The delegation of law-making authority to the United States Forest Service: Implications in the struggle for national forest management

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THE DELEGATION OF LAW-MAKING AUTHORITY TO THE UNITED STATES

FOREST SERVICE: IMPLICATIONS IN THE STRUGGLE FOR NATIONAL FOREST MANAGEMENT

BY

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This paper presents a descriptive assessment of the presence of legislative delegation by the United States Congress to the United States Forest Service. The central tenet is an analysis of both the presence, and the impacts, delegation has had on the ability of the Forest Service to identify and accomplish a distinct agency mission.

The presence or absence of delegation by the United States Congress was established by employing formulae developed by Epstein and O’Halloran (1999). The formulae produce a relative means for measuring the extent to which statutes exhibit delegation, constraints, and discretion to an executive agency. The Organic Administration Act (1897, and as amended), the Multiple-Use Sustained-Yield Act (1960), the National Forest Management Act (1976), and the National Forest Timber Reform Act of 1975 (S.2926), were analyzed, all five exhibiting varying degrees of delegation, with the Organic Administration Act and the Multiple-Use Sustained-Yield Act exhibiting the most delegation and affording the Forest Service the highest degree of discretion.

The paper presents a description of the conflict intensive environment in which the Forest Service manages, and how delegation is both a cause and a result of this conflict. Specific problems related to conflict are discussed, including litigation, administrative appeals, and the nature of national forest outputs. The impact of delegation on two other Forest Service facets is also addressed: the budget process and the use of administrative regulations. Delegation appears to exacerbate the already complex budget process and contributes to the difficulty in matching agency funding to the agency missions. The administrative regulations too are subject to delegation, illustrated with examples of the current problems associated with the roadless initiative and the NFMA planning regulations.

The paper concludes by suggesting that imprecise management direction from the Congress has created or facilitated the current Forest Service management crisis. The suggested remedies focus upon revising Congressional incentives to delegate, and the formation of a new Public Land Law Review Commission to address these specific concerns.
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Chapter 1. Introduction

There was a time when the forest industry enjoyed the admiration of society. Paul Bunyan, Smokey the Bear, and hard working lumberjacks were respected for the roles they played in providing us with wood and protecting us from fire. This respect has been severely eroded by the anti-forestry movement, which portrays foresters and loggers as either tools of greedy capitalists or unthinking destroyers of the environment. How can this trend be reversed so the general public once again respect the hard work done to provide society with its most renewable material resource?

Patrick Moore1

Professor David Schoenbrod entitled his book on legislative delegation, Power Without Responsibility, How the Congress Abuses the People Through Delegation. In an application of his theories to the United States Forest Service, perhaps a revised title might read Power Without Responsibility, How Congress Abuses the People and the Forest Service Through Delegation. Congress, in this particular case, has not limited itself to an unfocused public disservice, but rather has elected to see a once model federal bureaucracy criticized, crippled, and castrated to the point that a book entitled A Burning Issue, A Case for Abolishing the U.S. Forest Service2, could even be published. I do not dispute Professor Nelson’s findings nor his arguments, but rather find it disturbing how an agency with a century of experience managing the largest parcels of land ownership in the United States could have arrived at such a place.3 It is generally a rare occurrence for

1 Patrick Moore, Greenspirit: Trees Are the Answer 143 (2000).
3 Gifford Pinchot best sums up the historic nature of the Forest Service: “The Forest Service was generally recognized as the best government organization of its day. It set a new standard of efficiency in
an executive agency to be disbanded, particularly one with the Forest Service's longevity. Surely it has, and will occur, but in rare instances. To consider the Forest Service one of those rare candidates for agency dissolution requires an acceptance that there are fundamental problems, unresolved or incapable of resolution, in the agency's mission and the agency's effectiveness, and that its existence is no longer warranted.

The agency's decline is in no small part a result of the wrong the Congress has done the agency, and in a way, done the public as well. In their own self-interest, the members of Congress have failed to grapple with the difficult and volatile issues of public land management. They have failed to make their will, and thereby the public's will, clear and unequivocal; and have failed to account for the tenacious nature of environmentalists and would-be natural resource managers, each seeming to have a vision or version of how best to manage public lands, to whom a compromise won is but a reason to seek another. This ongoing underestimation has been coupled with a dramatic increase in public involvement in the management of federal natural resources. The difficulty in the failure by Congress to perceive the heightened public interest in national forest decision-making was artfully described by Marion Clawson:

One of the truly difficult problems in public participation, both for the planner and the serious and responsible private group, is to find some means of screening out the obviously stupid, naïve, and self-serving suggestions of some members of the public, without at the same time discouraging genuine and sensible participation by the concerned public. Any public enterprise seems to attract a share of irresponsible self-appointed intervenors, whose major interest is entertainment and self-aggrandizement. Such people cannot reject any opportunity to speak in public and to seize, if only for a

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Washington. That was because it had a great purpose and knew that it had, and because it was organized on the principle of individual recognition and responsibility.” BREAKING NEW GROUND 281-282 (1947).

moment, a degree of public attention—like the naughty boy at the party who would rather be noticed and despised than ignored.\textsuperscript{5}

The result has been that the United States Forest Service has been at the fore of some of the most protracted and heated administrative controversies of the last forty years. While the history and bases of the particular criticisms of this agency have varied, it is a central tenet that a prevailing and fundamental flaw may exist in the legislative source of this agency's management authority.

The Forest Service has been tasked with managing and regulating vast natural resources by virtue of the statutory edicts of the United States Congress. Congressional direction to the Forest Service has been less than specific, affording little in the way of an concrete agency mission. Consequently, the Forest Service's attempts at resource management have been plagued by controversy and litigation, ultimately imbuing the agency with a sort of administrative schizophrenia, unable to identify or even recognize its mission. The cause, I posit, is that the Congress, by enacting broad, vague legislation, with accompanying directives to the Forest Service to meet various and oft conflicting goals, has left the Forest Service saddled with the unenviable task of interpreting amorphous statutes; the whipping boy for the public's ire when the agency misinterprets Congressional intent. As has recently been observed:

\begin{quote}
The purposes of the national forests and public lands are no longer clear...The management planning process for the national forests and the public lands cannot resolve basic differences in values.\textsuperscript{6}
\end{quote}

\textsuperscript{5} MARION CLAWSON, THE FEDERAL LANDS REVISITED 256 (1983).
Of course, it may be a polite understatement to imply that the purposes of the national forests have only recently become unclear; it may be accurate to state that the purposes have been unclear for at least the last 40 years.

In analyzing the role that such goal-based legislation plays, David Schoenbrod has made the useful distinction between goal statute and rule statutes:

Rules statutes state rules demarcating permissible from impermissible conduct; the job of deciding what these rules mean in particular situations is interpretation. Goals statutes state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others who are entrusted with promulgating the rules of conduct necessary to achieve those goals. Goals statutes delegate legislative power.7

Goals statutes with the accompanying delegation of law-making authority can reflect a reluctance or unwillingness to accept responsibility for the costs of broadly drawn legislation. Schoenbrod notes that:

Given the political nature of the legislative process, a goals statute is likely to express popular hopes that are inherently contradictory and the leave the delegate with the unhappy job of dealing with the people's disappointments and conflicts. In a goals statute, the legislature therefore tends to do only half a job—to distribute benefits without taking responsibility for the costs. The bill for the benefits comes later and on the agency's letterhead. The agency gets the blame while Congress gets only the praise.8

Scholars have addressed generally the Congressional delegation of law-making authority;9 and while many arguments have been set forth that such delegation is

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6 DONALD W. FLOYD, ED. FOREST OF DISCORD 50 (1999).
8 Id. at 1254.
violative of the Constitution, the United States Supreme Court, since the New Deal era of the 1930's, has not seriously limited the Congressional trend to delegate ever greater law making authority to federal administrative agencies. Consequently, arguing against the practice of legislative delegation from a constitutional perspective may be neither persuasive nor practical. It appears, as Professor Lawson suggests, that the "bloodless revolution" has occurred; and the tenets of Article I of the Constitution have been subverted or are perhaps being politely ignored. Consequently, this paper will not examine the Constitutional arguments against the delegation of legislative authority. Rather, in what I believe to be a pragmatic decision, this paper will seek to illustrate, from a policy perspective, to what extent, and with what effect, the unchecked delegation of legislative authority is having on the Forest Service and its efforts at managing the national forests. If the restrictions of Article I have been abrogated, if not de jure, then certainly de facto, perhaps the only remaining means of dissuading delegatory behavior is by demonstrating that it not only fails to achieve the goals established by the legislature, but that it generates a political and management fiasco in its wake.


10 The recent decisions in American Trucking Assoc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) and American Trucking Assoc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) stood for the proposition that the non-delegation doctrine may not be as extinct as is commonly thought. However, the Supreme Court's holding on the issue at Whitman v. American Trucking Assoc., 121 S. Ct. 903 (2001), in which the court unanimously upheld the constitutionality of the Congressional delegation of authority to the EPA, does not bode well for a legal resurrection of the non-delegation doctrine.

11 Lawson, supra note 9 at 1231.
This paper seeks to analyze the manner in which the Forest Service has acquired the management authority it now wields, and the manner in which the nature of that authority has affected the attempts as national forest management.

The Forest Service management program has been characterized as an amalgam of "conflicting legislative incentives and congressional expectations, differences in the beliefs of Forest Service personnel, and legal challenges to the agency's plans and projects." While some argue that the enactment of the Multiple-Use-Sustained-Yield Act of 1960 and the National Forest Management Act of 1976 served as Congressional attempts to exert closer supervisory authority and perhaps to accept more responsibility for the management of the national forests, it has contrarily been argued that Forest Service management discretion has remained essentially unencumbered. This paper will attempt to resolve such conflicts. For, while it may superficially appear that these laws serve to define and restrict Forest Service regulatory authority, I propose that Congress has perpetuated agency discretion with ambiguous management goals, all the while continuing to avoid responsibility for difficult resource management decisions.

Robert Nelson appropriately noted that:

Clearly the Multiple-use Sustained-yield Act in practice provided little specific guidance to Forest Service land managers. Because of its vagueness, the definition of multiple-use is subject to many


different interpretations. The Public Land Law Review Commission concluded from its investigations that “multiple use has little practical meaning as a planning concept or principle.” Even Edward Crafts, one of the key Forest Service officials responsible for the Multiple-use Sustained-yield Act, later conceded, “Everything fell under multiple use and who can argue against multiple use because it is all things to all people. They used it as a justification for whatever they wanted to do.”15

Lacking specific statutory direction, the Forest Service management role has been described as the “nearly impossible task of serving many different interests.”16 Yet “goal statutes” are not simply synonymous with “vague statutes.” Goal statutes can indeed have substantial constraints embedded within them. In either case, however, the result is the same, the agency is delegated law-making authority, that it might meet the goal or goals set before it.

Building upon Professor David Schoenbrod’s examination of the Clean Air Act and the Environmental Protection Agency17, this paper will examine the jurisprudence and administrative structure directing and guiding the Forest Service’s management of the national forests. The statutory resource management goals of this agency, when juxtaposed with the manner and effectiveness of achieving those goals may serve to illuminate whether the Forest Service has been guided by goal or rule statutes. If goal statutes predominate, it must be determined whether the Forest Service has been able to

16 Resources Ltd. Inc. v. Robertson, 789 F.Supp. 1529, (D. Mont. 1991) modified, 35 F.3d 1300 (9th Cir. 1993), 8 F.3d 1394 (9th Cir. 1993)
meet the goals set for it. If delegation is indeed occurring, what are the effects? Is
delegation, as asserted earlier, a cause of the current identity crisis in the Forest Service?

The related issue of judicial review will be impossible to ignore during the course
of the paper. While the topic is not my primary focus, critics of legislative delegation
often point to the judiciary as a means of tempering agency discretion, and some would
see the courts as a surrogate decision-maker when the Forest Service's actions fail to
meet the management vision of these individuals.

As indicated earlier, the constitutionality of Congressional delegation will not be
addressed. A majority of the Supreme Court appears comfortable with its absence; and
additionally, Professor Schoenbrod has argued that managers of public land are not
bound by the constraints of Article I. My effort is not to dispute his assertion, but rather
to ascertain whether delegation fails to accomplish legislative goals, and whether it does
so in a particularly contentious manner. This paper will examine the applicability of the
argument that federal agencies, in this case the U.S. Forest Service, should not serve as
repositories of law-making powers. The patent dangers in Congressional delegation
being excessive agency discretion, insurmountable management obstacles, and perhaps
most importantly: “Unchecked delegation would undercut the legislature’s accountability

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20 Schoenbrod, supra note 9, Power Without Responsibility: How Congress Abuses the People Through Delegation at 186, Schoenbrod, supra note 7 at 1265.
to the electorate and subject people to rule through ad hoc commands rather than democratically considered general laws.21

Chapter Two will discuss the theories surrounding the delegation of legislative authority, and the incentives for legislatures to delegate and pass vague goal statutes. Chapter Two will not focus upon the Forest Service specifically, but will frame the issue which the later chapters of this paper will explore. Chapter Three presents an analysis designed to assess the extent to which Congress has in fact delegated its authority to the Forest Service. Chapter Four will examine the nature of the management environment in which the Forest Service must try to function, and the role delegation comes to play. Chapter Five will look at delegation’s impact on the agency’s multiple-use mandate, while Chapter Six presents an overview of the problems faced in attempting to formulate budgets in the face of delegated law-making authority. Chapter Seven examine two particular areas of administrative rule-making, the Roadless Rules and the latest NFMA rules. Finally, Chapter Eight summarizes the paper’s findings and provide suggestions for improving the agency status quo.

Summary:

There is little argument that the current Forest Service situation is dire. The recognition that the agency is wallowing about, unable to define a consistent path or to stay upon a path is evident in the rush to embrace management philosophies that may appease its varying critics. The Forest Service offered up ecosystem management as an overarching framework in which its management of the national forests would occur. For

21 Schoenbrod, supra note 7.
naught, however, because the environmental community continues to rail against the agency for any harvest of trees on public lands, regardless of the management label, and the timber industry continues to criticize the ever diminishing harvest volume on public lands. Failing to placate its critics, the Forest Service has now turned toward the dual concepts of sustainability and collaboration as both as a planning tool, and as a a substantive methodology.\textsuperscript{22} These approaches, though newly labeled, are concepts that the forestry profession has been cognizant of since well prior to the existence of the national forests. But while the Committee of Scientists cites to Theodore Roosevelt for the premise that planning in the national forests must be focused upon sustainability in an environmental sense,\textsuperscript{23} it would be remiss to omit that Roosevelt was very much a proponent of productive human uses of these forests:

\begin{quote}
The fundamental idea of forestry is the perpetuation of forests by use. Forest Protection is not an end in itself; it is a means to increase and sustain the resources of our country and the industries which depend upon them. The preservation of our forests is an imperative business necessity. We have come to see clearly that whatever destroys the forest, except to make way for agriculture, threatens our well-being.\textsuperscript{24}
\end{quote}

It is in this cauldron of fundamental management dispute that this paper endeavors to explain why the dispute has so clearly manifested itself in the decay of the once proud Forest Service.

\textsuperscript{23} Committee of Scientists, Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century 14-15 (1999).
\textsuperscript{24} President's Message of December 2, 1901, as related by Gifford Pinchot, Supra 3 note at 190.
Chapter 2. Incentives to Delegate

Although policy ambiguity is often a political necessity and is even technically desirable in many circumstances, it does have drawbacks. Vague policies make it difficult to set priorities and identify exactly what is to be accomplished. For example, a forester who must make land use decisions on the basis of “multiple use” does not have a well-defined set of decision rules or criteria for guidance...Finally ambiguity invites conflict and managers who must implement vague policies often find themselves in the middle of heated arguments.

Fred Cubbage, et al.\textsuperscript{25}

Before delving into the particulars that delegation plays with the Forest Service, it is necessary to understand and appreciate the general tendency that legislatures have towards the passage of vague goal-setting laws. This behavior, explainable by a number of theories, is fundamental to the politics of legislatures. As such, any analysis of the problems faced by the Forest Service need be in the context of this reality.

The role played by administrative agencies in the development of policy and management of the vast and diverse federal public lands cannot be underestimated. The federal public lands managed by only two such agencies, the United States Forest Service and the Bureau of Land Management comprise some 462 million acres. In the case of many federal agencies, the charge has been leveled that the Congress routinely empowers the agencies with the authority to make law.\textsuperscript{26} In other words, the Congress delegates legislative authority to the executive branch and its agencies, empowering agency formulation of policy.

Critics of such delegation in many cases offer constitutional rationales for why such behavior is inappropriate and even illegal.\textsuperscript{27} In the case of federal land management agencies, particularly the Forest Service and the Bureau of Land Management, the constitutional argument against delegation warrants minor consideration. Both of these agencies are charged with managing federal public lands, and Article IV of the Constitution has provided Congress with unfettered discretion to choose the management regime of such lands.

This chapter proposes approaching the issue from a different tact. It seeks to address the rationales whereby Congress may be inclined to implement a relatively vague statute, thereby leaving the administrative agency the role of deciphering and implementing the details of the law. Law-making authority vested in federal public land management agencies places the agencies in the policy-making role for the federal public lands. This chapter’s positive approach is designed to “analyze the operation of an existing, or a postulated, set of rules for collective decision-making quite independently of the efficacy of this set in furthering or promoting certain “social goals.”\textsuperscript{28} Though compelling normative arguments have been made that legislative delegation is inappropriate for a variety of reasons,\textsuperscript{29} this chapter will not debate the merits of these arguments. Rather, the discussion will focus on a positive examination of delegation by

\textsuperscript{26} For the most complete critical description of the delegation issue see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

\textsuperscript{27} Id., see also Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231, and Delegation and the Constitution, 22 REGULATION 23 (1999).

\textsuperscript{28} JAMES BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT 308 (1962).

\textsuperscript{29} For recent and comprehensive indictments of legislative delegation see the symposiums compiled at 36 AM. U. L. REV. (1987) (A Symposium on Administrative Law “The Uneasy Congressional Status of the
Congress in the field of public land management. The chapter will attempt to answer the question: why are legislators inclined to craft vague statutes, setting broad goals, without particular guidance?

Legislatures and Their Desire to Delegate

Any inquiry into the individual and collective motivations for the generation of ambiguous statutes, and the resultant delegation to the bureaucracy by Congress, must begin with a review of the theories addressing why legislators act as they do. This section shall discuss the primary theories asserted to explain why Congress might pass vague legislation. While much of the literature addresses the act of delegating law-making power to agencies, integral to delegation is the passage of hazy goal-based statutes.

The primary school of thought addressing this aspect of legislative motivation is represented by the public choice theorists. A central tenet of this body of literature is that legislators act according to a primary desire to be reelected. The legislation produced by such individuals would then tend to reflect this need for reelection. Much of the following discussion will flow from that basic premise. It should be recognized however, that identifying a single rationale for vague legislation may not be practical, or even possible, as Fesler and Kettl point out:


The reasons for deliberate or inadvertent delegation of policy-making power are various. In a new policy field in which there is little or no accumulated experience to build on, the legislature wants something done but can make only a vague gesture as to the direction that action should take. In a field whose technology or other features are expected to change rapidly, the statute must permit flexible action by the agency, rather than require frequent returns to the legislature for enactment of new language. Some subjects simply do not lend themselves to specification of criteria to confine administrative discretion. Also, in some areas the ingenuity of business people can be depended on to generate clever ways of evading any highly specific prohibitions in a statute...At times, the legislative process itself is so stormy and full of crosscurrents that the statute passed incorporates a number of contradictory policy guidelines, and the agency has to use its own judgment in making sense out of the mish-mash. Sometimes, too, the necessity of reaching a compromise solution leads the legislature to use language that papers over disagreement but whose deliberate ambiguity leaves the agency great scope for interpretation.31

**Self-interest and Re-election**

Legislators respond, as argued by Weingast,32 to the compelling force of the electoral imperative. The electoral imperative as described by Weingast dictates that:

The principle of survival in electoral competition implies that representatives who fail to maximize their chances of reelection are systematically replaced by those who do so. In the face of the electoral imperative, congressmen ensure that their actions promote this goal. Virtually every action they take and every resource they deploy, therefore, contributes to their reelection.33


33 Id. This primal motivation is also recognized by Anthony Downs in AN ECONOMIC THEORY OF DEMOCRACY (1957), wherein he applies the self-interest axiom to illustrate the rational vote-maximizing government. Robert Dahl in DEMOCRACY AND ITS CRITICS (1989), too notes, as an element of his "polyarchy", the behavior modifications undertaken by politicians to win elections.
Weingast’s model suggests that delegation, or passage of vague goals statutes, manifests a decision by the legislature designed to enhance the likelihood of reelection of its members. Logically, each legislator must ascertain which decisions enhance reelection chances, and which do not.

Morris Fiorina suggests that legislators exhibit behavior designed to minimize the transaction costs of a particular policy. In those instances, when the net transaction costs of legislating (including time, resources, uncertainty of result, and judicial review) exceed the costs associated with delegation (including agency drift, oversight, interest-group influence or agency capture), the rational legislator will legislate vaguely, leaving the costly process of developing the details to the agency.

If, as Charles Lindblom notes in addressing the constant issue of risk:

Neither social scientists, nor politicians, nor public administrators yet know enough about the social world to avoid repeated error in predicting the consequences of policy moves. A wise policy-maker consequently expects that his policies will achieve only part of what he hopes and at the same time will produce unanticipated consequences he would have preferred to avoid,

the risk-averse legislator may be inclined to avoid the uncertainty associated with legislation.

35 Fiorina sets forth a model, $N_j(x) = b_j(x) - c_j(x)$, wherein $N$ is the net benefit of policy $x$ enacted in legislative district $j$, $b$ are the benefits and $c$ are the costs. In analyzing a choice between an administrative remedy and a legislative remedy, the rational legislator applies the two submodels: $L_j(x) = b_j(x) - c_j(x)$, and $A_j(x) = b_j(x) - c_j(x)$, where $L$ and $A$ are the net costs of the legislative and administrative delegation respectively.
Epstein and O'Halloran describe this analysis generally as "transaction cost politics." To them the costs break out as follows:

Legislators can enact direct, detailed laws though normal congressional procedures, but the necessary information to make well-formed policy may be costly to obtain; bicameralism and supermajority requirements inhibit speedy, flexible action; and legislative logrolls tend to inflate the costs of even the simplest policy initiatives. Alternatively, Congress can delegate authority to the executive branch to escape this dilemma, but bureaucrats may be motivated as much by the desire to pursue their own policy goals, inflate their budgets, and increase their scope of control as by their desire to follow congressional intent. Neither option is without its faults, but in different circumstances one or the other may be relatively more attractive from the legislators' point of view.37

In their model, "delegation will follow the natural fault lines of legislators political advantage." Krislov and Rosenbloom agree, adding that "it is one of the perversities of the modern bureaucratic state that elected officials come to rely heavily upon bureaucracy for their incumbency."39

Fiorina, similarly, summarizes elsewhere: "...Congressmen appropriate all the public credit generated in the system, while the bureaucracy absorbs all the costs."40

Fiorina's general model contains a specific theory of delegation--responsibility shifting behavior--discussed in detail later. It is important to now note that Fiorina's model is essential if one accepts that Congress delegates to shift responsibility. Fiorina suggests that when Congress wishes the credit for the outcomes of legislation, it is far less likely to

37 DAVID EPSTEIN AND SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999) 7-8.
38 Id. at 47; See also Alex Cukierman and Allan H. Meltzer, A Positive Theory of Discretionary Policy, The Cost of Democratic Government and the Benefits of a Constitution, 24 ECON. INQUIRY 367 (1986).
delegate the details away. Only in those instances when the net benefit of legislative action is negative will delegation occur—thus, delegation does not always occur.

It is also important to recognize that the view that legislators will invariably delegate to enhance the prospect of reelection is not universally accepted. Wilson points out that:

Some scholars assume that in their single-minded desire to get reelected members of Congress always seek to manipulate the bureaucracy in order to enhance their prospects for reelection. They would do well to ponder the lengths to which Congress has gone to weaken many of the powers that would permit it to exercise such control.

Wilson may be off base in suggesting that granting the bureaucracy greater autonomy is not a mechanism by which to manipulate the bureaucracy. By shifting the difficult and contentious matters to the agency, the Congress has indeed manipulated the agency, all the while increasing agency autonomy—the two are perhaps not as mutually exclusive as Wilson seems to suggest. Nonetheless, David Schoenbrod, certainly a critic of delegation, nonetheless realizes that legislative behavior may be explained in terms of motivations apart from reelection. Thus, though many public choice theorists construe legislative behavior as a response to an identifiable incentive—reelection—there remain other cognizable factors which may provide an explanation.

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41 Supra note 34 at 46.
43 Supra note 26 at footnote 23. Schoenbrod includes among the possible rationale: power and prestige within Congress, making good public policy, and moving into higher elected office. Though these incentives are technically not focused upon reelection, they nonetheless may all contribute to vague legislation.
In the matter of the Forest Service, it is no doubt a temptation, when faced with highly polarized and organized interests, to avoid actions which may negatively impact reelection chances. Any action in such a setting will disenfranchise at least some of the relevant interests. The alternative--vague legislation (e.g. the Multiple-Use Sustained-Yield Act of 1960 (MUSYA))-- is essentially a form of non-action. No one can determine what the statute requires; and hence, no interest can negatively view a legislator that voted for it. The MUSYA reflects a legislative reelection strategy described by Schoenbrod:

Delegation thus allows members of Congress to function as ministers, who express popular aspirations (through enacting lofty statutory goals) and tend to their flocks (by doing casework), rather than lawmakers who must make hard choices in passing laws...With delegation, legislators can escape being ejected from office except upon grounds that would oust a minister from the pulpit- scandal. In those exceptional cases when incumbents do lose an election, their defeat is far more likely to be caused by some escapade or chicanery than by how they shaped the law.44

Who could condemn a legislator for supporting a law directing the Forest Service to manage the vast national forests for “outdoor recreation, range, timber, watershed, and wildlife and fish purposes”?45 The language is plain, simple, inclusive, and nearly meaningless. The delegation to the bureaucracy is even more obscure. The Secretary of Agriculture is directed to promulgate regulations for the management of these oft

44 David Schoenbrod, Delegation and Democracy: A Reply to My Critics, 20 CARDOZO L. REV. 731, 740-741 (1999). It is important to understand that though Schoenbrod may well provide a rationale for the promulgation of a statute such as the MUSYA, it is nonetheless quite plausible that in the case of this particular statute, the agency itself was largely responsible for the ambiguous nature of the law in an effort to ensure its own authority and discretion. This issue is discussed in more detail later in this chapter.

conflicting resources, all the while "due consideration shall be given to the relative values of the various resources in particular areas." 46

Observation of these obscurities in the MUSYA is not novel. Thirty years ago, the Public Land Law Review Commission, in analyzing the MUSYA, noted that:

The lack of clear statutory direction for the use of the public lands has been the cause of problems ever since Congress started to provide for the retention of some of the public domain in permanent Federal ownership. 47

* * *

Congress has not provided the agencies with clear policy objectives, directives to engage in land use planning to accomplish those objectives, nor general guidance as to the kinds of factors to take into account in the land planning process. 48

While this paper will discuss other plausible theories why Congress may have chosen to delegate so broadly and blindly, in the case of the Forest Service, it is certainly reasonable that reelection in the face of a polarized constituency may be an omnipresent factor. Finally, passage of any contentious piece of legislation, one whose impact the concerned interests can glean prior to rulemaking, will entail a great number of "transaction costs." Fiorina's model would suggest that the Congressman choose delegation in such a scenario.

