Post-fire management and public lands conflict: The Bitterroot National Forest and beyond

Alex Corbly Sienkiewicz

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POST-FIRE MANAGEMENT & PUBLIC LANDS CONFLICT:
THE BITTERROOT NATIONAL FOREST & BEYOND

by

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Post-fire Management and Public Lands Conflict: The Bitterroot National Forest and Beyond

Chair: Dr. Jack Ward Thomas

Montana’s Bitterroot Valley is rich in nature, history, complexity, and cultural diversity. The wildfires of 2000 burned significant portions of public forest land in the Bitterroot Valley and in the Northern Rockies. These fires comprised disturbances to both forest ecosystems and human communities. Different stakeholders, entities, and agencies viewed the burned landscapes through different lenses. Some saw “catastrophe,” others saw natural processes, others saw threats to personal property, others saw ecological processes in action, others saw an opportunity to extract a vast volume of burned timber for commercial purposes, and others believed active salvage and mitigation efforts at large spatial scales would generate unnecessary ecological harm. The Bitterroot National Forest (BNF) proposed post-fire management on a significant scale, promulgating what the BNF believed to be a balanced plan addressing both commodity-related and ecological values. The BNF’s plan met both support and opposition, but ultimately resulted in stalemate. The conflict resulted in a court-mandated settlement—which all involved stakeholders and managers deemed unsuccessful. Tensions spilled over into subsequent management actions, including 2005’s Middle East Fork sale. The story of the aftermath of 2000’s wildfires includes powerful political figures, broken promises, diverted restoration funds, and appearances of impropriety. Politicians belittled the BNF, citing the Montana Department of Natural Resources (DNRC)’s speedy and voluminous salvage as a success. If the criteria of timber volume extracted and that of successful interactions with stakeholder groups are those used to define “success,” then the DNRC was, in fact, successful. While the contrast in outcomes between the two agencies relates in part to the clarity of the DNRC’s trust mandate/agency mission, it also relates to the attitudes and management culture manifest in the DNRC’s leadership. Further, BNF/USFS managers were hindered by complex barriers to efficiency and propensities for conflict relating to Congress and USFS central office-influenced budgets, bureaucratic inertia, and the traditional culture of public lands “forestry”—which resists sharing management discretion with non-agency citizens. The dialogue over national forest management following 2000’s wildfires was (and largely remains) ambiguous, confusing, and replete with undefined terms and imprecise, polarizing use of natural resource-related rhetoric.
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Missoula, Montana

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# Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 1</td>
<td>Introduction and Purpose of Study</td>
</tr>
<tr>
<td>Chapter 2</td>
<td>Design and Methodology</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>Theoretical and Legal Frameworks</td>
</tr>
<tr>
<td>Chapter 4</td>
<td>Background: Public Lands, the Bitterroot National Forest and Beyond</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>The Wildfires of 2000: a Story of Protracted Conflict</td>
</tr>
<tr>
<td>Chapter 6</td>
<td>Results: A Mosaic of Understanding, What Observers and Insiders Think of the Perceived Success of State Trust Land Managers as Compared to the BNF</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>Promises vs. Obligations: The BAR Project's Lost Restoration Funds</td>
</tr>
<tr>
<td>Chapter 8</td>
<td>Important Lessons</td>
</tr>
<tr>
<td>Chapter 9</td>
<td>Conclusion: Disparate Outcomes between the BNF and the DNRC</td>
</tr>
</tbody>
</table>

**Afterword**

**Sources**

**Appendix A**  Further Themes or Patterns of Understanding as Exhibited by Respondent-generated Data/Expressed by Respondents

**Appendix B**  Select Laws: Abbreviations and Acronyms

**Appendix C**  Abbreviations and Acronyms
Chapter 1

Introduction & Purpose of Study

This is an interdisciplinary case study addressing natural and human resources relating to public forest lands in Western Montana and elsewhere. This study is meant to be more practical than theoretical. The author's intent is to document and explore a complex case of natural resource conflict. While some theoretical frameworks for public participation and governance are presented, this study is policy-focused in the lessons it discusses and does not present in-depth focus on any single related genre. Rather, this study's goal is to cover a range of issues-relating to aftermath of the wildfires of 2000 in Western Montana.

Following the wildfire season of the year 2000, contending stakeholders in public land management looked upon the burned landscapes of the Bitterroot National Forest (BNF), the Sula State Forest (SSF) and the Northern Rocky Mountains through various lenses: those of ecological integrity, those of commodity extraction and revenue generation, those of political expediency, those of fiduciary obligation, those of multiple uses, and those of citizens who didn’t know much about—or didn’t care to know much about—America’s public lands (Interviews 1-37). While various parties made efforts to communicate and come together in mutual understanding, in the end, tension and conflict reigned. Five years after the fires, fighting over management of the Bitterroot Valley’s federal lands has not ceased, though the Bitterroot’s state lands, managed by the Montana Department of Natural Resources and Conservation (DNRC), are another story.
The wildfires of 2000 and their aftermath suggest that the landscape on which humans live and its resources and ineffable ecological and socio-political processes can, at any moment, actuate conflict, crisis, and diversion of scarce public resources. Federal Judge Michael Hogan, who guided the post-fire conflict’s court-mandated settlement, noted: “The Bitterroot Valley is a fairly concentrated area and there was the real possibility of... physical confrontation between people who had... opposing ideas in the valley” (Interview 13:4). BNF Supervisor Dave Bull noted, after criticism of his use of law enforcement officers to control attendance at a 2005 press release, “It’s the Bitterroot. You never know what’s going to happen” (Interview 36:1).

The conflict surrounding the aftermath of the Bitterroot fires of 2000 provides not only an interesting story and legal fact pattern, but also a lens through which to analyze public lands conflict, post-fire management, and the efficacy and legitimacy (from various criteria) of our public land management agencies. The Bitterroot fires of 2000 beg important questions. Who controls public lands? How democratic is national forest management? How democratic should it be? Does the management of state trust land offer lessons for our federally managed lands? Can polities balance commodity extraction with ecological integrity, efforts to sustain a clean and healthy environment, and multiple use?

The answers to these questions are manifold and vary greatly depending upon who provides the answer. Because the mission the national forests is often perceived as unclear (Interviews 9, 27, Thomas and Sienkiewicz 2005), it follows that many of these questions do not and will not have clear answers. Public land law scholars
George Cameron Coggins and Robert Glicksman (2001:191) note of the concept of multiple use that guides national forest management, "[it] is so abstract that its usefulness as a constraint on agency management is questionable."

Nonetheless, the common law, which is constantly and rapidly evolving from lawsuits, can provide some measure of clarity if managers and congressional and central office budget makers recognize and learn the holdings’ significance. For instance, *Wilderness Society v. Rey* (180 F.Supp.2d 1141(2002))—the case in which the BNF found itself following the wildfires of 2000—has already served as precedent upon which subsequent public lands cases, including 2005’s *Earth Island v. Pengilly* (376 F.Supp.2d 994 (2005)) rely. Had involved agency officials, attorneys, and supervising political appointees read, understood, and appropriately considered *Wilderness Society v. Rey* and its rules regarding the right to appeal USFS agency decisions; the holding in *Earth Island v. Pengilly* (and its direct and opportunity costs to the USFS and to American citizens) might have been obviated.

With focused examination and thought, those involved can learn from every experience wherein conflict envelops public lands, the degree to which the land and its various resources, systems, and biota are visceral and vital components of human communities. Natural disturbances of varying intensities and scales indicate that human-land relationships should be (and increasingly are) both the subject and object of ongoing thought, discourse, dialogue, application, and adjustment. As stories such as those emerging from the 2000 wildfires and 2005’s Hurricane Katrina indicate; humanity will be taught over and again that humility and heed will improve human relationships with the land, and moreover, with one another.
The unique status and existence of the public lands are among the lasting accomplishments of American democracy (Runte 1991). The ongoing social experiment that is the public estate should be scientific in nature: asking, testing, and objectively communicating and applying resulting knowledge with intellectual and ecological humility. That is to say, society should seek to manage public lands not merely under vague notions of the greatest good for the greatest number in the long run (Pinchot 1947, Hirt 1994), but to define such credos and continually refine those definitions so that human and ecological communities may likewise prosper. As Forest Service Chief Dale Bosworth notes, “The devil is in the details” (Miller 2004:vii).

**Purpose of Study & Central Research Question**

The interdisciplinary examination that follows will not reconcile the many public lands complexities and paradoxes, but it does relate a complicated public lands dispute within the context of an evolving human community struggling to make sense of its relationship to surrounding public lands and resources. Beyond relating the fact pattern and evolving story, this study’s primary research explored the notion that the DNRC successfully avoided public conflict and legal disputes, while the BNF became embroiled in public conflict and legal battles. *Why the differing outcomes as between the DNRC and the BNF? What did the DNRC do to fend off conflict? What might the BNF have done differently to mitigate the protracted conflict? What factors contributed to the fact pattern that played out?* Conclusions drawn and associated analyses comprise responses to problems and contributing variables highlighted through research.
Chapter 2

Design

This case study seeks primarily to describe, explore, and explain (Yin 1994) important aspects of the aftermath of the Bitterroot Valley wildfires of 2000 in the interdisciplinary context of public land management. It utilizes embedded units of analysis (Yin 1994) in the form of respondent interviews, legal documents, archival records, scholarly articles, and news articles. It also examines a time series of events in the form of a chronology (Yin 1994). The study employs pattern matching (Yin 1994) techniques by virtue of its comparisons between land management agencies and to a lesser degree, by comparing temporally distinct management conflicts.

Methodology

This case study inquires as to what factors contributed to disparate outcomes and public perceptions as between DNRC and USFS post-fire management on burned areas in the Bitterroot Valley following the wildfires of 2000. Primary sources include more than three dozen data sets derived from personal interviews, seminar-style discussions, focus groups, and observed panel discussions. Respondents included state and federal public land managers, a federal judge, lobbyists, foresters, non-government organization (NGO) representatives, policy analysts, and academics.

Sample

Respondents were chosen on the basis of direct knowledge of and participation in the events and associated conflicts that followed the wildfires of 2000. First, researchers developed an extensive list of stakeholders and involved parties through examination of legal records, archival data, news articles, and preliminary telephone
interviews. Researchers next sent letters introducing the study to more than 100 potential respondents. These letters were sent during the spring and summer of 2004. To the extent certain stakeholders were unable to participate in this study, other stakeholders and interested parties were included in the sample. Interviews were completed by fall 2005.

The sample broke down as follows:

- Academic Observers 5
- DNRC Employees/Managers 5
- Environmental/Conservation NGO Employees 6
- Federal Judges 1
- Timber Industry or Lobbyists 5
- USFS Employees 15

Of the 15 USFS-related respondents, 5 were non-local, non-participants in the events that occurred in the Bitterroot Valley, but may have experienced episodes similar to events discussed in this study. These non-local respondents were chosen in order to provide comparative units of analysis relative to involved-USFS managers.

Beyond primary research, this study draws upon legal records, public meetings, panel discussions, and other observations. Interviews were semi-structured, and sought to illuminate differing experiences, perspectives, and values as pertained to the central research question in the context of conflicts that followed the Bitterroot fires of 2000. Interviews were conducted and transcribed during 2004 and 2005.
The Interview Process

Interviews generally entailed a process whereby a series of broad, thematic, open-ended questions gradually narrowed in scope, eventually focusing on the central research question relating to disparate outcomes in post-wildfire management as between the BNF and the DNRC.

Anonymity

Researchers offered anonymity (as pertained to the final report) to all respondents. Some respondents preferred to remain anonymous, while others did not. One DNRC employee and five USFS employees requested anonymity.

Interview Analysis

Qualitative Interview analysis entailed integrated use of techniques including: theme identification (Ryan and Bernard 2005), key-words-in-context (KWIC) (Ryan and Bernard 2005), constant comparison (Glazer and Strauss 1967), evidence of social conflict (Spradley 1972), and the single case study and critical case study methods (Yin 1994). Data selection within each data set was based on the degree to which it related back to the central research question. Interview transcripts were analyzed by virtue of ideas expressed, the patterns or umbrella themes under which ideas were expressed, the frequency with which such ideas were expressed, the overall context in which such ideas were expressed, and the relevance of ideas to the central research question. Ideas were subsequently grouped into higher-order categories in order to establish overarching themes (Ryan and Bernard 2005) that are presented in this report.
Sponsorship and Funding

Alex Sienkiewicz conducted this research for his doctoral dissertation under the guidance of Dr. Jack Ward Thomas, at the University of Montana College of Forestry and Conservation. Doctoral committee members contributing guidance and editorial advice included Dr. Perry Brown, Dr. James Burchfield, Raymond Cross, Esq., and Dr. Alan McQuillan. The United States Department of Agriculture (USDA) Forest Service Rocky Mountain Research Station provided grant monies to fund this study.

Documentation

All research-related interactions with respondents were documented in a research log/electronic database. Contact information for both potential respondents and actual respondents was likewise maintained in an electronic database. Interviews will become available in the Mansfield Library at the University of Montana. Interviews will be sealed for a period of years in order to protect the interests and/or anonymity of certain participants and mentioned stakeholders associated with this study. Some materials are and will remain sensitive due to the legal implications of associated conflict and the gag order associated with the Wilderness Society v. Rey (180 F.Supp.2d 1141) settlement process and resulting agreement. Researchers have made good faith efforts to exclude any sensitive materials from this report. The University of Montana’s Institutional Review Board approved this study’s design, methodology, and inclusion of human subjects-related research.
Chapter 3

Theoretical and Legal Frameworks

In analyzing events such as those upon which this study focuses, it is useful to be able to draw upon a theoretical context or framework. This allows for the comparison of variables, a richer analysis, and more clarity. Application of related theory allows the researcher to stand upon the foundational work of previous researchers. While providing context, application of extant theory can allow for the expansion, elucidation, and or revision of previous research through application to contemporary circumstances. This, in turn, may increase the likelihood that current policy makers, policy executors, and interested citizens will make use of research as it pertains to existing, real-world conditions.

Agency Decision Making in Public Lands Planning and Management: Expertocracies and Technocracies

The notion of injecting a higher degree of democratic involvement into USFS management runs counter to the dominant technocratic paradigm of the Progressive Era, wherein Theodore Roosevelt and Gifford Pinchot preached long-term public values, but held that the minutiae of forest planning and management should be largely left to the trained professionals (Hirt 1994, Thomas and Sienkiewicz 2005). These Progressive Era agency experts comport with the “expertocratic” paradigm described by Rossi (1997), wherein policy makers and decision makers possess specialized, technical training and education that facilitates an understanding of arcane issues. Under the expertocratic paradigm, an exclusive right to make management decisions attaches to the expert skill set (Rossi 1997, Dunn 2004). Early
models along the lines of technocracy or expertocracy assumed that skill and expertise alone justified a “bureaucracy’s claim to power” (Rossi 1997:197).

**The Synoptic Paradigm**

Rossi (1997) argues that the “synoptic” or “comprehensive” paradigm is the modern incarnation of expertocracy. Synoptic models are labeled as such because of the high degree of synthesis required of modern decision makers (Rossi 1997). Within such models, agency decision makers (theoretically) make rational decisions by: 1) defining a policy problem, 2) clarifying and prioritizing goals, values, and objectives (ends), 3) devising practical policies for achieving desired ends, 4) investigating possible consequences or outcomes as pertains to different policy options, 5) comparing alternatives, and 6) choosing policy alternatives deemed most likely to achieve desired ends (Rossi 1997). Thus, the synoptic model and other modern versions of technocratic/expertocratic decision making seem to have retained the notion of specialized training and expertise, but also add an aspect of synthesis with regard to multiple categories of specialized knowledge. Such models acknowledge the complexity of natural resource and public land management, and public administration generally, while also retaining more unilateral traits of the expertocratic models.

Grumbine (1992) argues that such technology or expert-dominated models do not readily accept citizen participation beyond that provided by traditional administrative processes (Dunn 2004). Grumbine notes, “Technocracies of professional experts do not mix well with participatory citizen movements” (1992:168). Attached to “technocratic,” “agency professional,” and/or “agency expertise”-related models is an
implicit assumption relating to the notion that a significant degree of ignorance about environmental and natural resource issues dominates the interested public.

**Deliberative Democracy**

A more democratic paradigm is that presented by Dryzek (2000). Dryzek’s deliberative democratic model promotes public discourse and accommodates opportunities for reflection and flexibility. Dryzek and List (2003:1) note,

> For deliberative democrats, the essence of democratic legitimacy is the capacity of those affected by a collective decision to deliberate in the production of that decision. Deliberation involves discussion in which individuals are amenable to scrutinizing and challenging their preferences in light of persuasion (but not manipulation, deception or coercion) from other participants. Claims for and against courses of action must be justified to others in terms they can accept. Jurgen Habermas and John Rawls, respectively the most influential continental and Anglo-American political philosophers of the late twentieth century, have both identified themselves as deliberative democrats. Deliberative democrats are uniformly optimistic that deliberation yields rational collective outcomes.

During deliberation, citizens (as a group) exchange ideas about courses of action most beneficial to the common good (Poisner 1996). The common good is found through dialogue, not pre-existing consensus (Poisner 1996). As evidenced by its process-orientation, the deliberative paradigm calls upon teleology and its philosophical contributors such as Kant, Locke, and Rawls (Bak and Urven 2005).

Poisner (1996:94) propounds a deliberative model wherein tools for citizen participation, such as the National Environmental Policy Act (NEPA) (42 U.S.C.A. §§ 4321-61), should focus on the concept of citizenship and create structures that remove citizen roles such as “advocate” and “bystander,” replacing such roles with the role of “decision maker.” Poisner notes (1996) that,

> According to proponents of deliberation, the long-term health of American democracy depends upon certain forms of discussion... The purposes of
deliberation include the creation and implementation of the common good of the community and the inculcation of civic virtue in the participants... The political philosophy of civic republicanism provides the theoretical underpinning of the deliberative ideal... Civic republican advocates of deliberation... do not believe that individual utility, however aggregated, can entirely capture the range of goals appropriately pursued by a democratic society. Community, from the civic republican perspective, denotes not just a collection of individuals, but a set of relationships that can give rise to goals not capable of being expressed in individual terms. Civic republicans believe that citizens can work together to “create” a common good for the community.

The deliberative model Poisner describes is distinct from the pluralistic model he outlines, in which predetermined, as opposed to organic/flexible, management schemata are addressed through a stakeholder bargaining process (Poisner 1996, Dunn 2004).

The Pluralistic Model

Under pluralistic models, government decision making processes emulate economic (free) markets as policy seeks a level playing field from which all parties may use political pressure, posturing, and strategic bargaining to influence outcomes. Poisner (1996) suggests that pluralistic models are problematic in that they refer to a mode of discussion wherein private interests bargain with one another in self-interested attempts to maximize their own private utility. Poisner notes that pluralist models evince the core belief that no public good exists, but rather, private interests collectively provide for an overall social utility (Sunstein 1985, Barber 1994, Poisner 1996). The pluralistic notions of aggregating private interests and deriving a collective utility therefrom, evoke classical economic theory.

Evident within pluralistic paradigm are some of Adam Smith’s foundational theories, including his theory of economic welfare and the notion of the *invisible hand* whereby the self-interested application of capital to industry by individuals in
society frequently bolsters society’s collective utility (Smith 1937). Pluralistic models also seem to be utilitarian, by virtue of the underlying assumption that in a competitive, capitalist culture most individual economic behavior is self-interested (Hunt 2002).

Application of such economic-influenced theories to public participation models pertaining to environmental regulation, natural resource management, or public land management illuminates a tension between the interest of the individual as loosely equating to the public interest, and the public interest as something altogether distinct from individuals pursuing their own self-interested ends. That is to say, some models assume that the public interest is born of aggregations of disjoint self-interested behavior, while others argue the public interest results from a more deliberative, interactive, non-aggregating process.

**Social Choice Theory**

Theories of social choice stand in contrast to pluralistic models of governance and public participation. Social choice theories question the notion of aggregating private interests. Kenneth Arrow’s seminal work argued that the aggregation of private interests is “bedeviled by impossibility, instability and arbitrariness” (Dryzek and List 2003). William Riker argued further, that any notion of a popular will independent of the mechanism used to aggregate preferences was untenable (Riker 1982). Some social choice theorists thus argue that democratic choices are arbitrary, and democracy is thus devoid of meaning by virtue of the ineffectiveness of its aggregative mechanisms (Dryzek and List 2003).
Deliberation and Public Discourse

Deliberative democrats tend to value public discourse. Nonetheless, some would argue that there is a point of diminishing returns or threshold at which too much public participation hinders democratic decision making (Rossi 1997). Rossi (1997) notes,

Mass participation, while in some cases beneficial to agency legitimacy, may in certain circumstances impair deliberation, which many contemporary political theorists perceive as an equally important function of administrative law. A threshold amount of participation is necessary to deliberative decisions, but at some point participation creates significant institutional costs for deliberative administrative process. As a result, the ideals of democratic governance may suffer.

Shepherd and Bowler (1997) present a model wherein managers “all too often” involve public in management planning because laws such as the NEPA require the agencies to do so. Shepherd and Bowler outline four major rationales underlying public participation in agency decision making:

1) Public participation is proper and fair in the context of democratic government

2) Public participation is an accepted means of ensuring projects meet citizens’ needs and are suitable to affected publics

3) Public participation creates more legitimacy and less hostility by virtue of the fact that affected parties can influence the decision making process

4) Final decisions are better when local values and knowledge are incorporated and when expert knowledge receives public scrutiny

This model thus distinguishes between meeting minimal legal requirements and making the participation process meaningful with regard to outcome. Further, Shepherd and Bowler (1997) correlate perceptions of citizen participatory processes
to fairness, efficacy, success, and legitimacy in instances where citizens feel that
input has been heard and has affected policy outcomes (Dunn 2004).

Critics of public participation in planning processes such as that associated with
the NEPA, note that it is quicker and more cost-efficient to exclude the public from
environmental planning processes (Shepherd and Bowler 1997). Some managers
may regard public participation as unnecessary because citizens lack project-specific
expertise or because managers may not want to educate the public about the merits of
particular projects (Shepherd and Bowler 1997). Nonetheless, Shepherd and
Bowler’s model suggests that the short term costs of implementing public
participation in time and money, beget long term gains in the form of trust and
cooperative attitudes:

To the project proponent, it might seem more prudent to push the project
through quietly rather than run the risk of a public process. However,
excluding the public does not ensure expediency. Alienated citizens become
skeptical citizens and, once citizens begin to lose trust in a project proponent,
it is difficult, if not impossible, for the project proponent to regain citizens’
trust... Distrustful citizens tend to respond with contentious, legalistic actions
which can be time-consuming and expensive for the project proponent...
Therefore, the project proponent needs to consider not only the risks of
including versus avoiding citizen input, but also the potential benefit of
establishing a long term cooperative relationship with the citizens (Shepherd
and Bowler 1997:726).

Wondolleck and Yaffee (2000:62) discuss the concept of agency discretion as it
relates to decision making,

The concept of agency discretion is here important, as the degree to which
discretionary actions incorporate citizen input largely depends upon individual
agency officials. Importantly, where individuals possess discretion, individual
personality and agency culture become significant variables. USFS District
Ranger, Gordon Weldon, noted of agency culture, bureaucratic discretion, and
obstacles to collaboration: “Turf, ego, the human elements—those are the real
barriers” (Wondolleck and Yaffee 2000:62).
The NEPA Process, Agency Action, and Public Participation

The National Environmental Policy Act has been described as “the basic charter for environmental protection in the United States” (Poisner 1996, Shepherd and Bowler 1997). In passing the NEPA, Congress intended to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man” (42 U.S.C. § 4321 (1988 & Supp. V 1993), Poisner 1996).

EIS and Scoping Overview

The NEPA requires all federal agencies to conduct an environmental impact statement (EIS) for proposed major activities. The NEPA has multiple purposes. These include 1) improving the quality of decisions; 2) informing the public of the proposed projects and possible environmental impacts (Shepherd and Bowler 1997); and 3) incorporating public input into agency decision processes (Kent et al. 2003). The NEPA includes a process for public participation, which is generally referred to as scoping. Scoping entails the solicitation of public input through public notice of a major activity. Public notice often entails announcement in the Federal Register, newsletters, public meetings, workshops, or other fora (Kent et al. 2003).

The NEPA Framework

The first step an agency takes under the NEPA, is deciding whether to prepare an EIS. Agencies are required to categorize actions into three groups: 1) actions normally requiring an EIS; 2) actions normally requiring (the less exhaustive analysis of) an environmental assessment (EA), but not necessarily requiring an EIS; and 3) actions that normally require neither an EIS, nor an EA (40 C.F.R. § 1508.13 (1995),
If an agency determines that the third classification applies, then no further action is required under the NEPA. If the second classification applies, then an agency must prepare an EA (40 C.F.R. § 1508.13 (1995), Poisner 1996). An EA is a public document that outlines baseline information used by an agency to determine whether an EIS is necessary (Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985), Poisner 1996).

Generally, EAs focus on whether a proposed action will have a significant impact on the human environment. If it is determined that a proposed action will significantly affect the human environment, then the agency must prepare an EIS. If the proposed action will not have a significant effect on the human environment, the agency must prepare a finding of no significant impact (FONSI). Agencies generally do not consult with the public in writing EAs or FONSIs (40 C.F.R. § 1501.4(e), Poisner 1996). Public participation usually begins during the scoping process, whereby the agency identifies the range of issues implicated by a project and effects a project might have (40 C.F.R. § 1501.4(e), Poisner 1996).

Scoping requires agencies to seek participation and input of other agencies as well as citizens and interest groups (40 C.F.R. § 1501.7, Poisner 1996). Both writing and public meetings are common mechanisms for input under the scoping process (Poisner 1996). After an agency completes the scoping process, it prepares a draft EIS (DEIS). Generally, an EIS includes the following information:

1) Project summary stating issues, controversies, and conclusions
2) Statement of proposed project’s underlying purpose
3) Identification and comparison of alternative courses of action
4) Description of the affected environment(s)

5) Description of environmental consequences of each alternative (40 C.F.R. § 1502, Poisner 1996)

After considering comments from citizens and other agencies, the agency adjusts its EIS and produces a final EIS (FEIS), which must respond to "responsible" opposing viewpoints (Committee for Nuclear Responsibility, INC. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971), Poisner 1996). 30 days after release of the FEIS, an agency may issue its record of decision (ROD). The ROD specifies a final decision and should open the agency's "decision making soul" to public scrutiny (Poisner 1996:74). The ROD must identify the alternatives considered, specify environmentally preferable alternatives, discuss factors that were balanced in coming to the final decision, and discuss whether or not all practical means of avoiding or minimizing environmental harm were incorporated into the decision (Poisner 1996).

Administrative Appeals

Administrative appeals comprise formal mechanisms by which citizens and entities may challenge an agency's decision to act, not to act, or to act in a certain manner. Administrative appeals, though part of a broad set of legal rights, generally occur within an agency's internal bureaucracy, and are thus distinct from litigation processes. At present, multiple laws provide for various rights to appeal USFS/agency decisions. These laws include the Administrative Procedure Act (APA) (5 U.S.C.A. §§ 551-559, 701-706), the Appeals Reform Act (ARA) (16 U.S.C. § 1612), the NEPA, and the National Forest Management Act (NFMA) (16 U.S.C.A. §§ 1600-14). Under the current Code of Federal Regulations (CFR), three types of USFS activities may be appealed. These include forest plans, revisions, and
amendments (36 CFR 217); permits or written authorizations relating to use or occupancy of the national forests (36 CFR 251); and NEPA project decisions (36 CFR 215) (Teich et al. 2004). Appeals have proven a controversial aspect of national forest management and remain the subject of ongoing policy debate (Floyd 2004, Manring 2004, Teich et al. 2004).

Nancy Manring notes (2004:237) that in the context of national forest planning, "administrative appeals [of agency decisions] provide an instrument of both political and legal accountability." Moreover, administrative "appeals provide an essential avenue for meaningful public participation in the management of national lands... appeals have helped compel the agencies to follow the laws more closely" (Baldwin 1997:2). Teich et al. (2004:14) note that USFS [often] blames administrative appeals for delaying national forest projects "championed for reducing the risk of catastrophic, stand replacing wildfires." Teich et al. (2004:14) describe USFS officials as invoking the phrase "analysis paralysis" in critisizing the administrative appeals processes by which the agency must abide.

Donald Floyd (2004:9) summarizes a political tension associated with administrative appeals, noting:

Appeals and litigation are a symptom of a broader problem—they represent the skirmish lines within a network of conflicting values... Democratic processes and public participation that ensure government accountability may seem frustrating and inefficient to resource managers confronting forest fires and insect and disease outbreaks. But if we value democratic traditions and trust citizens, our professional responsibility includes listening carefully and acting in partnership with the many individuals and groups who care about our [national] forests.
Public Participation and Democracy

In discussing public administration, public participation, and government interactions with the citizenry, the word “democracy” is inevitably mentioned or discussed. How “democratic” is our government? Are our public participation processes democratic enough? In many ways notions of democracy and what the concept entails are ambiguous and philosophical in application. Nonetheless, it is important to note that democracy is both a system of government as well as an idea. Political scientist John Dewey (1927:144) included among democracy’s trappings as a system of government, “general suffrage, elected representatives, majority rule, and so on.” As an idea, Dewey characterized democracy as service of community.

Government exists to serve its community… its purpose cannot be achieved unless the community itself shares in selecting its governors and determining their policies… Belief in this political aspect [of democracy] is not a mystic faith as if in some overruling providence that cares for children, drunkards and others unable to help themselves. It marks a well-attested conclusion from historic facts. We have every reason to think that whatever changes may take place in existing democratic machinery, they will be of a sort to make the interest of the public a more supreme guide and criterion of governmental activity, and to enable the public to form and manifest its purposes still more authoritatively. In this sense the cure for the ailments of democracy is more democracy. The prime difficulty…is that of discovering the means by which a scattered, mobile and manifold public may so recognize itself as to define and express its interests.

Thus, in the context of national forest management, the same difficulties of scattered, mobile, and manifold interests seem to confound and complicate clear and efficient public lands governance. Dewey and advocates of more deliberative models see more democracy as the road ahead, while advocates of synoptic, technocratic, and, to some degree, pluralistic models see expertise and more limited citizen involvement in agency decision making as mechanisms for improving governance.

20

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Such models and theories aid in the analysis and distillation of the conflicts that followed the Bitterroot wildfires of 2000.
Chapter 4 Background

Public Lands, the Bitterroot National Forest and Beyond

*If the national forests are going to accomplish anything worthwhile, the people must know all about them and must take a very active part in their management. The officers are paid by the people to act as their agents and to see that all the resources of the forests are used in the best interest of everyone concerned.*

- Gifford Pinchot, 1907

Human conflict surrounding public lands management is not a recent phenomenon. Though Chief Pinchot’s words are propitious, they offer little utility to the managers of public lands. What is “the best interest of everyone?” Conflict is perhaps as native and historic a component of public lands management as is wildfire (Arno 1980) in Northern Rocky Mountains’ ecosystems.

The Bitterroot National Forest

The BNF encompasses 6 million acres in Montana and Idaho including postcard-worthy peaks, wild and scenic rivers such as the Selway and the Salmon, part of the largest block of contiguous undeveloped wildland in the lower 48 states, and ecological values that defy monetization. Forty-seven percent of the BNF (743,000 acres) lies within the Anaconda-Pintler, Selway-Bitterroot, and Frank Church-River of No Return Wilderness Areas (BNF 2005).

The BNF has a rich history that includes some notable periods of public conflict surrounding its management. Due to what is now generally regarded as short-sighted management that favored extractive values over ecological health and the popular aesthetic sensibilities, the BNF would, in the 1960s and 1970s, become the subject of national controversy (Bolle et al. 1970, Hirt 1994, Thomas and Sienkiewicz 2005). Politicians, academics, and other observers criticized the BNF for terracing mountainsides and clear cutting large tracts of forest. As a result of the BNF’s largely unpalatable forest management, in addition to a similar situation involving a public backlash on West Virginia’s Monongahela National Forest, Congress passed the NFMA. Among other important objectives, the NFMA responded to the quality of land stewardship on the BNF and elsewhere. The NFMA was in part a prescriptive measure designed to qualify and update the 1897 Organic Act’s (16 U.S.C.A § 476 et seq. (§ 476 repealed 1976)) broad mandate to the agency (Steen 1991).

**The Sula State Forest**

While the NFMA and other federal laws governing the management of national forests manifest a growing respect for ecological integrity, a need for intellectual humility, and a legal land ethic, some consider the myriad federal laws and their prescribed multiple uses to be ambiguous when applied to on-the-ground management (Interviews 2, 5, 8, 9, 12, 24). By contrast, the State of Montana manages its state lands under rules quite different than those governing the BNF. Rules governing state trust lands are less complicated than those governing management of the national forests (Sienkiewicz 2006). Nonetheless, Montana’s constitutionalization of environmental protection established ecological values as a
priority for all Montanans (Mont. Const. art. II, § 3). Ironically, Montana’s constitutional protection of the environment runs up against requirements to fund public schools because the mission and institutional structure of state trust land management requires long-term profit maximization for trust beneficiaries (Souder and Fairfax 1996, Sienkiewicz 2006). Thus there exists in Montana, a battle of public goods—a tension or inverse relationship between two auspicious social values (Sienkiewicz 2006). The USFS is therefore not alone in having paradoxical management goals.

Relative to the BNF’s vast acreage, the SSF’s acreage (within the same general area) is, perhaps, relatively insignificant. Of course, culturally, ecologically, aesthetically, economically, and politically, the SSF—like the BNF—is of significant value. The 17,600 acre SSF lies within Ravalli County’s Camp and Cameron Creek Watersheds, near Ross’ Hole. Ross’ Hole provided the inspiration for Charlie Russell’s masterpiece, Lewis and Clark Meeting the Indians, which hangs in Montana’s State House (Bitter Root Valley Historical Society 1982). The SSF is surrounded by the BNF, but being classified as state trust land, it is managed and guided by a dramatically different management mission than that of the BNF.

During the 2000 wildfire season, 87% of the SSF burned, though in mixed degrees of severity (Harrington 2003, Interviews 7, 20, 22, 28). The State Land Board, which oversees the management of state-owned trust lands by the Montana DNRC, praised the agency’s efforts to salvage burned timber from the Sula in a timely fashion. At the same time, elected officials at both the state and federal levels of government criticized the BNF for its delays in salvaging commercially-valuable
burned timber from the fire-disturbed areas on federal lands. In 2001, (former) Montana Governor Judy Martz told Montana’s Congressmen,

   We’ve just gone to town, but the Forest Service hasn’t done one thing yet. And they need to do something too... My point is simple, [i]f the state of Montana can move in a timely, environmentally sound and fiscally responsible manner with limited resources, should we not expect our federal neighbors to do the same? (Missoulian, March 9, 2001).

DNRC managers opted for an aggressive salvage operation, removing more than 27 million board feet (MMBF) of burned trees from approximately 6,000 acres of the SSF trust lands (Harrington 2003). This salvage operation generated more than $6 million for Montana’s state trust land beneficiaries (Harrington 2003). According to the DNRC’s Forestry Division Administrator, Bob Harrington, “The majority of this harvest occurred within six months of the fire, allowing [the DNRC] to capture maximum [economic] value from purchasers” (Harrington 2003).

With respect to his federal counterparts on the BNF, Harrington (2003) commented: “The internal [NEPA] appeals process has been used to handcuff agency professionals, and to prevent good projects from moving forward.” Although perspectives as to the importance of public participation under the NEPA (42 U.S.C.A. §§ 4321-61) and definitions of “good” can reasonably differ, Harrington’s words and those of some federal managers evince resentment of the appeals process as applied and/or the manifestations of public participation in public land management that emerged following the wildfires of 2000 (Interviews 2, 10, 12). Many public stakeholders, by contrast, value and exercise their participatory rights under the NEPA and other public land laws (Interviews 5, 9, 19, 20, 22, 24...). Importantly, government officials, managers, stakeholders, and pundits infrequently
offer definitions of subjective terms such as good, or healthy, or restoration, or thinning when offering public commentary on land management issues. Definitions of such terms vary dramatically depending upon applicable evaluation criteria or desired management goals. Economic “health” will in many cases differ from ecological health. Thus, the public lands management dialogue requires precise language. Agreed upon definitions of such terms is critical to productive communication between parties and for comprehension of issues by the general public. As Voltaire said, “If you wish to converse with me, define your terms” (Polymath Systems 2005).

