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Public Lands- Forests and Forestry - Is Clearcutting Prohibited by the Organic Act of 1897 - Izaak Walton League v. Butz

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CASE NOTES

PUBLIC LANDS — Forests and Forestry — Is clearcutting prohibited by the Organic Act of 1897? Izaak Walton League v. Butz, 6 ERC 1016 (N.D. W.Va. 1973)

The Izaak Walton League and other conservation organizations[1] alleged that the National Forest Organic Act of 1897[2] permits only the cutting of dead, mature or large growth trees which are individually marked and all of which must be removed from the forest.[3] They therefore sought a declaratory judgment and injunctive relief requiring the United States Forest Service to comply with the provisions of this act in three specific sales[4] and all future sales in the Monongahela National Forest. The defendant Department of Agriculture officials[5] answered that reading the statutory provisions cited by plaintiffs in the context of the purposes embodied in that act[6] indicated that the language was meant to be applied collectively to trees within the forest and not to individual trees. *Held,* the clear and unmistakable language of the Organic Act authorizes only the sale of individually marked and regionally designated dead or mature trees, all of which must be removed from the forest.

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1. The Sierra Club, the National Resources Defense Council, Inc., the West Virginia Highlands Conservancy, and Forest Armentrout joined the West Virginia Division of the Izaak Walton League in bringing this action.
2. 16 U.S.C. §§ 473-482, 551 (1970).
3. 16 U.S.C. § 476 (1970):

   > For the purpose of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such national forests as may be compatible with the utilization of the forests thereon, . . . to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom . . . . Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision . . . .

4. The specific sales were called the Middle Mountain North Sale, the Snorting Lick Sale, and the Music Run Sale. The harvesting was to total some 1,077 acres of which 428 acres were to be clearcut. Even in the areas not clearcut, trees as small as 5 inches in diameter at breast height were to be cut.
5. Defendants in this action were Secretary of Agriculture Earl L. Butz, Chief of the Forest Service John R. McGuire, Regional Forester Jay H. Cravens, and Forest Supervisor Alfred H. Troutt.
6. Defendants emphasized that portion of 16 U.S.C. § 475 (1970) providing that one of the purposes of the act is to furnish a continuous supply of timber to the people of the United States. They argued, basically, that the act requires scientific management and that determination of the specific management practices to be followed is within the discretion of the Secretary of Agriculture.

This case is significant because it is the first case construing the language of the Organic Act to prohibit what is commonly referred to as clearcutting. Clearcutting has expanded since its acceptance as official policy in 1964[7] to the point where it accounts for almost half of the timber harvest of the national forests.[8] This note will consider the legal reasoning of the court's opinion, examine other cases construing this portion of the act, and reflect on the policy considerations inherent in the case. The conclusion ultimately reached is that the decision may be correct as a social determination on the basis of the facts before the court, but the decision is probably incorrect in its statutory construction.

THE REASONING

"The words . . . of a statute are to be accorded their plain and ordinary meaning."[9] With this documented[10] basic assumption, the court proceedel to examine the statutory language on which the plaintiffs had focused this action.[11] The language provides explicitly that the Secretary of Agriculture may sell dead, mature, or large growth timber.[12] Since the

7. Izaak Walton League v. Butz, 6 E.R.C. 1016, 1019 (N.D. W.Va. 1973). *See also* Senator Randolph, *A Senator Looks at Forestry*, 77 AM. FORESTS 14, 15 (Jan. 1971) (hereinafter cited as Senator Randolph).
8. *See* N. WOOD, CLEARCUT, THE DEFORESTATION OF AMERICA 7 (1971) (hereinafter cited as WOOD).
9. Izaak Walton League v. Butz, *supra* note 7, at 1023.
10. The court cited Justice Frankfurter in Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944), which indicated that statutes not in technical terms are meant to be understood by the ordinary man. Judge Maxwell's approach was to examine the statute to the exclusion of virtually all aids to construction. *Contra*, United States v. Dickerson, 310 U.S. 554, 562 (1940), which held that statutes must be construed in light of all the information available. The *Izaak Walton League v. Butz* court did not draw the circular distinction between statutes in derogation of the common law (to be construed strictly) and remedial statutes (to be construed liberally). This dichotomy is generally labeling used to create a make-weight argument at any rate. The court approached the question from the standpoint of congressional intent in enacting this particular statute. *See* text *infra* p. 531-2.
11. 16 U.S.C. § 476 (1970), *see supra* note 3.
12. 16 U.S.C. § 476 (1970) also contains some startling language to the effect that the timber harvested from the national forest may be used in the state where it is cut but cannot be exported therefrom. This provision was superseded in 1917 by provisions now codified in 16 U.S.C. § 491 (1970), which placed exports in the realm of the Secretary of Agriculture's discretion. In 1926, 16 U.S.C. § 616 (1970) was enacted permitting such export if in the Secretary's judgment local timber supplies are not depleted. Along these same lines, 16 U.S.C. § 475 (1970) provides that among the purposes authorizing the establishment of national forests is furnishing a continuous supply of timber for the use and necessities of citizens of the United States. If we can make the assumption that national forest resources can be utilized only in accordance with the purposes for which national forests are established, then the clear and unmistakable conclusion is that timber

