, 30 *High County News* 12–13 (Apr. 27, 1998) (available at <http://www.hcn.org/servlets/hcn.Article?article_id=4109>).

⁶⁶ Laitos & Carr, *supra* n. 64, at 158.

⁶⁷ *Id.* at 160.

⁶⁸ *Logging Our Legacy*, 84 *Sierra* 63 (July–Aug. 1999).

⁶⁹ Laitos & Carr, *supra* n. 64, at 144.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The two statutes, MUSYA and NFMA, require the USFS to manage consistent with multiple-use. These acts promise harmonious coordination of a variety of disparate and inconsistent land uses. However, they do not provide clear standards, and therefore, some argue that legislated program direction will inevitably evolve into a dominant-use strategy. In part, this is because society and its lawmakers will eventually pass dominant-use management statutes to control and protect resources of high value. The National Park Service Act,⁷⁴ National Wildlife Refuge System Administration Act,⁷⁵ Wilderness Act⁷⁶ and ESA are examples of statutes passed to override multiple-use criteria. Secondary uses only remain viable alternatives when they are consistent with the dominant use. Having to referee and resolve the conflict between recreation and preservation will require the USFS to act on little experience and with even less statutory guidance on how to resolve issues between two dominant uses.

VI. WE LIVE . . . AFTER ALL . . . IN A DEMOCRACY

There is a USFS anecdote that Senator Hubert Humphrey, the sponsor of NFMA, once stood on the Senate floor and spoke something to the effect: We have taken the management of the national forests out of the hands of the courts and placed it in the hands of the professionals. Many people within the USFS remember that senators regularly asked then USFS Chief John McGuire, during the markup sessions for NFMA: “Can you live with that Chief?”⁷⁷ Congress wanted planning to be conducted by agency professionals, without coercion from political appointees. Federico Cheever has written, however, that things turned out differently. “The ‘institutional conversation’ between Congress and the Forest Service which gave us the substantive standards so undercut their apparent meaning and potential power to constrain agency conduct that the confusion and litigation failures that followed were quite predictable—although generally unpredicted.”⁷⁸ He also says that “if the purpose of NFMA was to keep lawyers and judges out of the forest, NFMA has been a failure.”⁷⁹

The Constitution vests legislative authority in the Congress, but the executive branch has responsibilities in both the formulation and enactment of that legislation. As is commonly stated: “While the President proposes, the Congress disposes.” In July of 1995, attached to legislation responding to the

⁷⁴ 16 U.S.C. §§ 1–460 (1994).

⁷⁵ 16 U.S.C. §§ 668dd–668ee (1994).

⁷⁶ 16 U.S.C. §§ 1131–1136 (1994).

⁷⁷ Cheever, *supra* n. 39, at 694.

⁷⁸ *Id.* at 606.

⁷⁹ *Id.* at 692.

Oklahoma City bombing, President Clinton signed a timber salvage rider passed by the Congress.⁸⁰ That one act raised the ire of environmentalists and caused many to cry that it resulted in logging without laws. Known as the Salvage Rider, it authorized the USFS to sell several billion board feet of salvage timber by the end of 1996.⁸¹ The USFS was freed from its normal environmental assessments and was immune to administrative appeals.⁸² According to the Congressional Research Service, the cut mandated by the salvage rider was more than double the amount of the salvage timber the USFS had originally intended to sell in the same seventeen-month period, thus, forest planning was circumvented.

The increasingly detailed instructions to the USFS, by political appointees, by individuals, and by Congress, are seen by some to be unnecessary micromanagement and meddling. In reality, when Americans are interested they reexamine federal agencies and question their role and purpose. That is part of the democratic process. The intent of NFMA, in 1976, was to stabilize, centralize, and “professionalize” planning. Since the rise of the environmental movement in the 1960s, appeals and criticisms of USFS planning have mostly focused on the goals and expected end products of forest management rather than about the most scientifically appropriate way to do things. The management of national forests is management of value conflicts in America. NFMA, from its inception, was not intended to resolve value conflicts. NFMA was intended to keep science and politics in separate domains and allow the professionals to find the best scientific answer. However, there is no longer a separation between politics, science, and management.