In contrast to the DNRC’s explicitly-mandated, commodity-driven management mission, Mike Hillis, a biologist on the Lolo National Forest (LNF) described ecological considerations for which the USFS must—by federal statutory and common law—account. These include, among sundry other ecological values, the habitat function provided by large diameter standing dead trees (which are also those trees most valuable for harvest in a salvage logging operation):

Snags are the most important tree for wildlife in the forest. Pileated woodpeckers will dig huge cavities in snags, and lots of them, which are used by everything from pine martens to flying squirrels to flammulated owls. They need large larch or ponderosa pine snags. No other snags will do (High Country News, April 9, 2001).

When does a scorched tree become moribund? What constitutes a dying tree? What constitutes a snag? How many snags per acre are appropriate to maintain viable local populations of the species Hillis noted? What diameter constitutes “large?” The uncertainty associated with such questions fosters scientific debate and facilitates public conflict. This is so because unsettled scientific questions leave room for
argument and thus draw involvement by politically-motivated factions and stakeholder groups.

Vagueness and ambiguity are sometimes intentional relative to underlying laws. This ambiguity can allow outcomes other than that which statutory language might suggest to laypeople—in order to, among other reasons, make a law more marketable in its legislative phases. Sometimes ambiguity is a trait of poorly drafted legislation. Sometimes legislators (and their bill drafters) are intentionally vague in order to avoid accountability (Thomas and Sienkiewicz 2005). These political realities consequently interact with sociological and ecological variables. Forest managers, forest users, and forest ecosystems must live with the outcomes. The aftermath of the wildfires of 2000 bears out the complexity of such interactions.

Larry Campbell, Conservation Director of the Friends of the Bitterroot, noted, “If you are ever going to leave a forest alone to heal and ensure future productivity, it should be done after a fire” (High Country News, April 9, 2001). In response to such critiques, DNRC silviculturist, Jon Hayes, noted of the mission for state lands such as the SSF: “Unfortunately, concerns with wildlife don’t generate the type of revenue the logs do. We’re required by state law to make money off these lands. A lot of times we’re not able to do the maximum for wildlife” (High Country News, April 9, 2001). Here, DNRC Silviculturist Hayes relates a clear management priority—generating revenue. In contrast to that guiding the DNRC’s trust land management, the law and policy guiding USFS management is not conducive to such clarity. Some argue that USFS-related law and policy is confounding in its application to the land
and in its interaction with unwritten realities relating to political, social, economic, and institutional pressures (Interviews 8, 9, 27, Thomas and Sienkiewicz 2005).

Are comparisons of the SSF to the BNF valid? Did elected officials and managers who drew such comparisons understand the difference in mission and purpose that guide federally-managed USFS lands as compared to Montana’s state trust lands? Did (former) Governor Martz’ criticisms of the USFS/BNF account for differences in spatial and temporal scale and complexity, as between the BNF and the SSF? Did observations and public commentary following the fires of 2000 manifest an adequate understanding of legal, ecological, and ethical mandates? No matter the nature of one’s opinions, the aftermath of the wildfires of 2000 in the Bitterroot Valley begot drastically different results as between the SSF and the BNF.

Interestingly, the legal mandate underlying Hayes’ comments has led some non-beneficiaries (mostly in western states) to question the state trust land doctrine and the common interpretation in favor of revenue maximization above all other management values (Sienkiewicz 2006). In Montana, the tension between managing for ecological integrity and managing for commodity extraction on state lands sometimes makes for muddled policy (Sienkiewicz 2006). This is so partly because Montana’s Constitution declares that all of its citizens possess a right to a clean and healthy environment (Mont. Const. art. II, § 3). Nonetheless, trust land jurisprudence—by virtue of its relative clarity and simplicity—favors deference to state land management agencies more than federal public land law favors deference the federal land management agencies (Sienkiewicz 2006).
Bitter Conflict

Given the human history in the Bitterroot Valley and its relevance to public lands, it is interesting that national-scale conflict returned to the area after the landmark fire season of 2000. The BNF seems a magnet for controversy, but it is simultaneously a proving ground for novel interpretations of public land law and policy. The BNF has provided a forum for addressing the complex ecological, social, political, and economic equations that inform public forest management. Some see in the besieged BNF a potential for serving as the model for guiding national forest management.

Spike Thompson, BNF Deputy Supervisor during 2000’s wildfires and their aftermath, noted:

It seems like to me that with a forest that’s basically allocated the way the Bitterroot is, 50% wilderness, 25% inventoried roadless, if you could somehow get the public to buy into a restoration program for the forest where you could just set down the political philosophies for a while, because I know there’s people there that want the Bitterroot to cut 30 million board feet [(MMBF)] a year and there’s people there that want them to cut zero. If you could just set aside the political philosophies for a while, the Bitterroot could be the model forest for the whole nation... You’ve got... such a diverse amount of things you can do there. It’s really becoming an urban forest, where the day use has... tremendously increased over the last few years. And yet, you’ve got some of the wildest country in the United States, outside of Alaska, close to it. It just seems like the Bitterroot could be the model forest for the [United States], and this is what I always told the environmental groups, “If you could help us, you can make this the model of what you’d like to see the whole Forest Service look like.” And yet, they couldn’t see that for the philosophy difference. And rather than give someone that 25% and let the Forest Service have some maneuverability there, they fight every project (Interview 2:25).

Spike Thompson is Supervisor of the Lewis and Clark National Forest in Northwestern Montana.
The Conflict Continues

It is debatable who initiated (and initiates) the conflicts that continually plague the BNF and whether “every” project is actually challenged. In any case, conflict continues to characterize the BNF’s management. Just when it seemed time would leave the post-2000 wildfire conflicts behind, 2005’s Middle East Fork project found many of the same stakeholders once again at odds over BNF management. The subtitle for a September 2005 article in the Missoulian declared: “Bitterroot National Forest prepared for timber cut before final decision [was] reached.” Reporter Michael Moore led-in: “[The BNF]… spent more than $160,000 marking trees for a timber cut designed to reduce hazardous fuels, even though a final decision on the logging project ha[d]n’t been reached.” The article did not define “hazardous fuels.” In the same article, Moore quoted Matthew Koehler, Director of the Native Forest Network:

We find it incredibly disingenuous that during the public comment period, a period where [the BNF] said they would take the public’s comment and incorporate it into their plan, they were just moving ahead with the plan that they apparently already have chosen (Missoulian, September 23, 2005).

A few days later, BNF officials ordered USFS law enforcement officers to escort environmental advocates Jim Miller, Larry Campbell, and Stewart Brandborg from a press conference (called to allow invited participants to discuss the aforementioned timber sale/ thinning operation) before they were able to sit down. The 80-year old Brandborg, whose father once served as the BNF Supervisor, noted that “In all my life, I’ve never seen where the public couldn’t attend a press conference” (Missoulian, September 23, 2005).
Larry Campbell said of the process surrounding the Middle East Fork Sale, “The Forest Service ignored nearly 10,000 public comments that were unfavorable toward the preferred alternative to favor a handful of Sula residents” (*Missoulian*, September 23, 2005). USFS spokeswoman Dixie Dies noted, “Most all of the comments we got on this are form letters, so we take that into account” (*Missoula Independent*, November 10, 2005). For his part, Supervisor Bull later noted that if he had the whole process to do over, he would do it differently (*Missoulian*, September 30, 2005). As to the 98% of received public comments opposing aspects of the Middle East Fork Sale, Supervisor Bull noted that the BNF will do “what’s best for the resource”—and that such decisions are not a “popular vote” (Interview 36).

Supervisor Bull explained that the public already knew how opponents of the project felt, that the press conference at issue was to allow supporters of the planning option favored by the BNF to speak. Bull noted that the “Washington D.C. office” had urged him “to control the message,” so he invited only supporters of the USFS’ proposed actions and denied other citizens entry (Interview 36). Were those involved—manager, NGO (non-government organization), and citizen alike—communicating? Clearly? In good faith? The aforementioned comments suggest a polarity or tension between technocratic, unilateral leanings of some managers and the more deliberative democratic preferences of some interested citizens.

Some of the citizens barred from the press conference are, at the time of writing, pursuing a lawsuit for what they call “a series of anti-democratic actions” by certain BNF personnel (*Missoulian*, October 5, 2005). These events beg the question as to what the role of democracy in national forest management is and should be. Do the
democratic rights of individuals, as pertain to national forest management, extend beyond the right to vote for elected officials?

It seems that environmental groups, federal managers, Washington power players, industry representatives, and others have staked out the BNF as a symbolic chess board as pertains to individual agendas. The BNF could be called the “Gaza Strip” of the National Forest System. Moreover, the Bitterroot Valley’s privately-held bottomlands are undergoing rapid changes relating to in-migration, parcelization, human population growth, development, and the accompanying policy problems and pains (Flores 1999).

Today, tensions continue to run high in communities adjacent to the BNF. Will old wounds ever heal? Trust between the USFS and the spokespersons of interested stakeholder contingents appears to be no stronger than it has ever been, to the extent it exists at all. But as some USFS managers are apt to say, “If everybody’s mad at you, you’re ok,” suggesting conflict goes hand in hand with multiple use management (Interview 9:34). What is the importance of mutual trust between and among public forest managers and the many concerned publics?

Perhaps USFS managers simply cannot please everyone, and in seeking to do so, please no one? Are such assumptions valid in the context of the management of ecosystems and their interactions with complex socio-political systems? Should citizens accept discord as inevitable where the public estate is concerned? Is public participation an obstacle to management? Is management an obstacle to public participation? Is there a balance to be struck? Given extensive scientific research and the significant natural resources educational infrastructure, is it unreasonable to

32
expect public land management to rise to meet the challenge and complexity of today’s changing ecological, social, and political climate?

A salient variable further complicating national forest governance relates to congressional delegates and political appointees playing a direct role in regional and local management of the national forests (Vaughn and Cortner 2005). This, if coupled with attempts to keep such influence below the “public radar,” creates a problem for managers and citizens alike. To this effect, Undersecretary of Agriculture for Natural Resources & Environment Mark Rey signed the Record of Decision (ROD) for post-fire management actions on the BNF following the 2000 wildfires. Rey subsequently attempted to avoid a court-ordered settlement conference in the federal lawsuit associated with the same management actions. The official case record suggests that Undersecretary Rey’s attempted absence irked federal Judge Donald Molloy who noted in a court order that “apparently, [land management] decisions are being made in Washington D.C. (emphasis added)” (Document 44, CV 01-219-M-DWM: 180 F.Supp.2d 1141).

Bolstering conclusions related to top-level influence on local issues, BNF Supervisor Dave Bull, BNF District Ranger Dave Campbell, and others have argued that elected officials, executive branch appointees, and centrally-made budgets leave USFS managers with little leeway as to what categories of projects receive priority (Interviews 8, 9, 27). Should USFS management of public lands and resources of be of a top-down or a bottom-up nature? USFS Chief Dale Bosworth noted of senior officials influencing local decisions, “If [an executive] want[s] to tell a [District Ranger or Forest Supervisor] what decision to make, then [she] ought to make it
[her]self... and be accountable to that decision... [that is to say:] ‘I'm OK with making a different decision Boss, just don't tell me what decisions to make and make like it was my idea’” (Interview 12:6-8).

Given the present formula of law, forest plans, and budgets, Chief Bosworth’s words suggest he would prefer a more bottom-up land management process. To what extent does a particular national forest's Congress-influenced and centrally-determined budget have the same effect as an executive official ordering a particular course of land management action without claiming ownership of that course of action?

**The Collaborative Paradigm**

If, as a matter of policy, public land management agencies seek to be less technocratic and more deliberative as a mechanism for avoiding protracted conflict, then collaboration is one means by which to do so. Collaborative, open, and adaptive frameworks propounded by some in both environment and extraction-focused stakeholder groups stand in contrast to the present management paradigm (Interview 24). Some planning models derived from the collaborative school of thought differ from the current public participation paradigm, most conspicuously, because proposed collaborative efforts at planning entail adoption by agency managers as opposed to being merely ‘considered’ by managers (Interviews 24, 36). As Supervisor Dave Bull noted, management decisions are not a “popular vote” (Interview 36). The agency has not embraced such collaborative planning processes at a significant scale—nor have recent executive administrations (Vaughn and Cortner 2005). Although Supervisor Bull’s election metaphor does not quite match
the context of national forest management planning; ironically, his words hint at possible mechanisms for ameliorating conflict—namely, devising a process whereby diverse stakeholder views might be better represented in final agency actions. Such a process would comprise a move toward the deliberative democratic models outlined by Dewey (1927), Poisner (1996), and Shepherd and Bowler (1997).

Importantly however, such alternative, participatory planning models would not jibe well with ongoing, indirect congressional and executive branch-born influences some USFS managers describe and decry (Interviews 5, 8, 9, 27). The strong presence of such influence speaks to the competitive pluralistic models described by Sunstein (1985), Barber (1994), and Poisner (1996). Nonetheless, much current scholarship focuses on the auspices of more collaborative, deliberative public lands management (Interviews 1, 24, Wondolleck and Yaffee 2000, Brick et al. 2001).

Thinking Big

In September 2005, six scientists published an article in the Journal of Forestry imploring managers to think “big,” to think holistically, and to analyze problems of forest fire and management from a landscape perspective. They urged a cultural shift toward holistic management occur—“now”—before the window of opportunity for “big thinking” closes “as communities expand into forests, and fire is used as a scapegoat for management failures” (Sisk et al. 2005). The message these scientists convey is one to the effect that “managers” are presently focused narrowly, entrenched in a myopic culture, thereby facilitating rhetoric and oversimplification of eco-sociological problems. Do such ideas apply to the BNF’s handling of post-fire management following the 2000 wildfire season? Do USFS managers have the
intellectual and political tools, or the cultural-institutional freedom, to think “big?” Can USFS managers think “bigger” than their overseers allow? What is the nature of managerial discretion? May a manager contravene official, centrally-made budgets? To what extent does the policy agenda of the executive branch and its political appointees proscribe managerial discretion? Can a shift to more collaborative bottom-up management of the national forests originate anywhere but the top? Would a more collaborative management process solve any problems? Would a more collaborative management process prove more meaningful in a democratic sense?

Moving On

The players in the ongoing BNF drama have a long history of dysfunction with which to contend. Norman Maclean said, “If boyhood questions aren’t answered before a certain point in time, they can’t ever be raised again” (Maclean 1976:8). Is it time to start over, and leave “boyhood questions” behind? The professional society most closely allied with the Forest Service, the Society of American Foresters, recently published an article in its Journal of Forestry titled, When an Agency Outlasts its Time (Fairfax 2005). Analogously, two of the environmental/conservation movement’s own have stirred infighting and dialogue with their 34 page piece titled, The Death of Environmentalism (Shellenberger and Nordhaus 2005).

The authors detail overarching problems in public land management and environmentalism, respectively—relating to such broad themes as mission, message, and core philosophy. These are, of course, only two of numerous scholarly and philosophical perspectives about contemporary public land and environmental issues.
Nonetheless, as the theories manifest in the titles of these articles suggest, conflict’s aftermath can prompt reexamination, and perhaps, produce change.

This story of enmity and conflict has prompted reconsideration of present paradigms within movements, industries, Congress, and agencies. Some argue that Undersecretary Rey, other executive branch officials, and elected officials of various levels intentionally provoked controversy in order to, as Judge Molloy noted in *Wilderness Society v. Rey*, “speed matters to... court” (180 F.Supp.2d 1141, 1148).

The USFS would do so, note critics, in order to lay foundation for the “analysis paralysis” argument—or the notion that USFS managers are “shackled” (Harrington 2003, Vaughn and Cortner 2005) by the NEPA (42 U.S.C.A. §§ 4321-61) and the existing body of environmental and public land law (Interview 15, Vaughn and Cortner 2005).

Vaughn and Cortner (2005) argue further, that members of the George W. Bush Administration and its supporters have made a habit of manipulating rhetoric and utilizing polarizing, apocryphal characterizations in order to garner support for the Healthy Forest Restoration Act of 2003 (HFRA) (16 U.S.C.A. §§ 6501-6591). Vaughn and Cortner (2005) note also, that some within the broad environmental community have responded in kind, with polarizing rhetoric of their own.

A recent public lands conflict brought to light a tension between the executive branch USFS and the judicial branch whose decisions guide USFS management. Following 2005’s *Earth Island v. Pengilly* (376 F.Supp.2d 994) holding, USFS Chief Dale Bosworth ordered national forests to cease all “categorically excluded” projects. These included not only those significant actions prominent environmental NGOS

37

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often challenge, but also negligible actions such as an individual cutting a Christmas
tree. Judge James K. Singleton’s ruling in the case had not contemplated prevention
of insignificant activities on public lands by individuals, but rather land use and
planning-related issues (376 F.Supp.2d). Nonetheless, the USFS halted activities
such as the cutting of the Capitol’s Christmas tree and firewood collecting by
individuals.

Chief Bosworth perhaps did so as part of a strategy to actuate clarification of the
ruling. Others, however, saw the action as gamesmanship being played-out in the
federal courts. Retired USFS economist, Bob Wolf, chastised Undersecretary of
Agriculture Mark Rey (USFS Chief Bosworth’s supervisor) for the “administration’s
abuse of the court system,” noting to Undersecretary Rey in an e-mail, “Your ploy
backfired… Congress didn’t leap to overturn Judge Singleton’s decision. Instead,
senior members wrote that you were playing a game” (High Country News, January
23, 2006).

An article in the Washington Times (October 11, 2005) described the national
forest shutdown associated with Earth Island v. Pengilly, arraying
“environmentalists” (ostensibly referring to the Plaintiffs) in positions antipodal to
Christmas and boy scouts. The Society of American Foresters (SAF)—a professional
society with extensive cultural, historical, and professional ties to the USFS—linked
to the Washington Times article in its electronic newsletter without qualification of
the included characterizations (E-Forester, October 17, 2005). In a subsequent issue
of The Forestry Source (December 2005), the SAF’s editors again presented this legal
dispute in terms that could reasonably be perceived as casting aspersions upon
administrative process. The SAF’s editors, again, pitted environmental groups and administrative appeals against Christmas.

Judge Singleton, upon motion by those who had sued the USFS (over issues relating to public participation), subsequently issued an order stating that the USFS had over-applied the ruling, which had been intended for major actions such as timber sales or thinning projects (376 F.Supp.2d 994). Some, again, accused the USFS of intentionally drawing controversy in order to build a case against the current body of environmental and public land laws and to lay foundation for the “analysis paralysis” argument (Missoulian, October 21, 2005, Vaughn and Cortner 2005).

No matter one’s opinions on these matters, it is clear that parties from across the political spectrum presently cripple national forest management by utilizing rhetoric-based, euphemistic methods to influence national forest law and policy and broad-based environmental law and policy. This is perhaps the nature of politics, but significantly increased litigation and associated diversion of limited public resources, with associated costs in time, personnel, and money, is a salient outcome that deserves examination (Thomas and Sienkiewicz 2005). USFS management has, of late, been unable to rise above the controversy. Some among the myriad “environmental community” also seem unable to rise above the controversy, choosing adversarial strategies over working toward better dialogue and relationships. The vicious cycle of public land conflict thus continues in the Bitterroot Valley and elsewhere.

Protracted conflict characterizes not just the BNF, but many of America’s national forests, Bureau of Land Management (BLM) lands, park lands, and other public land
designations. Public land management faces manifold challenges that prevent expeditiously meeting the various desires of the people and the needs of the land. Prominent among these challenges are core differences between citizens, stakeholders, and managers as to what “the needs of the land” actually are (Interviews 1-37). Other challenges include uncertainty, increasingly scarce funding, imperfect information, institutional barriers to change, conflict, ever-changing direction from changing political regimes, and many others (interview 1-37).

At present, some federal officials are open to moving public lands into private ownership. Terry Anderson, Public Lands Advisor to President George W. Bush, has proposed “selling off public lands to private game ranchers” (Hermann 2005:32). Further, 2005 proposals to sell select national park lands (Headwaters News, October 10, 2005, Sacramento Bee, October 29, 2005) and loosen claim patenting requirements under the Mining Law of 1872, once again thrust public lands to the fore of American policy debates (Missoulian, November 20, 2005, New York Times, November 20, 2005, High Country News, November 28, 2005). USFS Chief Emeritus (and Former Head of the BLM) Mike Dombeck noted of these trends,

[O]ur federal public lands are under siege in Congress. It seems that some folks simply do not like the idea of the public owning land. These radicals and ideologues are taking advantage of the fact that Americans are preoccupied with economic insecurity, high fuel prices and a war abroad to promote their personal interests by pushing language in the federal budget bill that would put a “for sale” sign on 270 million acres of national forest and other public land... Theodore Roosevelt put it this way: ‘The nation behaves well if treats the natural resources as assets which it must turn over to the next generation increased, and not impaired in value.’ That kind of leadership is why Roosevelt’s face is carved on Mount Rushmore. The leadership we are seeing in some dark corners of Congress will leave Americans with a much different legacy (Missoulian, November 22, 2005).
Thus, the public ownership of public lands is not immutable. Perhaps present attempts at privatization are somehow related to the National Forest System’s past conflicts and changing management focus? To the degree conflict over public land management engenders policies that would diminish the public estate, then it would behoove employees of public lands agencies and all manner of public lands users to redouble efforts at public lands conflict resolution. Perhaps the conflicts will diminish with more certain mandates, better coordinated and revamped laws, and more clearly defined processes for arriving at management plans.
Chapter 5

The Wildfires of 2000: a Story of Protracted Conflict

During the summer of 2000 the Bitterroot Watershed of Montana and Idaho experienced wildfire at a scale and severity it had not seen since the extensive wildfires of 1910 (USFS 2000A). The 2000 wildfires burned 356,000 acres in the Bitterroot Watershed (USFS 2000A). Fire affected nearly 20 percent of the BNF (USFS 2000A). The 2000 fires gained national attention as they dominated the attention of public land managers and citizens alike across the Northern Rockies (USFS 2000A).

Tragic, inspiring, and cathartic events marked the 2000 fire season. However, the social and political conflict that polarized human communities in the Bitterroot Valley and surrounding areas is perhaps of tantamount importance. Moreover, similar issues remain divisive and vitriolic today—five years later. Ongoing tensions exist between individuals and groups focused on ecological restoration and those individuals and groups focused on the salvage of wildfire-burned timber. Events following the wildfires comprise a classic case of natural resource value conflict. Interestingly, in recent years, the policy distinction between ecological restoration and salvage logging has become increasingly unclear due to ambiguous and undefined rhetoric pervading forest management (Vaughn and Cortner 2005). Many, for instance, speak of salvage and restoration interchangeably (Interviews 2, 6, 8, 10, 11, 12), while others distinguish between the two concepts (Interviews 12, 15, 16, 17, 18, 19, 24, 25, 26A, 26C, 27).
The post-fire conflicts played out within local communities, state and federal agencies, the Montana Legislature, the halls of Congress, the White House, federal court houses, and elsewhere. For those tied to the diverse natural resources and values associated with public lands, a continued analysis of the management and policy lessons surrounding the 2000 fires can provide significant lessons. As history has many times taught natural resources professionals, careful consideration over time tends to clarify that which was once unclear and to correct the imperfect vision that comes of being human in a time of turmoil.

**Background**

The Bitterroot Valley’s 2000 wildfire season began in early June when lightning ignited the Fish Lake area in the Upper East Fork of the Bitterroot drainage. This fire grew to only five acres, not portending the significant ecological and social disturbance that was to erupt later in the season and affect much of the intermountain West. On July 15, the Little Blue Fire forced the evacuation of 25 homes near Painted Rocks Lake and burned 5800 acres before being suppressed (USFS 2000A). Other wildfires were ignited across the Bitterroot and Sapphire Ranges, and within the Selway-Bitterroot and Frank Church River of No Return Wilderness areas. On the night of July 31st, a severe lightning storm swept across the Bitterroot Valley igniting 78 discrete blazes. Some would merge into larger fire “complexes,” significantly altering stand structure and ecological function in affected localities (USFS 2000A). Thus began the 2000 fire season in the Bitterroot Watershed. Blazes would continue until September of that year (Halvorsen 2002). Parts of the Bitterroot
Valley’s east and west flanks burned. Many homes within the wildland-urban interface (WUI)\(^1\) were lost to wildfire.

BNF officials, in view of building risk to human communities and ongoing wildfire suppression efforts, closed the forest to public access. Many non-forest roads in the WUI were likewise closed. Within the Bitterroot Valley’s (human) communities, stage two and three air quality alerts became a regular occurrence during the 2000 fire season. At the time, many viewed the fires as an unprecedented disaster (Halvorsen 2002). Severe fire seasons are, of course, nothing new to Rocky Mountain ecosystems. Nonetheless, local communities galvanized to address the dangers to private property, livelihood, and well-being. While the 2000 fires took 70 homes, 170 ancillary structures, and 94 vehicles from forest edges in the Bitterroot Valley, some 1,700 threatened homes were saved as a result of interagency cooperation and community efforts (USFS 2000A).

Beyond the Bitterroot Valley, the 2000 wildfires affected much of the West, where more than 2.2 million acres of national forest land and 5 million acres of other public ownerships and private land burned at varying degrees of intensity. The 2000 wildfire season set records for government firefighting expenditures, consuming more than $1 billion in federal funds (TFCS 2004). In 2000, firefighting expenditures on the BNF, alone, approached $70 million (TFCS 2004). Although such expenditures were little questioned at the time, they have prompted re-consideration by a broad array of citizens and public and private interest groups as to what appropriate wildfire

\(^1\) WUI is the point at which urban development abuts “wildlands” or the forested landscape. Definitions of the term will vary, but the idea connotes development and human domiciles within the private forest lands that adjoin public forest lands. From an ecological or a wildfire perspective, there is no clear boundary, and thus homes in the WUI are at risk.
management and policy should entail. This re-consideration continues, and focuses as much, if not more, on what comprises appropriate forest management after fires have altered a stand, watershed, ecosystem, or human community. As BNF Supervisor Dave Bull noted, “[post-wildfire operations] are just always controversial. They just always are” (Interview 8:16)

**Post-Wildfire Salvage and Restoration**

By December of 2000, significant political and social conflict over post-fire salvage logging plans was increasingly apparent. The BNF’s personnel had, nonetheless, been in communication with the public through a series of town hall meetings, through an extensive website dedicated to the fires and their aftermath, as well as through the traditional public comment processes and proposed management actions required under laws such as the APA (5 U.S.C.A. §§ 551-559, 701-706) and the NEPA (42 U.S.C.A. §§ 4321-61).

Through the fall of 2000, the BNF began what its officials termed an “aggressive emergency rehabilitation program.” According to the agency’s literature, the BNF stabilized 4,000 acres of sloped terrain (via placement of straw waddles and cross-felled trees), seeded 254 acres with nursery stock (Interview 37), rehabilitated 200 miles of fire line, sprayed 195 acres for weeds and replaced 350 undersized culverts during this initial post-fire period (USFS 2000B). The BNF operated under the assumption that the aforementioned actions were ecologically restorative. Others would challenge such assumptions.

Burned Area Emergency Rehabilitation (BAER) Teams performed much of the initial emergency rehabilitation work. The emergency efforts included the labor of
more than 400 volunteers (USFS 2000B). Some stakeholders opposed these management actions, calling upon the Beschta Report—a scientific study that questioned common assumptions theretofore accepted by agency foresters and managers as to what management approaches best actuated post-fire ecological “recovery” (Interviews 15, 16, 18, 19, 26A, Beschta et al. 1995).

In a post-fire survey the BNF sponsored, the ecologically-focused approach described by the Beschta Report was not specifically mentioned. Nonetheless, the post-fire survey drew criticism (Interviews 15, 16, 17) for arraying a “do nothing” approach against positively-framed management activities (BBER 2001). “Doing nothing” amounted to a label often attached to proponents of natural recovery (Courier-Journal, October 12, 2005, Forestry Source, December 2005, thefurtrapper.com 2005). Importantly, neither managers, nor environmental NGOs advocated one approach for all categories of burned terrain, yet oversimplifications of mission and management approach on burned lands were (and are) often repeated in the media (Vaughn and Cortner 2005).

The Burned Area Recovery (BAR) Project

By February of 2001, the BNF was well into the process of planning post-fire management per the BAR project. The BNF solicited and received public comment on the BAR project, which included an EIS required under the NEPA. The BAR project and its associated EIS would become the focus of much of the post-fire controversy. The BAR outlined how much dead, dying, or live timber would be cut and where; what roads would be built and where; what manner of restoration activity would occur and where; as well as addressing other pressing management concerns...
such as site-specific forest plan amendments. In an effort to help address fire recovery on non-USFS lands, the BNF joined forces with other agencies and community groups, forming the Bitterroot Interagency Recovery Team (BIRT). Partners included the Natural Resources Conservation Service and the Ravalli County Extension Office (USFS 2000B).

**Management Alternatives under Various Stages of the EIS Process**

During the “scoping” process (proposing management alternatives and soliciting and analyzing comment on those alternatives), the BNF and interested stakeholders eventually produced seven management alternatives (identified as A-G) which would be considered for implementation. These alternatives addressed the critical issues of economic opportunity, erosion and aquatic habitat, fuels reduction, motorized access, reforestation, roads, proliferation of noxious weeds, and others. The alternatives differed with regard to tradeoffs anticipated between the degree of ecological degradation associated with the various proposed management actions and habitat protection for various species, volume and methods of timber extraction, and other associated actions such as road building, maintenance, and “storage.”

In May of 2001, the BNF issued a draft environmental impact statement (DEIS) as part of the BAR project (CV 01-220-M-DWM 2001). The DEIS included five potential management alternatives for post-fire management that addressed logging, watershed improvement, and other issues. Some of the stakeholders that would eventually sue the USFS over the BAR project, commented on these alternatives within designated time limits. These stakeholders would, in turn, submit their own post-fire management alternative for consideration, called the “Conservation and
Local Economy” alternative. This alternative would later appear as an option in the final environmental impact statement (FEIS) (CV 01-220-M-DWM 2001).

The “Conservation and Local Economy” alternative focused on fuel reduction efforts around homes and communities within the WUI. This alternative (Alternative G) proposed aggressive decommissioning of roads to protect sensitive watersheds as well as establishing a “community conservation corps” to implement fuel reduction activities and generate employment opportunities for local citizens (CV 01-220-M-DWM 2001).

By September of 2001, the BNF completed the FEIS, whose stated purpose was to:

1) Reduce fuels in portions of the burned area.
2) Improve watershed and aquatic conditions in heavily impacted burned drainages.
3) Restore forested conditions in some areas.
4) Accomplish fuel reduction more cost efficiently by harvesting forest products, and provide jobs and income.

The FEIS noted that the proposed action was designed to move resource conditions closer to desired future conditions as described in the BNF Land Use Plan (USFS 2001A). Nonetheless, the FEIS proposed amendments to the Bitterroot Forest Plan that entailed modification of:

1) Forest-wide snag retention standards.
2) Forest-wide elk habitat effectiveness index in third order drainages.
3) Forest-wide thermal cover standard in one geographic area.
4) The coarse woody debris standards for several management areas.
Modifications would apply only to projects prepared under the BAR (USFS 2001A). The FEIS chose Alternative F as its preferred management option, which had not been part of the DEIS and thus had not received prior public scrutiny. The BNF’s choosing a previously unreleased option was unorthodox and controversial. The FEIS included as an option, but did not select, the community-submitted Conservation and Local Economy Alternative (CV 01-220-M-DWM 2001).

With regard to “treatment of suitable timberland outside of the [wildland-urban interface]”—meaning backcountry forests—alternatives A, C, E, & G proposed no action. By contrast, Alternative B proposed salvage operations on 21,490 acres, Alternative D proposed harvest on 21,490 acres, and Alternative G proposed salvage on 15,930 acres (USFS 2001A). In general, all of the scoping process’ contemplated alternatives differed significantly from the BNF’s original plan to conduct salvage operations and thinning on 79,221 acres (Missoulian, August 11, 2001)—a salvage sale which would have been among the most voluminous in USFS history had it been carried out (United Nations ISDR 2002). In the FEIS, the BNF chose Alternative F, which proposed salvage on 46,239 acres, replanting of trees on 32,977 acres, repair of 513 miles of forest road, placement of 105 miles of road into “storage” and decommissioning of 46 miles of forest roads (Missoulian, October 11, 2001).

Larry Campbell of the Friends of the Bitterroot called the chosen alternative called it an “old-fashioned timber sale” (Missoulian, October 11, 2001), while (then) BNF Deputy Supervisor, Spike Thompson, noted that more than half of all burned acreage occurred within the Selway-Bitterroot Wilderness or other unroaded areas and would not be considered for active management (Missoulian, October 11, 2001).
The BNF Interdisciplinary Planning Team Leader (for post-fire management) Stu Lovejoy noted,

The forest had literally hundreds of thousands of acres of fire killed stands. Some of those stands were in certain locations... of concern... In the absence of any fuel treatments [the burned trees] will pile up on the forest floor. And when... all the stars [line] up with hot, dry, windy, really good burning conditions and lots of fire ignitions, as happened in July and August of 2000, now we’re going to have this insurmountable and very, very impactive disturbance both to people and communities and natural resources (Interview 6:3).

Along these lines, the BNF defended its decision noting the importance of breaking up “large contiguous blocks of heavy fuels that are created when... burned trees fall down” (Missoulian, October 11, 2001). Debate continues as to whether the “reburn hypothesis” is valid. Some fire scientists argue that logging in burned areas actually increases wildfire risk, or in the least, is not ideal if recovery of ecological integrity is desired (Beschta et al. 1995, Donato et al. 2006). This tension proved divisive among BNF stakeholders, and pitted the agency’s preferred science against external science—some of which was authored by federal government scientists (Beschta et al. 1995, Donato et al. 2006).

The Administrative Appeals Exemption

What was, perhaps, the most controversial issue of the early stages of the Bitterroot conflict arose in conjunction with the BNF’s release of the FEIS in October of 2000 and the BNF’s subsequent Record of Decision (ROD). Some respondents noted that BNF’s actions under the FEIS/ROD were presented to USFS officials by Michael Gippert (USDA Assistant General Counsel) and USFS executives in Washington D.C. (Interview 8). These officials presented a strategy to exempt the
BNF from the normal administrative appeals process on more than 5000 acres of burned forest lands (Interview 8).

Gippert noted in a September 2000 meeting in Washington D.C. that in the previous administration, President Clinton’s Undersecretary of Agriculture for Natural Resources, James Lyons, had often signed records of decision for controversial decisions so as to exempt projects from administrative appeal by citizens or NGOs (Interview 8). At this juncture, the feeling among involved USFS/BNF officials including then Supervisor Rod Richardson, then Deputy Supervisor Spike Thompson, then Regional Forester Dale Bosworth, and then BNF Planning Leader Stu Lovejoy was that the environmental community had drawn a hard line and would sue if the BNF pursued its preferred management alternative (Interviews 2, 8, 9, 10, 12).

Because no party had previously sued on the issue of exempting projects from administrative appeal (vis-à-vis the Undersecretary of Agriculture for Natural Resources signing the ROD), Chief Bosworth and Undersecretary Rey assumed this process to be legal. It seems that this approach was, in fact, not a new one—theretofore comprising an occasional administrative habit in previous administrations (Interview 12). Because their supervisors believed the exemption to be legal and appropriate, BNF officials also assumed that avoiding the administrative appeals process in this manner was legal. The subsequent court holding in *Wilderness Society v. Rey*, would invalidate these assumptions, illuminating nuances of laws governing USFS management that agency managers had not considered (180 F.Supp.2d 1141).
USFS officials, managers, and concerned political figures wanted to salvage log as soon as possible in order to capture maximum market value for burned timber, which loses market value over time (Interviews 2, 8, 9, 10, 12, 15, 26B, 27). Environmental interests would later argue that time was, likewise, of the essence with regard to ecological restoration activities including road upgrades (Interviews 15, 16, 17, 18). Environmentalists propounded this argument, because the ecological impact of soil-related disturbances (such as sediment loading to streams and rivers) is front-loaded with regard to the variable of time (Agee 1993, Interviews 15, 16, 17, 18).