parties stipulated this act to be the Secretary's only authorization to sell,[13] it follows that only trees meeting these descriptions can be cut and sold. Similarly, congressional usage of both the terms "mark" and "designate" in the sale provisions leads to the conclusion that "mark" refers to each individual tree and "designate" refers to trees within an area. Finally, the act provides that such timber shall be cut and removed.

Clearly the learned judge had more on his mind than a narrowly drawn, seventy-six-year-old statute. Some hint of Judge Maxwell's thinking emerges from the severe construction he gave the purpose clauses of Sections 475 and 476.[14] The conclusion reached by his construction is that commercial timbering for its own sake is completely unauthorized in the national forest. The only reason any tree can be cut is in furtherance of the growth of younger trees. Insight into his nonstatutory considerations is also provided by the figures cited in documenting the extent of harvesting in the Monongahela Forest and the proportion alleged to have been clearcut.[15]

Perhaps a more explicit expression of the implicit fears of Judge Maxwell is to be found outside the record. Senator Randolph of West Virginia suggested that perhaps the Monongahela Forest had become a demonstration program for intensive clearcutting which focused solely on the demand for commercial timber.[16] Judge Maxwell may well have been concerned with the aesthetic and recreational values with which clearcutting interferes. These points are well argued in

harvested from the national forests cannot be exported from this country. This conclusion may make the protectionists happy, but no court has yet reached this construction. Conceivably, a court could evade this result by deciding 16 U.S.C. § 491 and § 616 (1970), discussed above, are sufficiently broad to allow not only export from the state but export from the country as well.

13. Izaak Walton League v. Butz, *supra* note 7, at 1017. *See* text *infra* p. 532.
14. *Id.* at 1020. 16 U.S.C. § 476 (1970) says the purpose of cutting the trees shall be to further the growth of younger trees. The court utterly refused to allow the purpose of providing timber specified in 16 U.S.C. § 475 (1970) to mitigate the limitations of the purpose set out in § 476.
15. Izaak Walton League v. Butz, *supra* note 7, at 1018. The figures indicated that 39,922 acres were harvested between 1968 and 1972 with 14,300 acres under contract to be cut at that time. Plaintiffs alleged that 46.7% of the portion harvested during this period was clearcut. Ultimately, 784,000 out of 820,000 acres were classified as commercial forest.
16. Senator Randolph, *supra* note 7, at 14.

the Sierra Club battlebook, CLEARCUT, THE DEFORESTATION OF AMERICA,[17] which, perhaps not so coincidentally, tells the environmentalists' side of the story of the Monongahela National Forest. In fact, public concern over the abuses of this forest land lead to the creation of the first state government commission to investigate and recommend ways of controlling the alleged pillaging.[18] *Izaak Walton League v. Butz* thus seems to emerge as much a social reaction as a construction of statutory law. Before more fully considering the social factors, several intervening legal barriers potentially affecting the case must be hurdled.