For years people believed that all management actions on the national forests would be a derivative of forest planning and no other decisions would be made outside of the approved forest plan. History shows that other decision processes exist outside of those made through NFMA. Courts make interpretations that change agency actions. Incumbent administrations and their political leadership, rather than the professionals of the USFS, control administrative appeal decisions. Select groups of interested citizens are capable of accessing political leadership and changing the process as evident by the Quincy Library Group.⁸³ All of these actions are expected and part of the process in a democratic governance.

⁸⁰ Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240–47 (1995).

⁸¹ *Id.* at § 2001(b)(1).

⁸² *Id.* at § 2001(c).

⁸³ See Gerry Gray & Jonathan Kusel, *Changing the Rules*, 103 Am. Forests 27 (Winter 1998).

VII. IS NFMA WORKING?

Some say there have been positive changes in the USFS that have evolved during the implementation of NFMA. The agency is more open and diverse than it was twenty-four years ago. There is increased diversity in both gender and race, as well as professional discipline. The amount and quality of public participation has increased dramatically, although many argue that it is still not adequate. The degree of analysis and depth of public disclosure of its decision processes are far more visible than they were previously. The amount of clearcutting has been significantly reduced and harvest levels have changed. How the agency views biodiversity stems directly from issues brought out and analyzed as part of the NFMA process.

On the other hand, mining regulation is still not considered in planning, but is left to the project stage for analysis and decision making. Water is rarely analyzed in as much detail as the timber program, which still dominates decision making even in its reduced role. Tribal involvement, even where tribes have legal or strong equitable claim to national forest land, can often be cursory. Some would point out that the agency has still failed to adequately integrate its major programs of Research, State and Private, and National Forest Systems. Issues identified at the time NFMA was drafted are still issues today: sustainability, the subsidizing of federal timber sales, impact of harvesting on wildlife, watersheds, and recreation. Timber harvesting remains the single longest running unresolved conflict in federal public land law and policy.

The most important questions are: How has the land itself been treated over the last twenty years? and Has direction from NFMA made any difference? Significant healthy acreage was lost between 1976 and 1989 when national and regional harvest began to decline. Since then large wildfires have become commonplace and many species, both animal and plant, are in jeopardy. Some will acknowledge that areas are healing since 1989 when the national timber harvest dropped from twelve billion board feet to the current level of between two and three billion board feet. How much of this drop and how much of this change is a result of NFMA driven planning?

Even though every national forest has a forest plan, most have been long delayed. Planning has proven to be much more expensive and much more complex than anticipated. But, how could it be otherwise? Any corporation owning 191 million acres of land would also engage in an elaborate and expensive planning process. Driven by a public rather than corporate process makes it even harder because of its diffuse nature. The size is not necessarily the problem. Other federal agencies, directed by well-intended yet differing laws, in

effect have become “partners” to USFS planning. In reality, they have veto power over proposed actions which results in significant federal court rulings that can hold forest plans hostage.

Often, forest plans have been rendered irrelevant by events as actual decision making bypasses the planning process either by congressional mandate or the White House. Some of the most significant planning actions on national forests—wilderness decisions, spotted owl protection in the Pacific Northwest, Mexican spotted owl, Pacific salmon, bull trout, Southwestern grazing issues, and California spotted owl—were not identified nor resolved as part of the formal NFMA process. They emerged outside of the planning process. Then the USFS had to revise or update plans. Gridlock has occurred on most of the national forests serving select interest groups who favor doing nothing or, at best, the status quo. In response, the emphasis for the management of national forests is shifting from traditional commodity production (timber, grazing, and mining) to preservation of biodiversity, enhancement of fish and wildlife habitat, recreation, and watershed protection and enhancement. This shift did not result from forest planning required by NFMA. Instead, forest plans have been modified through amendments and revisions after the decisions were made.