For their part, some in the environmental community saw the USFS’ emergency exemption/exclusion strategy in a different light than did agency managers. Larry Campbell of Friends of the Bitterroot noted,

And [the BNF] very quickly they came up with this scheme where Mark Rey, Undersecretary of Agriculture—because he wasn’t a Forest Service employee—was asked to sign the record of decision and they claimed it would [release] them from the legal responsibility of the appeal process because that only applied to the Forest Service. And that in my view was, at that point is where [I became] really disappointed (Interview 15:16).

Pacific Rivers Council Senior Staff Scientist and Research Associate Professor (University of Montana and Oregon State), Chris Frissell, noted,

The legal interaction was hastened by the Interior [(sic)] Undersecretary Mark Rey’s decision to circumvent appeals regulations in this case and sign the record of decision himself... That pushed everyone into acute legal conflict at the point where most of us weren’t... quite prepared to go there yet (Interview 18:6).
USFS Chief Dale Bosworth noted of this critical juncture,

It had gone on for almost a year. People had pretty well said that [were] any timber... removed they were going to go to court. Some of... what I call the more hardcore environmentalists had said that... that’s their position. And so... given... that they stated they were going to court, the purpose of the administrative appeal is really to try to resolve things that way rather than going to court. And so it doesn’t make a lot of sense to go through all that if you don’t have to (Interview 12:5).

Chief Bosworth qualified his comments by describing courts and administrative appeals as being separate from public involvement, “They’re the result of public involvement not having worked” (Interview 12:6). According to Chief Bosworth’s logic, the BNF’s post-wildfire public involvement efforts did not work. Thus, a “he said-she said” came to exist between the USFS, environmental interests, and extractive interests. Chief Bosworth indicated that environmental interests were opposed to “any timber” being removed (Interview 12:5). The “Conservation and Local Economy” alternative propounded by some local residents and some local environmental NGOs, however, entailed salvage logging and thinning within the WUI. Evidently the USFS and the environmental groups entertained different definitions of such key terms as WUI, salvage, and timber.

Some of the 5,000 acres the BNF sought to exempt from administrative appeals occurred in watersheds that were habitat for threatened and/or endangered salmonid species (bull trout [Salvelinus confluentus]/westslope cutthroat trout [Oncorhynchus clarki lewisi]) (Missoulian, October 11, 2001). This reality fueled a backlash by some local residents and environmental groups. BNF Deputy Supervisor Spike Thompson believed the requested emergency exemption would not prevent appeals in [federal] court, suggesting that the ultimate recourse still remained for public sector
opponents of the BNF's salvage and restoration plans (*Missoulian*, October 11, 2001). Nonetheless, the BNF postponed a final record of decision on the BAR project largely in response to opposition to the final environmental impact statement. This opposition came from those who preferred less salvage logging than was proposed as well as those who preferred more (*Missoulian*, November 20, 2001).

Some of those dissatisfied with the FEIS and/or the degree of public involvement and character of that involvement staged protests at the BNF headquarters in Hamilton, MT (*Missoulian*, November 21, 2001). Ellen Engstedt, a lobbyist for the Montana Wood Products Association, noted: “The Forest Service is stuck in the middle... No matter which way they fall on this decision, they are going to fall” (*Missoulian*, November 20, 2001).

It became clear that Larry Campbell and other environmentalists were primarily concerned with three umbrella issues: 1) the spatial scale and volume of the proposed salvage logging, 2) the notion that 34% of proposed logging would occur in roadless areas, and 3) the appropriate consideration of threatened salmonid (*Salvelinus confluentus, Oncorhynchus clarki lewisi*) populations (*Missoulian*, November 20, 2001).

By November of 2001, USFS executives in Washington D.C. were well aware of threatened litigation regarding the BNF’s plan to salvage log more than 45,000 acres of burned forest (Alternative F). The agency and stakeholders had, once again, come to very public impasse regarding management of the BNF. Both the national and international media thoroughly tracked these events. Chief Bosworth noted in a letter to Under Secretary of Agriculture, Mark Rey, that, “The exchange of paper” that
occurs under administrative appeals “will not serve to illuminate the public or the agency, but merely delay likely litigation.” To this end, Bosworth requested that Under Secretary Rey ratify the BNF’s Burned Area Recovery Plan and associated final environmental impact statement. Bosworth stated further, “I think it is in the best interest of the public, the agency and the resources to get on with this entire project” (Missoulian, November 28, 2001).

In the meantime both extractive and environmental interests marched on the Forest Supervisor’s office in Hamilton (Missoulian, December 11, 2001). On December 17, 2001 Undersecretary of Agriculture Mark Rey co-signed the Burned Area Recovery Plan Record of Decision along with Chief Dale Bosworth, Regional Forester Bradley Powell and BNF Supervisor Rodd Richardson (USFS 2000B).

**Litigation**

Immediately following the release of the ROD, two coalitions, comprised largely of non-profit environmental groups, sued the BNF/USFS in U.S. District Court. Taken together, Plaintiffs’ claims accused Defendant BNF/USFS of:

1. Violating the ARA by circumventing administrative appeals
2. Violating the NEPA by failing to adequately address appropriate science in the FEIS
3. Violating the NFMA by failing to insure viable management of indicator species and sensitive species
4. Violating the NFMA by failing to insure that soil resources will be conserved and that soils will not be significantly impaired or irreversibly damaged and
5. Violating forest plan standards and guidelines (CV 01-220-M-DWM 2001).
The Plaintiffs sought injunctive relief preventing implementation of the BAR project as well as declaratory relief deeming the USFS' attempt to circumvent the administrative appeals process arbitrary and capricious (and in violation of the ARA) (CV 01-220-M-DWM 2001). In essence, Plaintiffs sought to ensure that the BAR project adequately and scientifically considered ecological and natural values.

Administrative laws tend to hinge upon notions of “arbitrary and capricious” agency action—particularly in the context of laws such as the Administrative Procedure Act (5 U.S.C.A. §§ 551-559, 701-706) and the NEPA (42 U.S.C.A. §§ 4321-61). These laws, in turn, evoke notions of administrator-accountability, minimum standards of public involvement in agency decisions, and—in short—some injection of democracy into the discretionary power of individual government decision makers.

There were originally two coalitions of plaintiffs. One coalition including the local group, the Friends of the Bitterroot, hoped to proceed on substantive claims that would undermine agency policy and scientific arguments relating to the prudence of active management in burned public forests. The coalition, including wealthier national organizations such as Earthjustice and the Wilderness Society, sought to use the more efficient and time-tested procedural claim approach. The national groups’ preference to file suit under procedural claims, as opposed to substantive claims (relating to ecological impacts actuated by salvage logging, road building, and other post fire management actions), proved to be divisive within the environmental community and the greater public lands stakeholder community.
Herein arose a tension between the political and financial expediency of a procedural claim, and riskier but higher-stakes ecology-based tack that would attempt to force the USFS into acknowledging and acting upon a particular body of science and technical information that did not comport with agency policies on post-fire management and/or interpretation of that same information (Interviews 2, 8, 9, 10, 12, 26B). This distinction is illustrative of the reality that there is no single “environmental” community, just as there is no single “industry” community.

Soon after Undersecretary Rey signed the ROD, Judge Molloy joined (consolidated) the two law suits. Those litigants preferring to sue primarily on procedural claims won out within the forced environmental coalition opposing the USFS. Larry Campbell called this split within the environmental community a “watershed” event.

The paths split in the environmental side because what happened at that point is you’ve got these heavyweights, the Wilderness Society, Sierra Club, and Pacific Rivers came in with Earthjustice and argued on procedural grounds, which I’m glad they did. [Rey’s signing the ROD] was a totally illegal maneuver, which Molloy confirmed. But then what happened, and what actually usually happens in these court cases is—now as far as the public goes, the whole argument is procedural... meanwhile, our homework prior to that had been all based on substantial damage to the environment (Interview 15:16-17).

The Government responded to the Plaintiffs’ complaint, arguing that the administrative head of an agency has the right, at any time, to re-assume an authority delegated to subordinates and thus make a final administrative decision, and that consequently, Undersecretary Rey’s decision was not subject to the appeal requirement of the Appeals Reform Act (180 F.Supp.2d 1141, 1144). The Defendants’ attorneys further argued that “the public interest squarely lies with
making productive use of dead trees where doing so will not only result in no negative environmental impacts, but will result in positive externalities... Even the delay of one season renders the provisions of the project considerably less viable” (Missoulian, December 29, 2001).

Legalese

Government attorneys propounded this argument based upon ambiguous language in § 1506.11 of administrative regulations guiding implementation of the NEPA (36 C.F.R. § 1506.11). This language states,

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council [on Environmental Quality] about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review. (36 C.F.R. § 1506.11)

In effect, this administrative provision provides both flexibility and a loophole, whereby an agency may hypothetically bypass normal administrative processes such as soliciting public comment, hearing administrative appeals, and the like, so long as the agency can justify its actions as “an emergency.”

Administrative rules allow USFS officials, including the Chief and Deputy Chief to declare situations to be “emergencies” per the aforementioned NEPA administrative language (36 CFR 215.10(d)(1)(iii)). Former BNF Supervisor Rodd Richardson had, in fact, petitioned USFS Chief Bosworth to declare an “emergency” on 4800 acres “to allow immediate tree cutting... and to decommission about 12 miles of road” (180 F.Supp.2d 1141, 1144). Supervisor Richardson had already petitioned Chief Bosworth on October 1, 2001—well before the release of the final
environmental impact statement. Chief Bosworth did not act on this petition. This, perhaps, suggests that Chief Bosworth remained unpersuaded that an emergency existed as Supervisor Richardson had argued via his petition to the Chief. Whether or not it was his intent, Chief Bosworth’s failure to respond to Supervisor Richardson’s request left the impression that he did not support acting under the umbrella of “emergency.”

Importantly, the government’s principal legal argument, both in briefs and during trial, was based on an “emergency situation.” Such fundamental contradictions in logic do not play well in court. Wilderness Society v. Rey notes,

At the January 3, 2002 oral argument I asked counsel for the United States to explain why the Chief would not exercise the legal authority vested in him to permit the logging while an administrative appeal was pending, but at the same time would argue in court that the Temporary Restraining Order should be dissolved because emergent conditions this winter require immediate logging. The issue involves the same logging identified by Rodd Richardson. No answer other than empathy with the Court's conundrum was offered (180 F.Supp.2d 1141, 1144).

Judge Molloy’s opinion continues,

Perhaps the explanation lies in what happened next, the extra legal effort to circumvent the law. On November 23, 2001 Chief Bosworth instead asked Mark Rey, the Department of Agriculture Undersecretary for Natural Resources and Environment, to sign the Record of Decision for the BAR. Chief Bosworth reasoned that having Undersecretary Rey sign the ROD would relieve the Forest Service from any administrative appeals process, which Bosworth reckoned would delay implementation of urgently needed restoration actions. This unique approach looked to create a non-existent statutory exception by relying on a strained textual reading of the governing statutes and regulations. Chief Bosworth then asked Undersecretary Rey to delay any decision until December 10, 2001 so the Forest Service could provide notice that Undersecretary Rey would sign the ROD. This too was a novel approach to the law (180 F.Supp.2d 1141, 1144).

Specifically, government attorneys failed to successfully address the Appeals Reform Act (16 U.S.C. § 1612). From a legal perspective, this omission could be
interpreted as poor lawyering through a lack of thorough preparation. The likelihood of such outcomes increases where political motives, as opposed to the strength of a case’s particular facts, dominate the government’s criteria for defending a particular case (Thomas and Sienkiewicz 2005). Molloy noted of the government’s violations,

By its plain language, the Appeals Reform Act requires the Secretary to implement an appeal process for decisions of the Forest Service on proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans. Title 7 C.F.R. 2.12 allows the Secretary to exercise authority she has previously delegated, but it does not eliminate the statutory right to an appeal of a Forest Service decision codified in the Appeals Reform Act. The Secretary is required by statute to have an administrative appeal process; the regulation does not alleviate her statutory duty. Simply having the Undersecretary or Secretary sign a record of decision of the Forest Service does not diminish the fact that the record of decision is a decision of the Forest Service. To hold otherwise defies common sense. All the work on this case from start to finish was done by Forest Service employees or administrators. The implementation of the project, whatever its parameters, will be by the Forest Service and its employees. The notion that a signature by the Undersecretary transforms the action from Forest Service business to the business of some other agency is mystical legal prestidigitation. The decision, not the signatory, is the operative fact for purposes of the Appeals Reform Act. The Secretary may not escape her statutory duty to provide an appeals process by completing the signature line of a Forest Service record of decision (180 F.Supp.2d 1141, 1148).

In short, government attorneys and USFS officials simply did not have their story straight. Conspicuous contradictions undermined their arguments. This is glaringly apparent independent of whether one agrees with Judge Molloy’s interpretations of the NEPA and the ARA (16 U.S.C. § 1612). Some did not agree with Judge Molloy. A lobbyist for the Montana Logging Association, Julia Altemus, noted of the BNF’s attempt to bypass the appeals process,

I think… there is a perfectly legal [explanation], unfortunately, Judge Molloy doesn’t know about it or doesn’t care to respond, but there’s a perfectly legal alternative within NEPA. CEQ [(President’s Council on Environmental Quality)] is in charge of NEPA. CEQ is under the administration. At this point this is Bush, [but] the Council of Environmental Quality exists because
the President wants it there. Now it doesn’t matter which President. It was [there] under Clinton. I mean, it’s been [there] under other ones. But because of that, there is an alternative arrangement that can happen under NEPA that if you have an emergency... you can ask for an emergency exemption from the Secretary, which is what the Forest Service did. It was the first time it had been used, maybe ever. I don’t know, but certainly in a long time. And because it was a CEQ-sanctioned act, [Chief] Bosworth decided that [Undersecretary] Mark Ray was the one that should sign it. Perfectly legitimate. Probably where I would have suggested that they go also.

The environmentalists didn’t like that. It was the first time that the Regional Forester or the Chief of the Forest Service had not signed a record of decision and they didn’t like it. And that’s why they filed. They felt that there was some kind of back room, behind-the-scenes discussions going on. I mean, they looked at salvage as some kind of a give away to the timber industry which, you know three’s not a lot of value in salvage. But we’ll do it because it needs to ecologically be done. There wasn’t any back room dealings. It was just because of... this language and that was what they decided to do.

Now, the environmentalists in their motion stated that that was illegal and they couldn’t do that, and they cited other things in forest law as why they can’t. However, they didn’t cite [the alternative arrangements], which is also law, and it does take precedence in an emergency situation. And Molloy’s motion says that the environmentalists are right and so that’s why he gave them the temporary restraining order (Interview 10:4-7).

Judge Molloy’s opinion in Wilderness Society v. Rey addresses each legal issue in the aforementioned commentary. But, like the USFS’ attorneys, Ms. Altemus assumes an action to be legal because it had not before been challenged in court. For instance, segregated schools, buses, and diners were once “legal” by virtue of having never been challenged. Brown v. Board of Education (347 U.S. 483 (1954)) and a series of subsequent cases clarified germane law.

The law is dynamic. Moreover, Ms. Altemus seems unaware of administrative law and the importance of a complete agency record as provided by the administrative appeals process. It is the spirit of administrative law—in addition to its letter—that should tell a federal manager that the BNF’s actions were illegal.
Finally, as did the USFS’ attorneys, Ms. Altemus looked upon the NEPA’s vague *alternative arrangements* language, and imputed contemplation of the fact pattern at hand. This imputation would perhaps be tenable in some scenarios, but not when weighed against the clear language and intent of germane administrative law, including the specific statute (the ARA) which required the USFS to provide an opportunity to administratively appeal any action relating to implementation of land management projects (106 Stat 1372, 322).

In the end, the Court found that the BNF/USFS violated procedure in its attempted avoidance of the administrative appeals process. Judge Molloy noted that the USFS’ ostensible reason for attempting to circumvent the administrative appeals process was “to speed the matter to its likely destination, this Court.” Further, Judge Molloy stated that this motive was based upon invalid assumptions and that the administrative appeals process must be followed (180 F.Supp.2d 1141, 1148). In light of this violation, Judge Molloy granted the Plaintiffs a temporary injunction and remanded the case to the USFS for reconsideration (180 F.Supp.2d 1141, 1149).

The Court did not address claims beyond that of the appeals exemption, as the USFS was found to be in procedural violation (180 F.Supp.2d 1141, 1150). In effect, the plaintiffs’ suit garnered injunctive relief on procedural grounds before substantive issues could be addressed. An example of a substantive issue might include the federal attorneys’ claims that salvage logging has “no negative environmental impact” (*Missoulian*, December 29, 2001). Notably, procedural claims tend to be more straightforward and less costly than substantive claims, which can require
voluminous document review, expert testimony, and otherwise more vast expenditures and consumption of judicial resources.

In the meantime, Defendant BNF/USFS took two weeks to file its appeal of Judge Molloy’s ruling, which had, in no uncertain terms, rebuked USFS officials at both local and national levels. Judge Molloy’s opinion and the official record, bespeak the Judge’s frustration with the behind-the-scenes gamesmanship of Washington D.C.-based officials who seemed content to allow local managers bear the burden of responsibility when chosen and de facto management strategies failed. Further, the Judge exhibited little tolerance for the inchoate and contradictory arguments propounded by the government’s attorneys. Why would the government take two weeks to file an appeal when it repeatedly argued that the BNF needed to conduct immediate emergency action? Certainly there were bureaucracy-related delays as might be associated with any agency action, but no matter the explanations, the undeniable effect was that of weakening and ultimately rendering moot the government’s own claim of emergency.

Meanwhile, the lawsuit sparked a backlash within the timber community and wood products industry. They took their concerns to Montana Governor Judy Martz who stated in reference to the pending litigation: “The obstructionists got ahead of us while we were making a living... It’s not going to be an easy haul, but we are not going to let them walk all over us anymore” (Missoulian, January 31, 2002). While elected officials like Martz oversimplified and polarized the debate (Vaughn and Cortner 2005), associated issues came to dominate local, state, and even federal politics (if for a short time).
The adversarial posturing and filing of related motions continued in Federal District Court in Missoula until early February of 2002. Issues relating to "democracy" and rights relating to public participation began to stand out among competing arguments and viewpoints. Is administrative process and legal redress "obstruction" as Governor Martz noted, or are such rights inherent to democratic processes? Governor Martz, who served as Chair of the Western Governors' Association, told reporters, "I would like to do away with appeals period" (Vaughn and Cortner 2005:153). Thus were spun the inherent value conflicts within the story of the aftermath of the wildfires of 2000. Martz' comments embrace a technocratic or unilateral decision-making paradigm, while environmentalists were fighting for a more deliberative process.

On February 1st, attorneys for the federal government told the Court that emergency restorative action on 5,400 acres of the burned area was required within 21 days. This stood in stark contrast to their initial arguments relating to "the productive use of dead trees" (Missoulian, December 29, 2001). Ostensibly, government attorneys now took a different argumentative tack—this time based on potential harm to endangered salmonid (Salvelinus confluentus, Oncorhynchus clarki lewisi) populations within the burned watershed. Specifically, the government argued that five separate proposed salvage harvest operations needed to be carried out before spring thaws posed increased risk of erosion and sediment loading to associated streams.

The government noted,

Failure to proceed with winter work will harm bull trout and westslope cutthroat trout by delaying and jeopardizing the ultimate completion of
roadwork necessary to reduce stream sedimentation; increase the future risk of unusually severe fires by delaying and jeopardizing the ultimate completion of fuel-reduction harvesting; and harm local businesses whose operations have been curtailed, first as a result of the fires, and now as a result of the Court’s injunction (Missoulian, February 1, 2002).

Federal attorneys were crafting arguments that would, in their judgment, comport with Judge Molloy’s interpretation of the NEPA, the APA, and the ARA. Although their legal advocacy was likely zealous (as all legal advocacy should be), it was not rigorous (as effective legal advocacy should be). In response to the government’s emergency motion, Judge Molloy ordered the parties to enter a mediated settlement—and to take no longer than two days to reach a compromise. Judge Hogan, a federal District Court Judge from Oregon, would conduct the mediation process. On the eve of the settlement conference, BNF Supervisor Rodd Richardson stepped down from his supervisory role to take a more specialized position in the USFS Regional Office, although he would still participate in the negotiation (Missoulian, February 5, 2002).

Being an experienced and well-regarded judge, Molloy understood that negotiations and settlements are of little value unless all decision makers are at the table. Despite what would prove to be novel and unforeseen occurrences with regard to the post-settlement outcome, Judge Molloy attempted to gather the appropriate decision makers in one room to iron out differences and enforce resulting promises. Despite his signing the ROD and being formally involved in the BAR conflict, Undersecretary Rey attempted to avoid participation in the settlement negotiation, which seemingly irked Judge Molloy. In a formal motion (request) to the Court, U.S. Attorney William Mercer asserted, “Representatives of the United States with
ultimate settlement authority will attend, even if Mr. Rey does not attend.” Judge
Molloy’s responding order stated,

The Court specifically ordered Mr. Rey to be present in person in
Missoula on Tuesday, February 5 and Wednesday, February 6, 2002 to
participate in mediation. Further, the United States already asked that Mr.
Rey be excused from attending and the Court denied that request.

The purpose of the mediation is to get all parties together to reach a
solution. Allowing one of the named defendants, in fact the very person who
approved the plan, to avoid attendance would undermine the legitimacy of the
session.

Accordingly, IT IS HEREBY ORDERED [(sic)] that Defendant’s Motion
to excuse Mark Rey’s attendance at the mediation is DENIED. [(sic)] Mark
Rey shall be in Missoula, Montana as ordered on February 1, 2002. (CV 01-
219-M-DWM 44).

The following exchange is that to which Judge Molloy referred in his
aforementioned order. The transcript sheds light on a sometimes tense dynamic as
between the federal judiciary and executive agency political appointees... the
separation of powers doctrine, divided government, and the checked-balance of
power in action:

The Court: Now, when we get off the phone you are all going to be able to
get on the phone with your airline reservation people and, Bill and Richard,
you will have to tell the following people that they will be in Missoula on
Tuesday and Wednesday: Rodd Richardson, Mark Rey, and Dale Bosworth.
They’ll be here on Tuesday and Wednesday. And then each of the plaintiffs
will have somebody with the ultimate authority to make a commitment to the
mediator. And you will be here, everybody’s going to be in Missoula on
Tuesday and Wednesday. And that includes counsel and the three named
defendants and whoever has ultimate authority for each of the plaintiffs’
or ganizations must be here.

Mr. Mercer: Judge, if I have the ultimate authority, does that obviate the
need to have Mr. Rey here and - - -

The Court: No.

Mr. Mercer: - - Bosworth?
The Court: You don't have the ultimate authority, because apparently, these decisions are being made in Washington D.C. And he must be here. (emphasis added). (CV 01-219-M-DWM 44).

Judge Hogan, who noted that mediation work was “the hallmark of [his] career,” conducted the proceedings leading to a settlement agreement as he would most court ordered mediations (Interview 13:1). The negotiation was not collaborative or cooperative in the conventional or deliberative democratic sense. Parties were given an overview of the process, placed into separate rooms, and subsequently relayed messages to opposing interests via Judge Hogan. Judge Hogan then massaged compromises out of each party, wielding as a tool the information that he had gained from the individual interests in private (Interviews 13, 16, 17, 19). This mediation, as do a great many court-ordered mediations, worked upon the notion that only the mediating judge knows the participants’ “bottom lines.”

The Judge, as the mediator, pursued a middle ground whereby all participants gave a little or a lot. He moved back and forth between isolated parties and manipulated them (in the literal, objective sense of the word) based on their incomplete knowledge of the other parties’ interests and resources.

This casts no aspersions on Judge Hogan, but rather illustrates the realities of court-conducted mediations. “Manipulation” is apt, and judicial efficiency is critical in driving this strategy to a satisfactory conclusion. This was done in order to quickly remove this particular conflict from the docket of the overtaxed federal court system. Judge Hogan accomplished just this, although participants from every value-base and viewpoint involved expressed dissatisfaction with the process (Interviews 26 A-D).
However, no participant likely made their judgments or spoke from the criteria of judicial efficiency—which was of great importance to Judges Molloy and Hogan.

At 2 a.m. on Thursday February 8th, U.S. District Court Judge Michael Hogan concluded the settlement negotiations over which Judge Molloy had requested he preside. The parties agreed on a figure of 60 MMBF to be salvaged from 14,700 acres in 19 separate timber sales. 2,000 acres of proposed logging sites would be in roadless areas (Missoulian, February 8, 2002). With regard to restoration, the USFS representatives promised stream restoration on 16 miles of stream, reforestation on 33,150 acres, road obliteration on 45 miles of roads, and road storage on 102 miles of roads. The USFS promised, further, to allocate $25.5 million to this end (Oregonian, March 9, 2003). The agreement was memorialized in writing in the form of a formal legal document—the settlement agreement, which was akin to a contract and trumped all previous plans (interview 13).

Following the settlement Judge Molloy ordered Defendants (upon Plaintiffs’ motion) to pay more than $200,000 in Plaintiff’s attorney’s fees and costs, and noted that the government’s argument was “novel,” but wrong (Missoulian, May 27, 2002).

**Broken Promises & False Assumptions**

As of March 2003, the BNF had completed 13 of the 500 miles of promised road upgrades to accommodate timber hauling. Approximately half of the 45 miles of road obliterations had been carried out (Oregonian, March 9, 2003), while 4,000 of more than 300,000 acres to be reforested had been planted (New York Times, March 4, 2003). USFS officials attributed the unfulfilled promises to diversion of budgetary
funds to fight wildfire in subsequent fire seasons, without adequate reimbursement from Congress (Interviews 2, 8, 9, 10, 12, 26B, Oregonian, March 9, 2003).

As of January 2004, 14% of promised Best Management Practices upgrades had been accomplished, 29% of promised road decommissions had been carried out, 19% of road storage projects had been carried out, 56% of culvert replacements had been completed, 56% of fish habitat improvement projects had been completed and 24% of promised reforestation had occurred (FOB 2004). As of February 2004, $18 million of the more than $25 million promised for restoration “[was] just gone. It’s not there. We are not going to get a windfall of $18 million. It’s just not going to happen,” said BNF spokeswoman Dixie Dies, referring to Congress’ diversion of the funds to fight fire. As of Dies’ statements, more than 9,000 acres on the BNF had been salvage logged (Environmental News Service, February 9, 2004).

John Grove, a member of the FOB and a retired USFS District Ranger noted, “The reality on the Bitterroot is that the restoration rhetoric from [USFS] Chief Dale Bosworth, Undersecretary Mark Rey, and Bitterroot Supervisor Dave Bull has proven hollow. Actions always speak louder than words” (Environmental News Service, February 9, 2004).

On February 7, 2005, the Missoulian headlines read: “Group simmers over wildfire funds: Environmentalists, Forest Service at odds over recovery plan for 2000 blazes” (sic) (Missoulian, February 7, 2005). The same article noted,
Environmentalists said Friday they “swallowed hard” and agreed to salvage logging in the Bitterroot National Forest after the 2000 fire season, only to have the Forest Service violate their trust by not following through on promises to also restore the burned watersheds and forests. ‘It was a matter of trust. We trusted that the restoration work would happen,’ said Larry Campbell, Conservation Director of Friends of the Bitterroot... Two years after environmentalists, loggers and the Forest Service signed a court-mediated burned area recovery plan... the agency has completed just 17% of promised road and watershed rehabilitation work... [a]nd most of the $30 million [(sic)] originally appropriated for the Bitterroot’s post-fire restoration was recalled to pay firefighting bills on other national forests during the 2002 fire season (Missoulian, February 7, 2005).

Thus, the blame laying, distrust, value conflicts, and broken agreements continued to characterize the Bitterroot settlement and salvage and restoration efforts.

Moreover, this enmity carried over into subsequent forest management actions, including 2005’s controversial Middle East Fork sale—conducted under Healthy Forest Restoration Act (HFRA) authority (16 U.S.C.A. §§ 6501-6591)—where yet again, BNF management was shrouded in controversy.

The 2000 salvage and restoration conflicts are a long and convoluted story. The foregoing account provides a cursory outline of events that transpired and continue to evolve. Lessons to be gleaned from the saga are many and will continue to develop over time.
Chapter 6

Results: A Mosaic of Understanding, What Observers and Insiders Think of the Perceived Success of State Trust Land Managers as Compared to the BNF

Themes: Leadership, Political and Financial Support, Management Culture

Ellen Engstedt, a Lobbyist with the Montana Wood Products Association, cited DNRC leadership as contributing to what she perceived to be efficient removal of burned trees and completion of significant environmental mitigation efforts.

It was the ability of the state, through leadership, to move quickly, to say OK, this is what needs to happen on the ground. Politically, the [Governor’s] Administration was 110% behind... Bud Clinch, [Clinch] was the Administration... I mean, he worked for Montana Logging Association. So he knows the resource, which is a real plus. [Clinch] had the ability and the drive to say, look, this is what needs to happen. We need it to happen this winter because you can be out there in the wintertime. It’s frozen. We can do a lot of work this winter, which they did that very first year...

The stuff was still smoking, and they were out there seeing what they might be able to do to clean it up, to do two things: clean it up and do some restoration, reforestation. And within six months, seven months that was pretty much accomplished. I mean small parts of it went on another year or two, but the basic bulk of the cleanup, the salvage was done within a very short period of time... You know, you pay attention to the Clean Water Act, the Clean Air Act, all those others as well, fishery things. But they were able to get in real quick on the ground and get work done.

The flipside of that was the Forest Service, the Bitterroot National Forest, and they started scoping and doing an EIS to the tune of, I can’t remember the final number, it’s like $1.5 million or something to produce the environmental impact statement that they finally came up with. In their view... a very quick timeframe. But it was oh, I want to say a year and a half after the fires had finished (Interview 11:30).

Engstedt suggests that Clinch’s strong leadership and his ability to garner the political and financial support of Montana’s Governor allowed the DNRC to focus primarily on salvage while also conducting mitigation measures. Engstedt draws what became a common comparison: that between the DNRC moving quickly to

71
salvage log, and the BNF becoming mired in planning. She believes DNRC managers conducted salvage logging with an eye toward mitigating ecological impacts, while also successfully retrieving commodity values. In comparing the DNRC to the BNF, she suggests that the sum the BNF spent on planning and conducting an EIS was excessive. This perhaps evinces a negative perception of NEPA planning and suggests a preference toward synoptic or technocratic models of management. Engstedt also attributes Clinch’s abilities to lead a salvage operation, to some degree, to his experiences in the logging industry and the expertise he gained therefrom.

One DNRC manager attributed political and financial support (in the form of funding to facilitate immediate management actions) from the Governor’s Office as spurring prompt action.

It came basically from... the Governor. She was in strong support of Sula and getting the job done down there. And in order to do that, some activities had to occur before the ground froze, like in October and November, such as some of the culverts we wanted to get upsized before spring runoff. We did a lot of road work, bringing roads up to [best management practices]... because they needed better drainage than what they had had, because with the fire you’re going to have more drainage onto roads... So there was a lot of work we had to get done before the ground froze up by December first or so... We got that special money to be able to do that up front because we didn’t have any salvage going on to pay for it yet.

But we got that money, I think, because the Governor was in strong support of the salvage operation and wanted to see things go well down there and if we didn’t have to salvage, like I say, I don’t think we would have gotten any funding hardly at all. We might have been able to do a little bit of stuff. But you’ve got to be able to make money to be able to fix things up. And, that’s the way we operate. There isn’t any just pot of cash out there, in DNRC at least, to be able to just throw at things like that very often, unless they’re small projects (Interview 22:15-16).
This commentary speaks to the importance of financial support from political leaders as being critical to successful agency leadership and the completion of management plans. This commentary also speaks to the institutional behavior economist Randal O'Toole has described as “budget maximizing behavior” whereby a forest management agency must conduct significant commodity extraction-based measures in order to “fix things up” or, in other words, to replant logged forests, mitigate erosion, maintain roads, and other non-commodity-extractive work (O'Toole 1988). Although O'Toole developed this theory in the USFS context, this DNRC manager relates similar institutional behavior.

In the DNRC context, this behavior may be characterized by notions of conducting the salvage logging activities preferred by political figures in order to generate internal agency money to be put toward restoration or non-commodity purposes. This occurs, in part, because legislatures tend to fund extractive management actions to a much greater extent than restoration or non commodity-based management (Interviews 5, 9, 22, 27).

This budget maximizing or salvage-to-restore behavior and philosophy comprised another source of tension between both state and federal land managers and their critics (Interviews 8, 10, 12, 19, 20, 24, 26A, 26B, 26C, 27). This was the case, because environmentalists preferred that restoration activities occur first, during initial stages of ecological disturbance. Nonetheless, it is often the reality, that agencies such as the DNRC and the BNF lack funds to conduct restoration until they have generated such funds through salvage operations: thus, the “salvage to restore” or “budget maximizing” model tends to dominate.
Because the fiscal priorities of certain public stakeholders may differ from those of political powers that actuate management and agency leadership through political and budgetary support, there is often tension or conflict over what management projects receive temporal and fiscal priority. This was certainly the case for the BNF in the wake of the 2000 fires. This sort of tension was present to a lesser degree for the DNRC and the Sula State Forest.

Bud Clinch directed the DNRC during its post-fire management on the Sula State Forest. Clinch believes differences between the DNRC’s and the BNF’s responses to the fires of 2000 relate to organizational structure and legal mission, but also to leadership, management approach, and manager culture (Interview 20). He noted that for approximately a decade, he promoted and promulgated the DNRC’s primary mission on trust lands: to generate revenue.

Starting eight years before the fires, I was putting a fair amount of effort into building an organization that understood their mission was to manage those lands for revenue… For multiple years we worked internally building a philosophy that understood about timber management, about sustainability, and about what our mission was… So we were in the process of building an organization and a mindset within that organization, that forest management was an acceptable thing to do (Interview 20:1-3).

It is important to note that terms such as “management” and “restoration” mean different things to different people. There is, in public land management, an ongoing battle between stakeholders and agency managers/spokespeople to control the public dialogue (Clary 1986, Hirt 1994, Vaughn and Cortner 2005). This often manifests in carefully-crafted word choice by those (of all interests and positions) communicating with the media and the public. Moreover, it results in an ever-evolving natural
resource management vocabulary—one that responds, in mercurial fashion, to public perceptions and sentiments.

In the aforementioned quotation, the DNRC’s Clinch refers to “management” as including all manner of resource extraction for commodity values so to jibe with the state trust land mission. Nonetheless, Clinch also suggests restoration and mitigation efforts would also fall under the “management” umbrella (Interview 20).

Clinch notes that DNRC had a “team spirit” from the director through Tom Schultz, through the Forest Management Bureau, down to the foresters. Clinch seems to suggest that by contrast to his agency, the BNF was ambivalent in its approach to post-fire management.

[I spent time] building this philosophy that doing forestry was OK and that we didn’t have to hide or be shameful of anything that we did. So that is probably critical. In fact that when the year 2000 came along and we had that massive fire year and all this work before us, we already had the group of people who were poised, ready to respond. And I think that’s quite the contrary to what the Forest Service [did].

I’m a firm believer... it was good forest management. It’s the type of stuff that we learned about in forestry school. See, I’m a forester by trade, too, which that may play into this scenario as well. And I’m the [DNRC] Director, I’m pretty... supportive of that...

As September came around [we] started preparing for responses, and we knew the big thing in those kinds of issues is public involvement process, the environmental issues and all of that. And we learned early on that a couple of issues were going to be critical, fisheries and water quality impacts associated with it as well as wildlife. And quite frankly, we’d never dealt with a fire salvage operation the size that we were faced with there.

So early on in the process, we made the decision that we were going to make that our priority. We weren’t going to abandon our green program. We were going to implement as much of our green timber program, but we were going to do all of this salvage that we could get accomplished. And we did a number of things that I think were critical to that. We authorized overtime pay for employees. We brought out some contract and services so that we could get the type of expertise we needed right now. And we didn’t want to
siphon off a wildlife biologist that we had that was currently working on other projects that we didn’t want to fall by the wayside. So we found a wildlife biologist that we contracted with for several types of analysis that were critical. And we set ourselves a fairly aggressive timeframe, trying to project out when do we want to be doing the salvage in terms of winter operation and then backing up from that, determining, okay, if we wanted to start operations on January first, when do we have to be advertising logging contracts... [We] often found out that we were really up against a timeframe. And so we compressed the timeframes that we could and we did whatever effort we could to alleviate the impacts associated with that. And we moved forward. And I think, if I remember correctly, we even had a special Land Board meeting somewhere around the first of December to authorize the sale of these so that we could begin the bid process and to move forward.