Legislative Efficiency

46 Id. at § 529.
47 Public Land Law Review Commission, One Third of the Nation's Land 43 (1970)
48 Id.
A number of possibilities have been put forth to explain delegation and vague statutes in terms of manageability.\textsuperscript{49} Though these relatively innocuous arguments are viewed skeptically by delegation scholars, the increase in federal spending and legislation in the last century, with no accompanying increase in the size of Congress or in the congressional sessions, are two reasons Nishkanen cites as an argument for an ever increasing congressional willingness to delegate.\textsuperscript{50} He argues that:

...This has reduced the potential for Congress to formulate detailed legislation on many issues and to monitor performance under such legislation. This has led Congress, especially on regulatory issues, to approve 'symbolic' legislation, delegating to the administration the power to fill in the detail.\textsuperscript{51}

Thus, the influence of such things as time constraints, staffing limits and volume of legislation may indeed contribute to passage of non-specific statutes.

\textit{Responsibility Avoidance}

The theory has been advanced that legislators will invariably seek to avoid difficult decisions for which they will be directly accountable to the electorate.\textsuperscript{52} This paradigm is but one factor that may be included among Fiorina's legislative costs, a sub-

\textsuperscript{49} Peter Aronson et al., \textit{A Theory of Legislative Delegation}, 68 CORNELL L. REV. 1, 21 (1982), describe managerial explanations as consisting of four elements: 1) reducing congressional workloads; 2) eliminating the need for frequent statutory amendments; 3) having specialists decide matters about which Congress is not knowledgeable; and 4) establishing relative permanence among the decision makers who control certain problems.

\textsuperscript{50} William Nishkanen, \textit{Legislative Implications of Reasserting Congressional Authority over Regulations} 20 CARDOZO L. REV. 939 (1999).

\textsuperscript{51} \textit{Id.} at 942.
model perhaps, but one that also stands on its own, seemingly capable of explaining delegation all by itself. This model has been best described as responsibility-shifting.

Stone summarizes this behavior:

Legislators must worry about getting reelected as well as about substantive issues. Each legislator faces not only conflict with representatives of other constituencies, but conflicting interests within his or her own constituency. One way to escape conflict and avoid alienating potential supporters is to shun statutes that clearly harm people...But when they are forced to make substantive rules, ambiguity is a wonderful refuge. Nothing lubricates difficult bargaining and hides real conflict so well.53

William Niskanen has described this as part and parcel of the American political system.54 He notes that:

The most important insight about this behavior is that substantial delegation of fiscal and regulatory authority usually serves the interests of both Congress and the President by allowing both to play their expected roles...Congress often approves very general regulatory legislation—leaving the regulatory agencies with broad discretion to define the law by the rules they promulgate. This permits members of Congress to play both sides of the street—to take credit for the presumed benefits of the regulation and the blame the agencies for the costs of meeting specific rules. The President accepts the role of regulatory cop in exchange for much more executive discretion on regulations than on fiscal issues.55

The relationship between this model and federal land management can easily be appreciated. In discussing the nature of forest policy, Cubbage, O’Laughlin and Bullock point out that:

52 Fiorina, supra notes 34 and 35.
54 Supra, note 50.
55 Id. at 941-42.
Many forest policies are vague. Such lack of specificity is intentional because policymakers usually must appeal to a variety of groups with dissimilar views and values. More specific policies with well-defined objectives quite often are divisive because they clearly identify winners and losers. To avoid disagreement, policymakers retreat to ambiguity and leave specifics to implementing agencies.56

It would be undoubtedly difficult to focus the myriad difficulties of the Forest Service on a particular legislator’s role in passage of, for example, the Multiple-Use Sustained-Yield Act of 1960. The management of public lands is monitored by a diverse, well-funded and aggressive set of special interests. In such a climate, the incentive to avoid labeling the statutory winners and losers of forest policy is easily understood.57

Additionally, when interest groups are both active and organized, as in many public land debates, a legislator may seek to avoid what Schattschneider describes as the “socialization of conflict”.58 When the scope of the conflict expands, a legislator’s ability to control or predict its outcome is diminished. In those instances where the special-interest does not expect the result it desires, the tendency will be to expand the conflict.59

In such cases, a risk-averse legislator may exercise the power described by Bachrach and Baratz as the power to obstruct.60 In this instance, the obstruction is to prevent expansion of the entirety of a conflict into a legislative and publicized forum. The preferred

56 Supra, note 25.
57 For example, Dennis LeMaster argues in DECADE OF CHANGE (1984) that the NFMA was the political product of the Forest Service, the environmental interests, and the timber industry. I would further suggest that though the NFMA as enacted was perhaps the democratic result of the political process, it did not produce the best long-term result for the agency.
59 Id. at 38. Schattschneider argues that “Private conflicts are taken into the public arena precisely because someone wants to make certain that the power ratio among the private interests most immediately involved does not prevail.”
mechanism becomes the administrative forum. The rationale described by Bachrach and Baratz is: “B [the interest group] is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A’s [the legislator] set of preferences.” 61 Thus, in the case of national forest legislation, our hypothetical legislator will often be faced with difficult decisions compounded with close scrutiny of those decisions. Shifting the responsibility, with its attendant costs, to the Forest Service begins to look quite appealing.

This strategy becomes particularly salient in light of the effectiveness with which the environmental community has been able to nationalize the forest management debate. For example, using the spotted-owl and old-growth as tools, these groups were able to “socialize the conflict,” expanding the situs of the dispute from the Pacific Northwest to national prominence. 62 Correspondingly, a legislator need concern himself with not only the ramifications of local decisions, but with a far larger interested public. The pressure to shift the difficult decisions to the Forest Service begins to look ever more appealing.

Now, while David Schoenbrod has argued that responsibility-shifting is the primary rationale behind vague statutes and delegations to agencies 63 as a means to explain why delegation occurs, it also may explain why it does not always occur.

60 Peter Bachrach and Morton S. Baratz, Two Faces of Power, 56 AM. POL. SCI. REV. 947 (1961).
61 Id. at 948.
Legislators are also more likely to avoid delegation if doing so significantly would shift credit away from them or would fail to shift away much blame...Conversely, are more likely to delegate if doing so would shift blame away from them significantly or would fail to shift away much credit.\textsuperscript{64}

Schoenbrod expands on this basic premise to offer two related incentives for delegation. One, "delegation enhances legislators' opportunities to simultaneously support the benefits of an action and oppose its costs...";\textsuperscript{65} and two, "delegation enables legislators to represent themselves to some constituents as supporting an action, and to others as opposing it..."\textsuperscript{66}

Again, the proponents of this model are not without opposition. Peter Schuck argues that delegation and the resultant agency authority do not deflect responsibility, but rather manifest an increase in public responsibility.\textsuperscript{67} He argues that agencies are the focus of policy formulation, as they are typically more accessible and responsive to the public and that:

\ldots It is only at the agency level that the citizen can know precisely what the statute means to her; how, when, and to what extent it will affect her interests; whether she supports, opposes, or wants changes in what the agency is proposing; whether it is worth her while to participate actively in seeking to influence this particular exercise of government power, and if so, how best to go about it; and where other citizens or groups stand on these questions.\textsuperscript{68}

\textsuperscript{64} Id. \textit{Power Without Responsibility} at 90-91.

\textsuperscript{65} Id at 92.

\textsuperscript{66} Id. at 92-93.


\textsuperscript{68} Id. at 782.
Rather than providing a bastion from responsibility, Schuck sees delegation to agencies as providing the public with the access and accountability they require. Though Schuck persuasively explains his position, it is perhaps more suited to arguing why delegation is not improper, rather than a rebuttal of the responsibility-shifting delegation provides. Schuck’s position may actually serve to reinforce the incentives for a congressman to delegate.

Jerry Mashaw additionally argues that delegation, if viewed as a policy lottery utilized to avoid responsibility, only does so up and until the “administrative delegate ‘spins the wheel’ and chooses a determinate policy.” At that point, he argues, the legislator can no longer obscure his role. Mashaw advances a number of normative arguments why delegation is not detrimental, but underlying those arguments is his tenet that delegation is not as useful a tool for responsibility avoidance as has been argued by others.

Conflict and Compromise

The very nature of partisan, and perhaps interest-group politics, suggests another theory for delegation. Contemporary American policy-making has been characterized by Theodore Lowi as “interest-group liberalism.” Lowi postulates that American politics have devolved to a bargaining process whereby special-interests subvert the democratic process by avoiding the rigors of the rule of law. Lowi summarizes:

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69 JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW, 148 (1997).
Interest-group liberalism has little place for law, because laws interfere with the political process...A good clear statute puts the government on one side as opposed to other sides, [or on every side] it redistributes advantage and disadvantage, it slants and redefines the terms of bargaining. It can even eliminate bargaining as this term is currently defined.\(^7\)

Delegation is crucial to Lowi’s view of modern government. Lowi sums up the relationship:

The legal expression of the new liberal ideology can be summed up in a single, conventional legal term: delegation of power. Delegation of power refers technically to actions whereby a legislature confers upon an agency certain tasks and powers the legislature would and could itself exercise if that were not impracticable. Delegations can be narrow or broad, but the practice under the liberal state has most generally and consistently been broad. As Professor David puts it, Congress in effect says, “Here’s the problem: deal with it.”\(^7\)

He continues:

Clear statutes that reduce pluralistic bargaining also reduce drastically the possibility of scientific treatment of government as simply part of the bundle of bargaining processes and multiple power structures. A good law eliminates the political process at certain points. A law made at the center of government focuses politics there and reduces interests elsewhere. The center means Congress, the President, and the courts. To make a law at a central point is to centralize the political process.\(^7\)

Lowi indicts the bargaining found in interest-group government, or logrolling as it is more pejoratively labeled, to be the cause of much delegation,

\(^7\) Id. at 125-26.
\(^7\) Id.
\(^7\) Id. at 127.
while vague laws facilitate an ever greater degree of logrolling. Bargains then, among the special-interests and the legislators he claims, result in laws which reflect the bargains—all winners, no losers, and no identifiable position for the “center of government.”

Viewed not as a collection of special-interests in constant policy negotiation, the nature of public opinion may instead be generally described by the multimodal diagram espoused by V.O. Key.74 This ‘W’ shaped curve depicts a situation in which opinions on a particular issue are arranged in three peaks ranging on a spectrum from radical to conservative.

With any specific public land issue, for example closures of national forests to motorized travel, Key’s model suggests that a block of opinion will oppose, a block will support, and a block will be neutral on the issue. In such cases, Key states that:

In the resolution of conflict the outcome obviously depends on the direction in which those citizens shift who occupy the central position in such a distribution or on their ability to pull to a central position individuals located at the extremes.75

Shifting the distribution often mandates political compromise. In those instances where compromise is required, vague statutes reign. David Truman points out that:

The imperative of compromise among groups, between group demands and the “rules of the game”, explains various aspects of the legislative process...One of these is the ambiguity of many legislative formulas...[A]mbiguity and verbal compromise may be the very heart of a successful political formula, especially where the necessity for compromise is recognized but is difficult to achieve in

74 V. O. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 71 (1961)
75 Id. at 71.
explicit terms. Ambiguity may postpone or obviate the necessity for a showdown and as such has an important political function.76

Similarly, Richard Stewart points out the role conflict plays in generating vague statutes. He posits:

...There appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail. Legislative majorities typically represent coalitions of interests that must not only compromise among themselves but also with opponents. Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy...These circumstances tend powerfully to promote broad delegations of authority to administrative agencies.77

Terry Moe suggests a contrary possibility. Based upon a legislative fear that a later Congress may undo the acts of the current body, legislators will seek to enact laws that "insulate" their pet agencies from post hoc tampering.78 Moe acknowledges that there are several ways to accomplish this goal, but the "most direct way is for today's authorities to specify in excruciating detail, precisely what the agency is to do and how it is to do it, leaving as little as possible for future authorities to exercise control over, short of passing new legislation."79 Moe's argument suggests a rationale for why delegation would tend not to occur. The fact that vague statutes are indeed promulgated leads one to believe that while Moe's rationale may be one consideration of legislators, it is one outweighed by other factors. It may be but one element in Fiorina's model.80

77 Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1695-96 (1975). Stewart's footnote following this passage concludes that "broad delegations avoid potential stalemate by providing a 'means of acting without making final choices.'" This tends to support the idea that vague legislation is essentially non-action.
79 Id.
80 Supra, notes 34 and 35.
Agency Impetus

Thus far, this paper had focused on the incentives that may persuade a legislator, from strictly a legislative perspective. While the literature on delegation does not address the effect of agency-initiated action in any detail, it is important to recognize the role an agency might play in the passage of a deliberately vague piece of legislation. An agency may have any number of reasons for seeking broad, vague legislation; perhaps the most plausible being that the agency enjoys the discretion and lack of statutory constraints on its actions.

First and foremost, is the recognition that agencies will seek, both as collectives and as individual bureaucrats, to further its/their own self interest.\(^8\) Part of that self-interest is the perception that it is preferred to have greater discretion and greater decision-making space in the application of the law, than lesser. The difficulty, of course, is when the greater discretion creates more problems and impediments to accomplishing on-the-ground tasks than would a specific, rule-based statute.\(^2\) A self-interested agency should always consider this potential when the opportunity to support legislation arises.

In the specific case of the Forest Service, it has been argued by at least one closely related to the process, that the agency itself was responsible for the promulgation

\(^8\) Supra note 4.

\(^2\) It is easy to see that when an agency's action cannot be measured against clear statutory responsibilities, in the ensuing legal fracas a court may be left with second guessing the agency's decision. If the statutory responsibilities are clear, there is very little dispute as to whether the agency has met them. This problem is particularly acute in environmental policy act cases (both federal and state), wherein the agency is never quite sure to what extent an analysis is adequate until a court correctly explains to the agency the manner in which it should have conducted its analysis.
of the MUSYA, a notably obscure law.\textsuperscript{83} Wolf summarizes the agency incentive as follows:

\ldots The Forest Service felt that if it had general authority, that was not specific, that enumerated what it was to do then it could reconcile these differences in a way it [emphasis added] thought would best serve the public interests. So the Multiple Use bill came up, the terms weren't defined—there was a jumble of uses and resources as you know when you read the act—and they said it wasn't going to cost anything, but its enactment would be of great value, which again, you're in 1960 and election is coming up and you're dealing with people who have political antennae.\textsuperscript{84}

Wolf's recollection supports a theory that the Forest Service, and other agencies, drive legislation in their own self-interest.\textsuperscript{85} Dennis LeMaster's similarly posits that the NFMA, too, was a product of the Forest Service.\textsuperscript{86} The irony, of course, is that while the MUSYA and the NFMA may have indeed been born out of agency interest, the very discretion the Forest Service sought to ensure has provided its contemporary opponents with the means to challenge and obstruct its actions.

\textit{Summary}

This chapter set out to outline the various incentives faced by legislators in crafting a given piece of law. Regardless of which theory is most appealing, it remains difficult to


\textsuperscript{84} Id. Interview at p.2

\textsuperscript{85} This view is shared by Anthony Downs and is discussed in \textit{Inside Bureaucracy} (1966).
dispute that the choice to delegate is often quite rational on the part of the legislator. In simplest terms, when the benefits of delegation outweigh the costs, the rational congressman will shift the responsibility to the agency. What is the implication for the Forest Service? The next chapter will examine the extent to which delegation to the Forest Service has occurred. If in fact delegation has occurred, and there are costs borne by the agency and the public as a result, the remedy may be as simple as altering the legislative formula—ensure that the costs of delegation exceed the benefits. That possibility will be discussed in Chapter Eight.

\[\text{86 Supra, note 57. The Forest Service essentially had the opportunity to support one of two competing pieces of draft legislation, S.2926 and S.3091. The agency perceived S.3091 as the more discretionary and threw its support behind that bill—which eventually was signed into law as the NFMA.}\]
Chapter 3. Congress and the National Forests

*The most effective public policies are those that define fairly clear ends, yet provide some flexibility in the means chosen to reach those ends, the capacity of agency staff to pursue the ends effectively, and the ability for nongovernmental watchdogs to press agencies when necessary.*

Steven Yaffee. 87

Professor Yaffee's above suggestion implies a sort of balancing of the specificity of a policy in establishing agency goals with the methodological discretion by which to reach the goals. He goes on to cite to the Endangered Species Act as an example of a statute that has succeeded both generally as a law, and specifically as an example of this balancing. 88 There is certainly ample room to question his conclusion on both counts; but more topically, he points to the central question of this chapter: to what extent has Congress balanced discretion and specificity in Forest Service Management? Discretion, specificity of actions, and delegation are all interrelated. Delegation can be quite broad, but with equally sweeping constraints the resultant agency discretion may be quite limited. It is not quite so simple as saying a vague statute is bad because it delegates and results in too much agency discretion. Every statute will have a component of delegation, and a component of constraint. The balance between the two will determine how much discretion an agency wields. In critiquing the statutes that drive the Forest Service, it is insufficient to merely note that they are "vague", without a more detailed understanding of the relationship between delegation and ultimate discretion.

The difficulty is in being able to objectively review any of the statutes directing the Forest Service, and compare the results both to the other Forest Service laws, and to federal legislation at large. Fortunately, the problem is not novel. Professors Epstein and O'Halloran have devised, and elaborated upon in their 1999 book, a method whereby the extent to which delegation in federal legislation can be quantified.\textsuperscript{89}

Epstein and O'Halloran systemize delegation so that differing public laws can be compared in a relative manner. They relied upon the \textit{Congressional Quarterly} for descriptions of each law in question, breaking the law into major provisions. Each major provision was examined using a set of criteria to determine whether delegation had occurred. A series of 14 constraints were then applied to each law in an effort to quantify the statutory restrictions on agency actions. The formula developed by Epstein and O'Halloran produces a discretion index expressed as: $d_i = r_i - c_i$.\textsuperscript{90} Based upon this formula, an index of 0 suggested that no discretion is present, while an index of 1 suggested the law affords the executive branch unfettered discretion--essentially a complete delegation of authority to the agency.

Epstein and O'Halloran examined in excess of 250 laws; the National Forest Management Act (NFMA) of 1976 among them. They did not however, examine the Organic Act of 1897, the Multiple-Use Sustained-Yield Act (MUSYA) of 1960, or the Resource Planning Act (RPA) of 1974, all certainly important laws in Forest Service "I d."

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{Supra}, note 37

\textsuperscript{90} The formula assesses the delegative provisions present and the constraints present, and expresses both as ratios: $r_i$ and $c_i$. The two are multiplied together to reach the constraint index, $c_i$, and that then is subtracted from the delegation ratio to obtain the discretion index, $d_i$. This system was designed to avoid the potentially of having a discretion index result less than zero.

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jurisprudence. Additionally, the results of their methodology as applied to the NFMA is not contained within their text. The general methodology, though, is contained in some detail.

Consequently, since a determination of delegation regarding the Forest Service requires an analysis of several laws, and their comparison to other federal laws, this Chapter focuses upon an application of their methodology to as many of the national forest management laws as practicable. Since several of the pertinent Forest Service laws are not referenced in the Congressional Quarterly, notably the Organic Act, which predated the Congressional Quarterly, I have nonetheless chosen to analyze all of these laws, and the National Forest Timber Reform Act of 1975 (NFTRA),91 with the same methods as Epstein and O'Halloran; maintaining as close a parallel to the process premised upon the Congressional Quarterly, as possible. There of course other laws that impact the Forest Service; a recent list cites 82 of them.92 Many of these other laws, however, are not the direct Congressional mandates to the Forest Service national forest management program. Some deal with very specific issues or resources, while others are of general applicability to all federal agencies. I have chosen the laws that have been passed with the clear purpose of setting forth the manner in which national forest management would be conducted.

Before undertaking such an analysis, it is important to note that though Epstein and O'Halloran have admirably crafted a useful means of comparing statutory discretion, there are several junctures at which the examiner's bias can create flaws in the apparent

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91 The National Forest Timber Reform Act of 1975 (S.2926) was the ill-fated alternative to the NFMA sponsored by Senator Jennings Randolph (D. W.Va).
objectivity of the method. First, the determination of "major provisions" by the Congressional Quarterly, whose staff is subject to change over the years, is by no means an objective measure of a statute's provisions. Depending upon how the law is broken into provisions can drastically affect the calculations. In other words, the simple identification of provisions can be driven by the bias of the analyst, resulting in a potential range of results. Second, an analyst applying this system must make the determination of whether delegation has occurred or not in each identified provision. A seemingly simple task facilitated by the guidance in Epstein and O'Halloran's text, it is nonetheless another opportunity for subjectivity and bias to become inserted into the process. Again, a small change in the number of "delegating provisions" can create a large change in the delegation ratio and discretion index.

In an attempt to provide continuity across the several statute to be examined, and to allow the results to be compared to Epstein and O'Halloran's data, I have sought to adhere to their protocols as closely as possible. I have additionally attempted to remain consistent in my own approach to these statutes in both the identification of major provisions, and in the identification of delegation. Nonetheless, the results I present are acknowledged to be relative comparisons between laws, inherently relying upon a certain amount of discretion and judgment.

Chart 1 displays graphically the results of the calculations performed on four distinct laws, and includes the amended version of the Organic Act. The necessity to review the Organic Act in both its original format, and the amended version is due to the substantial differences between the two. A large number of provisions are absent from

92 DONALD W. FLOYD, ED. FORESTS OF DISCORD 71 (1999).

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the amended act, particularly the timber harvest provisions that provided the basis for the *Monongehela* decision. The National Forest Timber Reformation Act is included as a contrast to the NFMA. As the competing legislation in 1975, it arguably represented a more prescriptive, less vague statute.

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**Chart I. Relative Delegations, Constraints and Discretion Among Forest Service Statutes**


94 **Organic Act (as enacted):**

9 major provisions, 6 delegate
3 of the 14 constraints present

\[ \therefore r_1 = \frac{6}{9} = .33 \]
\[ \therefore f_1 = \frac{3}{14} = .21 \]
\[ \therefore c_i = (.33)(.21) = .07 \]
\[ \therefore d_i = .33 - .07 = .26 \]

**Organic Act (as amended):**

10 major provisions, 6 delegate

\[ \therefore r_1 = \frac{6}{10} = .60 \]
The chart reflects this contrast, both in the authority delegated, and in the total discretion afforded the Forest Service. The constraint index for the NFMA and the NFTRA is, incidentally, identical.

While the work of Epstein and O’Halloran depict discretion indices ranging from 1.00 for the most discretionary laws, to a law with a ratio of .0004, indicating very little discretion, it realistically appears that few laws exceed a discretion index of 0.4. The discretion indices for both the NFMA (.26) and the NFTRA (.17) bracket the mean (.20)

\[
\begin{align*}
\text{MUSYA:} & \\
\text{4 major provisions, 3 delegate} & \therefore \frac{r_i}{i} = \frac{3}{4} = .75 \\
\text{None of the 14 constraints present} & \therefore \frac{f_i}{i} = \frac{0}{14} = 0 \\
\therefore \frac{c_i}{i} &= (.75)(0) = 0 \\
\therefore \frac{d_i}{i} &= .75 - 0 = .75 \\
\text{NFMA:} & \\
\text{22 major provisions, 10 delegate} & \therefore \frac{r_i}{i} = \frac{10}{22} = .45 \\
\text{5 of the 14 constraints present} & \therefore \frac{f_i}{i} = \frac{6}{14} = .43 \\
\therefore \frac{c_i}{i} &= (.45)(.43) = .19 \\
\therefore \frac{d_i}{i} &= .45 - .19 = .26 \\
\text{NFTRA (S.2926):} & \\
\text{17 major provisions, 5 delegate} & \therefore \frac{r_i}{i} = \frac{5}{17} = .29 \\
\text{6 of the 14 constraints present} & \therefore \frac{f_i}{i} = \frac{6}{14} = .43 \\
\therefore \frac{c_i}{i} &= (.29)(.43) = .12 \\
\therefore \frac{d_i}{i} &= .29 - .12 = .17 \\
\end{align*}
\]

\(^{95}\) Supra, note 37 at 111.  
\(^{96}\) Id.
for the *public lands* category established by David Mayhew (though this category includes only the laws analyzed by Epstein and O'Halloran, and specifically excludes the MUSYA, and the Organic Act). In contrast, the MUSYA would be the fifth most discretionary law among all the public laws analyzed, regardless of category, with the Organic Act as amended following closely as the ninth most discretionary law.

The simple, or perhaps simplistic, conclusion is the recognition that delegation of law-making authority is occurring in national forest management, this coming as no real surprise. The MUSYA reflects a level of discretion that pervaded much of the federal legislation generated during the 1960's. The NFMA, an arguably less discretionary law, was crafted in the 1970's, a period of less sweeping delegation. These two laws represent the trend, noted by Epstein and O'Halloran, of a decrease in delegation. They suggest that though the trend towards delegation appears downward, the increase in the number of legislative provisions and the procedural constraints within which agencies must operate may nonetheless intensify: “Congress is writing laws that allow interest groups more impact on policy, which in turn gives rational groups greater incentive to

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97 *Id.* at 199.

98 If the Organic Act (as enacted) and the Multiple-Use Sustained-Yield Act are included the mean becomes .29, with the NFMA and the NFTRA then tending to fall below the mean.

99 *Supra*, note 37 at 111.

100 *McMichael v. U.S.*, 355 F.2d 283 (9th Cir. 1965).

101 David Clary, in *Timber and the Forest Service* 192 (1996) argues that “While NFMA offered a fundamental charter for the Forest Service, it was a refined endorsement of multiple use. The options that it preserved for the land manager ensured that the Service would never be relieved of controversy.”

