Summary: Wolf explains the Attorney General's (Robert Kennedy's) opinion of 1962 regarding access to public lands. He also lays out the opposing viewpoints of federal agencies and the problems with accessing public lands.

Hall: We're in the archives of Mansfield library and we're speaking with Bob Wolf today, we're going to be talking about the Attorney General's opinion of 1962. Okay Bob, would you like to start?

Wolf: On February 1, 1962 the Attorney General of the United States, who was then Robert Kennedy, issued a decision involving rights of way over national forest lands which is based upon his interpretation of a section of the 1897 act that gave a statutory right of ingress and egress to certain classes of people living on, using and crossing the national forest lands. That's what we'll be talking about today.

But before detailing the issues that decision raised, there's some background information that is helpful in understanding it. Access to timberland had always been vital to people that owned timber and control of access of adjacent timberland has always been vital to people who owned timber. As a private forester one of the things I used to do was buy up key tracts that gave our company control of access for a period of years. And the landowners we had, in effect,
land locked had no simple alternative aside from forcing the right of away through court action, which very often was costly, and they didn't want to pursue it or didn't know how to pursue it. So this is a technique that's long been used by some timber companies to control more timber than they held title to. The federal policy of granting alternate sections for railroad construction which then wound up with timber companies getting title and owning alternate sections when they bought from railroads gave them effective control over certain national forests and other public lands that had timber on it. In addition to which the abuses under the land law that permitted people to file homestead entries and timber and stone entries and buy up key tracts, gave them control of the federal lands behind it. This would not have been a significant problem if it had not been for the position erroneously taken by the Department of Agriculture on the question of access across national forest lands based on the 1897 act. In the case of the Bureau of Land Management, which had the same sort of problems on their lands, it was more a lack of doing anything for years. In 1947, late 1946, the Bureau of Land Management concluded out of reasons totally unrelated to timber that they needed to have intermingled access and this stemmed from an issue in the electrical power generation area called Wheeling. The Department of [the] Interior had taken the position that private power companies had to give a right of way to have power transmitted across their lines when they got federal power or when they crossed federal lands. And this was called Wheeling. The case went to the Supreme Court and the Supreme Court held that it was legal for the Department of Interior to require this. So when the Bureau of Land Management was faced with a problem with land-locked timber in western Oregon it was natural for their attorneys to say, well, this is a Wheeling principle and to say that we have an authority under another act, an 1895 act that enables us to require that timber purchasers give us access when they want access.
Hall: What was the time period of this BLM?

Wolf: 1946, [194]7, [194]8 period. Anyway, through 1948 the BLM worked through their advisory boards in western Oregon in a long involved ruckus with the major timber owners and established these regulations that let them, wasn’t let them, under which they said they had the authority to require a timber owner who sought access across federal lands, national, BLM lands to give access to the government to its timber so that other people could bid upon it. Now the industry threw up all kinds of roadblocks saying, well, some of these small operators are not safe people to let on your roads. They'll run them up and wreck them and so forth. But that was all smoke screen because you can cover those issues by bonding and so forth. In any event, it's my understanding that when the secretary of Interior, who was about to sign the regulations contingent of lumber management, came in and called them upon it, and I believe it was Oscar Chapman who was then secretary of Interior. And he seemed to almost be wavering about signing the regulations when reportedly one of the lumbermen in frustration said to Chapman, that this was nothing but a bunch of god damn socialism. Whereupon Chapman reportedly picked up his pen and signed the regulations. [laughter] Because whatever they were, they weren't socialist.