Initially, immediate legal action after the announcement of a timber sale by those seeking to stop it may be critical. In the principal case, the sales were announced in April 1973. and within a month plaintiffs had their temporary restraining order.[19] The plaintiffs in *Sierra Club v. Hardin*[20] were not so vigilant. That action was not initiated until five years after announcement of the sale; the timbering company was spending $100,000 a month in salaries in preparation for the project and had committed itself to a $3,000,000 expenditure. This delay and reliance constituted laches which pervaded the decision which tacitly permits clearcutting in the face of some of the same arguments made in the principal case. The Alaska court held that all plaintiffs' causes of action except those arising from the National Environmental Policy Act were barred by laches.[21]

Another doctrine which arguably could alter the outcome of *Izaak Walton League v. Butz* and similar cases is statutory reenactment—a doctrine used extensively in tax law.[22] Basically, this theory holds that if the Forest Service allows clearcutting and Congress subsequently passes any comprehensive forest law without prohibiting it, Congress has implicitly enacted a law permitting its usage. Reversal of the principal

17. WOOD, *supra* note 8.
18. Craig, *Esthetics, The Sixth Value*, 76 AM. FORESTS 7 (Oct. 1970) (hereinafter cited as Craig).
19. Izaak Walton League v. Butz, *supra* note 7, at 1019-1020.
20. 325 F. Supp. 99 (D. Alas. 1971).
21. *Id.* at 127. The court also barred plaintiffs' causes of action on grounds of failure to exhaust administrative remedies. *See* discussion *infra* note 47.
22. *See* Fribourg Navigation Co. v. Comm'r of Internal Revenue, 383 U.S. 272, 283 (1966), *discussed in* J. CHOMMIE, FEDERAL INCOME TAXATION 11 (1968).

case, which is rumored to be on appeal, is unlikely on the basis of this theory, however, because the statutory reenactment theory has merit only in the absence of congressional action to the contrary. The restrictions in the Organic Act,[23] as the court construed them, are a congressional mandate to the contrary. Furthermore, the last extensive congressional action in the forestry realm was in 1960,[24] and clearcutting is generally held to have become official Forest Service policy in 1964.[25]

A twin doctrine to reenactment is the doctrine of congressional acquiescence illustrated in *United States v. Midwest Oil.*[26] In *Midwest Oil,* the Land Department successfully argued that although it had no statutory authority to make the type of reservation from entry at issue, it had been doing so for a great many years. Congress knew of these actions, so the court concluded that it had acquiesced in them. Again, the outcome of *Izaak Walton League v. Butz* would not be changed, because the elapsed decade since clearcutting became official policy[27] seems inadequate to provide sufficient foundation for this assumption of executive power, especially in light of the statutory provisions to the contrary. This is not to say that no clearcutting was practiced prior to 1964.[28] In fact, some commentators have been willing to assume clearcutting is so well established that any actions now contesting it are delaying actions intended solely to obstruct the orderly timbering of national forests.[29] Apparently in answer to this type of argument, the *Izaak Walton League v. Butz* court stressed the fact that Congress has been careful to avoid any abdication of its legislative control.[30] In looking at congressional intent, the court found that at the time of the passage of the Organic Act, Congress expressed a serious determina-

23. 16 U.S.C. § 476 (1970), *see supra* note 3.
24. Multiple Use-Sustained Yield Act, 16 U.S.C. §§ 528-531 (1970).
25. *Supra* note 7, at 1018 n.4.
26. 236 U.S. 459 (1915).
27. *Supra* note 7, at 1018 n.4.
28. *See* ENVIRONMENTAL ACTION ORGANIZATION, UNIVERSITY OF WYOMING, SOME ECOLOGICAL ASPECTS OF CLEARCUTTING IN THE MEDICINE BOW NATIONAL FOREST WYOMING 3 (1972) which indicates clearcutting in the Medicine Bow National Forest began in 1952.
29. Rogers, *Izaiahs at the Bar: Environmentalists and the Judicial Process,* 7 LAND & WATER L. REV. 63, 68-70 (1972).
30. Izaak Walton League v. Butz, *supra* note 7, at 1022.

tion to stop the exploitive invasion of these public lands.[31] In other words, Congress made its mandate clear, even if it was seventy-six years prior to this case. The court held that if the science of silviculture and the peoples' will have now changed, it is only within the competence of Congress to change the law.[32]

A much stronger argument against the holding in *Izaak Walton League v. Butz* than reenactment and acquiescence is that the Multiple Use-Sustained Yield Act[33] grants additional authority for the sale of timber. This act provides that the purposes it enumerates are supplemental to, and not in derogation of, the purposes set out in 16 U.S.C. § 475 (1970).[34] However, it is Section 476 which contains the substantive restrictions, and it is clear that authority for contravening the limitations of Section 476 is not inherently in conflict with the purposes set out in Section 475.[35] Thus harvesting timber is authorized by 16 U.S.C. § 529 (1970)[36] and such lumbering is not necessarily restricted by the mature growth, mark and designate, and cut and remove provisions of the Organic Act.