102 *Supra*. note 37 at 112-117.
organize and come to Washington." The question of the impact of delegation and its relationship to special interest politics will be addressed in the next chapter.

Based upon these calculations, it may be asserted that the Organic Act and MUSYA are extraordinarily delegatory; the NFMA, substantially less so. In some ways, that is in keeping with the perception that the NFMA was a Congressional attempt to wrest forest management from the agency and reassert its role as the arbiter of national forest decision-making. The opposing camp, of course, can rally around the fact the more prescriptive option, the NFTRA, was not the bill chosen by the Congress to accomplish that goal. The incentives and costs faced by Congress suggest that though action was needed in light of the Monongahela decision, Congress did not wish to act so assertively as to ignite a conflagration of political conflict. As suggested in Chapter 2, by delegating, it could both act decisively with a new law, and essentially not act by passing a law that enjoyed general political support, but that left the nasty issues in the hands of the agency.

Another way to examine this result is by applying the formula developed by Morris Fiorina and discussed in Chapter 2. Fiorina’s model attempts to explain the individual legislator’s decision to delegate as:

\[ N_j(x) = b_j(x) - c_{ij}(x), \]

wherein \( N \) is the net benefit of policy \( x \) enacted in legislative district \( j \), \( b \) are the benefits and \( c \) are the costs. In analyzing a choice between an administrative remedy and a legislative remedy, the rational legislator applies the two submodels: \( L_j(x) = b_j(x) - c_j(x) \), and \( A_j(x) = b_j(x) - c_l(x) \), where \( L \) and \( A \) are the net costs of the legislative and administrative delegation respectively.\(^{104}\)

\(^{103}\) Id. at 120.

\(^{104}\) Supra, notes 34 and 35.
The model suggests that in the decision to adopt the NFMA over the NFTRA, \( N \) was presumably positive for each senator that voted for the former. If the benefits to each legislator did exceed the costs, what was the range of political support an opposition to each respective bill? Dennis LeMaster provides a summary of the array of interests.105 LeMaster portrays the situation as one in which the majority of the environmental groups, the Forest Service, the professional associations, and the timber industry all had thrown support behind S. 3091, and against S. 2926.106 Support for S. 2926 appeared to reside only with several of the environmental groups, particularly those that had successfully litigated the *Monongahela* case. LeMaster describes the embrace of S. 3091:

Members of the two committees [Agriculture and Forestry, and Interior and Insular Affairs] were quite proud of their efforts, believing that genuine compromises had been reached on some very difficult issues...Acceptance of the amended bill [S.3091] grew among conservation and industry groups alike.107

It is not difficult to see, at least superficially, the Congressional incentive to pass the less precise legislation. S.3091, in its original form, was a product of the Forest Service itself. Much like the promulgation of the MUSYA, the agency played an integral role in the formulation and passage of the its own management statute. In both cases, in its desire to ensure its own discretionary authority, the agency miscalculated the nature of those forces that sought to oppose national forest management. This miscalculation has

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105 *Supra*, note 57.
106 *Id.* at 64-67.
107 *Id.* at 71. See also Robert Wolf, *Promises to Keep: How the Forest Service has Pruned Back the National Forest Management Act*, 7 THE ENV'TL FORUM 10 (1990), wherein he points out that the NFMA was chosen because it was viewed as a progressive forest management law.
compounded the problems associated with the delegation of authority, and will be discussed in greater detail in Chapters 4 and 5.

With the sheer weight of support in favor of the legislation, it is tempting to assert that the Congressional choice of S. 3091 represented not only a cost/benefit analysis of delegation, but also was the choice most reflective of the democratic process. To a congressman in 1975, it may well have appeared that the short and long term problems associated with national forest management would be resolved by subscribing to the option preferred by the moderate majority of the interests, not the one supported by the marginalized extremists. Legislators run a risk in accepting the special interests as proxies for the greater public interest; the risk that the two will not ultimately coincide. Congress, in the interests of political expediency, will tend to choose that legislative option most likely to placate as many special interests as possible. That strategy, however, is precisely what Congress must not do in the realm of national forest management. Failure to appreciate the long-term impacts of its legislative decisions is a flaw that cannot be underestimated, but is one that makes delegation that much more attractive to individual legislators. The results of such a short term, placatory strategy will be discussed in the next two chapters.

It is interesting to note that while the MUSYA depicts a great degree of delegation and discretion, the NFMA offers far less, and the NFTRA less still, the debate continues after 25 years as to whether the NFMA provides any substantive standards at all by which the Forest Service must temper its management. This debate, or contrast in perceptions, reflects a fundamental problem associated with the NFMA. The statute does not do what
the myriad of interests want it to do, nor does it represent the same commodity to even allied interests. Though a product of a political process, the NFMA does not represent to the environmental community the directives to the Forest Service that they wish to see imparted, and to the forest products industry the NFMA serves as a stumbling block to the efficient transformation of wood fiber. Apart from the dissatisfaction found among ideological opposites, is the curious dichotomy that the NFMA provides substantive standards that just need enforcing, versus the view that no such standards exist, and that new legislation is therefore warranted. This state of affairs is a result of the nature of the statute itself, and bears further examination in the next chapter. Suffice it now to say that the requirements of NFMA, though a great deal more prescriptive than the MUSYA, do not appear to be effective in preventing multiple interpretations of the statute, and dispute over substantive requirements. Such flaws will inevitably drive litigation. This conclusion was shared, at least by some, shortly after the passage of the NFMA:

Ideally Congress should set policy for federal forest land management...In the real world, Congress sometimes fails to do its policy-setting job. In fact, all too often Congress has the annoying

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108 For those interests that do not wish to see the harvest of timber in any national forest, the NFMA does not represent a complete victory. While it does restrict certain activities, it continues to facilitate harvesting.


110 Supra, note 57 at 71.

111 Supra, note 109.

112 Cheever, supra, note 109 at 694. He argues that each of the standards enacted in the NFMA are more ambiguous than those contained within the Organic Act.
habit of passing laws without clearly articulating what it--Congress--intends the policy to be. Considering the complexities of the issues with which Congress must deal, inadvertent oversights are understandable. But sometimes it seems as if laws are intentionally ambiguous, in which case the agency or the courts must divine the intentions of the lawmakers when they wrote the bill. When Congress fails to articulate policy, the agency has no choice but to set its own or cease to function. This leaves the agency vulnerable to lawsuits by those who disagree. If there are those who still don't agree, the whole thing winds up back in Congress for resolution....

I am not disputing the interpretations arrived at by the courts, but I do question whether adjudication is the best way to set land and resource management policy. We were frequently told in law school that the purpose of the law is to let people know what is expected of them, so that they may plan their actions with certainty. But these days, most federal land-management agencies are certain of only one thing—more environmental lawsuits.113

More recently, it has become apparent that the best intentions of the NFMA to resolve and reduce litigation, have instead provided fertile ground for spawning litigation.

-An Example of Delegation's Failings: the Organic Administration Act (1897)

The discretion indices, and delegation and constraint ratios are useful measures for comparing disparately different statutes with a common parlance. Unfortunately, in providing that commonality, the details of the statutes, the "meat" of the statutes if you will, may become obscured. In order to appreciate the effects of these statutes, it is necessary to understand the details, beyond what the Epstein/O'Halloran equations deliver.

The Organic Administration Act, in its original form, contained a large number of provisions for the survey of public lands in the West. These provisions specified both the locale, and the appropriation for the survey. While of historic import, these provisions played no role in designating the management of the national forest reserves, and do not appear in the amended Organic Act. The provisions that empowered the president to take certain measures in the management of the national forests, in some cases, were similarly quite prescriptive. For example, the language of difficulty during the Monongahela controversy, specifically required certain procedures for the harvest of timber from the federal reserves. Pinchot, commenting on the Act, noted that this language imparted broad discretion to the forester:

Specifically, the Secretary was authorized to sell ‘the dead, matured, or large growth of trees’ on the forest reserves, after the trees had been ‘marked and designated.’ Another door wide open to the forester.

At the time, the restrictions offered, at least to Pinchot, ample room to exercise the profession of forestry in a relatively unencumbered setting. The countervailing argument is that the Act was not in fact a delegation of authority at all to the agency, but was a prescriptive set of regulations designed to harness agency discretion. The regulations are less an attempt to shackle the agency, but more reflect an attempt to prevent continued abusive national forest harvesting practices by loggers. The Forest Service retained great leeway in management under this Act.

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114 Act of June 4, 1897, c.2, §1, 30 Stat. 32
115 Id.
116 GIFFORD PINCHOT, BREAKING NEW GROUND 117 (1947).
This same language, however, interpreted some 70 years later, would be strictly and narrowly construed, quite a contrast to Pinchot's vision. One author described the situation as:

The decision in *Izaak Walton League v. Butz* showed many of us that the Organic Act's authority was not quite as broad as we had assumed. Still this kind of legislation by and large reflected an apparent congressional unwillingness or inability to specify the kind of management policies and practices it deemed most appropriate for the public lands, in essence telling the administrators to do the best job they could within the general guidelines provided...Thus, the Forest Service, delegated rather broad discretion to manage the national forests in the public interest, established its own policies to carry out its responsibilities. It did so simply because Congress has failed to provide any specific guidelines.118

The marked variation in interpretation and the technical nature of the litigation119 should have been a brilliant warning to Congress of the tone and tactics of future national forest litigation. The professional discretion of the forester was to quickly be replaced with the angry allegations of groups intent on ending the practices for which the forest reserves were originally established. This fundamental shift in both policy and methods was even recognized by the court:

It is apparent that the heart of this controversy is the change in the role of the Forest Service which has taken place over the past thirty years.120

*Izaak Walton* also brings to the fore a recurring theme related to both the Forest Service and delegation: the holistic nature of contentious issues and the effect on both

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119 The judge in *Izaak Walton* consulted a dictionary for a definition of the term mature, though that term of forestry art has implications far removed from that found in Webster. This is a blatant example of the peril faced by the forestry profession when its decisions become the subject to judicial second-guessing.
Congress and the Forest Service. As the next chapter will discuss at length, with a given policy issue, in a climate of heightened controversy, Congress will be best served by addressing the policy, but by not addressing the underlying controversy. That unhappy task will be foisted upon the agency. Of course, in such a climate, the agency wants as precise a direction as is possible to avoid being rendered about by the political forces.

Unfortunately, when the agency is slow to recognize its peril, Congress will act in its best interest, often even garnering the agency’s support for proposed legislation. It should be clear that as national forest management was elevated both in the public’s consciousness and as the general level of conflict escalated, the scrutiny of the statutory framework also increased. Opponents of Forest Service programs could pore over the respective laws, in the hopes of unearthing a silver bullet akin to the harvesting language of the Organic Act.

**Summary:**

Compromise of contentious issues by shifting the focal point of the conflict away from Congress, towards the agency is the tragic irony of Forest Service legislative involvement. The Forest Service must be stirred from its mistaken belief that an abundance of bureaucratic discretion will ensure its ability to effectively manage in the current social climate. The reason for the agency’s slumber is perhaps a result of the longstanding, and justifiable, reliance on scientific management as a shield from public pressure. I do not suggest that the Forest Service has at any point been immune or

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120 *Supra*, note 93 at 954.
insulated from public pressure, but to a large extent the pressure emanated from Congress. With the *Izaak Walton* decision, the dependence on scientific management to buttress Forest Service decisions entered its twilight. As many have noted, with the public’s rejection of agency expertise, and distrust of its management decisions and rationale, the Forest Service’s ability to defend its actions eroded. As the chart in Chapter Four will point out, I would suggest that as the agency moves further up the curve, the reliance on sound scientific management increases if the agency is to overcome the increasing obstacles. If the agency cannot take refuge in science, its ability to exercise the discretion granted it to meet any particular goal will be illusory. As Sally Fairfax notes:

> The question of why the Forest Service emerged an early winner in the nondelegation terrain is interesting. It seems important that the agency presented itself as the premiere expression of scientific decision-making.\(^{122}\)

I doubt that any person familiar with the today’s Forest Service would suggest that the agency remains atop the pedestal of “scientific decision-making”.

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CHAPTER 4: AN ENVIRONMENT OF CONFLICT

In the first part of this century, the courts fairly consistently rejected agency programs and decisions by locating in them an unconstitutional delegation of authority. The U.S. Forest Service successfully dodged the nondelegation bullet. Public domain management was one area in which the court significantly aided the expansion of federal authority.

-Sally Fairfax123

There are undoubtedly any number of potential effects that may result from Congressional delegation to the Forest Service. An optimist might argue that the increased discretion afforded the agency leads to the efficient and effective management of the national forests. While possible, such a view requires that the delegation of authority also include forest management goals that are definable, consistent, and attainable. In the absence of such goals, the discretion afforded the Forest Service is nothing more than the power to do as the agency chooses, or perhaps the means whereby the agency is coerced into performing as the salient special interests choose. While Professor Fairfax may be accurate that the Forest Service dodged the nondelegation bullet, the result may be that the agency caught another bullet squarely in the chest.

This Chapter will discuss this fundamental concern in understanding the effects of delegation: how conflict has served as both an impetus and a result of delegation, and further illustrate the contentious management arena in which the Forest Service must operate. Describing first the intertwined relationship between delegation, vague statutes
and the inherent conflicts faced by agencies, the chapter will follow with a detailed examination of specific problems posed by the nature of litigation, administrative appeals, and judicial review. All of these difficulties, it must be remembered, are part and parcel of the role delegation plays in creating obstacles for effective agency operation. If the Epstein/O'Halloran formulae accurately reflect the statutory situation, and delegation is indeed prevalent, the nature of national Forest conflict itself is worthy of attention.

The Nature of the Beast

The problems associated with delegation are not simply a direct result of a legislative addiction to delegation, but rather they result from the interaction between delegation, conflict, and ambiguous statutes. Put another way, in order to avoid the direct responsibility for legislative effects, a legislature must provide an agency with sufficient discretion to essentially craft its own set of laws; the legislature must provide the agency with enough rope for the agency to eventually hang itself. Discretion is built upon ambiguity, and the ambiguity can be the product of a broad management goal, the lack of effective constraints on agency action, or both. Regardless of the particular combination, an inevitable effect of vague statutes is the potential for multiple interpretations. In such cases, when disparate parties with incompatible value systems can reasonably interpret a legal mandate differently, the stage is set for conflict. In turn, that conflict will spawn litigation.\textsuperscript{124}

\textsuperscript{123} Id..

\textsuperscript{124} Some might argue that the precise details in the NFMA, for example stand regeneration within five years of harvest, are nearly meaningless in any silvicultural sense. I would suggest that specificity of that type is not particularly beneficial for the Forest Service in this context, as it merely ties a specific management requirement to an ambiguous underlying management goal or purpose. While it may provide
Expressed simply, the relationship between conflict, delegation, and vague statutes can be visualized like so:

Delegation, as such, is neither exclusively a cause nor an effect of conflict. Rather, it is both a product of the conflict inherent in the national forest management arena (as a device described in Chapter Two), and it fuels further conflict by its failure to conclusively set forth a cogent and legitimate strategy for national forest management, leaving too much room for disagreement. Based upon this relationship, I would suggest that as the public interest\textsuperscript{125} becomes more unclear to a legislator, the interests become

\textsuperscript{125}In the absence of a universally accepted definition, much like the term "old-growth", the term "public interest" tends to mean what each individual user of the term chooses. My intended meaning refers to a consensus or political majority position that is recognizable to a politician. Where that majoritarian break-
more fragmented, or if the legislator is less sure as to the prevailing interest to support, the greater the tendency toward delegation. The corollary of course, is in situations with a clearly identifiable public interest, one reflecting a great deal of unanimity, a legislator will tend to advocate self-aggrandizing legislation.

Though not written in the context of national forest management, Professor Pendleton Herring, in discussing the public interest, noted nearly 65 years ago that:

Its [the public interest's] value is psychological and does not extend beyond the significance that each responsible civil servant must find in the phrase for himself. Acting in accordance with this subjective conception and bounded by his statutory competence, the bureaucrat selects from the special interests before him in a combination to which he gives official sanction. Thus inescapably in practice the concept of public interest is given substance by its identification with the interests of certain groups.\(^{126}\)

Herring's view suggests that the public interest is largely a construct that takes corporeal form when a bureaucrat makes a decision to ratify a set of interests. There is no need, however, to limit this observation to bureaucrats. Certainly a legislator too lends substance to the public interest in the choice of legislative paths. But before any one path is chosen, the legislator, like the bureaucrat, must select a single or a set of special interests to advocate, or must devise some intermediate position, and then convince these constituencies to accept that position. In order to maximize the opportunity for re-election, the rationale legislator would likely choose from the special interest positions point is set, be it a simple majority, supermajority, or unanimous consent, is not the issue. Rather, a politician must be able to discern from his perception of his constituents which particular stance on an issue will maximize the number of constituent votes. For a broad and thoughtful analysis of the public interest, see Carl J. Friedrich, ed., NOMOS V, THE PUBLIC INTEREST (1962).

\(^{126}\) E. Pendleton Herring, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 24 (1936).
(or craft and intermediate position), that among other things, represented a number of votes—presumably more votes than any contrary position.

This aspect of the hypothesis is not new, and in fact tracks closely with the various theories of legislative behavior described in Chapter 2. I would offer, however, that there is a resulting impact upon the agency for whom the hypothetical legislation is crafted, one that is directly related to both the nature of the public interest, and the extent of the delegation. That impact is the extent to which the agency becomes the focal point for dispute, litigation, and ultimately, frustration of its mission.

Basically, an agency is not served by delegated authority in areas of intense social and political conflict. In such instances, the agency is far better served by precise, even prescriptive legislation, whereby the actions of the agency can be easily measured against the statutory language. Figure 2. below illustrates the nature of this argument.

![Figure 2. Agency Difficulty Curve](image-url)

Figure 2. Agency Difficulty Curve
It is, of course, possible to describe “Agency Difficulty” in a wide number of ways. For the purposes of this paper, it is defined as the conflicts and obstacles met by the agency in the pursuit of its mission.

This depiction is similar to the model developed by Clark and Cummings in assessing whether an agency will or should negotiate, collaborate, or compete. In Clark and Cummings’ model, an agency’s actions are largely dependent upon several factors: the extent of the cooperative behavior of the agency in seeking to please other parties, the agencies own relative power, and the risks associated in competing in the conflict. In the context of the Forest Service, these factors can fluctuate in any given situation, as can the amount of delegation with any given statute. The essence, however, is that the agency’s behavior is not only influenced by external forces, but in turn influences those external factors. When the agency has a great deal of delegated power, it nonetheless may not imbue the agency with sufficient relative power to triumph in a conflict situation. Unfortunately, it is conflict that many Forest Service adversaries seek.

Categorically, agency conflicts and obstacles are typically of the legal variety, as lawsuits and injunctions are a powerful tool in preventing agency action and in modifying agency behavior. While other metrics of difficulty surely exist, legal problems are often the bottom line, where actual projects either succeed or fail, and where the public is often presented with perhaps its only window on the forest management debate.

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For example, an issue like the silvicultural practice of clear-cutting, (the genesis of both the Monongehela decision in West Virginia\textsuperscript{128} and of the Bolle Report’s\textsuperscript{129} indictment of Forest Service practices in the Bitterroot Valley of Montana) represents a highly divisive issue for Congress; passions run high on all sides. Congressional response to the 1975 Court of Appeals decision was legislation that was predictably not a prohibition on clear-cutting, but rather was a restriction designed to limit its applicability. The final discretion to employ clear-cutting as a harvest regime remained with the Forest Service.

The result of permitting such broad discretion without adequately defining applications should not be unexpected. For example, in an instance where clear cutting is proposed, the legal challenge might be brought that its use is illegal and violates the ambiguous language of the NFMA, or its implementing regulations.\textsuperscript{130} The situation could not be worse for the implementing agency. The appearance of professional discretion is a mirage for judicial interpretation; not the result any professional forester would have.

Like the average citizen who must know the laws governing his everyday affairs in order that the results of violating those laws be predictable, a management agency too must know what is expected from it. Just as a “reasonable and prudent” speed limit contrasts with a specific, numeric limit, an agency’s mission can range from the ambiguous to the well-defined. When it tends toward the latter, the agency is left without

\textsuperscript{128} Supra, note 93.


\textsuperscript{130} Sierra Club v. Peterson, 185 F.3d 349 (5th Cir. 1999).
the ability to predict the outcome of its actions. Predictability, however, is a hallmark of
the legal system. If the Forest Service cannot anticipate the reactions, from all of the
affected parties, to a selected management regime (and it appears that it cannot; for
example, ecosystem management has not been a panacea with environmentalist
challenges), its attempts to effectively manage the national forests will be inconsistent
and floundering; always wondering from which quarter the next challenge will come to
its latest proposals.

The Environmental Dispute Industry

National Forest conflict, both as a result of delegation, and as a cause of future
delegation, is to a large extent a result of interested participants that possess both the
resources and the will to dispute Forest Service management decisions. Resources, as
discussed later, have become readily available, and in fact are tied directly to the
industrialization of environmentalism. Nor is the will lacking. The desire to control or
direct national forest management has not, as will be explained, waned over time. Both
the resources and the will to fuel disputes are amply reflected in the nature of modern
environmentalism.

The notion that environmental concerns are localized and subject to solution by
the appropriate measure of executive or legislative compromise is partially correct ("Not
in my backyard" or NIMBY environmentalists certainly comprise many of the national
forest management objectors), but this view also ignores the reality, or perhaps the
entirety of the situation. The environmental community has evolved into an industry
whose raw materials are ambiguous statutes, and whose cash crop is litigation.
By way of example, in 1976, J. Michael McCloskey, of the Sierra Club Legal Defense Fund, made the following statement:

A lot of interests have great fun making myths about us and inventing suppositions that we’re trying to stop all timber cutting or all oil drilling or what have you. This is not our policy. **We believe there is an ample role for timber cutting—to be specific, cutting on the national forests.** (emphasis added) Those who indulge themselves in such myths don’t do their cause a very good service. Anybody who operates on the basis of unrestrained enthusiasm for such gross characterizations is really living in his own private world.¹³¹

In contrast the Sierra Club both currently, and for the last several years, opposes all commercial timber harvesting on not only the national forests, but on any public land; actively supporting federal legislation designed to meet that end.¹³² Now there are several possible rationale for this shift. It may be that in 1976, J. Michael McCloskey artfully employing the lawyer’s craft, said precisely what he meant: that the Sierra Club did not oppose all timber cutting, just all commercial timber cutting. Or—it may be that conditions have so markedly deteriorated since 1976 on the national forests that the Sierra Club was morally compelled to alter its position to prevent further destruction. Considering that the commercial harvest volume has declined precipitously in the last decade (during the period that the Sierra Club’s recent position was adopted) tends to argue against that direct suggestion, though it may support the variant, which is my preferred option.

¹³¹ DENNIS LEMASTER AND LUKE POPOVICH, EDs. CRISIS IN FEDERAL FOREST LAND MANAGEMENT 29 (1976).

¹³² http://www.sierra.club.org/forests/bill-97.asp. The legislation supported by the Sierra Club, the National Forest Protection and Restoration Act, would end the sale of timber on the national forests. Ironically, it
The reason, I would suggest, for this seeming catharsis is that environmentalism is indeed a business, one that thrives on conflict, needs conflict, and will work to nurture conflict wherever and whenever possible. For example, the Sierra Club alone has annual revenues exceeding $40 million, while one source reports the twelve largest national environmental organizations having annual revenues exceeding $600 million, and another source reports 13 national environmental groups with annual revenues exceeding $1 billion. As Alston Chase describes:

Like many spiritual movements that achieve worldly power, therefore, environmentalism has lost its way. Bloated by wealth, mainstream environmental groups have become bureaucracies not unlike the public agencies they pledged to police. Occupying high-rent offices in the nation's capital far from the “ecosystems” they promised to defend, and heavily staffed with well-paid lawyers, these organizations are driven by ever greater pressure to increase income flow. They spread scare stories to stimulate public generosity and embrace litigation as a way of life.

This behavior, of furthering any number of goals, by highlighting crises, real or imagined, has been labeled as “popularizing;” and, it is argued, is part and parcel of the environmental movement. The Sacramento Bee has recently and thoroughly investigated and published a series of articles on this very question, suggesting that

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135 ALSTON CHASE, IN A DARK WOOD 414 (1995).
prominent elements of the environmental movement have indeed acquired the trappings of any large corporate business endeavor.\textsuperscript{137}

Consequently, it would seem foolish to ignore the monetary incentives for the opposition of federal land management policy\textsuperscript{138} (as I would argue it is foolish to ignore the spiritual or romantic aspects of environmentalism that undoubtedly fuel many a crusade\textsuperscript{139}). The notion that national forest timber harvesting must end can serve well as a focal point for groups such as the Sierra Club, rallying their supporters with tales of despair, and increasing memberships and funding.\textsuperscript{140} Further, the control that many interests seek over the management of the national forests can be pursued with a number of strategies, including both legislative means and resort to the judiciary. The judiciary has been the forum of choice for many groups, as the lack of any major forest management legislation in the last 25 years attests. The result has been a rush from the halls of Congress to the courtrooms. Relying upon the judiciary as an avatar to assert the

\textsuperscript{137} Tom Knudson of the Sacramento Bee newspaper, in a 5-part series of investigative reports from April 22-26, 2001, set forth a compelling collection of evidence that supports this argument. The stories may be accessed at http://www.sacbee.com/news/projects/environment/20010422.html

\textsuperscript{138} For example, the curiously titled Equal Access to Justice Act, 5 U.S.C. 504, provides that a party that triumphs over the United States in a adversarial proceeding may recover its legal fees and costs from the government. This hybrid of the American and English legal fee rules hardly suggests equality of any sort. In fact, since the government cannot conversely recover costs or fees in the event it prevails, a situation is created in which an environmental plaintiff faces virtually no costs for litigation, opportunity or otherwise. One can well imagine the effect this incentive arrangement would have on the number of lawsuits brought against the Forest Service.

\textsuperscript{139} One need not look very far to see the confrontational aspect incorporated within the environmental movement. See, for example, Rik Scarce, Eco-Warriors, (1990). Somewhat humorously, a recent lawsuit against the Forest Service (Associated Contract Loggers, Inc. v. USFS, 84 F. Supp. 2d 1029 (D. Minn. 2000) claimed that the agency’s acceptance of the “religion” of deep ecology was in fact an unconstitutional violation of the Establishment Clause. The plaintiff’s case was dismissed, and a rule has been issued to show cause why plaintiff’s counsel should not be sanctioned for bringing such an action.