And that’s another thing that’s kind of different, whereas the supreme authority over state lands presides with the Land Board, who are five elected officials here in Montana that are accountable to the people of Montana. And that’s quite a bit different than you have with the Forest Service [which takes direction from] Washington, D.C. And that is such an internal quagmire that even if you had the ear of your Congressman or what, you really don’t ever get that pressure applied to make things happen.

[When you have the five highest elected officials of Montana engaged in the process and they’re all tied in very keenly to the political pressures of the state of Montana, that brings a whole different reflection to it. And I think that worked to our benefit in that that summer when the Bitterroot burned, there was an incredible outcry from the public about all kinds of things, everything from the lack of forest management to lack of response time to, I mean, and at the point of most of that criticism was the U.S. Forest Service. Certainly the Land Board, Montana’s five highest political officials, they didn’t want to fall victim to that criticism. And they saw an opportunity as this whole thing kind of emerged, that the action of salvage logging was one that seemed to be politically acceptable. And although they never encouraged or pressured us or did anything for us to move forward, I think they started seeing the handwriting on the wall right away that this was a highly supported public process. And, yeah, probably bring some interesting political dynamics with it as well because the question gets to be is how come you to work with 25 million board feet within 60 days of the fire, why were we not appealed and all those types of things? And there’s several reasons for that...

I think that we are viewed differently than the Forest Service by most of the environmental organizations. We’ve been very, very progressive in our forest management. In fact, one of the leaders in forestry in the state has been state lands associated with the DNRC and everything from developing our forestry prescriptions to leading with the best management practices. And we work with multiple environmental groups. So I think we had all the right things...
coming together there in that we had pretty good reputation asset on the ground forestry group. We had timing to where it was immediately following the fire. Everybody was still reeling from... the biggest devastation that ever occurred... and then we had this political thing where the five highest officials were kind of overseeing it...

We just didn’t have an outpouring of opposition. I mean, we met multiple times with the Friends of the Bitterroot and some others. And ultimately they came on board. We did engage them early on. We took their comments seriously. We met with them on the ground, showed them restrictions. And I think we developed the trust relationship. We did multiple show-me trips before, during, after. And it’s quite a success story in terms of how that proceeded compared to what didn’t happen on the federal lands and court actions and all kinds of things (Interview 20:3-6).

Clinch’s comments are revealing. Interestingly, he reiterates what his managers had noted regarding DNRC’s culture, and the agency’s clear mission to “manage” or generate income. He also associates his leadership style with what he learned in “forestry school.” The implication is that his expertise and professional experience in the growth and harvest of trees, naturally influenced his leadership of the agency. The idea that leaders influence an agency’s culture and manifestations of the agency’s mission is important.

Also, that Clinch would be proud of his silvicultural knowledge and openly promote timber-focused management or commodity-focused management stands in contrast to some USFS managers, who increasingly portray many management actions that include cutting of trees—both large diameter and small diameter, live and dead—as “restoration,” “forest health,” “fuel reduction,” or “fire prevention” (Vaughn and Cortner 2005). USFS managers rarely refer to a timber sale as a timber sale (Interviews 2, 6, 12, 24, 27, 36, Vaughn and Cortner 2005).

A conspicuous result of this tendency to market and package management to avoid controversy, is one whereby the USFS appears disingenuous or contrived in its
policy language (Interviews 15, 19, 24, 27, Vaughn and Cortner 2005). The USFS’s careful word choice—avoiding “timber sale” and other terminology evocative of the agency’s timber-focused past—is often born of marketing approaches and political strategists (Interviews 8, 13, 15, 24).

Vaughn and Cortner (2005) note that some environmental groups have used comparable rhetorical tactics. The net result, no matter who is promulgating policy, is typically obfuscation, confusion, the appearance of dishonesty, broken communications, and, in many cases, the perpetuation of ecological ignorance or misunderstanding among the lay public.

Former DNRC Director Clinch describes a working relationship with the Friends of the Bitterroot, a litigant in the case(s) against the USFS/BNF. Both Clinch and State Trust Land Administrator Tom Schultz, as well as the DNRC forester respondents, describe relationships with NGOs such as the FOB in an objective tone. Interviews indicate that compromises the DNRC made regarding green trees and other management issues were matters of political expediency. One could say that such compromises were impersonal, and the result of a political and economic benefit-cost analysis regarding potential conflicts. However, one might also attribute such compromises, in part, to a more deliberative democratic culture and the trust that comes with the existence of a working relationship. That is to say, there seems to exist a correlation between the absence of enmity and resentment, and the presence of administrative compromise on the part of DNRC managers.

Clinch acknowledged the auspices of a mutual trust between the environmental community and DNRC, but does not advocate collaboration at all costs.
I’m not saying that I will advocate that you [collaborate] at all costs. I mean at some point there’s a threshold where you say, hey I’ve done all I can. We feel we have a good project. We’re just going to go ahead. Sue us if you damn well want to. And I think that’s not a bad backup philosophy to have. I certainly think you need to put the effort up front to engage people early, to take their comments seriously. And I think above all, you have to establish yourself as a credible organization to begin with. And we had already done that. I mean, I think for the most part the proof was in the pudding. There wasn’t a lot of accusations about us not coming through, or [not] fulfilling obligations in the past or our practices… (Interview 20:6-7).

Clinch notes the importance of engaging people early in any process, taking their comments seriously, and working through differences to the degree doing so does not dominate the agency’s financial and human resources. He also stresses credibility and trust, indicating that the DNRC did what it said what it was going to do. In effect, the DNRC entered the post-fire management operations on stable footing, with political capital. There was little pre-existing distrust or animosity. This was a byproduct of successful leadership.

Since I came to the organization from the wood products industry, there probably was a little apprehension that I was going to be this new aggressive harvesting rape and run sort of a guy. And I think if you ask the serious environmental organizations, none of them can say that. I’ve been successful at expanding the timber program and getting a lot of that done. But everybody would be hard pressed to show where harm to the environment occurred, and it’s because we did it in a thoughtful manner and scientifically-based.

I can’t say enough about building an organization that (1) that wants to do what their mission is, and (2) [is] comfortable and [has]… the right kinds of individuals that can build productive relationships with these other organizations.

I don’t know enough about the Forest Service or even the Bitterroot National Forest to be critical of individuals. But I would say it’s my observation that generally… the people within the Forest Service timber program have really changed over the years… [But] I don’t think that they’ve kept up with the times. I mean, I think you have the old standby foresters that they’re either retired now or they’re 30-year people that enjoyed the glory days of when you do whatever you want and it was about how much wood you could get and
how cheap logging you could offer. And there’s some of that left, people clinging on. And I think that over the last 20 years they’ve not been very good at building a timber management staff that kind of blends the new environmentalism with... their productive capacity of timber harvesting. And I think they’re kind of disjointed there. I mean, they have a great number of people internally that have strong environmental beliefs and who tell you all the reasons why you can’t get something done. And then they have all the people that are disgruntled because it’s not the way it was in 1965 anymore. They don’t have a very good contingent that blends that stuff together.

And I think, if I could say what DNRC has, [it] ha[s] that. [DNRC] ha[s] the good staff of professional foresters that have kept abreast of public concerns and those issues and they interact very well with that.

[The trust mandate]... obviously is part of [our success] because that’s become an issue in several of the lawsuits that we’ve been involved with. [But], I certainly wouldn’t put it down to simply say that that’s the difference. I think it’s much more complicated and integrated than that. And the reason that I say that is oftentimes the issues that bring the Forest Service to their knees are some of the same ones that are issues that get raised on our [projects]. So it isn’t simply... that DNRC doesn’t have to comply with multiple use... We still have to meet the water quality law, the Endangered Species Act and all of those things. And if you look at the variety of lawsuits against the Forest Service, those are some of the issues that are intertwined... So we’re vulnerable on some of those very same claims in spite of having a trust mandate. The trust mandate doesn’t exempt us from compliance with the same things that the environmental organizations have litigated the Forest Service on.

In Montana, if you’re unhappy with a proposed timber sale and you’ve already looked at it at a local level and it’s still proceeding and you dislike it, you can come to Helena and you can, well, first you go to Missoula and you talk to the bureau chief and then you talk to Tom Schultz and then you can have a meeting with the director himself. And then if you’ve still not got anywhere, then you come to the Land Board on the day that the timber sale is being approved. So there’s multiple ways to get involved to kind of get your point across.

The other thing is we’ve gone through some battles. And I keep saying we as if I’m still there... DNRC... engaged with some of the key environmental groups relative to old growth and the Forest Management Plan and while neither the agency nor the environmentalists came out of all those discussions thinking that they got what they wanted, it was another example of a lengthy dialogue and then there has been history of the department implementing that. And I think even the environmentalists would say [DNRC] has implemented its Forest Management Plan, its prescriptions and at each individual timber
sale nobody has ever taken us back in the 12 years I was there and drug us out to the timber sale and said, "look at this. You told us you were going to do a selection cut and this is a goddamn clear-cut." You know, "you told us you were going to do this. You've ruined the bull trout." Never, never once and that'd be over maybe 300 timber sales. And so over time I think you build credibility.

And while people maybe still don't like it, and I say people, I'm only talking about a handful of key organizations and their spokespersons, because that's really who we deal with. We deal with the few people that were the Friends of the Bitterroot, the spokespersons there. We deal with Friends of the Wild Swan and MEIC [(Montana Environmental Information Center)] and Audubon a little bit. And collectively that's ten people that are actually the ones that engage. So if you do enough engaging with them over time and they see meaningful recognition of their points and of things implemented, I mean, they have to begrudgingly agree that you're kind of in compliance (Interview 20:8-11).

Clinch, in the above passage, intends to dispel the notion that differences in efficiency and public acceptability between the DNRC's and the BNF's handling of post-fire management, related solely to mission and legal mandate. Clinch stresses mission clarity, esprit de corps, trust by the various publics, collaborative approaches to management, and integration of public sentiment into management plans. Also, he stresses the importance of having resource professionals trained in modern, integrated curricula—those that understand both resource extraction, as well as the importance and complexity of environmental protection, sociopolitical factors, and ecological integrity. Clinch thinks that the USFS is behind the times in this respect. He suggests that the BNF managers did/do not successfully approach management from a holistic perspective. He also indicates that the DNRC follows through and actually implements management compromises born of collaborative or cooperative processes. This idea stands in contrast to the BNF, which, for many reasons, failed to
timely accomplish management goals as dictated by the court-ordered settlement agreement that followed the fires of 2000.

**Theme: Capitalizing on Windows of Public Acceptability**

Ellen Engstedt noted that the DNRC’s quick action during initial post-fire stages capitalized in public fear and fickle public moods. She suggests public perceptions changed as fires burned out, and thus opportunities to act were quickly lost.

The public… wanted something done. And the longer… the period of time when you’re not choking in smoke, you know, the public forgets how horrible it really was, and they forget the whole valley was on fire… [They] see the devastation now and even did shortly after the fires, but it becomes a little bit different. Your attitude is a little bit different…

And I think the other side of that is DNRC did do meetings and public contact. They’re very good at their public interaction. They were also not only promoting the timber harvest part of it, but they were saying this is what we need to do to help the land recover. These are the erosion controls we need to put in. Bull trout, you know, if you care about the fish, then we need to do some mitigation to help that situation in the long term. And the short term, it’s really a mess, but in the long term it’s much more beneficial to get in there and do it, do it quickly. So that was the rationale, as far as I could tell, from the state side.

On the federal side, now they painstakingly start with their NEPA process. And the Forest Service, and I will say this to them as well, they’re very process oriented, which is why they don’t accomplish a lot on the ground. They get so hung up in how do we get there, that they never get there. Their whole thing is taking the journey instead of getting to the station at some point (Interview 11:5).

Engstedt characterizes public fear and frustration at having lived through wildfire in their communities as contributing to what she belies is a broad base of public support for salvage logging. She suggests that immediately following wildfire, community members are supportive of salvage logging in order to garner economic benefits and help the land. This support she says, diminishes with time.
Engstedt notes that the DNRC promulgated management strategies and their underlying scientific premises to the public. Importantly, the management premises she attributes to the DNRC comprise scientific theories to which other stakeholders from the environmental community do not subscribe. To this effect, a principal tension between various stakeholders relates to questions regarding whether managers can help burned forest ecosystems recover faster than might occur naturally if ecological processes were left to run their course without interference by forest managers. This was a major substantive difference between BNF managers and environmental groups that litigated. Engstedt points out that the DNRC effectively persuaded public observers that their management strategies would “help the land recover” (Interview 11:5). Further, she draws a comparison between the DNRC and the USFS, characterizing the USFS as process-oriented and the DNRC, by contrast, as results-driven. Again, she seems to prefer a more technocratic or synoptic model of management, pointing to delay as a salient cost of the NEPA and/or more deliberative processes.

**Themes: Humility, Working Relationships, Dialogue, Trust, & Candor**

Tom Schultz, DNRC Trust Land Administrator noted,

> Our [post-fire management] wasn’t without a hitch. Nothing ever is… We were thinking simultaneously with the fire suppression efforts, we’re going to be in here [and will]… keep the salvage and the restoration simultaneous… They were both discussed at the same time (Interview 7:1-2).

Shultz’s comments acknowledge that Montana’s state management was not a model of perfection. This attitude stands in contrast to stereotypes of what are commonly referred to as “bureaucrats,” and “technocrats”—civil servants who tend to assert their “technical expertise” (Hirt 1994:XVI, Rossi, 1997, Thomas and Sienkiewicz

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Whether the expertise is legitimate or spurious is of secondary import where agency-stakeholder relationships are concerned. Schultz’s candor does not fit the “technocratic” characterization. Schultz notes that any portrayals of state management following the fires as perfect are erroneous, thus suggesting humility.

Many stakeholders tend to value administrative, ecological, and intellectual humility (Interviews 9, 14, 15, 19, 24, 26A, 26C). Some critique USFS managers for lacking humility (Interviews 5, 14, 16, 18, 19, 24, 26A, 26C). Further, some have cast the USFS in such terms as a “Stalinesque bureaucracy” (Hirt 1994:XVI). Others, however, have lauded the USFS’ more recent efforts at soliciting citizen input and holding public meetings, thus suggesting a culture that is evolving to be more open and deliberative (Koontz 2002).

Larry Campbell of the Friends of the Bitterroot noted of the DNRC,

[DNRC] came up with a plan pretty early on. And they were actually pretty straightforward. They came, took the initiative and came to us and let us know what they had in mind when they were planning to get in there and salvage log it. And you know as far as that goes, they are much easier to deal with. They’re much more straightforward… Tom Schultz was there, actually, for one of the trips. And for the most part they’re really personable and they are straightforward… I think a large part of it is… just their demeanor and that they would take the initiative to develop sort of this personal, you know, they came to us and said, hey, come on, let’s go out there and look and we’ll tell you what we do. And that I think is just their own personal character and integrity. Some of it, and that they are more, I believe, more honest and forthright (Interview 15:2-5).

Campbell noted of the USFS,

Whereas the Forest Service, sometimes I kind of feel sorry for them. They’re in the position where their basic motivation, I believe, is get in there and cut the big timber because that’s what’s worth the most. But they’re stuck in a position of having to fabricate these long song[s] and dances about how it’s good for the ecosystem or at least benign and blah, blah, blah. And so they have to come up with these tortuous rationales for how they’re benefiting restoration by salvage logging. Well, right away that puts you in a really
indefensible position, you know. And yet they got to stick to it if they want to get to retirement, you know, their retirement funds.

[USFS] basically need[s] to jump through a lot of hoops because of laws protecting our national forests. Their mission is different. Their mission isn’t simply to make money. It’s to, you know, protect the soils and the watersheds and, you know, and then, and by the way, get some timber off the deal. So basically they’re in conflict.

You’ve got people in there who have risen to the level of being line officers or decision-makers that are essentially selected by the upper echelon of the Forest Service which has been politically, you know, badgered and manipulated into doing the will of the timber industry. You know, so on one hand what’s really driving the Forest Service is this drive to get the timber out because of PAC [(political action committee)] money going to politicians like Conrad Burns and you name it. And even Mark Rey, you know, I mean it’s really clear these days. Mark Rey, who is later in the story, I mean, he comes to Missoula... He was directly involved with that. He’s like a timber industry lobbyist. His allegiance is to the timber industry. And I don’t believe he’s ever seen a timber sale he didn’t like. You know, so that percolates down into the decision-makers.

But meanwhile, they are bound, you know, the checks and balances are that people who are concerned about the environmental ecological health of the forest can go to court and enforce the laws. And that’s the only thing we can do... And we can try to get the public to understand, try to win the hearts and minds of the public (Interview 15:2-5).

Campbell’s language exhibits a trust in and respect for DNRC managers. Although he does not agree with the DNRC’s management mission for state trust lands, he has a working relationship with DNRC managers, knows them by name, and appreciates their proactive efforts at involving him and his organization in management and planning. Campbell notes that the DNRC does not modify its salvage plans to the degree he would like, but appreciates other policies that protect ecological integrity. Campbell expresses distrust for USFS managers, but seems to sympathize with what he suggests are institutional and cultural forces that work upon those managers. Nonetheless, he dislikes what he perceives to be disrespect and

85

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dishonesty toward the public, and an underlying preference for interests that wield influence through monetary donations to elected officials and political appointees in Washington D.C.

Campbell’s comments bolster the notion that candor, trust, and working relationships are built upon honesty and open dialogue as in the deliberative democratic paradigm. Where processes are more closed, technocratic, or synoptic, there is greater chance for misunderstanding and distrust.

Daniel Kemmis, Director of the O’Connor Center for the Rocky Mountain West, noted that the conflicts in the Bitterroot Valley over federal land management were (and are still) exacerbated by what he calls “intellectual dishonesty.”

As is fairly typical of land management decisions, it was done in a framework that encouraged people to seek out positions and take sides rather than to try to resolve the issues up front. And in this case, we had a very contrived and artificial pressure cooker effort at the end to come up with a negotiated settlement. But those are not by any means the best conditions for doing that kind of work.

And then I think that the situation was exacerbated by the fact that the two sides, or at least the most contentious players on the two sides were both, in my opinion, engaged in a certain kind of gamesmanship that was guaranteed to undermine trust and the ability to work together. And what I mean is that on the one hand, by that time the timber industry had kind of locked onto the idea that they were arguing publicly that what cutting trees was all about was forest health. I don’t know who’s supposed to believe that line or why anybody should. But, yeah, I think that a certain kind of forest management that involves cutting some merchantable timber can contribute to forest health. I don’t deny that. I’m just saying that there was a kind of intellectual dishonesty I think in the way that the timber industry was and still is saying in effect, what we’re interested in is forest health...

There was, I mean, just going to the other side, then, you’ve got a whole cadre of environmental organizations that are committed to ending all commercial logging on national forests. But in any given situation they generally don’t say that’s what they’re up to. They say that what they’re up to is just trying to make sure that the Forest Service follows the rules, etc., etc., etc. Well, that’s intellectually as dishonest as anything the timber industry is doing. If what
you’re doing is trying to end all commercial logging, then just say that’s what you’re doing.

So I’m just saying that I think there’s about equal intellectual dishonesty on both sides in those cases and that it makes it very hard for either side to trust the other when you’re not saying what your real agenda is. Then it’s hard to work together...

I didn’t necessarily see that the Forest Service was even trying to encourage collaboration. Maybe I missed it. But in cases where there has been encouragement of a collaborative approach, then you have the agency exercising its discretion in some way that’s contrary to what the collaborative approach came up with. And that’s very destructive I think. So that’s a real problem.

I think we need to be looking for ways to empower collaborative processes up front to actually design the solution and then have that be the solution [where participants know that their work will be in some way put to use]. That’s not easy to do... I think that in those terms, that this was an instance that was all too typical of how things have worked in the old system, that is, you encourage people to come up with different kinds of solutions. And NEPA does put an emphasis on multiple alternatives and so on. But if you’re encouraging people to do that, and there’s really very little likelihood that anything they come up with is going to be adopted, then you’re just inviting more cynicism and frustration (Interview 24:1-4).

Kemmis notes that the semantic word-play and carefully-crafted, euphemistic management and policy language contributed to the BNF becoming embroiled in conflict. Kemmis believes the BNF’s critics sometimes engage in similar tactics. Moreover, Kemmis suggests that the NEPA process is flawed or hollow in that management alternatives preferable to participants in the planning process are rarely chosen. By contrast to respondents’ perceptions of the BNF/USFS, no respondent suggested that gamesmanship, “intellectual dishonesty,” or disingenuousness characterized DNRC management.

DNRC Trust Land Director Tom Schultz described the DNRC’s proactive, voluntary efforts to compromise with critics among the public.
Tony Liane was the [DNRC/SSF] area manager. He… wanted to make sure we [did] not get into a pissing match over which trees are going to live and which trees are going to die… [The Sula burn] was in mixed severities… You can get endless debate over which trees will live and which trees will die… Fires can be controversial. So we made a call quickly that if there was any green in the trees, they will stay (Interview 7:2-3).

The DNRC made a voluntary, proactive concession to potential opponents regarding live trees. This comports with a more deliberative approach to management. If there was any question as to whether certain trees were still living, noted Schultz, those would stay. The DNRC foresaw a controversial issue and made a prospective and proactive concession. It did so for the sake of present and future efficiency vis-à-vis “give and take” with those stakeholders apt to participate in management planning.

Although the DNRC’s top-down culture was very much apparent in the agency’s salvage focus, it was to some degree subject to “bottom-up” and/or exogenous influences by virtue of its flexibility and openness to compromise and negotiation. The DNRC seemed to exhibit a management and cultural model that mixed both top-down and bottom-up elements—a deliberative, cooperative, collaborative approach within a military-like, top-down, synoptic management culture. The DNRC’s mixture of military-like, top-down leadership with mission promotion and proactive compromises regarding green trees and other issues, suggests a hybridized management model.

The DNRC seemed able to compromise with stakeholders during post-fire management. To this effect, one DNRC field forester noted that there was “no internal discussion or disagreement as to how to proceed. [However], the decisions that are made in what direction to take as we proceed down that path… there [was]
some latitude there” (Interview 22:9). This forester noted further that the DNRC’s decision not to cut green trees as dictated by the environmental assessment (EA), “was a concession, or mitigation [effort]… a conscious decision… a compromise” (Interview 22:9). Moreover, the forester described a working relationship with the Bitterroot Valley’s primary environmental NGO, the FOB—a plaintiff in Wilderness Society v. Rey, the case in which the BNF would become embroiled as a defendant.

We did [have a working relationship] with Friends of the Bitterroot. We dealt with them regularly. I was kind of nurturing that relationship. Yeah. We were taking them out on some of our timber sales, trying to show them how DNRC operates, why we need to do what we do, how things, how we manage the ground… and they were always commenting on our EAs..., wanting things done a little differently… and yeah, we definitely had a relationship there (Interview 22:15-16).

Theme: Trust Mandate as Deterring Challenge from Environmentalists

Matthew Koehler, Director of Missoula’s Native Forest Network (NFn) noted of the common comparison between the post-fire responses of the DNRC and the BNF,

To some extent it’s comparing apples and oranges. I’ve… gone down there with some forestry folks and [a] Ph.D. soils [scientist]… They said that what basically happened from a soils standpoint, they got lucky on the Sula, given some different weather conditions that could’ve taken place. There would’ve been some pretty big problems down there. But I know that no one really put much time or effort into the Sula situation. Just a lot of it has to do with a different mandate.

Of course all of us [in the environmental community] know [about the different legal mandate]. I do think it’s rather ridiculous for the richest, most powerful nation in the world to fund the education of its children like [that]. It just seems to cause problems, not only on trust lands but on other lands as well (Interview 16:1).

Koehler believes that the environmental community is well aware of starkly different legal mandates, organizational structures, and political incentives as between state trust land management and national forest management. Koehler suggests that
the DNRC was not of primary concern to his organization, because laws guiding trust land management do not facilitate inclusion in planning to the same extent those laws governing USFS-managed lands do. Thus, he suggests, there is little incentive for groups such as his to invest as much time in becoming involved with DNRC management. In essence, Koehler suggests that it was the trust land mandate that precluded significant legal conflict surrounding the DNRC’s post-fire salvage logging efforts.

USFS Chief-Emeritus Jack Ward Thomas offered similar thoughts to this effect, “It’s probably the size of the big game you’re after. Why hunt squirrels when you can hunt an elephant?” (Interview 27:7). Koehler, further, suggests that serendipitous (cold) winter weather allowed the DNRC to minimize erosive impacts of salvage logging, and thus draw praise from various stakeholder groups. Nonetheless, Koehler’s NFN is a nationally-focused group based in Missoula. It has different incentives relating to participation than do smaller, locally-focused, more literally “grass-roots” organizations such as the FOB.

Larry Campbell of the FOB noted:

And that, I think, relates to [the DNRC’s] mission. Basically, they can just go up there and say, we’re going to salvage log this because we can make money doing it. And then what are you going to say?...

And there’s no National Forest Management Act, you know. They’re not bound to protect biological diversity and all. So environmentally it’s, you know, the logging that happens on state land is as damaging, and probably more so than what goes on... on national forest land. But they traditionally haven’t been into clear cutting, which is nice. The state lands are much more into selective cutting. They’re looking in longer term. They’ve got less land. They need to manage it for sustained use.

But I will add that the Sula State Forest burned much more severely over a greater percentage of the Sula State Forest and burned more severely than
surrounding national forest lands because they hadn’t been dealing with the slash. They’d been lopping and scattering slash because it’s cheaper.

And so they made more [money] doing it. And, boy, when the fire got in there, whoosh, it went crazy. So, you know, what are you going to do? … We couldn’t make any legal arguments. We pleaded for [DNRC] to mitigate environmental damage [but] … I don’t think they modified their salvage timber sales very much to appease us. They [do] have a policy that we appreciate—and that they were careful to enforce—of not allowing off-road vehicles to get off state road. [On] state land, you cannot take a vehicle off of the road. And that’s especially important in burned areas like, ‘cause boy, even when you walk through a recently burned area, all you have to do is look at your footprints and see the sensitivity of the soil. You know, it’s just crunch, crunch, crunch. And it compacts and it’s really a mess. So that was appreciated. But no, I don’t think they modified their timber sale very much.

So I think part of the reason they can be so straightforward and forthright is they don’t have to make excuses, other than we’re going to make some money (Interview 15:2-5).

Like Koehler, Campbell acknowledges that the trust land mission successfully deters legal challenge to DNRC management, but Campbell does speak to a more collaborative, deliberative attitude among DNRC managers.

Theme: Assumptions about the Public as “Vocal Minority” or “Silent Majority”

A USFS Presidential Management Fellow (working in off road/highway vehicle (ORV/OHV) use planning) expressed sentiments similar to some expressed by the DNRC’s Bud Clinch. This manager noted that the USFS needs more holistically-trained managers, but that the agency is largely aware of this need. Further, this respondent believes that those participating in national forest management planning hold different core values than the majority of the country’s population.

We have a diverse group of people using the national forest nowadays. People from local communities, people from urban areas, people from suburban areas, and in addition to all those diverse groups, we have a clear set of individuals and groups who now follow a more fundamental value system based on probably a more, I wouldn’t say hard core, a fundamental value system that they follow, that guides their life, whether it’s, they think that
things should be more ecocentric so now they’re going to say, and they’re going to follow that in terms of something that may be more of a religion to them or a way of life than it is just something that they think about or read about on a day-to-day basis. So I think that at the core of a lot of these problems are fundamental values. If someone is following a, and I used the example when we were talking earlier about if my fundamental value is, for example, no commercial timber harvesting on national forests. And that’s one of the guiding values and principles in my life now. Then every time those issues come up and it’s in my area, I’m going to be involved in it and I’m going to have interest in it. And it is likely that I’d probably be less willing to compromise on alternatives that would meet other people in the middle.

So I think that right now we’re seeing a lot more people involved. And to me it’s a small number of people. It’s an interested and vocal minority of people that are involved who are entrenched in these issues and have pretty solid fundamental values that are guiding their lives. And it’s making it very difficult for forest managers and others to try and find a middle between people on the right and left side of any issue...

And so for me, there’s someone who has to be the protectors of that real public interest. Who is going to take care of that silent majority that isn’t part of this debate? Yes, the interested minority, you know, their voice needs to be heard. And that’s understandable. But someone across all of these fences has to watch out for that public at large that really either doesn’t care or they just don’t have time to be involved. And I don’t know whether that’s a public manager, is it his job to draw that line? To make decisions that are in the public-at-large interest? Or is it to look at local communities that they work with or those interested minorities and say yes, they’re the ones involved and we’re going to put more weight on what they want? So to me it’s a delicate balance...

But I think there’s someone across the spectrum that’s going to have to keep that silent majority’s interest in mind and make assumptions. You know, someone’s going to be assuming that the public interest at large probably wants this or probably wants this or probably wants this. And then they’re going to have to weigh that against what the interested minority’s telling them and at some point make a decision and draw a line and say yes, I’m willing to make some compromises as a manager to address some of the things that you would like to see on the national forest. But I also have to draw a line because there’s other people out there that I have to protect in my job. And it’s a delicate balance.

For public land managers to make some type of competent decision in terms of public interest, there’s a lot of training and understanding on their part that’s going to have to be involved. They’re going to have to have more skills to be able to weigh those things out. And, you know, unfortunately in my
opinion at this point in time we do lack some of those skills in our technical resource managers... I think somewhat intuitively... [of the] public interest... I think a manager [sh]ould say, well, how can I achieve both objectives? And the Forest Service is really looking to that (Interview 1:6-9).

Early in this passage, the USFS respondent uses the terms “vocal minority” and later, the term “silent majority” in reference to environmental organizations or other NGOs that provide formal comment and litigate. This suggests he believes that the interests represented by involved NGOs are not the interests of the general populous—or that the NGOs that submit comment and sue on USFS management actions are a minority of the general populous in terms of values. While his is not a wholly pejorative characterization, it marginalizes interests pursued by environmental NGOs. It also seems to assume that because a small percentage of citizens participate in land management planning processes, that their values and viewpoints are also those of a minority of the general population.

In effect, this USFS manager makes the logical leap that the values of the participatory minority represent the values of a minority of the general public. This manager thus suggests that the majority of Americans do not share values with the “vocal minority.” He believes that many Americans are unfamiliar with the nuances of the national forest designation. This manager suggests that he tries to be inclusive: “There’s other people out there that I have to protect in my job. And it’s a delicate balance” (Interview 1:3). By “other” he seems to suggest the citizens who do not undertake to become involved in land management planning, i.e., “the silent majority.”

This manager notes: “And I think if we’re going to meet the demands of that interested minority who has a great impact on the work that we do, but also watch out
for the public interest, we’re going to have to do better in terms of integrated management—understanding” (Interview 1:3). While he expresses belief in integrated management, his words suggest bias with the presumption that the values of “that interested minority” are distinct from “the public interest.” His assumption may or may not be correct under any given circumstances, but his words evince a bias against those participating in the USFS management process and thus suggest a preference for more technocratic or unilateral management. This USFS respondent’s words stand in contrast to DNRC respondents, whose words make no suggestions that those who participate in management are distinct from “the silent majority” or general populous (Interviews 7, 20, 22, 23, 28).

Similarly BNF Supervisor Dave Bull also referred to a “silent majority” and “the squeaky wheel,” noting that the silent majority does not have time or energy to participate as does the “squeaky wheel” (Interviews 8:47, 36:1). Supervisor Bull expressed frustration at the abundance of press coverage of those who disagree with BNF management, as opposed to the dearth of coverage of those in agreement, whom he characterizes as the “silent majority” (Interview 36:1).

Thus, Supervisor Bull’s language suggests that those participating hold values of a nature that differ from those of the broad population. Such thinking manifests further in the way some USFS officials indicate they treat public comment solicited under the NEPA process.

BNF spokeswoman Dixie Dies indicated that the majority of public comments submitted addressing 2005’s Middle East Fork sale on the BNF were of little or no import because they were submitted via e-mail or through an NGO’s server (Missoula
Independent, September 22, 2005). Supervisor Bull also indicated that such manner of public comment has little effect on his decisions (Interview 36:1). Bull asked whether the 98% majority of the 11,500 comments were from “people that had firsthand knowledge and interest in the project” (Interview 36:1). The 98% majority to which Bull referred opposed the BNF’s preferred alternative for the Middle East Fork Sale (2005) (Missoula Independent, November 17, 2005).

Managers stressing a silent majority versus a squeaky wheel place these categories of public stakeholders into a hierarchy. This is an either-or way of thinking. This binomial approach stands in contrast to comments made by DNRC forest managers indicating incorporation of suggestions of those participating in land management planning into final management plans. More generally, DNRC respondents’ comments speak to some level of compromise within the DNRC’s management mission. The DNRC’s Bud Clinch notes that he dealt with “a handful of key organizations and their spokespersons” (Interview 20:11). This language, in contrast to that of multiple USFS respondents, contains no generalizations to the larger population of Americans or implicit assumptions about a “silent majority”—as do characterizations and labels such as the “vocal minority,” or “squeaky wheel,” or “hard core,” or “fundamentalist.”

What can be said about this distinction? The DNRC managers’ seemingly more objective characterizations of public participants in planning and management operations suggest more objective, more deliberative, and more open working relationships, and perhaps a more pragmatic approach to conflicting values among public stakeholders and agency managers (Interviews 1, 2, 3, 6, 8, 9). Independent of
management outcomes, there was, among some USFS respondents, a distinct attitude of dismissal toward environmental NGOs (Interviews 1, 3, 2, 8, 9, 12, 26B, 27, 36).

It seems likely that non-agency participants in the USFS management process would be cognizant of such attitudes if they interact with USFS officials. This likelihood is reinforced by the notion that 65-90% of communication is nonverbal (Warfield 2001).

And thus, where such attitudes are pervasive, participatory processes are likely to be unfulfilling for both managers and participants. Under this model of USFS management, assumptions as to the validity of public comment are made on the basis of the manager’s preconceptions and assumptions about participants. Under such circumstances public comments are not likely to be given much weight. It follows that participating citizens are unlikely to derive satisfaction from their participation. This reality would logically increase the likelihood of enmity, resentment, litigation and associated direct and opportunity costs.

**Theme: Holistic Management, Holistic Managers**

One USFS manager described the increasing need for integrated management,

> You know, this theory of integrated management to satisfy diverse interests is becoming extremely important in the agency. And I think if we’re going to meet the demands of that interested minority who has a great impact on the work that we do, but also watch out for the public interest, we’re going to have to do better in terms of integrated management—understanding. Our managers have to have more skills than just one natural resource skill. They need to know more about forest management than just forest or wildlife. I mean, they have to have that whole toolbox of skills to ever be able to weigh those things out effectively...

> And, you know, there’s people who say, well, we still need specialists and, you know, all of a sudden we’re going to end up with a bunch of generalists. But maybe that’s all we need. Maybe that’s all society’s going to ask us for, you know, a small number of specialists to support a larger number of generalists who can, at least in public land management, who can better weigh these types of conflicts and find creative ways of satisfying both of those
interests, that of the interested minority and protecting the public interest at large and what they do. So I think it’s essential for the forestry schools, other schools to somehow be more integrated in their learning cells…

And one example of that… after being on the [national forest] for one week was that we went out, looked at some restoration work that was done by a group of foresters who had been with the Forest Service for a long time. And they were doing restoration projects that were opening up stands with that old typical park-like, big ponderosa pine, open vegetation understory. And wow, look, we have user created OHV trails all over the place because when you’re going down the road and you’re saying, hmm, where can I ride today? It’s an open invitation. It’s saying, ride through me because you can ride wherever you want in a stand like that.

So in terms of, well, if forest managers were better trained on how to do landscape architecture or what effects recreation can have on the ecosystem, then maybe they would change their silvicultural prescriptions. Maybe they would put in a 50 foot buffer along any road so that when someone’s driving down the road and they’re looking in it doesn’t appear to be an open stand. Because in other areas where we saw that there was heavy understory vegetation you don’t have user created trails because they just don’t have the ability to ride freely.

