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Since mismanagement of the national forests can result in irreparable damage, and since Congress, in delegating the management function, has granted such broad administrative discretion, the author believes that an examination, and perhaps a reappraisal, of the extent and right to judicial review of these vitally important management decisions should be undertaken immediately.

THE NEED FOR MEANINGFUL CONTROL IN THE MANAGEMENT OF FEDERALLY OWNED TIMBERLANDS

*James P. Rogers**

ONE does not approach this subject without trepidation. For about six decades the relationships between the Forest Service, as the custodian and manager of the national forests, and those who are dependent upon those forests in various ways, have proceeded with relative calm. To suggest that these relationships could now be disrupted and on occasion need outside, third-party, review against arbitrary and capricious action might well be called a species of *lese majeste*.

In today's world we can foresee, however, far greater problems and pressures than heretofore, with respect to the management of the national forests. That we have thus far achieved considerable success in avoiding real controversy among competing interests under statutes vague to the point of license does not mean that we will hereafter do so. Nor should it be considered alarmist to suggest the possibility that under existing law there are chances for arbitrary and

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capricious action which, when done, cannot be undone, and could well be forever detrimental to the best interests of the whole people in whose hands the ownership of these forests lie.

It is interesting to note that of late there has been an increasing number of articles dealing with the lack of control the people have in the management of the federal lands which they, as citizens of the United States, own. In 1962 Professor Charles A. Reich took a penetrating look at the subject in "Bureaucracy and the Forests."¹ In May of 1966 Professor Norman Wengert² wrote an apparently unpublished paper called "Changing Relationships Between Government and the Forest Products Industry: An Exploration of Policy Processes." In the *Land and Water Law Review* Raphael J. Moses contributed an article entitled *What Happened to Multiple-Purpose Resource Development?—A Plea for Reasonableness*.³ Some of the basic legal problems to be considered here were examined by Louis L. Jaffe⁴ in an article entitled "The Citizens as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff."⁵ And of course Messrs. Clawson and Seld have examined in their book *The Federal Lands: Their Use and Management* the nature of the decision-making process and the lack of outside review controls over it.

All these, and many others, deal in one way or another with the problem of the citizens' control—or its lack—over administrative actions of the executive departments of the federal government. It is not the purpose of this paper to cover too much territory in a field this broad; it is our intent here to examine the bases of some of these problems, and to delineate within the framework of our present system, considering only federally owned forests, whether and to what extent we have in the right of judicial review some safeguards against the exercise of uncontrolled discretion in executive decision-making.

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1. Copyright The Fund for the Republic, Inc., Center for the Study of Democratic Institutions at Santa Barbara, California.
 2. Professor of Political Science, Wayne State University, Detroit, Michigan.
 3. 3 LAND & WATER L. REV. 435 (1968).
 4. Byrne Professor of Administrative Law, Harvard University.
 5. Symposium by University of Pennsylvania Law Review and Section of Individual Rights and Responsibilities of the American Bar Association, August 1968, p. 1033.

It should be noted that the title of this paper relates to the need for meaningful controls on federally owned timberlands; this then excludes Indian lands but includes timberlands managed both by the Forest Service and by the Bureau of Land Management, and to some extent by various other executive agencies of the federal government such as the National Park Service.

The problems are, inherently, the same whichever agency manages these lands, but their major impact is felt in those managed by the Forest Service in the Department of Agriculture. In volumes of timber growing, and sold, from nationally owned lands the percentage of public domain and National Park lands is small indeed. The only timberland area the BLM manages of significance is the "O&C lands" in western Oregon,⁶ for example. While the statutory scheme for these lands is not basically dissimilar from those covering the national forests, and the land ownership pattern, being of the checkerboard type, resembles much of the lands in the national forests, their 2½ million acres is so relatively minor that we can lump that subject in with the much larger one here considered.

The national forests, and their management, have their major impact in the western United States, that is, the entire area west of the 100th meridian.⁷ Elsewhere their importance wanes, from zero, through negligible, to almost important. And it is in the areas where the national forests are most vital to the economy that political power has always been lowest. In the House of Representatives most of that power comes from the states east of the Mississippi, where the importance of the national forests to the economy is less than great. Thus it has usually been the Senate where the impetus for legislation relating to the national forests has most forcefully come.⁸ In too many instances these were quasi-emergency

6. Act of August 28, 1937, 50 Stat. 874.

7. The federal government owns 34% of the total land in the 50 states. The percentages of land owned by the federal government in selected western states is: Oregon 52.2%, Alaska 98.3%, Arizona 44.7%, California 44.1%, Colorado 36.1%, Idaho 64.3%, Montana 29.6%, Nevada 87.1%, Utah 67.3%, Washington 29.4%, Wyoming 48.2%. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 198 (87th ed. 1966).