This discussion parallels, but is distinguishable from, the theory of implied repeal discussed decently in *Friends of the Earth v. Armtrong.*[37] *Armstrong* involved Section 3 of the Colorado River Storage Act[38] which provides that no dam or reservoir built under the authority of that act be within any national park or monument. Section 1 of that act provides specifically that protective measures must be taken to ensure no harm comes to the Rainbow Bridge National Monument.

31. *Id.* at 1020.
32. *Id.* at 1023.
33. 16 U.S.C. §§ 528-531 (1970).
34. 16 U.S.C. § 528 (1970).
35. The tension between Section 475 and Section 476 was discussed previously in the context of the purpose clauses. Section 475 contains the broad congressional reason for creating national forests. Proper clearcutting is not in violation of the purposes for which the forests were created even though clearcutting is, as the *Izaak Walton League v. Butz* court held, in violation of the specific limitations of Section 476. 16 U.S.C. § 528 (1970) alludes specifically to 16 U.S.C. § 475 (1970) and not the Organic Act in general which would include Section 476.
36. "The Secretary of Agriculture is authorized and directed to develop and administer the renewable resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom."
37. 5 E.R.C. 1694 (10th Cir. 1973).
38. 43 U.S.C. §§ 620-620o (1970).

The court found that these two provisions were inserted in the context of the preparation for the Glen Canyon Dam which at full capacity backs the waters of Lake Powell into the Rainbow Bridge National Monument unless protective measures are taken. Upon a fuller consideration of the costs, Congress subsequently declined to appropriate sufficient funds, and in fact prohibited the utilization of any funds, to build the protective facilities.[39] The district court enforced the provisions of Section 1 and enjoined the appropriate authorities from allowing the water to back up into the monument. The appellate court reversed and held that the failure to appropriate or allow the use of funds amounted to a clear, direct, and informed repeal of the previous policy even though that policy remained in the statutes.[40] *Armstrong* differentiated *Posadas v. National City Bank,*[41] which ruled generally that implied repeals in all areas will not be found unless there are clear statutory indications Congress meant to do so, by finding congressional intent to be clear.

No such intention to repeal can be found in the Multiple Use-Sustained Yield Act. As mentioned, 16 U.S.C. § 528 makes the purposes of this act supplemental to the Organic Act. The *Izaak Walton League v. Butz* court was therefore correct in finding there was no repeal by implication.[42] However, the court failed to comprehend that the Organic Act need not be repealed before clearcutting can be authorized because the restrictions of Section 476 apply only to the cutting authorized therein and Section 529 now authorizes additional cutting. The administrative agencies seem to recognize the Multple Use-Sustained Yield Act authorizes timber sales. In fact some regulatory provision authorizations of timber sales are based upon this act.[43] Either the defendants failed to make this argument, as would appear from their stipulation that the Organic Act is the only authority for sales,[44] or the court did not respond to it.

39. Friends of the Earth v. Armstrong, *supra* note 37, at 1698.
40. *Id.* at 1699.
41. 296 U.S. 497 (1936).
42. Izaak Walton League v. Butz, *supra* note 7, at 1021.
43. 36 C.F.R. § 221.6 (1973).
44. Izaak Walton League v. Butz, *supra* note 7, at 1017.

THE PRECEDENTS

Examination of other cases construing 16 U.S. §§ 473-482 reveals cases ranging in subject matter from peat moss to taxes. Only *Sierra Club v. Hardin*[45] and *Thompson v. United States*[46] are sufficiently related to *Izaak Walton League v. Butz* to warrant full consideration.[47]

The only other federal case to reach the substantive restrictions of 16 U.S.C. § 476 (1970) is *Sierra Club v. Hardin.*[48] Before reaching the substantive arguments the Alaska district court considered several collaterally relevant factors beyond the scope of this note.[49] The chief nexus between the two cases is the common allegation of failure to mark and designate each tree. In the Alaska case, the defendants countered this allegation by arguing that the trees must be marked before they are sold but since title does not pass in any given tree until it is cut and paid for, the restriction is not violated. Thus a marking at the sawmill is sufficient in their view to fulfill the technical requirements of the statute. The court thought both extremes inconsistent with the multi-

