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The National Forest Management Act of 1976: A Critical Look at Two Trees in the NFMA Forest

The four national forests located primarily within Wyoming cover 8,642,337 acres.¹ These federal lands are the source of many different natural resources from which Wyoming and the nation derive substantial economic, aesthetic, and ecological benefits.² In some cases revenues generated from forest resources have facilitated the development of entire communities along forest boundaries.³ Two of the national forests in Wyoming, the Bridger-Teton and the Shoshone, are also biologically linked to the ecology of the "Greater Yellowstone Ecosystem."⁴

National forest management influences both national interests and the Wyoming economy and has been a continuing source of contro-

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1. The four national forest administrative units located primarily within Wyoming include the Bighorn National Forest, covering 1,107,670 acres, FOREST SERV., U.S. DEP'T OF AGRICULTURE, FINAL LAND AND RESOURCE MANAGEMENT PLAN FOR THE BIGHORN NATIONAL FOREST II-1 (1985) [hereinafter BIGHORN PLAN]; the Medicine Bow National Forest covering 1,665,880 acres, FOREST SERV., U.S. DEP'T OF AGRICULTURE, FINAL LAND AND RESOURCE MANAGEMENT PLAN FOR THE MEDICINE BOW NATIONAL FOREST AND THUNDER BASIN NATIONAL GRASSLAND II-3 (1985) [hereinafter MEDICINE BOW PLAN]; the Shoshone National Forest, covering 2,433,125 acres, FOREST SERV., U.S. DEP'T OF AGRICULTURE, FINAL LAND AND RESOURCE MANAGEMENT PLAN FOR THE SHOSHONE NATIONAL FOREST I-6 (1986) [hereinafter SHOSHONE PLAN]; and the Bridger-Teton National Forest, covering 3,400,250 acres itself, plus 35,412 acres in the Palisades Wilderness Study Area of the Targhee National Forest, administered by the Bridger-Teton National Forest, FOREST SERV., U.S. DEP'T OF AGRICULTURE, LAND AND RESOURCE MANAGEMENT PLAN—PROPOSED FOREST PLAN FOR THE BRIDGER-TETON NATIONAL FOREST II-26 (1986) [hereinafter BRIDGER-TETON DRAFT PLAN]. Other national forests with peripheral acreage in Wyoming include the Targhee, Wasatch and Black Hills National Forests.

2. These four Wyoming national forests contain: a majority of the state's commercial timber resources; a substantial amount of lands in the overthrust belt with speculative potential for oil and gas production; large tracts of land critical to the survival of several endangered or threatened species such as the bald-eagle, the grizzly bear, and the trumpeter swan; all but two of Wyoming's alpine wilderness areas; and a large percentage of Wyoming's finest lands for hunting, fishing and outdoor recreation. See generally BIGHORN PLAN, *supra* note 1, at II-1 to -90; MEDICINE BOW PLAN, *supra* note 1, at II-1 to -65; SHOSHONE PLAN, *supra* note 1, at II-1 to -100; BRIDGER-TETON DRAFT PLAN, *supra* note 1, at II-1 to -54.

3. An example of such a community is Dubois, Wyoming (population 1050), which derives approximately thirty percent of its total employment base from lumber production drawn almost entirely from national forest timber. Of this thirty percent roughly twenty-five percent is directly linked to a Louisiana-Pacific Corp. sawmill. FOREST SERV., U.S. DEP'T OF AGRICULTURE, DRAFT ENVIRONMENTAL IMPACT STATEMENT, BRIDGER-TETON NATIONAL FOREST LAND AND RESOURCES MANAGEMENT PLAN—PROPOSED PLAN G-11 to -13 (1986) [hereinafter BRIDGER-TETON DRAFT PLAN DEIS].

4. The boundaries of Yellowstone Park do not follow ecological lines of demarcation; consequently, some Park animals do not reside exclusively within the Park year round. Further, the plants and hydrology of the area ecologically interrelate with others beyond Park boundaries. The exact boundaries and specific interrelationships of these lands are highly controversial. See generally *Greater Yellowstone Ecosystems: Oversight Hearing before the Subcommittee on Public Lands and the Subcommittee on National Parks and Recreation of the [House] Committee on Interior and Insular Affairs*, 99th Cong., 1st Sess. (1985). Recently, recognition of the ecological interdependence of Yellowstone Park with the areas that surround it has increased. When viewed in its entirety the area can be seen as a composite "island" of land which has been called the Greater Yellowstone Ecosystem. *Id.*

versy.⁵ That controversy is now entering a new era as local national forest planning teams finalize the first generation of comprehensive national forest plans pursuant to the National Forest Management Act of 1976 (NFMA)⁶ as it amended the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA).⁷ These plans will provide the framework for all management decisions regarding any forest resources in a specific national forest for the next ten to fifteen years.⁸

Formal administrative appeals from final approvals of the new forest plans will be the first step in a long series of challenges to the planning process by a diverse collection of groups each asserting its own special philosophical or economic interest.⁹ Administrative appeals and litigation challenging individual plans¹⁰ will be the vehicles by which congressional intent behind NFMA is adjudicated and effected.

This comment focuses on two NFMA issues from Wyoming forest plans which are likely subjects of litigation.¹¹ First, forest planning is significantly uncertain regarding the substantive obligations forest planners and managers owe to small communities whose economies are based primarily upon revenues derived from timber harvesting or mineral ex-

5. Public concern regarding the proper uses of clearcutting in national forest timber harvesting led to the enactment of the National Forest Management Act of 1976. See Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 40-45 (1985). Evaluation of national forest lands for designation as wilderness areas also generated considerable controversy from 1967 through the early 1980s. See *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), *aff'd sub nom.* *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982).

6. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified at 16 U.S.C. §§ 1600-1614 (1982) and scattered sections of 16 U.S.C.) [hereinafter NFMA] requires the Secretary of Agriculture to use an interdisciplinary approach to develop land and resource management plans for each administrative unit of the National Forest System. 16 U.S.C. § 1604(f) (1982).

7. Pub. L. No. 93-378, 88 Stat. 476 (1975) (codified at 16 U.S.C. §§ 581h, 1601-1610 (1982)).

8. 16 U.S.C. § 1604(f)(5) (1982).

9. 36 C.F.R. § 211.18 (1986) sets out the procedures for appealing a final forest plan. An appeal is first ruled upon by the Chief of the Forest Service. The plan appeal is then reviewed by the Assistant Secretary of Agriculture for Natural Resources and Environment. *Id.*

10. A final forest plan cannot be challenged in federal court until available administrative remedies under 36 C.F.R. § 211.18 (1986) have been exhausted. See generally R. PIERCE, S. SHAPIRO & V. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 120-215 (1985).

11. These issues are raised in appeals from three finally approved Wyoming NFMA plans filed with the Chief of the Forest Service, pursuant to 36 C.F.R. § 211.18 (1986), for the Bighorn National Forest, the Medicine Bow National Forest, and the Shoshone National Forest. WILDERNESS SOC'Y, *FOREST PLANNING MONTHLY REPORT* (May 1987). They are also likely to be raised in almost certain appeals from the fourth plan for the Bridger-Teton National Forest. That plan was originally scheduled for final release in 1987. See 51 Fed. Reg. 19,774 (1986). Now, however, planners have decided to modify the computer models used for the draft plan and DEIS and issue the final plan in 1988. See Melnykovich, *Bridger-Teton forest plan to be reanalyzed*, Casper (Wyo.) Star-Tribune, Apr. 4, 1987, at A-1, col. 2. The Bridger-Teton National Forest contains all necessary ingredients for litigation on forest planning issues. It is one of the nation's largest forest units, containing sizable timber resources and lands that have potential to produce oil and gas. It borders both Yellowstone and Grand Teton National Parks as well as the National Elk Refuge. Lastly, at least five Wyoming communities (Dubois, Afton, Riverton, Pinedale and Jackson) rely on it for a large percentage of their economic well-being. See BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at III-1 to -107.

traction. The Forest Service has undertaken specific planning procedures to evaluate the effects of a final forest plan on these communities.¹² The question, however, is whether the Forest Service must go beyond studying and actually provide for the stability of these communities. The second issue concerns the interplay between the Wyoming Wilderness Act of 1984 (WWA)¹³ and NFMA. The WWA contains "sufficiency and release" language¹⁴ designed to relieve NFMA planners from having to conduct a wilderness suitability review during the initial round of planning, and to "open-up" roadless lands in Wyoming national forests to non-wilderness multiple-use management.¹⁵ It is ambiguous to what extent this "sufficiency and release" language affects legal responsibilities of NFMA planners under the National Environmental Policy Act of 1969 (NEPA)¹⁶ to analyze plan effects on nonwilderness roadless lands. While these issues are framed in terms of their effect on forest planning in Wyoming, they also apply generally to other Western national forests.¹⁷

BACKGROUND

This analysis requires a working understanding of the administrative structure and limited judicial interpretation behind the current planning legislation. While a comprehensive attempt to break down the legal and political history of national forest planning statutes and regulations would greatly exceed the scope of this comment,¹⁸ a brief overview of the current planning scheme and relevant legal precedent is provided below.

Prelude To Planning

Land and resource management planning in the national forests did not take on national prominence until passage of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).¹⁹ Prior to MUSYA, however, forest

12. FOREST SERVICE MANUAL § 8226 (Oct. 1973); FOREST SERVICE ECONOMIC AND SOCIAL ANALYSIS HANDBOOK § 1909.17 (Aug. 1985).

13. Pub. L. No. 98-550, 98 Stat. 2807 (1984) (codified in note following 16 U.S.C. § 1132 (1982)) [hereinafter WWA].

14. The sufficiency language congressionally ratifies previous Forest Service wilderness review studies and environmental impact statements. See *infra* notes 175 & 179. The release language expresses congressional intent that lands not designated as wilderness in the WWA may be managed for other uses not compatible with a wilderness designation. See *infra* note 176.

15. See *infra* text accompanying notes 175-79.

16. Pub. L. No. 90-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321-4335 (1982)).

17. For example, the Department of Agriculture recently recognized the need to fully examine the dependent community issue on a national scale. See Letter from Peter C. Meyers, Assistant Secretary, Natural Resources and Environment, U.S. Dep't of Agriculture to R. Max Peterson, Chief of the Forest Service (May 23, 1986) (on file at the Land & Water Law Review office).

18. An impressive account of the legal and political history behind NFMA and forest planning in general can be found in Wilkinson & Anderson, *supra* note 5.

19. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-531 (1982)) [hereinafter MUSYA] directed the Secretary of Agriculture 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." 16 U.S.C. § 529 (1982). This legislation formally broadened the resource values or uses which the Forest Service could technically consider under the Organic Act of 1897. See *infra* notes 25 & 26; See also *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965).

planning did take place in local ranger districts based on the broad authority exercised by the Forest Service under the Organic Act of 1897.²⁰ Passage of MUSYA facilitated "multiple-use planning," employing a zoning concept. This planning theory divided every acre in a given ranger district into zones of various renewable resource values enumerated in MUSYA.²¹ Unfortunately, MUSYA zone-plans had one major drawback. While they classified all land in a given ranger district according to its resource values, they "seldom attempted to identify a listing of resource outputs from a ranger district which might be optimum in terms of what forest uses that district could provide for the American people."²² Multiple-use zone-planning also fostered the idea that the MUSYA somehow directed the Forest Service to try to extract all MUSYA renewable resource values concurrently from every acre of forest land.²³ This unfortunate interpretation is still prominent in the minds of some persons who directly influence the current forest management process,²⁴ despite the obviously contrary original congressional intent behind the MUSYA.²⁵ These plans were valuable, however, because they would ultimately prove to be the basis for consideration of *all* resource values in NFMA planning.²⁶

The Forest Service administers contemporary forest planning under a two-tiered scheme. It uses national and regional resource planning to direct federal budgeting for forest management under RPA.²⁷ It further implements the NFMA amendments to RPA to create a comprehensive

20. Act of June 4, 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. §§ 473-482, 551 (1982)) [hereinafter Organic Act] was the original legislation directing the establishment of forest reserves "for the purpose of issuing favorable conditions for water flows, and to furnish a continuous supply of timber for the use . . . of the citizens of the United States." 16 U.S.C. § 475 (1982). The Secretary of Agriculture administers the reserves under authority derived from the Transfer Act of Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628 (1905) (codified at 16 U.S.C. § 472 (1982)).