8. Cf. floor debate in the Senate on H.R. REP. No. 12203, 55th Cong., 3rd Sess. (1899), a deficiency appropriation bill, as reported in CONG. REC. 2800-2801, 2861, as illustrative. It is striking to observe how much of the early legislation relating to the forest reserves and the national forests came about

matters, which may account for the breadth of the statutes and the lack of overall policy guidance to the forest-administering agency and the courts as well.

Before considering the means of judicial review as a possible checkrein on arbitrary administrative decisions of the Forest Service we should note how broad is the discretion given by the Congress to the managers of the national forests. In effect, the Congress has said to the Forest Service, "Go forth and manage," without setting any but the most minimal standards for the control of decisional aspects of forest management. As Professor Reich stated it in his paper on "*Bureaucracy and the Forests*,"⁹

The standards Congress has used to delegate authority over the forests are so general, so sweeping, and so vague as to represent a turnover of virtually all responsibility. "Multiple use" does establish that the forests cannot be used exclusively for one purpose, but beyond this it is little more than a phrase expressing the hope that all competing interests can somehow be satisfied and leaving the real decisions to others.

As he puts it at another place:

In a democracy, laws and policies, including laws governing publicly owned resources, must theoretically be made in public by the people's elected representatives. But in today's overcomplicated world an overwhelmed Congress has been forced to delegate a large measure of legislative power to specialized executive and administrative agencies the officials of which are not elected or directly controlled by the people.

Again, Professor Reich notes,

Managing the forests is no mere caretaker's job. There are fundamental choices to be made—choices that pit one portion of the public against another, and that can change irrevocably the character of the domain as a whole.

as Senate riders to House appropriation bills. The basic forest reserve statute referred to by the Forest Service as its Organic Administration Act, Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. § 478 (1964), was itself such a rider—to a Civil Expense Appropriation Act after it had passed the House. Cf. 42 OPS. ATT'Y GEN. OPINION #7.

9. See, *supra* note 1.

Today's growing population tears insatiably at the forests. As people spread into every corner of the land the forests shrink. Armies of mechanized campers invade. Dam builders covet choice valleys. Sheep nibble the high pastures. The power saw turns beauty into board feet. Roads drive deep wounds into the solitudes.

Management must decide between the competing demands on the forests. When different uses clash, which shall be favored? How are local needs to be balanced against broader interests? Should the requirements of the future outweigh the demands of today?

In sum grants, in other fields, of such discretion to an executive department or agency by the legislative branch would have been deemed grants of the legislative power itself, and would thus have run afoul of the constitutional doctrine of separation of powers in which only the legislative legislates and the executive administers that legislation. But ever since *United States v. Grimaud*,¹⁰ and its companion, *Light v. United States*,¹¹ it seems to have been accepted doctrine, in the Forest Service and elsewhere, that in this peculiar and complex field of such varying conditions and circumstances the Congress has an impossible task in setting clear legislative guidelines. Read the words of Mr. Justice Lamar in *Grimaud*:

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.

Read again the same Justice in *Light*:

"All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal Co.*, 137 U.S. 160. And it is not for the courts to say how the trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands

10. 220 U.S. 506 (1911).

11. 220 U.S. 523 (1911).

for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to *proprietorship*, to say nothing of the power of the United States as a *sovereign* over the property belonging to it. (Emphasis supplied.)

We will shortly refer to the italicized words in the above quotation.

There is, of course, a considerable difference between the legislation involved in *Grimaud* and *Light* and that of the present day. Those were relatively simple: the former case involved the Secretarial authority under the 1897 Act¹² to

make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to *regulate their occupancy and use, and to preserve the forests thereon from destruction*; and any violation of the provisions of this act or such rules and regulations shall be punished as prescribed in Rev. Stat., § 5388. (Emphasis supplied.)

Today's statutes which Professor Reich discusses are not only of a different generation but a different generality. For example, Section 2 of the Multiple Use Sustained Yield Act of 1960¹³ reads:

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title.

12. Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. § 475 (1964).

13. Act of June 12, 1960, Pub. L. 86-517, 74 Stat. 215, 16 U.S.C. §§ 528-531 (1964).

Surely the breadth of this grant of language justifies Professor Reich's comment that it does little more than express a hope "that all competing interests can somehow be satisfied."