\textsuperscript{140} Supra, note 137.
degree of control desired, of course, necessitates litigation.\textsuperscript{141} Jones and Taylor’s research substantiates this observation.\textsuperscript{142} They observed that from 1977 to 1992 in the case of the NFMA, and from 1971 to 1992 in the case of the NEPA, environmentalists were responsible for 60\% and 70\% of the respective lawsuits.\textsuperscript{143} Of those, 75\% and 92\% respectively, were brought with the intention of obstructing commodity production.\textsuperscript{144} Jones and Taylor’s conclusion, based upon these numbers, was that: “it reveals also that environmentalists were much more likely to use litigation as a tool to seek changes they desire in National Forest Management.”\textsuperscript{145}

The data from 1993 to 2000 is similar, but with a slight increase in the percentages. Environmental groups brought 70\% of the NFMA lawsuits during 1993-2000, and 87\% of those suits were for the purpose of obstructing commodity production. This appears to support the finding that the environmental community has indeed embraced litigation as a means to facilitate changes in national forest policy. While the Forest Service had by that time, evolved into something other than a timber production agency, the volume and type of litigation does not reflect that fact.

Though it appears that litigation is a tool, and perhaps the preferred tool, I do not suggest that it is the only tool. Legislative remedies are always an option. A fairly recent

\textsuperscript{141} The use of the courts to assert control, unfortunately, is indirect and highly undemocratic. It is therefore, difficult to accept positions on national forest management that do not originate with the Congress as representative of the “will of the people.” As the most democratic of our federal branches of government, the actions of Congress, or inactions, should be considered the closest approximation to the “will of the people.”


\textsuperscript{143} \textit{Id.} at 319-321.

\textsuperscript{144} \textit{Id.} at 322-323.

\textsuperscript{145} \textit{Id.} at 323.
study noted that between 1977 and 1992, 507 bills were introduced to the Congress addressing one aspect or another of the Forest Service. Of those, 164, or nearly a third were enacted. Of course, none of the 507, and none of the bills introduced since, have resulted in the passage of a comprehensive, explicit alteration in the existing statutory structure for management of the national forests, or in the Forest Service’s mandate. Consequently, an environmentalist with the will and the resources is better served by committing to litigation as a mechanism for change. Paul Hirt describes it somewhat differently, but with the same general meaning:

Environmental groups, in pursuit of real change and convinced it was unlikely to come from the executive or legislative branches, increasingly turned to the courts to defend nontimber multiple use values and to attempt to block timber sales in remaining roadless areas. The judicial branch soon proved to be an effective forum for advancing environmental goals. Litigation proliferated.

That, I believe, is the explanation for why the Sierra Club changed horses. It represents a model of the larger, industry-wide embrace of a kind of corporate environmentalism. Though the 1990s saw commercial timber harvesting as a mere shadow of its former self, and the Forest Service embarking upon its most holistic management path ever (ecosystem management), the sounds of battle did not fade. That is not to say however, that the war hasn’t been decided. In the words of the former chief of the Forest Service:

The “war” over the purpose [of the national forests] is over—at least for the moment. Muir’s forces have won. Yet the enviros stay

146 Elise S. Jones and Will Calloway, Neutral Bystander, Intrusive Manager, or Useful Catalyst?: The Role of Congress in Effecting Change Within the Forest Service, 23 POL’Y STUD. J. 310, 345 (1995).
147 Paul W. Hirt, A CONSPIRACY OF OPTIMISM 253 (1994).
focused on "mop up" and wander the battlefield bayoneting the wounded.  

The incentive structure suggests that the Sierra Club and others must raise the bar, find a new dragon to slay, or at least a new windmill to charge—in this case pursue a federal zero cut policy, advocate a roadless policy of unprecedented proportions, and oppose any harvesting of old-growth timber, however subjectively that term might be defined.  

Similarly, Professor Hoberg recently pointed out that:

During the debate over Section 318 [of the timber salvage rider] in 1989, environmentalists proposed an allowable cut of 4.8 bbf per year. A harvest level they were willing to accept in 1989 is 4 times higher than the level they consider outrageously high in 1993.

If the environmental industry must perpetuate conflict to thrive, then perhaps the most effective means is by the litigation stemming from arguments over the intent of ambiguous statutes. Certainly, conflict is not enhanced by the formulation of more specific laws to reign in the Forest Service. Specific laws make it easy for an agency to determine whether it is in compliance or not. In such instances, the agency's legal counsel is generally capable of predicting and advising whether any given action will result in a violation of a statute or rule. In this hypothetical world, an agency, if it so

148 Jack Ward Thomas, "The Times They Are A'Changin'—Is Multiple-Use a Worn-Out Concept?" Speech at the University of Washington (November 15, 2000)
149 For an interesting attempt at getting the Congress to explicitly embrace this ideology, see H.R. 1396, 106th Cong., 1st Sess., as well as its successor, H.R. 1494, 107th Cong., 1st Sess. (2001). It remains questionable, however, whether an entrepreneurial environmental group would ultimately support such a blanket ban. It would surely eliminate that particular source of conflict, and much like participating in collaborative processes designed to find solutions to problems, solutions may not be the actual goal of such groups.
150 Supra, note 62 at 11.
151 Robert Wolf argues that indeed the Forest Service's legal counsel had advised its client that clearcutting of "immature" trees was violative of the Organic Act. The supposition being, had the client heeded this
chooses, can avoid the nasty pitfall of litigation, and the costs associated with conflict at all levels.

From the opposition’s perspective, if the law is clear and defined, it is quite easy to assess whether the agency violated it. If the agency appears to have complied, an environmental plaintiff is not quite as eager to commence hostilities.

It must be kept in mind that courts of law are comprised of former lawyers, many of whom now adjudicate in very diverse fields. It is somewhat unnerving for a resource manager to entrust a project’s or plan’s fate to a single judge or a panel of judges, particularly if the question at hand comprises both factually and legally complex natural resource issues, mired in public land administrative procedures. Consequently, the tactics of an environmental challenger are simple but can be quite effective. If the plaintiff can sow enough confusion, contradiction, and doubt with the court, the agency has a difficult challenge. Judges can be all too easily convinced that the “precautionary principle” is prudently preferable to permitting an action to proceed. This cautious tendency can be compounded by the various depictions of natural resource management agencies by their critics as callous despoilers.

If the legal framework directing an agency’s management is ambiguous, the environmental challenger’s chances of prevailing are enhanced. Given the opportunity to craft and pass into law any form of national forest legislation, environmental challengers

advice, the results of Monongehela may not have occurred as they did. Nonetheless, the fact remains that the agency had for nearly 70 years interpreted and applied a law in a manner that with which the court did not agree. The goal is to craft laws that do not create space for such dichotomous interpretations.

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would not seek a detailed, prescriptive work. Rather, it would favor the very ambiguity that has served so well in the past to confound the agency.¹⁵²

There are number of ways to focus the discussion on the actual conflicts the Forest Service faces, both to support the tenets of this chapter, and as a means of illuminating the effects of delegated authority. The amount of litigation the agency faces reflects the nature and clarity of its management mandate. It too reflects dissatisfaction with the agency’s actions, and is again related to the theory that the agency is largely unable to clearly ascertain its course. Additionally, the amount and type of administrative appeals sets the tone for the level of conflict related to project development. Finally, judicial review of the various legal challenges to the agency actions is important to understand, both as an influence on the outcomes of agency actions, but also in its relationship to delegation.

LITIGATION

As increased demand began to press the capacity of the national forests, conflicts arose between those who would manage the stands for commercial timber purposes and those who would preserve forest environments in an aesthetically pleasing way for outdoor recreation enthusiasts. So intense was the conflict between those with an interest in having the national forests produce a larger volume of natural resource commodities and the growing body of militant outdoor recreationists that the issues which divided them were increasingly taken to court for adjudication.¹⁵³

¹⁵² It is interesting to note that the NFTRA, arguably a more prescriptive bill, was apparently only supported by those environmental groups that had litigated the Izaac Walton decision. The more “mainstream” groups offered their support for the NFMA. In reality, it appears that both bills imparted very nearly the same amount of discretion, but it is in keeping with this argument that most of the environmental groups preferred what was perceived as the more discretionary, and thus more easily challenged law.

¹⁵³ Michael D. Bowes and John V. Krutilla, Multiple-Use Management: The Economics of Public Forestlands 6 (1989).
The history of Forest Service litigation is a long one, including nearly every variation of allegation creative plaintiffs can craft. The important bases for the purposes of this paper are the primary management statutes. Both the NFMA and the NEPA have been examined on at least one occasion by those outside the agency.\(^{154}\) Relying upon the WestLaw legal database, Jones and Taylor tracked the number and type of Forest Service litigation from the enactment of the NFMA and the NEPA until 1992. Using a similar methodology, it is possible to instead track the NFMA and MUSYA litigation from their respective passages, to 2000. The results of that analysis are set forth in Charts 2 and 3 below.\(^{155}\)

\(^{154}\) Supra, note 142.

\(^{155}\) In keeping with the protocols employed supra, note 9, a search was conducted on Westlaw of the ALLFED database for cases containing the terms “MUSYA AND National Forest OR Forest Service”, and cross checked with a search for “Multiple-Use Sustained-Yield Act And National Forest OR Forest Service”. Both terms and connectors and natural language modes were utilized to verify results. The searched returned 23 and 20 documents respectively. Cases were then individually examined to edit out those cases that were not pertinent. Only those cases that referred to a count in the plaintiff’s complaint for Forest Service violation of the MUSYA were included in the set. This list included unpublished decisions as well, a set excluded from the 1995 work supra note 1. Similar protocols were utilized for the NFMA. The same database was searched for NFMA AND National Forests OR Forest Service and National Forest Management Act AND National Forests OR Forest Service. The searches returned 184 and 186 documents respectively, which were then edited to remove extraneous cases. The remaining list included unpublished decisions.
Chart 2. Multiple-Use Sustained-Yield Act Litigation

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There appears to be a trend towards an increased level of litigation under both statutes. It does not appear that the mere timber harvest level, the traditional nemesis, is necessarily driving litigation. The absence of a link between timber harvest volume and litigation supports the contention that conflict itself may be the goal, not the cessation of national forest timber production. While Chart 4, infra, indicates that by 2000 the national forest timber sold and harvested had decreased to 1940s levels, with the suggestion of further decreases, it appears to be a case in which there is a fixed or an increasing demand for the filing of lawsuits by environmental groups as indicated by Chart 5 below.
As additional support for this argument, the silvicultural practice that has engendered the greatest angst among Forest Service critics, clearcutting, has been on a downward trend since at least 1989.\textsuperscript{156} Clear cutting represents only 10\% of the silvicultural treatments employed in 1998, down from 31 \% in 1989.\textsuperscript{157} Perhaps even more dramatically, the total acres on which clearcutting was utilized, dropped from some 250,000 acres in 1989 to less than 50,000 acres in 1998.\textsuperscript{158} Notably, this relative elimination of clearcutting from the national forests does not appear to have had any limiting impact on litigation.\textsuperscript{159}

Collectively, these indicators substantiate the theory that the environmental conflict industry will strive to maintain a consistent and ongoing program of national forest dispute, no matter the trends in actual timber sale and harvesting activity.\textsuperscript{160} One way to understand the issue is to consider a sort of supply and demand model. The volume of timber offered for sale over the last two decades has plummeted. Nonetheless, the corresponding number of NFMA lawsuits has not. With less volume to object to, but with a need to maintain funding and support, environmental groups have continued to litigate with the same intensity (As will be seen later, this pattern is replicated with

\begin{thebibliography}{9}
\item \textsuperscript{156} U. S. DEPT. OF AGRICULTURE, FOREST SERVICE, FOREST MANAGEMENT PROGRAM ANNUAL REPORT FY 1997 29-30 (1998).
\item \textsuperscript{157} U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, FOREST MANAGEMENT PROGRAM ANNUAL REPORT FY 1998 45-46 (2001).
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Clearcutting, like old-growth, or any number of other modern forestry pariah are often constructs of subjective imagination and perception. Clearcutting, like any other silvicultural technique, has both appropriate and inappropriate applications. See DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY 162 (1990) for a discussion of this very issue.
\item \textsuperscript{160} See Kevin L. Gericke and J. Sullivan, Public Participation and Appeals of Forest Service Plans An Empirical Examination, 7 Soc'y AND NAT. RESOURCES 125 (1994), in which the authors’ study of forest plan level appeals reveals that timber volume harvested was not a significant variable in any of their models analyzing the number of administrative appeals.
\end{thebibliography}
administrative appeals). With a declining pool of sales, a higher percentage of those sales will be litigated. The environmental industry, like any other, is reticent to downsize to meet changing conditions. It is in this volatile, yet quite predictable atmosphere of conflict that the Forest Service finds itself, where even drastic harvest reductions does not relieve the agency from incessant challenge.

**Summary:**

Undoubtedly, litigation against the Forest Service is multi-factorial. It is beyond the scope of this paper to attempt to account for all those factors, though I believe I have set forth what is perhaps the primary problem. In the cases of both the MUSYA and the NFMA, there has been a marked increase in litigation since the acts’ respective passage. It may be that the delegatory nature of these statutes, particularly the MUSYA, do not provide the impetus for lawsuits (that may be a social effect), but rather provide the means for the litigation. Both procedural and substantive bases to litigate Forest Service decisions is created, from which the agency's actions can be contested as non-compliant with the law. This effect is perhaps nowhere more pronounced than with the National Environmental Policy Act, but it also pervades the MUSYA and NFMA. The less specificity the statute imparts (or a lack of substantive standard), the greater the

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161 *Id.*

162 See R.W. Behan, *RPA/NFMA—Time to Punt*, *J. OF FORESTRY* 802 (1981), wherein he notes that: "Without a law, you can't litigate, and that's one reason to repeal RPA/NFMA. From the land manager's point of view, repealing the law is a guaranteed way to help get forest management decisions out of the courtroom and back into the forest."

163 The NEPA provides a universal mechanism for litigants to challenge, upon procedural grounds, the proposed action of any federal agency. By virtue of its inherent ambiguity and lack of precise terminology it is a fountain of lawsuits. Jones and Taylor's work, *supra* note 133, also demonstrates that the number of Forest Service lawsuits premised upon the NEPA is increasing.
ability of a plaintiff to accuse the agency of an ambiguous illegal action, and the greater the chance that the agency’s decisions will be second-guessed. It is then the responsibility of the courts to sort out whether the agency is acting within the scope of an already contentious piece of legislation, adding their interpretation to the mix. This tryst of delegation, ambiguity, and conflict serve to cripple Forest Service attempts to justify and explain its management decisions.

Figure 1 suggested that in situations with an uncertain or fragmented public interest, the legislature will delegate to a greater extent, thus creating more difficulty for the agency to face. It is precisely for this reason that delegation should not occur under such conditions. The greater the public controversy, the greater the necessity to rely upon democratic devices. When the legislature abdicates this responsibility, the burden and opportunity fall to the agency. At all times the agency is subject to the directives of the executive branch, whose policies may or may not correspond with the will of the legislature.\(^{164}\) When the legislature delegates and affords the agency great discretion, the price can be high. The public that prompted congressional action is not satisfied, because the problem is not solved, but is rather refocused with a promise and a handshake. The result is predictably a continuation of the litigation and obstruction that initially prompted congressional action.

Over a six fiscal year period (1992-1997), the Forest Service national timber sale outlay for appeals/litigation and appeals/litigation-indirect averaged over six million

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\(^{164}\) The current Clinton Roadless Initiative is a prime example of this dilemma. Though Congress has enacted a statutory mechanism for the protection of wilderness, and has in fact set aside in excess of 30 million acres to date, the executive branch insists upon taking an alternative path to the same result, one that does not entail congressional assent, as is statutorily required.
dollars annually.¹⁶⁵ This number does not include those costs that are attributable to the
Department of Justice for the actual litigation in which they represent the Forest Service
exclusively, and consequently underestimates the true cost of Forest Service appeals and
litigation. Nonetheless, while that number does not appear to be increasing, (averaging
between 1% and 2% of the annual total outlay), it still represents a substantial sum,
whose significance will increase as the revenues generated from timber sales decreases.
This state of affairs has been aptly described:

Appeals and lawsuits are pursued in high numbers and are
considered a routine cost of doing business. In fact, for many, they
are their business.¹⁶⁶

ADMINISTRATIVE APPEALS

Conflict, or resistance to agency actions, is implicit in the actions of any public
bureaucracy, regardless of the mission or setting. Measures of conflict can range from
full blown litigation, as discussed above, to lesser but nonetheless frustrating and
debilitating actions. The Forest Service Administrative Appeals process is one such
measure. The number of appeals taken over forest plans promulgated under the NFMA
reflect a somewhat different trend from litigation. While there appears to be a decline, or
a least a leveling off in the annual number of project level administrative appeals (see
Chart 6 below), the 1245 forest plan level appeals filed in the last 12 years alone, and the

¹⁶⁵ U.S. General Accounting Office RCED99-174 Forest Service, Amount of Timber Offered,
¹⁶⁶ Jack Ward Thomas, What Now? From a Former Chief of the Forest Service, in A Vision for the U.S.
roughly 1000 project level appeals per year, nonetheless represent a tremendous indicator of dissatisfaction with Forest Service management planning efforts, and a willingness to


3000
2500
2000
1500
1000
500
0


impede those plans.

Generally, appeals of particular projects increased steadily, peaking in 1993, when the Congress amended the Forest Service appeal process, restricting the time in which an appeal could be filed, and requiring formal public participation in order to have standing to appeal.167 Following the enactment of this new provision, the number of national forest appeals dropped, sharply at first, but in the last several years appear to have stabilized (See Chart 6). Perhaps more interesting is the relationship between the

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number of appeals, and the sale volume of timber from the national forests, and the relationship of timber-oriented appeals to the total number of appeals.\textsuperscript{168}

The number of timber-oriented appeals per billion board foot of timber sold from the national forests for 1990-1999 is displayed in Chart 7.

\begin{center}
\end{center}

![Graph showing the number of timber-oriented appeals per billion board foot of timber sold from the national forests for 1990-1999.]

Again, the number of appeals appears to have peaked just prior to 1993, dropped steadily during the nineties, bottoming out in 1997, but is now on the rise again. All the while the absolute amount of timber sold has been decreasing. This would suggest that

\textsuperscript{168} The Forest Service sorts administrative appeals into eleven categories, one of which is "timber".
the amount and volume of timber sales alone are not, as if often portrayed, the driving force behind national forest contention.\textsuperscript{169}

Similarly, as Chart 8 depicts, the percentage of timber appeals to the total number of appeals tracks quite closely.

\begin{center}
\textbf{Chart 8. Forest Service Timber Appeals/Total Appeals, FY1990-1999}
\end{center}

Again, the peak occurred near 1993, a rapid decline followed, and then a steady climb back to the previously high numbers. Of note is that nearly half of the 1000 or so national forest appeals per year are timber related, and that the percentage has not abated in light of the changes in timber volumes sold and harvested.\textsuperscript{170} Nothing suggests that the

\begin{flushright}
\textit{Supra note 160.}
\end{flushright}
decrease in timber volume sold over the last decade has meaningfully impacted the conflict level in the arena of administrative appeals.

It is likely that the appeals of forest plans track closely with plan formulation and plan amendments as they occur from time to time, and thus may not depict any clear pattern. The project-level trend, however, also does not appear to be associated with the timber sale volume. Again, though sale volume dropped sharply after 1994, and continues to do so, appeal trends do not reflect that drop. One author has concluded that the number and percentage of appeals related to timber sales:

...Indicates that timber management is the most controversial activity in which the agency engages, and it illustrates a high level of frustration with the agency's timber policies among at least a segment of the American public. 171

Like litigation, it appears that administrative appeals too will occur at steady levels, as the various environmental groups contend amongst themselves to ply their trade in the face of a shrinking market. It is questionable then, whether even a complete cessation of national forest timber sales would be effective in limiting appeal numbers, or whether the demand would simply drive greater numbers of appeals into the other ten appealable management categories.

The costs associated with appeals are immense. Estimates for FY 1990 were $195 million in tax revenue and $179 million in PILT foregone, and total Forest Service expenditures of $150 million in addressing appeals. 172 Costs aside, any suggestion that the appeals system be revised or abandoned is commonly met with vehement objection.

171 Supra, note 142.
Often the rationale is that the appeal process plays an integral role in sound public participation in national forest management. The mere mention of an abatement or restriction of the appeals process has been vocally condemned.\textsuperscript{173} Self-interest in perpetuating conflict may compel environmental groups to oppose any stricture of the appeals process that might diminish these groups’ ability to carry on with business.\textsuperscript{174}

Other observers opine that the Forest Service appeal system is fundamentally flawed:

This system is designed for an oversimplified model of resource management that is informal, discretionary, and purely technical....The current appeals system is ill-equipped to address important hybrid questions that contain both technical and social components...The failure of the system belies the image of the expert steward that the Forest Service has cultivated over the past eighty-eight years.\textsuperscript{175}

It is not, however, a matter of an “oversimplified model of resource management,” but perhaps instead a matter of an outmoded model. As will be discussed in Chapter 8, the appeal system is but one aspect of the traditional national forest management paradigm that has been altered as a result of the diminution of science, the rise of public...

\textsuperscript{173} \textit{id.} at 185-243.

\textsuperscript{174} One might argue that it is a fundamental desire to end all timber harvesting on federal lands that spurs the increased intensity of obstructionist litigation. That theory would tend to conflict with the notion that this type of litigation is an end unto itself. If timber harvesting, one of the most promising and perpetual sources of lawsuits, was eliminated, it would in turn eliminate a focal point for popularizing or demonizing the agency, thus making the popularization of forest crises more difficult. This conundrum is best illustrated by asking whether a group such as the Sierra Club would support to enactment a law such as H.R. 1494, knowing that its passage would spell the end of the litigation gravy train in many respects.

involvement, and the role of conflict in forest management. Nonetheless, it is recognized
that some relief needs be afforded to project-level actions.\textsuperscript{176}

Sustaining conflict, at any level, implies a resource commitment, one that Jones
and Taylor point out, may be misdirected:

Use of litigation and administrative appeals to force agency change
incurs significant time and money costs for both the Forest Service
and the external interests that initiate the challenges. Such resource
expenditures represent significant opportunity costs; if alternative
means were found to resolve conflicts, these finite resources could
be spent by both sides in productive ways to enhance stewardship of
our forests.\textsuperscript{177}

Unfortunately, if the parties respective costs were equivalent, such solutions
might be attainable, but the very nature of the conflict ensures that costs are not
equivalent. Unlike a war, the various combatants in the national forest management fray
do not risk the same defeat. Traditional users of the national forests: the loggers, miners,
and motorized recreationists all stand to lose the forest privileges that they currently
enjoy. The risks inherent to conflict are that the uses these groups currently undertake
will be lost, that these particular multiple-uses will be abrogated to some other multiple-
use, say wilderness or primitive areas. On the other side of the battlefield, the
environmentalists face no such risk. Indulging in conflict carries with it no
corresponding possibility that the uses that these groups enjoy might be lost and

\textsuperscript{176} GAO REPORT, FOREST SERVICE: ISSUES RELATED TO MANAGING NATIONAL FORESTS FOR MULTIPLE
USES 7 GAO/T-RCED-96-111 (1996); R. Max Peterson, “The Forest Service Mission: Past, Present and
Future”, Paper prepared for the University of Montana School of Forestry and Resources for the Future,
“Collaboration and Decision-making on the National Forests: Can it Work? Four Perspectives of the

\textsuperscript{177} Supra, note 142 at 333.
converted to another use. No one would seriously entertain the possibility of converting
the Bob Marshall Wilderness to commercial timberland.

Quite simply, as a result, the front is generally stable, punctuated with forays, or
moves in only one direction, with the environmentalists advancing. This fundamental
difference in risk heightens the willingness of the environmental industry to take legal
actions. As the environmental industry has become more affluent and organized, its
ability to incur substantial litigation and appeal expenses has correspondingly increased.
Unfortunately, this collective of groups has really never had to face the truly hard costs,
the loss of use that is risked by all other parties to the national forest debate.

Entwined with a mission of conflict, the environmental industry does not
perceive conflict as a problem to be solved.178 The variant of conflict for these groups is
control. Control is, of course, something that can never directly occur whilst the Forest
Service exists. Thus, conflict must suffice. Conflict and control are both dependent upon
the resources or "power"179 of an organization to muster. Paul Culhane has developed a
model of measuring the policy output of a particular national forest issue.180 Culhane's
model is depicted below:

\[ O = i_1APV_1 + i_2APV_2 + ... + i_nAPV_n \]

Where \( O \) = policy output

178 For an interesting insight into this issue, consider the Sierra Club's vehement rejection of collaborative
efforts at dispute resolution. The Quincy Library Group forest management program, for example, has
been roundly criticized by the Sierra Club for a number of reasons. It is this type of dispute resolution that
disempowers the conflict industry and cannot, therefore, be tolerated. For details, see
http://www.sierraclub.org/planet/199711/deibert.html and
http://www.sierraclub.org/chapters/sanfra...ve%5ethe%5Fforest%5F%5Fcut%5Fthe%5Ft.html

179 I would again emphasize that power can be broken into two components: resources and the will to
accomplish a task.
i = a particular group’s relative influence index

A = the group’s access to decision makers

P = the group’s power

V = the group’s value preference

n = total number of groups in the policy process

Of particular interest is variable P. The group’s respective power implies not only the ability to influence policy formation at the legislative level, but also at the judicial level. Culhane factors into the power variable a number of aspects, including: membership, budgets, and professional staff.\(^{181}\)

While Culhane concluded in 1981 that preservation groups did not exert much influence upon such items at timber sale volume, particularly not relative to the forest products industry, it is important to recognize that his analysis was done in the years just following enactment of the NFMA. Looking at Chart 3, one can see that NFMA litigation had not yet accelerated. Culhane’s analysis, if applied to current times, (particularly for variable P for preservationists) would likely show a much higher influence by these groups. Additionally, Culhane’s earlier calculations reflect a severe disadvantage for preservationists in the budget subcategory. Again, this factor would likely reflect a heightened current power of preservationists to influence policy.

\(^{180}\) **Paul J. Culhane, Public Lands Politics** (1981)

\(^{181}\) *Id.* at 373.
It is uncertain whether the appeals process has resulted in substantive changes in forest management for the better.\textsuperscript{182} It is highly likely, however, that the appeals process has provided an incentive to designing projects that are less controversial, thus less likely to trigger an appeal.\textsuperscript{183} Unfortunately, this influence often occurs in a forum (the judiciary) that may not be the appropriate and democratic manner in which national forest management should be directed. Project modification to avoid appeals by special interests does not suggest that the revised projects are more legally defensible or scientifically sound, only that they are more palatable to the various critics.