21. See Wilson, *Land Management Processes of the Forest Service*, 8 ENVTL. L. 461, 468-69 (1977).

22. *Id.* at 469.

23. *Id.*

24. Telephone interview with Bob Baker, Chief Forester for Louisiana-Pacific's Wyoming Division (Nov. 10, 1986).

25. MUSYA defines "multiple use" as

the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of the resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that *some land will be used for less than all of the resources; . . . and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.*"

16 U.S.C. § 531 (1982) (emphasis added).

26. MUSYA specifically lists forest renewable resource values by stating that "it is the policy of the Congress that the national forests are established and shall be administered for *outdoor recreation, range, timber, watershed, and wildlife and fish purposes.*" 16 U.S.C. § 528 (1982) (emphasis added). NFMA plans must be developed according to the spirit of MUSYA. 16 U.S.C. § 1604(f) (1982); 36 C.F.R. §§ 219.3, 219.11(c) (1986).

27. 120 CONG. REC. 14,174 (1974) (remarks of Sen. Talmadge), reprinted in SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, 96TH CONG., 1ST SESS., COMPILATION OF THE FOREST AND RANGELAND RENEWABLE RESOURCES ACT OF 1974, at 214 (Comm. Print 1979) [hereinafter SENATE COMPILATION].

local resource planning process in which an individual forest plan is created for each administrative unit of the National Forest System.²⁸ How these two schemes interrelate, and whether one ultimately overrides the other, is unclear on the face of the legislation.²⁹ Consequently, the Forest Service compromises between them in its regulations. These regulations do not compartmentalize the two planning levels but can be read so that local planning decisions can vary from the goals of the RPA.³⁰ This is sensible in light of the value which the Forest Service has long placed in local decisionmaking³¹ and the failure of Congress to budget sufficient funds to comply with RPA requests over the years.³²

The National Forest Management Act

NFMA is an amendment to the RPA. The RPA was the first congressional attempt at "centrally controlled long range planning for publicly owned forest resources."³³ Its primary purpose is to provide long term guidance for national and regional forest management activities.³⁴ RPA frames this guidance in terms of national and regional goals and alternatives developed by the Secretary of Agriculture³⁵ and the President.³⁶ These goals and alternatives are then sent to Congress for use in the

28. See *supra* note 6.

29. Three possible interpretations of the RPA/NFMA language as a whole include: (1) "top-down" planning in which national-regional RPA goals and objectives govern local NFMA plans; (2) "bottom-up" planning in which local NFMA plans control when their goals and objectives conflict with those in RPA plans; and (3) iterative exchange of planning information up and down the planning chain allowing flexibility in management strategies for different resources. Wilkinson & Anderson, *supra* note 5, at 77-81.

30. 36 C.F.R. § 219.4(a)(3) (1986) (emphasis added) states: "The planning process is essentially iterative in that the information from the forest level flows up to the national level where in turn information in the RPA Program flows back to the forest level." 36 C.F.R. § 219.14 (1986) mandates that timber harvest decisions are to be made locally considering specific NFMA criteria. How iterative exchange works for resources other than timber is unclear and largely within the discretion of the Forest Service. Strong, *National Forest Management Act of 1976—What Impacts on Federal Timber Management?* 13 IDAHO L. REV. 263, 277 (1976-77).

31. Wilkinson, *The Forest Service: A Call for a Return to First Principles*, 5 PUB. LAND L. REV. 1, 8-9 (1984).

32. For example, the President's proposed budget in 1979 asked for 1.8 billion dollars for the Forest Service. This request was six-hundred million dollars below the funding needed to meet the RPA Program for that period. *National Wildlife Fed'n v. United States*, 626 F.2d 917, 920 (D.C. Cir. 1980) (citing THE BUDGET OF THE U.S. GOVERNMENT 1979, at 123).

33. Cortner & Schweitzer, *Institutional Limits to National Public Planning for Forest Resources: The Resources Planning Act*, 21 NAT. RESOURCES J. 203 (1981).

34. S. REP. No. 93-686, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4060, 4062.

35. RPA directs the Secretary of Agriculture to develop a national "Assessment" of the current and prospective conditions of forest resources. 16 U.S.C. § 1601(a) (1982). The Assessment is to be updated every ten years and is to contain a resource inventory. *Id.* at §§ 1601(a), 1603; see also 36 C.F.R. § 219.4(b)(1)(i) (1986). The Secretary also develops a management "Program" that directs national forest management actions prospectively for five years by recommending alternative goals and outputs for forest lands. 16 U.S.C. § 1602 (1982); 36 C.F.R. §§ 219.4(b)(1)(ii), 219.8 (1986).

36. The President uses the Program to formulate a "Statement of Policy" that guides his budget requests for all Forest Service management activities. 16 U.S.C. § 1606(a) (1982). He must explain any budget request which does not appropriate sufficient funds to meet the goals set forth in the Statement of Policy. *Id.* § 1606(b).

budget process. While this scheme has revolutionized forest management in a general sense, it has not ensured funding sufficient to meet all Forest Service management needs.³⁷

NFMA was added to the RPA planning scheme for two reasons. First, it was a congressional response to public concern over Forest Service practices promoting extensive clearcutting.³⁸ Litigation in the mid-1970s was an expression of public fear that widespread clearcutting jeopardized other forest resources.³⁹ The case ultimately prompting Congress to pass the NFMA amendments was *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz*.⁴⁰ In *Butz* the Fourth Circuit upheld a permanent injunction against the use of clearcutting in the Monongahela National Forest.⁴¹ The court based this holding on a plain reading of the timber sale language in the Organic Act of 1897.⁴² In passing the NFMA amendments Congress added specific local planning procedures to the RPA and reinstated the Forest Service's ability to manage timber through clearcutting.⁴³ It did so, however, by requiring that such management techniques were to be used only after the agency had given consideration to the forest's ecological well-being in terms of MUSYA values.⁴⁴

The second reason Congress passed NFMA was that it perceived a need for long-range forest planning at the local forest level.⁴⁵ NFMA arguably has not changed the Forest Service's longstanding bias toward

37. See *supra* note 32. Congressional interpretations and judicial constructions of RPA further suggest it probably never will. Wilkinson & Anderson, *supra* note 5, at 83-85.

38. Clearcutting is "the harvesting in one cut of all trees in an area for the purpose of creating a new, even-aged stand. The area may be a patch, stand, or a strip large enough to be mapped or recorded as a separate age class." FOREST SERV., U.S. DEPT OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT, SHOSHONE NATIONAL FOREST FINAL LAND AND RESOURCES MANAGEMENT PLAN VII-4 (1986) [hereinafter SHOSHONE PLAN FEIS].

39. Strong, *supra* note 30, at 268-69.

40. 522 F.2d 945 (4th Cir. 1975) [hereinafter *Monongahela*].

41. A detailed analysis of the genesis and aftermath of *Monongahela* is located at Haines, *Monongahela and the National Forest Management Act of 1976*, 7 ENVTL. L. 345, 347-60 (1976).

42. Act of June 4, 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. §§ 473-482, 551 (1982)). This provision originally stated in part:

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, natural, or large growth* of trees found upon such national forests as may be compatible with the utilization of the forests thereon . . . Such timber before being sold *shall be marked and designated* . . .

16 U.S.C. § 476 (1976) (repealed by 90 Stat. 2958 (1976)). The Fourth Circuit held that a plain reading of the language, coupled with its legislative history, precluded the clearcutting of young trees in a stand or trees not individually marked and designated. *Monongahela*, 522 F.2d at 948-49.

43. See *supra* note 7; 16 U.S.C. § 1604 (1982). *Monongahela* had the potential to hamstring the Forest Service's ability to use clearcutting not only in Fourth Circuit forest lands, but also in Ninth Circuit forests, where a substantial portion of the nation's softwood timber resources are located. See *Zieske v. Butz*, 406 F. Supp. 258 (D. Alaska 1975). *Zieske* also enjoined the use of clearcutting in an Alaska national forest using the *Monongahela* reasoning. *Id.* at 260.

44. NFMA states that decisions to clearcut "are [to be] carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation and esthetic resources, and regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v) (1982).

45. 122 CONG. REC. S14,494 (Aug. 25, 1976) (remarks of Sen. Humphrey), reprinted in SENATE COMPILATION, *supra* note 27, at 409.

timber harvesting as the focal point in forest resource management.⁴⁶ The legislation does, however, create a very thorough site-specific resource value consideration process for long-range forest planning.⁴⁷ Each forest is now to be governed by its own NFMA plan⁴⁸ prepared pursuant to planning regulations promulgated by the Secretary of Agriculture.⁴⁹ When finally approved,⁵⁰ a plan controls all management decisions for the relevant forest with the legal force of a federal regulation.⁵¹ A plan is subject to mandatory revisions every ten to fifteen years⁵² and may be amended prior to revision when necessary.⁵³ Local Forest Service managers continue forest management under pre-NFMA resource plans until an initial NFMA plan is finally approved.⁵⁴

The creation of a comprehensive NFMA plan for a specific national forest is a complex process centered around two documents prepared by local forest planners. The primary document is the plan environmental impact statement (EIS).⁵⁵ The EIS is distinct from the plan itself, accompanying it when issued in draft and in final form.⁵⁶ The draft EIS (DEIS) is especially important to the planning process because it is the preliminary Forest Service management analysis⁵⁷ of land suitability for timber harvesting under the Church Guidelines,⁵⁸ resource inventories, and other relevant information as prescribed in MUSYA.⁵⁹ This information is organized and presented in the DEIS as management alternatives for the relevant

46. Wilkinson, *supra* note 31, at 15-24.

47. Each forest plan must include a detailed NEPA analysis of resource management alternatives for that forest. 36 C.F.R. § 219.11 (1986).

48. 16 U.S.C. § 1604(a) (1982); 36 C.F.R. §§ 219.1(b), 219.4(b)(3) (1986).

49. 16 U.S.C. § 1604(g) (1982). The regulations were promulgated on September 17, 1979. 44 Fed. Reg. 53,928 (1979). They were subsequently amended on September 30, 1982, 47 Fed. Reg. 43,026 (1982), and are located at 36 C.F.R. §§ 219.1 to .29 (1986).

50. 16 U.S.C. § 1604(c) (1982); 36 C.F.R. § 219.10(c) (1986).

51. 16 U.S.C. § 1604(i) (1982); 36 C.F.R. § 219.10(e) (1986).

52. NFMA plans must be revised every fifteen years. 16 U.S.C. § 1604(f)(5) (1982); 36 C.F.R. § 219.10(g) (1986). A revision consists of a complete repetition of the planning process. *Id.*

53. 16 U.S.C. § 1604(f)(4) (1982). Amendment of the plan is not a complete revision but must be executed using proper NEPA procedures. 36 C.F.R. § 219.10(f) (1986).