The question, then, is whether there are any areas, in the administration and operation of the national forests, in which a final action of the Secretary of Agriculture (in most cases the Forest Service) can be challenged, however harmful that action may be or however mistaken its basis. If so, where are they; if not, should there be, and where?

A not inconsiderable part of the problem discussed here is the fact that when the federal government deals with the national forests it wears two pieces of headgear, as Mr. Justice Lamar noted in the foregoing quote from *Light v. United States*. The hat of a proprietor is one, the crown of the sovereign the other. This concept creates problems in which those who must deal with the government as adjoining private timberland owners often know the frustrations of second-class citizens.

A significant example of the operation of this dual status of the United States has arisen in connection with rights of way for forest access roads in areas where federal and private timberlands are intermingled in a checkerboard ownership pattern, a common situation in the West.

In such ownership patterns it is quite obvious that neither the government's timber nor the private owner's timber is available for use except by access across the lands of the other. The same situation exists in the O&C lands in western Oregon. On April 5, 1950, the Secretary of the Interior issued regulations¹⁴ requiring reciprocal right-of-way use agreements as a condition of granting access to private timberlands adjacent to the O&C lands managed by the BLM. These regulations were the forerunners of the present Forest Service regulations,¹⁵ though originating in the 1937 O&C Act.

For many years it was thought that, as to national forest lands, the Secretary of Agriculture was required to grant revocable access to privately owned lands across lands man-

14. As originally issued, 43 C.F.R. §§ 115.154 to 115.179 (1950); now cited as 43 C.F.R. §§ 2234.2-3(b) to 2234.2-4.

15. The present reciprocal right-of-way regulations for national forest lands are found in 36 C.F.R. §§ 212.10 to 212.12 (1968).

aged by the Forest Service, but that the Secretary had no power to compel the private applicant to grant reciprocal rights to the United States. By an opinion dated February 1, 1962, however, the Department of Justice dispelled that notion and two years later, in 1964, the Congress enacted Public Law 88-657 allowing the Secretary to grant permanent easements across Forest Service-managed lands in exchange for permanent easements across adjacent private lands.¹⁶

While this once-explosive situation has quieted down, candor compels the observation that when dealing with the Forest Service for reciprocal right-of-way and road-use agreements the private timberland owner is still almost wholly dependent upon the good will of that Agency's personnel. Where two private landowners are in similar situations their bargaining power is usually about equal; in states where constitutions and statutes allow landlocked timberlands to be made accessible by private eminent domain proceedings, such as Washington and Oregon,¹⁷ neither can impose unreasonable burdens on the other. And even in states which have no such basic protections for unlocking this timberlands door, neither side is likely to promote a "Mexican standoff" for a very long time.

When the private owner negotiates for access with the Forest Service for the lands it manages, however, there is a completely unknown limit to the demands which that agency can make, as a sovereign, though it is basically acting in a proprietary capacity. If the private landowner has no practical means of achieving some sort of equality at the bargaining table, if worse comes to worst, the bitterness and frustration which can result is bad for everyone, perhaps most for the Forest Service itself.

Another example: Upon the supply of logs from lands managed by the Forest Service virtually the entire forest products industry of the western states depends. Few in those states are the owners of sufficient volumes of timberlands to supply much of the nation's wood fibre needs from their own

16. For a well-written history of this problem and its solution, see Robert Kennedy's Big Case, 74 *American Forests*, No. 9 (J. Craig ed. Sept. 1968).

17. See ORE. CONST. art. I, § 18 and ORE. REV. STAT. §§ 376.505 to 376.540 (1967). See also WASH. CONST. art. I, § 16 and WASH. REV. CODE ANN. §§ 8.24.010 to 8.24.040 (1961).

forests for any length of time; if sales of logs from national forest lands were suddenly to be stopped, chaos would result. It is estimated that in the states of Washington and Oregon, for example, something around 50 percent of their entire economy is dependent directly or indirectly upon the forest products industry. And necessarily the nation's housing and other wood fibre needs can be supplied only if the production of logs from the vast timberlands managed by the Forest Service in the West continues unimpaired.

Yet few realize that there is no obligation whatever upon the Secretary to sell one log from national forest lands, except as it may be an incident to the management of those lands for sustained-yield production. He is *authorized* to sell, but not required to do so, and the amount he sells is completely within his administrative discretion.

Here is a matter of life and death to the economy of the West and to the nation as a whole. But is arbitrary and capricious action foreclosed only by what are really political considerations, that is, the politico-economic effects which would result if, on a large scale, the production of logs from the national forests were stopped, or impaired by conditions so unreasonable as to amount to a direct prohibition? Is there any right of review of arbitrary action in a part of national forest management so important as this?