In any event, in the course of that BLM negotiation with the industry, the BLM had suggested to the Forest Service that they should adopt the same policy. And the Forest Service declined to do so. In fact the Forest Service took the position that this 1897 language, which is important to read here at this point, said that nothing in this act should be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of the national
forest or from crossing the same to and from their property or homes, and then it goes on to say a
few other things about the roads themselves. It was the actual settler clause words that became
the key. The Forest Service had an unsigned opinion of their general counsel [Fred Mynatt], he
would not sign it, which said that a lumber company was an actual settler residing. But anyone
who became familiar with the public land laws knew that the term Aactual settler
residing referred to a particular class of person. It was an individual who was either a citizen or
declared his or her intention to become a citizen who had a homestead entry, not a patent -- an
unpatented homestead entry -- they were trying to prove up. Those were actual setters; nobody
else was an actual settler. There is other language in this section that deals with people who own
land. So the lumber companies were not actual settlers, and therefore they had no statutory right
of ingress or egress. The 1897 act gave this statutory right so that the government could not
prevent homesteaders from getting land under the Homestead Act in the national forest.

Hall: I am curious about the general counsel and his decision not to sign this and where he got
the idea for this one.

Wolf: Well, he was asked, the gentleman, and unfortunately he's dead, and so it's impossible to
go back and ask him. I knew him. I think what he did was, in response to a request by the chief
that he prepare such an opinion ...

Hall: Who was the chief?

Wolf: That would have been Lyle Watts at the time, or possibly Dick McArdle, it was in that era,
or the timber management people. Mynatt, his name was Fred Mynatt, prepared the decision, but wouldn't sign it, in effect said, well you can try to use it but I'm not going to put my name on it because it's illegal. So I never understood why Fred did this, but the Forest Service used this theoretical authority to grant rights of way. And there were more and more demands by then of large timber companies for rights of way across the national forest in checkerboard situations for them to build roads or when they owned land at the lower end they would control the road and then buy timber sales up and back and then control the mouth of the drainage and in effect have a lock on that timber. The Forest Service took an alternative position then, and said if somebody won't give us a right away we won't sell the timber. So there was an awful lot of national forest timber, particularly in the Northwest in the face of the bottom end of drainages that was locked up -- more timber than the wilderness people have ever been able to lock up. It took a real value; I am talking about real timber not low value low cost timber. I am talking about extremely fine Douglas fir stands. Anyway, the Forest Service was faced with adjusting sale programs and doing a variety of things because of this lack of access.

Well, in 1955, when the House Government Operations committee and the Senate Interior Committee were looking at this question, they had a lawyer who had worked for the Department of Interior, Jim Lanigan, who knew the access issues backwards and forwards. Jim decided to ask the Library of Congress American law division to study the matter, to see if that sort of an approach could be used to leverage the Forest Service to shift their position. He got this opinion written by a lawyer in the American law division. The Forest Service wouldn't shift its position, they were going to stay with it. They didn't want to engage in a battle with the forest products industry with the giants of it is what it came down to. And the conclusion of the people on the [Capitol] Hill who were mainly Western Democrats was that there was no

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sense in trying to push this thing under the Eisenhower administration because they wouldn't get anywhere. Well 1960, when Jack Kennedy got elected, the Western Senators got together, and I think everyone of the Western Democrats got elected on this letter, with a letter to the attorney general requesting that he issue an opinion -- that the 1897 language of the actual settlers excluded lumber companies.

Wayne Morse, of Oregon, who had been a law professor at the University of Oregon, was considered a noted Constitutional scholar still by his colleagues, was selected to take the lead in this thing. Bill Berg, his administrative assistant who was also a first rate lawyer, prepared the letter. I worked on it, mainly in a technical capacity, not in terms of the legal aspects. But before it was sent down, I remember Senator [Wayne] Morse held another meeting with Ed Crafts, then a deputy chief of the Forest Service, urging that they make this decision themselves, and Crafts declined. Morse did not tell him that he had this letter ready to go to the Attorney General or about the position of the other Westerners, he just simply held a meeting and suggested that this was a policy that ought to be changed because it had adverse effects on Oregon and its forest products industry in the broader sense, even though it was beneficial to the larger land owning companies.

One of the things I do recall from that meeting was Morse did something that was rather unusual for him, he bluntly told Ed Crafts that he thought the Forest Service was in, as he put it, in the pocket of the lumber industry.

Hall: How well did that go over?