54. 16 U.S.C. § 1604(c) (1982); 36 C.F.R. § 219.29 (1986).

55. The Forest Service prepares NFMA plans in accordance with NEPA. 16 U.S.C. § 1604(g)(1) (1982); 36 C.F.R. §§ 219.6(b), .10(b), .12(a) to -(k) (1986).

56. 16 U.S.C. §§ 1604(d), -(g)(1) (1982); 36 C.F.R. § 219.10(b) (1986); *see also* 40 C.F.R. § 1502.9 (1986).

57. NFMA plans and EISs form an integrated plan for each individual unit of the National Forest System and are prepared by an interdisciplinary team. 16 U.S.C. §§ 1604(f)(1), -(3) (1982); *see also* 36 C.F.R. §§ 219.12(b), -(d), -(e) (1986).

58. As a result of the *Monongahela* controversy, NFMA directs the Secretary of Agriculture to promulgate regulations specifying guidelines to determine which timber lands are suitable for harvesting. 16 U.S.C. § 1604(g)(3)(E) to -(F) (1982). These provisions were adopted almost verbatim from a set of guidelines for clearcutting on public lands found in *Clearcutting on Federal Timberlands: Hearings Before the Subcommittee on Public Lands of the [Senate] Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971) [hereinafter Church Guidelines]. These requirements dictate where and how timber is to be harvested and can be found at 36 C.F.R. §§ 219.14, .15 (1986).

59. Plans are to be formulated using "the definition of terms 'multiple use' and 'sustained-yield' as provided in the [MUSYA]. . . ." 36 C.F.R. § 219.3 (1986); *see supra* note 25.

forest.⁶⁰ The Forest Service must consider these alternatives in developing the forest plan.⁶¹ The DEIS also informs the public about what forest resources are available for management on the relevant forest and what management alternatives local Forest Service officials are considering.⁶²

The planning team evaluates the alternatives in the plan DEIS⁶³ and from them selects a "preferred alternative."⁶⁴ The preferred alternative then becomes the basis for the management directives that are organized as the proposed local forest plan.⁶⁵

When the DEIS and proposed plan are completed both are released to the public for review and comment.⁶⁶ During this comment period local Forest Service officials conduct local meetings to solicit public opinion on the adequacy of the DEIS and the management direction of the plan.⁶⁷ After the comment period, planners synthesize public reaction to the two documents and produce a final plan EIS (FEIS) and a final plan. The FEIS discloses all considerations made in developing the final plan.⁶⁸ The FEIS and plan are then submitted to the Regional Forester for final approval along with a "Record of Decision" that explains why the planners chose the management options they did.⁶⁹ The plan is implemented after approval,⁷⁰ and at that time the plan and FEIS are subject to administrative appeal⁷¹ and subsequent legal challenges.⁷² Final approval of most initial NFMA plans for the entire nation should be finished some time in 1987.⁷³

Caselaw and Administrative Interpretations of NFMA

To understand NFMA's legal requirements, one must first understand the cases and administrative challenges to Forest Service land and resource management activities since the passage of NFMA. Although limited in number,⁷⁴ these decisions do stress one important theme: The

60. 36 C.F.R. §§ 219.12(f), -(g) (1986); *see also* 40 C.F.R. § 1502.14 (1986).

61. 36 C.F.R. §§ 219.12(g), -(h) (1986).

62. *See* Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 554 (9th Cir. 1977) (per curiam).

63. 36 C.F.R. § 219.12(h) (1986).

64. *Id.* § 219.12(i).

65. *Id.*

66. 16 U.S.C. § 1604(d) (1982); 36 C.F.R. §§ 219.6, .10(b) (1986); *see also* 40 C.F.R. § 1503.1 (1986).

67. *Ibid.*

68. 40 C.F.R. § 1502.9 (1986).

69. 36 C.F.R. § 219.10(c)(1) (1986); 40 C.F.R. § 1505.2 (1986).

70. 36 C.F.R. §§ 219.10(e), .12(j) (1986).

71. 36 C.F.R. §§ 211.18, 219.10(d) (1986).

72. Challenges to federal regulations are subject to the strictures of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). 36 C.F.R. § 219.10(d) (1986).

73. Congress required that all plans be finally issued by September, 1985. 16 U.S.C. § 1604(c) (1982). Actual approval has been delayed by several years. As of May 1, 1987, the Forest Service had issued one-hundred-seven draft NFMA plans, sixty-five of which had been finally approved. Of those sixty-five plans, sixty-three have been appealed to the Chief of the Forest Service. WILDERNESS Soc'y, *supra* note 11.

74. Several cases, which are not addressed below, raised a NFMA issue, which was not substantively decided. *See* Vance v. Block, 635 F. Supp. 163, 169 (D. Mont. 1986); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 606 (N.D. Cal. 1983). In

Forest Service has broad administrative planning discretion over a forest's resources, even for timber planning under the restrictive Church Guidelines.⁷⁵ That broad discretion will be a pivotal factor in the ultimate resolution of NFMA challenges which attempt to force the agency to act substantively rather than just procedurally.

The bounds of Forest Service timber management discretion were first addressed shortly after NFMA became law. In *Texas Committee on Natural Resources v. Bergland*,⁷⁶ the Fifth Circuit faced the task of defining Forest Service discretion in timber management during the interim between passage of NFMA and final approval of the first NFMA plans.⁷⁷ After assessing the congressional intent behind NFMA the court held that the Forest Service was not precluded from using clearcutting as a harvest method prior to the adoption of relevant NFMA plans so long as the Service considered the factors enumerated in the Church Guidelines.⁷⁸ This meant that, for interim management of *timber resources*, the Church Guidelines, as incorporated into NFMA, were the outer boundaries of Forest Service timber management discretion.⁷⁹

Forest Service timber management discretion has also been addressed in the context of below-cost timber sales.⁸⁰ The case of *Thomas v. Peterson*⁸¹ recently addressed this issue under language in the RPA.⁸² The plaintiffs in *Thomas* asserted that, when Congress required roadbuilding on the forest to be "carried forward in time to meet anticipated needs on an *economical* and environmentally sound basis,"⁸³ it intended the Forest Service to sell timber only where the stumpage⁸⁴ value of the timber exceeded roadbuilding costs.⁸⁵ In rejecting that interpretation, the Ninth Cir-

other cases the NFMA issue was overshadowed by a NEPA issue. See *State v. United States Forest Serv.*, No. CIV.A. H-86-4224, at scr. 10 (S.D. Tex. Nov. 26, 1986) (WESTLAW, DCT Database); *Methow Valley Citizens Council v. Regional Forester, Pacific Northwest Region Forest Serv.*, No. 85-2124-DA, at scr. 16 (D. Or. Apr. 30, 1986) (WESTLAW, DCT Database); *Kettle Range Conservation Group v. Berglund*, 480 F. Supp 1199, 1203 (E.D. Wash. 1979).

75. See *supra* note 58.

76. 573 F.2d 201 (5th Cir.), *cert. denied*, 439 U.S. 966 (1970).

77. *Texas Committee*, 573 F.2d at 205-06.

78. See *supra* note 58.

79. Subsequent caselaw sustains this holding. See *Methow Valley Citizens Council v. Regional Forester*, No. 85-2124-DA, at scr. 16; *State of California v. Block*, 690 F.2d 753, 775 (9th Cir. 1982).

80. "Below-cost timber sales" are defined as sales which "cost more to prepare, sell and administer than they return in revenue" and often are caused by high roadbuilding costs. BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at II-24, -25. For an excellent discussion of below-cost timber sale issues raised by the BRIDGER-TETON DRAFT PLAN AND DEIS, see CASCADE HOLISTIC ECONOMIC CONSULTANTS, REVIEW OF THE DRAFT BRIDGER-TETON FOREST PLAN 9-12 (Dec. 1986) [hereinafter CHEC REVIEW].

81. 753 F.2d 754 (9th Cir. 1985).

82. Wilkinson & Anderson, *supra* note 5, at 169 n.868, point out that while the *Thomas* court referred to the relevant provision (16 U.S.C. § 1608(a) (1982)) as a part of NFMA, it is actually from RPA.

83. 16 U.S.C. § 1608(a) (1982) (emphasis added).

84. The Forest Service sells standing timber or "stumpage" by contract. M. CLAWSON, THE ECONOMICS OF NATIONAL FOREST MANAGEMENT, RESOURCES FOR THE FUTURE, WORKING PAPER 85 (1976).

85. *Thomas*, 753 F.2d at 761.

cuit said that the language was a "declaration"⁸⁶ rather than a "specific prescription."⁸⁷ Furthermore, it held that the Forest Service should be given wide discretion in defining the word "economical" so that public benefits to be realized from access to a timber sale other than just for timber removal could be figured into the value equation.⁸⁸

A recent administrative opinion by the Assistant Agriculture Secretary for Natural Resources and the Environment (MacCleery Opinion)⁸⁹ suggests that Forest Service timber management under NFMA regulations will be consistent with the basic holding in *Thomas*. The MacCleery Opinion was a USDA ruling on an appeal from a Colorado forest plan. The appeal asserted that below-cost timber sales in the plan allowed under the NFMA regulations⁹⁰ violated NFMA itself.⁹¹ Appellants argued that the regulations should allow NFMA planners to determine which lands can be harvested in terms of costs and benefits related directly to the timber sales only.⁹² The Assistant Secretary disagreed. He held first that planners must give thorough consideration to all available alternative timber management methods.⁹³ He then held that lands unsuitable for timber production, on the basis of timber harvest values and costs alone, could nonetheless be found suitable for timber production by considering nontimber benefits and the timber goals of the plan.⁹⁴

These cases and the MacCleery Opinion suggest that, for timber management under the Church Guidelines, courts will defer to Forest Service discretion in setting harvest levels. Local planners will probably be able to determine the long term value of timber management activities in terms of timber and nontimber resource values. This is clearly the interpretation that has been used by forest planners in Wyoming.⁹⁵ For management of nontimber resources, Forest Service discretion appears to be limited only by the mandates of MUSYA and NEPA.⁹⁶

86. *Id.*

87. *Id.*

88. *Id.* at 762.

89. *USDA Decision on Review of Administrative Decision by the Chief of the Forest Service Related to the Administrative Appeals of the Forest Plans and EISs for the San Juan National Forest and the Grand Mesa, Uncompahgre, and Gunnison National Forest* (July 31, 1985) (decision of Douglas MacCleery, Deputy Asst. Agriculture Sec'y Nat. Resources and Env't) [hereinafter MacCleery Opinion].

90. 36 C.F.R. § 219.12(b) (1986).

91. 16 U.S.C. § 1604(k) (1982) (emphasis added) provides in part: "In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, . . ."