Consider a matter of very recent history as illustrative: Another portion of the 1897 Act¹⁸ provides that

[T]he Secretary of Agriculture may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such national forests and may sell the same for not less than the appraised value *to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom.* (Emphasis supplied.)

On April 12, 1926, the Congress amended this flat prohibition to say that:

Timber lawfully cut on any national forest, or on the public lands in Alaska, may be exported from the State or Territory where grown if, in the judg-

18. See *supra* note 12.

ment of the Secretary of the department administering the national forests, or the public lands in Alaska, *the supply of timber for local use will not be endangered thereby*, and the respective Secretaries concerned are authorized to issue rules and regulations to carry out the purposes of this section.¹⁹ (Emphasis supplied.)

The Congressional command, then, from 1926 to today, with respect to the sale and use of timber from the national forests was that the logs were to be reserved for the use and benefit of the people of the state in which each forest lies, *unless* the Secretary determined that local use would not be endangered by the export of such logs beyond that state's boundaries.

How has even so explicit a Congressional command as this been applied?

During the past several years the export of softwood logs to Japan from the national forests of the Pacific Northwest, initially the states of Oregon and Washington and later Idaho, California, and western Montana, became a very serious problem, becoming one of the important factors which have driven stumpage prices sky-high, to the detriment of local mill operation, local employment, and national lumber and plywood prices. If the clear Congressional commands with respect to log export were obeyed, it could not help but have some substantial effect on the ills excessively high log prices create for the national as well as regional economics.

Yet in the face of the statutory commands above noted, and in the face of the fact that the Secretary had not made, and with today's great wood fibre demands could hardly make, a finding that logs produced from these national forests were unnecessary for local use, the Secretary took no action to enforce, or to ask the Department of Justice to enforce, the prohibition against export of those logs.²⁰

19. Act of April 12, 1926, 44 Stat. 242, 16 U.S.C. § 616 (1964).

20. The fact that the "Morse Amendment" to the Foreign Assistance Act of 1968 was finally adopted by the Congress and became law with the President's signature on October 9, 1968, does not take away the problem, since that legislative action would have been unnecessary had it been clear that judicial means were available to users of national forest timber to compel the Secretary of Agriculture or the Attorney General, or both, to carry out the Congressional commands.

These examples are, of course, within the primary area of commercial forest use, but those interested in other uses—recreation, for example—are equally vulnerable to the Secretary's action or refusal to act. The Secretary has it in his power to set aside, or refuse to set aside, large forest acreages for recreational and scenic purposes, and the Chief of the Forest Service may do the same for wild areas. The Chief of the Forest Service may by administrative decision irrevocably affect the watersheds on which we are utterly dependent for the volume and purity of our water, the habitat for our game, the forage for our stock, and the other forest values on which we set such great store. And when these decisions are made, they are often of such nature that they cannot be unmade.

Are administrative decisions of such vast importance as these left without a chance of judicial review against arbitrary or capricious action or inaction, or flagrant mistake however honest?

Not so long ago the answer would have been a flat "yes," likely, in virtually every instance; today it is probably the opposite in a substantial number of cases.

One of the difficulties is, as we have noted, that most of the statutes themselves are of such generality as to afford little, if any, standards by which a court could say that administrative decisions have not followed the Congressional mandates.

Frost v. Garrison,²¹ is apt, though a Park Service rather than a Forest Service case. The plaintiffs were guides and

Nor does it matter whether the Secretarial inaction was brought about by not-to-be-resisted 1968 pressures from the Departments of State and Treasury, and Executive Department agencies, seeking to make the products of the national forests instruments of international trade rather than of the welfare of the people who owned them.

The experience here suggests that even in instances where the statutes respecting national forest management have been quite explicit, they are subject to other executive and administrative insistence in the name of a wholly different "public interest," which cannot help but disquiet those vitally interested in national forest management. This time the prospective "loser" was the commercial bidder for national forest timber, and whose employees, their families, and their suppliers also lost, under a very explicit statutory scheme. Under a more general one could recreationalists be equal victims of the public "welfare"? Could the timber set aside for recreational uses be equally thereafter committed to help our nation in what the State Department considers a higher "public use"—in logs exported in international trade?