45. *Supra* note 20.
46. 308 F.2d 628 (9th Cir. 1962).
47. An example of the specific following of 16 U.S.C. § 476 (1970) right down to the necessity of the trees being dead is Lewis v. Garlock, 168 F. 153 (D.S.D. 1909). The dispute arose when holders of mining claims objected to the government selling beetle-infested trees which they apparently were using in their claims. The case is not directly related to *Izaak Walton League v. Butz* because the primary issue was who owned the trees rather than under what restrictions they could be cut.
48. *Supra* note 20.
49. Chiefly they are standing, the appropriatness of judicial review of administrative action, and exhaustion of administration remedies. None of these issues were contested in the principal case. The court concluded its standing discussion by finding the conservation organizations to have standing to assert aesthetic, conservation, and recreation interests of local members who are directly affected by the timber sales, at least under statutes which clearly evince congressional intent to protect such uses. Where congressional intent is solely to protect the citizen as a taxpayer, the Alaska court found standing more questionable. Thus, if the bidding requirement of 16 U.S.C. § 476 (1970) is simply for the purpose of insuring adequate compensation for the trees, aesthetic injury would not give the taxpayer standing to contest failures in this process. This conclusion is not inconsistent with Sierra Club v. Morton, 405 U.S. 727 (1972), decided subsequently, in which the Supreme Court denied standing to those who did not allege personal use. The Alaska court proceeded to find the Secretary's duties under the act to be mandatory and therefore judicial review is not barred by 5 U.S.C. § 701 (a) (2) (1970), the Administrative Procedures Act section in question. The court then reached the issue of exhaustion of administrative remedies. It pointed out that the Sierra Club was fully aware of the protest procedures within the Forest Service and the failure to utilize them constituted a bar to all causes of action save the one arising under the newly-enacted National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1970).

ple use embodied in the Multiple Use-Sustained Yield Act of 1960.[50] It found individual marking prior to cutting constituted too onerous a burden. The court pointed out that blocks of timber are designated every five years and provisions are made for withdrawing areas particularly valuable for recreation and aesthetic purposes. The court's decision amounts to extrapolating the broad purpose from all the relevant statutes and applying it to the facts before it. Judge Plummer accepted neither plaintiffs' nor defendants' construction but rather was ultimately oblivious to the specific statutory restrictions.[51] No allegations were made concerning the limitation of cutting to dead, mature or large growth trees or the requirement of total removal. Even if they had been made, the broad perspective approach used by Judge Plummer might well have overridden the narrow language of the statute.[52]

Another case suggesting possible complications in analyzing the reach of the Organic Act in clearcutting and other topic areas is *Thompson v. United States.*[53] The dispute in *Thompson* bottomed on the question of whether Thompson could obtain mineral rights in the national forest pursuant to 16 U.S.C. § 478 (1970), which is part of the Organic Act. The land in question was deeded to the United States and accepted by the Secretary of Agriculture pursuant to the Clarke-McNary Act.[54] The forest land in *Izaak Walton League v. Butz,* on the other hand, was apparently acquired pursuant to the Appalachian Forest Act.[55] Both acts provide that all

50. 16 U.S.C. §§ 528-541 (1970).

51. Sierra Club v. Hardin, *supra* note 20, at 121-123.

52. A bit of historical irony is added to Sierra Club v. Hardin, *id.*, by Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), in which the United States Supreme Court denied compensation to Indians for divesting their claims in the North Tongass National Forest where a decade later the sale in *Sierra Club v. Hardin* took place. Add to this the long term contract to sell the total output of the forest harvesting operation contested in Sierra Club v. Hardin, *Id.* at 105, and the result is the United States government taking timber lands from the Indians without compensation so that the Japanese can have wood, all in the name of protecting the forest, improving water conditions, and furnishing a continuous supply of timber to United States citizens per 16 U.S.C. § 475 (1970).

53. *Supra* note 46.

54. Specifically, 16 U.S.C. § 569 (1970). This act and the Appalachian Forest Act, discussed note 55 *infra,* are the basic forest purchase acts.