Wolf: Crafts didn't like it, and Morse's position was that the Forest Service attitude on this issue
was proof enough for him, and he found it very disappointing, he told me. Well, anyway ...

Hall: Before you continue, what was the opinion of the Forest Service? How did they view this timber lock up that was occurring?

Wolf: They viewed it as that their hands were tied, in theory. That they could not overturn, they couldn't change their policy. Basically they were afraid to get into this sort of a battle. They would have welcomed, for instance, Congress enacting a law, but the position of Morse and all the other Westerners who were lawyers, there was no sense in us enacting a law that says that the law is the law. But also the year before -- this would be [19]61, when we were doing this, in [19]60 -- Senator Magnuson and Senator Jackson, had had an Appropriation hearing, because Magnuson was on Appropriations, with Ed Cliff of the Forest Service on access to the Lewis river drainage on the Gifford Pinchot National Forest, where there was a lot of insect infestation of timber, and access was denied. I can still remember Warren Magnuson, who was a very colorful Senator, telling Ed Cliff, AYou know I go and drink with all these fellows when I am in Seattle, I know them well. They're not going to give you anything, Cliff, [laughter]. You gotta take it. He said, AI will tell you what I am going to do. I am going to put a couple of million bucks in the appropriations bill and tell you to condemn. Now what do you think of that? Cliff says if you do it, we'll condemn! And Maggie [Senator Magnuson] told him that's right, you will. [laughter]. So he put the money in the appropriations bill and the right of way was condemned. But Maggie didn't feel, and the other Westerners didn't feel, that that was the way to go about it regularly. But this was an emergency situation in his view, and that was Magnuson's style.
Anyway, the next thing was a meeting that was held by, as I recall, it was probably Morse, and Jackson and Mansfield -- at least the three of them were there -- with Secretary Freeman, to tell them that they were going to send this letter to the attorney general and they wanted him to be aware of why they were doing it. That there had been a meeting with the Forest Service and the Forest Service had declined to institute a change of policy and they were going to do this. And then there had been by then also a preliminary discussion with the attorney general on his possibly issuing a decision. He had not promised that he would. He had simply said that he would give it a careful look. But I had meet with Tom McKevitt, who was the lead trial lawyer in Lands Division, and I knew from McKevitt, that in a Minnesota case involving the same sort of issues from a recreational standpoint of people who had camps up in the Boundary Waters Canoe Area, and the Forest Service said they had a right of access, too. That McKevitt did not like this position and had argued in court and had won that they did not have a right of access, but he saw no way to get the Forest Service to back off on the timber road issue. But his view was the Department of Justice shouldn't have to be instituting condemnation actions in situations where the law was clear, all because of a misplaced sense of what was the correct thing to do in the Forest Service. So they met with Freeman. Freeman said he understood the situation, and he said we’ll get a letter to the Attorney General once your letter gets there and he requests something from us. That was the nature of the commitment. The letter went to the Attorney General, the Department of Agriculture lawyer sent a letter to the Attorney General, which in effect said you don’t want to decide this, do you? [laughter] And it's in the record so you can read the letter.

The Attorney General then went to work on the issue, researching it, having his legal looking at it.
Hall: This is Bobby Kennedy?

Wolf: Robert Kennedy. I was then asked by -- it was in January of 1962 -- I was asked to go
down to a meeting with the Attorney General and Senator Morse, which the attorney general had
requested. I went with him and Bill Berg from his office, we met with Robert Kennedy and Nick
Katzenbach-- his deputy. The attorney general showed the senator a letter from Senator
McClellan of Arkansas, for whom Robert Kennedy had worked in the special investigations
committee of Jimmy Hoffa and things like that, in which McClellan's letter said that he had
heard of this proposal, that a decision of the nature being sought would be illegal and improper,
and if the attorney general issued such a decision the forest products industry would sue. It was
very apparent from reading the letter that it had been written by the National Forest Products
Association, and McClellan had said it. There were a number of large timber companies in
Arkansas.