Administrative appeals and their associated costs, like litigation, are products facilitated by delegation. The Forest Service, perhaps at the genesis of the administrative appeals process, apparently believed the appeals process would afford a procedural mechanism to attempt the resolution of dispute without the need for formal litigation.\textsuperscript{184} Unfortunately, it has offered no such insulation. It must be apparent that so long as the agency is left defining and redefining its own mission, its opponents will use all means to thwart its actions.

\textbf{JUDICIAL REVIEW}

In any assessment of the legal conflicts facing the Forest Service, there need be an understanding of the role the courts play in deciding the outcomes of the disputes. This

\textsuperscript{182} \textit{Supra}, note 142. Jones and Taylor note that between 1988 and 1992, on average less than 7\% of appealed actions were reversed or remanded to the decision-maker for additional work.

\textsuperscript{183} \textit{Id.} at 329.

\textsuperscript{184} Why else propagate administrative rules that insert not only costs and delays in project development, but serve as one more level of litigation, unless the rulemaker believed the appeals would in fact streamline the timber sale process?

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role is likewise important in understanding the relationship between delegation, and the agency’s management frustration. This section will discuss these relationships.

The role played by courts in clarifying and even defining an agency’s legal obligations has become ever more common, partially as a result of the various statutes providing standing for challengers of agency actions. Standing alone, however, is not responsible for the increase in challenges to the Forest Service. The increase can also be linked to the delegatory nature of the enabling statutes under which the agency must manage. As discussed in Chapter 3, the discretion afforded the agency under any of its three primary management statutes is substantial. That discretion, in a judicial context, has the potential for two discrete effects.

First, in any challenge to an agency decision under this set of laws, the reviewing court is tasked with determining the legality (procedurally, substantively, or both) of the agency decision. In doing so, the principle in reviewing agency actions is the notion that deference is due the agency’s decision. Only when the agency has acted arbitrarily, capriciously, or illegally, will a reviewing court overturn an administrative decision. Delegation, unfortunately, can wreak havoc with the theoretical functioning of this principle.

The standard by which a court must review agency action was established in Chevron, U.S.A. Inc. v. Natural Resources Defense Council. Justice Stevens, writing for the court, set forth the principle that when the intent of the Congress is explicit, both the agency and the court are bound to give effect to that clear intent. In cases where the

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185 The Administrative Procedures Act and the National Environmental Policy Act are two that have markedly increased judicial scrutiny of Forest Service policy and projects.
intent is not explicit or is ambiguous, however, the court is bound to review the agency’s action in the context of the standard of arbitrary, capricious, or contrary to the intent of Congress.

While this standard has often been read as assuring substantial administrative deference, it is only so if the court in question is stringently conservative, not activist. In the event any particular court is result-oriented, or willing to impose its own vision, it may easily overturn Forest Service decisions as “contrary to the intent of Congress”, as the primary national forest legislation is notably ambiguous.

The problem manifests when the court is left as the arbiter of the threshold decision of whether Congressional intent has been made clear in the language of the statute. The court must look to the MUSYA or the NFMA to glean whether there is a clear management intent. If the court finds one, then the agency’s actions must comport with the court’s particular finding, which is not necessarily equivalent to the agency’s own interpretation of Congressional intent. The court is empowered to second guess the agency’s view of the statute in cases where the intent of the statute is unclear. This sets the stage for an increase in litigation. It requires but one lawsuit, in which a court determines that the Forest Service has failed to comply with Congressional intent, and the floodgates are opened to every party looking to prevent any given activity associated with that statute. In other words, if a court finds that the Forest Service has misinterpreted Congressional intent in a given instance, every instance relying upon that particular interpretation is then suspect. As the former Chief of the Forest Service put it:

I would say that unfortunately, or some would say fortunately, these evolving statements of mission or purpose for the National Forests are so broad and esoteric that for practical purposes they are rather meaningless to anyone who seriously tries to relate them to a specific area of land. Unfortunately, people like federal judges end up trying to determine what these statements really mean in specific cases. 187

Now some might argue that the courts defer all too often to the Forest Service in upholding its administrative decisions. In other words, the Chevron standard provides the agency with too much deference for its actions. Data on this issue suggests that simply in terms of winning or losing, the Forest Service is typically the victor, winning nearly 54% of the NFMA lawsuits from environmentalists, and nearly 80% of the lawsuits initiated by commodity interests. 188 While the specific nature of the lawsuit certainly has an effect on the success rate of the agency, the slim majority of victories against the environmental challengers is hardly conclusive evidence that the federal courts are blindly deferring to the agency. Such a narrow margin of wins could as easily be obtained by flipping a coin in the courtroom.

It takes little imagination to visualize the demoralizing and chilling effects on public land managers of this type of scenario. With such randomness inserted into the planning process outcome, one suspects the Forest Service might seek to better its odds in each subsequent lawsuit. The problem, of course, is that in no particular instance is the agency any more likely to meet Congressional intent. Certainly, a court’s opinion is precedentially valuable in making that determination, but it offers no safeguard in future

187 Peterson, supra, note 176
188 Supra, note 142 at 326. The data is derived from NFMA litigation from 1977 to 1992.
litigation. Once again, the agency is left to its own devices, struggling to predict the legal outcome of its actions.

It is difficult, without a detailed analysis of each suit in question, to settle the quantitative question of judicial deference. It does appear however, that in nearly half the occasions, the Forest Service interpretation of the laws and rules that it must uphold, are adjudged to be inaccurate. In one half of the cases the environmentalists' interpretation of the laws and regulations is adjudged to be incorrect. Given that the specific facts of each case will drive the court’s analysis, it is nonetheless remarkable that there is no greater unanimity on the means by which the Forest Service meets its legal requirements. If the law is clear, and the rules promulgated to effect it are likewise clear, how can courts, half of the time, find for the agency and the other half, find against it?

Delegation, as set forth earlier, results in vague statutes with very little in the way of substantive tests for agency conduct. While it might be relatively easy for a court to determine whether the agency proposed a 40 acre clearcut or a 41 acre clearcut, or whether the agency left four trees, larger than 21 inches diameter breast height per acre or only 3, such standards are not legislatively or administratively present, and such questions are consequently not typically asked. The court instead must resolve questions such as “does this timber sale meet the biodiversity intent of the NFMA? And by the way what is that, and do the agency’s rules reflect that intent?” These types of questions lead even the most well intended jurists into an area in which they lack the technical expertise.
For example, recently the Fifth Circuit addressed an ongoing conflict over the Forest Service’s use of even-aged management on the Texas national forests. In that case, the challenge was made by the environmental plaintiffs that the Forest Service use of even-aged silvicultural techniques violated the NFMA, and the agency regulations implementing the NFMA. Various intervenor-defendants in the case made the argument that the NFMA was merely a planning statute and contained no substantive management provisions. In response, the court, in a less than comforting ruling, held the following:

In Sierra Club I, we implied that the NFMA has a substantive component. We found that the approval of even-aged management techniques were within the discretion of the Forest Service. This court reasoned that the Forest Service could take actions anywhere along the continuum between “preservation of the status quo” on one end, and “eradication of species” on the other. Allowing even-aged management was just such a discretionary action. This discretion is not, however, “unbridled.” We also warned that “[t]he regulations implementing NFMA provide a level of protection by mandating that the Forest Service manage fish and wildlife habitats to insure viable populations of species in planning areas.” In addition, the statute requires the Forest Service to “provide for diversity of plant and animal communities.” Consequently, this court has already determined that the NFMA and its associated regulations require the Forest Service to comply with the law on-the-ground rather than merely issuing standards and guidelines as part of its LRMPs.

The court of appeals went on to affirm the lower court’s entry of injunctive relief based upon the district court’s finding that the agency had violated the NFMA “and had not protected soil and watershed resources or inventoried and monitored other natural resources.” The court did not, however, define for the agency what level of protection is required.

189 Supra, note 130.
190 Id. at 373.
191 Id.
would satisfy the requirements of the NFMA. The Forest Service was left guessing what action might in fact meet this court's perception of the NFMA.

In a 1997 case from a federal district court in Pennsylvania, the court was confronted with claims that the Forest Service had violated the NFMA, as well as other statutes. The court, in a bizarre amalgam of procedure and substance, found that the agency had violated both the NEPA and the NFMA for its failure to develop a sufficient number of reasonable alternatives for the timber sale in question. While the holding was largely driven by the NEPA, the court took the time to indicate that the required additional harvest alternatives must “involve more uneven-aged management techniques.” The court apparently believed that the NFMA and the NEPA required that it direct the agency as to the type of silviculture it should consider in the sale area.

While the court did not second guess the agency's expert determination that even-aged management was appropriate, the court insisted that such a finding be made in the context of analyzing for an array of uneven-aged applications. In other words, the Forest Service decision to limit its NEPA analysis to a “no-action” alternative (largely a procedural matter), and a largely even-aged alternative (largely a substantive decision), was found to be arbitrary and capricious.

What do rulings of this sort suggest for the land managers attempting to get projects on the ground? The law appears to hold that the NFMA has some level of substantive requirement, though the courts also apparently believe that the while the discretion of the Forest Service is nearly boundless, constrained only by such

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193 *Id.* at 554.
requirements as insuring the viability of various species populations in the planning area, the agency must also provide for the diversity of plant and animal communities.

Practically, rulings of this nature are of little or no value to a land manager. The agency is left back at the drawing board, with its actions still subject to challenge. The courts are all too willing to say what was suggested was wrong, but cannot define what is right. Consequently, with ambiguous laws and regulations, the Forest Service is left with very little in the way of a means of predicting the legal outcome of any particular decision.

As another example, the court in Izaak Walton, relied upon the dictionary definition of maturity, when there are at least three such forestry definitions that immediately spring to mind (CMAI, the Fisher solution and the Faustman solution)\(^{194}\), all three independent of Webster. Certainly, the language in the Organic Act appears clear, at least to a forester. It also appeared clear to the court. Unfortunately, those two clear views did not happen to coincide. This historical vignette illustrates the largest pitfall. When two reasonable interpretations of a statute are possible, the challenge will invariably arise to that version which the agency has adopted, in many cases simply because the challenge can be made. The court is then left determining which of the two versions is the proper view, or perhaps finding its way to a third version. In some cases the agency may prevail; in others it will not. In any event, conflict is perpetuated.

\(^{194}\) CMAI, or Culmination of Mean Annual Increment, may be termed biological maturity or the point at which harvest would occur to maximize the production of timber on a site. The Fisher Solution, a measure of financial maturity, provides that when the increase in the volume of an age class of trees is equivalent to or is less than the interest rate that could be earned upon the dollar value of those trees, the trees are mature and should be harvested. The Faustmann solution, another measure of financial maturity, is similar to the Fisher solution, except that it incorporates the value of the land the trees grow upon into the determination of value.
These cases point out that the agency’s difficulties lie not solely with the very specific or the very broad provisions of the law, but in the manner in which the two are melded. Broad discretionary authority, bounded by often vague and subjective limitations, does not create an enviable situation. While the courts, in a large percentage of the lawsuits against the Forest Service, defer to agency expertise in its interpretations of the NFMA and the corresponding regulations, the problem remains that the challenges continue to occur, with ever greater frequency.

The threat of litigation and the lawsuits themselves can have profound impacts on the agency, regardless of whether the agency eventually prevails in the suit. Concern with these very lawsuits and appeals was the foremost rationale offered by the current Chief of the Forest Service as to why the FY 2002 forest product offering will not increase from prior fiscal years, though he apparently believes it in fact should increase.\textsuperscript{195}

The second concern is that judges harbor, as does the general populace, opinions on the emotionally charged issues that forest management seems to generate. While an idealist might argue that the court’s role is as objective arbiter of the law and reviewer of the facts, this faith in judicial conservatism is probably naïve.\textsuperscript{196} Judges, like the public, are susceptible to the campaigns waged to paint the Forest Service in a diabolical or dysfunctional light. In contrast with other professional decisions (medicine, nuclear

\textsuperscript{195} Statement of Dale N. Bosworth, Chief USDA Forest Service before the Sen. Comm. on Energy and Natural Resources, Fiscal Year 2002 Budget, May 8, 2001. Chief Bosworth specifically cited to “the costs and time to navigate the complex appeals and litigation processes, [and] the need for additional work directly attributable to legal decisions.”

physics, military choices, etc...), the public is encouraged to actively participate, and does at every turn, in the decisions made on national forests. The focus is diverted from the science required for meeting management objectives and whether management goals can be met, to arguing over what those goals should be. Public land management is not a field that lends itself well to scientific management any longer because so much of the management direction is based upon personal values.\footnote{197} The relatively minor role to which science has recently been relegated is in keeping with the nature of those most in opposition to the Forest Service.\footnote{198} Allan Fitzsimmon labels this group as the “new paradigmists:

They are forsaking emphasis on the roles played by theory, empirical evidence, and verification—in favor of high-sounding but subjective, insubstantial, and verifiable concepts, such as the notions of ecosystem integrity, health and sustainability. The change in beliefs allows the new paradigmists to advocate a public policy of federal protection of ecosystems whose success or failure cannot be judged by objective and verifiable criteria or through the use of independent and replicable testing. The Forest Service provides a practical example of this shift away from the tenets of science to a value-based system based on opinion and subjectivity.\footnote{199}

\footnote{197} Some management models, for example the various state trust models, do not appear to suffer nearly so much from this malady. State trust land forests are managed by fiduciaries with clear and enforceable obligations to manage the lands in a particular fashion (typically for the sustained economic benefit of the beneficiaries). While these management models too are affected by the erosion of science as a management touchstone, the impact is less profound as these management agencies’ respective missions are far clearer, and the legal tests to assess the managers’ behavior are more precise. The “values” driving trust land management are explicit and subject to change only in a rigorous legal and political fashion—by amendment of the states respective constitutions, coupled with congressional approval.

\footnote{198} The Second Committee of Scientists, at some level, appears to have recognized this problem, and recommended that scientific review be increasingly incorporated into project design. However, the thrust of the recommendation is not necessarily designed to return credibility to the agency’s scientific reputation, but perhaps is designed to facilitate projects in the face of a general public distrust of agency “science.” This approach, in the long term, may have the potential for resurrecting the agency’s image, provided the peer reviewers concurred with agency determinations.

\footnote{199} Allan Fitzsimmons, Defending Illusions 7 (1999).
Unfortunately, in the absence of any scientific touchstone or any clear congressional direction, courts are left with refereeing arguments over what Congress might, or even should, have meant. It should not be suggested that values are not important, even essential, in the formation of sound forest policy, but the forum in which that policy should be developed is the body best able to balance the varying values—the Congress. Courts are not designed to arbitrate, and should not arbitrate, such political questions. Unfortunately, ambiguous statutes provide every opportunity for the courts to do just that.

Summary:

Clarity of purpose, and priority of goals are the fundamental problems. Though brimming with discretion, the Forest Service cannot effectively exercise that discretion in the face of an unflappable conflict industry whose very existence is fed by inciting disputes with the agency over federal land management. The blame for this collection of results can be laid largely at Congressional feet. Failure to deal with the fundamental conflicts permeating national forest land management simply shifted the focus of litigation and contention to the agency. Any critic with a bona fide concern for the manner in which the national forests have been managed should realize that Congress is ultimately responsible for choosing the management goals for the national forests, and those that would oppose Forest Service actions should recognize and accept that fact.
CHAPTER 5: THE MYSTERIES OF MULTIPLE-USE

My thesis is that multiple-use as a management concept for national forests and other public lands is, if not dead, fading fast. I don't care what the Multiple-Use Sustained Yield Act says—multiple use has fallen on hard times, and the prognosis for recovery, at least in the short term, doesn't look too bright.

*Jack Ward Thomas* 200

In simplest terms the concept of multiple-use is premised upon the ability of a land manager to balance competing interests, all the while providing any number of natural resource outputs. On the national forests, this Congressionally mandated task has been much maligned. The criticisms often cite the ambiguity of the Multiple-Use Sustained Yield Act, or MUSYA, and the nearly meaningless management standard it provides. The MUSYA, the first of the three legs of Chief Emeritus Thomas’s national forest management stool201, sets forth the mission of the agency. The MUSYA provides for the mixing and matching of resource outputs in the manner most in the public interest. Unfortunately, the discretion embodied in the MUSYA is a management curse by any other name. It does not embody true discretion, but rather bestows a false sense of assurance upon the Forest Service. In order to guarantee discretion, the law would have to insulate the agency from the interference of the judicial branch, limit the effects of

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200 Jack Ward Thomas, “The Times They Are A 'Changin'—Is Multiple-Use a Worn-Out Concept?” Speech at the University of Washington (November 15, 2000)

201 *Id.* Chief Thomas describes the MUSYA, the RPA and the NFMA as the legs of the three-legged stool making up national forest management. He argues that all three legs have essentially been sheared off, leaving the Forest Service and the national forests without a management framework. Chief Thomas argues that the MUSYA has been abrogated by the steady decline in active management, that the RPA has never been seriously relied upon by Congress, and that the NFMA forest plans have never been implemented as written. This legal triumvirate, it appears, has been eroded to the point where it no longer can support the weight of the agency.
transient executives, and ensure that Congress ratified the agency’s choice of outputs with budgetary appropriations. The MUSYA does none of these things.

What the law does do is grant the agency a free hand in establishing what may be the “best” combination of outputs the national forests are able to provide. That free hand, however, comes at a price. With no particular criteria to make the decision as to what that “best” combination may be, the agency is left twisting in the wind each and every time it makes an allocation of outputs. The authority delegated to the agency to make decisions on uses is also the means whereby those decisions are attacked, and further, is responsible for the agency’s inability to justify its positions.

This Chapter will examine several of the outputs that the Forest Service must manage, intending to demonstrate that though the law has remained fixed, the outputs have varied with the political and legal forces that buffet the agency. The Multiple-Use doctrine explicitly ensures that the respective national forest outputs will fluctuate to some extent as the “needs of the American people” change over time,\(^202\) while the other side of the multiple-use coin, the sustained yield doctrine, explicitly ensures the outputs of the national forests will not be inappropriately diminished.\(^203\) Fluctuations in this instance, however, have occurred as the agency has sought to comport its management strategy with the political demands set before it. Those political demands, not reflected in statute apart from the broad mission of the MUSYA, have ensured that the Forest Service’s interpretation of multiple-use sustained-yield, and its allocation of outputs will never divorce it from criticism and complaint.


\(^{203}\) 16 U.S.C. §531(b).
Ecosystem Management: An Example of the Administrative Shell Game

In order to illustrate the difficulty in applying multiple-use, sustained yield requirements in a manner for which no cogent statutory authority exits, we need only turn to the concept of ecosystem management. Not an explicit product of Congress, Allan Fitzsimmons has recently noted that the NEPA and the ESA instead serve as the linchpins for the Forest Service embrace of ecosystem management.\textsuperscript{204} While the NEPA and ESA, do not directly prescribe Forest Service management, it is axiomatic that these two laws have impacted Forest Service decision-making to an ever increasing degree since their respective passage. As these two laws are not the subject of examination, I will not speculate on the degree to which they also delegate authority to the Forest Service. Suffice it to say that the Forest Service is relying ever more on these laws to support programs that differ from the traditional focus of the agency—wood fiber production. In fact, as reflected in Chart 9, timber production peaked at nearly the same time as the passage of the NFMA, dropped slightly thereafter, peaked again some 15 years later, and has plummeted dramatically since. The plummet occurring during the formulation and implementation of the ecosystem management strategies.\textsuperscript{205}

\textsuperscript{204} Supra, note 199.

\textsuperscript{205} It is commonly held that ecosystem management did not necessarily precipitate the decline in timber volume sold, but rather may have been an attempt by the agency to address that very decline.
Perhaps not surprisingly, the projections of budget priorities for the next two fiscal years, 2000 and 2001, reflect less than 7% of the entire Forest Service budget will be dedicated to timber sales. The corresponding goals for timber volume offered for sale are less than 4 billion board feet per year, with fiscal year 2001 representing less volume than fiscal year 1998. This volume figure corresponds to a reduction in volume not seen on national forests since circa 1955. There is no reason to suspect that actual harvest volumes will exceed these projections.

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207 Id.

In contrast, production of the goods and services the Forest Service currently emphasizes depend largely upon the acceptance of the ESA and the NEPA as enabling legislation, and upon a particular interpretation of the MUSYA, and the NFMA. While timber production, in any commercial sense, has atrophied, the notion of ecosystem management has correspondingly blossomed. Again, the legal rationale for this paradigm is premised upon a holistic reading of the entirety of the laws directing the Forest Service. There may not be however, as Fitzsimmons and Jack Ward Thomas point out, any discrete statutory authority for ecosystem management (though the rulings of the Honorable Judge Dwyer in Seattle Audubon Society v. Evans, 771 F. Supp. 1081 (W.D. Was. 1991, aff’d at 952 F.2d 297 (9th Cir. 1991), and Seattle Audubon Society v. Mosely, C92-479WD, May 28, 1992; July 2, 1992, may argue otherwise). The interesting part of this puzzle is that while the Forest Service has embarked on a management journey designed to enable continued timber management, albeit as a much reduced level, the new paradigm has nonetheless not contributed to any drop-off in litigation or in appeals.

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209 See, Errol E. Meidinger, Organizational and Legal Challenges for Ecosystem Management, in Creating a Forestry for the 21st Century 361 (Kathryn A. Kohm et al., eds. 1997). Meidinger sets forth his vision of the varying statutory bases for ecosystem management. Interestingly, Meidinger is able to see within these statutes a Congressional intent to manage on an ecosystem scale, and for particularly non-commodity resources, while others view the MUSYA and the NFMA in quite a different light. The fact that these statutes are subject to such broad interpretations, furthers the argument that such vague legislation will generate conflict and agency schizophrenia. For a detailed examination of the nature of ecosystem management law, See Oliver A. Houck, On the Law of Biodiversity and Ecosystem Management, 81 Minn. L. Rev. 869 (1997). For a specific examination of the NFMA “biodiversity” provision See Michael A. Padilla, The Mouse That Roared: How the National Forest Management Act Diversity of Species Provision is Changing Public Timber Harvesting 15 J. of Envtl. L. 113 (1996/97).

210 Id.

211 Supra, note 199 and infra, note 305.
It should be apparent that the notion of ecosystem management, without the explicit support of the Congress, is not the panacea for conflict that was once thought.\textsuperscript{212}

With the decline in the timber output, the theory of multiple-use management suggest that some other outputs may have in turn increased. And they have; national forest wilderness and general recreation area use and visits has increased steadily over the last 30 years, well exceeding 12 million visitor days to wilderness areas alone in 1995.\textsuperscript{213}

Correspondingly, the area of designated national forest wilderness has also been steadily growing, to encompass in excess of 30 million acres.\textsuperscript{214}

\begin{center}
\textbf{Chart 10. Visitor Days to the National Forests, 1950-1996}
\end{center}

\textsuperscript{212} The GAO, as recently as 1998, opined that ecosystem management was an attempt by the Forest Service to avoid and/or prevail in legal challenges to its management of the national forests. See Forest Service Priorities, Evolving Mission Favors Resource Protection Over Production, GAO/RCED-99-166 (1999).

While the 2000 and 2001 annual Forest Service budgets projections do not predict an increase in Full Time Equivalent (FTE) or dollars committed to the wilderness output, it will nonetheless comprise 13.9% of the budget (nearly double the timber sale component),\(^\text{215}\) and command 6,000 FTE, or nearly 1/6 of the agency’s personnel (and nearly double the FTE committed to the timber output).\(^\text{216}\) Yet in spite of these acreage increases, the Clinton administration has pushed the agency into analyzing for the potential of adding an additional 58.5 million acres of national forest as \textit{de facto} (certainly not \textit{de jure}) wilderness, and the agency has in fact adopted rules doing precisely that. Hunting and fishing have also increased on the national forests since 1965, though not in so dramatic a fashion.\(^\text{217}\)

What do these examples demonstrate? As the GAO has noted,

> While NFMA and other statutes…provide little direction for the agency in resolving conflicts among competing uses on its lands, the requirements in environmental laws and their implementing regulations and judicial interpretations do not [provide little direction].\(^\text{218}\)

Various outputs from the national forests have seen often dramatic swings in the last 25 years, while others have remained fairly stable. The law, however, the Congressional mandate to the agency, has remained static. No substantive piece of national forest legislation has been enacted since 1976. Instead, as a result of public and political pressures, and certainly litigation, the Forest Service itself has seen fit to juggle

\(^{214}\) \textit{Id.}\(^{215}\) \textit{Supra}, note 206.\(^{216}\) \textit{Id.}\(^{217}\) \textit{Supra}, note 213, at 173.
the multiple-use balls in the order and speed it has seen fit, often not even having that choice as special interests and the judiciary determine how many balls to give the agency, and tutor it in the art of juggling. The result has been the susceptibility of the agency to every political force imaginable, from local timber protesters and industrial lobbyists, to federal appellate judges.

Consequently, resource output priorities have been unpredictable and inconsistent. The result is that the agency cannot adequately justify its chosen path, and conversely, cannot defend that path when challenged. As Fitzsimmon argues:

...There is no legal authority for any federal agency to make protection of ecosystems its prime objective, and in recent years Congress specifically rejected efforts to enact that idea into law...Congress needs to reassert its authority over federal lands and clarify its priorities for federal land managers. Does Congress want multiple use and sustained yield or not? Does Congress want the protection of endangered or threatened species to trump all other potential uses of public land all the time? 219

This determination contrasts plainly with the such findings as that of Manning et al:

The authors conclude that the evolution of national forest policy toward ecosystem management-related principles is strongly supported by the public and that these management strategies should be implemented more quickly in response to this evolving public opinion. 220

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218 GAO REPORT, EVOLVING MISSION FAVORS RESOURCE PROTECTION OVER PRODUCTION, 7 GAO/RCED-99-166 (1999).
219 Supra, note 199 at 277.
This creeping evolution of management models is manifested most recently in the recommendation of the 2nd Committee of Scientists, the Forest Service has completed administrative rule-making for the purpose of implementing the sustainability thrust of the Committee’s report. This paradigm appears to differ little from that of ecosystem management, except for its more explicit encompassment of the human component (perhaps it is only a matter of biocentric degree). The second thrust of the recommendations is the increased use and reliance upon collaborative efforts to resolve national forest disputes. This revised vision of national forest management will be ensconced in agency rules as law (which is a great deal more tangible than any prior incarnation of ecosystem management). The administrative rules will track closely the recommendations of the Committee, without the need for Congressional assent. The argument is that these rules will comprise the methodology designed to implement the policy. Methods, and rules for that matter, are never free to alter the fundamental legislative direction. In this case, since the legislative direction is muddled, the rule-makers are pretty much free to experiment. For example, the biodiversity provisions of the NFMA that the Forest Service has previously implemented in rule, and those related management concepts that the Committee has recommended, exceed even the rigor of the

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221 A product of the NFMA, the 2nd Committee released its report in March, 1999.
223 See, Roger Sedjo, Does the Forest Service Have a Future? in A VISION FOR THE U.S. FOREST SERVICE: GOALS FOR ITS NEXT CENTURY 110 (Roger Sedjo, ed., 2000) for the recognition that the Committee of Scientist’s recommendations are utterly lacking a legislative foundation, and are therefore highly improper, and potentially illegal.
Endangered Species Act. The new regulations, as has been suggested, may spell the end of active management on the national forests.\textsuperscript{224}

There seem to be two easy predictions for the results of adoption of this latest ecosystem management iteration. One, if the rules do not prohibit commercial logging of national forests, there will likely be challenges that whatever the remnant commercial logging is somehow "unsustainable." Two, the rules will not, as they propose, ameliorate conflict by virtue of some collaborative process; nor for that matter, even ensure that superior management decisions are made. Collaborative decision-making is an effort to diffuse the decision-making power away from the agency, toward the interested publics. It is, by analogy, the passing of the buck by the agency, after discovering it could not work with the discretion it guarded so closely during the 1960s and 70s. As Congress first sought to avoid the dangerous terrain, the Forest Service now seems ready and willing to do the same, even of it must abdicate its professional autonomy in the process.