92. MacCleery Opinion, *supra* note 89, at 11.

93. *Id.*

94. *Id.*

95. See BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at 11-57, -58.

96. See *supra* notes 26 & 55. It is also well settled that there is no irreconcilable conflict between NEPA and NFMA, *Texas Comm. on Nat. Resources v. Bergland*, 573 F.2d 201, 208-09; S. REP. NO. 94-893, 94th Cong., 2d Sess. 14 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6662, 6673-74, and that Congress expressly intended all NFMA planning to incorporate NEPA procedures, *State of California v. Block*, 690 F.2d 753, 775 (9th Cir. 1982). For interim management of these resources which does not involve NFMA planning, a district court in the Ninth Circuit recently explained that, while local forest

ANALYSIS OF THE FOREST-DEPENDENT COMMUNITY ISSUE

In Wyoming, the dependent community issue has its roots in two different, but related, interests. The most obvious interest is that of local residents who want to keep their towns alive after NFMA plans are implemented. The second interest is that of the large lumber corporations that want to influence NFMA plan timber outputs to maintain or increase their current levels of operation. These two interests are not mutually exclusive but, instead, have become tightly intertwined over the past two decades of relatively heavy timber harvesting in Western public forests.⁹⁷ This is unfortunate because it forces NFMA planners to choose between the relatively high harvest levels necessary to keep a large corporate sawmill operating, and the lower harvest levels required to compromise among other forest resource uses.⁹⁸ This situation should lead to legal challenges to forest plans mandating the latter approach. Assertions that NFMA planners owe dependent communities a substantive legal duty to provide enough sawtimber to keep a large corporate mill alive, thus stabilizing the community it is located in, should fail under the law.

The controversy is, in one sense, a clash between old Forest Service timber management policies and new congressional directives which mandate resource management lacking heavy emphasis on timber harvesting. Residents of towns dependent on the old ways have come to rely heavily on federal timber and mineral exploration revenues for their economic well-being. For them, the NFMA process is a relatively abrupt break in longstanding agency resource management traditions. During the seventy-year period between the creation of the national forest system under the Forest Service⁹⁹ and the legal battles resulting in passage of NFMA,¹⁰⁰ the Forest Service became a major supplier of timber for the nation.¹⁰¹

managers need not comply with NFMA planning procedures the mandate of other relevant legislation, particularly NEPA, still controls. *Methow Valley Citizens Council v. Regional Forester*, No. 85-2124-DA, at scrs. 16-17 (D. Or. Apr. 30, 1986) (WESTLAW, DCT Database).

97. See *infra* note 101.

98. From 1980 to 1984 the Louisiana-Pacific Corp. mill in Dubois, for example, has purchased an average of 7.4 million board feet (MMBF) of federal timber from the Bridger-Teton National Forest, BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at G-14, from a forest-wide timber allocation of roughly 25 MMBF, *id.* at G-18. The Bridger-Teton Draft Plan proposes cutting the forest-wide timber harvest level to 15.9 MMBF. *Id.* at G-14. This effectively reduces the amount of timber within reasonable hauling distance of the Dubois mill such that its closure would be likely. *Id.* at G-15.

99. The Creative Act, ch. 561, 26 Stat. 1095, 1103 (1891), *repealed by* 90 Stat. 2792 (1976) allowed the President to create forest preserves by executive proclamation. The preserves were first managed by the General Land Office of the Department of the Interior pursuant to the Organic Act of 1897, *supra* note 20. After considerable pressure from President Theodore Roosevelt and the Head of the Division of Forestry in the Department of Agriculture, Gifford Pinchot, Congress transferred administrative jurisdiction of the reserves to the Department of Agriculture under Pinchot's newly renamed Forest Service in the Transfer Act of 1905, *supra* note 20. The reserves were later renamed "national forests" under the Agricultural Appropriations Act of 1907. Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269 (1907); see S. DANA, FOREST AND RANGE POLICY 98-151 (1956).

100. See *supra* text accompanying notes 40-42.

101. Shortly after the outbreak of World War II the focus of national forest management shifted from careful resource use through common-sense conservation to management which stressed higher national forest timber outputs and a renewed interest in forest min-

This approach was not the result of specific legislation but, rather, was the evolutionary product of the original Forest Service conservation theories espoused by men like Gifford Pinchot.¹⁰² Pinchot built the agency on the principle that managed *use*¹⁰³ of forest resources would stop past abuses,¹⁰⁴ keep the forest young and healthy,¹⁰⁵ and, at the same time, provide for the growth of the undeveloped West.¹⁰⁶

To implement his philosophy, Pinchot innovatively exercised his wide management discretion under the language of the Organic Act.¹⁰⁷ Early

ing claims. Timber production peaked at 12.1 billion board-feet (BBF) in 1966, and the national forests saw a large increase in roadbuilding. See Wilkinson & Anderson, *supra* note 5, at 136-38; see also West Virginia Div. of the Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945, 954-55 (4th Cir. 1975).

102. Pinchot was the first Chief of the Forest Service in 1905, when the Transfer Act passed. He is remembered as the administrator who established the basic idea that the forest lands were to be used wisely through conservative management. See H. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 74-81 (1976).

103. Pinchot's basic philosophy is best illustrated by a letter he wrote to himself in 1905, which was signed by then Secretary of Agriculture James Wilson and which explained his management position. It read in part:

In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not the temporary benefit of individuals or companies. All resources of the forest are for *use*, and this use must be brought about in a thoroughly prompt and businesslike manner, under such restrictions only as will insure the permanence of these resources. The vital importance of forest reserves to the great industries of the Western States will be largely increased in the near future by the continued steady advance in settlement and development. The permanence of the resources of the reserves is therefore indispensable to continued prosperity, and the policy of this department for their protection and use will invariably be guided by this fact, always bearing in mind that the *conservative use* of these resources in no way conflicts with their permanent value.

You will see to it that the water, wood, and forage of the reserves are conserved and *wisely used* for the benefit of the home builder first of all, upon whom depends the best permanent use of the lands and resources alike. The continued prosperity of the agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent accessible supply of water, wood and forage as well as upon the present and future use of their resources under businesslike regulations, enforced with promptness, effectiveness, and common sense. In the management of each reserve local questions will be decided on local grounds; the dominant industry will be considered first, but with as little restriction to minor industries as *may be possible*; sudden changes in industrial conditions will be avoided by gradual adjustment after due notice; and *where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run.*

G. PINCHOT, *BREAKING NEW GROUND* 261-62 (1947) (Univ. Wash. Press Americana Library ed. 1972) (emphasis added).

104. The major impetus to protect federal forest lands in the Creative Act of 1891 was the large scale land frauds which had occurred under earlier legislation including the Preemption Act of 1841, ch. 16, 5 Stat. 251 (1841); the Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862); and the Timber Culture Act of 1873, ch. 277, 17 Stat. 605 (1873). Large lumber corporations and other business interests became adept at using strawmen to file large land claims, which then were "purchased" by the corporations at ridiculously low prices. See generally J. ISE, *THE UNITED STATES FOREST POLICY* 79-118 (1920).

105. See *supra* note 103.

106. *Id.*

107. In two early opinions the U.S. Supreme Court established that the authority Congress vested in the Forest Service under the Organic Act and the Transfer Act included the

on, he emphasized local community needs by decentralizing the Forest Service, delegating resource decisions to local rangers and supervisors who were a part of each community and knew its needs.¹⁰⁸ He also stressed the idea that forest timber was to be harvested giving a preference to the needs of local industry and not necessarily large lumber concerns.¹⁰⁹ These factors combined with the expanding national economy in subsequent decades to give the Forest Service wide management discretion linking it directly to the needs of developing frontier communities which are now forest-dependent communities.

Considered against this backdrop, it is no surprise that residents of dependent communities came to rely on Forest Service timber harvest policies in the 1950s and 1960s. They were policies promoting heavy timber harvesting by large lumber corporations. For these people, the old management policies were more than just an exercise of Forest Service discretion. They had become moral obligations with which the agency regularly complied.¹¹⁰ Understandably, by extensively considering the effects of potentially reduced timber harvest levels on dependent communities, the NFMA process only underscores local residents' realizations that they are now susceptible to the same agency discretion upon which they previously relied.¹¹¹ It also allows lumber corporations to use public sentiment as a lever to try to force the Forest Service to return to the old management policies.¹¹²

Some advocates of dependent community "rights" argue that the Forest Service must stabilize dependent community economies because

power to promulgate regulations concerning the use and occupancy of the forests. *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Grimaud*, 220 U.S. 506, 521-22 (1911). Recent caselaw affirms these basic holdings. See *Kleppe v. New Mexico*, 426 U.S. 543, 541 (1976); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

108. REPORT OF THE FORESTER, U.S. DEP'T OF AGRICULTURE, H.R. DOC. NO. 1047, 60th Cong., 1st Sess. 423 (1908).

109. See *supra* note 103.

110. Letters commenting on the Bridger-Teton Draft Plan and DEIS illustrate this sentiment. For example, a letter from a Dubois, Wyoming, citizens group states:

This community is apparently facing a situation in which it virtually has no control over its own destiny. Their lives are facing the trauma of being uprooted. It is much like those areas of Africa where people can no longer live where they have been born, schooled and raised because famine or government action has forced them from the land.

Letter from Mel Furman, Executive Director, Citizens for Multiple-Use to Brian Stout, Forest Supervisor, Bridger-Teton National Forest (Dec. 20, 1986), reprinted in *FOREST SERV., U.S. DEP'T OF AGRICULTURE, PLANNING UPDATE, BRIDGER-TETON NATIONAL FOREST 14* (Dec. 1986).

111. The Bridger-Teton Draft Plan DEIS states that implementation of the preferred plan alternative could result in the loss of large sawmill potential at Dubois, Wyoming. *BRIDGER-TETON DRAFT PLAN DEIS*, *supra* note 3, at IV-175.

112. These large corporations are strong lobbyists for local public sentiment. In Dubois, for instance, the Louisiana-Pacific Corp. recently purchased 600 subscriptions for local residents to a county newspaper published 80 miles away in Riverton, Wyoming. The Riverton paper had supported the corporate position throughout the planning process. The local newspaper, the Dubois Frontier, had taken an editorial policy arguably less favorable to the corporation. See Chapman, *L-P buys subscriptions for Dubois citizens*, *Casper (Wyo.) Star-Tribune*, Jan. 15, 1987, at A-1, col. 2.

the language of the Organic Act of 1897¹¹³ mandates it.¹¹⁴ The Organic Act is particularly attractive as a legal basis for this argument for two reasons. First, it is the analytical starting point for determining the purposes for which the forests were established.¹¹⁵ Second, its broad language and somewhat confused political history render it quite susceptible to creative interpretation.¹¹⁶ A proper analysis of the Organic Act's legislative history, however, suggests that this argument should fail.

The most striking aspect of the legislative history of the Organic Act is the extent to which Congress restricted timber harvesting on the forest preserves. As first passed, the Organic Act contained specific restrictions regarding what kinds of timber could be harvested, how that timber could be harvested, and the primary purpose for which it could be harvested.¹¹⁷ These provisions were the result of amendments to the original bill, first introduced in 1893.¹¹⁸ Curiously, these amendments were not the product of preservation-minded Eastern representatives. Instead, they were demanded by Western congressmen who, while anxious to open up the forest preserves for reasonable use by settlers, realized the inherent value of retention of forest lands in perpetuity.¹¹⁹ Even after President Cleveland made extensive additional reservations in 1897, which inflamed Western public sentiment against forest land preservation,¹²⁰ the timber management amendments remained in the final law.¹²¹ Thus, even when it was essential to the nation to develop and settle the Western states, Congress did not intend to promote the short term benefits of heavy forest use over

113. See *supra* note 20.

114. This argument is used in STATEMENT OF REASONS IN SUPPORT OF THE APPEAL OF THE SHOSHONE NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN, In re *Appeal of the Land and Resource Management Plan and Environmental Impact Statement for the Shoshone National Forest*; ROCKY MTN. OIL AND GAS ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND MOUNTAIN STATES LEGAL FOUNDATION APPEAL, ON BEHALF OF THEIR RESPECTIVE MEMBERS 27-31 (May 28, 1986) [hereinafter RMOGA APPEAL].