21. 201 F. Supp. 389 (D. Wyo. 1962).

outfitters in and near Yellowstone Park who sought to enjoin National Park Service employees from embarking on a program to kill off about 5,000 elk, their presence being considered detrimental to the Park. Plaintiffs sought to prevent this slaughter on the ground that it was cruel, needless, and unnecessary, and that the elk were not detrimental to the Park. The court had little difficulty in disposing of the case by dismissal under the following language contained in one of the basic statutes²² governing national parks, which in part reads as follows:

He [the Secretary of the Interior] may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations.

Since the Congress had thus given the Secretary of the Interior, and through delegation from him the Park Superintendent, untrammelled discretion to order the slaughter of any Park animals, the court was not empowered to overrule him however (apparently) arbitrary or capricious or mistaken his action might be. Thus the court never reached a trial on the merits of whether or not the presence of the elk was "detrimental" to the Park.²³

Second and more difficult, however, in the field of judicial challenge of administrative decision under statutes of such generality, is the question of "standing to sue," that is, the right of a person or group to ask for and obtain judicial review of such decisions as these. Even were the statutes involved more specific—for example, the term "the public interest" were more clearly delineated—who is entitled to raise the point in court? Are the courts likely to apply to today's conditions and requirements of national forest management tests of a far older period when fewer conflicts in what is "the public interest" were possible?

22. Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. § 3 (1964).

23. See also *Lansden v. Hart*, 180 F.2d 679 (7th Cir. 1950), involving an attempt by landowners and hunting club owners and operators to enjoin enforcement of provisions of Presidential and gubernatorial proclamations closing an area of about 20,000 acres in Illinois to the hunting of wild geese, the statutes and regulations involved implementing migratory bird treaties between the United States and Great Britain and the United States and Mexico. In that case the court also examined the "merits," holding that the treaties were the law of the land, the statutes implementing them were not unconstitutional, and the regulations, broad as they were, were authorized by those statutes.

Perhaps one of the most striking statements of a court on defining the criteria by which one obtains "standing," by which we mean, of course, not the ability to get into court but to stay there, was made in *Tennessee Electric Power Co. v. TVA*,²⁴ where the court said, by Mr. Justice Roberts, that a person threatened with injury by government action or inaction may not challenge it

unless the right invaded is a *legal* right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege

. . . [T]he damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, at 137-40. (Emphasis supplied.)

In the preceding year the Supreme Court had decided a similar case, *Alabama Power Co. v. Ickes*.²⁵ In the year following *Tennessee Electric* the court decided *Perkins v. Lukens Steel Co.*,²⁶ in which the same test was laid down.

In *Tennessee Electric* and *Alabama Power* the plaintiffs, private power companies, challenged the creation and operation of TVA as a governmental entity producing electric power sold to industrial users, municipalities, and cooperatives operating distribution systems which sold competitively with the complainants. In applying the "legal injury test" the court held that injury to the private power companies was injury lawfully inflicted; that no law gave them absolute power to be free of lawful competition; and therefore such injury as they suffered, even to the point of financial ruin, was *damnum absque injuria*.

More strikingly to this subject, *Perkins* involved would-be bidders for government contracts who were "blacklisted" under the Public Contracts Act²⁷ and contended their blacklisting was caused by an administrative error of statutory interpretation so that in order to obtain such contracts and remove their "blacklisting" status the plaintiffs would be required to comply with wage schedules founded upon an error of law. Without considering whether or not the alle-

24. 306 U.S. 118 (1939).

25. 302 U.S. 464 (1938).

26. 310 U.S. 113 (1940).

27. Act of June 30, 1936, 49 Stat. 2036, as amended, 41 U.S.C. § 35 (1965).

gations of the complaint were true, that is, that the Department of Labor had in fact erred in construing the Act, the court in effect held that the right to bid competitively for government business is not a *legal* right, saying:

We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction was based. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.²⁸

Perhaps some language from an opinion by Judge Frank in *Associated Industries of New York v. Ickes*,²⁹ illustrates best the plight of those who depend upon national forest-produced logs for their livelihood, or would-be recreational users of the national forests for their enjoyment. In that case Judge Frank said:

That the plaintiff shows financial loss on his part resulting from unlawful official conduct is not alone sufficient, for such a loss, absent any such invasion of the plaintiff's private substantive legally protected interest, is *damnum absque injuria*. Thus, for instance, financial loss resulting from increased lawful competition with a plaintiff, made possible solely by the defendant official's unlawful action, is insufficient to create a justiciable controversy. *More is required "than a common concern for obedience to law."*³⁰ (Emphasis supplied.)