So the meeting revolved around this letter and what to do about it. The attorney general
made very clear that if there was a likelihood of a suit, he would not be inclined to issue a
decision. Morse gave a legal argument about why the attorney general should go ahead and
render the decision that had been requested. In then rather surprisingly, I had known Bobby
Kennedy for several years, we weren't close or anything but we knew each other on a first name
basis -- we both worked on staffs on the Hill -- and he turned to me and said, ABob, what do you
think? I am sitting there with all these high powered lawyers and I am not a lawyer, the only one
who isn't, and I hadn't expected really to be asked anything. But I thought quickly and I looked
at Kennedy, and I said, AMr. Attorney General, the Bureau of Land Management has the same
type of regulation on the O and C lands in western Oregon, when the Department of Interior issued those, the forest products industry said they would sue. That was 1948, its now 1962, there never was a suit filed, I view their threat is empty. It was then that Bobby Kennedy turned to Nick Katzenbach and said, let it be done. [laughter] As I say, to me the evidence of a prior suit would have been a sufficient reason to hold up. At any rate, the decision was issued, the congressional record of early February of that year has it all printed, and there's also something else on the sixth of July of [19]62 that Morse put in about the amount of material, national forest timber land that was, locked up federal timber land by this access policy. After the attorney general decision came out, the National Lumber Manufacturers, as they were then known, contended that 39 million acres of private land would have their value impaired by the attorney general opinion. And in effect it would deny access to private land, which was a lot of malarkey.

In any rate the Forest Service went ahead and issued regulations and ever since then the decision has stood. And the Forest Service has not been as vigorous in negotiating agreements as it should have been, but they have negotiated them, and they have opened up access and they are able to use roads, and the timber industry, as an industry, was never hurt by the decision. Companies have had a lock on the timber -- had a lesser lock -- because even though a road had to be advertised that it was built privately and that share paid to the owner, that was a proper payment, and it reduced the price of the timber. So it wasn’t something that made an uneven bidding table for anybody. And it was a sound decision.

There's an interesting angle to this whole thing, though. And that is that national forest timber sales would have probably preceded more expeditiously, and penetrated more of the national forests with a road network more rapidly if the timber industry had not pursued this policy of no access, and the Forest Service had been more forthcoming originally on it. And
therefore there would have been less roadless areas for conservation groups to argue about keeping roadless, and the timber program would have proceeded to have cut more timber than was cut. So when you look back on it, to me the position the industry was taking might have been in the best interest of individual companies. It was in this case for some of them, but it was not in the best interest of the industry. And the Forest Service position was not in the best interest of the industry, even though in general it had a bias toward timber production. I can’t think of anything that is more vital to the exploitation of timber than having roads. So this to me was counterproductive to meaningful and sound timber exploitation or to disruptive timber exploitation. But from the Forest Service standpoint, they hurt themselves from that position and the industry hurt itself. But that was the decision, and as I say, it functioned well.

Hall: Could you explain a little more in detail about the real gist of the attorney general opinion and what it ...

Wolf: Oh yes, the attorney general held, he researched the history of the 1897 act and the debates. He said that the Congress intended, when they wrote that section, that an actual settler residing be a particular narrow class of individual, and lumber companies weren't among them. And since lumber companies weren't among the type of person I described earlier, the man or woman declaring that he or she will become a citizen, who wants a homestead entry, and has filed a homestead entry but hasn't gotten title. Since lumber companies don't fall in that category, they do not have a statutory right of ingress and egress. Their right of ingress and egress can be conditioned by the secretary of Agriculture under rules and regulations that he may prescribe. Which is a heck of a big difference from having a statutory right, which was the way
the Forest Service was treating it. If XYZ timber company came to the Forest Service and said we want to build a road from point A to point B across national forest land, they'd say you're an actual settler yeah. Here, go ahead. They might talk to them and say could you shift it a little bit because we have a concern here about the impact it may have on this stream, but they couldn't say no, they thought they couldn't say no.