So understanding, you know, if I look back, and I didn’t have much training in recreation, if I was out doing a silvicultural prescription as a forester I wouldn’t have thought of that. And that’s probably the last thing I would have… Or, you know… the recreation people have seen where the foresters just aren’t closing the roads when they leave. Well, here come the OHVs. So a lot of that type of stuff, the more we understand it across all those spectrums, I think the better we’ll do in all of our decision-making in terms of how do we… To me it’s not about restoration work. It’s about how do we do preemptive management? And that’s my term. Is that preemptive in the sense of, okay, I have a forest stand and I want to create a better condition than what it’s in now. Now should I take it back to something that it used to be? Or should I put it in the stage that it’s ready for what is coming, so it’s ready for maybe global climate change, so that it’s ready for the number of OHV users that are going to come up there. Something that maps, you know, we need better abilities at prediction of what things are going to look like in the future and try and maybe adapt our stands to be ready for those conditions, whether it’s OHV or climate or fire (Interview 1:6-9).

This USFS manager sees himself as part of a new generation of holistically-trained managers. While this manager acknowledges a need for a more integrated approach, he believes the USFS is on its way to meeting this need. While this
manager acknowledges the importance of integrated management, he does not stress public dialogue or discourse as being a prominent part of holistic or integrated management, and thus would seem to prefer a more synoptic management paradigm to a deliberative democratic model. That is to say, in his view, the knowledge and information flows from managers and better training of managers rather than from dialogue and deliberative discourse with stakeholders.

**Theme: Political Pressures as Contradicting the USFS Management Mission**

One USFS manager, who had risen through the ranks to an executive post, related the pressures that worked upon him as a manager.

> Sometimes managers are placed in a difficult situation in that they get direction and targets and expectations established for them by their superiors and by the administration that’s in power at the time or in power at the time. And so on one hand they’re dealing with trying to make their bosses happy, meeting whatever the targets are for that period of time. And in those cases where those targets aren’t consistent with what the public values are in an area, in spite of the fact that they may have all the best intentions of collaborating with the public and trying to come to solutions that are acceptable to all sides, when they are under pressure to meet certain targets and within certain timelines, it just puts them in a difficult spot and it makes it much more difficult, sometimes, to be as fully open and take the time it needs to do true collaboration that is probably the best way to at least get to some point of public consent about moving forward with one program or another.

It’s both [a national and a local pressure]. And it varies. You know, it varies from year to year, from administration to administration, from individual to individual. But to the extent that there are national priorities set and to the extent that people being held accountable where the emphasis is on meeting targets and accountability for meeting certain targets, that puts a lot of pressure on people to accomplish those objectives. And again, it just puts them in a situation that sometimes is difficult for them to deal with in terms of trying to get the, to have the time to get the collaboration that’s necessary and to maybe not meet their target but get something that’s more acceptable to the public on the ground...

I can’t speak for the state. I know the Forest Service, you know, has, in some ways they may have an advantage in that they have I think a much vaster array of specialists and skills and people available to them to bring to bear on
particular issues. But they may not, but because they may be, on the federal side, on the Forest Service side, because we have to deal with policies and rules and regulations that are maybe in some ways more constraining than state agencies may have to deal with, in that sense it could make things more difficult for us to get things done on the ground and work through some of the dilemmas and controversies.

I mean, we have controversies on both sides. I mean, on one side of issues we have folks that are impatient with us for not moving ahead fast enough to get things done on the ground that they see are important and those policies and regulations sometimes are the cause of us not moving ahead as fast. At the same time, the need to take the time to do collaboration to get consent for getting things done on the ground also can be a reason for not getting things done quite as fast as some folks would like. On the other side, there are folks that want us to take the time, would rather have us not even take some management actions. And so they’re more concerned about us taking the time or delaying things or trying to keep certain projects from going forward (Interview 5:2-4).

This USFS employee’s comments speak to political pressures, and to achieving timber volume quotas or “targets.” BNF Supervisor Dave Bull expressed similar sentiments, citing the leverage wielded by Montana Senators Max Baucus and Conrad Burns (Interview 8).

It is important to note that timber quotas or targets as mandated or “encouraged” by elected officials and/or political appointees are seemingly antithetical to notions of ecosystem-based management, or of the idea that what you leave on the ground/in the forests is more important than what you take, as expressed by USFS Chief Dale Bosworth (Interview 12). However, if such quotas related to ecological thresholds, then perhaps appropriate quotas could be protective of ecological integrity? The difficulty, of course, relates to balancing competing management values in creating such thresholds. To the degree thresholds are created based on Congress-influenced, centrally-created budgets and influence from the administration, the driving force will likely be economic return (Interviews 5, 8, 9, 12, 19, 27) as non-market values do not
tend to be the driving force in public lands politics. Although the Multiple Use and Sustained Yield Act certainly authorizes timber among its multiple uses, it is, again, anyone’s guess as to what the appropriate management formula and ratio as between uses should be under any given circumstances.

Chief Dale Bosworth noted of the USFS’ management mission,

The Forest Service is really focused on a different mission than what we were on back in the ‘70s and ‘80s and ‘60s. I mean, I think the ‘90s were a period of transition and I think people in the Forest Service accepted and embraced an era of restoration, outdoor recreation as our mission.

And you talk about the four threats to the nation’s forests which are really restoration kinds of things. One’s fire and fuels, one is invasives, one of them is loss of open space, and one of them is unmanaged motorized recreation. And all those are sort of restoration and management focused. And the people in the Forest Service I think have moved on to restoration philosophy. So I don’t think it’s as uncertain in people’s minds today as it was during those years of transition. But still in the public, particularly in the activist part of the public, my view is that people are still fighting battles that were, that they won by and large 15 years ago.

You know, we were selling 12 billion board feet ([BBBF]) up to the late ‘80s and we’re selling 2 now, and that’s about what we’ll probably continue to, 2.2, somewhere in that vicinity. Now if they just look at that amount, it’s like one cubic foot per acre per year. I mean, that’s a piece of wood that big. I mean, that’s what we’re removing from the national forest today. Now, I’ll agree that a lot of it’s wilderness and rock and ice and all that. But if you just take an average across all the national forest lands, if you take just the forested lands, it’s like 2 cubic feet. I mean, it’s a pretty infinitesimal amount. And probably 70% to 80% of what were removed is being removed either for ecological restoration purposes or for value recovery… That’s the only two reasons we remove it. The only exception to that is the Tongass National Forest in Alaska by and large. I mean, you’re not, any timber you harvest in the Tongass you’re not doing for restoration purposes. You’re doing it for jobs and economics…

Timber volume is a byproduct of our objectives in probably 70% of the timber that we produce today. In the 1980s it was probably 90% of the timber that we produced was to produce raw materials, to produce timber for the economy and stuff like that. It’s a complete reversal from where we were 15 years ago…

100

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I'm a pretty optimistic person. And I do think that there are, that we can emerge from these decades of conflict into a little more collaborative approach. On the other hand, if you look at our 100 years history from the date the Forest Service was formed and the national forests were moved to the Department of Agriculture we've been going through controversy, I mean, of one type or another. We might go through a decade where it's relatively calm, and then we get into something again. So it's been that way from the time that we started trying to map the boundaries of the national forests and get them under control. And it's still that way.

But I don't think it has to be quite at the fever pitch that it's been in some places. In other words, there are other places around the country where I'd say that it's relatively quiet regarding controversy. A lot of the Southeast now, a lot of the country around say Colorado, Wyoming, the central part of Utah other than water issues, it's relatively quiet right now. In the Southwest it's actually pretty quiet in terms of controversy, except for grazing. And there's a place in the Southwest where grazing is a big issue (Interview12: 17-19).

Chief Bosworth's comments, when taken with those of the aforementioned USFS respondents, suggest a discrepancy between the USFS' internal goals and mission and the de facto goals and mission that result from exogenous influences, the realities of congressional and USFS central office budget making, and other intervening forces. In effect, it appears that despite the goals and desires relating to ecosystem-based management and ecological integrity, such concepts can be trumped by executive branch demands, congressional politics, and political "horse trading."

This appears to have been the case following the wildfires of 2000 in the Bitterroot Valley. Supervisor Bull, District Ranger Dave Campbell, Chief Bosworth, as well as anonymous USFS respondents related such political pressures as influencing management (Interviews 2, 5, 8, 9, 12, 26B, 27). Nonetheless, these realities are rarely, if ever, mentioned in explaining budgetary problems to the public. According to some of the same USFS respondents, this "silence" is, in part, a result of agency culture (Interviews 5, 8, 9, 15, 26B). Complaining to Congress or elected
officials about the paradoxes of USFS management is taboo (interview 8). This may be a cultural reality of the USFS, but when such realities exist, and a manager cannot relate the truth to an angry public for risk of losing her job or suffering workplace alienation (Interviews 8, 9, 15, 19, 24, Matson 1996)—then an insoluble paradox exists (Interviews 5, 8, 24, 26B).

**Multiple Truths**

Science involves the continued and intense pursuit of knowledge and truth. Yet successful conflict resolution requires acknowledging multiple “truths” or multiple constructions of reality (Berger and Luckman 1966). Can science accommodate multiple political realities? Can the multiple political stances find a common scientific truth? The interview process followed here makes apparent that there are indeed multiple divergent perspectives, which are likely regarded as “truth” by respective subjects. Thus, if managers and policy makers hope to mitigate or avoid protracted legal/political conflicts, it is logical to acknowledge the existence of applicable divergent “truths.”

It is, then, logical to work toward reconciliation of conflicting views and finding common ground rather than, or in addition to, analyzing these myriad truths in a hierarchical framework upon which management decisions might be based. Examination of the data associated with this study suggests that before any substantive progress may be made in the management of federal lands, managers of these lands and their counterpart environmental NGOs and industry-related stakeholders must move beyond personal enmity, disrespect, and vitriol toward better working relationships as exhibited by the DNRC and the NGOs of Western Montana.
and elsewhere. Although some NGOs from both ends of the political spectrum may be characterized as conflict prone or litigious (Thomas and Sienkiewicz 2005), many stakeholder groups are not inherently litigious. Many stakeholder groups simply respond in kind to behavior of those already acting (or failing to act) within their particular spiral of conflict.

Core value differences aside, persons interviewed in the course of this study communicated a distinct tendency among DNRC managers to engage, involve, and solicit information and advice from diverse stakeholders—to a degree beyond that required by applicable law (Interviews 1-37). This would tend to comport with more deliberative models of governance. DNRC managers and executives communicated active promotion of an inclusive management culture. In a sense, DNRC managers injected public involvement into the management of lands whose designated management purpose is economically driven (Sienkiewicz 2006).

One can reasonably theorize from data that in the case of the aftermath of the wildfires of 2000, the DNRC’s voluntary, prospective, proactive involvement of stakeholders into management decision making begot diminished controversy and avoided conflict-related costs over the longer-term. Importantly, DNRC managers compromised with environmental interests from the beginning. These compromises were manifest in tangible, concrete planning and management successes.

By contrast, there was a pattern among USFS respondents to regard participants in the NEPA process as “other,” “interested minority,” “squeaky wheel,” “hard core environmentalist,” or “fundamentalist.” Without empirical data suggesting these interests are, in fact, different than those of the general population, local population,
or any population to which a manager is generalizing—then such characterizations evince a bias. The stereotypes described by some USFS respondents may, in some cases be true. Nonetheless, the suggestion that all or many participants in the NEPA process are outside of the larger population’s value-norm is problematic.

Whether or not this bias affects management is a separate issue, but such appearances or perceptions seem likely to exacerbate controversy and mistrust. The DNRC, ostensibly shares the management goal of significant timber harvest with the USFS, however DNRC manager and forester respondents made no use of the aforementioned marginalizing language. Vaughn and Cortner (2005:137-142) describe the marginalizing language used by some USFS respondents as rhetoric.

Theoretical Applications

Neither the USFS, nor the DNRC, could legitimately be described as pure manifestations of the deliberative paradigm as outlined by Dryzek, List, Poisner, or others. The deliberative paradigm and its focus on direct, ongoing dialogue is contrary to the historic and present management cultures of both the USFS and the DNRC. Moreover, the complicated administrative structures, scale of management, and political nature of public lands governance have so far precluded a purely deliberative, or even a significantly deliberative, model of management.

Both the USFS and the DNRC are dominated by one or many natural resource and forestry-related skill sets, which in turn, come with particular attitudes and cultures attached. These cultures and attitudes influence what managers might feel is right, just, or appropriate management given certain conditions. Such dominant management cultures are distinct from the goals and values that would rise to the
surface given the presence of deliberative democratic processes. Despite the presence
of technocratic or expert-dominated agency cultures, it would not, however, be fair to
describe either agency as purely expertocratic and closed to outside influence.

Within both agencies there exist technocrats and experts that believe they know
what the best course of management is. This belief is evident in respondent
comments suggesting an agency manager is attuned to the public good, to the
interests of “silent majority,” etc. Nonetheless, the NEPA paradigm (and its state-law
counterpart for DNRC) and its mandated consideration of public input, reduces
technocratic unilateralism to the extent managers are prompted to address a wide
range of management considerations. Moreover, the USFS and the DNRC both
exhibit synoptic traits, in that management must synthesize across many different
natural resource disciplines: forestry, ecology, biology, hydrology, economics, and
others. This further reduces the likelihood that USFS and DNRC management is
purely technocratic or expertocratic in nature.

Nonetheless, the comments of both agency managers and public stakeholders
seem to bear out Grumbine’s assertions (1992) that the expert-dominated agencies do
not readily accept participatory citizens’ movements. Specifically, comments of
USFS respondents to the effect that those participating in planning constitute a
“squeaky wheel” or “vocal minority” suggest prejudice against citizen involvement.

DNRC respondents, however, exhibited a more deliberative attitude than did
USFS respondents. DNRC respondents, seemed collectively less expertocratic and
more deliberative in their approach to citizen involvement than did USFS
respondents. This is so because, DNRC managers tended to allow informal
negotiation, spontaneous interactions, and proactive concessions to influence the agency's overall approach to post-fire management. Although, the deliberative traits exhibited by DNRC managers did not dominate the DNRC's post-fire management process, they certainly facilitated the trust, dialogue, and working relationships which benefited DNRC management. It is fair to say that the ongoing dialogue DNRC managers enjoyed with interested stakeholders led to diminished conflict and more rewarding processes (despite philosophical differences) for interested citizens and stakeholder groups.
Chapter 7
Promises vs. Obligations: The BAR Project’s Lost Restoration Funds

On February 5, 2005, the Missoulian published what had become almost a ritual piece—the newspaper’s anniversary article addressing management status for the Burned Area Recovery Plan settlement agreement relative to the salvage of timber resources and ecological restoration of forests burned in the wildfires of 2000. The Missoulian article (February 5, 2005) noted that certain interest groups (and by implication, their constituents) were dissatisfied that the BNF had given management priority to economic values such as timber sales, while ecological restoration projects were proceeding at a pace under which their completion could take many years (Missoulian, February 5, 2005).

The BAR settlement agreement was a court-ordered, judge-mediated, mutually-agreed-upon, and (theoretically) contractually-binding document. During its time of relevance, it (theoretically) trumped all previous planning documents, including the forest plan. Nonetheless, its omissions with regard to funding sources, timelines, scheduling, and prioritization of projects actuated further controversy. The BAR plan perpetuated a vitriolic dispute concerning public land management priorities in the Bitterroot Valley and the nation in general. This chapter explores the following:

1) What was the obligation of the BNF to complete its plans under the court-mandated settlement agreement?

2) Were budget constraints a legitimate excuse for inaction?

These questions go to the heart of the conflicts that pervade contemporary public land and resource management in the United States. The Bitterroot BAR and settlement agreement are emblematic of greater problems in the realm of the
management of natural resources on federal lands and in the American polity. Questions linger as to what degree public lands are public. What is the appropriate role of the individual citizen and NGO realm in the management of these lands? Though the national forests have long been known as the land of many uses, what is the formula that delineates the appropriate balance between management for the myriad values the public lands are expected provide? Is balanced management per the Multiple Use, Sustained Yield Act of 1960 (16 U.S.C.A. §§ 528-531) and other germane statutory laws to occur at the stand level, the forest level, the regional level or nationally? Is it always the place of the courts to answer questions of statutory interpretation?

Put another way, if certain laws speaking to forest planning do not address critical issues such as scale, timing, funding, and other nuances of public land management, the question is begged as to whether an agency’s discretionary undertaking to manage in a certain way is, then, legal or illegal. Should public land and resource management reflect democratic ideals? If so, how does an agency or other government entity translate such ambiguous philosophical concepts into useful, effective administrative rules and policy? What are the outer bounds of an executive agency’s discretion to manage with the methods and priorities of its choosing in compliance with the law? Are natural resource management agencies merely purveyors (de facto or de jure) of the administration’s chosen policies? To be sure, these queries are fraught with complexity. Nonetheless, it is useful to consider and distill those queries and responses to those queries, particularly with regard to conservation of the nation’s public lands and resources.
In 1958, USFS Chief Richard E. McArdle noted,

A timber sale—a timber harvesting program on the national forest—is no longer a matter just between (the logging industry) and the Forest Service... More people are seeing firsthand the results of our management. More are ready to criticize if they do not like what they see (Clary 1986).

Richard E. McArdle (1899-1983) was the eighth Chief of the United States Forest Service (1952-1962). He was the first Chief to hold a Ph.D., and was Dean of the University of Idaho School of Forestry. Before becoming Chief, McArdle was a career researcher with the Forest Service (Forest History Society 2005). McArdle’s words (1958) predate much of modern public land law and, in turn, suggest the degree to which conflicts relative to public land timber-sales are not a new phenomenon. Chief McArdle’s insightful words also suggest the importance of pursuing conflict resolution as a formal component of public land and resource policy.

What Was the BNF’s Obligation to Complete its Plans?

The BAR settlement agreement was unique and should be distinguished from conventional agency planning. Planning under the BAR ultimately hinged upon a formal legal document, the BAR settlement agreement, and its interpretation. Thus, planning under the BAR settlement agreement is not wholly subject to conventional analysis. Further, the BAR settlement agreement/management plan is distinct from conventional forest or management plans because the settlement agreement arose from a fact pattern of first impression in the jurisprudence and history of public land and natural resource policy. The settlement agreement’s court-mandated nature gave the plan a unique status.
Although disputes following wildfire over salvage and restoration are nothing new, the particular chain of events surrounding the Bitterroot fires of 2000 was, in fact, novel. These events and their circumstances resulted in significant monetary and political cost to the agency for BNF's actions and omissions. Judge Molloy's opinion in *Wilderness Society v. Rey* condemned the USFS' arguments as flawed, and declared the USFS' attempt at exempting its actions from administrative process to be illegal.

The ostensible claimed motive of the Forest Service for attempting to circumvent the administrative appeals process is to speed the matter to its likely destination: this Court. This motive is based on assumptions that are not valid. First, the agency now asks this Court to declare an emergent situation as a justification for dissolving the temporary restraining order. The agency itself refused to make this determination for portions of the BAR that Supervisor Richardson determined fell under the emergency situation regulation. Instead the agency opted to push the full BAR before the Court (180 F.Supp.2d 1141, 1148-49).

Further, Judge Molloy seemed intent upon educating the involved USFS/BNF officials and Department of Agriculture executives such as Undersecretary Rey as to how their actions violated the spirit of core administrative laws governing government activity in the American polity:

The administrative appeal serves legitimate functions in the deliberative process the agency is required to follow. The administrative appeal is a means for interested participants to question the accuracy of assumptions or science relied upon in the agency decision. It is a means of permitting the agency to exercise its expertise prior to judicial intervention, if that takes place, by answering the specific allegations of an appellant. The administrative appeal assures compliance with applicable standards, science, and sound analysis. It provides the agency the opportunity to explain why the ROD complies with the applicable standards and statutes. Most importantly, it completes the administrative record so that proper judicial deference to agency decision-making can be measured and applied. It is the one time when interested appellants can find out if relevant data was relied upon or ignored and it provides the agency the opportunity to flesh out conclusive statements or findings that lack the requisite close look or analysis at first blush.

110
From the agency's perspective the administrative appeal provides an opportunity to correct mistakes or to reconcile inconsistencies, thus narrowing issues that might be subject to judicial review. It also provides a complete record for judicial review and enables a court to realistically assess whether the proposed action is arbitrary or capricious. The agency might alter, amend, or reconsider its decision depending on the issues raised in the administrative appeal. The appeal may avoid a legal challenge or narrow the issues that can be reviewed. Ultimately its force is to allow the democratic process of participation in governmental decisions the full breadth and scope to which citizens are entitled in a participatory democracy (180 F.Supp.2d 1141, 1148-49).

Moreover, Judge Molloy observed that the USFS/BNF drew a hard line—grouping every aspect of post-fire management into an overarching plan and, then, summarily attempting to exclude the public from participating in the decision making process. In so doing, wrote Judge Molloy, the USFS/BNF polarized the issue, forcing citizens into a “black position” or a “white position”—evacuating middle ground, and leaving only legal battlegrounds:

Unfortunately, the BAR is often seen in a false polemic. Too frequently it is couched as if it is a zero-sum or all-or-nothing proposition. This is not the way the Congress intended the participatory process to work. The Forest Service could have excised the exigent portions of the project for separate consideration under application of the emergency regulations. The agency could have parsed out the portions of the project that are not in controversy and proceeded separately. Whatever the motivation of the agency to proceed as it has, the agency could have addressed the concerns of all parties in administrative appeals, and this it has refused to do.

Another purpose of an administrative appeal is to address the second tier of public participation demanded by the statute before any matter can proceed to court. Standing to sue is garnered only after exhaustion of the statutorily-defined administrative remedies. A plaintiff cannot sue the Forest Service over a record of decision until she has exhausted her administrative appeal remedies. By circumventing the appeals process, the Forest Service seems to be attempting to create jurisdiction and standing in this Court without benefit of exhaustion of the statutorily-required administrative remedies.

Reducing the government's argument to its essence leaves the parties with the simple proposition that the agency thinks there has been enough public input
and no more is needed. The reasoning seems to be that if a decision by the Forest Service involves a large project with great public interest and comment, then there should be less opportunity for public participation after the ROD is made. The scale of the project does not dictate the level of opportunity for public participation. Logically, the converse is true, the more participation at the comment level before the ROD, the greater the need for administrative appeal, especially where the alternatives considered have expanded or changed. (See e.g. Swan View Coalition v. Turner, 824 F.Supp. 923, 932 (D.Mont.1992)) (J. Lovell discussing standing for ESA claim: "The mere fact that the Forest Service is not bound by the recommendations of FWS [(U.S. Fish and Wildlife Service)] and that a redrafted biological opinion would not necessarily result in a modified Forest Plan is irrelevant. The asserted injury in this case is that 'environmental consequences might be overlooked ... as a result of deficiencies' in the biological opinion. The fact that the Forest Service might not alter its course in any way following the completion of a new biological opinion does not negate this asserted injury.") (180 F.Supp.2d 1141, 1148-49).

The administrative appeals exemption catalyzed a backlash by some local residents and environmental groups (Missoulian, December 19, 2001). The Bitterroot case is unique and, yet, offers timely lessons that portend increasing complexity in public land and resource management that will be expensive in time and resources.

If this salvage and restoration conflict was indeed a fact pattern of first impression, history teaches that the initial policy response to such a circumstance will likely be imperfect. This is so because complicated new problems are not usually solved with ease. While natural resource use conflicts are, perhaps, as old as humanity itself (Diamond 1999, 2005), their resolution under novel and increasingly complicated circumstances will likely require continuous revision of law and policy through the common law and/or the cycle of policy creation and revision (Lester and Stewart 2000). The cycle of public lands conflict and piecemeal responses seems likely to continue until Congress undertakes reconciliation of the sundry laws that
influence public lands management and/or clarify the USFS mission relative to competing policy priorities (Thomas and Sienkiewicz 2005).

In addressing the issue of completion of action required under the BAR settlement agreement, it is necessary to examine the actual agreement and compare that which was (or was not) outlined in the document, to the actions that played out on the ground and in the public arena (CV 01-219-M-DWM). The BAR plan’s chain of events steered the conflict into an ongoing battle of semantics and legal interpretations. Under these circumstances, the nuances and obligations of plan completion under the settlement agreement were and remain, at best, unclear.

**The Importance of Perspective**

Depend upon the interests and positions of participants in the settlement, one stakeholder’s error or omission relative to the settlement agreement could be another stakeholder’s boon or auspice—i.e., perspective is critical (Fisher and Ury 1981). What seems a contractual violation to one party may comport, for all intents and purposes, with the agreement’s tenor according to another party. What one stakeholder may see as an abandoned management project may, for another stakeholder, comport with the Chevron Doctrine (467 U.S. 837, 843-844 (1984)) of deferral to agency discretion. As in the greater society, if such resource-related value differences come to a head in the court system, only a legal entity wields the authority to settle the dispute. Thus, the judiciary became and remained a cornerstone in the BAR conflict and is, moreover, a cornerstone of civil society.

The mediator’s shibboleth holds that *there are multiple truths*. It is these multiple truths that keep the legal community gainfully employed. These multiple truths also
ensure that a common or court-made law will perpetually evolve. Though slow to
develop, this evolution of the common law serves as an important cultural filter where
statutory interpretation is concerned. In other words, an evolving common law helps
to reflect changing values, norms, and cultural mores. Supreme Court Justice Oliver
Wendell Holmes once noted,

> The truth is, that the law is always approaching, and never reaching,
> consistency. It is forever adopting new principles from life at one end, and it
> always retains old ones from history at the other, which have not yet been
> absorbed or sloughed off. It will become entirely consistent only when it
> ceases to grow (Holmes 1881 in Woodfield 2000:29).

Thus, what happens in courtrooms during trials and court-ordered mediations is
critical to the evaluation of applicable common law. These events contribute to the
dynamism of the common law and the evolution of public land and natural resource
management (Woodfield 2000). The enduring conflicts surrounding the 2000 fires,
and other public lands-related conflicts, present opportunities for making policy
revisions as well as establishing criteria for improving the outcomes of negotiated
settlements and alternative attempts at dispute resolution (ADR) in general. The
unique circumstances surrounding the BAR conflict set precedents that will influence
management and policy responses in future public land and resource management
disputes. In order to analyze the BAR settlement agreement and the issue of plan
completion, one must begin with the document itself.

**Settlement Agreement as a (Poorly Drafted) Contract**

The BAR settlement agreement was, in effect, a contract. Judge Hogan noted of
the agreement,
It is [in effect, a contract between parties]. It’s legally-binding. The advantage for [participants] in [signing the agreement] is that you can do without all this litigation... the language says... that I’ll determine questions [regarding possible breaches of the settlement agreement] based on procedures and information that I believe is appropriate. And the whole point of that is to give people a quick decision and enforcement if necessary. And we have to do that [(enforcement)] sometimes. Now, because it’s without appeal, the parties are well advised to try to work things out among themselves. They probably will give each situation more time than I would, and that’s probably appropriate (Interview 13:6).

Thus, the settlement agreement was legally-binding to the degree that its terms and provisions were clear and not unconscionable or otherwise illegal. The settlement agreement was to be treated as a contract—enforceable by Judge Hogan, and ultimately, in a court of law. Thus, whether or not parties retained a remedy tied to provisions of the settlement agreement was based strictly upon the document’s language, and little else.

Persistent conflict over appropriate management following the wildfires of 2000 focused on the settlement agreement. This indicates that the settlement agreement, itself, was an incomplete and imprecise document. With regard to clarity and management efficiency, the document was, for all intents and purposes, flawed. To this effect, BNF Supervisor Dave Bull emphasized the notion that the settlement agreement made no mention of scheduling, timeline, or benchmarks for project completion. Further, Supervisor Bull suggested that, as far as the agreement went, the BNF was meeting its duties (Missoulian, February 5, 2005). Supervisor Bull’s statements speak to the adage, *expressio unius est exclusio alterius*—a canon of legal construction holding that to express one thing (in a contract) is to exclude all others (Garner 1999). Thus, if a provision is absent from the contract, there is nothing to enforce with regard to what may have been exogenous to the document.
For involved citizens (and organizations) who preferred that restoration projects be conducted at the same pace as timber sales or extractive projects, the document in which they placed their faith failed due to its lack of specificity. Moreover, attorneys representing such interests failed in allowing such glaring omissions relative to timelines or priority hierarchies. The document’s failures seem to indicate that this legal dispute resolution process failed. Such failures, in turn, further eroded public trust in the USFS/BNF and faith in ADR as a useful process (Wondolleck and Yaffee 2000). Where dispute resolution efforts fail, the spiral of unmanaged conflict, by default, can leave stakeholders with a sense of crisis. This may encourage (further) litigation and costly adversarial strategies (Carpenter 1991).

The BAR settlement agreement did not contain a hierarchy of project priorities, nor did it address the issue of timing. Further, the agreement set no deadlines (CV 01-219-M-DWM). Supervisor Bull cited these facts in suggesting that the BNF had no obligation to do other than that which it had been doing, at a pace that comported with the rate at which project funding became available. To this effect Bull noted,

The question comes up every year... Is restoration behind schedule or on schedule? There was no schedule identified [in the settlement agreement]. We identified a list of tasks that were important for us to accomplish, and that we would attempt, when we got funding” (Missoulian, February 5, 2005).

Despite erratic and lagging funding, the BNF ostensibly breached the spirit of the settlement agreement, at least constructively speaking. The nature of the BNF’s strict contractual obligation was a separate matter.

Ostensibly, the settlement agreement, for its omissions of timelines and management priorities, provided the BNF/USFS with a measure of flexibility. With
regard to interests based primarily in ecological integrity, the agreement failed to achieve the desired level of USFS accountability (Missoulian, February 5, 2005).

The ambiguities regarding timelines for completion and prioritization of projects effectively favored the BNF/USFS. This is so because instead of being a pro-spective legal document that would actuate certain management actions to be given priority over others, the document was ambiguous. Whether this ambiguity was intentional is an open question, but the ambiguity, by default, provided the BNF with “wiggle room” to prioritize management projects as it saw fit. Expressio unius est exclusio alterius... Thus, environmentally-focused groups were not able to pinpoint an iron-clad provision regarding timeliness of restoration projects or restoration project priority relative salvage logging projects. Despite the semantic flexibility the settlement agreement provided the BNF, the BNF, nonetheless, suffered criticism for its very public failures to fulfill promises.

Re-active Policy and Special Jurisdiction for the BAR Settlement Agreement

Because the BNF ostensibly broke its promises (independent of the relative merits of extenuating circumstances offered), environmental interests retained only an ability to react to the BNF’s actions and omissions. The chance for the settlement agreement to be a more efficient pro-spective policy tool had been lost. This “put the ball in the court”—so to speak—of the environmental groups. Unless the BNF agreed to extra-judicial negotiations, the environmental groups were left with no option but to return to Judge Hogan (the federal judge who mediated the settlement) for resolution of the continuing conflict.
In the case that environmental interests deemed the BNF to be in material violation of the settlement, the involved parties could, having exhausted possible remedies under Judge Hogan, have returned to trial in federal court. To this end, environmental stakeholders repeatedly complained that the BNF failed to uphold its end of the bargain. Because the BNF effectively failed to uphold its promises of restoration in a timely manner, environmental groups' complaints were valid.

Nonetheless, these same groups did not have a persuasive legal argument because the settlement document failed to hold the BNF, political entities, or the U.S. Congress accountable for budgetary support of associated management projects.

Judge Molloy placed a “gag order” on the settlement negotiations (Missoulian, February 6, 2002). Thus, only Judge Hogan and the participants were aware of impressions, promises, and suggestions made beyond that which was documented in the settlement agreement. While *ex parte* communications may have influenced the settlement, they were effectively meaningless if not incorporated into the settlement agreement document. Furthermore, participants in the negotiation were obliged to meet with the complete group of stakeholders in Judge Hogan’s presence before seeking injunctions or otherwise filing motions, appeals, or additional claims (CV 01-219-M-DWM).

These criteria for challenging the outcomes of the settlement agreement were significantly onerous, so much so that it is unlikely that the case will ever resurface in court. In failing to mount a legal challenge addressing the settlement agreement promises, environmental and extractive/industry interests alike, lost an opportunity to create formal precedent from the settlement agreement. This is particularly so in light
of the fact that most participants are now critical of the settlement process and its outcomes (Interviews 26A-D).

Nonetheless, the socio-political conflict surrounding post-fire management on the BNF remained, in many ways, contentious long after the settlement conference concluded. Following the settlement, the environmental interests felt betrayed, while BNF officials privately deflected blame onto budget makers in the USFS Washington, D.C. office and in Congress. Publicly, BNF officials blamed the happenstance of ecological disturbance elsewhere as having diverted monetary resources that would have funded BNF restoration projects.

It is clear that the settlement agreement should have addressed the critical issues of funding, timing/scheduling, as well as the prioritization of management activities. In light of these glaring contractual shortcomings, one questions the competency of involved legal counsel. Corrective hindsight suggests that Undersecretary Mark Rey and USFS Chief Bosworth should not have been relied upon to account for restoration monies which would eventually be diverted by Congress. As fate would have it, Rey and Bosworth could point to a short phrase within the settlement agreement that would allow them to escape responsibility for their broken promises under the settlement.

The bottom of last full page of the settlement agreement’s text notes: “Nothing in this agreement shall be construed to commit a federal official to expend funds not appropriated by Congress” (CV 01-219-M-DWM). This succinct phrase seemingly allowed Rey, Bosworth and other government officials to throw up their hands with impunity and blame Congress for lost funds. Despite this ostensible victory for
agency officials in the series of tactical and adversarial maneuvers, this “win” came at
great cost to the USFS’/the BNF’s image, agency morale, and public standing.
Undersecretary Rey and Chief Bosworth did not sufficiently consider these
substantial costs born of their failure to keep their promises. That agency leaders
would stand behind slippery contractual verbiage, suggests a failure of leadership and
judgment.

In the end, all would learn that Congress was the entity possessing final authority
where the provision of the more than $25 million in restoration project funding was
concerned. Many environmental stakeholders would lose faith in the USFS’ ability to
stand by its word. Larry Campbell noted that he was quick to contact NGOs dealing
with Oregon’s Biscuit Fire salvage and others around the country dealing public lands
salvage conflicts and warn them not to trust USFS promises (Interview 15).

For those apt to blame Judges Molloy or Hogan for the settlement agreement’s
failures, it can only be said that it is not a judge’s role to make attorneys’ arguments
for them. Judge Molloy ordered parties to come to a compromise parties believed
reasonable. If environmental stakeholders’ counsel did not predict that
Undersecretary Rey and Chief Bosworth would call upon the “funds not appropriated
by Congress” escape clause, then it was not the place of either of the judges to stand
in the shoes of one stakeholder or another and propound the most effective
arguments.

USFS Obligations

What do these events suggest about the USFS’ obligation to complete its plans
under the settlement agreement—a management plan separate from all other planning
documents? The BNF was obligated to finish the agreed upon restoration projects. However, budgetary losses aside, the settlement agreement’s ambiguity provided leeway for the BNF to give restoration projects low temporal priority. Notably, the variable of diminished trust (whether warranted or not) seemed to be of secondary import when BNF managers prioritized management projects and justified their actions and omissions publicly. That is to say, no matter the misfortune and happenstance that perforce diverted USFS funding to the chagrin of BNF officials and environmental interests alike, the ongoing delays in accomplishing agreed upon restoration projects and perceived preference for extractive values further tarnished an agency that requires public trust in order to be successful. Further, BNF officials did not successfully explain all of the reasons for their pitfalls to the public.