These rules, if today applied, would tell us that judicial review of administrative decisions relating to the very fundamentals of national forest management are unlikely. For under them who has a "vested legal interest" in obtaining a contract right to enter and cut national forest timber? What individual or group has a "vested legal interest" in the setting aside of an area of national forest timberlands for scenic and recreational purposes? To go even further, does any intermingled private landowner have a "vested legal right" to reach his forest lands which lie within the boundaries of a

28. *Perkins v. Lukens Steel Co.*, 310 U.S. 111, 125 (1940); see also *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

29. 134 F.2d 694 (2d Cir. 1948).

30. *Id.* at 700-01.

national forest, in view of the "Minnesota Wilderness Cases"³¹

There is some language in the opinion of the Attorney General of February 1, 1962,³² suggesting that, in the field of access to intermingled lands, arbitrary or capricious action in a denial of that right within the national forest boundaries might subject such Secretarial action to judicial scrutiny; near the end of that opinion the Attorney General said,

As the Supreme Court pointed out in *United States v. Grimaud*, 220 U.S. 506, 516-517, it is your function to determine what private use of the national forests in any given case is consistent with the purposes sought to be attained by the statute. The imposition of harsh and onerous requirements not related to the benefit received or to your general responsibility to preserve and manage the national forests, might well constitute an abuse of discretion.

It may be that the denial of access across national forest lands to one's own property by arbitrary or capricious action would constitute an invasion of a "vested legal right" giving the victims sufficient "standing" to test that action. But here are industries, their employees, and whole communities utterly dependent upon the sale of logs from the national forest; if they are deprived of those logs through action, or failure to act, by the Secretary, what rights have they to enter and remain in court?

Since 1960, at least, the Congress has made it clear that recreational uses of the national forests is one of the objectives of their management and has indicated clearly the intent to set aside for such use national forest areas primarily valuable for that purpose. Have those who would benefit from those uses standing to review an action which set aside the wrong area, or refused to set aside any, even though a realistic determination of all the facts would have justified other action than the Secretary took or failed to take?

We come here into some of the most vexing problems of constitutional law and the administration of our legal system.

31. *Perko v. United States*, 204 F.2d 446 (8th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953); *Bydion v. United States*, 175 F. Supp 891 (Ct. Cl. 1959); and *Mackie v. United States*, 194 F. Supp. 306 (D.C. Minn. 1961).

32. 42 OPS. ATT'Y GEN. Opinion #7.

First, the judicial power of the United States is limited by Article III, Section 2, of the Constitution to the determination of "cases" or "controversies"; it does not extend to abstract legal questions.

Second, the courts are rightly reluctant to throw open the judicial portals to spurious or obviously mistaken cases and thus occupy the judicial time to no avail.³³

Third, the courts desire in litigants raising a "case" or "controversy"

such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.³⁴

These present the basic reasons why the courts have frequently gone to the "legal interest" rule to deny "standing," thus avoiding the merits of the controversy, whether of constitutional or statutory origin.

In the field here discussed, that is, conservation of natural resources, the legal breakthrough came in *Scenic Hudson Preservation Conference v. FPC*,³⁵ where an unincorporated conservation group prevailed on the court to set aside an order of the Federal Power Commission licensing the Storm King Project of Consolidated Edison on the Hudson River, because the Commission had failed to compile a record sufficient to support its decision. The objections were that the Commission had not considered scenic values, recreational values, and the effect on wildlife, particularly fish, of the project in balancing its merits and demerits. The court ordered the matter sent back to the Commission for further hearings and consideration in which these factors ought to be considered. This case marks perhaps a beginning point for judicial intervention in the interest of conservation concerns in the guidance of administrators of our natural resources, not necessarily because natural resources were involved but because a new concept of "standing" is in the judicial air.

33. See *Koll v. Wayzata State Bank*, 397 F.2d 124 (8th Cir. 1968), as a virtually perfect example of such a case.

34. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

35. 354 F.2d 608 (2d Cir. 1965).

Several other reasonably recent cases foreshadowed this ruling.³⁶ These all have one thing in common, that is, that in the statutes being construed the Congress had provided for an appeal from an administrative ruling or decision to any party "aggrieved." Since none of the statutes governing the management of national forest lands has in it such a provision, is that lack *per se* fatal to judicial review? It does not appear so.

Of themselves the words "parties aggrieved" create no judicial magic; if there were no jurisdiction in the court to consider the merits of the attacked decision, the Congress could not by their use have created it.³⁷ Review at the instance of a "person aggrieved" in the Communications Act of 1934, the Federal Power Act, and the Federal Food, Drug and Cosmetic Act of 1938, involved in these cases, would at most have indicated a Congressional desire that administrative decision should not always escape judicial scrutiny, a concept the courts would not necessarily heed.