Collaboration, of course, only compounds the delegation problem. Instead of agency personnel, specifically trained in the particular management fields, and ostensibly cognizant of some sort of goal set for it by Congress making management decisions, these same personnel will only be another stakeholder at the collaboration table. It is perfectly feasible that a collaborative effort might produce a collective decision acceptable, even embraced by the stakeholders, yet at the same time be violative of one law or another. Congress will be further removed from the process rather than forced to directly deal with the management difficulties. If responsibility is to ultimately be borne

\textsuperscript{224} K. Norman Johnson, \textit{Forest Assessment and Planning at Large Scales for the National Forests: Lessons from the Northwest Experience}, paper prepared for the University of Montana and Resources for the Future.
by the Congress in collaborative efforts, Congressional ratification of such efforts is crucial, both for legal and policy reasons. Perhaps foremost, ratification will place the credit or blame for collaborative outcomes, not on the heads of the collaborators, but atop Congress.

Summary:

The manner in which the various outputs of the national forests have been adjusted over time can be attributed to an array of causes. Perhaps the simplest is that the Forest Service is simply meeting its statutory mandate to manage the forests in the manner that best meets the needs of the American people. It seems more likely that the Forest Service is responding to pressures, both legal and political, that are tugging on the agency in many different directions at once, threatening to shred the agency fabric. Ecosystem management was created, at least partially, in response to those forces, as a means of forestalling conflict. With the multiple-use mission as it currently stands, however, no single management construct or theory appears to be able to permit the Forest Service to avoid the conflicts.

Delegation plays the key role in both facilitating the conflict, and in ensuring that no end will ever be in sight. The MUSYA, a markedly discretionary statute, has ensured that any management paradigm the agency adopts will never adequately satisfy the conference “Collaboration and Decision-making on the National Forests: Can it Work? Four Perspectives of the Potential Problems and Opportunities” (January 22-23, 2001).
various multiple-users. That dissatisfaction, expressed particularly in lawsuits, forces the agency to alter its positions, and seek new paradigms to temper the dissatisfied. In doing so, the agency merely replaces one group of critics with another group of critics. The result is an agency staggering like a drunk down a dark alley, reeling from one side to the other, never able to regain its balance.
Chapter 6: Forest Service Budgeting: Compounding the Problem

There is no Legal Direction to generate a Profit from the Sale of the National Forest Timber. The governing statutes under which the national forests are administered do not mandate that managers seek to produce a profit.

-U.S. Forest Service Report

Some now warp these fifteen words, claiming that they authorize the Forest Service to ignore financial considerations completely and lose money. In fact, the words say that dollar profits and use yields need not be the “greatest”. The 1960 Act is not a license to lose money.

-Robert Wolf

If the Congress believes that increasing revenue or decreasing costs from the sale or use of natural resources should be mission priorities for the Forest Service, it will need to work with the agency to identify legislative and other changes that are needed to clarify or modify the Congress’s intent and expectations for revenue generation relative to ecological, social and other values and concerns.

-General Accounting Office

In addition to the matters discussed in the last Chapter, there are other aspects of the Forest Service that are also susceptible to the hazards of delegation. Two of these, budgeting and administrative rules, are not products themselves of delegation to the agency, but rather are agency processes that delegation has the tendency to corrupt. The allegations made in Chapter One, that the agency has been ignominiously deserted by

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Congress, is facilitated by the marriage of delegation and these two agency facets. This Chapter will discuss the difficulties faced by an agency in coordinating a budget with management goals in a delegatory environment. The next chapter will address the issue of administrative rule-making, and dangers fraught in that activity.

There is not, even today, an agreement on the fundamental question of whether the United States Forest Service must ever return a profit to the Treasury. Absent agreement on even this most basic question, it has become both easy and common to target the process whereby the Forest Service budget is developed and implemented. The General Accounting Office, has, in the last several years, repeatedly criticized one aspect or another of the Forest Service budget process, and the agency’s accountability. The debate is particularly remarkable when you consider that in its nascence, the Forest Service funded its activities from national forest revenues, and that today the agency costs taxpayers nearly two billion dollars annually. There is little doubt that the Forest Service budget and budget process can be frustrating, mysterious, and not least, expensive. As this paper is examining delegation and its effects, it seems appropriate to dedicate a chapter to how delegation and ambiguous statutes may exacerbate these budgetary concerns.

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230 Supra note 228, Forest Service, A Framework at 18-19.
It is not my intention to rehash the criticisms that have been previously leveled; rather, I am interested in the role that the budget plays in light of the statutory delegation. Delegation, and its symbiont, ambiguous laws, provide a difficult realm in which to match a budget to a program. Though the problematic result is often recognized, it is not often that delegation is identified as one of the causes. In an ideal situation, an agency would have an mission "x", established clearly by the Congress. The budget necessary to effectuate that mission would be then a function of that agency mission, or \( f(x) \). Were it that simple, for in reality, there is no mission "x", but rather a mission that might be best represented by \( a + b + c + \ldots + n \). Additionally, the Forest Service budget is hardly a mere function of its mission (however that might be defined), but is rather a complex result of an agency requests, executive scrutiny, and legislative politics. This multi-layered process, unfortunately, offers a prime opportunity for delegation to create yet another series of problems for the agency. Then Forest Service Chief Jack Ward Thomas noted the inherent problem:

Forest Plans reflect resource conditions and trends, public demands for such resources, and public expectations (or "desired future conditions"). They are not designed to anticipate agency budgets. This lack of connection between forest plans and the appropriations can frustrate both agency personnel and the public, since anticipated outcomes may not be realized.\(^{231}\)

This perception is described by V. Alaric Sample as the Forest Service’s prisoner’s dilemma. He notes that:

For many years, they [Forest Service field officials] have seen their budget proposals warped by the appropriations process, making it difficult for

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them to fulfill their perceived responsibilities for multiple-use forest management.\textsuperscript{232}

This particular disconnect between forest plans and budgeting is but a slice of the larger pie. The failure of program requests to match budget appropriations is, after all, a problem inherent in any bureaucracy. Funding levels very seldom reach the level the agency would ideally desire. Roger Sedjo identified this problem in his dissent to the 2\textsuperscript{nd} Committee of Scientists Recommendations wherein he stated:

As currently structured, there are essentially two independent planning processes in operation for the management of the National Forest System: forest planning as called for in the legislation; and the Congressional budgeting process, which budgets on a project basis. The major problem is that are essentially two independent planning processes occurring simultaneously...There is little evidence to that forest plans have been seriously considered in recent years when the budget is being formulated.\textsuperscript{233}

The Forest Service, however, presents an even more fundamental problem of a related, but distinct sort. By virtue of Congressional delegation, the authority of the Forest Service to chart its own administrative course in choosing management of the national forests implies certain difficulties. The largest is that absent explicit congressional direction, it is surely possible that the agency will choose a course that any particular congress will endorse in its specific appropriations. There is no guarantee that the administratively prioritized budget requirements and requests developed pursuant to the MUSYA, the NFMA, and RPA will match congressional expectations for outputs. In

\begin{itemize}
  \item \textsuperscript{232} V. Alaric Sample, The Impact of the Federal Budget Process on National Forest Planning 213 (1990).
  \item \textsuperscript{233} Roger A. Sedjo in Sustaining the People 's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century, USDA, Comm. of Scientists, Appendix A, Views of Committee Members (March 15, 1999).
\end{itemize}
the event the two coincide, it is as likely serendipitous as intentional. Data from 1977-1986 suggest that in none of the fiscal years within that period did the Forest Service Budgets and the RPA program targets coincide. Nor, for that matter, did these Forest Service budgets, the RPA targets, the OMB’s recommendation, nor Congressional funding happen to coincide.334

This disjunctive planning relationship can be visualized as Figure 3 below depicts. Other actors, such as the USDA and the Office of Budget Management, both have respective roles in modifying a Forest Service proposal. They do not, however, necessarily play a role in interpreting Congressional intent, and therefore are not co-equals with the Service in this depiction. That is not to suggest that delegation’s impact on budgeting is not compounded by these intermediary budget actors. They too contribute to the difficulties in matching management to funding.

![Figure 3. Congress and Forest Service Budget Relationship](image)

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234 Supra, note 232 at 24.

235 This chart admittedly oversimplifies the Forest Service budgeting process. The role of the various Congressional subcommittees, the Office of Budget Management, and the Department of Agriculture are

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This divergence in funding is manifested in the agency's inability to achieve the goals it has set for itself:

Congress itself has undermined implementation of the multiple-use concept by its failure to match budgetary actions with legislative instructions. Repeatedly, the Forest Service has gone to Congress with budget proposals requesting levels of spending for the various resources necessary to achieve "harmonious and coordinated management of the various resources" only to have Congress differentially fund one over another.\textsuperscript{236}

While it is recognized quite frequently that budget appropriations and planned outputs rarely coincide, the basic cause seems overlooked. It is not a matter, as the GAO would suggest, of merely implementing a different or improved budget format, or of more closely measuring the outputs of the forest plans. The fundamental flaw will remain: Congress will continue to covertly exert its management will through the budget process, without ever expressing that will in plain terms that can be apprehended and agreed upon by the agency and the public.\textsuperscript{237}

The incentive for this type of behavior hearkens back to the discussion in Chapter 2. Budget decisions provide the perfect mechanism to make delegation work. In this instance, the fragmented nature of the public interest supports the tendency for legislators to delegate—like the siren's song, it beckons to them. But certain legislators face a quandary—how to delegate and still ensure the agency provides those commodities most substantial. The purpose of the chart, however, is to depict the difficulty in reconciling Congressionally established budgets, with Congressionally established missions.

\textsuperscript{236} DONALD W. FLOYD, ED. FORESTS OF DISCORD 21 (1999)

\textsuperscript{237} Supra, note 146.
demanded by his or her constituency? The answer lies in the budget. It has been suggested that:

In areas where local industries are heavily dependent on national forest timber outputs, members of Congress pay attention because "this translates into employment in the affected industries and ultimately into votes."  

There is evidence to support this contention; more often than not Congress has increased the timber harvest volume in the final appropriations bill over what the Forest Service has proposed. Provided the agency's mission is ambiguous, it is a veritable certainty that budget proposals will not meet the expectations of any particularly constituted Congress. There is no reason, for example, to believe that the 106th Congress will support the self-imposed mission of the Forest Service stemming from a vague statute enacted by the 99th Congress. Conflicts then, between the bureaucracy and the legislature are resolved with the budget. There arises no need to enact more specific legislation with its associated costs. That, after all, might defeat the purpose of the initial delegation. The budget provides fertile ground for the legislature to satisfy its immediate goals without the need to undermine the benefits associated with delegation.

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238 Supra, note 232 at 149.

239 Id. at 150. Sample's data is from 1977 to 1989, during the peak timber harvest years on the national forests. In each year but two, it appears that the final committee appropriations bill suggested an increase in the harvest above the Forest Service proposal (all in excess of 10 billion board feet). Sample also notes the incredible specificity of the Fiscal Year 1986 conference report which dictated both volumes and regional timber output levels to the Forest Service for Oregon and Washington. Such specificity, if a
A New Budget For A New Mission?

Robert Nelson, in his eye-opening treatise on the demise of the Forest Service, published just prior to the destructive and wide-spread fires of the 2000 season, argued the following:

The fire-fighting activities of the Forest Service could be justified economically in the past as necessary to protect the commercially valuable timber stored in the national forests. For many years revenues from timber sales in fact substantially exceeded the costs of fire fighting. However, this is no longer the case. If saving the timber for harvest is no longer a top priority, new justifications for spending hundreds of millions of dollars per year on forest fire control will be necessary.240

Professor Nelson was nearly prescient in his claim. The National Fire Plan for fiscal year 2001, promulgated in response to the 2000 fires, establishes a budget totaling $1,103,421,000, as an addition to the activities for which the Forest Service has already been planned and budgeted. Arguably, only $985,147,000 of that sum is actually earmarked for the national forest system. Nonetheless, this lesser figure represents approximately 25% of the agency's FY 2001 entire budgetary projection issued in March 2000, just prior to the fire season, a budget that encompasses all Forest Service activities, not simply national forest management.241 The national fire plan sum earmarked solely for the national forest system represents 77% of the FY 2001 national forest system budget target, and 128% of the FY 2001 wildland fire management target.242

regular occurrence, could actually shift responsibility for national forest decisions back to the Congress, in a manner that could be easily appreciated.

240 Supra, note 2 at 25.
241 Supra, note 206.
242 Id. at Appendix A.
In contrast, the Bush administration’s FY 2002 budget proposal for the Forest Service reflects a 31.9% reduction from the prior year’s budget in the wildland fire management category. If approved by Congress, the 2002 budget will apparently alter the management statements made by that the FY 2001 budget and the National Fire Plan. By GAO estimate, the forest fuels reduction goals set by the agency cannot be met with such a budget.

Be that as it may, the argument could be made that the FY 2001 investment by the Congress, in what might be termed as “forest health and sustainability,” reflects a new mission for the agency, one evidenced and accompanied by the appropriate legislative funding. If so, it provides an example of how the Congress is able to manipulate the role of the agency. There will be those that will praise and those that will condemn the National Fire Plan, but the fact remains that it will, with dollars and performance expectations, drive the Forest Service in a particular management direction. Unfortunately, there is no assurance the direction will comport with the requirements of the national forest legislation. It is easy, for example, to envision a preoccupation with precommercial thinning, at the expense of commercial harvesting, or even to the exclusion of commercial harvesting.

The difficulty is again not with whether the substance of the National Fire Plan is good or bad, sound or flawed. The difficulty resides with the Congressional willingness to manage with purse strings, not explicit legislation; to forego an explicit forest

243 USDA Forest Service FY 2002 Budget Justification
management direction, and replace it with a politically embraceable, but short term and incomplete remedy.

Summary:

Criticisms that Congress manipulates only the timber budget, and not other resource outputs, provides credence for the argument that delegation empowers the use of the budget as a covert management tool. Timber has been, by and large, the premiere commodity of the national forests in terms of economic measurement. By no coincidence it is perhaps the most salient output in terms of translating to votes. As such, it is fairly easy to see that as Congress dabbles with national forest timber funding (and output) it is in the best interests of the majority of legislators. I must reemphasize that it is the variability in the perceptions of what Congress expects that permits this game to occur. This potential for change in Congressional expectations has been observed by Farnham's examination of Forest Service and Congressional budget trends:

Because of the apparent lead that Congress takes in determining funding, the budget data suggests that Congress is attempting to push the Forest Service toward a particular balance among the five traditional multiple uses. The logical conclusion is that Congress has been the impetus for the changes that are occurring in Forest Service Appropriations.

Farnham goes on to note that this situation reflects a breakdown between the planning process and the budget process; in other words, the same conclusion reached by

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245 I do not suggest that if the value of water or recreation were captured, the market value of these outputs might not exceed timber. The fact remains that these outputs remain largely unvalued and uncaptured by the Forest Service.

the GAO.\textsuperscript{247} This planning and budget difficulties are again only the symptoms; a fundamental cause remains the ambiguous delegation of national forest management and law-making power to the Forest Service.

\textsuperscript{247} \textit{Id.} at 266.
CHAPTER 7: ADMINISTRATIVE RULES: FERTILE GROUND FOR DELEGATION’S HAND

Agencies cannot resolve controversial issues with dispatch because all of the political pressures that Congress would have to wrestle with in resolving an issue are also felt by the agency and, in addition, Congress imposes upon the agencies extremely time consuming procedural requirements and then fails to give them sufficient funding to fulfill these requirements.

David Schoenbrod

Administrative rules can provide as much “law” directing an agency’s actions in many cases, as can statutes. Agency rules are typically adopted unilaterally by the agency, with executive approval, though typically with either public participation via a formal rulemaking procedure, or an environmental policy act, or both. The guiding tenet is that the agency may not promulgate rules for which there is no statutory authority, nor may the agency contradict in rule the authority set forth in statute. Consequently, when the underlying statutes’ meaning cannot be plainly understood, the agency stands in a precarious position at rule-making time.

Delegation and Administrative Rules

The role that agency rules play in the operation of any bureaucracy should not be underestimated. In many cases, administrative rules provide the substance of the agency’s operations, filling in gaps left by the enabling legislation:


\[249\] See generally, Administrative Procedure Act, 5 U.S.C. 551 et seq.
The general pattern of legislation providing for public and private rights and privileges to the public lands and their resources has been for Congress to state general policies and to delegate to the Federal land managing agencies broad discretion to implement the statutory policies.\textsuperscript{250}

The result of delegation, however, is an intensification of this process. The basic legal premise guiding administrative rulemaking is that the agency shall not promulgate rules that either contravene the underlying statute, nor that create new law not contemplated by the legislature. The legal rationale is similar to the policy arguments offered against delegation in general: to prevent the executive branch from usurping the authority of the legislative branch in a manner in which legislative safeguards will not be in place. The determination of whether agency rules have violated this restrictive principle is unfortunately made more difficult by the enactment of ambiguous statutes with broad delegatory authority. As the scope of delegation and the statutory ambiguity increase, a test to determine whether the agency has acted \textit{ultra vires} in its rulemaking becomes more difficult to formulate. This was recognized early on:

Agencies should be required to state in their regulations: (a) any administrative interpretations of statutory language, and (b) the standards under which statutory rights are to be administered and discretionary authority exercised. This will promote greater certainty in the administrative process, which is at the heart of any legal system. It will also facilitate congressional oversight to determine whether policies are being carried out in accord with congressional intent.\textsuperscript{251}

The key to this observation and recommendation is that Congress will explicitly comment on whether the agency's rules meet the intent of the law they interpret. The

\textsuperscript{250} \textsc{public land law review commission, one third of the nation's land. a report to the president and the congress} 251 (1970).

\textsuperscript{251} \textit{id.} at 251-252.
ability of Congress to do so is pinioned upon the agency making crystal clear in its rules, what its interpretation of the law is. If either recommendation is absent, the system breaks down—if the agency is not explicit, and if Congress chooses not to address the rules, then any hope of direct Congressional responsibility for agency actions is lost.

Two examples of the dangers presented when delegation meets agency rulemaking are the Clinton administration's roadless initiative\(^{252}\) and the 2nd Committee of Scientist's Recommendations for national forest management planning rules.\(^{253}\) The former proposes limitations on the uses and management of approximately 58.5 million acres of the national forests, while the latter suggests a management paradigm based upon sustainability and collaborative decision-making. Both represent management directions that reflect no explicit legislative direction, and rather are creations of the executive branch.

### I. The Roadless Initiative

On January 28, 1998, the Forest Service announced that it would enact an 18 month moratorium of future road construction and reconstruction in roadless areas of the national forests. The agency announced as well that it would commence development of a long-term road management policy during the pendency of the moratorium.\(^{254}\)


\(^{253}\) 65 Fed. Reg. 67,513 (2000) codified at 36 C.F.R. pts. 217 and 219) For the underlying rationale and study results, see *Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century*

\(^{254}\) 36 C.F.R. § 212 (1999).
On October 13, 1999, the President issued a Memorandum to the Secretary of Agriculture directing the Forest Service to promulgate regulations to "provide appropriate long-term protection for most or all of these currently inventoried 'roadless' areas, and to determine whether such protection is warranted for any smaller 'roadless' areas not yet inventoried." In compliance with this directive, the Forest Service, on October 19, 1999, published a Notice of Intent to Prepare an Environmental Impact Statement analyzing proposed rules to protect the "remaining roadless areas within the National Forest System."256

The Process

The manner in which the President and the Forest Service have chosen to implement a new management regime for roadless national forest lands departs from what has historically been the manner in which the President, the Forest Service, and Congress have interacted for the protection of wilderness.257 Please note the term "wilderness" is used herein with deliberation. It is reasonable and supportable to equate roadless areas with the concept of wilderness. It may be argued that the presence or absence of roads in a national forest defines whether "wilderness" is present.258 The RARE II study, for example, stated that its purpose in inventorying and evaluating

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255 Protection of Forest "Roadless" Areas, Memorandum from President William Clinton to Secretary of Agriculture (October 13, 1999).
258 Id. at §1131(c). "Wilderness" is defined by the Act largely by the absence of permanent human improvements or habitation—"Man is a visitor who does not remain." The presence of roads would likely not meet this test, though see Samuel Dana and Sally Fairfax, Forest and Range Policy (1956) for a discussion that this standard was relaxed in the enactment of the Eastern Wilderness Act.

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roadless national forests was in part: “to select appropriate roadless areas to help round out the National Forest System’s share of a quality National Wilderness System.”

Though the President’s October 13, 1999 directive does not mention wilderness, the management philosophy it suggests, coupled with the Statement of USFS Chief Mike Dombeck before Congress, clearly imply that the esoteric or non-extractive values of the national forest lands under consideration are paramount. Chief Dombeck referred to these lands as the “last vestiges of wilderness.” Further, scholars have clearly equated the roadless national forest lands with wilderness. The terms “wilderness”, “wildlands”, “wildness” and “primitive area” tend to be used quite interchangeably—but all are pinned on the absence of human disturbance and activity. Roads, which facilitate these activities, are the coarse filter in identifying and defining wilderness.

The intrigue associated with the current Forest Service proposal is a result of political prestidigitation. Accepting the premise that roadless forest is synonymous with wilderness, the proposed process of delineating and managing roadless forests for wilderness values escapes the process established by the Wilderness Act of 1964, the National Forest Management Act of 1976 (NFMA), the Forest and Rangeland

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260 Before the Subcomm. on Forests and Public Lands Management of the Senate Comm. on Energy and Natural Resources, (November 2, 1999) (Statement of Forest Service Chief of Mike Dombeck.)
261 Id.
263 Supra, note 257.

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Renewable Resource Planning Act of 1974 (RPA)\textsuperscript{265}, and the various regulations and rules enacted by the Forest Service.\textsuperscript{266} It may certainly be argued that the ultimate decision of the Forest Service may not result in the management of the subject roadless lands as \textit{de facto} wilderness. That speculation, however, ignores the tenor of the current presidency, and the evidence thus far imparted to the public. The President's October, 13, 1999 Memorandum, for example, clearly establishes expectations for the result of the Forest Service's National Environmental Policy Act (NEPA) review. The President described the roadless lands as:

\begin{quote}
...Some of the last, best unprotected wildlands in America...They are a treasured inheritance, enduring remnants of an untrammeled wilderness that once stretched from ocean to ocean. Accordingly, I have determined that it is in the best interest of our Nation, and of future generations, to provide strong and lasting protection for these forests...
\end{quote}

Former Chief Dombeck added: "Our objective is to ensure that our grandchildren will be able to marvel and wonder at the land legacy we hold in trust today."\textsuperscript{268} This is not the language of an Administration intending to manage the roadless forests for any commodity but wilderness. As NEPA is not substantive, but rather procedural,\textsuperscript{269} the Forest Service is free to choose the outcome of its environmental review, provided the effects of its decision are adequately described and disclosed. Any argument that the outcome is not predecided must be tempered by the clear executive mandate to the Forest

\textsuperscript{265} 16 U.S.C. §§1600-1606, 1607-1614.

\textsuperscript{266} See 36 C.F.R. §219.17 for a discussion of roadless area evaluation.

\textsuperscript{267} \textit{Supra}, note 255.

\textsuperscript{268} \textit{Supra}, note 261.

Service, and the ineffectiveness of the NEPA process to conclusively alter the agency’s intent.

Returning to the premise that the suggested outcome of the Forest Service EIS will be a pseudo-wilderness designation for all or nearly all of the lands under consideration, the question remains: is the current roadless initiative in comport with the existing legal structure for both wilderness designations, and with the agency rules for national forest management? Congress has for nearly 40 years recognized the value of wilderness to the American public.270 The Wilderness Act provides specifically for the protection of the “wild” character of national forest roadless lands. As a mechanism for such inclusion, the Forest Service carried out an initial roadless inventory (RARE), and a more comprehensive subsequent inventory culminating in 1979 (RARE II). The purpose of these inventories was to provide the information necessary that the President might suggest to Congress those lands the executive branch believed appropriate for inclusion in the wilderness system.271 The Act represents a specific exercise of Congressional legislative authority under Article I of the Constitution for the management of federal property. The specific delegation made to the executive branch entailed the identification, and then the suggestion to the legislature of those lands suited for special status.

Contrast this mechanism with the current methodology employed by the executive branch. The legislature’s role has been excised. The identification of the lands to be managed as wilderness, and the specific management regimes are decisions being made

270 Supra, note 255.
271 Id. at §1132.
entirely by the executive branch. I would suggest that there may be a separation of powers infirmity in the current scheme.\textsuperscript{272} Regulations, it has been argued, should not be a substitute for laws promulgated by Congress.\textsuperscript{273} In this case, not only is the executive branch disregarding a specific federal statute, it also appears to be exercising authority neither granted to it by the Constitution nor delegated to it by the Congress.\textsuperscript{274} This perception is, of course, premised upon the earlier argument that the current exercise being conducted by the Forest Service is a thinly disguised attempt to create wilderness. Contrarily, if one rejects that argument, the Forest Service's position may be seen as merely an exercise of some broad discretion to manage national forests.