Top-Down and Exogenous Pressures

It is important to note that Supervisor Bull was a “local” USFS Employee, subject to the whims of executive branch appointees and the Congress-made budgets. As far as the involvement of USFS officials at higher levels went, Bull indicated that the notion of attempting to bypass administrative appeals was hatched in D.C. by government lawyers and political appointees (Interview 8). This maneuver fanned the controversy into a blow-up. Supervisor Bull noted that Chief Bosworth originally opposed the plan to bypass appeals,

[‘N]o, I’m not interested in doing that. And I’m not even going to ask Mark Rey … The decision needs to be made at the local level[,]” [said Chief Bosworth.] And then the more that Mike Gippert talked about it and the more others thought about Mike’s rationale about how the previous administration had used it and how it allows us to get past the appeal which is going to unnecessarily delay this project, people were saying, and go right to court, the sooner we can get it resolved and the sooner we can get on with business. So that started gaining some traction. And so by the time of this phone call, I
guess it was, that I was mentioning with Max Baucus, there was pretty much basically acceptance of the fact that we’re going to let Mark Rey sign this. And so for all those reasons: bypass the appeal, going straight to court. We’re going to win in court, we feel like. It’s been done by the previous administration. We’re on solid ground. Mike Gippert [said] we’re on solid ground.

So Mark Rey ended up signing the decision. He wrote something in the cover letter about the intent of this decision is to make wood available for the small timber interests in the state of Montana. We can’t say that only people in the Bitterroot Valley or only people with corporations registered in the state of Montana can buy national forest timber. We can’t do that. So that was, he just tried to step around that one in a letter of direction to the Chief on making sure that we did everything we could to allow this timber to be salvaged by local workers (Interview 8:25).

Given Supervisor Bull’s invocation of USDA attorney Mike Gippert, Undersecretary of Agriculture Mark Rey, USFS Chief Dale Bosworth, and Senator Max Baucus; it is likely that powerful national and regional political forces worked upon Supervisor Bull (as well as Chief Bosworth) with regard to management priorities. Moreover, Supervisor Bull inherited the Bitterroot conflict when BNF Supervisor Rodd Richardson left the post mid-conflict. Nonetheless, Supervisor Bull did not argue that his handling of the conflict was perfect (Interview 8). Thus, some USFS respondents related a web of local, regional, and national political pressures that worked upon managerial discretion and local outcomes. These forces, in addition to the adoption of the appeals bypass plan by USFS officials and other factors, actuated the Wilderness Society v. Rey litigation.

For his part, Chief Bosworth did not specifically attribute the attempted bypass of administrative procedure to USDA attorney Mike Gippert alone,

[T]here were a lot of people on my staff that were working and were well aware of and were involved in this. Fred Norbury, who is the planning director, was involved. Dave Tenney, who works for Mark Rey as the Deputy Undersecretary was involved. I was involved. I’ve had conversations with
Rod Richardson at the time, and Brad Powell. And so there was a lot of people involved. And who first came up with the idea, well maybe, you know, it’s been done before where you just have the undersecretary sign it. I’m pretty sure the idea came up in the Forest Service, so whether it was at the Washington office, region office, forest or... I’m not sure which. But the decision to go ahead and do that had everybody involved in it. And in the end I think everybody signed the decision, not just Mark. I think Brad did, too, if I’m not mistaken, and so did Rod. And I think I did... (Interview 12:8).

Candor and Qualification

Despite extenuating circumstances surrounding the BAR conflict—and there are many—public agency officials lost an opportunity to gain trust by addressing the appearance of imbalance or impropriety directly. This approach could have mitigated tensions and skepticism. To cite ambiguous contractual language as Supervisor Bull did, in effect, communicated to the environmental interests the message: “It’s not in the contract, so claims of impropriety are invalid.” The facts surrounding the settlement bespeak the enmity that existed (and exists at the time of writing) between some BNF officials and some in the local environmental community. Of note, such enmity was largely absent between the same environmental advocates and the DNRC’s state managers, whose agency mission is extraction-focused, as opposed to multiple use-focused. The USFS/BNF did not present clear, fully-explained answers as to why restoration projects continually lagged behind extractive projects.

The BNF had reasonable answers to these questions. Namely, the costs incurred by the agency as a result of salvage are far less than those of restoration projects (Interview 8). Also, elected congressional and state-level officials personally pressured BNF managers to focus on salvage (Interview 8). Further, the burned timber’s economic value was rapidly deteriorating, but this argument was less persuasive to some, as it stood contrast to the government’s legal arguments to the
effect that ecological restoration was the driving force behind the requested emergency exemption and bypass of administrative appeals.

Complicating Supervisor Bull’s ability to divulge the more persuasive reason’s for the BNF’s actions and omissions, was the notion that USFS culture did/does not allow managers to complain to elected officials about administrative problems, complain to Congress, or otherwise express the contradictions and perverse incentives inherent to the agency’s multiple use mission (Interview 8). Thus, there is a disjoint between that which BNF officials expressed to the public following the 2000 wildfires and that which they expressed during interviews conducted for this study. This disjoint has implications with regard to the inherent tensions and contradictions of USFS management culture.

The many publics, and agency managers alike, are keenly sensitive to pat answers and disingenuous statements. Many stakeholders are also acutely aware of their rights and remedies under germane administrative and public land law. Thus, BNF managers might better have avoided conflict by conveying the full context under which their decisions were/are made, to the degree this was possible. Nonetheless, dialogue and trust are two-way streets. At a certain point following the 2000 wildfires, it became clear that neither managers, nor environmental stakeholders were going to start or continue efforts at collaborative conflict resolution. The relationships and sincere dialogue simply did not exist, and thus there was no foundation for discussion.

In the early stages of the conflict, the BNF did not seem to be forthright about its policy of “salvage to restore”—i.e., the policy of conducting resource extraction
funded by congress-influenced budgetary allocations so as to generate internal revenue that can be spent on non-commodity management. This issue would have been best addressed as the fire burned out, or at the latest, during the settlement conference, along with other details of timeline and budget. Some of the BNF’s critics seemed unaware that USFS officials in the Washington, D.C. office—more than individual BNF managers—determined where the balance of BNF funds were to be spent. Nonetheless, USFS managers did not seem to exude a sense of candor and transparency when confronted about budgetary issues. Equivocation on the part of managers seems to have perpetuated significant public distrust. As Charles Bukowski said (1999), “What matters most is how well you walk through the fire.”

With regard to the settlement agreement, the BNF continued, through subsequent years, to conduct restoration projects at a diminished pace, while the balance of timber salvage sales from the 2000 burns were completed far sooner. Supervisor Bull noted that the USFS’ and the BNF’s budgets were significantly diminished as compared to prior years (Interview 8). As a result of these circumstances, appearances led many to believe that the BNF favored extractive projects over restoration (Interviews 8, 19, 24, 26A, 26C).

Supervisor Bull’s comments to the effect that the BNF had complied with the settlement agreement under the language of the document, in spite of the obvious loss of restoration funds, lent credence to de facto preference for extractive timber values. Such a preference would comport with the congressional and budgetary pressures Bull described (Interview 8). Critically, much might have been gained by asserting the USFS’ legal right to harvest timber—including salvage logging operations—so
long as proper precautionary and environmentally protective measures were taken. But again, this would seem to contradict dominant agency culture, which currently frames most management actions as ecologically beneficial or healthy (Interviews 12, 15, 19, 24, 27, Vaughn and Cortner 2005).

**Forces Complicating USFS Management**

Independent of one’s hierarchy of values, reasonable conclusions may be drawn from the 3 year anniversary statistics: 80% of planned salvage acreage had been logged (comprising 40% of planned volume to be extracted) while restoration projects were between 20-30% complete (*Missoulian*, February 10, 2005). Among these conclusions is one that asserts that the BNF gave salvage logging projects, at least, temporal priority over restoration projects. By extension, the salvage projects given temporal and budgetary priority suggested a preference for market-based extractive values (on the part of the BNF, the administration, *and* congressional/USFS central office budget makers).

One is reminded of the furor over 1970’s *Bolle Report*, terracing on the BNF and other contentious events (Bolle et al. 1970, Hirt 1994, Behan 2001, Thomas and Sienkiewicz 2005) leading up to the National Forest Management Act of 1976 (16 U.S.C.A. §§ 1600-14). These events should have impressed USFS officials as to the need to avoid appearance of imbalance or preference toward extractive values. It is important, however, to keep in mind that USFS management is not simply *USFS* management. That is to say, the USFS’ *de facto* management responses and the appearances of primacy of the timber program are influenced by congressional actions, timber-focused budgets preferred by the administration, and the USFS
leadership in Washington, D.C. It is also well to remember the *de facto* timber primacy as manifest by America’s consumer wood products economy (Thomas and Sienkiewicz 2005).

The USFS is subject to the administration’s and Congress’ whims where budgets and execution of those budgets is concerned. James W. Giltmier notes in his essay *The Art of the Possible*,

The [USFS] chiefs belong first of all to the presidential administration, since the Forest Service is an executive branch agency. The Chief answers to the Department of Agriculture’s undersecretary for natural resources, who these days also oversees the Natural Resources Conservation Service. Next up the ladder are the secretary of Agriculture and his deputy. Above the secretary are the Office Management and Budget, which sets the president’s spending priorities, plus the Council on Environmental Quality, and other White House desks, such as the Office of Science and Technology Policy. The Department of Justice, the Environmental Protection Agency, the Department of Commerce, and several agencies of the Department of the Interior may want to meddle, too. At the top is the president, who seldom gets involved—unless his name is William J. Clinton or George W. Bush.

But the 535 members of the House and Senate know who really owns the Forest Service. They do, because Congress holds the purse strings. Congress does not sit up on Capitol Hill chunking out one law after another. Congress spends a lot of time looking over the shoulders of the executive branch agencies to see whether the laws it enacted are being carried out in accordance with the desires of its constituencies, and it tries to put new shadings on existing laws that the original authors never dreamed of. The agencies, in response, dedicate a lot of their energy to avoiding the dictates that Congress has given them against their advice. The result is a democratic game that makes chess look like child’s play (Steen 2005:145-5).

**Multiple Use, Market and Non-Market Values, Externalities**

Under the MUSYA, multiple use management should entail harmonious, coordinated resource management that does not impair the land’s productivity. Further, multiple use management should incorporate adaptive principles reflecting changing needs and conditions (Glicksman and Coggins 2001). The MUSYA
outlines a policy stating that the national forests are to be managed for five value sets. These include outdoor recreation, range, timber, watershed, and wildlife and fish (Glicksman and Coggins 2001). The MUSYA does not address issues of scale or a range of ratios which might comprise a reasonable balance as between the multiple uses. Thus, the present ongoing discussion relative to “value-balanced” management is one to which USFS officials should pay close attention.

The NEPA states in part:

All agencies of the Federal Government shall... identify and develop methods and procedures... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations (42 U.S.C. § 4332(2)(B)).

The NEPA thus states that USFS managers and other public managers must examine the values underlying management projects and attempt some measure of equity. Although issues of scale confound truly balanced attempts at multiple use management, USFS officials can better avoid conflict by justifying management actions and omissions in these terms (underlying values).

Extractive values can be associated with multipliers or positive externalities linked with an infusion of timber into local and regional economies. This is so because timber and primary wood products comprise raw materials on which many extractive economies are based. On the downside, extractive activities can also be associated with negative externalities such as ecological degradation associated with road building, hauling, and other human disturbances (Gregory 1987, Lindenmayer and Franklin 2002).
In contrast to extractive projects, the restoration projects given lower priority in budgets delivered to the BNF supported ecological/natural values associated with mitigation of ecological and anthropogenic disturbance. These projects sought to reduce or mitigate harm to ecosystems and natural processes. Prominent among the ecological values at stake in the BAR plan were protection of salmonid habitat, reductions in loss of topsoil, reduction in invasive weed proliferation, as well as innumerable interactive effects that implicate flora and fauna at various trophic levels (Lindenmayer and Franklin 2002).

These values became manifest in disputes over planned salvage logging primarily in roadless areas and identified sensitive watersheds. Given these concerns, the USFS/BNF might have avoided significant conflict by removing contentious roadless areas and watersheds that were home to bull trout (*Salvelinus confluentus*) and/or westslope cutthroat trout (*Oncorhynchus clarki lewisi*) from consideration for salvage logging.

**Ambiguity and Uncertainty Dominated the Process**

With regard to the management plans derived under the BAR settlement agreement, the BNF’s obligation to complete certain projects in a certain order and style was, like many questions of policy and law, ambiguous. Until and unless the involved parties engaged one another through ADR, conflict surrounding completion of plans and interpretation of the settlement agreement resolution could only have been realized through formal legal proceedings. In this respect, the BAR conflict did not depart from conventional models (Carpenter 1991) of public lands conflict. There were, perhaps, other avenues of challenge and other legal theories available to those
dissatisfied, but the particular chain of events of the BAR controversy limited settlement participants to Judge Hogan's jurisdiction in the case that stakeholders sought formal challenge.

Dissatisfied stakeholders were limited as to their recourse. The BNF, on the other hand, let opportunity for a collaborative solution of the BAR controversy slip away. Nonetheless, there are ongoing (e.g., 2005’s Middle East Fork Sale) and future projects through which managers might begin to rebuild and/or enhance trust.

Following Wilderness Society v. Rey, the BNF chose to argue semantics of the settlement agreement and let time render moot most of the important ecological issues. The status quo tensions between some USFS managers and some stakeholders still remain. Alternately, the BNF might have engaged dissatisfied stakeholders and worked toward an extra-judicial solution. Doing so would have acknowledged concerns of those dissatisfied. This would likely have proven to be an auspicious gesture and might have mitigated weakened public trust. Instead, the BNF/USFS avoided underlying tensions by citing contractual ambiguities. Enmity resulting from the post-fire conflict carried over into 2005’s controversial Middle East Fork sale, which also gained national attention surrounding issues of democratic process and the integrity of public involvement under the NEPA.

Environmental advocate Larry Campbell noted the BNF’s breaking settlement agreement promises to undertake certain restoration projects,

Some of us are wondering, what are the options besides litigation? We tried the court settlement. Now it’s really clear that it didn’t work. The trust just isn’t there. Mainly... we just want to hold the Forest Service accountable. They’ve clearly not satisfied the contractual agreement (Missoulian, February 5, 2004).
BNF Supervisor, Dave Bull, noted,

Funding is going to continue to be a struggle. We keep hearing there is less and less discretionary funding available. We're looking at pretty austere times here in the Forest Service. So it may take a longer time to finish the restoration work. It is important to note, that the recovery of the burned lands has exceeded the projections of the Forest Service... The land is healing (Missoulian, February 5, 2004).

Supervisor Bull suggests responsibility should fall elsewhere, perhaps with Washington D.C. administrators and the politically-appointed officials that Giltmier describes. Supervisor Bull is, in some ways, correct, but unless he publicly explains the forces that work upon him and perhaps names specific responsible individuals, then the burden of proof will, where observers are concerned, remain on his shoulders. This is an inherent catch-22 of being a USFS manager or a USFS scientist (Matson 1996, Steen 2004, Thomas and Sienkiewicz 2005). One may reasonably conclude that, in the more than five years since the fires of 2000, parties to the conflict have made little progress with regard to ameliorating post-fire conflict and discord.

Judge Molloy, in the original BAR lawsuit (180 F.Supp.2d 1141), ordered the USFS to pay more than $200,000 in plaintiffs’ legal costs (Missoulian, May 21, 2002). This is, relatively speaking, an insignificant sum. Nonetheless, it was unnecessarily spent. The notion that the citizenry should take consolation because the sum was relatively small rings hollow. It was public money—large or small. It is logical for managers and stakeholders of all value sets to consider the notion that funds spent by the USFS and its litigants in legal battle—no matter how large or small—might have accomplished some measure of ecological restoration if thus applied. Moreover, the BNF’s/USFS’ actions precipitating Wilderness Society v. Rey
were deemed illegal, and appear ill-conceived and capricious by most measures. The USFS’ approach to the BAR plan openly defied administrative law and cost the agency political capital. The order to pay attorney’s fees, for better or worse, further sullied the officials that signed the ROD as well as their legal counsel.

The post-fire salvage and restoration conflict relative to the BAR and settlement agreement, predictably, burrowed its way into subsequent BNF management projects and sullied the USFS’ reputation nationally. This and other conflicts also provided those prone to polarizing rhetoric and unilateral models of public lands governance, such as Governor Martz (Vaughn and Cortner 2005), fodder with which to both denigrate “environmentalists” and the appeals process through which citizens may challenge agency actions (Vaughn and Cortner 2005).

**Budgets, Congress, Federalism: Profound Complexity and Political Tensions**

Budgets are key political documents as they register the allocative and distributive choices as to what policies take priority (Mitchell 1983). As the BAR controversy illustrated, budgets are perhaps the ultimate factor playing into policy formation and prioritization (Thomas and Sienkiewicz 2005). If there is no money, there is no policy, and no on-the-ground management project—whether restoration project or timber sale (Interviews 8, 9, 27). This idea underlies statutes such as the Unfunded Mandates Reform Act (2 U.S.C. §§ 658 et seq.), whose purpose is “to end the imposition, in the absence of full consideration by Congress, of federal mandates on state, local, and tribal governments without adequate federal funding…” (2 U.S.C. § 1501). Interestingly, this law targets unfunded mandates originating in Congress. It does not, however, specifically address the circumstances of the BAR conflict.
wherein a federal judge ordered a binding mediation in which the Undersecretary of Agriculture and BNF officials (not Congress) promised the completion of a suite of restoration projects—the funding for which was, ostensibly, diverted by Congress.

And so, where BNF funding is concerned, the BNF must rely, for all intents and purposes, solely upon the congressional and USFS central office budget allocation processes—over which it has little influence (Thomas and Sienkiewicz 2005). It is thus important to note the degree to which the BNF’s overseers, including the Department of Agriculture, USFS executives, and Congress, left BNF managers (largely Supervisor Bull) to bear the onus of criticism. Even so, the BNF never publicly and persuasively addressed the temporal priority it assigned timber sales under the BAR settlement agreement. Unlike diverted agency funds, the question of temporal priority as between salvage and restoration projects is possibly a discretionary question better answered by USFS officials in Hamilton (MT) than by any others. This is so, because the BNF, alone, conducted the minutiae of prioritizing projects under the settlement agreement, shoring up contracts, and earmarking funds for prioritized projects.

As much as the Bitterroot post-fire conflict appears simply to be a recent iteration of the stereotypical “iron triangle” of timber policy disputes (environmentalists, the USFS, and industry), the parties involved and the turn of events bespeak profound political tensions and complexity. For example, Congress is to some degree responsible for the diversion of $ millions that had been slated for BNF restoration projects. The Undersecretary of Agriculture for Natural Resources and Environment, Mark Rey, was the highest executive-branch authority to have signed the settlement...
Further, the settlement negotiation was a formal legal procedure ordered by a federal Judge (Molloy). A second federal Judge (Hogan) presided over the settlement. Thus, if environmental interests had *forced the issue*, and were Judge Hogan unable to mollify all parties and clarify duties and rights under the agreement, then the whole dispute might have returned again to federal court.

If this had occurred, a federal judge might have found herself in the unenviable position of ordering that certain management actions take place or that the USFS re-analyze its planning conclusions; which, in turn, would require budgetary allocations and/or re-allocations, perhaps by Congress.

This convoluted conflict comprises a web in which each branch of government is tangled. The Judicial, the Legislative, and the Executive—the BAR controversy implicates all three branches of government and thus presents complex questions of separation of powers, checks and balances, and administrative law. In such a case, would a federal judge order an agency to take action and re-prioritize management in spite of congressionally-allocated budgets, thus overriding agency discretion? What is the position of a federal judge to compel Congress to account for diverted funds? Would a federal judge go so far as to hold Undersecretary Rey personally accountable for lost funds (as he was the highest ranking official to sign the settlement agreement)? Realistically, given such complexity and uncertainty, the conflict will not likely come to such a head. So, these questions will likely remain unanswered. But in a perverse way, one might prefer that circumstances had deteriorated further so that the federal judiciary might be forced to attempt to resolve these conundrums. If
we cannot rely on the federal judiciary to resolve our most wicked issues, cases, and controversies, on whom can we rely?

**Was the Settlement Agreement and the BNF’s Associated Management Legitimate?**

Webster’s (1991) defines legitimacy as, “the state of being legitimate[,] lawful; born in lawful wedlock, justifiable; genuine…” As bastard children are thusfar absent from this particular settlement agreement, the story turns again to the law—to that which is *lawful, justifiable*, and *genuine*. If the settlement agreement were specific as to time constraints for completion of restoration projects and timber sales, then determining the specific nature of lawful, justifiable actions would be less complicated. As it stood, however, the legitimacy of the BNF’s actions and omissions was tied to the notion of agency discretion. This placed the issue squarely into the policy and jurisprudence of administrative law, relative to what duties and rights attach to an executive agency, particularly with regard to details that Congress has neglected to spell-out.

**Agency Discretion**

Administrative law, in one sense, analyzes the limits placed on the powers and actions of administrative agencies (Gellhorn and Levin 1997). Here, the critical consideration was whether the BNF possessed the discretionary authority under the settlement agreement to conduct timber sales prior to conducting restoration projects—or to otherwise prioritize management activity as it chose. The question of whether budgetary shortages provide a legitimate excuse is a subset within the issue of agency discretion. This is so because, if the BNF’s decisions fell within the discretionary authority authorized by Congress, then they were legitimate decisions in
the eyes of the law. Because the settlement agreement is silent on the issue of budgets, only a court could decisively determine the legitimacy of budget shortfalls as an excuse for inaction. Context in such a decision is critical because such analyses are fact-driven.

Congress has granted the USFS broad planning obligations and authority through fundamental public land statutes such as the Federal Land Policy and Management Act (43 U.S.C §§ 1701 et seq.) (FLPMA) and the NFMA (16 U.S.C.A. §§ 1600-14). Likewise, the USFS is subject to environmental assessment and planning requirements under the NEPA (42 U.S.C §§ 4321 et seq.) (Glicksman and Coggins 2001). The USFS is also subject to a host of other laws that authorize and/or mandate broad planning discretion. This study does not attempt to reconcile the numerous planning law complications under which the USFS must operate (Thomas and Sienkiewicz 2005). Nonetheless, the US Supreme Court has upheld broad delegations of authority and planning discretion to the USFS (Glicksman and Coggins 2001).

The notion of deferral to agency discretion—the Chevron Doctrine—is fundamental to predicting whether the BNF could legitimately prioritize management projects as it saw fit under the justification of budgetary shortfalls:

*Chevron*—a rule-like doctrine that requires courts to accept reasonable agency interpretations of ambiguous statutes (Percival et al. 2003).

In the modern administrative state there is a tendency in the public and in courts to defer to government agencies for the specialized handling of public problems... Agencies reflect the full diversity of a society’s pressure, and thus can be less than vigilant, neutral enforcers of public laws... Courts too typically tend to defer to agencies’ discretionary actions (Plater et al. 1998).
As Percival et al. suggest, the *reasonableness* of an agency action is critical. Plater, moreover, acknowledges the degree to which the Chevron Doctrine pervades modern jurisprudence, but suggests this is problematic with regard to the frequency of its use. Thus, a court would likely defer to the BNF’s discretionary choices as to what management actions are granted priority under the BAR settlement agreement. This is particularly true in light of the settlement agreement’s vagaries.

**Agency Inaction and Delay**

The BNF’s granting restoration projects lower priority likely falls under the category of agency inaction or delay because the BNF effectively postponed restoration projects indefinitely. The APA’s definition of “agency inaction” includes “failure to act” (5 U.S.C.A. § 551(13)). Where judicial review addresses inaction, courts tend toward greater deference to agency discretion than when an affirmative action is at issue (Gellhorn and Levin 1997).

With regard to the BAR settlement agreement, the BNF did not fail to act in an absolute sense, as it completed a certain percentage of planned restoration projects and continued along those lines. This fact would likely weaken claims of inaction in a court of law. Nonetheless, courts tend to be sensitive to the practical difficulties described by BNF Supervisor Bull in the *Missoulian* (February 5, 2005). In particular, courts tend to consider the practical realities of inadequate budgets, personnel shortages, and opportunity costs (Gellhorn and Levin 1997). These realities lend credence to the notion that the BNF would have been on fairly stable legal ground had the BAR settlement issues returned to court.
The USFS’s myriad planning requirements are regarded by many as contradictory, unwieldy, and—when taken as a whole—largely unworkable (Thomas and Sienkiewicz 2005). Nonetheless, objective and thorough administrative process and the absence of arbitrary and capricious government action, despite associated short-term burdens, is the foundation of American administrative law (5 U.S.C.A. §§ 551-559, 701-706). To this effect, Judge Molloy, who initially ruled against the USFS in *Wilderness Society v. Rey*, attributed his ruling largely to the notion that by denying administrative appeals, the BNF left its own record incomplete, thereby preventing proper judgment as to whether *Chevron* deference might be due in the future (180 F.Supp.2d 1141, 1148).

Under *Chevron*, a court would likely acknowledge the uncertain and paradoxical nature of USFS management. In discussing this uncertainty and complexity, Mary Lou Franzese, a timber industry observer from Northern Idaho, titled a piece on the USFS planning process: “Life inside the ‘Monster’” (Franzese 1988). In further acknowledgement of complexity pervading the USFS planning process, John Hall of the National Forest Products Association noted in a speech to Forest Service employees,

> Attitudes have shifted from optimism to sharp words. [USFS] employees just shy of 20 years service, [are] ‘jumping ship.’ What has been happening…? Are the multiple use questions insolvable…? (Franzese 1988).

Such questions and statements acknowledge obstacles to efficient USFS management and bolster judicial trends indicating an empathy and overall presumptive deference to USFS management discretion.
While Judge Molloy’s ruling in *Wilderness Society v. Rey*, on its surface, appears to contradict the presumption of deference to USFS discretion, Judge Molloy noted that he could not properly consider the Chevron Doctrine because the administrative record was left incomplete when the appeals process was denied to citizens (180 F.Supp.2d 1141). *Wilderness Society v. Rey*, in this respect bolsters the validity of Chevron deference to agency discretion.

Obvious factors relating to surreptitious political influences and gamesmanship hindered the USFS’/BNF’s defense. Judge Molloy sensed the gamesmanship and potentially inappropriate entanglement of political appointees in the BAR conflict. This entanglement became readily apparent when federal lawyers bungled arguments and contradicted the stories of USFS managers with regard to claims of emergency. The Judge’s opinion seems to communicate to involved parties, that the federal judiciary is an improper venue for engaging in gamesmanship and brinksmanship born of political maneuvering rather than firm legal questions—and that the government representatives should know this.

It is not clear whether the BNF’s execution of the settlement agreement was or was not equitable or lawful. Nonetheless, for any involved stakeholder to have challenged the BNF’s discretionary authority would have been a Sisyphean undertaking—akin to pushing a boulder uphill. However, as Judge Hogan suggested of the American legal system, it is only those who undertake such Sisyphean financial and political risks that will reap ‘victory’ (Interview 13).

139

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The Time Variable and Ecological Complexity

With regard to both extractive values and ecological values, the variable of time is fundamental. The market-economic value of burned timber declines in over time, while erosion and sediment loading from burned terrain are concentrated in temporal proximity to fire events, tending to attenuate over time thereafter (Agee 1993). Thus aside from project funding issues, the BNF’s granting of temporal priority to extraction projects over restoration projects, seemingly exhibited a (short-term) preference for market-based economic values because both economic and ecological considerations required prompt action.

One could argue that the BNF/USFS exhibited a de facto preference for extractive values. One could also argue, however, that this is not so, because the market value of standing burned timber was quickly declining and quick salvage was required. One might counter, arguing that ecological damage was of comparable urgency, and that culverts needed to be upgraded and roads repaired in order to protect extant stocks of threatened and endangered species. No matter one’s opinions, the BNF conducted salvage first.

Given this fact, the BNF’s delay of restoration projects, de facto, de-prioritized erosion risks associated with the period of time immediately following wildfire. This is not to say that the BNF did not address soil erosion and species implications; the BNF did significant early work through its BAER teams (USFS 2000A). Nonetheless, Supervisor Bull’s later statements to the effect that streams in burned watersheds are recovering naturally (Missoulian, February 5, 2005) was somewhat

140
misleading in that it ignored the ecological reality that sediment loading to streams following fire diminishes over time (Agee 1993).

Recovery often occurs independent of management. This is so, because ecological disturbances, even “catastrophic” disturbances, often fall within historic or natural ranges of variation (HRV or NRV) (Lindenmayer and Franklin 2002). That is to say, most ecological systems, given time, will largely recover from ecological disturbance within HRV (Lindenmayer and Franklin 2002). Given complex issues of ecological disturbance, the BNF might have simply acknowledged the more obvious ecological tradeoffs rather than arguing notions that salvage activities were ecologically healthy with little or no qualification (Missoulian, February 5, 2005).

Again, such arguments suggest (whether accurate or not) a lack of ecological humility and a lack of candor. Candor and humility were critical factors facilitating the DNRC’s successful stakeholder relationships following the wildfires of 2000.

The importance of restoration project timing relates to how soon ecological recovery may or may not occur, as well as to the precise natural values or species of flora and fauna on which restorative management will focus. Species of concern for those conservation interests involved in the BAR settlement agreement included bull trout (Salvelinus confluentus) and westslope cutthroat trout (Oncorhynchus clarki lewisi).

Management actions designed to protect these threatened species should have minimized short-term sediment loading. This is so because bull trout and other salmonids require clean, cold, flowing waters and aerated gravels in which to dig spawning redds (Behnke 2002). Thus, to the degree these species were meant to be
protected, BNF management priorities would need to have specifically addressed the critical consideration of timing of treatments. That said, in the context of other considerations, fire, erosion, and other vectors of disturbance can sometimes be ecologically auspicious.

In fact, ecological disturbances can have many beneficial effects in addition to their detrimental effects (Reice 2001). Natural disturbance can “reset” the successional state of riparian areas through mobilization and redistribution of coarse woody debris and sediment (Bayley 1995, Lindenmayer and Franklin 2002), thus speeding revitalizing aspects of watersheds and aquatic ecosystem (Gregory 1997, Lindenmayer and Franklin 2002). Likewise, wildfires can, ceteris paribus, create structural heterogeneity, leaving legacies of snags and logs and provide habitat for cavity-nesting biota. (Thomas 1979, Inions et al. 1989, Lindenmayer and Franklin 2002). Thus, an ecological disturbance’s relative harm or benefit to a natural system must be qualified with regard to the variable of time. Otherwise, general statements, one way or the other, offer little utility where policy and management are concerned. It is also important to note that the aforementioned ecological functions associated with disturbances (within HRV) undergird arguments opposing salvage logging in burned areas (Beschta et al. 1995, Donato et al. 2006).

That said, the most appropriate time to address restoration and issues of sediment loading from forest burns is the period immediately following the burns—not four to ten years later. This is not to say that all risk of erosion has passed within such a period. Forest roads, as opposed to burned timber stands, pose an ongoing risk of
sediment loading to watersheds that does not necessarily diminish over time (Havlick 2002).

Absolute statements and generalizations are problematic where ecological systems and concepts are concerned. Complexity is the rule. Moreover, for USFS managers to insist upon one particular body of science as the truth upon which all post-fire management must rely is perhaps unscientific. This is so because science is inherently humble, acknowledging uncertainty and change. Nonetheless, science is only part of the debate. Entrenched interests will often selectively argue that science which supports their interests. The debate over the effects of salvage logging, restoration activities, and their nuances pertaining to the public lands context remains controversial (Donato et al. 2006).

To the degree a “chosen” body of science supports salvage to restore policies that speak to restoration as a byproduct of economically motivated salvage, then environmental interests will likely claim USFS timber primacy. Candor and honesty are tools managers can use to mitigate tensions and deflect criticism to other parties or to institutional forces. If the agency’s primary goal is timber salvage, managers can promote deliberative management and dialogue with citizens by directly addressing the de jure and de facto goals managers have been given. Engaging in such dialogue and deliberative mechanisms garnered state managers trust and working relationships despite value-differences with stakeholders. BNF managers seem to have lost trust by virtue of their framing salvage logging as primarily ecologically restorative (Interviews 15, 19, 24, 26A, Vaughn and Cortner). To this
effect, Vaughn and Cortner (2005) suggest that issue framing in public lands management has become a problem of institutional proportions.

**Budget Shortfalls**

Because of traditional judicial deference to agency discretion, it is likely that, from the standpoint of legal outcomes, budget shortfalls provide a reasonable explanation for the BNF's discretionary choices relating to project implementation. With regard to other criteria, equity as between management values for example, budget shortfalls comprise a tenuous excuse. From the equity standpoint, conservation interests seem to have lost out to extractive interests by virtue of the facts that 1) salvage logging was largely completed in short order, 2) the USFS central office earmarked funds for salvage logging and the BNF consummated contracts for those services thus securing those funds, and 3) the BNF (and USFS forests in general) typically conducts restoration activity after salvage logging, because proceeds from timber sales comprise the bulk of money the BNF will have for non commodity-based management (Interviews 8, 9, 12, 15, 27, O'Toole 1988). This is so because Congress' budgets and those of the USFS central office tend toward timber primacy (Interviews 8, 9, 12, 15, 27, O'Toole 1988). However, at forest-wide spatial scales, some USFS managers pointed to the fact that almost 50% of the BNF is designated wilderness, suggesting that it was actually non-extractive values that won out on the BNF following the wildfires of 2000 (Interview 25). Herein lies a tension between underlying values.

Importantly this tension is largely due to stakeholders coming at an issue from different criteria for analysis. That is to say, does “timber primacy” relate to total
volume extracted versus total acreage burned? Does it relate to which activities are conducted first? Does it relate to the cumulative 100 year management of national forest ecosystems? Stakeholders and managers often speak in different languages and from different perspectives. Thus, communication tends to be ineffective.

Value balanced-management is, of course, complicated. For example, wilderness areas are increasingly impacted by use and do not necessarily speak to ecological integrity foremost (Landres et al. 2001). At a spatial scale based on the BNF’s burned area, evidence could suggest some measure of preference for extractive management. This is so based on the temporal priority given extractive management actions. Whether or not this preference is the result of the institutional habit of salvation to restore, the value preferences of individual BNF managers, agency culture, political influence, or other factors is unclear. All of the aforementioned factors likely contributed to the BNF’s post-fire actions and omissions.

On the other hand, at spatial scale equal to the BNF’s burned area, evidence could suggest some measure of preference for natural recovery. This could be argued because the bulk of burned timber was in designated wilderness and would be left alone. Thus, such management questions have no simple answers.

**Citizen Recourse**

The ability of citizens to respond to real or perceived problems regarding implementation of federal plans is both a philosophical and a practical issue. The USFS, the BLM, the National Park Service (NPS), and the Fish and Wildlife Service (FWS) are all distinguishable from most other federal agencies in that the public land resource is unique, and directly implicates the personal well-being and quality of life.
of many, if not all, Americans. The USFS, for instance, must manage lands from which citizens extract natural resources for economic gain; on which citizens graze livestock; on which citizens recreate in sundry ways; in which citizens hold spiritual values; from which flows fresh water (perhaps the most critical western natural resource) (Powell 1879, Dana and Fairfax 1980, Stegner 1985 (1999), Wilkinson 1992, Sienkiewicz 2004); around which citizens build communities and derive a sense of place (Berry 1990, Kemmis 1990).

In considering that citizens have and will increasingly build lives and communities around proximity to public lands, Wendell Berry’s description of the relationship between place and community is apropos:

A community is, by definition, placed, its success cannot be divided from the success of its place, its natural setting and surroundings: its soils, forests, grasslands, plants and animals, water, light, and air. The two economies, the natural and the human, support each other; each is the other’s hope of a durable and livable life (Berry 1990).

Thus, public lands represent innumerable diverse values to many Americans. Public land and resource agencies are distinct from the non-land executive branch departments and agencies (for example, the Department of Commerce and its National Oceanographic and Atmospheric Administration (NOAA)). This is so because the public lands agencies manage a tangible resource. The public lands resource is intermingled with intimate, value-laden aspects of citizens’ lives to a greater degree than the resources or policy genres handled by most other federal agencies. One need not explore the literature long before being inundated with testaments to fact that many do, indeed, consider the public lands to be a birthright (Thomas 1995).
Because the tangible nature of public lands is coupled with visceral human attachment to these same lands and their resources, the obvious modes of participation in the American democracy do not necessarily satisfy the need for meaningful citizen participation. Voting, writing representatives and civil servants, submitting comment, and, when necessary, suing: these mechanisms do not likely sate the publics’ continued appetites for meaningful involvement in the management of public lands. Citizens are not merely watching and criticizing—as USFS Chief McArdle suggested in 1958 (Clary 1986)—but they are perhaps demanding greater influence on public lands management (Kemmis 1990, 2001). This demand for meaningful participation will likely increase as a result of shifting demographic patterns and as a result of the per-capita diminution of American open space and ecologically-intact land. Population growth, increased recreation, and economic growth will further amplify this demand.