But the Attorney General said, to quote the wife of the former president of the United States, they could Ajust say no. They could condition it, really, they couldn't prohibit you from getting to your land, they could condition it on reasonable terms. They could tell you the kind of road you had to build, where you had to put it, and the Forest Service could say you have to give the U.S. the rights we need to use the road. We will cost share it with you, but we need access because we own 10 times as much timber in back of this road as you own. And so the attorney general decision said that the Forest Service could get all the rights it needed to use the road fairly and equitably. And require that the road be built so that trucks of both could traverse it safely and so forth.

Hall: In the early days of the Forest Service, Gifford Pinchot was quite adept of seeking out the legal opinions or decisions that he needed to manage the Forest Service, this appears to be a real departure from that or is it really a departure of that trend?

Wolf: Well, early in the game the Forest Service -- Pinchot, as you read his stuff -- railed against the monopolist and the potential monopolist. This was a regular and recurring theme. Even if there weren't monopolists, he created them, virtually. This was a theme he pursued, and it was part of his populist background. In the sale of timber, the Forest Service, many of the early big
sales, were railroad logging, where the company had to build a logging railroad, which was not a common carrier. And that just thought to be the logical thing to do, there was not a great deal of competition for federal timber. To the contrary, timber was only sold by application.

Companies would apply, and if my firm was the applicant for timber, I had to put up the cost of advertising the timber, which I got back, and it was a very small amount that I got back after the sale.

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Wolf: And even though it was sealed bidding, you probably wouldn't bid against me, because there wasn't that sort of a shortage of timber. If you wanted timber you'd make your own application. Now some of the smaller sales had a little bit of competition, but there wasn't a great deal of competition so the issue never really came up. Such as the question that came up on grazing, of requiring permits and charging a fee. And so, I would just say that Pinchot was ...

Hall: But he would selectively choose judges and courtrooms where he thought the Forest Service could get a favorable opinion, and he would maneuver in that direction. This seems to me that the Forest Service, in this instance, is shying away from a legal decision that could have ...

Wolf: Oh yeah ... By the late [19]40s, the Pinchot influence was largely gone. But my point was that the issue never came up in Pinchot's time or really in Greeley or Grave's time -- you know the earlier chiefs.
Hall: No, the issue wouldn't.

Wolf: It didn't become an issue until after World War II when timber sales jumped from the one billion board for the year level to the six, seven, eight, nine, ten level. Then these issues became more pertinent. Also a number of the companies who had bought these ... you see the Forest Service probably had fifty or sixty large, long term timber sales -- ten to twenty-five year sales they have made for development purposes. While the litany of the Forest Service was that their timber was for small operators, the fact is when you look at the record of who got the timber, was that most of the timber was sold under large, long-term sales, most by volume, not by number sales. And so you made a big, long-term sale, and there happened to be a company that would apply, and they had some intermingled land, and they were the successful bidder. Well you didn't pay any attention to the ingress/egress thing, it just sort of didn't come up. Now, it should have come up. They should have said it if they were designing a long-term sale, that they had to have access to them. But you were an applicant, so that's why the policy grew the way it did. It wasn't something sinister or malevolent, until after the war, when faced with the opportunity to change policy and seeing the growing competition for federal timber that was when the Forest Service should have said: what is our policy? Why do we have this policy? Is this a sound policy? And then they should have acted without having to be pushed by the attorney general, by members of Congress, or by a revised law or anything else. No, they should have ... Pinchot's style, as you pointed out earlier, was to examine what his legal foundation was, and if he thought he had sufficient authority to do it, he'd do it. Which is why he got into the battle he did over grazing.
Hall: Yeah, that's true.

Wolf: It was absolutely essential that he had access, permits and fees. If he couldn't control grazing, he certainly couldn't control timber or other uses. It is really fascinating that by striking at the grazing issue right at the outset, he incurred the -- for the Forest Service -- enmity of the livestock industry that still persists. But it was an essential thing to effective management. You just can't have lawlessness and sound administration. Whether you are running the city of Missoula or you are running the Lolo National Forest.