The separation of powers problem is not lonesome. The statutes that direct Forest Service management fail to clearly authorize the current process. The Multiple-Use Sustained-Yield Act (MUSYA) does not mention a "wilderness" use at any point.\textsuperscript{275} While outdoor recreation, watershed, wildlife and fish purposes are indeed mentioned,\textsuperscript{276} and the maintenance of these goals may imply exclusion of human activity from certain regions, it is creative indeed to read the MUSYA as authorizing the designation of 58.5 million acres as wilderness, replete with the exclusion of other resource users.\textsuperscript{277}

\textsuperscript{272} This view is shared by Dr. Jefferson G. Edgens, \textit{Roadless Area Paved With Politics}, Georgia Public Policy Foundation (December 20, 1999) <http://www.gppf.org/pubs/commentaries/1999/wildemess.htm>.

\textsuperscript{273} \textsc{Louis Fisher}, \textsc{Constitutional Conflicts Between Congress and the President} 107 (1997).

\textsuperscript{274} This is not an instance of a "grey area" delegation where a court might apply the "intelligible principle" test found in \textit{Mistretta v. U.S.}, 109 S.Ct. 647 (1989). Rather, in this case, Congress has explicitly expressed the process for wilderness designation by statute.

\textsuperscript{275} Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§528-531.

\textsuperscript{276} \textit{Id.} at §528.

\textsuperscript{277} The USFS does acknowledge the MUSYA provision "that the establishment and management of wilderness was consistent with the management of the National Forest System for multiple uses." It is
criticisms of the term “multiple-use” are numerous— the result: the MUSYA can essentially be argued to support any land management regime desired.\(^{278}\) It is important for the purpose of this paper to note only that the MUSYA did not explicitly provide for protected wilderness designations. Had it done so, Congress would have had little reason to enact the Wilderness Act a mere four years later.

The RPA and the NFMA are perhaps the more pertinent statutes, as they direct more specific levels of action on the national forests. The wilderness planning requirements of these statutes are manifested in the Forest Service national forest regulations.\(^{279}\) When managing roadless areas on national forests, the Forest Service regulation provides succinctly that: “Unless otherwise provided by law, roadless areas within the National Forest System shall be evaluated and considered for recommendation as potential wilderness areas [to the President and then to Congress] during the forest planning process.”\(^{280}\) The October 13, 1999 executive memorandum to the Forest Service does not appear to comprise the “law” required by this regulation to alter the required process; yet the Forest Service has apparently relied upon it as such. The roadless areas in question are being analyzed for management as wilderness, yet no

difficult to envision how this relatively innocuous conclusion is a rationale for an executive declaration that the entirety of the roadless lands be set aside as wildlands. While wildlands may indeed provide several “uses” to the public, the volumes at issue and the sweeping nature of the proposal do not reflect a concern for utilizing the resource “in the combination that best meets the needs of the American people.” It is of note that Congress, in 16 U.S.C. §532, provides that an adequate road system is integral to “provide for intensive use, protection, development, and management of these lands under principles of multiple use and sustained yield of products and services.” One might argue therefrom, that roads are necessary if one intends to manage in a multiple-use sustained-yield regime.

\(^{278}\) See ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT (1995) for a discussion of the defects in the MUSYA.

\(^{279}\) Roadless area evaluation is addressed at 36 C.F.R. §219.17.
recommendation shall be offered to Congress. The decision will rest with the agency, ostensibly in violation of its own regulation.

The problem persists in the Forest Service Manual (FSM) detailing Recreation, Wilderness and Related Resource management. Section 2321 of the manual, entitled Establishment or Modification, states: Direction for evaluating potential wilderness and recommending areas to the Congress for wilderness designation is found in 36 CFR 219.17 and FSM 1923...” The FSM clearly acknowledges the sole authority of Congress to designate wilderness, and the role of the agency as an evaluator, not a decision-maker.

There are then, legal questions at every level with the roadless initiative. The existing statutory requirements for wilderness are avoided, if only superficially, by not labeling the current undertaking as a wilderness designation process. The executive and the agency must be confident that the flimsy façade will survive judicial scrutiny; I am not.

The acceptance of the premise that the current roadless initiative will create de facto wilderness is largely immaterial to a conclusion as to whether the current proposal is the “best” means to resolve this long-standing land use conflict. The process of resolving such a contentious issue should not itself inject a new layer of conflict into the mix. President Carter, in 1979, stated to the Congress:

RARE II provided a comprehensive nationwide review and evaluation of these important lands [roadless national forests]. It is my hope that the decision being announced today will help resolve the long-standing controversy over their case. This decision will assure the American people that high-quality areas will be protected

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280 Id. at (a).
281 Forest Service Manual, Title 2300 (as amended June 20, 1990).
for wilderness consideration by the Congress and for the enjoyment of future generations. It will also assure a continuing sustained yield of goods and services from these lands not recommended as wilderness. This will help our national economy as well as the growth and stability of local communities by providing additional oil and gas, minerals, and timber products which are essential to restraining inflation and increasing productivity.282

President Carter was, of course, referring to his recommendation to Congress for the inclusion of 15.4 million acres of roadless national forest for designation as wilderness.

Now, twenty odd years later, another president is proposing that such land use protections be granted for an additional 40 million odd acres; this time without Congressional assent.

There is no shortage of conflict with the substantive issue of wilderness designation. The Wilderness Act and the RARE process were results of that conflict. Unfortunately, the current Executive directive has made the procedural aspect of wilderness designation equally contentious. Speed, for example, is of prime concern of the Administration.283 The haste with which the agency is scrambling to complete the analysis and decision-making under NEPA has been recognized by at least one court as perplexing. Judge Edward Lodge writing from the federal bench noted that:

The sheer magnitude of this governmental action involving some 40 to 60 million acres nationwide that precipitated 500,000 comments in sixty days is the best evidence the Forest Service should proceed with caution. Time is not of the essence on an issue that has been studied for over 30 years.284


283 Supra, note 261. Chief Dombeck expected the final EIS and rule issuance by Fall 2000.

284 State of Idaho et al. v. USFS, CV99-611-N-EJL, 2/18/00 Order of Court (D. Idaho, 1999).
The current process has likewise been indicted by the Western Governor’s Association (WGA). The WGA argued that the forest planning process was the appropriate mechanism for a roadless review, as well as noting that the Enlibra collaborative doctrine to which the WGA subscribes was disregarded entirely by the Administration.\textsuperscript{285}

The Society of American Foresters (SAF) also condemned the current process.\textsuperscript{286} The SAF, like WGA, argued that the forest planning process was a preferred mechanism to deal with roadless forest, not a single national level decision. SAF too noted the USFS’ failure to adhere to its own regulations requiring collaborative decision-making.

Finally, and more recently, the National Association of Forest Service Retirees labeled the rules as “incomplete, arbitrary and illegal.”\textsuperscript{287}

It is clear that the process underway will intensify the substantive conflict, rather than abate it. A decision of such magnitude, if for no legal argument, should nonetheless be left to the Congress for the fact that the legislature represents the political mechanism best able to resolve entrenched conflict. The inherent problem is illustrated by the Statement of Representative George Miller, the ranking Democrat on the House Committee on Resources. Miller stated:

\textit{In my view, the President’s initiative sets in motion a process...[to afford] long-term protection for these vital resources in the final policy. But the initiative also sets forth an open public process for comment and debate on roadless issues.}\textsuperscript{288}

\textsuperscript{285} December 20, 1999 letter to Michael Dombeck, Chief, USFS; Resolution 99-030.
\textsuperscript{286} November 8, 1999 letter to USDA Forest Service-CAET.
\textsuperscript{287} January 21, 2001 letter to Ann Veneman, Sect. Of Agriculture.

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Miller is incorrect, for the NEPA establishes the requirements for a public process. Nonetheless, his comments are probative. He first notes his agreement with what will be the eventual outcome of the initiative, then softens it by noting too that the public will be involved. What he omits is that regardless of the outcome of the NEPA process, no substantive changes to the initiative need occur in response to any public comment. In contrast, Don Young, chairman of the same committee, stated:

Land designations and administration of the National Forest System are subjects within the jurisdiction of the Committee, as are the regulatory allocations of federal land by the Forest Service. Because, in part, the Administration has acted without proper consultation with Congress it is vital that the Committee examine the underpinnings of this directive...I hope the Administration will be forthcoming and cooperative in our effort to determine how and why this controversial policy was developed.289

It spurs speculation as to why the Executive would compound a contentious subject with a contentious process. The fact remains however, that the current process will lead to greater conflict between the interested parties, including the Congress. In 1978 the contentious nature of these issues was aware to all. Senator Frank Church noted that even though a wilderness system would be in place following RARE II, the controversy would continue. He stated:

...The remaining [roadless] areas are still susceptible to a continuing controversy, and you get to the point where wilderness advocates are in a position to say: ‘This is ours because Congress has said so; now

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let's take a closer look at what is yours over here.' That process keeps bubbling along year after year.\textsuperscript{290}

During that same hearing, it was made clear that the mechanism to finally resolve the roadless issue would reside with Congress. The Forest Service Director of Recreation Management suggested in discussing the results of RARE II:

> Once this is done [RARE II], we would most likely package it into some sort of environmental statement process... Most likely when it reaches the national level the Secretary of Agriculture would become the deciding official. He would be prepared to select one of the alternatives and propose to Congress, certainly, legislation for immediate designation of certain areas as part of a wilderness system—helping round out the wilderness system. He could also propose that the Congress, through statute, provide planning guidance back to the Department through RPA and land management planning for unit planning at the local level... Congress, of course, must ultimately designate wilderness.\textsuperscript{291}

It was at that time recognized that statutory authority would be mandatory to resolve a conflict with the intensity of the roadless issue. Forest planning is recognized as historically contentious,\textsuperscript{292} and the President’s plan magnifies that dispute. The preferred alternative in the Roadless Final EIS, Alternative 3, would prohibit road construction, reconstruction and commercial timber harvesting on 58.5 million acres of national forest.\textsuperscript{293} It is beyond debate that a decision of this magnitude, facilitated solely by the executive branch and its agency, will guarantee long-lived resentment among portions of the public, and fodder for legal disputes well into the future.

\textsuperscript{291} Id. at 8.
More recently, the Committee of Scientists has found that a key to future national forest management will depend on collaborative planning.\textsuperscript{294} It is curious that while the roadless initiative has the appearance of a predecided, unilateral process, the regulations mandate a collaborative and cooperative planning process to develop landscape goals.\textsuperscript{295} A landscape absent a 58 million acre roadless block hardly appears to meet the intent of these new regulations.

Already the agency and the executive struggle to deal with the artifacts of the former administration. Forest Service Chief Mike Dombeck, in a January 5, 2001 statement, spoke glowingly of the accomplishment of the agency in reaching a decision on the roadless issue, and “lasting protection” the decision would provide the national forests.\textsuperscript{296} Dombeck noted proudly that the agency had managed to address some one million comments during the rulemaking process. The final rule and record of decision confirming Dombeck’s statements were published in the Federal Register a week later, claiming somewhat oximoronically, that “the intent of this final rule is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management.”\textsuperscript{297} If nothing else, such a statement should conclusively prove what the critics of the MUSYA have claimed for decades—that it can be relied upon to justify virtually any form of management.

\textsuperscript{294} \textit{Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century}, USDA, Comm. of Scientists (March 15, 1999).
\textsuperscript{295} Id. at 219.12.
\textsuperscript{296} Mike Dombeck, A speech entitled \textit{Roadless Area Conservation: An Investment for the Future} (January 5, 2001)
Predictably, the Bush administration's executive order delaying the implementation of the roadless rules was published in the Federal Register less than thirty days later.298 The new administration is now grappling with how to address the sweeping nature and the investment in the proposed rules. Of course, as with many such issues, the courts have been enrolled.299 A recent ruling by a federal judge in Idaho has held that the Forest Service violated the NEPA in promulgating the roadless rules.300 While the court did not enjoin the agency's implementation of the rules, it quite clearly indicated that once the new administration had completed its review of the rules, it was likely that any implementation of the rules would trigger the issuance of an injunction by the court.

Interestingly, the Forest Service did not defend the merits of the Plaintiff's case, but rather argued only that it was premature to issue injunctive relief. It can be made no more clear that delegation has wreaked havoc upon the agency than in a situation where the agency spent nearly a year developing its roadless rules, quickly promulgating the rules under the outgoing executive, and then under the successor administration, is essentially directed to not participate in the legal defense of those rules; an absurd result by any standard.

The perspective one holds on the merits of the roadless rules is immaterial to the question of whether a matter of this magnitude, affecting 58.5 million acres (or nearly 30% of the total national forest system), and one that has become caught between

300 See State of Idaho v. U.S. Forest Service, (D. Id. 2001), Order of Judge Edward Lodge (April 5, 2001) and Order of Judge Edward Lodge (May 10, 2001)
opposing management ideologies, is a matter that should be decided solely by the agency. It seems reasonable to expect an explicit Congressional role. The fact that Congress will likely not act cannot be relied upon as tacit approval of the agency’s decision, for all of the various reasons that a legislature cannot mobilize to nullify an agency decision in a regular and effective manner. This decision demands Congressional ratification, and delegation makes certain that Congress need not speak.

Summary

In summary, the roadless issue has been intensely contentious from the first. While the Forest Service and Congress apparently recognize the value of collaboration in national forest management, the current roadless initiative process makes no allowance for conflict mitigation via a cooperative agency mechanism, nor a legislative compromise. Should the current administration succeed in undermining the current rules, it should signal to any observer of the process that the agency and the executive branch have usurped far too much management authority. It is inconceivable that drastic management decisions can be slipped on and off like a pair of shoes, while the legislative body responsible for these lands remains a passive conspirator. If indeed one million citizens took the time to comment on the roadless rule, should not the Congress have been compelled to participate in the decision, not as passive observer, but as the political body best suited to make political decisions on national forest management?
II. The Committee of Scientists' Recommendations

Roger Sedjo, in criticizing the role that the Committee of Scientists (and a member of the Committee himself) had taken with Forest Service rulemaking, recently stated:

...The Committee decided to provide the new mission statement that the Forest Service has lacked. Casting aside concerns about whether it was appropriate for the committee to dictate a mission for the Forest Service, the committee boldly declared that the binding change has been sustainability and recommended, in essence, that the Forest Service manage for sustainability. Apparently, the committee was less concerned about the necessity of having a legislative directive to provide mission clarification from Congress and the President...  

Sedjo is correct in noting that this most recent foray into ferreting out a mission for the Forest Service is lacking in statutory authority. It may be argued that this type of explicit discussion of the agency interpretation of congressional intent is in keeping with what the PLLRC recommended in 1970. For example, the regulations remark that:

This section would confirm ecological, social, and economic sustainability as the foundation for the National Forest System management. The first priority for management is the maintenance and restoration of ecological sustainability which is consistent with laws guiding use and enjoyment of National Forest System lands. These laws clearly proclaim a national policy to provide for sustainability of these lands in perpetuity.

301 Supra, note 222.
303 Supra, note 47.
304 Supra, note 222 at Section 219.19.
I am unsure as to the objective meaning of either of the first two sentences, but I am awed, that after 40 years of struggling with identifying the one true meaning of the myriad legislation surrounding national forest management, the committee has discovered it. It is interesting to note the contrast between this view, with that of former Forest Service Chief Jack Ward Thomas, who notes:

The problem is not that the Forest Service does not have a clear and overriding mission but that the mission is not clearly spelled out in law and is not universally acknowledged. And the Forest Service can do little or nothing about it. The mission has simply evolved, with no open blessing from Congress or the administration.\(^{305}\)

It may be that the missions identified by both the committee and by Chief Thomas are one and the same (I cannot say definitively due to the amorphous nature of the committee’s finding). Regardless, the committee sees the mission “clearly proclaim[ed]” in the law, whereas Chief Thomas finds it notably absent. The GAO, in its review of these same rules, has concurred with Chief Thomas, finding that:

Although the Forest Service’s 1999 proposed planning regulations would make ecological sustainability, rather than economic or social sustainability, the agency’s top priority, the priority assigned to ecological sustainability is not driven by the statutory authorities specific to the management of the national forests. These authorities provide little direction for the agency in resolving conflicts among the competing uses on its lands. Rather, the priority assigned to ecological sustainability is predicated on the requirements in environmental laws—enacted primarily during the 1960s and 1970s—and their implementing regulations and judicial interpretations.\(^{306}\)


The committee’s proclamations and subsequent codification as administrative rules have engendered conflict within the culture of the Forest Service itself. The FSX Club, an association of Forest Service retirees, made the following comment upon the draft rules:

Ecological management as defined by the Committee of Scientists, and included in this rule, is not a scientific based form of management but a philosophical approach. The FSX Club of Washington, D.C. strongly urges the Forest Service to withdraw the proposed rule and undertake a rewriting of it by scientists, planners, resource specialists and forest managers experienced in the actual conditions facing the National Forests.307

Similarly, the Service’s own scientists complained that:

Ecological integrity and species viability, as we shall discuss later in this comment, are concepts not real entities such as number of trees of a certain size or miles of stream that have specific characteristics. They are human constructs based upon both implicit and explicit assumptions. Further, even as concepts, they are ambiguous, elusive, or impossible to measure with clarity of any degree of scientific consensus. Thus, hinging forest planning and management success on ecological sustainability as defined by ecosystem integrity and species viability dooms every plan and planning process to failure before it even starts.308

More recently, the Society of American Foresters has criticized the adopted regulations as “inconsistent with current law, particularly the Multiple-Use, Sustained-Yield Act of 1960.”309 In its letter to the Secretary of Agriculture, the SAF points out that the Chairman of the Committee of Scientists, K. Norman Johnson, has publicly stated that:

308 Memorandum from Robert Lewis, Jr., Deputy Chief for Research and Development USDA Forest Service, to Chief, USDA Forest Service (February 7, 2000).
309 February 8, 2001 letter from William Banzhaf, Exec. VP. SAF to Ann M. Veneman, Sec. of Agriculture.
I believe that this [species diversity] requirement, will seriously undermine the ability of the Forest Service to achieve the broad definition of sustainability stated in the proposed rule and to meet the mission of the Forest Service of providing for multiple-use of the national forests and grasslands.310

Dr. Johnson was remarking on C.F.R. 219.20(2) which requires that decisions consider and ensure a “high likelihood” that species viability will persist and that populations be well distributed throughout their respective ranges. If Dr. Johnson’s premonitions are correct, and these rules spell the end of active forest management, it seems axiomatic that the rules will have violated the fundamental tenets of both the Organic Act and the Multiple-Use Sustained Yield Act (this does not assume that the earlier NFMA regulations did not also violate the MUSYA).

It is impossible to ignore the obvious—the use of administrative rules to establish management policy is inherently flawed. Rules are supplements to the statutes, not replacements for them. In the case of the Forest Service however, as the agency casts about for a mission, any mission, that can save it from the abyss, rules are appealing as a means to chart a course. The GAO has recently (and in concurrence) noted that:

By making clear that ecological sustainability—rather than economic or social sustainability—is the Forest Service’s highest mission priority, the agency’s proposed planning regulations, when finalized, would provide the national forests with needed direction on how to resolve conflicts among competing uses when developing and implementing forest plans. However, establishing ecological sustainability as the agency’s highest mission priority is better done outside procedural regulations governing forest planning.311

310 Supra, note 224.
Additionally, COS embraced the principles that surround and embody collaborative decision-making. To some extent, the collaborative process proposed by the Committee has been field tested. The recently enacted Herger-Feinstein Quincy Library Group Forest Recovery Act sets forth the management framework for over 2 million acres of national forest in California. The Act, a codification of the agreement reached by the parties to the Quincy Library collaborative effort represent a first in national forest management—Congressional ratification of a locally developed forest management plan. The Act sets out some specific management constraints, in particular restrictions on timber harvesting in designated spotted owl habitat, riparian areas, and in other areas of heightened concern. Further, the act sets out quite specific silvicultural requirements, requiring such things as the use of group selection and individual tree selection, in which group selection on an average must equal .57 percent of the project area each year, and that the total acreage to be managed must not exceed 70,000 each year. Though containing these specifics, the law generally references the Quincy Library Group-Community Stability Proposal as the guidance for the amendment of the forest plans. This is a case-book example of the delegation of forest management to someone other than the Forest Service. In this case the delegation is not even to the agency, but rather to a collection of local interests.

The Congressional ratification of the uneven-aged management prescriptions proffered by the Quincy Library Group, however, does to some extent suggest that in this case Congress was willing to bear the responsibility for the direction in which these select forests would be managed, and to that extent, is a positive step toward the elimination of

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the effects of delegation—paradoxically, through the use of a form of delegation. It remains to be seen however, whether this method will ultimately be successful. In addition to the difficulties with implementing such a process on each and every national forest, and the criticisms by many of the collaborative process, there also is the unanswered question of whether the costs associated with vague legislation will be resolved by this methodology. In this regard, for example, witnesses during the hearings on the Herger-Feinstein Quincy Library Group Act (H.R. 858) made the tried and true arguments that forest managers have come to rue:

Overall HR 858 is vague and creates a great uncertainty about what actually will happen “on-the-ground”...313

Summary:

The GAO, an agent of the Congress, realizes that rules cannot act as proxies for clear legislation. Inappropriate as they may be as statutory substitutes, national forest rules are a harbinger of litigation. Dissatisfaction with the agency’s decision under the Committee’s recommendations, and the inevitable inability to measure, quantify, or justify the outputs of this new management paradigm, will as Sedjo suggests, write the obituary of the agency.314 The culprit is delegation. If not for the vast, shifting terrain in which the Committee made its decision, no doubt the rules would have tracked legislative intent. It’s really quite simple—tell the agency what you want done, let them do it, and judge whether they accomplished the task. Delegation interrupts this primal process.

314 Supra, note 302h at 185-186.
Instead of certainty, the new NFMA rules have already become entangled in litigation. A suit filed in California by 14 environmental groups challenges the rules as violative of the NEPA, the ESA, the NFMA, the APA. Notably absent from the complaint is an allegation that the new rules violate the MUSYA, the law that the forestry professionals have largely claimed the rules violate.

Further, the Bush administration has recently determined that national forest compliance with the new regulations will be delayed, allowing for publication of a redrafted version of the rules sometime in May, 2002.

Even here, with the support (albeit less than unanimous) of an esteemed scientific review panel, the debate is not settled. Professor Arthur Cooper, a member of the original COS, fatefully noted that:

There is urgency about the need to bring multiple use and sustainability into closer agreement. Should the Forest Service finally adopt regulations with an emphasis on sustainability similar to those out for review now, there is a chance it would be setting itself up for another “Monongahela” case.

While the “scientific” inquiry may be at an end, the legal and political warfare rages. With no way to resolve such disputes other than through the political process, Congress must shoulder the responsibility for shaping and settling the debate.

This chapter should not suggest that there may not be a form of administrative regulation that would in fact complement the underlying statutes, and in fact resolve

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many of these concerns. Unfortunately, if the agency rule-making process is available as a forum for political debate, many legislators will in fact choose to see the battles fought in that arena. The underlying statutes must at all times place the blame or credit for Forest Service behavior at the feet of the Congress. Whatever rule-making occurs must be done in a manner that does not interfere with that tenet. While rules can be relied upon to fill in the details, the “filling in” must never be permitted to upstage the legislative actors.

Chapter 8: Realities, Suggestions, and Remedies

When government holds a forest for both conservation and lumber, how much we get of each and on what timetable can only be determined by never-ending political struggle. Today's political contest must be won today; tomorrow must take care of itself. A government agency established to balance opposing objectives of economic use and conservation is a political house divided against itself, forever tugged in opposing directions. The agency will staff up with conservation biologists on one side of the building and economists on the other. But how many trees are cut and how many are left standing will, in the end, have nothing to do with either discipline.

- Peter Huber\textsuperscript{318}

There are, it seems, several aspects to the problems posed by delegation. Foremost are the incentives faced by legislators to delegate, and the subsequent nature of the statutes that they enact. Another is the related role that an agency may play in supporting such laws, and lobbying the legislature for the discretionary authority the bureaucracy believes is in its best interest. Last is the part played by the courts. The judiciary has the ability to either ratify or prevent delegations of legislative authority. All of these facets, working singly or in combination, are capable of setting the stage for the problems discussed in Chapters 4, 5, 6, and 7.

What can be done to prevent this particular outcome? I suggest that there are ways of looking at the national forest situation that may obviate the historically granted discretion to the Forest Service. However, any proposed answers to the problems of delegation must first incorporate two contextual facets. The first is an understanding of

\textsuperscript{318} Peter Huber, Hard Green: Saving the Environment from the Environmentalists, A Conservative Manifesto 92-94 (1999).

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the role that scientific management has come to play in national forest management. Second, there seems to be a fundamental distrust of the agency by its critics that must be appreciated. These two factors will inevitably impact the effectiveness of any potential solution.

This Chapter will first discuss the role that science has evolved to playing on national forest management. The thrust of that discussion is that science can no longer be relied upon for either justifying delegation nor in acting as a shield for the Forest Service. Following that discussion, this Chapter will look at some possible solutions to the delegation problem, broken into legislative, judicial, and administrative categories.

### The Decline of Scientific Management

There is little doubt that the role played by science, and the faith placed in the Forest Service’s ability to manage based upon science, have eroded considerably.\(^{319}\) It may be as others suggest that the Forest Service reliance upon science was never that deific and in fact has always been only a piece in a far larger management puzzle.\(^{320}\) With either paradigm, however, there has nonetheless been a decline in the ability of the Forest Service to rationalize or defend its management positions based upon scientific arguments. The reasons for this are twofold. The first is systemic. The American public, with its increasing interest in the management of public lands, has, in many cases, developed opinions that forest management is somehow simple or unscientific, not requiring any particular training or education in order to make decisions. This may be a

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natural result of intense public interest in any field—it tends to generate armchair professionals—in this case armchair foresters. Professor Nelson summarizes the problem:

The management of the national forests is in a state of paralysis and gridlock. Part of the reason is that the American public no longer accepts the main tenets of scientific management, whether applied to forests or other areas of American life. The level of public trust in professionals, from doctors to lawyers to economists to foresters, has been declining for a quarter of a century. Before agreeing to surgery, patients solicit second and third opinions from other doctors as standard operating practice. One observer found that “judges increasingly worry that parties to a case can find an ‘expert’ to testify to anything and that flawed or distorted research—‘junk science’—can mislead jurors.” Other signals of this trend are seen in the willingness of members of the U.S. Congress as well as the judiciary and executive branches to intervene in the management of the national forests...Part of the reason the Forest Service is confused about its mission is that the American public is no longer sure about the future of professional expertise and the place of science in government. [citations omitted]^{321}

The unfortunate result is that forestry, perhaps more so than any other profession, has become the habitat of amateurs and self-anointed experts, vocal critics that have never managed an acre of forested land, nor have any formal training in the field. Clawson, perhaps remorsefully, points out that:

In the “good old days” of truly long ago, the district manager could make a timber sale, issue a grazing permit, build a fire-control line, engage in some controlled burning, or carry out other resource management actions on the land, using his best professional judgment and the best facts available to him...That day of federal land management has passed....^{322}

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This state of affairs has relegated to an ancillary position the role of science, and largely replaced it with personal value systems and rhetoric. Forest management critics are often motivated by emotional and aesthetic concerns with very little regard for any scientific position that tends to rebuke the value-driven stance they have adopted. The unfortunate result is that forest science has increasingly become a tool for accomplishing the goals that particular interests seek. The value of science as an objective touchstone, against which political decision can be measured or gauged, is lost. Baden and Dana recognize and describe the problem:

...It has become apparent since the Progressive Era that science cannot be insulated from politics. Special interest groups sway scientists as persuasively as laymen. Thus, when presented with the same set of information about the dangers of nuclear waste disposal, a scientist from the Sierra Club will often defend a significantly different position from that of a scientist from the Nuclear Regulatory Commission.