**An Agency’s Obligation to Heed Public Input**

A significant policy tension relating to citizen influence on management lies in the fact that administrative law grants the USFS and other land management agencies ultimate authority (within the confines of political realities) to craft their own rules and regulations. This is so even if public input under both the APA and the NEPA processes overwhelmingly supports rules or policies that are antithetical to those finally promulgated by agencies. In other words, agencies are often obligated to solicit, but not necessarily incorporate, public input into final management actions. This discrepancy between solicitation of input and its actual incorporation underlies
many of the major public lands conflicts (Carpenter 1988) such as that of the Clinton
era Roadless Rule as replaced by the Bush Administration’s Roadless Rule.

By way of example, in 2005 the Lewis and Clark National Forest solicited
comments under the NEPA for its travel plan revisions on Montana’s Rocky
Mountain Front. 98% of the 37,000 comments preferred alternative 3, the USFS-
generated alternative that maintains traditional modes of travel (horse and foot) and
eliminates motorized travel on existing trails. Lewis and Clark National Forest
Supervisor, (former BNF Deputy Supervisor) Spike Thompson, noted,

> It’s really an important decision and we are giving it a lot of thought. However the number of comments for or against a proposal doesn’t drive the review process. It’s not really a voting process. It is good for us to know what alternative but even more than what alternative, it is good enough to know what do people value on the Front. Once you know that, you can craft a decision that may not give everyone what they want, but can address their values and concerns (Great Falls Tribune, Oct 12, 2005).

Thus, the tension between agency discretion and citizen participation is
fundamental to understanding modern public lands conflict. Despite lacking “a vote,”
citizens are not helpless. They retain the ability to sue agencies over process under
the APA and other statutes. Lawsuits, however, are an extreme remedy and place
agencies and citizens in antipodal positions—communication having ceased,
perceptions distorted, and judicial remedy the only possible resolution (Nie 2004).
Moreover, litigation can harm relationships and halt productive dialogue. It is
difficult for any party named in a suit to remain objective. As BNF Supervisor Bull
noted, it’s hard to retain composure when people attack you personally (Interview
37). Likewise, BNF/Darby District Ranger Dave Campbell related a website that
vilified him personally and conveyed false information. Ranger Campbell confronted
the website’s proprietor noting, that he would not stoop to similar tactics, and would always take the high road (Interview 9).

USFS officials are not elected, and thus have no direct accountability to citizens. It is true that elected federal officials at times exert tremendous pressure on USFS decision makers, but this occurs “behind the scenes.” In the case that citizens find USFS management to be unacceptable, senators and representatives should, with regard to outcomes they precipitated, be held to account. This however is a difficult proposition, as evading public lands management controversy is relatively easy for such officials, and is often the most politically expedient tack. There is an ever present tension between managers and the nature of their accountability to the public (Dunn 2004).

Voting for or against elected officials might mitigate citizen frustrations if the forces influencing the policy process were more visible—if elected officials would take direct responsibility for policy direction they actuated. But more often, elected officials seek refuge in the face of conflict, leaving local and regional agency officials to absorb political strife (Thomas and Sienkiewicz 2005).

Where citizens are dissatisfied with policy content and/or implementation, the American suite of environmental and administrative laws is, generally, conducive to extreme actions. This is increasingly the case as many citizens feel that the ostensible middle ground provided by notice and comment rulemaking and the NEPA scoping process is really a mirage and that their input is meaningless (Interviews 15, 24).

For example, the BNF spent more than $160,000 marking 2005’s Middle East Fork Sale while the project was still open for public comment. BNF officials had no
explanation relating to the NEPA, noting only that the marking crew travels and the
BNF took its services when they were available (Missoulian, October 9, 2005). A
BNF District Ranger noted,

The regional marking crew availability is limited. They rotate around the region
to wherever there is a need. Community members here are interested in seeing
something done as soon as possible. It just made sense to follow the intent of
Congress [in reference to the Healthy Forest Restoration Act]. We never
thought about the controversy that the decision would bring (Missoulian,
October 9, 2005).

The BNF’s actions likely prove that USFS decisions were here (and perhaps on
other occasions) made prior to public comment or scoping. These profound
implications suggest that the NEPA process is, in effect, often, but perhaps not
always, a charade. By virtue of her comments, the District Ranger seems unaware of
this fact’s implications as to the NEPA and the notion of public participation in
national forest management. The intent of Congress to which she refers includes all
public land laws, not just the Healthy Forest Restoration Act (HFRA) (16 U.S.C.A.
§§ 6501-6591) under which the Middle East Fork Project was marketed to the public.

Given this District Ranger’s ostensible ignorance of the NEPA and the APA and
her invocation of the HFRA, readers of her comments are left to assume she is
unaware of many important public land laws. Occurrences such as the BNF’s Middle
East Fork tree-marking incident prompted participating citizens to wonder why the
USFS wasted their time (Missoulian, September 23, 2005). Moreover, in
circumstances where political/budgetary forces predetermine management priorities
(Interviews 8, 9, 27), USFS officials may tend to view public comment as a mere
exercise and will perhaps resent having to go through hollow motions by virtue of the
NEPA, the APA, the NFMA, the ARA, and other germane laws (Vaughn and Cortner 2005).

The District Ranger suggests that she understands how congressional intent translates into management. She suggests that she knows the interests of community members, but does not specify what community. To what community is she (by law) obligated? How does she know? Her words are problematic and suggest a pre-decided course of action. A similar attitude cost the BNF/USFS much credibility when *Wilderness Society v. Rey* was filed in federal court only a few years prior. Judge Molloy’s opinion vehemently communicates as much (180F.Supp.2d 1141).

The attitude manifest in the District Ranger’s comments is antithetical to the principal ideas underlying American administrative jurisprudence (Gellhorn and Levin 1997). Whether the characterization is just or not, her ostensible attitude lends credence to stereotypes of technocracy and timber primacy. The problems manifest in her comments are reminiscent of BNF managers’ comments during the BAR conflict.

Whether or not the District Ranger’s quoted words are indicative of her expertise, her comments speak to efforts to “control the message” (Interview 36) in their selection of information to include and exclude. One senses that USFS managers such as this District Ranger are unfamiliar with laws other than those laws internally promoted. Perhaps this is not the Ranger’s fault, but rather the result of priorities passed along from executive branch political appointees all the way to Sula, Montana. It is perhaps the result of agency priorities as dictated by executive branch policies, and by Congress-influenced budgets (Interviews 8, 9, 27). While USFS employees serve at the pleasure of the executive branch, they must also heed every public land
law still in force—including those laws the executive branch and local managers may
find onerous. To the extent laws allowing for public participation are discounted,
participating members of the public will perceive a resistance to deliberative
democracy, and a salient effort to reestablish a more technocratic paradigm.

From both the managerial and stakeholder perspective, piecemeal awareness of
laws pertaining to federal public land management comprises a problem. It is
difficult to sympathize with USFS managers on this front. Many qualified applicants
compete for jobs such as District Ranger posts—many with germane doctoral-level
degrees (USFS Human Resources 2005). Such jobs are located in some of the most
desirable communities in America—trout streams, snow capped peaks, wildlife... the
mythical West. Generally speaking, filling public land management jobs with
broadly qualified natural resource professionals would entail overriding a system that
often grants hiring preference based on criteria other than quality and talent
(Interviews 14, 35, USFS Human Resources 2005).

USFS managers, in some cases, are not equipped for the complexities with which
they struggle (Interview 1, 13, 14, 20). Thus, coping with modern public lands
complexities requires some grasp of the challenging interactions between science,
law, policy, and politics. Judge Hogan noted, “[F]rom the Forest Service standpoint,
I think it probably ought to have some folks who have that sort of litigation gene,
litigation DNA, as a good part of their training” (Interview 13:3). Further, it is clear
that USFS managers must wield, in addition to legal knowledge and political savvy, a
thorough understanding of ecological science—at multiple spatial and temporal
scales. Such holistic training would largely encompass the skills taught in forestry/silviculture-focused curricula.

Principles of public involvement, democracy, germane law, and ecological competence all play significant roles in modern public land management. A well-rounded mix of such skills will help prevent and ameliorate much conflict. This remains true even with a staff of experts, as synthesis and informed analysis of an array of arcane knowledge requires significant exposure to many disciplines. Having public relations skills, or silvicultural skills, or administrative skills alone is insufficient.

**Citizen Participation and Lawsuits**

Importantly, there are situations in which traditional methods of citizen participation are highly effective. In particular, while environmental interests are often criticized as being litigious, the right to sue under natural resource, public land, and environmental laws is a fundamental check on unlawful agency action. Legal recourse is important with regard to private enforcement per citizen suit provisions, but also, it is important in the contexts of judicial review, the separation of powers doctrine, and federalism.

Judicial review, for its inefficiencies, promotes rational, empirical agency decision making, while also ensuring that agency action does not exceed authority delegated by enabling legislation (Gellhorn and Levin 1997). Thus judicial review does not merely protect citizens and resources, but is a fundamental component of our checked-and-balanced system of government. In the BAR lawsuit for instance, the Court declared the exemption policy the USFS formally adopted to be illegal (180...
F.Supp. 2d 1141). The federal judiciary’s pronouncement would not have occurred had not private interests sued the BNF/USFS.

Jack Ward Thomas has observed the proliferation of NGOs dedica{ng} their resources to the primary end of suing agencies and private entities for conservation purposes. Thomas dubbed this phenomenon, the conflict industry, noting the economic and political incentives to join this industry and thus perpetuate the vicious cycle of extreme actions (Thomas and Sienkiewicz 2005). Nonetheless, the right to sue is likely here to stay. This is so, because sometimes collaborative methods are precluded; sometimes collaborative efforts are attempted, but fail (Coggins 2001). Moreover, agencies sometimes, accidentally or intentionally, break the law. Thus traditional methods, including litigation, remain important tools of citizen participation for which managers and policy makers must account.
Chapter 8

Important Lessons

Of Agencies and Individuals

The USFS and other land agencies do not, in every case of protracted public lands conflict, deserve to be vilified. In a chapter titled, *the Art of the Possible in the Native Home of Hope*, Daniel Kemmis goes so far as to call federal agencies in the West "a version of imperialism." Kemmis describes the "feds" as "remote" and "powerful" (1990:126-128). There is some truth in what Kemmis says, but he might qualify his descriptors by noting that "fed" district rangers and biologists and office managers send their children to the same schools and pay the same property taxes as non-"imperialist" citizens. USFS managers in many cases are indistinguishable from local citizens.

Kemmis suggests that federal public lands are largely local resources and could be managed effectively as such, absent federal "imperialism." Ironically, many USFS managers—by virtue of preferences for what they perceive to be local sentiment as well as a disregard for "form letter input"/"e-mailed comments"—tend to favor local residents (Interviews 6, 8, 9, 37, *Missoula Independent*, November 10, 2005, *Missoula Independent*, November 17, 2005). Jack Ward Thomas has spoken of the USFS' tendency to move its employees around the country as being partly due to a concern that employees might "go native"—that is, come to favor local sentiment to the detriment of the *national* forests (Interview 27). Given that evidence suggests that USFS managers may have a logical tendency to favor local residents with whom they share a community; perhaps it is simply the fact that power lies with employees of a
federal, as opposed to a local, agency that rubs Kemmis wrong? Perhaps it is the potential for arbitrary and value-biased decision making that Nie (2004) describes?

Kemmis’ words speak to the auspices of a more deliberative, democratic process. Nonetheless, they are undermined by a resentful tone. The “imperialist” line of thought discounts fundamental concepts that would protect federal lands, such as economies of scale tied to federal budgets and the protection of these lands from tragedies of the commons born of unregulated open access to common-pool resources.

Mr. Kemmis’ ostensible purpose in writing the piece is that of promoting a more collaborative policy process. Many argue collaborative management and/or conflict resolution is auspicious (Wondolleck and Yaffee 2000, Brick et al. 2001). On the other hand, there is some danger in localist tendencies that would tend to pigeon-hole USFS managers as do Kemmis’ comments; the complexities of bureaucracy, economics, and our systems of federalism and divided government should remain at the fore of any discussion. This is not to dismiss the problems inherent to federal public land governance, but some measure of federal control may always be necessary to prevent a wholesale taking of nationally-owned resources. The federal lands are, as the moniker suggests and until Congress decides otherwise, the property of all Americans.

Further, it is important to embrace the concept that bureaucracies as a whole manifest values and behavior that sometimes contradict the values and behavior of individuals within those same bureaucracies (Wilson 1989, Matson 1996, Waterman et al. 2004). Moreover agency culture is akin to the common law in its inability to
make dexterous changes. USFS culture in particular, is known as being, for better and worse, particularly entrenched (Clary 1986, O’Toole 1988, Hirt 1994, Wondolleck and Yaffee 2000, Thomas and Sienkiewicz 2005). Bureaucratic inertia is the rule.

The USFS and the Law—an Awkward Dynamic

The Bitterroot salvage conflicts illuminate the reality that the USFS’ organizational structure does not mesh well with the legal system. The BNF employs no staff attorneys. No BNF employees hold law degrees. The BNF’s lawyers in Wilderness Society v. Rey were generalist U.S. Attorneys—having little intimate experience with the day to day management of the BNF lands. U.S. attorneys, in reality, likely focus most of their time and energy on cases dealing with more mainstream issues such as drug trafficking and free speech. Supporting the notion that U.S. attorneys may be too busy to have intimate knowledge of case details, much less the ecological conditions of a national forest, Montana’s Chief federal Judge Donald Molloy wrote U.S. Attorney General Alberto Gonzales urging him to replace U.S. Attorney William Mercer—one of the government attorneys who represented BNF in Wilderness Society v. Rey. Judge Molloy noted that Mercer was neglecting his work (Missoulian, November 15, 2005). Although it is unclear whether Mercer has the combination of substantive expertise required of a complex public lands case, this episode lends credence to the fact that generalist U.S. attorneys may have neither the time, nor the expertise to do justice to complex public lands litigation.

Perhaps some of U.S. attorneys in Wilderness Society v. Rey possessed a general knowledge of natural resources and public lands, but based on their arguments, they
seemed to lack significant understanding of the Bitterroot Valley’s socioeconomics and pertinent interactions with public lands, natural resources, and ecological science. This is perhaps so, because many Department of Agriculture attorneys may live and work in Washington, D.C. or a satellite office as does Mercer, spending significant time in transit to and from Washington, D.C. (Missoulian, November 15, 2005) and working on a wide variety of cases. Moreover, decisions as to what cases get settled, defended, or otherwise pursued are made in Washington, D.C. by political officials (Thomas and Sienkiewicz 2005)—not in Hamilton, Montana by a local Forest Service staff attorney with local knowledge of ecological, social, and political circumstances.

By virtue of their diverse caseloads and professional constraints, it is unlikely that federal lawyers from the Departments of Agriculture or Justice have sufficient expertise in local natural resources and ecological science, the interactions between law and science, and the actual fact patterns and stakeholders with which/whom they must work when conflict makes its way to the federal judiciary. This was at least so in Wilderness Society v. Rey. Inadequate lawyering, and poor judgment for defending the suit to begin with, cost the U.S. tax payers hundreds of thousands of dollars in attorney fees, and judicial and executive branch opportunity costs.

Lending credence to the notion that U.S. attorneys may be ill-suited to represent national forests is the BNF’s attorneys’ argument that salvage logging has “no negative environmental impact” (Missoulian, December 29, 2001). Government attorneys representing the BNF appear not to have performed the due diligence necessary to argue a science-related case. Further, it would seem that this misinformed legal argument/strategy was born of motivations to defend the case for
political reasons (as opposed to the strength of legal positions) (Thomas and Sienkiewicz 2005). Most any management action has ecological impacts (Interview 27), or as Jack Ward Thomas noted, every manipulation of nature—great or small—impacts the environment to one degree or another (Interview 27). Complexity is the rule. Proponents of ecological integrity will often challenge assertions from managers or U.S. attorneys lacking such knowledge, or appearing to lack such knowledge. In the Bitterroot case, failure to openly acknowledge this reality seemed to beg controversy. By contrast, acknowledging the ecological realities of management will, if relationships are not burdened by enmity, allow stakeholders and managers to move on to more practical matters.

Though by no means crystalline, perhaps germane public land law offers more clarity than managers may admit. Yes, there are many laws to know. Further, the letter of the law is difficult and expensive to follow, particularly for managers untrained in the nuances of preempting, pursuing, and defending litigation. Nonetheless, the USFS’ legal clumsiness is exacerbated by a lack of (official) collaborative conflict resolution policies and an ostensible unwillingness to adopt such strategies unless forced to do so by a court. The USFS’ tendency to draw suit is further exacerbated by enmity between certain USFS officials and certain environmental interests. Although all parties to this enmity contribute to the dysfunction, it is the USFS—the government agency—that is obligated to keep forest management professional and not personal. If certain environmental or extractive interests prove unruly or unreasonable, dialogue and discourse can help managers to
remain on high ground. As John Dewey said (1927:44) “the cure for the ailments of
democracy is more democracy.”

Value Conflicts

The 2000 salvage and restoration conflicts highlight the notion that human values
are central not only to the position or stance one takes on a natural resource issue, but
also to the underlying interests (spoken or unspoken) one might have for taking a
certain position or stance. Values are central to one’s perspective with regard to both
fire and other aspects of natural resource management. Importantly, values are
complex and difficult to deconstruct or reduce to simple categories.

It is clear, for example, that certain of the plaintiffs valued wildland fire and
leaving burned areas intact. This value was expressed in spite of fire’s capacity for
short-term ecological disturbance. Some with differing values frame the
aforementioned stance as a “do nothing” approach (BBER 2001). Phrasings such as
“do nothing” comprise rhetoric, polemic devices, and/or oversimplifications (Vaughn
and Cortner 2005). The University of Montana’s Bureau of Business and Economic
Research (BBER) used “do nothing” language in a survey the BNF commissioned to
determine how local residents felt about post-wildfire management (Bureau of
Business and Economic Research 2001). The survey the BNF commissioned asked
as its first question:
1. This summer’s fire season brought attention to areas where people build homes in wooded lands near national forests. These areas are called urban–wildland interface [(WUI)]. The Bitterroot National Forest wants to know what you think about possible management actions in the urban–wildland [(sic)] interface. Please rate the following actions from one to five, where one is not at all important and five is very important.

a. Reducing fuels and fire hazards on BNF Lands 1 2 3 4 5
b. Educating Landowners about fire hazards 1 2 3 4 5
c. Helping Landowners reduce fire hazards on their lands 1 2 3 4 5
d. Using prescribed burning 1 2 3 4 5
e. Thinning trees 1 2 3 4 5
f. Doing nothing 1 2 3 4 5
g. Other (please describe) 1 2 3 4 5

The aforementioned question prompts one to question the survey’s design. Definitions were not offered for any resource management terms. How does the BNF or the BBER define “fuels,” “fire hazards,” “prescribed burning,” “thinning,” “doing nothing?” Did respondents understand these terms? Is natural recovery “doing nothing?” Were the telephone operators hired to administer the survey trained in the nuances of ecological terms of art or the nuances of the USFS’ definitions of forestry terms? Why did the authors of this survey exclude wildlife and fish, watershed, recreation, and range for which USFS/BNF must manage under the MUSYA? Is timber the only of the five multiple use values under the MUSYA that applies to the WUI? How does the USFS define “WUI?” Where does the “WUI” begin? Where does the “WUI” end? Does this question address public lands or private lands? If both, what is the nature of the USFS’ obligations to private landowners who knowingly build and live in fire-prone ecosystems? Did the BNF’s/the BBER’s association of “doing nothing” with natural recovery for which environmentalists advocated as applied to roadless lands suggest an institutional bias?
To the degree the BNF based its conclusions as to public sentiment on devices such as the BBER’s survey, the BNF perhaps exhibited biases. This is so, depending upon the degree to which BNF employees participated in the survey’s design and utilized the survey to bolster management choices. This survey had divisive consequences following the wildfires of 2000 (Interviews 15, 16). The cumulative data surrounding the Bitterroot conflicts suggest the issues were more complex than doing something vs. “doing nothing” (BBER 2001).

The BBER survey seemed to exacerbate controversy (Interviews 15, 16) because it suggested to the reasonable observer that conclusions were made prior to seeking input and information from the public. Further, a reasonable person might conclude that the survey was propounded to support management that had already been decided upon, or at least, was propounded to attempt to undermine proponents of natural recovery in burned roadless areas. Characterization of proponents of ecological integrity as “do nothing” was not a politically expedient approach to what were already complicated public land management issues.

In retrospect, analysts have the privilege of asking whether economic values to be gained by salvage logging on burned roadless areas outweighed the costs of defending federal lawsuits, reducing trust, and sulling the agency’s image? Such lines of inquiry prompt further questions as to whether there were not sufficient stocks of timber in burned roaded areas, or in other areas over which environmentalists were less opinionated and concerned? Pervading the post-fire fact pattern is a spirit of personal enmity between BNF/USFS employees and
environmentally-oriented stakeholders. This seems to have significantly influenced the turn of events that followed the Bitterroot wildfires of 2000.

**Environmental Values**

Looking behind the environmental interests should be of concern to agency managers as these were the stakeholders that filed suit. Environmental stakeholders valued fire for its naturalness and its wildness, for the ecological values it can create, such as structural heterogeneity, age-class and species diversity, and cavity-nesting bird habitat. They valued the post-fire patchy mosaic and forest *legacy* structures that eventually succeed a burned landscape (Lindenmayer and Franklin 2002). Such stakeholders valued untrammeled natural recovery as opposed to human-actuated efforts to achieve desired conditions.

This is not to say that these same stakeholders did not value the utility of salvaged burned timber and the positive economic externalities that may be gleaned from its harvest, but perhaps economic/utilitarian values for such stakeholders were of secondary importance. These stakeholders believed that chosen management strategies favored extraction over ecological values. Moreover, it is apparent that scarce un-roaded forest land (Havlick 2002) and protection of endangered species were priorities for those concerned with ecological integrity (Interviews 15, 16, 18, 19, 26A, 26C). Such values were ostensibly secondary or tertiary considerations on burned forest land for industry stakeholders and some local residents.

**Timber Industry Values**

Some of the extractive interests that marched in Hamilton and sought recourse from former Governor Martz gleaned their economic livelihood from extracting the
timber resource. This is not to say that extractive interests did not care to protect environmental quality and ecological values such as those of bull trout (*Salvelinus confluentus*) or west slope cutthroat trout (*Oncorhynchus clarki lewisi*); but extractive commodity values were simply paramount for these stakeholders. Perhaps those who supported the BNF’s early proposals of harvest on 86,000, and later 46,000, acres believed that these figures provided a fair compromise in light of the more than 300,000 acres that had burned. Thus, those stakeholders favoring increased levels of extraction tended to view the Plaintiffs as “obstructionist” (*Missoulian*, October 11, 2001).

**Inter-temporal Scales and Ecological Humility**

In contrast to those favoring economic primacy of national forest management were those who favored ecological primacy. Some believed that extensive ecological harm to national forest ecosystems resulting from 430,000 linear miles of roads (*Predator Conservation Alliance 2005*) and many years of “aggressive” commodity-focused management comprised an ecological “debt,” not soon to be remedied by a few years during which extracted timber volumes are far less than historic levels—burned or not (Interview 19). Noted ecological advocate, Howie Wolke, expressed such sentiments:

> The Forest Service has probably butchered more national lands, public lands than any other agency. Hard as the BLM has tried to do their share, if you simply look at the results of Forest Service management over the last 100 years in this country, take an over-fly of most national forests, it is, it’s appalling. If you fly over the non-wilderness sections of the Bitterroot National Forest, what you find is massive environmental destruction. We’re not even talking about controversial forms of resource management. We’re talking about massive environmental destruction in terms of trashed watersheds, weed infestations, complete loss of old growth habitats, the destruction of riparian areas and streams, the loss of local wildlife populations
due to open road densities that in some cases are three or four times what the forest plan standards are. And if you then take that small plane and plop it over in some of the forests in the Cascades of the Pacific Northwest, it makes the Bitterroot look like small potatoes. We're talking about millions and millions of acres of unmitigated, massive environmental destruction under the guise of Forest Service multiple use management.

And, you know... having seen these crimes against nature perpetrated over and over again, having been involved with many negotiating sessions with the Forest Service and seeing how deeply ingrained this bias towards resource extraction and intensive management in general is, I long ago lost confidence that the Forest Service could be whittled down, that the Forest Service’s timber program could be whittled down at least voluntarily by the Forest Service into the type of program that the forest could really sustain.

I witnessed from post-World War II, well, I didn’t witness it right after World War II because I wasn’t born until 1952, but from post-World War II until the Clinton Administration, the Forest Service was roading and developing a million acres of roadless de facto wilderness, the roadless areas. They were whittling the roadless areas away at the rate of a million acres a year. And Max Peterson finally fessed-up to that. I can’t remember exactly what year, but in an interview... back in the early ‘80s I believe it was.

So unless the Forest Service were to get some very stiff directives on slowing this program down from the top, which was beginning to happen... under Clinton [and] Dombeck... You know, Dombeck was slowing down the timber program. He was basically putting the skids on the road building program. They had come up with the roadless rule to try to protect the wilderness areas... [B]ut that only lasts as long as that person and his administration’s in power (Interview 19:15).

Underlying stances such as Wolke’s and others’ within the various schools of thought in the environmental community, is the notion that the USFS does not tend to approach management actions with a sense of ecological and intellectual humility.

Those clashing with the BNF felt cut out of the planning process on lands to which they believe they have a rightful claim. Others, however, criticize “the law” as shackling the USFS (Harrington 2003). This viewpoint is more common among land managers (Interviews 2, 8, 9, 12).
In reality, the law shackles most any who do not understand it. Thus, non-lawyers tend to hire lawyers to do their legal work. Before attributing conflict causality solely to the many laws protecting ecological values and public input, critics of current law might consider the nature of the USFS’ attempts to deal with those laws to which it must conform. Likewise, those who tend to write-off the USFS’ actions as being primarily related to bias might look to the pressures that work upon managers in the form of centrally-made budgets and house-calls by elected officials.

**Hard Lessons: Court-ordered Mediations**

Court-ordered mediations are often appropriate in purely private conflicts, but must be carefully considered before being imposed upon public land and resource conflicts. It is likely that both sides of the salvage and restoration lawsuit were engaging in strategic posturing and tactical maneuvering. This is part of zealous legal advocacy and motion practice (written pre-trial motions to the presiding court). It is part of what many would consider to be good lawyering. As a federal judge, Judge Molloy was beholden to interpret that which parties present to him, and apply the law accordingly. After granting the Plaintiffs a temporary injunction preventing implementation of the BAR project, Judge Molloy reacted to the Defendant USFS’ motion requesting emergency action by noting that Defendant took two weeks to file its appeal—this, while government lawyers already argued that time was of the essence.

Nonetheless, Defendant USFS’ strategy of claiming ecological emergency seemed to give Judge Molloy pause. If he denied the USFS’ request to take action, he might stand responsible, in the eyes of some or many, for any realized ecological or
economic harm associated with delay. But if Judge Molloy granted the USFS' request to take emergency action, and management actions on the ground did not reflect what had been promised, then Judge Molloy might appear to have been manipulated by agency officials and political appointees who had illegally denied the public an administrative appeals opportunity. It was reasonable under either scenario to expect a return of all parties to Judge Molloy’s Court for further proceedings.

Judge Hogan noted in a 2005 interview,

[When] someone [is] a mediator, people come and say this case is too complicated to be mediated... [F]rankly, the truth is usually opposite. Those that really have the untenable problems and complications are good candidates for mediation. The only thing was this one was sort of unique is that the Bitterroot Valley is a fairly concentrated area and there was the real possibility of even physical confrontation between people who had really opposing ideas in that valley. And so there was a sense in which a mediator could call them to their highest and best thoughts in treatment of other human beings. But settlement of this type of case ordinarily is something that – it’s kind of a trading match where people have to look at what’s really important to them, pick the two best things they’d like to have happen (Interview 13:4).

Perhaps, it is plausible that Judge Molloy ordered mediation out of default. In doing so, he would possibly avoid what would—for any judge or court—be a controversial, expensive, and difficult trial process that might eventually have had to decipher dueling science and ecological and biological vagaries, and balance economic and non-market values. More likely though, Judge Molloy was simply trying to think creatively, to look for an efficient solution to complex, time-consuming public lands litigation.

Were the interests at stake solely private, Judge Molloy’s decision would have been a success, at least from the standpoint of conserving judicial resources and taxpayer dollars. As it stood however, the mediation order failed to account for some
important details: (1) No single USFS administrator or political appointee can guarantee future budgetary allocations from Congress (2) By ordering select private parties to determine land management practices with a public agency—behind closed doors—USFS management was subjected to “capture” by those same select parties. Passage of time would highlight the settlement agreement’s foibles. Interestingly, although most participants in the mediation were dissatisfied with both process and outcome (Interviews 26 A-D) certain parties seemed to win from the criteria of gamesmanship.

The absence of project timelines from the settlement document in essence allowed the BNF to prioritize its budget and timelines as it saw fit, thus allowing restoration commitments to occur at a snail’s pace with full legal impunity. Impunity, however, is a separate issue from costs in diminished trust and goodwill, and exacerbated public tensions. The USFS’ national leadership underestimated the political importance of the Bitterroot controversy. USFS leaders lost an opportunity to shine, whatever this might have required, while all eyes were on the Bitterroot. Instead, local officials, such as Supervisors Richardson and Bull, were left to equivocate and fumble through the political process in order to compensate for failed leadership in the agency’s upper echelons.

Some would argue that the settlement agreement reduced the BNF’s original proposal in both harvest area and volume significantly, suggesting a victory for those who advocated for ecological integrity over economic gains (Interview 27). It is difficult, however, to gauge victory when gamesmanship and brinksmanship
dominated the process. Further, the notion that public lands management would be intentionally adversarial at all is suggestive of systemic institutional problems.

**Agency Ties to Congress**

Hindsight illuminates what attorneys for environmental stakeholders overlooked. As far as budgets go, the BNF and other agencies are, to a significant degree, subject to the whims of Congress and the USFS' central office in Washington, D.C. Where promises as large as the $25.5 million in lost restoration funds are concerned, mediated settlements are tenuous at best. Whether the loss of this funding was a comedy of errors or entailed some manner of malice and political horse trading is now largely irrelevant. The possibility of the USFS' promises being broken was always present. Nonetheless, it was imprudent for USFS officials to make promises they could not keep. Significant political capital was lost as a result. Because budgets originate in Washington, D.C., Undersecretary Rey and Chief Bosworth—as the agency’s executives—should shoulder the balance of blame. This is so, because of their intimate familiarity with budgetary realities and their knowledge of the likelihood of losing restoration funds not shored-up.

For his part, Judge Molloy might have realized that federal agencies cannot, with respect to mediated settlements, be treated as would a private party. The private law mediation model is not readily applied to public land conflicts. Nonetheless, it is apparent that Judge Molloy was striving for an effective solution to a complex problem. Despite the unanswered questions and time constraints, Judge Molloy might have ameliorated tensions by making the difficult ruling on the motion for
emergency action that was before him. All involved would learn the hard way that those representing the USFS did not, in this instance, possess deal-making authority.

To his credit, Judge Molloy ordered the Under Secretary of Agriculture, Mark Rey, to participate in the negotiation, in spite of Rey’s efforts to avoid involvement. Furthermore, most would assume, as did Judge Molloy, that an executive such as Rey would wield penultimate authority. Nonetheless, this was not the case, and neither Rey nor the USFS were held to account for unfulfilled promises that were reached as part of the settlement. It remains unclear as to whether Undersecretary Rey and USFS officials in Washington, D.C. could have replaced lost restoration monies with alternate budget lines or accounting methods.

To this effect, Undersecretary Rey and his superior, Secretary of Agriculture-Mike Johanns, regularly award discretionary grants. In fiscal year 2005 these totaled more than $4.4 million in the category of woody biomass utilization alone (USDA 2005). These awards were given to entities within the wood products and timber communities. Certainly, grants for research, specialized kilns, and small diameter log mills are for many reasons auspicious. Nonetheless, these grants allowed critics to think that Rey and Johanns ignored the BNF’s loss of restoration funds when they could have mitigated circumstances (Interviews 14, 15, 26C). Despite his political fumbles, BNF Supervisor Bull does not seem to have been primarily responsible for failing to actuate restoration projects in a timely manner. To some extent, Supervisor Bull and other local agency managers seem to have been pawns in a political chess match.
Had the right decision makers made it a priority, significant monies could likely have been found and applied toward fulfilling the USFS’ promises of ecological restoration under the settlement agreement. Whether or not it is the reality, Undersecretary Rey’s and Chief Bosworth’s failure to keep their word per the settlement agreement is problematic and perhaps suggests a bias. Whether the facts bear out this suggestion is debatable. For his part, Chief Bosworth said that there were other national priorities that took precedent over replacing the missing restoration funds (Interview 12).

Nonetheless, the Department of Agriculture’s grants totaling millions of dollars to the timber and wood products industries are difficult to ignore relative to the lost ecological restoration funds. Local officials on the Bitterroot National Forest were left to absorb blame and criticism while Undersecretary Rey and Chief Bosworth returned to Washington, D.C. to address national priorities. It seems however, that given the negative media coverage and lost political capital, USFS and USDA leadership would have benefited by treating the Bitterroot conflicts and settlement agreement as a national priority as well.

The settlement agreement was a legally binding contract, enforceable in court; and so the story may not yet be over, but it likely is. Parties have moved on to the next conflict. Importantly, congressional budget makers were the public servants who wielded ultimate deal-making authority where the BNF’s restoration promises were concerned. Nonetheless, Undersecretary Rey and Chief Bosworth failed to exercise their penultimate discretionary authority to mitigate circumstances for proponents of ecological integrity in the Bitterroot Valley.
Agency Capture and Public Perception

Agencies are most always subject to some degree of capture by competing interests (Hirt 1994, Nie 2005, Thomas and Sienkiewicz 2005). This relates in part to individual values, funding sources, decision making authority, administrative process, organizational structure, agency culture as well as other issues. It is important to know that stakeholders may capture Congress-made budgets by virtue of influence over key delegates, and thus indirectly capture agency management regimes. However, some would argue that such is the nature of the American political system. No matter, the notion of capture is merely a mechanism through which to analyze power or control over agency decisions. This may be direct power, indirect power, or somewhere in between. Agency capture applies to the Bitterroot conflict in a few ways.

The first relates to credibility. Coming out of the 2000 fires, BNF officials proposed salvage logging and thinning on more than 79,000 acres. As the agency’s final request was for the emergency treatment of 5,400 acres, it is apparent that the USFS might have fostered more trust if it had initially proposed a lower harvest volume. From the beginning, the perception among environmental groups was that the USFS was, in effect, captured by logging interests by virtue of its post-fire focus on salvage logging. This perception was solidified early on by the USFS’ salvage proposals which were to change drastically over time. As elsewhere, values underlie the conflict surrounding management priorities. The decision as to whether to salvage on 79,000 acres vs. 5,400 acres is one that cannot be made without pitting
extractive and ecological values against one another. That is to say, early exploration of middle ground might have saved time, money, and energy.

The notion of perception is important in and of itself. The post-fire conflicts showed that it is of secondary importance whether or not perceptions are true. The BNF would have benefited by being better aware of public perceptions to begin with. The BNF might have benefited by openly promulgating a management strategy that a majority of stakeholders would consider to be value-balanced. How does this occur—most likely, through processes the BNF has not embraced. If BNF officials were not aware of public perceptions, then the Forest’s communications strategy was insufficient. Alternatively, if the BNF believed any of its initial proposals were indeed value-balanced, it needed to make this argument affirmatively and early in the process. That is, perceptions and misperceptions should be addressed promptly.