55. Also termed the Weeks Act of March 1, 1911, Pub. L. No. 61-186, § 7, 36 STAT. 963, which has been substantially amended and codified in 16 U.S.C. § 516 (1970).

land acquired under their authority shall be administered in accordance with the provisions of Section 11[56] of the Appalachian Forest Act. Finally, Section 11 provides that such land shall be administered in accordance with the provisions of the National Forest Creative Act of 1891.[57] Thompson's problem arose because the Organic Act is limited by its terms to public lands,[58] and neither the Clarke-McNary Act nor the Appalachian Forest Act are sufficiently broad to make land acquired under their authority subject to the Organic Act. Ultimately the *Thompson* court held that Thompson owed the United States $73,201.63 for minerals converted plus $42,670.22 forth of minerals not yet sold, on the theory that he intentionally trespassed on lands not subject to mineral entry and profited to that extent.[59]

An amendment to the Appalachian Forest Act in 1925[60] further complicates the application of this public land-acquired land dichotomy to *Izaak Walton League v. Butz.* It provides, in substance, that timber acquired in accordance with its provisions shall be cut and removed under the laws and regulations relating to such national forests under the direction and supervision of the Secretary of Agriculture. The amendment retains the reference to Section 11 of the Appalachian Forest Act which makes the land subject to the Creative Act as discussed above. The crucial problem presented is whether the phrase "laws and regulations relating to such national forests" can be taken to make the national forest land acquired under the Appalachian Forest Act subject to all forest laws notwithstanding the Organic Act's limitation to public lands. Reading that amendment to absolve the limitations of the Organic Act does not seem justified, particularly in light of the fact that the amendment did not

56. Now substantially codified in 16 U.S.C. § 521 (1970).
57. Act of March 3, 1891, Pub. L. No. 55-561, 26 STAT. 1103 now codified as amended in 16 U.S.C. § 471 (1970).
58. 16 U.S.C. § 475 (1970). The distinction between acquired land and public land was defined in Barash v. Seaton, 256 F.2d 714, 715 (1958), in terms of whether the land was within the original public domain or acquired from private or state ownership.
59. Thompson v. United States, *supra* note 46, at 630-631.
60. Act of March 3, 1925, Pub. L. No. 68-473, 43 STAT. 1215. Note that this language contains the same "cut and remove" terminology found in 16 U.S.C. § 476 (1970), upon which the plaintiffs based one of their contentions in the principal case. As to that contention it makes no difference whether the restriction is in the Organic Act or the amended Appalachian Forest Act.

specifically mention the Organic Act is it did the Creative Act.

The conclusion reached by this neecssarily complex analysis is that the Organic Act does not apply to acquired lands. This determination, based on the reasoning of *Thompson v. United States,*[61] indicates that *Izaak Walton League v. Butz* was decided incorrectly. The Monongahela National Forest, being land over which the United States did not originally have dominion, is by definition acquired land.[62] If, as the parties stipulated, the Organic Act is the Secretary's only authority for making sales, and the Organic Act is inapplicable to acquired land, the Secretary lacks any statutory authority to make sales in the Monongahela and other acquired forests. Again, not all sales are banned if the Multiple Use-Sustained Yield Act gives this authority as previously discussed. Whether or not the distinction between acquired land and public land can be justified from a policy standpoint is open to question.[63] As *Thompson* indicates, the distinction does exist in the law.[64]

POLICY

In a sense, *Izaak Walton League v. Butz* settles nothing. It is subject to reversal by the Fourth Circuit Court of Appeals, the United States Supreme Court, and ultimately by the Congress. Even without reversal its clearcutting proscription stands only in West Virginia. The case, in perspective, is but one of the judicial battles in the war over clearcutting now raging between the competing users of the national forests.

Congress specifically recognized most of the competing interests in the Multiple Use-Sustained Yield Act.[65] That act

61. *Supra* note 46.
62. The status of the Monongahela is discussed more fully in Curtis, *"For the Snark was a Boojum, You See": Counseling with Caution in Administering Acquired Eastern National Forest Lands Since NEPA*, 9 LAND & WATER L. REV. 21, 46 (1974) (hereinafter cited as Curtis).
63. *Compare* Curtis, *supra* note 62, at 36, with PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 5 (1970).
64. For a much broader discussion of the acquired forest land realm, *see* Curtis, *supra* note 62.
65. 16 U.S.C. § 528 (1970).

specifies that the forests are to be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. What the act does not specify is the relative importance to be accorded each use. The West Virginia Commission argues that each use should be given equal weight.[66] Judge Plummer concluded that since Congress did not specify any weight, the choice is left to the discretion of those who are administering the forest.[67] His conclusion seems inescapable form a legal standpoint. The clearcutting dispute is primarily a conflict between those who would use the forest for timber and those who would use the forest for recreation.