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323 Marion Clawson, Forests For Whom and For What? 22 (1975).
324 See Connie P. Ozawa, Science in Environmental Conflicts, 39 SOC. PERSP. 219 (1996) in which the author argues that science and politics have essentially become indistinguishable, and that science as a means of shielding an administrative position or decision from criticism has become difficult if not impossible.
This departure of scientific management from the scene has been documented most pessimistically by Nelson:

The loss of the scientific management ethos that guided the agency in the twentieth century is fatal. It is possible to stumble along making incremental changes but this merely delays the inevitable and increases the costs. Instead, the current functions of the Forest Service should be reassigned to other new and existing federal agencies, to states, and to the private sector.\textsuperscript{326}

The second difficulty faced by the Forest Service is a general distrust by those most aggrieved by national forest management. From broad accusations of agency capture by the timber industry, to specific distrust of such methods as clearcutting and any argument as to its use as a valid silvicultural tool, to the more recent failure to accept ecosystem management, there is among at least an element of the public an absolute unwillingness to accept the representations of the agency as fact. As Richard Alston describes it: "What are sound forestry practices to some represent abuse of the landed inheritance to others."\textsuperscript{327}

What these two observations mean for the Forest Service is simple. The historic argument made for delegation as deference to an agency's scientific expertise has become increasingly baseless. The "Pinchotian" pride in sound, scientific forest management has been debunked as either a myth, or a shift has occurred that does not validate agency discretion. No longer can Congress legitimately hide behind language like:

There are certain times, Mr. Chairman, when Congress should leave management to the professionals. This is one of those times. In these cases, Congress should establish general guidelines, without

\textsuperscript{326} \textit{Supra}, note 2 at 10

shackling the bureaucracy. Congress cannot hope to manage better than the managers, particularly on esoteric, complicated, and technical issues such as those involving the future of our forests.\textsuperscript{328}

This quote, referring to S. 3091 that was to become the NFMA, is a typical rational offered for deference to the bureaucracy. The premise, though, that the bureaucracy is better suited due to its superior technical knowledge, at least with the Forest Service has become unacceptable. The agency's science is not capable of insulating national forest management decisions. Consequently, delegation to the agency should not carry the momentum as it once did. That does not, however, resolve the current situation that has resulted from the MUSYA and the NFMA. As Peter Huber eloquently put it at the beginning of this chapter, science and economics cannot provide the basis of forest management, rather it is largely devolved into a political question.

With all of this in mind, it seems reasonable to turn to political and legal solutions as a means of correcting for the damage wrought be delegation. Any reliance upon a so called "scientific" rationale or remedy does not appear to offer a solution that will endure. As such, three forums exist in which legal or political solutions might occur.

\textit{Legislative Solutions}

Congress has the ultimate authority to determine the manner in which federal property, including the national forests, are to be managed. The trick, it appears, is to keep that management responsibility within Congress' hands. Drawing once more upon

\textsuperscript{328} \textit{Forest and Rangeland Management Joint Hearings Before the Subcomm. On Environment, Conservation and Forestry of the Senate Comm. on Agriculture and Forestry and the Subcomm. on the Environment and Land Resources of the House Comm. on Interior and Insular Affairs} 94\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess. 25 (Comments of Senator Bob Packwood) (1976).
Morris Fiorina’s delegation equation, it seems simple that to effectuate that result, one need only alter the equation to make the costs of delegation outweigh the benefits. While simple, this proposition faces several obstacles.

One hurdle that has been broadly recognized, is the tendency of legislators to make politically palatable, short-term decisions in their own re-election interests, while foregoing the difficult decisions into the more distant future. This temporal bias towards the short term is compounded by the legislative desire to associate themselves with the benefits of projects and to obscure the costs of such projects.\textsuperscript{329}

The second, and perhaps the most significant obstacle, is the very nature of national forest management itself. As others have noted, it is not likely that any management consensus is likely to ever be reached among the public at large, and certainly not among the more polarized interests.\textsuperscript{330} That said, referencing the graph I presented in Chapter 4, in such an environment of fragmented public interest, Congress will invariably continue to find that the benefits of delegation outweigh the costs. How then, in the face of can the equation be altered to incur greater expense on the Congress?

In order to adequately alter the equation, legislators need to recognize that delegation will diminish the likelihood of re-election. That does not presently occur because the brunt of the negative effects of delegation are borne by the agency. There needs to be a fundamental alteration of the statutory basis for national forest


management, for the current legislation permits the Congress to continue its delegatory behavior. The change would necessarily impose the costs of forest management problems directly upon the Congress. Delegation would not be a sought after remedy, if the costs remained squarely with Congress. This can be viewed in two ways: one, a change to the national forest management legislation that would so clearly define the agency’s mission and the parameters in which it was to accomplish that mission, such that little or no delegation would occur; and two, a less direct change, or series of changes that would refocus responsibility on the Congress without the need to alter the underlying statutes.

Many have suggested the former, in which a clear mission for the agency would be identified. Clarity, however, is only a partial solution. The agency too must be constrained from exerting the discretion that has come to plague it. If, for example, the Congress were to adopt Dr. Thomas’ suggestion that biodiversity is the primary mission of the agency, that alone is insufficient. The law cannot read “Biodiversity is the premiere goal of the Forest Service and the foremost required output from all national forests—go forth and accomplish this!” This is merely a spin on the MUSYA, and the Forest Service cannot simply be granted blanket authority to meet that mission in the fashion it sees fit. The days of professional discretion coupled with scientific expertise are at an end. Couching the agency mission in such terms with nothing else, will lead to the same delegation problems faced today. Constraints must be implemented.

Provided Congress could realize and embrace a focused mission, and further articulate it in statute, it is nonetheless historically unlikely that Congress would also be willing to limit discretion by implementing restrictions on the agency’s actions. That is not to say that there would not be support for such constraints. There does however, seem to be a difference in opinion on the ability of Congress to craft constraints, and their value and effectiveness if implemented. Given those concerns, it nevertheless is pessimistic to claim that a comprehensive statutory mechanism coupled with the appropriate administrative devices could not be developed to accomplish both the elimination of delegation and still guarantee the agency sufficient flexibility to respond to varying landscapes and environments. No serious attempt has heretofore been made; the mystique of agency expertise and discretion has up until now been insurmountable.

This is not to suggest that no such attempts have been made. Senate Bill 2536 is one. This bill, largely a farm budget bill, included language applicable to the Army Corps of Engineers. Congress, at least in this occasion, was unwilling to permit the executive branch to further modify the Corps’ mission. Section 3102 reads in pertinent part:

...none of the funds made available by this or any other Act may be used to restructure, reorganize, abolish, transfer, consolidate, or otherwise alter or modify, the organizational or management

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332 For example, there was some limited support for S.2926, and there seems to be a current cry from some that more prescriptive legislation is warranted.

333 Randal O'Toole in REFORMING THE FOREST SERVICE (1988) argues that prescriptive legislation is merely a treatment for the symptoms, not a cure for the problem. (p. 185). Though he may be correct that simply regulating the Forest Service timber management program may be insufficient, with legislative direction as to a clear management mission, the two would complement one another. In effect the ailment and the symptoms would both be cured.

334 S.2536 remains before the 106th Congress, though has been incorporated in HR 4461.

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oversight structure; existing delegations; or functions of activities, applicable to the Army Corps of Engineers. [emphasis added]

Surely, the delegated powers of the Forest Service could likewise be controlled. A clear set of constraints could likewise be linked to the agency budget, or as this law provides, no funding from any source would be available for the agency that deviated from Congressional restrictions. This is, of course, only a facet of a far larger proposition, but it demonstrates on a small-scale congressional willingness to accept responsibility for an agency’s actions.

Perhaps a more effective approach is represented by S.433. This bill, tentatively titled the “Congressional Responsibility Act of 1997”, contained a number of provisions specifically designed to rectify the delegation issue, though not limited to the Forest Service. One of the primary mechanisms is in Section 4. Enactment of Agency Regulations. This section requires that prior to any administrative regulation becoming effective, the Congress must first enact a bill containing only the text of the rule. In effect, Congress would be forced to ratify each and every agency rule, as meeting the intent of the statute the rule was attempting to implement.

There is some merit to this approach. For example, the proposed regulations that will implement the suggestions of the Committee of Scientists or the Roadless Area rules discussed in Chapter 7, would be require the ratification of Congress to become effective. The action or inaction of Congress on the regulations would send a clear message to the agency and the public as to how the Congress expected to see these forest lands managed. Such a bill, tailored to the particular needs of the Forest Service, could provide a means

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335 S.433 was before the 105th Congress in 1997, but never left committee.
to remove the agency from the precarious position in which it now rests, and redirect any
discontent with forest management to the Congress. The democratic process would, at
least theoretically, account for this dissent in the formulation of the rules, so when they
were presented as a bill, the political process would have already accounted for all
interests.

The other interesting aspect of the bill is a limitation on judicial review of the
promulgated rules. Section 6 provides that the rules contained within the bill would not
be considered an agency action for purposes of judicial review under Chapter 7, Title 5 of
the United States Code. This provision makes particular sense in the highly litigious
setting of the Forest Service. The rules, at least, reflecting clear legislative intent, would
not be subject to challenge, for example, for failing to comply with the MUSYA or the
NFMA. Challenges would then essentially come only for specific actions of the agency
for not meeting its own rules, as congressionally sanctioned. This could be a significant
step in reducing the litigation plaguing the agency, without denying the public its access
to the decision-making process, an oft cited argument against any proposed limitation in
judicial review.

Limitations on judicial review, while vociferously criticized,336 comprises two
areas of import. First and perhaps more pragmatically, it offers a means to actually get
forest management out of the courtrooms and back into the forests as Richard Behan
might put it. Second, by limiting judicial review, Congress is essentially saying that it
has democratically established the means of national forest management, and it does not

336 Victor Sher and C. Hunting, Eroding the Landscape. Eroding the Laws: Congressional Exemptions from
wish to see its federal land management prerogative second guessed by interest groups or the courts, once that democratic decision is reached.

Of course, the devil is in the details, and that certainly applies to this question. Where, when, and how much limitation on review is desirable is part and parcel of the political management decision itself. Nonetheless, limitations on review have beneficial effects, the critics aside, and such limitations do not detract from a citizen’s right to participate in government, if the limitations are in fact products of the democratic process, whereby that citizen’s will is or is not accepted. If the role of the courts is to assess whether an agency has acted in accord with the law, or has met Congressional intent, why not have Congress explicitly make that decision? If the agency actions are ratified by the Congress, there appears very little need for the courts to become involved.

Skeptics, of course, will argue that to ever expect Congress to accept greater land management responsibility is foolhardy and naïve.337 How can the incentives for delegation ever be overcome, such that the Congress will in fact choose not to delegate? Fortunately, there are several examples of differing scales, where the Congress has in fact not delegated to anywhere near the extent it has previously, and in fact has set forth relatively specific management direction.

The first, and the more limited of the two examples, is represented by the timber salvage riders passed into law by Congress in 1989, 1990, and 1995 in particular. Love them or hate them, what these laws have in common is that they represent a clear decision by the Congress to absorb both the costs and the benefits of directing a particular

management regime in a specific and explicit manner. The 1995 rider is particularly enlightening in this regard.\textsuperscript{338} The rider specifically provided:

1. Salvage timber harvest was to be achieved to the “maximum extent possible” at a level above the existing program level.\textsuperscript{339}

2. The Secretary of Agriculture was authorized to conduct salvage sales notwithstanding any “decision, restraining order, or injunction” issued by a court.\textsuperscript{340}

3. No salvage timber sale shall be subject to administrative review.\textsuperscript{341}

4. No “restraining order, preliminary injunction, or injunction pending appeal” shall be issued by any court with respect to any decision to prepare or advertise a sale.\textsuperscript{342}

5. Civil lawsuits filed against any sale shall be heard at the earliest possible date and any decision thereon must be rendered within 45 days of the date of the suit.\textsuperscript{343}

6. The Secretary of Agriculture is not required to issue rules to implement the salvage rider.\textsuperscript{344}

7. The documents and sale procedures under the rider shall be deemed to satisfy the requirements of the RPA, the FLPMA, the NEPA, the ESA, the NFMA, the MUSYA, and any and all other applicable federal environmental and resource laws.\textsuperscript{345}

\textsuperscript{339} Id. at (b)(1).
\textsuperscript{340} Id. at (C)(9).
\textsuperscript{341} Id. at (e)
\textsuperscript{342} Id. at (3)
\textsuperscript{343} Id. at (5)
\textsuperscript{344} Id. at (b)
\textsuperscript{345} Id. at (i.).

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8. The rider shall not require nor permit any amendment or other changes to any forest plan.\textsuperscript{346}

The specificity and the clarity with which the Congress addressed this national forest question provide some hope that a more comprehensive proposal might at some point become a reality. While some might argue that the political will does not exist for the Congress to ever address national forest management explicitly, this particular law belies that point. For example, even after the Clinton Administration attempted to soften and modify the effects of the 1995 rider by executive directive, the Forest Service was nonetheless able to meet the explicit volume commitment made by the Secretary of Agriculture to Congress.\textsuperscript{347} Every party to this episode was quite aware of where responsibility lay. The salvage riders, whether welcome or detested, represent a political mechanism that left little doubt as to the manner in which the agency was to act, and more importantly, the blame or kudos for the results could be laid squarely at Congressional feet.

The second, and broader example of a non-delegated national forest decision is the Alaskan National Interest Conservation Act (ANILCA).\textsuperscript{348} While it covers quite a broad array of topics (it is particularly well known for guaranteeing access for non-federal inholders in the national forests) the ANILCA is notable for a particular Congressional edict which addresses the balancing point on Alaskan national forests between local and national interests, and between economic and environmental concerns:

\textsuperscript{346} Id. at (1).
\textsuperscript{347} See USDA Forest Service, Forest Management Program Annual Report, FY 1996, pp. 22-24, for a more detailed summary of these events.
\textsuperscript{348} P.L. 96-487, codified at Title 16 U.S.C. §3101 et seq.
This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation ...has been obviated thereby.349

Such a declaration is attractive in that the Congress, depending on the details of the management plans, has taken the responsibility for the management of these public lands, and individual legislators can be held accountable to the decision. While nearly two decades old, the ANILCA nonetheless represents a far more desirable legislative scheme than the statutes generally governing the national forests.

These examples aside, the criticism remains that it is far too politically divisive or contentious for any comprehensive piece of national forest legislation to be promulgated. This pessimistic view discounts the examples cited, all of which occurred in a climate of intense political wrangling. Neither the salvage riders nor the ANILCA were passed in some utopian environment of bilateral trust and understanding. Rather, both the salvage riders and the ANILCA were promulgated after protracted political warfare. As such, even in today's' conflict–ridden national forest management era, there is no reason to eliminate the potential for Congressional action designed to clarify the role of the forests and of the Forest Service.

349 Id. at §3101(d).
What's available now as candidates? There are two, particularly different substantively, pieces of national forest management legislation pending. The first, a long-lived bill submitted by Senator Larry Craig entitled *the Public Lands Planning and Management Improvement Act of 1999*.350 The other is the recurring product of wide number of sponsors entitled the *National Forest Protection and Restoration Act of 2001*.351 While the substance of the two bills provides much fertile material for discussion, the importance to this paper is their delegatory content.

Senator Craig's bill and the H.R. 1494 are depicted in Chart 11 below, in comparison to the earlier laws and bills.

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As can be seen, both versions are comparably delegatory to both the NFMA and the NFTRA. Both, however, employ far more constraints on agency discretion, and therefore both have discretionary indices below any of the other laws examined in this paper. A close reading of the these two recent bills reveals that they are quite prescriptive in a number of ways, the extent of which may not be entirely reflected in Chart 11.

It may be that both reflect a modern trend toward less discretionary laws, accomplishing that goal largely by limiting the exercise of delegated authority. They
may also reflect a certain willingness or understanding on some level that delegation and boundless discretion may not be an effective means of managing the national forests.

The bottom line in any attempt to change the outcome of the delegation formula is to convince voters that legislative delegation to the Forest Service is not in the interests of the public, that it produces poor but expensive results, and that legislators that support its continuation are not desirable. A political solution to a political problem may be viable when the diverse interests realize that the legislators they believe can be influenced do not serve those same interests by leaving the agency with the discretion and authority to produce a myriad of unaccountable management results. Special interests should realize that reliance upon indirect controls like the budget or the judiciary, imparts greater uncertainty into the outcome of the agency’s efforts. Those interests seeking predictability and certainty should denounce delegation, and lobby for greater legislative responsibility. As Jerry Mashaw pointed out, the legislator’s role in policy formulation must become apparent once the agency “chooses a determinate policy.”

State Trust Land Management

Legislation might also be crafted which imparted specificity, fundamentally altered the management approach, but still left the implementing agency with substantial discretion. One such model would emulate state trust land models. The specificity of purpose with which the various state trust land management programs are endowed, provides an example of an instance in which the legislature established the purposes of

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the public lands, and various agencies were basically left only with the management decisions.\textsuperscript{353} The political disputes were largely resolved by the time the matter came before the agencies. Consequently, the trust land management model has been cited as a possible alternative management mechanism for federal public lands.\textsuperscript{354}

There a number of reasons why such a model may be a viable solution to many of the current problems in federal public land management, but for purposes of this paper, trust-type management represents a particularly defined objective for the implementing agencies, generated within the political process, at the legislative level. State land managers do not find themselves facing as many of the conflicts which do the Forest Service, thought these state agencies engage in many of the same types of resource management activities.\textsuperscript{355}

The trust model is but one potential alternative to the problems associated with the current system. There are other more “radical” options for the management of the public lands that have been suggested over time. These alternative regimes depend largely upon fundamental restructuring of national forest management and redefinition of the basis of property rights in the forests. Options range from the complete privatization of the national forests,\textsuperscript{356} disbursement of the national forests to various interest groups in

\textsuperscript{353} Jon A. Souder and Sally K. Fairfax, State Trust Lands (1996).

\textsuperscript{354} Supra, note 122.

\textsuperscript{355} For example, it is the experience of the Montana Department of Natural Resources & Conservation that few of its timber sale projects are challenged, and those that are, are challenged on procedural bases. The agency’s timber program must follow the specific mission of providing economic support for the school trust beneficiaries, and therefore, at least theoretically, cannot be dragged by varying political forces down management paths that do not satisfy that primary management goal.

\textsuperscript{356} Terry Anderson, V. L. Smith, and E. Simmons, How and Why to Privatize Federal Lands, Cato Policy Analysis No. 363 (December 9, 1999); Richard L. Stroup, Privatizing Public Lands: Market Solutions to Economic and Environmental Problems, 19 P. LAND & RESOURCES. L. REV. 79 (1998); Richard L. Stroup, Weaknesses in the Case for Retention in RETHINKING THE PUBLIC LANDS (Sterling Brubaker, ed. 1984);
fee or to endowment boards with fiduciary responsibilities, to narrow dominant use management by Forest Service units or geographically based dominant use system ratified by Congress. Any of these alternatives, to be effective, would require explicit legislative action on the part of Congress

Judicial Solutions

A judicial solution is premised upon one event: that the courts will once again rigorously enforce the historical nondelegation doctrine. The possibility of that occurring is arguable, particularly in light of the acceptance by the American public of the bureaucratic culture entrenched in modern government. With that culture has come greater reliance upon administrative agencies. With the reliance has come greater agency discretion and authority. It is not foreseeable that this state of affairs will change in the near future.

Perhaps more important, is the absolute authority possessed by Congress under Article IV of the Constitution to manage federal property. With such broad powers, the likeliness of any court finding any particular delegation to the Forest Service as illegal is quite slim. There is, then, little reason to expect judicial relief from the delegation problems that haunt the Forest Service. Though the trend may swing towards a


Both Dr. David Jackson, Professor of Forest Policy and Economics at the University of Montana, and Dr. Richard Stoup, Professor of Economics at Montana State University have advanced theories of management that would establish systems of this nature.

revitalized nondelegation doctrine in the future, the Forest Service should not expect to be the beneficiary of such an occurrence. Only a Congressional modification of the role the courts have come to play in charting national forest management can offer a solution to the litigation that has thrust the judiciary into the role as federal land manager.

Administrative Solutions

Any administrative solution, considering the relationship between the Congress and the agency, must be premised upon one thing: the Forest Service must accept the realization that delegation and its accompanying authority are not in the best interests of the agency in the current political and social climate. Given that acceptance, the agency needs to aggressively consult with Congress on how best to define its mission, how to reduce the effects of current delegation, and refrain from supporting any legislation that would tend to preserve the agency's professional discretion. The GAO similarly noted that:

While the agency continues to reduce its emphasis on consumption and increase its emphasis on conservation, the Congress has never explicitly accepted this shift in emphasis or acknowledged its effects on the availability of other uses on national forests. If the Forest Service is to be held accountable for its performance,[and I would add for Congress to be held accountable] the agency will need to consult with the Congress on its strategic long-term goals, as the Government Performance and Results Act requires. This process may entail identifying legislative changes that are needed to clarify or modify the Congress' intent or expectations.360

As discussed earlier in this paper, the notion of professional discretion and scientific management have been seriously compromised. The agency cannot continue to

rely upon these concepts to defend its action. It must instead seek specific direction and ratification of its actions from the Congress. This is, unfortunately, not an easy pill to swallow, particularly for foresters with training and experience in their field, and a certain pride in their abilities to manage the national forests. Nevertheless, the fact remains in this context that discretion is synonymous with conflict and litigation. With no clear mission and boundless discretion, no USFS bureaucrat is able to function effectively or efficiently.

Historically, the agency has supported legislation and administrative regulations that have ensured its discretion would remain unencumbered to the greatest extent possible. There needs to be a fundamental rethinking of how that discretion has ironically come to cripple the agency. The Forest Service needs to propose new legislation designed to bring the delegation issue to the fore and make the public aware of the source of the agency difficulties. Perhaps then the equation can be altered for the legislators, and the "fault lines of legislator's political advantage" can be shifted for both the agency and the public's benefit. As Professor Leshy stated it: "Congress is more directly accountable and better able to resolve the tension between local and national interests, than unelected officials in the executive branch."361

To articulate the problems that have come to plague the agency, and to suggest thoughtful, nonpartisan solutions, the formation of a second Public Land Law Review Commission (PLLRC) is warranted. It has been nearly 30 years since the Congress was the beneficiary of the last PLLRC findings, and a review of the tremendous changes in

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the very nature of forest management in the last three decades is overdue. Unlike the 2nd Committee of Scientists (a creation of the executive branch), whose suggestions have been by and large adopted by the Forest Service and made law by administrative rule, the PLLRC's assessment is made directly to the Congress, and whose findings are made law only by an explicit act of Congress, a far preferable means of national forest management.

Criticisms leveled at the original PLLRC have either been obviated by the passage of time, or can be adequately addressed in the second report. Most importantly however, is the notion that Dana and Fairfax identify, that a new report must be both timely and probative:

The commission's discussions of disposition and commodity utilization were sorely out of tune with the times. Its bland generalizations about environmental quality were a thin veneer over recommendations that were unacceptable to the Congress, which Aspinwall insisted should impose clear direction on public land management.

A coupling of the experience and consideration of the original PLLRC, the criticisms of that early study of management, and an understanding of the current situation should provide the guidance and context for the next undertaking. Provided delegation is recognized as a pitfall, a new PLLRC could develop strategies to mitigate its effects, and bring the problem to the fore in a manner which the Congress might not so easily ignore.

Many readers familiar with Norton Long's eloquent, but despondent writing:

There is no more forlorn spectacle in the administrative world than an agency and a program possessed of statutory life, armed with

363 Id. at 235.
executive orders, sustained in the courts, yet stricken with paralysis and deprived of power. An object of contempt to its enemies and of despair to its friends.\textsuperscript{364} can no doubt see the image of the Forest Service within those words. Without a dramatic shift in the manner in which the agency and forests are empowered, Professor Nelson’s prediction of demise may all too well be true.\textsuperscript{365} The public must consciously assess whether the Forest Service continues to serve a useful or necessary component in federal natural resource management. If indeed it does, the Congress must be prompted to take steps to correct the situation in which the agency has found itself. If the agency no longer seems useful or necessary, then perhaps equally radical steps are warranted to replace an outmoded institution. Surely that is preferable to Long’s purgatory.


\textsuperscript{365} \textit{Supra}, note 2.
Bibliography


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McCubbins, Matthew D. "The Legislative Design of Regulatory Structure." American

McCubbins, Matthew D. "Abdication or Delegation: Congress, the Bureaucracy, and the

Moe, Terry B. "Political Institutions: The Neglected Side of the Story." Journal of Law,

Moore, Patrick. Green Spirit: Trees Are the Answer. Vancouver, B.C: Greenspirit


Nelson, Robert H. Public Lands and Private Rights: The Failure of Scientific


Nishkannen, William H. "Legislative Implications of Reasserting Congressional


Ozawa, Connie.

Padilla, Michael A. "The Mouse That Roared: How the National Forest Management Act
Diversity of Species Provision is Changing Public Timber Harvesting." Journal of

Parent, Stephanie M. "The National Forest Management Act: Out of the Woods and Back
to the Courts?." Environmental Law (Lewis & Clark School of Law) 22 (1992): 699.

manuscript presented as a conference on “Collaboration and decision-making on the

1947.