115. Wilkinson & Anderson, *supra* note 5, at 65-66; see also *United States v. New Mexico*, 438 U.S. 696, 717 (1977).

116. Commentators have suggested, for example, that Justice Rehnquist misinterpreted the legislative history of the Organic Act in *New Mexico*. See Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979).

117. See *supra* note 42.

118. The original legislation to allow managed use of the forest preserves was introduced into the first session of the Fifty-Third Congress by Oklahoma Representative Thomas McCrae as H.R. 119. 25 CONG. REC. 2371 (1893). It gave the Secretary of the Interior broad discretion to sell forest preserve timber. *Id.*

119. Amendments to McCrae's original bill were added by Oregon Representative Herman, Montana Representative Hartman and Wyoming Representative Coffeen. Coffeen explained that his amendments tightened up the "timber sale" language so that the Secretary of the Interior could not abuse his timber sale authority. 27 CONG. REC. 367 (1894). The requirement to mark each tree in every timber sale sold was added by Colorado Senator Teller in a later version of the original bill. 27 CONG. REC. 2779 (1895).

120. These additional forest reservations included roughly 21,000,000 acres located mainly in the Western states. President Cleveland set this land aside by proclamation under the Creative Act on February 22, 1897. The "Washington's Birthday Reserves," as they came to be known, created strong anti-forest preserve sentiment in the Western states. See J. Ise, *supra* note 104, at 129 (1920).

121. *Id.* at 130-38.

the value of the lands in the long run. Rather, Congress passed a law designed primarily to limit timber harvesting in the face of potential private abuses.¹²²

This places in perspective the provisions of the Organic Act that survived the NFMA amendments¹²³ and, arguably, mandate Forest Service support to dependent communities.¹²⁴ Congress' concern in creating the national forest system was not to provide local communities with the side benefits of extensive timbering activities. Instead, it was to allow carefully controlled use of federal timber over the long run.¹²⁵

This conclusion is further buttressed by the congressional purposes reflected in NFMA.¹²⁶ Formulation of an allowable timber harvest level in a NFMA plan is carefully constrained by land suitability and harvest method restrictions in the Church Guidelines.¹²⁷ It is also clear that, in passing these timber management restrictions, Congress chose not to include language that would allow a deviation from them to stabilize local economies.¹²⁸

The Organic Act also fails as a basis for providing more timber for dependent communities when the party asserting those harvest levels is a large corporation. The overriding evil, that Congress sought to abate in passing its original forest management bill, was the extensive land fraud which had taken place for years under earlier legislation.¹²⁹ Large lumber corporations in particular had become adept at using employees or paid strawmen to illegally gain fee title to large blocks of public forest land. The Organic Act was intended, arguably from the date of its introduction in 1893, to put a stop to these abuses.¹³⁰ The idea being that legitimate local use of public timber to develop frontier settlements should be distinguished from large-scale timber harvesting, which promoted only corporate profits.¹³¹

These original concerns are still relevant in the current dependent community controversy, that, in Wyoming, is being fueled primarily by large corporations.¹³² A contemporary legal intrusion into the NFMA process

122. Note the discussion in *Monongahela* where the court explains its interpretation of the congressional intent behind the Organic Act. See 522 F.2d 945, 951-52 (4th Cir. 1975).

123. See *supra* note 20.

124. RMOGA APPEAL, *supra* note 114, at 27.

125. See *supra* note 119.

126. See SENATE COMPILATION, *supra* note 27, at 410, 122 CONG. REC. at S14,495.

127. See *supra* note 58.

128. As noted by Professor Wilkinson, the only language in NFMA legislative history which dealt with community stability was language introduced by Senator Hatfield. Hatfield's language would have allowed the Forest Service to depart from certain timber harvesting requirements of the Act in the interest of dependent community stability. This language, however, was struck by the Conference Committee after its introduction and was not subsequently restored. Wilkinson & Anderson, *supra* note 5, at 177-78 nn.916-17 (citing SENATE COMPILATION, *supra* note 27, at 772, 783, 122 CONG. REC. H33,836-37).

129. J. ISE, *supra* note 104, at 92-95, 99-102.

130. 25 CONG. REC. 2374 (1893) (remarks of Rep. McCrae).

131. *Id.*

132. The Louisiana-Pacific Corp. owns local sawmills in Dubois, Riverton, and Saratoga. The corporation is active in bringing appeals from the SHOSHONE PLAN and the MEDICINE

at the behest of a large corporation in the name of community stability would frustrate the multiple-use management goals that Congress contemplated in NFMA.¹³³ Such an intrusion would create a modern result analogous to the abuses of forest legislation in the 1800s.

It would also violate the basic tenets of Gifford Pinchot's early interpretation of the Organic Act. Pinchot clearly believed in responsible resource management which benefited local needs.¹³⁴ He did not, however, advocate managing the forests in a way that promoted commercial exploitation over the ecological well-being of the land.¹³⁵ Instead, he recognized that resource use conflicts must be resolved in favor of the greatest good for the greatest number in the long run.¹³⁶ At the turn of the century this meant promoting frontier settlement. Today this means forest management through planning that takes national, as well as local, needs into account.

A second basis for a government obligation to support dependent communities purportedly arises¹³⁷ from regulations¹³⁸ promulgated under the

BOW PLAN. STATEMENT OF REASONS IN SUPPORT OF THE APPEAL OF THE SHOSHONE NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN, In re *Appeal of the Land and Resource Management Plan and Environmental Impact Statement for the Shoshone National Forest*; LOUISIANA-PACIFIC CORPORATION DUBOIS AND RIVERTON, WYOMING (Feb. 27, 1986) [hereinafter SHOSHONE APPEAL]; STATEMENT OF REASONS, In re *Appeal of Land Management Plan and Environmental Impact Statement for the Medicine Bow National Forest*; LOUISIANA PACIFIC CORPORATION, R.L. HAMMER TIMBER & LUMBER INC., BIGHORN LUMBER COMPANY, BRANDT & WICKLUND FOREST PRODUCTS APPEAL 3 (Feb. 13, 1986) [hereinafter SAWMILLS APPEAL]. Another Appeal from the Shoshone Plan was filed by the Rocky Mountain Oil and Gas Association. See RMOGA APPEAL, *supra* note 114.

133. Louisiana-Pacific, for example, while conceding the fact that no federal statute or regulation mandates Forest Service responsibility to people in dependent communities, still attempts to assert such a duty by trying to read a diverse collection of federal forest statutes and policies *in pari materia*. The SHOSHONE APPEAL states:

There appears to be no written law to demonstrate that the Forest Service has a responsibility to people under a dependency situation, however when considering laws and regulations including the Small Business Setaside policy, Evenflow policy, Multiple-Use Sustained Yield Act, Twenty-Five Percent Fund, Timber Export, and the Sustained Yield Forest Management in cumulation, it becomes apparent that the Forest Service has such a responsibility.

SHOSHONE APPEAL, *supra* note 132, at 4. This is clearly an overly general interpretation of only a partial list of federal forest statutes and policies involved in the current dependent community controversy. While at least one of these statutes gives the Secretary of Agriculture the discretion to provide timber for dependent communities, see *infra* text accompanying notes 140-46, none of them mandate such a responsibility read cumulatively or otherwise. Further, NFMA mandates only consideration of dependent community stability, and the Forest Service's interpretation of it should be deferred to because it is consistent with the underlying statutory scheme. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1983).

134. See *supra* note 103.

135. *Id.*

136. *Id.*

137. See *supra* note 132.

138. 36 C.F.R. § 221.3 (1986) (emphasis added) states:

Management plans for national forest timber resources shall . . . :

Provide, so far as feasible, an even flow of national forest timber in order to facilitate the stabilization of communities and of opportunities for employment.

Sustained-Yield Forest Management Act of 1944.¹³⁹ This Act expressly gives the Secretaries of Agriculture and of the Interior the authority to establish specific sustained-yield units on federal timber lands.¹⁴⁰ When established, the units can be sold without competitive bidding to purchasers from dependent communities that would normally benefit from such sales.¹⁴¹ These powers are only invoked, however, if one of the Secretaries determines they are necessary.¹⁴² The language in the regulations tracks this discretionary intent.¹⁴³ While it is curious that this provision has survived repeated changes and deletions to the timber management regulations in 36 C.F.R. Part 221,¹⁴⁴ as well as the regulatory onslaught of the NFMA regulations in 36 C.F.R. Part 219,¹⁴⁵ the fact that it remains does not render it mandatory. Federal authority under the Act, therefore, is purely discretionary and should not be interpreted to override the Secretary of Agriculture's broad timber management discretion by placing him in a dependent-community straitjacket.¹⁴⁶

Consequently, absent congressional action specifically compelling the Forest Service to provide timber for forest dependent communities, those communities will be forced to shift their economic focus to remain viable.¹⁴⁷ It is not likely that the current Congress would willingly invade NFMA for that purpose considering the strong criticism Congress already receives

139. Act of Mar. 29, 1944, ch. 146, § 1, 58 Stat. 132 (1944) (codified at 16 U.S.C. §§ 583, 583a-583i and 43 U.S.C. § 1181(2) (1982)). Do not confuse this legislation with MUSYA, which is an entirely different Act. See *supra* note 19.

140. These powers are to be invoked "in order to promote the stability of forest industries, of employment of communities, and of taxable forest wealth, through continuous supplies of timber . . ." 16 U.S.C. § 583 (1982). The Act also allows either of the Secretaries to establish cooperative sustained-yield units with private forest landowners. *Id.* § 583a.

141. *Id.* § 583(b).

142. *Id.* §§ 583(b), 1181(2).

143. See *supra* note 138.

144. The current 36 C.F.R. § 221.3 (1986) first appeared on December 14, 1948, at 13 Fed. Reg. 7711 (1948), as part of a revision to Timber Regulations. See 36 C.F.R. § 221.3(b) (1948). The section was amended in January 26, 1963, and renumbered as 36 C.F.R. §§ 221.3(2) to -(3). A subsequent amendment in January 17, 1969, did not affect § 221.3(2). On February 23, 1977, all of 36 C.F.R. Part 221, except § 221.3, was deleted, and 36 C.F.R. Part 223 covering sale and disposal of timber was added.

145. On August 22, 1980, the Forest Service requested comments on review of 36 C.F.R. § 221.3 pursuant to Exec. Order 12,044 (Mar. 23, 1978), 43 Fed. Reg. 12,661 (1978), which calls for *regulatory reduction*. On August 11, 1981, the Forest Service proposed to modify 36 C.F.R. § 221.3 so that it would apply only to non-NFMA timber management plans developed prior to September, 1979. Apparently the rule was not changed since it remains in the 1986 version of 36 C.F.R.

146. One case suggests this result. See *Sierra Club v. Hardin*, 325 F. Supp. 99, 119 n.41 (1971).

147. This situation is described as a "trade-off" problem. BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at VI-16. In that discussion the Forest Service suggests that, regardless of the fate of the Louisiana-Pacific sawmill in Dubois, the community's economic stability can only be preserved through increased economic diversity. *Id.* at VI-20 to -22. The MacCleery Opinion, *supra* note 89, at 9, also notes in passing that an "increased [local] dependency on submarginal timber sales would seem to result in potentially greater community instability due to the uncertainties over continuation of a relatively high level of Federal funding to support a timber program with costs greater than its revenues."

about below-cost timber sales.¹⁴⁸ The Forest Service is accordingly legally free to allocate forest resources and to balance all resource needs within the discretion it exercises under NFMA.