Flast v. Cohen,³⁸ decided by the United States Supreme Court on June 10, 1968, provides the touchstone for this observation. The court there allowed a taxpayer, if she could prove the essential elements of her interest in the administration of certain portions of the Elementary and Secondary Education Act of 1965, to question the constitutional propriety of the expenditure of federal funds for projects allegedly forbidden by that document.

While the point sought to be raised by the taxpayer was a constitutional one, the principles are not different from the point raised in the cases previously referred to³⁹ beginning with *Sanders* in none of which would the plaintiff have that legally protected interest required by the line of cases beginning with *Tennessee Electric Power*.

In the *United Church of Christ* case, for example, the petitioners-plaintiffs were listeners or would-be listeners of

36. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

37. *Muskrat v. United States*, 219 U.S. 346 (1911).

38. *Flast v. Cohen*, 88 S.Ct. 1942 (1968).

39. *See supra* note 36.

a radio station who contested the renewal of its FCC license; in other of these cases the petitioners were competitors of applicants for FCC licenses. These were, in the language of Judge Frank in *Associated Industries of New York v. Ickes*,⁴⁰ "private Attorney Generals."

This designation of a new status for objectors to administrative or regulatory decisions seems wholly apt to our inquiry here. In a special concurring opinion in *Flast* Mr. Justice Douglas used this precise language to say that in a constitutional case:

Taxpayers can be vigilant private attorney generals. Their stake in the outcome of litigation may be *de minimus* by financial standards, yet very great when measured by a particular constitutional mandate.

This same principle is equally applicable to challenges of Congressional authority.

This new judicial course in making available the courts to objectors of arbitrary, capricious, or unauthorized action by executive or administrative decisions is basically directed to the protection of the individual or group against the action of a government grown so big as frequently to be insensible to the rights and requirements of its citizens. The objectives of these ever-increasing decisions broadly construing "standing," in constitutional cases or otherwise, have been plainly put by Professor Jaffe in his paper, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,"⁴¹ in which he said in part,

There are important reasons for allowing citizen suits. Some of these have less applications to questions of constitutionality than to questions of the legality (the *vires*) of administrative and official action. It has now become a commonplace that the individual citizen in our vast, multitudinous complexes feels excluded from government. Thus, while governmental power expands, individual participation in the exercise of power contracts. This is unfortunate because the feeling of helplessness and exclusion is itself an evil, and because the individuals and organized groups are a source of information,

40. See *supra* note 29.

41. See *supra* note 5.

experience, and wisdom.***[T]here can be no question that there is danger that officials and their staffs will become attached to certain positions and to certain accommodations which narrow their vision. For these reasons procedural devices, which enable citizen groups to *participate in the decision-making process and to invoke judicial controls*, are very valuable

. . . Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking. The usual taxpayer and citizen suit is thoroughly consistent with the primacy of majority rule. The issue will be the statutory authority of the official action, and the lawsuit itself will be prescribed by statute. The conservation and broadcasting cases emerge, then, as excellent examples of the lawsuit as a form of citizen participation within a framework established by majority rule. (Emphasis supplied.)

These comments, related both to constitutional or statutory controversies, forecast the same philosophy expressed by Mr. Justice Douglas in his special concurring opinion in *Flast*, where he said:

The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.

I would not be niggardly therefore in giving private attorneys general standing to sue. I would certainly not wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction. To wait for a sign from Congress is to allow important Constitutional questions to go undecided and personal liberty unprotected.

There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a

wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like.⁶ When the judiciary is no longer "a great rock" in the storm, as Lord Sankey once put it, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.

"The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks." *Ferry v. Williams*, 41 N.J.L. 332, 339 (S.Ct. 1879).

There is little doubt but that these observations would apply, as Mr. Jaffe has indicated, as well to Congressional as to constitutional authorization for a given executive or administrative decision, and the review the courts would afford it.

The principle goes back not to *Scenic Hudson* alone, but to *The Chicago Junction Case*⁴² decided in 1924, where the Supreme Court, at the behest of several railroads deeming themselves adversely affected by an ICC decision allowing the New York Central Railroad to acquire control of a crucial and until the independent belt line railroad in Chicago required the Commission to hear the plaintiffs' objections and take evidence on the harms to "the public interest" if the acquisition were permitted. Despite the lack of Congressional language in the Interstate Commerce Act giving a right of appeal by "a person aggrieved," the court, speaking through Mr. Justice Brandeis, held that it was the Commission's duty under the Act to protect the plaintiffs from unlawful competition. Since the Commission had not so construed the statute and therefore denied the plaintiffs a hearing on their objections, the court returned the case to the Commission in order that these be heard and considered.