The first logical policy question is why anyone would want to clearcut in the first place. The most commonly voiced, lumber-related justifications are increased efficiency,[68] with its concomitant lower harvesting costs,[69] and the regeneration of those species of trees needing sunlight when they are young.[70] The greater efficiency comes in two phases. Initially, clearcutting allows the use of larger machines[71] and results in a higher yield of lumber from each acre harvested.[72] Perhaps even more important are the commercial advantages from the second crop of trees which are uniform in size.[73] Estimates of the decrease in efficiency in harvesting Douglas fir if clearcutting were unavailable run as high as thirty-eight percent.[74] Closely allied with this output theme is the increased regeneration of light sensitive species, including not only Douglas fir but many of the eastern hardwoods. The theory is that for those species requiring sunlight, clearcutting is the only feasible silviculture method giving any kind of satisfactory regeneration.[75] Along these same lines,

66. The commission would also add a sixth value, aesthetics, Craig, *supra* note 18.
67. Sierra Club v. Hardin, *supra* note 20, at 123.
68. Davis, *ABC's of Even-Aged Management*, 77 AM. FORESTS 19, 49 (Aug. 1971).
69. McQuilkin, *To Regenerate Eastern Hardwoods—Clearcut*, 76 AM. FORESTS 20 (1970) (hereinafter cited as McQuilkin).
70. *Hearings on Management Practices on the Public Lands Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 1, at 243 (1971) (hereinafter cited as *Hearings*).
71. McQuilkin, *supra* note 69, at 48.
72. *See* Izaak Walton League v. Butz, *supra* note 7, at 1018.
73. McQuilkin, *supra* note 69, at 85.
74. *Id.* at 22. *But cf. Hearings, supra* note 70, at 56.
75. McQuilkin, *supra* note 69, at 20.

it is argued that clearcutting allows the introduction of higher value[76] species of trees.[77]

The immediate reply from the recreational faction is that such arguments focus on timber productivity to the exclusion of all other values. No doubt the timber companies derive substantial profit from timber production, but their profits are not alone on the timber production side of the scale. The wood product consumer's interest must be considered also. In considering his interest, we start with the proposition that an industry-wide increase in efficiency in an industry with any competition will lead to a reduction in the price of the product.[78] To this must be added the potential substitution of competing products.[79] A forty percent decrease in the cost of wood thus will not necessarily decrease the cost of goods now made of wood the same forty percent. The conclusion reached is that clearcutting results in some relative savings, but how much is a function of the amount of increased efficiency which results, industry competition, and the availability of substitute products.

One further observation is necessary on the timber factor. The national forests do not constitute a monopoly of all land which can be utilized for timber production.[80] Not only are there sizeable private forest stands now, but lands not currently in timber production are capable of growing commercial timber. In a purely economic sense, if clearcutting is sufficiently profitable it will eventually attract more private lands. The clearcutting of private lands is apt to raise less of a public outcry.[81]

76. Higher value, not in the sense of wildlife, recreation, or aesthetics, but most desirable for commercial harvesting. *See* Senator Randolph, *supra* note 7, at 14.

77. McQuilkin, *supra* note 69, at 85.

78. *See* L. REYNOLDS, ECONOMICS, A GENERAL INTRODUCTION 378-79 (3rd. ed. 1969).

79. *Id.* at 61. The same concept is discussed in terms of cross elasticity of demand in D. WATSON, PRICE THEORY AND ITS USES 109-10 (2nd ed. 1968).

80. Only 23 percent of the total timber production in 1965 came from the national forests, according to the STATISTICAL ABSTRACT OF THE UNITED STATES 624 (1973). The same source indicates that in 1950 only 7 percent of the total timber output came from the national forest. The discussion in the text ignores the inevitable time lag involved in the growth of trees.

81. *Cf.* Comment, *Trees, Earth, Water and Ecological Upheaval: Logging Practices and Watershed Protection in California*, 54 CAL. L. REV. 1117 (1966) (hereinafter cited as *Logging Practices*).