One way the Secretary of Agriculture might mitigate NFMA impacts on dependent communities would be to exercise his discretionary authority under the Sustained-Yield Forest Management Act.¹⁴⁹ The Secretary could designate sustained-yield units of federal timber specifically for dependent communities within NFMA plan harvest limits.¹⁵⁰ Such allocations could be especially helpful to dependent communities seeking to establish smaller local sawmills as partial replacements for large corporate mills that cannot operate on the amount of timber allocated in a forest plan. The Secretary should not, however, be allowed to use this provision to alter timber harvest levels set out in a finally approved plan. The more likely result of the destabilizing effects of NFMA planning on dependent communities would be the passage of special interest legislation to provide federal subsidies and monitoring programs to help dependent communities diversify their economies. Previous congressional use of this approach for both timber related impacts¹⁵¹ and the effects of other federal legislation on vital local industry¹⁵² suggests its political popularity.

ANALYSIS OF THE EFFECT OF THE WYOMING WILDERNESS ACT ON FOREST PLANNING

Another issue in Wyoming NFMA planning which promises to generate controversy in the near future is whether the language of the Wyoming Wilderness Act of 1984 (WWA)¹⁵³ modifies Forest Service responsibilities to analyze roadless areas under the NFMA planning regulations. The roadless resource issue appears with varying emphasis in some of the appeals from the three finally approved Wyoming NFMA plans.¹⁵⁴ These

148. See, for example, CHEC REVIEW, *supra* note 80, at 13, which shows that each dependent community job supported by timber sales in the Bridger-Teton National Forest cost the government over \$10,600 in 1986.

149. See *supra* note 139.

150. 16 U.S.C. § 583 (1982). Such sales must be sold to designated community sawmill(s) for appraised value. *Id.* § 583(b). To date the Forest Service has approved five federal sustained-yield units on public land reserving timber on about 1.7 million acres to stabilize five communities in New Mexico, Arizona, California, Oregon and Washington. H. STEEN, *supra* note 102, at 252.

151. See 16 U.S.C. §§ 79k, 79l (1982 & Cum. Supp. 1986) (mandating mitigation of adverse economic impacts on the logging industry created by the expansion of Redwood National Park). Further explanation for these provisions can be found in H. REP. NO. 95-581, Part I, 96th Cong., 2d Sess. (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 468.

152. This situation occurred for communities dependent on small steel mills in the Mahoning Valley of Pennsylvania when the Federal Water Pollution Control Act of 1976 was construed strictly against effluent limitation variances for those mills. See *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 308 (3d Cir. 1977). Congress responded with special SBA loans and a monitoring program. See 15 U.S.C. § 1367(e) (1982).

153. Pub. L. No. 98-550, *supra* note 13.

154. Roadless resource issues are raised in the following appeals to the Chief of the Forest Service: (1) STATEMENT OF REASONS IN SUPPORT OF APPEAL ON BEHALF OF WYOMING CHAPTER OF THE SIERRA CLUB, AND THE BIGHORN FOREST USERS COALITION, *In re Appeal of the Record of Decision for the United States Department of Agriculture Forest Service by the Regional Forester of the Rocky Mountain Region, including the Land and Resource Management Plan*

appeals illustrate disagreement between conservation groups and the Forest Service regarding the extent to which the WWA relieves the agency from its NEPA responsibilities to analyze the effect initial NFMA plans will have on nonwilderness roadless areas.¹⁵⁵

The issue is important for three reasons. First, a plan EIS should provide the public with specific information about where, how, and when forest roadless areas are to be developed during the life of the initial plan on a given forest even though no wilderness designations will occur during that period. Leaving this information out of the planning documents deprives the public of its legal right to informed comment.¹⁵⁶ Second, the Forest Service should develop a detailed inventory and schedule of development of roadless lands to expedite the wilderness suitability review. The inventory and schedule must be completed when the initial plan is revised.¹⁵⁷ Third, roadless lands will become an increasingly valuable and limited resource in future planning.¹⁵⁸ Roadless lands are a forest resource distinct from other plan land classifications.¹⁵⁹ Because they can be developed under initial NFMA plans as local planners choose,¹⁶⁰ that development should be carefully analyzed in the initial plan. To interpret the effect Congress intended the WWA to have on the NFMA process it is helpful to review briefly the development of the WWA and similar legislation.

When NFMA was passed it directed the Secretary of Agriculture to promulgate regulations governing review of forest roadless areas¹⁶¹ to determine their potential suitability for inclusion in the National Wilder-

and Final Environmental Impact Statement for the Bighorn National Forest 10 (Nov. 15, 1985); (2) STATEMENT OF REASONS, In re *Appeal of Land Management Plan and Environmental Impact Statement for the Medicine Bow National Forest*; SNOWY RANGE GROUP OF THE SIERRA CLUB AND MEDICINE BOW WILDERNESS COMMITTEE Appellants 23 (Feb. 13, 1985); (3) STATEMENT OF REASONS IN SUPPORT OF APPEAL, In re *Appeal of the Record of Decision for the United States Department of Agriculture Forest Service of the Rocky Mountain Region, including the Land and Resource Management Plan and Final Environmental Impact Statement for the Shoshone National Forest*; GREATER YELLOWSTONE COALITION, SIERRA CLUB, DUBOIS WILDLIFE ASS'N, WYOMING WILDLIFE FED'N, PARK COUNTY RESOURCE COUNCIL, WYOMING WILDERNESS ASS'N, THE WILDERNESS SOC'Y, NATIONAL AUDUBON SOC'Y, FREMONT COUNTY AUDUBON, WYOMING OUTDOOR COUNCIL Appellants 55-58 (May 22, 1986) [hereinafter YELLOWSTONE APPEAL].

155. See *supra* note 153.

156. 36 C.F.R. § 219.10(b) (1986).

157. See *infra* note 176.

158. Roadless lands are valuable prospectively as potential additions to the NWPS needed to meet the ever increasing demand for wilderness recreation. In the Bridger-Teton National Forest, for example, wilderness recreation on existing wilderness lands is expected to increase "more than two and one-half times during the term of the Forest Plan . . ." BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at IV-18. "During the years 1970-1980, wilderness use on the Forest increased 30 percent through the decade. This rate of growth is expected to continue." *Id.*

159. "Lands which are allocated to wilderness and primitive nonmotorized recreation do not [necessarily] coincide with lands that are roadless." YELLOWSTONE APPEAL, *supra* note 154, at 57.

160. See *infra* note 177.

161. 16 U.S.C. §§ 1604(e)(1), -(g)(3)(A) (1982).

ness Preservation System (NWPS).¹⁶² While the Forest Service developed its NFMA planning process, it also undertook evaluation of all such roadless lands in a separate nationwide programmatic study.¹⁶³ The RARE II study was an attempt by the agency to make a complete NEPA wilderness review to improve upon its previous ill-fated attempt at nationwide wilderness review of roadless lands¹⁶⁴ and speed up the wilderness designation process.¹⁶⁵

The process was derailed, however, when California sued the Department of Agriculture seeking to enjoin development of forest lands that received a "nonwilderness" designation in California's portion of the RARE II study.¹⁶⁶ The court granted the injunction based on its determination that the RARE II EIS violated NEPA because the EIS lacked sufficient site-specific analysis on the effects a nonwilderness designation would have on roadless lands.¹⁶⁷ The court also held that the EIS lacked a sufficient discussion of alternative actions¹⁶⁸ and that the EIS failed to provide for effective public comment and response.¹⁶⁹ The Ninth Circuit affirmed and continued the injunction.¹⁷⁰

In response, USDA modified their 1982 forest planning regulations¹⁷¹ that had previously exempted all RARE II nonwilderness roadless areas from wilderness suitability review during the first NFMA cycle. The modified regulations ordered that roadless lands must undergo wilderness review during the initial planning cycle¹⁷² unless Congress specifically exempted such areas.¹⁷³

These developments, coupled with the threat of additional litigation challenging the sufficiency of the RARE II EIS for other states,¹⁷⁴ spawned new wilderness designation legislation under the Wilderness Act

162. The Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131-1136 (1982)), declared a national policy of encouraging wilderness preservation and created the National Wilderness Preservation System. 16 U.S.C. § 1131.

163. FOREST SERV., U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT, ROADLESS AREA REVIEW AND EVALUATION (1979) [hereinafter RARE II or RARE II EIS].

164. The Forest Service had previously done a RARE I study in 1972 in which it designated roughly 12 million acres for further in-depth wilderness suitability study. This effort, however, was strongly criticized and was rendered useless by litigation challenging its noncompliance with NEPA. See *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

165. S. REP. NO. 98-54, 98th Cong., 1st Sess. 6 (1983). RARE II was completed and submitted to President Carter, who submitted it to Congress with only minor changes in 1979. See *State of California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982).

166. *State of California v. Bergland*, 483 F. Supp. 465, 469-71 (E.D. Cal. 1980), *aff'd sub nom. State of California v. Block*, 690 F.2d 753 (9th Cir. 1982).

167. *Id.* at 481-93.

168. *Id.*

169. *Id.*

170. *Block*, 690 F.2d 753 (9th Cir. 1982).

171. 36 C.F.R. § 219.17(a) (1983).

172. *Id.*

173. The original modifications were issued in 48 Fed. Reg. 40,381-83 (1983). They are now located at 36 C.F.R. § 219.17 (1986).

174. This is summarized in the legislative history of WWA. See S. REP. NO. 98-54, *supra* note 165, at 3-4.

of 1964. Congressional delegations from Western states introduced their own, specific, wilderness designation legislation, containing sufficiency language congressionally ratifying the RARE II EIS for their particular state.¹⁷⁵ They also "released" all forest roadless lands not designated as wilderness in the RARE II EIS for multiple-use management and development.¹⁷⁶ The "sufficiency and release" language used in the WWA is typical of that used in wilderness designation legislation passed for other states.¹⁷⁷

The WWA contains several provisions that have a mandatory effect on the Forest Service under NFMA regulations. First, the WWA states that the RARE II EIS is sufficient to comply with NEPA as it applies to Wyoming forest lands and that federal courts cannot review that portion of the RARE II EIS.¹⁷⁸ Second, the Act directs that, for Wyoming forest lands, the RARE II study and EIS are deemed sufficient to fulfill the Forest Service's obligation to review roadless areas for wilderness suitability during the initial planning cycle.¹⁷⁹ Third, upon the first revision of the initial plans the Forest Service must resume roadless area wilderness suitability review for all lands remaining roadless at that time.¹⁸⁰

175. For example, Pub. L. No. 98-550, *supra* note 13, § 401(b) provides in part: On the basis of such review, the Congress hereby determines and directs that—

(1) without passing on the question of the legal and factual sufficiency of the RARE II final environmental statement (dated January 1979) with respect to national forest lands in States other than Wyoming, such statement shall not be subject to judicial review with respect to National Forest System lands in the State of Wyoming;

(2) with respect to the national forest lands in the State of Wyoming which were reviewed by the Department of Agriculture in the second roadless area review and evaluation (RARE II) and those lands referred to in subsection (d) . . . , that review and evaluation of reference shall be deemed for the purposes of the initial land management plans required for such plans . . . to be an adequate consideration of the suitability of such lands for inclusion in the [NWPS,] and the Department of Agriculture shall not be required to review the wilderness option prior to the revisions of the plan but shall review the wilderness option when the plans are revised

176. *Id.* § 401(b) (emphasis in original and added) further states:

(3) areas in the State of Wyoming reviewed in [RARE II] . . . and not designated wilderness or wilderness study upon enactment of this Act shall be managed for multiple-use in accordance with land management plans pursuant to [RPA and NFMA]; *Provided*, that such areas need not be managed for the purpose of protecting their suitability for wilderness designation prior to or during revision of the *initial* land management plans.