Although *Chicago Junction* was not cited in *Scenic Hudson*, it is on all fours with it in principle, and discloses that the "person aggrieved may appeal" language is not vital to judicial review when a statute protects a class of citizens,

42. *Baltimore & O.R.R. v. United States*, 264 U.S. 258 (1924).

whatever the composition of that class—in *Chicago Junction* railroads, in *Scenic Hudson* conservation groups.

We can now try to translate these legal principles to the management of the national forests and the review of decisional aspects of that management in circumstances where groups of people deem themselves adversely affected by those decisions.

First, despite the substantial increase between the 1897-1905 period and today in the statutory objectives of forest management, and therefore the number of that management's beneficiaries, it does not appear likely that the courts will deny their portals to a class of persons who have had their "rights" invaded by executive or administrative decision in the natural resource field.

Second, *Chicago Junction* and *Lansden* both tell us that the "person aggrieved" language in the statute is not vital to judicial review of such decisions; even in *Frost* the District Court did not rely on the "standing" issue to avoid decision, though it considered only the generality of the statute rather than the merits of the executive action.

Third, in these cases, where the plaintiff represents a class of citizens who are given an interest in the decision, *i.e.*, outdoor recreationalists, potential bidders for timber, applicants for range permits, or fish and wildlife interests,⁴⁸ for example, the courts will not in most cases tell the Secretary or the Chief of the Forest Service what to decide. They will instead review the factors and considerations upon which he acted. If he used the wrong ones or false ones, refused to use those he should have used, or discriminated between members or the interested class, they will remand the case to him for a new decision in which he has used all of the proper criteria the Congress has specified in the statute and the Constitution requires. Thus, it seems, would the judiciary protect statutorily created general interests and enforce "due process" concepts, and yet avoid invasion of the executive department's functions.

48. Listed in the Multiple Use Sustained Yield Act § 1, Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §§ 528-531 (1964).

It is difficult not to feel sympathy for the Forest Service in its developing problems. For many years—from 1905 until about 1939—its functions was primarily custodial, with overtones of benefits to timber-using industry and the communities those industries supported. Suddenly, with the onrush of World War II and the nation's burgeoning needs for all kinds of wood fibre products, it became a merchandiser while still retaining its custodial functions.

Then, before it could become acclimated to this new role, came the population explosion, the shortening workweek and lengthening vacation, the jet airplane and the camper truck; out of the blue the forests became the focus for vast numbers of recreational users and their pressure organizations, in addition to the other uses to which they were previously put.

These uses, and others, are the result of all of the "rights" the statutes confer. It would be an anomaly indeed if, simply because these are forests rather than something else, the courts would be considered powerless to protect in some manner both the Forest Service from bad decisions and those who should be beneficiaries of those decisions. Even if the right of judicial review of these decisions was never used, it should still be there in proper cases. The citizen frustrated without recourse by his government is a bad citizen.

It is not the author's intent in this paper to examine in other than general terms the subject of judicial review as it may be specifically applied to the field of federal timberland management. One would be bold indeed who flatly predicted the types of cases in which final action on the part of the Chief of the Forest Service or the Secretary of Agriculture could be judicially reviewed; we are only aware that there is a line somewhere between those which should, and should not, be subjected to judicial scrutiny. There are hundreds of such decisions annually; the judicial sifting through a multitude of cases to determine the review line entitles us to shudder.

We can be aware, however, that the doctrines of *Grimaud* and *Light*, elucidated in a day when only the custodial features of the national forests were the subject of legislation, are ill-suited to the statutory structure and obligations of

national forest management in 1969. These additional groups of forest users, for example recreationalists, have "rights" courts are not likely to ignore, even though the law is still in embryo in judicial review of decisions in the resource field. By the same token, "older" users dependent upon the national forests, in point of time, such as commercial producers of wood fibre products, should also have their interests clarified and protected, lest without judicial recourse the newer beneficiaries overwhelm them and those employees, communities, and markets dependent upon them.

This situation cries out for the attention and action of the Congress, which can take place in one or two sessions, rather than in what could be the decades required for judicial solution of these matters. It appears eminently desirable, not only because of time but perhaps the results to be achieved, that the Congress declare by well-considered and carefully structured language the dividing line between those decisions of national forest managers which ought to be reviewable and which not, and at the same time provide more certain language in the governing statutes themselves by which those who manage these forests may in this pressure-laden field be guided in their decisions.