Just as all potential timber land is not in the national forest, not all recreation land is within the national forest system. Even if the forests were completely obliterated, some of the dollars now spent and some of the fun now enjoyed in utilizing the forests for recreation will be spent and found in other forms of recreation.[82] Another factor mitigating injury to recreational values should clearcutting be permitted in the general forest is the classification of land for uses in which all commercial timbering is forbidden. The prime example is the wilderness system[83] which is closed to lumbering as well as all motor vehices whether commercial or recreational. Even within the nonwilderness forest some portion may be set aside for recreational purposes.[84] In the Monongahela Forest at the time of the clearcutting decision, some 36,000 acres, roughly four and one-half percent of the total area, was classified as noncommercial forest.[85]

Many of the conflicts between the competing sides can be eliminated by terminating the incidents of improper clearcutting. The West Virginia Commission advocates limitation of clearcut size to 25 acres.[86] Industry presentations have indicated that modern clearcuts are limited to 50 acres.[87] The beginnings of a consensus that clearcuts should not exceed 50 acres is apparent. Another prime concern of the conservation-oriented people seems to be the degradation of streams caused by clearcutting either on grades too steep or too close to the streams' banks.[88] There still should be enough timber standing in the forests that correction of these poor clearcutting techniques should impose no hardship on the lumbering faction.[89]

82. One member of the West Virginia Commission argues that clearcutting should be eliminated because tourism produces ten times the income of timbering in West Virginia (*quoted by* Brooks, *Senate Hears Clearcutting Concerns*, 69 J. OF FORESTRY 301 (1971)). This reasoning not only ignores the substitution factor, but it blindly assumes every tourist dollar spent in the state at that time was spent in the pursuit of forest recreation.
83. Pursuant to the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1970).
84. 36 C.F.R. § 221.3(4) (1973).
85. Izaak Walton League v. Butz, *supra* note 7, at 1018.
86. Craig, *supra* note 18, at 7.
87. McQuilkin, *supra* note 69, at 50.
88. *See Logging Practices*, *supra* note 81.
89. The factors mentioned are of course only some of the considerations. The proposed RESTATEMENT (SECOND) OF TORTS § 850B (Tent. Draft No. 17, 1971) more fully enumerates some of the factors any decision-maker, whether administrative, judicial, or legislative, must consider. The factors, as adjusted for our context, include the purpose of the respective uses, the

CONCLUSION

In the final analysis, the district court decision in *Izaak Walton League v. Butz* seems more of a judicial reaction to abuses in a given factual situation than a definite indication of how the clearcutting issue will be ultimately resolved. The parties assumed that the Organic Act is the Forest Service's sole statutory authority for allowing any timber to be harvested. In fact, such authority appears to be derivable from the Multiple Use-Sustained Yield Act as well. If the Organic Act were the only authorization to sell, the reasoning of the *Thompson* case indicates the Secretary probably has no authorization to sell at all because the Organic Act is inapplicable to acquired land.

The Multiple Use-Sustained Yield Act defines the multiple use it mandates in terms of the greatest benefit to the American people, which is not necessarily the greatest dollar return.[90] Maximization of the public good becomes the ultimate goal. The almost complete inability to quantify the factors and accord them appropriate weight is manifest. The Secretary's determination of the values would be given much credence in any dispute.[91] In short, forcing an administrative agency to do anything, or not do anything, on a statute as nebulous as the Multiple Use-Sustained Yield Act seems remote. If the discomfort with the decisions of the Secretary, and those who report to him, becomes sufficiently intolerable, the ultimate resolution of the dispute will lie with Congress.

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suitability of the uses to this forest, the economic value of the uses, the social value of the uses, the extent and amount of harm caused, the practicality of avoiding the harm by adjusting the use of one user or the other, the practicality of adjusting the portion of forest used by the respective users, the protection of existing values of land, investments, and industries (both timber and recreational) and the burden of requiring the user causing the harm to bear the loss. These are all tough questions, many of which will be answered by Environmental Impact Statements which may eventually be required for each timber sale from the indications of Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973). For a wealth of background material on the clearcutting dispute, *see Hearings*, *supra* note 70, and parts 2 and 3.

90. 16 U.S.C. § 531(a) (1970).

91. Sierra Club v. Hardin, *supra* note 20, at 119. *See also* Udall v. Talman, 380 U.S. 1 (1965).