177. Both the Oregon Wilderness Act of 1984, Pub. L. No. 98-328, §§ 7(b)(1) to -(3), 98 Stat. 272 (1984) (codified at note following 16 U.S.C. § 1132 (Cum. Supp. 1986)), and the Arizona Wilderness Act of 1984, Pub. L. No. 98-406, §§ 103(b)(1) to -(3), 98 Stat. 1485 (1984) (codified at note following 16 U.S.C. § 1132 (Cum. Supp. 1986)) contain identical language.

178. *See* Pub. L. No. 98-550, *supra* note 13, § 401(b)(1).

179. *Id.* § 401(b)(2). The WWA also states that:

(5) unless expressly authorized by Congress, the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of the National Forest lands in the State of Wyoming for the purpose of determining their suitability for inclusion in the [NWPS].

Id. § 401(b)(5).

180. *Id.* § 401(b)(2).

This renders the RARE II study and EIS both legally and factually sufficient to satisfy the otherwise applicable wilderness review requirements of the NFMA regulations. Congress has in effect substituted the RARE II EIS, along with its own independent wilderness review, for that portion of each Wyoming NFMA plan and EIS which would have analyzed roadless areas for wilderness suitability. Thus, while NFMA expressly mandates full compliance with NEPA in each planning cycle,¹⁸¹ Congress has statutorily exempted the Forest Service from having to comply with NEPA in reviewing forest roadless areas "for the purpose of determining their suitability for inclusion in the [NWPS]" during the first round of planning.¹⁸²

The extent to which the WWA sufficiency and release language precludes analysis of roadless areas in forest planning has been subjected to different interpretations in different regions of the United States. In Oregon, for example, while forest planners believe that sufficiency and release language identical to that used in the WWA relieves them of their NFMA/NEPA obligations to perform any wilderness evaluations, they still include detailed information and analysis on the effects that plan development will otherwise have on the roadless areas.¹⁸³ Forest planners in Wyoming, however, apparently interpret the WWA wilderness evaluation preclusion so broadly as to exempt them from having to do *any specific analysis* of the effects plan development will have on roadless areas.¹⁸⁴ Wyoming NFMA plan EISs contain, at most, a general statement or table showing the amount of roadless acreage that will be developed during the life of the plan.¹⁸⁵ They provide no information or analysis on plan effects in terms of how each roadless area will be developed, a schedule of potential development, or even a discussion of the way roadless area development might affect other forest uses. This approach does not follow federal caselaw and is not supported by the legislative history behind WWA.

181. See *supra* note 55.

182. Pub. L. No. 98-550, *supra* note 13, § 401(b)(5).

183. The DEIS for the Wallowa-Whitman National Forest in Oregon provides that, pursuant to the Oregon Wilderness Act, no wilderness suitability evaluation was necessary in the initial plan. The DEIS, however, provided further that "all remaining roadless areas are discussed and information on their resource suitability for roadless recreation, and potential for future consideration are provided." FOREST SERV., U.S. DEP'T OF AGRICULTURE, DRAFT ENVIRONMENTAL IMPACT STATEMENT, WALLOWA-WHITMAN NATIONAL FOREST LAND AND RESOURCES MANAGEMENT DRAFT PLAN III-68 (1985) (cited in YELLOWSTONE APPEAL, *supra* note 154, at 57).

184. The Shoshone Plan FEIS and the Bighorn Plan FEIS contain absolutely no information regarding the impact the plans will have on the amount of roadless areas that will be developed prior to initial plan revision. See SHOSHONE PLAN FEIS, *supra* note 38, at I-12, -13, IV-20, -28; FOREST SERV., U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT, BIGHORN NATIONAL FOREST LAND AND RESOURCES MANAGEMENT PLAN I-9, -10, IV-29 (1985).

185. The Bridger-Teton Draft Plan DEIS provides only a cumulative statement regarding the amount of currently roadless lands that will be developed during the life of the plan. BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at IV-84. The Medicine Bow Plan FEIS contains a cumulative table showing the acreage that will be lost in each forest roadless area prior to plan revision. FOREST SERV., U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT, MEDICINE-BOW NATIONAL FOREST AND THUNDER-BASIN NATIONAL

*City of Tenakee Springs v. Block*¹⁸⁶ is the only federal case which construes RARE II sufficiency and release language in the context of a forest plan. There, the Ninth Circuit faced a unique situation regarding the EIS for the Tongass National Forest Plan in Alaska. The Tongass Plan, unlike current Wyoming plans, was developed at the same time RARE II was being conducted.¹⁸⁷ Consequently, the Tongass Plan already included a comprehensive wilderness suitability review of roadless lands when RARE II was scheduled to be implemented in Alaska.¹⁸⁸ Seeking to avoid duplication of the wilderness review process, the Forest Service incorporated that portion of the Tongass Plan EIS covering wilderness review directly into the RARE II EIS.¹⁸⁹ Soon after the Forest Service issued the RARE II EIS, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA).¹⁹⁰ Already concerned that litigation might threaten the sufficiency of the RARE II EIS, and thus the validity of the Tongass Plan EIS, Congress added "sufficiency and release" language to ANILCA.¹⁹¹ This language congressionally ratified the RARE II EIS as it pertained to Alaska national forest lands, effectively precluding judicial review under NEPA.¹⁹²

The issue ultimately presented to the Ninth Circuit arose when the City of Tenakee Springs sought to enjoin construction of a logging road in the Tongass National Forest.¹⁹³ The lawsuit proceeded on the theory that the site-specific EIS for the road, developed under the Tongass Plan EIS, was inadequate under NEPA.¹⁹⁴ The district court denied the preliminary injunction based on the theory that the sufficiency and release

GRASSLAND LAND AND RESOURCES MANAGEMENT PLAN IV-45 (1986). The Medicine Bow National Forest planners, however, deleted an entire appendix to their plan DEIS, which contained specific information from prior wilderness review that could have been used to analyze development of roadless areas under the plan. The Forest Service justified the deletion stating:

Appellant's Exhibit F includes a portion of the roadless area evaluation which would have been Appendix G to the DEIS. During the time the proposed Plan and the draft EIS were being printed, the [WWA] was passed by Congress This Act resolved the wilderness issue in Wyoming for the current round of planning; therefore a roadless area evaluation was no longer within the scope of the Forest Plan EIS.

FOREST SERV., U.S. DEP'T OF AGRICULTURE, RESPONSIVE STATEMENT TO THE APPEAL OF THE MEDICINE-BOW NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN BY THE SNOWY RANGE GROUP OF THE SIERRA CLUB AND THE MEDICINE-BOW WILDERNESS COMMITTEE, Appeal No. 1422, at 18-19 (Mar. 25, 1986) (on file in the Land & Water Law Review office). While the Appendix could not have been included as a wilderness suitability review, it could have been used to create a thorough evaluation of plan effects on roadless areas. *Id.* at 18-21.

186. 778 F.2d 1402 (9th Cir. 1985).

187. *Id.* at 1404.

188. *Id.*

189. *Id.*

190. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101-3233 (1982 & Supp. III 1985)) [hereinafter ANILCA]. For a related article on the access ramifications of ANILCA, see Quarles & Lundquist, *You Can Get There From Here: The Alaska Lands Act's Innovation in the Law of Access Across Federal Lands*, XXII LAND & WATER L. REV. 347 (1987).

191. 127 CONG. REC. H10,544 (daily ed. Nov. 12, 1980) (statement of Rep. Udall).

192. *Id.*

193. *Tenakee Springs*, 778 F.2d at 1404.

194. *Id.*

language in ANILCA precluded judicial review of the Tongass Plan EIS.¹⁹⁵ The Ninth Circuit reversed and held that, while the RARE II EIS incorporated the Tongass Plan EIS by reference, thus insulating both from judicial review, the incorporation was only valid in terms of allocating certain lands to wilderness status. The court said, "[T]he (RARE II) EIS defers planning for the management of *nonwilderness* areas until such time as those areas are covered by detailed resource management plans."¹⁹⁶ The court further explained that, unlike the RARE II EIS, the Tongass Plan EIS

is more detailed, comprehensive and location specific than RARE II. Not only does the Tongass Plan . . . designate certain lands as wilderness, but it also assigns nonwilderness land to one of three specific land use designations. Consequently, while the Tongass Plan recognizes the RARE II wilderness designation, it provides a comprehensive management plan for all lands—wilderness and nonwilderness in the Tongass Forest.¹⁹⁷

The legislative history of ANILCA also suggests that, when Congress added the RARE II sufficiency and release language, it was concerned solely with "the distinction between wilderness and nonwilderness lands."¹⁹⁸ Further the court correctly asserted that, at the time Congress passed ANILCA, it could not have ratified the nonwilderness management directives of the Tongass Plan because that plan was incomplete when the RARE II EIS became final.¹⁹⁹

The Ninth Circuit's reasoning applies more forcefully to the WWA incorporation of the RARE II EIS and congressional designation of wilderness in Wyoming than it did for the Tongass Plan EIS. In *City of Tenakee Springs*, Congress had first incorporated the Tongass Plan EIS wilderness suitability review directly into the RARE II EIS. Therefore, the Forest Service might have argued that, in ratifying the RARE II EIS, Congress could have intended to immunize the entire Tongass Plan EIS for both wilderness and nonwilderness analysis from judicial review.²⁰⁰ The WWA, on the other hand, adopts only the separate RARE II EIS as it pertains specifically to wilderness designations for Wyoming forests.²⁰¹ In addition, the wilderness designations made in the WWA were the product of congressional compromise and not of a specific NFMA plan or plans from Wyoming Forest Service planners.²⁰² Therefore, the WWA sufficiency and release language exempts Wyoming NFMA plans from judicial review under NEPA only in terms of roadless lands not being analyzed for wilderness designation during the first planning cycle.

195. *Id.*

196. *Id.* at 1405 (emphasis in original).

197. *Id.*

198. 127 CONG. REC. S14,313 (daily ed. Dec. 2, 1981) (statement of Sen. Tsongas) (incorrectly cited in *Tenakee Springs*, 778 F.2d at 1406, as 127 CONG. REC. S14,324 (daily ed. Dec. 2, 1981)).

199. *Tenakee Springs*, 778 F.2d at 1406.

200. *Id.* at 1409 (Skopil, J., specially concurring).

201. Pub. L. No. 98-550, *supra* note 13, §§ 401(a), -(b)(1) to -(2).

202. 130 CONG. REC. H10,891 (daily ed. Oct. 2, 1984) (statement of Rep. Cheney).

The legislative history of WWA also suggests that the Act was not meant to invade the planning process other than to specifically alleviate wilderness designation analysis. In his description of the intent of Congress in including the WWA sufficiency and release language, one of WWA's primary architects, Wyoming Representative Dick Cheney, stated, "[T]he bill contains language to ensure that lands not designated as wilderness or wilderness study will be released for such nonwilderness uses *as are deemed appropriate through the forest land management planning process*, and prohibits lawsuits challenging the release of nonwilderness lands."²⁰³ The Senate Committee on Energy and Natural Resources also evidenced intent that WWA sufficiency and release language not invade the planning process other than to preclude wilderness designation review.²⁰⁴

The NFMA/NEPA exemption created by the WWA sufficiency and release language also fails to qualify as a broad NEPA exemption when analyzed in light of the construction federal courts have given to other legislation which exempts agency action from NEPA. Federal courts have generally found broad NEPA exemptions only in situations where the language of the exemption legislation itself, its legislative history, or both, support a wide-ranging exemption from NEPA. The most familiar example of such exemptions are found in the Clean Air Act²⁰⁵ and the Clean Water Act.²⁰⁶ Congress has also, on rare occasions, granted broad NEPA exemptions to further the development of a specific project of national or regional importance.²⁰⁷ Review of such exemptions has occurred only sporadically. Those cases, however, are instructive regarding how the scope of a NEPA exemption is determined.