Hall: You had mentioned the end of Pinchot's influence at the Forest Service, I wanted to ask you about that because that's a personal inquiry or inquest of mine, that I wonder about. Some people peg that at the end of World War II, some people put that a little later, a little earlier, what do you think about that?

Wolf: Well, Pinchot, I think became bigger in death than he was in life. He certainly was a remarkable man, with great achievements. His influence shifted, it eroded, it didn't just disappear, it eroded in different places. It is kind of like watching a stream -- you see erosion in one place and not in another. His concept of an ethic was the last thing to suffer any erosion, in my opinion. He had this strong public service ethic that stayed in the Forest Service after some of his other ideas faded. He moved from education to regulation of private timber out of frustration over the failure, in his view, of private landowners who practiced forestry. And he lost on that. It went down under Greeley who had a different view than Pinchot. They differed
strongly. Came back up in the [19]30s under Silcox and Watts, in the [19]30s and [19]40s, and then McArdle changed the policy when the Eisenhower administration came in. Again that was a very acerbic policy issue, I am not sure it would have ever functioned effectively. But that was a Pinchot view, which he held, which did not have tremendous support within the service. The idea of such a large set of national forest holdings was a middle sort of position of his. He had thought that the federal government should own all the timber land, but it turned out then to be one of the key positions of Greeley in the [19]20s, though it's not commonly realized. You look at what he said in those annual reports, you know. So Pinchot, my point is, Pinchot had views on a variety of things, but one of this strongest ones, which he and Teddy Roosevelt had, was to rail against the monopolists or the alleged monopolists. But that never, it was more words than it was facts. They didn't do much about them.

Hall: Pinchot had the, what I refer to as the old guard, the students that he chose that worked for him at the beginning of the Forest Service, and then later went on to manage the, Silcox was one, I believe, some of the others ...

Wolf: There was Graves, there was Greeley, there was Kneipp, Stewart, there was a whole bunch of them. All the early people came in virtually on the ground floor and stayed and grew with the Forest Service and achieved position of some responsibility, including chief.

Hall: I guess what I'm asking is does World War II define a good boundary between the passing of the old guard and a new era for the Forest Service?
Wolf: Oh yeah, I think it does. It was just the explosion after World War II of uses of the national forests that made the significant change. But for instance, the issue of wilderness. You hear nothing in anything that Greeley said, or that Pinchot said that gives a clue that he was in support of wilderness. But it was under Greeley, who later became the West Coast Lumberman's Association director after he left the Forest Service, that wilderness got a start.

What you have is a continuum of views, but I would say that Pinchot, you know the coining the phrase -- the greatest good to the greatest number in the long run -- which is a wonderful, meaningless phrase. That type of thing persists, it's a kind of thing you like to say but when you have to make a decision, it isn't a pragmatic way to do it. While we always try to elevate our decisions, to say that we weighed the public interest, this is in the public interest, it isn't always a balance thing from the standpoint of the effect of people, and you know it. Because you can't make totally even-handed decisions. The long run decision may be a good one, but the short run effects may seem to be horrendous and the long term effects may never be realized, you just hope that you made a good decision. We always rationalize our decisions, and say well, we looked at the long run, not always, but usually.

Hall: Well, I think that about wraps up this set, do you have anything you want to add in conclusion?

Wolf: No, I think we have explored the access issue -- it's a vital one -- and we continue to have debates over roads.

Hall: That's true.
Wolf: Here it is, 1990, for the last two sessions of Congress, a Senator from Georgia, Wyche-Fowler, has sought to redistribute the Forest Service budget by reducing roads and putting the money into other programs. The Forest Service is attacking it and the timber industry have alleged that he would cut the road program, not that he would redistribute the money. The current conservation groups, generally speaking, would like to see the road system capped, in fact since over 200,000 miles of roads have been added to the national forest system since World War II. Its over 365,000 miles now. That's a lot of roads. And yet the Forest Service would like to build another 100,000 and they argue that they need the roads for multiple use. When all the roads they need for multiple use are probably there. So the road issue will be with us for a while, but not the access issue.

Hall: Okay, thank you.

[End Tape]