The budget is the operative policy document of a federal agency and yet, forest budgets and forest plans neither connect with one another nor do they link to the national strategic plan in response to the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA),⁸⁴ or the more recent Government Performance and Results Act of 1993 (GPRA).⁸⁵ Administration and congressional decision making are mandating natural resource actions without analysis or information from forest planning which provides the basis for informed decision making. At an October 1995 conference on public land management, sponsored by the Natural Resources Law Center of the University of Colorado Law School in Boulder, Colorado, speaker after speaker lamented on the state of paralysis affecting the USFS.⁸⁶

The current issue of the USFS publication, *Laws Applicable to Forest Service Activities*, is two and a half inches thick and lists 212 laws. Most of these laws respond to NFMA. When planning decisions are made, it is not always clear what they are, what law they are affecting, and to what degree on-the-ground projects have in fact been committed. Often times, contestability in court is simply determined by the issues addressed, the range of alternatives considered, and the data and analysis that was used. Courts, often faced with identical laws

⁸⁴ Pub. L. No. 93-378, 88 Stat. 476 (1974).

⁸⁵ Pub. L. No. 103-62, 107 Stat. 285 (1993).

⁸⁶ Nelson, *supra* n. 12, at 95.

and regulations and very similar forest plans, have reached different conclusions about what final decisions are actually made in forest plans.

VIII. SUMMARY

NFMA continues to be a grand experiment in national-level federal natural resource planning. National forest planning has been complicated. It has been expensive and it has been controversial. It has taken place during a time when societal expectations have been changing. The last twenty-four years have been a time when technology and science are changing the way we observe and interpret our environment. Drafted during the 1970s, NFMA reflects the viewpoint of what society at that time desired from its national forests.

What the public expects from the national forests continues to change. Some would argue that the multiple-use concept is no longer relevant and societal desires are closing fast on two primary uses of forest lands: recreation and preservation. If that is not the case, it is at least clear that extractive uses have significantly decreased. Even with a reduction in extractive uses, however, no action is not an option. Ecosystems, and public demand for those resources, mandate some continuing mix of management activities. Public lands must be managed in a flexible manner to meet changing needs of the nation. Open analysis and public disclosure of decisions that direct that management must be accepted as a philosophy of leadership. Goals for management must be clearly articulated and the decision process must be unambiguous.

Science understanding has changed significantly over the last twenty-four years. The understanding of biodiversity is more comprehensive. Ecological research has made enormous strides in the areas of biodiversity, ecological and social sustainability, and population viability. Researchers have developed an entire suite of new tools and methodologies to assist land managers. There is no indication that information on the environment will stabilize, but rather will always be in flux.

NFMA requires that USFS regulations implementing the act are to be reviewed and revised on a periodic basis. In this way implementation is able to make use of the latest information. NFMA is congressional direction with a caveat. It requires a dynamic planning process whereby scientists and resource managers continually evaluate forest plans and the USFS seeks advice from an appointed committee of scientists. Revisions to its implementation direction have not been forthcoming and even though the agency tried several times to review and revise its internal direction, stalemate resulted. Planning and decision making must be dynamic rather than static.

Maybe it is the poet, T.S. Eliot, who can summarize best. "It is not necessarily those lands which are most fertile or most favored climate that seem to me the happiest, but those in which a long stroke of adaptation between man and his environment has brought out the best qualities of both."⁸⁷

The National Forest Management Act was an attempt to direct a course of action that would develop adaptation between Eliot's "man and his environment." It was right for the times of the 1970s. It directed a large, complex effort led by the USFS. That was twenty-four years ago. What it takes now to create an "adaptation" between a diverse culture and its environment may be different.

⁸⁷ T.S. Eliot, *The Harper Book of Quotations* 316 (Robert I. Fitzhenry, ed., 3d ed., Harper Perennial 1993).