In *Earth Resources Co. v. Federal Energy Regulatory Commission*,²⁰⁸ for example, the D.C. Circuit construed language in the Alaska Natural Gas Transfer Act (ANGTA)²⁰⁹ that rendered any EIS submitted by the President for the trans-Alaska gas pipeline automatically in compliance

203. *Id.* (emphasis added).

204. In its report, the Senate Committee on Energy and Natural Resources stated:

With the [NFMA] planning process now in place, the Committee wishes to see *the development of any future wilderness recommendations by the Forest Service take place only through the planning process*, unless Congress expressly asks for other additional evaluations. Therefore, the legislation directs the Department of Agriculture to conduct any further statewide roadless area review and evaluation of national Forest System lands in Wyoming *for the purpose of determining their suitability for inclusion in the [NWPS]*.

S. REP. NO. 98-54, *supra* note 165, at 3-4 (emphasis added).

205. The Clean Water Act exemption is codified at 33 U.S.C. § 371(c) (1982); *see also* South Terminal Corp. v. EPA, 504 F.2d 646, 661 (1st Cir. 1974) (upholding the Clean Water Act exemption).

206. The Clean Air Act exemption is codified at 15 U.S.C. § 793(c)(1) (1982).

207. Examples of this type of legislation include 15 U.S.C. § 719h(c) (Supp. III 1985) (exempting the Alaska Natural Gas Transport Act), *id.* § 719a, and Pub. L. No. 93-87, § 154, 87 Stat. 250 (1973) (codified at note following 23 U.S.C. § 101 (1982)) (withdrawing federal aid from the San Antonio North Expressway Project).

208. 617 F.2d 775 (D.C. Cir. 1980).

209. Pub. L. No. 94-586, 90 Stat. 2903 (1976) (codified at 15 U.S.C. §§ 719a-719o (Supp. III 1985)).

with NEPA and insulated it from judicial review.²¹⁰ Plaintiffs asserted that ANGTA only exempted those specific environmental issues raised in the President's EIS from NEPA compliance and that all other environmental issues raised by the pipeline should be subject to judicial review under NEPA.²¹¹ The court looked to the Statement of Purpose in ANGTA for guidance in judging the scope of the NEPA exemption.²¹² That section of the Act stated that "it is the intent of the Congress to exercise its Constitutional powers *to the fullest extent . . . particularly with respect to the limitation of judicial review of actions of Federal officers or agencies taken pursuant thereto.*"²¹³ Based on this express intent, the court easily found a broad preclusion of all NEPA challenges.²¹⁴ A similar result has been reached when a congressional exemption is not express, but only if it is clear that a NEPA exemption was the sole purpose for the legislation.²¹⁵

Analyzing the WWA in terms of these holdings illustrates that Congress could not have intended the Act to be a broad NFMA/NEPA exemption for forest plan analysis of roadless areas. The Act states that its purpose is to "insure that certain National Forest System lands in the State of Wyoming be made available for uses other than wilderness *in accordance with applicable national forest laws and planning procedures and the provisions of this Act.*"²¹⁶ This statement is consistent with the WWA legislative history explained above.²¹⁷

The Forest Service might also argue that the RARE II EIS, as incorporated into the WWA, provides the "functional equivalent" of the roadless area planning. The doctrine of functional equivalence in NEPA law provides "a narrow exemption from NEPA when environmental evaluation and public participation procedures provided in agency regulatory legislation are equivalent to those provided by NEPA."²¹⁸ Based on this definition, the RARE II EIS, as incorporated into Wyoming plans by the WWA sufficiency language, would not provide the functional equivalent of roadless area analysis under a plan. This is because the RARE II EIS dealt only with wilderness designations of roadless lands.²¹⁹

210. 15 U.S.C. § 719h(c) (Supp. III 1985).

211. *Earth Resources*, 617 F.2d at 779-80.

212. *Id.*

213. 15 U.S.C. § 719a (Supp. III 1985).

214. 617 F.2d at 780.

215. See, for example, *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't (II)*, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). There the Fifth Circuit found a broad NEPA exemption in federal legislation severing all federal contractual relationships with the State of Texas for construction funding of a section of the San Antonio North Expressway. The court ruled that Congress need not expressly exempt the project from NEPA where the legislation could only have been intended to obviate NEPA compliance. *Id.* at 1022-23.

216. Pub. L. No. 98-550, *supra* note 13, § 102(b)(2) (emphasis added).

217. See *supra* notes 199-200.

218. D. MANDELKER, *NEPA LAW AND LITIGATION* § 5:15 (1984 & Supp. 1986).

219. Further, without the WWA sufficiency language, the RARE II EIS would probably have been inadequate under NEPA based on the holding in *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982).

Since NEPA procedures are essentially the backbone of NFMA planning, especially for nontimber resources,²²⁰ roadless areas should receive real NEPA analysis in a plan EIS. This conclusion is also supported by the holding in *Texas Committee*, where the Fifth Circuit held that NFMA itself could not be the functional equivalent of an EIS for timber management policies in forest planning.²²¹

To comply with NEPA in analyzing a plan's effects on roadless areas, the Forest Service should do more than add maps to or cross-reference extensively within an existing NFMA plan EIS. Other resource evaluations within plan EISs do not currently provide an adequate roadless lands analysis.²²² NEPA requires "a reasonably thorough discussion of the significant aspects of probable environmental consequences . . ." ²²³ Courts review the sufficiency of an EIS under NEPA by applying a "rule of reason."²²⁴ This type of review uses a pragmatic standard fashioned to ensure that the EIS serves the dual purposes of promoting informed federal decisionmaking and of informed public participation.²²⁵ The requisite specificity for a given EIS depends upon the nature and scope of the proposed federal action.²²⁶ For NFMA plans this suggests an EIS containing information and analysis specific enough to carefully explain *long-range* management of forest resources.²²⁷ Such an analysis of roadless area impact should include a description of roadless areas, how each area will be developed, a discussion of the relationships of roadless area developments to other forest resources, and a cumulative look at those plan impacts.

This analysis could best be accomplished by analyzing roadless areas as a distinct "resource element"²²⁸ within a plan EIS. If so classified, the EIS would describe the areas in its "affected environment" section²²⁹ as

220. See *supra* note 55.

221. *Texas Committee on Nat. Resources v. Bergland*, 573 F.2d 201, 212 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978).

222. See *supra* note 159.

223. *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974) (en banc).

224. *Id.*

225. *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (per curiam). Under this standard of review courts cannot substitute their judgment for that of the agency preparing the EIS in question. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

226. *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 322 (1975); see also 40 C.F.R. § 1502.15 (1986).

227. The SHOSHONE PLAN FEIS, *supra* note 38, at I-1, states:

This final [EIS] discloses a proposed action, as well as alternatives to the proposed action, for managing the Shoshone National Forest for the next ten to fifteen years. The EIS describes the environment to be affected and the potential environmental consequences of implementing the proposed action and each alternative.

228. BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at VII-40 defines a "resource element" as

[a] major Forest Service mission-oriented endeavor which fulfills statutory or executive requirements and comprises a collection of activities from the various operating programs required to accomplish the mission. The eight [current] resource elements are: Recreation, wilderness, wildlife and fish, range, timber, water, minerals, and human and community development.

229. See 40 C.F.R. § 1502.15 (1986).

a grouping of lands with specific values and relationships with other forest resources.²³⁰ This would guarantee that both environmental consequences of roadless area developments and irretrievable commitments²³¹ of them to other forest uses would be discussed.²³² It would also ensure that direct and indirect environmental effects “and their significance”²³³ to roadless areas in terms of EIS alternatives are presented. The Forest Service could thereby include information on a plan’s cumulative impacts on roadless acreage and on plan present net values.²³⁴

These conclusions should not be interpreted to mean that planners must include an entirely new alternative in plan EISs providing for an “all wilderness” management of roadless lands. NEPA requires that an agency formulate an EIS which is “a detailed statement on . . . alternatives to the proposed action.”²³⁵ Normally, this would mean that a plan EIS must contain an alternative in which no roadless areas are developed. The WWA, however, clearly prohibits this alternative. NEPA states that the agency “shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of *available resources*.”²³⁶ Roadless areas of Wyoming forests not designated as wilderness in the WWA are clearly not “available” in this context in the initial planning cycle.²³⁷ This does not necessarily mean that these lands must be developed. It only means that a Wyoming plan EIS need not present a special alternative considering additional wilderness designations during the life of the first NFMA plan.

The practical conclusion of this argument is that forest planners should be required to describe specifically the development a given plan mandates for nonwilderness roadless lands. NEPA mandates this requirement, and the WWA “release and sufficiency” language does not create a broad NEPA exemption obviating it. Planners could best fulfill this requirement by treating nonwilderness roadless lands as a distinct “resource element” in the plan EIS. This does not mean that planners must add an “all wilderness” alternative to each plan EIS. It does mean, however, that planners should more carefully consider and disclose the specific effects a plan has on existing nonwilderness roadless lands.

CONCLUSION

This comment arrives at two conclusions. First, neither the Organic Act of 1897 nor current planning legislation and timber management

230. These sections in the Wyoming plans discuss the importance of the resource element to other forest resources and the current use and demand trends for the resource element during the life of the plans. See, e.g., BRIDGER-TETON DRAFT PLAN DEIS, *supra* note 3, at III-11.

231. 40 C.F.R. § 1502.16 (1986).

232. *Id.*

233. *Id.* § 1502.16(a).

234. *Id.* § 1508.25(a).

235. 42 U.S.C. § 4332(C)(iii) (1982).

236. *Id.* § 4332(E) (emphasis added).

237. Pub. L. No. 98-550, *supra* note 13, § 401(b)(2).

regulations mandate that timber dependent communities must receive enough timber under a NFMA plan to stabilize their economies. The Organic Act instead suggests a contrary result that is reaffirmed by the legislative history of NFMA. Federal regulations based on the Sustained-Yield Forest Management Act of 1940 vest the Secretary of Agriculture with the authority to stabilize dependent communities. That authority, however, is purely discretionary, and the Secretary is not required to exercise it. The Forest Service should consider urging the Secretary to use these regulations to allocate federal timber to dependent communities where a NFMA plan's timber harvest limits will plainly destabilize a community. Such an allocation, however, should not violate a plan's timber harvest limits and probably would benefit smaller local mills much more than it would benefit large corporate operations.

Second, Wyoming NFMA planners should reevaluate their interpretation of the NEPA exemption Congress created in the Wyoming Wilderness Act of 1984. Planners clearly do not have a legal responsibility to do a NEPA evaluation of forest roadless lands for wilderness designations until NFMA plans are mandatorily revised. This exemption, however, is not broad enough to obviate planners' NFMA/NEPA duties to analyze the effects of each forest plan on nonwilderness roadless lands themselves. These roadless lands are a distinctly valuable forest resource, and NEPA mandates that they be analyzed in detail in each plan EIS. This approach would also expedite mandatory wilderness suitability review of roadless lands when the first generation of forest plans are revised.

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