The BNF’s initial salvage proposal as compared to the final settlement indicates that relationships with the environmental community were already deteriorated before the 2000 fire season had ended. Otherwise, USFS officials might have foreseen the distrust and controversy that their initial salvage proposal was to foment. Ostensibly, the USFS sought extensive salvage of burned timber, and conducted participation processes knowing the agency’s primary goal was always to maximize salvage. The pressures to maximize timber extraction relating to budget constraints, pressure from elected officials, political appointees, and timber targets would support this conclusion. Moreover, BNF managers including the Supervisor and District Rangers are foremost among those relating such exogenous influences upon the course of post-fire management (Thomas and Sienkiewicz 2005, Interviews 2, 5, 8, 9).
It was predictable that the BNF's attempt at circumventing the administrative appeals process would exacerbate existing distrust and resentment. The decision to deny administrative appeals communicated the message to stakeholders that federal court was the only venue for discussion. Cutting off formal participation in this manner left the public to perceive managers acting upon notions of timber primacy—whether those perceptions were accurate or not. Administrative remedy and formal dialogue had ended abruptly. This encouraged some to think industry interests had captured the BNF management. Importantly, perception of agency capture can be as powerful and controversial as capture itself.

The notion of capture also plays into the Bitterroot conflict with regard to the court-ordered settlement. By ordering the Plaintiffs and the USFS to determine post-fire salvage and restoration management, Judge Molloy elevated select members of the public to positions where they could exert influence over national forest management. These individuals influenced post-fire management on the BNF. Other members of the public had no say in this process. Had the cases been argued in trial, Judge Molloy, being an experienced arbiter of complex cases, would have decided what the just and fair outcome would have been. In effect, he would have made a decision that justly balanced divergent values, as he has done many times before.

Notably, the rigor of legal arguments and evidence presented indicates the Plaintiffs were sincere in their convictions and entertained no frivolity in the process. Nonetheless, the incentive created by the settlement order is one whereby suing the USFS becomes an attractive strategy should one desire to influence public land management. Thus, the court-ordered public lands settlement possibly encourages a
tendency toward litigation, as well as a disincentive to pursue traditional administrative processes and negotiation.

It might also be said, however, that Undersecretary Rey, Chief Bosworth, and the BNF, whether by misunderstanding the law, engaging in power politics, or because of mutual enmity with environmentalists, encouraged a legal battle by summarily denying the right to appeal and exhaust rightful administrative processes. Outcomes suggest both managers and stakeholders would have better avoided conflict by engaging in more deliberative, collaborative, and cooperative efforts at management on a regular basis—not solely following political crisis or ecological disturbance.

**Administrative Process**

Evident from the controversy is the overwhelming concern on the part of various stakeholders that they had been cut out of the process to which they were legally entitled. This punctuates the importance of process by which citizens might voice concerns to USFS officials and feel that they have been heard, particularly in cases where administrators have reached final decisions. Even if USFS officials are decided on a general or specific course of action, the Bitterroot saga showed that although the process of scoping projects and subsequently accepting appeal is perhaps time consuming in the short term, it better avoids costly legal battles in the long run. The U.S. District Court affirmed as much by holding that the BNF had violated its lawful duty to accept administrative appeals and by awarding attorney fees to the plaintiffs.
Perspectives on Wildfire

The Bitterroot fires of 2000 illustrated that fires are harmful relative to certain values such as protecting human domiciles, protecting live trees, and minimizing sediment loading to aquatic habitat. With respect to other values, fires are positive. Fires create landscape heterogeneity through burning patches into both matrix and reserve lands (Lindenmayer and Franklin 2002). Fires can create habitat for cavity-nesting birds in the form of large diameter snags (Lindenmayer and Franklin 2002). Fire cycles nutrients to the soil and opens serotinous cones (Agee 1993). Thus, the relative utility of fire depends on one’s value hierarchy; so too does the relative utility of a burned landscape.

Natural systems are overwhelmingly complex. Fire severity, intensity duration, return interval, terrain slope, terrain aspect, terrain elevation, human fire suppression practices, interactive effects with insect populations, weather patterns before, during and after the fire, climate changes... these all contribute to the effects a fire may have on the landscape. The point being, that any post-fire management action will speak to some values while discounting others. Therefore, land managers will better avoid tensions by acknowledging complexity. Fire’s effects are both positive and negative depending upon one’s values. Further, it is impossible to manage for all values on a single burn site.

Managers can ease their burden by stating up-front the values or value that is manifest as a management priority in any given scenario. It is disparities between what is promised or advertised and what actually occurs on the landscape that most ignite controversy. This is so whether the incongruity is due to happenstance or
otherwise. Once major values at stake are brought to the fore, the discourse will be clarified and managers may then begin to take an honest and holistic approach that addresses the array of values at hand while outlining a realistic focus. When the discourse is thus clarified, the courts may be more likely to grant administrative discretion to the agencies where managers show they have considered the broad array of values before deciding upon a course of action.

For all of the criticism leveled against the NEPA and its scoping process, it is clear that the public stakeholders are process-oriented people. For all of the short-term inefficiencies, the long-term gains perhaps lend credence to what agency officials believe are onerous administrative processes. The present trend toward “categorical exclusions” and diminished public involvement in public lands will likely prove costly in terms of lawsuits, diminished trust, and reduced agency stature.

Executive Agencies Serve at the Pleasure of the Executive

USFS managers are placed in a difficult position. This is so because their elected and appointed counterparts tend to promote policies with oversimplified, misleading rhetoric, and often expect managers to do the same (Vaughn and Cortner 2005). For example, when asked to define a “healthy forest,” “restoration,” and “catastrophic” during a panel discussion at the University of Montana, a Lolo NF District Ranger offered only an ambiguous answer about taking members of the public out and showing them on the ground. Though diplomatic and personable, she appeared, otherwise, stumped (Native Forest Network Healthy Forest Restoration Act Forum 2005). Information, clarity, and specificity are critical to effective dialogue; informed
stakeholders will oppose most any policy promulgated on imprecise notions and ambiguity.

In accordance with models of deliberative democracy and the associated processes of dialogue and discourse, it would behoove USFS managers to willfully incorporate any and all stakeholders opposing proposed management projects into the decision making process. As DNRC managers illustrated, proactively offering compromise to potential litigants speaks to prudence, equanimity, and political savvy. In contrast to the DNRC managers, the BNF managers appeared, during the wildfire aftermath, aloof, largely protective of their power, and generally unwilling to yield any discretion to collaborative processes in which members of the public might influence final outcomes. In defense of managers, however, there exist salient risks to stepping outside of traditional agency policies, culture, or traditions (Matson 1996).

Precise Language

Because agency managers serve at the pleasure of the administration, they are bound to promote executive branch policies and associated rhetoric (Interviews 5, 12, 15, 16, 24, 27). For a USFS employee to do otherwise might risk job security or at least alienation (Matson 1996, Interviews 5, 9, 15). In the least, it seems that managers are discouraged from aggressively speaking out against executive branch policies while wearing their Forest Service hats (Matson 1996, Interviews 5, 9, 15).

USFS managers can, however, mitigate such political pressures and restraints, by stating specific project goals, defining terms, and providing specific evaluation criteria that communicate resource values that benefit as well as those that suffer from a particular management action. Importantly, there are always resource values that
suffer from any management action. This is the reality of complex ecological and sociological systems. To deny this reality is imprudent. Managers might avoid such appearances by acknowledging both benefits and costs. “Forest health,” and “restoration,” and “100 years of fire suppression” (Vaughn and Cortner 2005) are inadequate descriptors without specific context.

It is difficult enough to plan forest management around complex and stochastic ecological forces. When complex socio-political forces are overlain in the process, policy and management tend toward a morass. Congress, USFS central office administrators, judges, managers, stakeholders, and their attorneys would benefit by attempting, where possible, to qualify laws, mandates, rules, plans, negotiations, and agreements in terms of specific criteria. Important among these criteria are: time (short-term and long-run); specific ecosystem components (species, locations, inputs, outputs); funding; project prioritization; scheduling; and underlying values, among others. Of course much must, by virtue of expediency alone, be left to agency discretion. However, the BAR controversy has proven many such qualifying criteria to be critical. To ignore such criteria is to ignore the significant complexity of natural systems and the fundamental principle of ecological humility. To the degree that agency actions ignore these principles, proposed action will likely draw challenge.

**Harvesting Timber is Legal on National Forest Lands**

As DNRC managers expressed, there is no shame in harvesting timber or salvage logging because some citizens find the practice unpleasant (Interview 20). The DNRC’s Bud Clinch promoted an openness and understanding of the DNRC’s mission as including logging as part of a suite of revenue generating management
actions (Interview 20). A significant problem arises in federal land management when USFS managers propose harvesting timber, but insist that the management is primarily a restoration project. Along these lines, federal managers run into trouble when terms such as “thinning” and “restoration” are utilized to justify a project, but remain undefined and unqualified. When large diameter trees are cut, critics tend to challenge the USFS even though such harvest may be legal. It is not to say that salvage and restoration are always incompatible, but explanation is always required if the dialogue is to retain integrity.

Again, restoration of what? For whom? What is the definition of “thinning?” What age classes and diameters are subject to “thinning” treatments? What are the social, ecological, and economic costs of a particular project? What are the social, ecological, and economic benefits? Most importantly, what are the criteria or goals driving the management action? What are the desired future conditions? Does preferred “agency science” contradict science propounded by stakeholders? If so, how can divergent scientific conclusions be reconciled? Given differences, what are appropriate compromises that will satisfy potential litigants? Relative to the reburn hypothesis, the effects of post-fire salvage logging, or the minimum number of snags to retain after a fire, what diameter, etc.; why has the agency chosen one scientific school of thought over another?

Any deception or equivocation on these fronts tend to perpetuate the age-old resource-conflict paradigm. Moreover, it is actions as opposed to words that do the most to earn public trust. Controlling the message, as Supervisor Bull noted that his superiors suggest he do (Interview 36), can be done best by addressing all issues, then
countering critics with legal and ecological rationales. This is how a good attorney approaches a legal brief, by addressing every issue that might arise, so that the opposing counsel does not surprise her during trial.

**USFS and Local Economies**

Some USFS and non-USFS respondents described pressure to supply timber for local economies as being exerted by such external sources as local citizens, Undersecretary Mark Rey, Senators Conrad Burns and Max Baucus of Montana, and Governor Martz of Montana (Interviews 8, 9, 27). Given such pressures, whether legitimate or not, involved political figures might have openly considered the less divisive trend toward restoration as a USFS-influenced boon to local economies. If the political pressures to support local economies described by respondents were not euphemisms for maximizing timber harvest, then it would seem logical to explore other mechanisms for local economic infusions.

While ecological restoration may not always provide as many multipliers or positive externalities in the form of timber supplied to markets, ecological restoration projects can certainly provide jobs and deliver social benefits by virtue of the natural resource restoration industry. The Bitterroot Valley, in fact, is home to one of the nation’s preeminent private restoration companies—Bitterroot Restoration, which employs more than 80 full time and 50 seasonal employees (Associated Press, October 2, 2001). Moreover, ecological restoration projects bolster myriad non-market or indirect market values: intrinsic values, health values, recreation values, spiritual values, and others (Rolston 1994, Power 1996, Sienkiewicz 2004, Sienkiewicz 2005).
Some USFS respondents speak of the agency’s obligation to contribute to local economies by generating timber from the national forests (Interviews 6, 8, 9). Providing timber is one way to bolster local timber-based economies. (Although, it remains unclear how often national forest timber ends up in local economies and also whether or not local economies are the legal priority for national forest management.) Nonetheless, the notion that extractive projects are the only manner by which the USFS might support local and regional economic development is outmoded. If local economies are a de jure or de facto USFS priority, then the myriad means by which the agency might bolster such priorities deserve plenary, open discussion in the policy arena.

Due in part to the suite of federal environmental laws, today’s natural resource/ecological restoration market is burgeoning. This indicates some measure of structural shift away from resource extraction-dominated, public lands-based economies (Power 1996). The growing ecological restoration market suggests the onset of a natural resources-related/structural economic diversification, which, in turn, tends toward community stability (Power 1996). Such positive economic indicators reinforce the notion that value-balanced, multiple use management is a realistic and propitious goal for USFS managers on the BNF and elsewhere. Congress and the USFS Washington, D.C, office, of course, ultimately decide whether such management actions are funded.
Current statutory mandates indicate that economic goals relating to wood fiber production should not, across a large spatial and temporal scale, be dominant, but rather be considered alongside other co-equal uses:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes...

(a) “Multiple use” means: The management of all the various renewable surface resources of the national forests so that they are utilized in combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of productivity of the land, with consideration being given to the relative value of the various resources, and not necessarily the combination of uses that will give the greatest dollar return for the greatest unit output.

(b) “Sustained yield of the several products and services” means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land (16 U.S.C.A. § 531).

Thus, the elusive multiple use balance is the present paradigm, and managers must embrace that paradigm in all aspects of discretionary decision making.

Importantly, sometimes a single use will be dominant at smaller scales of analysis. This is legal so long as other legal mandates are followed (Glicksman and Coggins 2001). Managers would benefit by acknowledging this phenomenon when it occurs. That is to say, all management projects do not necessarily need to benefit all resource values all the time. A timber sale held primarily for economic purposes is legal so long as other requirements are met. Managers will benefit by saying as much
publicly. BNF managers lost credibility by arguing post-fire salvage operations were primarily conducted to promote ecological restoration and species protection. This rationale was unpersuasive.

**Obey the Law, Tell the Truth, Embrace Conflict, Honor Complexity**

When faced with conflict, USFS managers would benefit by holding fast to ecological and policy realities. Continually changing terms and reframing core issues begets conflict. This pattern of reframing issues intentionally or unintentionally confuses matters. As a consequence, the agency may often appear disingenuous to those stakeholders who demand precise language and remain suspect of undefined terms such as “forest health” or “restoration” (Vaughn and Cortner 2005).

By way of example, Kootenai National Forest (KNF) Supervisor Bob Castaneda recently removed the term “wilderness” from the KNF’s most recent forest plan revision. “Wilderness,” Castaneda said, has become “a conflict word” (*Missoulian*, October 21, 2005). Though Supervisor Castaneda does not spurn the idea of wilderness (*Missoulian*, October 21, 2005), his tack is common among USFS managers: reframe controversial issues in vague terms (Vaughn and Cortner 2005).

If it hints of conflict, call it something else. Political appointees, congressional representatives, and rhetoric writers perpetuate and promulgate such behavior in the interest of securing favorable public opinion (Vaughn and Cortner 2005). This pattern is often ironic in that it attempts to manipulate public opinion in support of particular management, but begets an opposite result among those who follow agency policy. Agency managers are left to address discrepancies between rhetoric and reality. As occurred when the BNF marked 2005’s Middle East Fork Sale before the
agency had completed the public comment period, any explanation of ostensibly arbitrary and capricious agency action appears to be contrived relative to what has already occurred on the ground.

**Lawsuit Success vs. Lawsuit Volume**

The pervasive rhetorical warfare now associated with modern public land policy (Vaughn and Cortner 2005) is as old as politics itself. One wonders why semantic wrangling of the present degree did not burden the public lands sooner. But beyond the war of words, USFS managers would benefit by acknowledging the importance of meaningful relationships with traditional enemies and embracing a spirit of experimentation by implementing exogenously-generated or collaborative (in the literal sense) management alternatives. Without such experimentation, stakeholders will continue to sue the agency whenever a persuasive fact pattern presents itself as it did in the Bitterroot Valley following the wildfires of 2000. Some are apt to cite the USFS' success in litigation as proof of legitimacy. This however is a dangerous notion. Even if polls show a 78-82% public approval rating (Interview 12), the presence of a significant litigation volume is, in and of itself, an indicator of significant management and policy problems.

A 2005 *Forestry Source* article described the USFS' overwhelming success rate in defending lawsuits (Forestry Source 2005). The article comprises an incomplete presentation of germane statistics. The fact that the USFS wins most of the cases filed against it does not appear to be the critical issue. Students of administrative law understand notions of agency deference and that high probabilities for litigation success apply to most federal agencies. The telling statistic relates to the actual
volume of cases filed against the USFS. From 1989 to 2002, litigants filed 731 lawsuits against the USFS that “challenge national forest management decisions or allege that the agency has failed to follow statutory requirements” (Forestry Source 2005). Independent of win-loss percentages, such suit volumes are indicative of broken stakeholder relationships and the absence of ongoing dialogue. It would thus be imprudent to deny the underlying policy problem. Moreover, what are the direct and opportunity costs of defending 50 - 60 federal lawsuits each year? They are significant to say the least.

The Society of American Foresters’ Forestry Source continues, quoting the cited study’s primary author, Professor Bob Malmsheimer:

If there’s a message here that needs to get out there to the public, it is that the courts find the Forest Service does things correctly the vast majority of the time (Forestry Source 2005).

Professor Malmsheimer’s above conclusion misses critical issues. His advocacy of the stated position fails to account for the notion that deference to agency discretion or decision making does not equate to doing things correctly—in effect, many cases such as Wilderness Society v. Rey are pursued on procedural grounds because this is the most expedient approach. As occurred in the post-fire litigation on the Bitterroot, power players in the environmental community (by virtue of legal staff and litigation budgets) often abandon substantive claims surrounding the agency’s scientific conclusions and their application to local ecosystems. It would make sense that those footing the bill should prefer the least expensive course of action. Thus, whether or not the USFS obeys the law as a matter of procedure or as a matter of substance is an important distinction.
One cannot claim that the Forest Service does things correctly the vast majority of the time, without discussion of particular facts of each case. Nonetheless, the Healthy Forest Restoration Act’s associated rhetoric teaches that validity varies drastically depending upon how one defines critical terms (Abrams et al. 2005). Here defining the term “correctly”—as in doing things correctly a vast majority of the time, is of critical importance.

The Forestry Source article and Professor Malmsheimer’s quoted words paint with a broad brush. Moreover, no matter what a court holds, if an agency is subject to suit more than 700 times in approximately one dozen years on land-related issues alone, then it may not be “doing things correctly [a] vast majority of the time.” The notion that public sentiment does not matter unless a court says it matters would tend to place the USFS in a technocratic, expertocratic, or synoptic paradigm, and is contrary to models of deliberative democracy as applied to public land management agencies. In this sense, the agency that does what it pleases until a court dictates otherwise is an agency destined to experience significant problems, on many fronts and at multiple spatial and temporal scales. By establishing a more deliberative democratic paradigm, by reaching out, by moving past existing enmity, and honoring public input, by making final decisions reflective of input, USFS managers may better achieve success in balancing preservation of public resources with the sustainable extraction of public resources.

The DNRC was Effective at Maintaining Working Relationships

The USFS would benefit by examining the DNRC’s 2000 post-fire cooperative efforts as a management model. If avoiding lawsuits and their formidable direct and
opportunity costs is desirable, then the USFS would not look merely to minimum obligations for citizen participation under the law, but to proactively include “the squeaky wheels” in the planning process. In some instances this is perhaps akin to asking Jewish and Palestinian militants to sit down and develop a plan for the equitable habitation of the Gaza strip. There exists between some managers and some stakeholders enmity, hatred, animosity, history, and culture with which to contend. One need only observe the interactions between particular USFS managers and particular stakeholders during public meetings or other fora to draw such a conclusion. Here again, managers unable to function as both diplomats and multifaceted experts in natural resources and public lands will be unable to effectively manage public lands and resources.

It is dangerous and perhaps disingenuous for USFS managers to classify, categorize, or pre-judge opposition to management projects based on the manager’s instinctual notions of national support for the administration or for its policies. This is so for many reasons, but practically speaking, it is so because supposed supporters will not be apt to sue the agency; it is the spurned opposition that will sue the agency. For this reason, the “squeaky wheels” must be taken seriously, no matter the values they represent. They matter because they wield the power to sue, to burden, and to actuate diversion of scarce resources away from land management. For these reasons and perhaps others, such interests deserve respectful inclusion in the management process. Such an approach is pragmatic, and need not be personal.

DNRC managers proved that long-term personal relationships with stakeholders have tangible benefits. As counter-intuitive as it might seem to federal managers
(who wield final discretion to either ignore or account for public comment on land management projects), it is the dissent to whom managers must reach out. The DNRC was able to do this following the 2000 fires, and did so without resentment or insecurity.

**Spin Begets Spin**

Some agency critics, including advocates for zero timber cut on public forests, respond to rhetorical manipulation of ostensibly propitious concepts such as “forest health” and “restoration” (Vaughn and Cortner 2005) with comparably euphemistic tactics, which may include marketing and data selection which tends to ignore any instances of positive management or data that might undermine their unspoken cause. Moreover, some environmental interests will seize upon the inevitable administrative, procedural, or implementation-related mistakes, when such mistakes might well be forgiven as a byproduct of behemoth bureaucracy. This vicious cycle is nothing new to the agency, but what managers fail to see is that a policy of incorporating traditional enemies into the planning process in a meaningful way would do much to break the cycle of conflict. USFS managers might experiment with relinquishing some measure of their final discretion on management projects. Doing so might deter lawsuits that can—after much expense to all involved—render the same final discretion moot. Importantly, DNRC managers showed that this exploration best takes place before a project proposal.

**Public Land Law: More Burdensome than Other Genres?**

Environmental and public land law is manifold and complicated, but is perhaps no more confounding than tax law, or constitutional law, or international trade law. The
BNF and the USFS, and the agency leadership generally, do not address germane law and legal-scientific issues on a forest by forest basis. What USFS leaders do understand of law, they tend to spurn as it hampers technocratic or expertocratic public land management models. Thus, there exists a tension between USFS management models, and the more deliberative, less technocratic models promoted by environmental and public land law. Public land law stymies unilateral discretion and as a whole embraces ecological and intellectual humility. This reality stands in opposition to the USFS' historical culture (Pinchot 1947, Hirt 1994) and the culture of forestry as a profession (Pinchot 1947, Clary 1986). Perhaps mirroring its inability to account for ecological notions at multiple temporal and spatial scales, the USFS has not understood the import of addressing law, politics, and conflict across various organizational and regional levels.

Professor Jerry Franklin once said that humans have a perceptual bias against appreciating temporal and spatial scales beyond our own (Franklin 2001). To this effect, the Bitterroot conflicts suggest that the USFS has been unable to perceive conflict resolution and negotiation of the legal maze at scales other than that of a behemoth national bureaucracy. Sending in a team of lawyers from Washington D.C. or a regional office to handle a local forest’s legal troubles will usually accomplish little but pecuniary waste. Thus, the government attorneys’ failure to grasp the basic inadequacies of their own arguments in Wilderness Society v. Rey, or their being forced to argue a certain way for political reasons (Thomas and Sienkiewicz 2005) is not surprising.
**Political Speak & Forest Management**

The debate over public lands issues is ineffective in that it fails to address underlying values and acknowledge trade-offs that might be relatively straightforward and conflict-free were they not mischaracterized by appointees, managers, and elected officials. Some USFS managers at local and regional levels seem simply to be victims of their own narrow training. Some fail to see that the language they perceive as protecting an image of science, equity, and ecological integrity in actuality bespeaks the technocratic language of traditional forestry. If a manager speaks of restoration and ecological integrity, then in order to avoid conflict, she must understand, from an ecological perspective, the import of every aspect of an ecosystem from bark beetle invasions, to root fungus, to drought and climate change, to wildlife, to wildfire and other disturbances of varying severities, scales, and degrees.

Certainly, within the holistic management context, knowledge of wood fiber production is a valid part of multiple use management, but the holism embraced by ecology naturally encompasses “forestry” and its inherent commodity-based focus on wood production. During the aftermath of the fires of 2000, the BNF aggressively marketed an extensive salvage logging operation as ecologically restorative. Again, forestry is for many reasons auspicious, but as Jack Ward Thomas noted, sometimes a cigar is just a cigar, arguing otherwise is asking for trouble—especially absent important qualifying details (Interview 27). The BNF post-fire salvage and restoration activities might have generated less conflict if marketed in economic terms.
Lifelong Learning

It is critical that the agency fill its leadership positions with not merely intellectually and ecologically humble managers, but managers committed to embracing both internal and exogenous science, reading and researching an array of germane knowledge regarding any single management decision as a federal judge would approach a complex case with her team of clerks. Statutory and common law are key among critical knowledge bases. It is insufficient to rely on a career specialist to be the perpetual source of best science and information on any management-related matter. There simply exists too much pressure and incentive to respond in accordance with *de facto* agency culture rather than questioning core assumptions about ecological, political, and social relationships between humans and the public lands ecosystems (Matson 1996).

The USFS might encourage managers to constantly seek out the latest science—in many genres—not merely that promoted by the forestry infrastructure. Forestry is based in economic values. Thus to the extent forestry culture is dominant within a multiple use agency, controversy will continue (Interviews 15, 16, 17, 18, 19, 24, 26B, 26C, 27). The USFS might look to giving all managers access to online databases as universities do for their professors and students. Scientific information is expensive to access, but likely worth the expenditures in the context of public lands. A manager should be part researcher, part scientist, part administrator, part lawyer.
Looking Beneath the Turmoil

Managers must use intuition as much as esoteric knowledge to balance values and avoid stalemate. The Bitterroot conflict was manifold in its variety of issues, but the crux issues seem obvious in hindsight. What opponents of USFS-generated management plans fought for were roadless areas, sensitive watersheds, associated ecological values, and some measure of influence over outcomes on the public forests of the Bitterroot Valley. To the degree the BNF wanted (or needed) to generate timber for local markets, it could have invited stakeholders to the table to develop a collaborative plan to meet common needs and address concerns. It was the BNF/USFS’ decision-making unilateralism, de facto preferences, and traditional forestry culture as much as any substantive issue of forest science or ecology that generated conflict and enmity following the fires of 2000. The same can be said for 2005’s Middle East Fork Sale. Importantly, as Supervisor Bull argued, congressionally-influenced budgets and USFS central office decisions appeared to drive the BNF’s post-fire decision making as much as any other factors (Interviews 8, 9, 27, Giltmier in Steen 2005).

While acknowledging budgetary constraints and political pressures working upon managers such as Supervisor Bull; the USFS might look to the DNRC managers’ infusion of deliberative democratic traits.

While the DNRC wielded clear legal authority under the trust land doctrine to operate in a more unilateral fashion, it embraced critics, made significant concessions to stakeholders concerned with ecological integrity, and did not hesitate to do so prior to deciding upon major management details. The DNRC and its managers continue
to benefit from ongoing goodwill and working relationships with those same stakeholders that some BNF employees consider to be enemies. The DNRC embraces openness, cooperation, pro-spective inclusion of stakeholders, and does not tend to marginalize stakeholders or generalize to core values of the larger society.

To the degree ecological integrity is important and sustaining ecological integrity is important then USFS managers might acknowledge these impacts publicly so that stakeholders might make informed decisions as to what forest values should take priority in any given circumstances. To the degree that the dialogue is ineffective, incomplete, or dishonest, then notions of public input into public land management are fallacious. Without a clear picture of desired short, mid, and long-term ecological conditions—then any discussion or argument as to appropriate management is for naught.

**Deliberative Democracy and Public Participation**

The USFS might move toward breaking the vicious cycle of litigation by better responding to citizen participation, by maintaining an ongoing dialogue in the spirit of deliberative democratic principles. Without shirking its congressionally-delegated responsibilities, the USFS might better incorporate into management the broad and diverse input it receives regarding discretionary management. Adoption of a formal process allowing the USFS to do so would effectively counter political pressures being exerted from other fronts.

**Public Lands, Public Ownership**

The concept of public lands is self evident. They are meant to be maintained and managed for the whole citizenry. The sense of entitlement to these lands felt by
diverse stakeholders will not likely diminish. In a strident defense of nationally-held public lands from the *County Movement* (that would have seen those lands privatized) former USFS Chief, Jack Ward Thomas, invoked public welfare and its dependence on the public lands:

Speaking for myself, I won't stand for [making public lands private] for me and I won't stand for it for my grandchildren and I won't stand for it for their children yet unborn. This heritage is too precious and so unique in the world to be traded away for potage. These lands are our lands—all the lands that most of us will ever own. These lands are ours today and our children's in years to come. Such a birthright stands alone in all the earth. Hell no! (Thomas 1995).

Public lands are of great personal value to a diverse citizenry. It is thus critical that USFS officials remain mindful of balancing management priorities, especially where public image is concerned. Adding complexity, these management priorities change over time (Hirt 1994, Thomas and Sienkiewicz 2005). Certainly, for many reasons, a literal balance of management activities would prove impossible at lesser scales, but the USFS must appear to be striving for this goal. On-the-ground action should always comport with what agency officials are relating to the public and to the media.

**Customer Service**

Where the USFS’ public relations and the BNF’s handling of post-fire conflict are concerned, one might invoke the business model of *McDonald’s* luminary CEO, Ray A. Kroc. Kroc believed that serving the customer was the overriding priority. If customers were happy, then the business would follow. The public attitude of employees, thought Kroc, was “make or break” with regard to customer satisfaction (Brooks 2005). Though the USFS is not a business *per se*, it could benefit from the
application of this model. As applied to the USFS, Kroc's truisms would simply translate into incorporating broad interests into planning activities, before being ordered to do so by a judicial body. The short-term inefficiencies of doing so are obvious, but it is likely that such a strategy would provide long-term gains under many criteria. Moreover, the USFS would be well served by managers who consider full public participation to be a job requirement, not a burden limiting would-be untrammeled discretion to manage the public estate. Candor, humility, and acknowledging both risks and benefits would garner the USFS much trust (Interviews 15, 16, 19, 24, 27).

A New Paradigm

Addressing the issue of citizen influence on public land management exposes innumerable sociopolitical interactions and profound complexity. Statutory law and common law can both be slow to change. This study offers no policy panacea, but moreover does not argue that traditional modes of participation in resource policy are always particularly effective, as every situation is different. Any mode of participation, voting, submitting comment, or filing suit, might be conducive to success under certain circumstances. Generally, however, these methods leave citizens dissatisfied.

The unique, personal, and visceral nature of the public land resource would ideally reflect a citizen-policy relationship that is more democratic, in the deliberative democratic sense, than that of other policy genres. Many of the values attached to public lands and resources; wildlife, open space, recreation, grazing opportunities, flowing water, wilderness, renewable extractive resources; are inherently public in
nature. They can be thought of as being simultaneously owned by all and owned by none. Thus, the management process might better reflect the public qualities inherent to the federal lands. Indeed, the tumultuous history of the public lands and resources suggests their contemporary policy directives require a different approach.

As Wallace Stegner suggested in the famous Wilderness Letter (1960), there is much of the public lands in the American character. Likewise, there is much of the American character in the public lands. Perhaps, a new direction beckons the land agencies. Without invoking quaint concepts, the USFS (and perhaps, to a lesser extent, the other land agencies) might consider moving toward more inclusive management in the deliberative tradition. Inclusivity, in this sense, must entail going beyond the limits of public participation required by the APA, the NEPA, and other statutes within what Poisner (1996) considers to be the extant synoptic, non-deliberative paradigm.

This would entail relinquishing some, but not all, rightful agency discretion. It would entail some measure of power transfer, not merely to local communities, but to all of the legal owners of public lands—to all Americans. These need not violate the strictures of non-delegation of agency duties, but would simply comprise a better response to those that take the time to participate, especially where it contradicted the decision maker’s personal values. Those who vote determine the makeup of political leadership. Those who show up, make the rules. Of those USFS managers who tend to discount form letters and e-mailed comments (Interview 36, Missoula Independent, November 10, 2005, Missoula Independent, November 17, 2005), one is tempted ask what would happen if state voting boards discounted absentee ballots, online votes, or
standard ballots that did not include an expository essay explaining the voter’s choices? In the complex and cumbersome American polity, one who does not speak up is not heard. Should public lands governance differ from other policy arenas?

Measures to a more collaborative end would couple well with extant processes such as notice and comment rulemaking and NEPA planning. Participation thresholds might be used to gauge prevailing popular sentiment regarding specific policies, such as roadless area protection or weed spraying in wilderness areas. Some democratization of management policies would be allowable under the present legal scheme (Wondolleck and Ryan 1999). The true obstacles to such a paradigm shift relate to congressional culture and politically-driven budgets and the agency culture that results (Wondolleck and Yaffee 2000). Budgets are, after all, the ultimate policy document and prioritization of scarce resources toward competing values (Thomas and Sienkiewicz 2005).

When public conflict arises, USFS managers should acknowledge that public lands, and their employment thereupon, concerns people as much as it concerns ecosystems and natural resources, thus the dialogue-focus of deliberative democracy seems directly applicable. Montana’s DNRC managers seem to have formally adopted this stance by virtue of their working relationships with those who disagree with overarching policy and management goals (Interviews 7, 20, 22, 23, 28).
Chapter 9

Conclusion: Disparate Outcomes between the BNF and the DNRC

Trust Land Mandate vs. Multiple Use

The DNRC successfully avoided public conflict and legal disputes, while the BNF became embroiled in public conflict and legal battles. Why the differing outcomes as between DNRC and BNF? The DNRC, undeniably, benefited from a relatively simple mission. Certainly, there are complexities and ambiguities within the trust land mandate to manage lands primarily for perpetual revenue generation. However following the wildfires of 2000, the burned timber of the Sula State Forest was simply more valuable from a market perspective as salvaged timber than as standing and/or downed woody structure within an ecosystem. Within the trust land mandate, there was little ambiguity or room for legal or administrative challenge, at least in the short-term.

Equivocation and Tenuous Rationales

The BNF, on the other hand, was bound to manage within the ambiguous legal framework of the multiple use mandate. Nonetheless, the BNF exacerbated existing value-related tensions by proposing extensive salvage and attempting to justify its actions, both in the media and in federal court, under ecological terms. To say the least, the notion that salvage logging is ecologically restorative comprises an unsettled scientific question. A federal court of appeals case, Ecology Center v. Austin (430 F.3d 1057 (2005)), recently asserted as much. In furtherance of the notion that salvage logging as ecologically restorative comprises an unsettled scientific question, Donato et al. (2006) note,
Recent increases in wildfire activity in the United States have intensified controversies surrounding the management of public forests after large fires. The view that postfire (salvage) logging diminishes fire risk via fuel reduction, and that forests will not adequately regenerate without intervention that includes logging and planting is widely held and commonly cited. An alternative view maintains that postfire logging is detrimental to long-term forest development, wildlife habitat, and other ecosystem functions. Our data show that postfire logging, by removing naturally seeded conifers and increasing surface fuel loads, can be counterproductive to goals of forest regeneration and fuel reduction. In addition, forest regeneration is not necessarily in crisis across all burned forest landscapes. [Our] results suggest that postfire logging may conflict with ecosystem recovery goals.

As Donato et al.’s conclusions (2006) suggest, basing large scale, programmatic post-fire management plans on general notions that salvage logging is “good for ecosystems” is problematic. That said, the USFS and the BNF have the legal right to harvest timber. Perhaps dialogue should have begun with this more honest premise, that the BNF desired for certain reasons (to be outlined for the public) to produce X volume of timber for market purposes. This discussion never occurred.

In short, the BNF proposed a large-scale salvage project for which many, even among industry stakeholders, argued the BNF had inadequate resources to undertake (Interviews 10, 11, 37). Moreover, the BNF attempted to justify this salvage operation with questionable and equivocal rationales, allowing critics to expose imprecise and inadequate explanations for proposed action.

**Dialogue & Deliberative Democracy**

Neither the DNRC nor the BNF could reasonably be considered deliberative democratic agencies. Both are steeped in technocratic “natural resource professional” cultures. Moreover, DNRC managers work under the relative clarity and ease of the trust land mandate to maximize revenue generation in perpetuity. Nonetheless, DNRC managers and administrators such as Bud Clinch, Tom Schultz, and DNRC
field foresters embraced a more deliberative democratic approach to management following the wildfires of 2000. They did so even though the jurisprudence of trust land law allow for a largely technocratic, unilateral management structure. DNRC managers operated on the assumption that long-term benefits and trusting relationships can result from ongoing dialogue, mutual respect with stakeholders, and candor as to administrative realities and the limits of compromise. DNRC managers seem to have benefited from this assumption. Many of the same stakeholders that sued the BNF expressed trust and respect for DNRC managers despite significant philosophical differences. Critically, DNRC managers seemed to set aside formal management frameworks such as Montana’s version of the NEPA (MEPA) and simply address stakeholders on personal terms, proactively discussing goals and desires and offering compromise where legally, there was no requirement to make any such concessions.

There was, for example, no legal requirement for DNRC managers to leave green trees or moribund trees. Managers did so merely out of compromise, in the context of ongoing dialogue with stakeholders such as the Friends of the Bitterroot, with whom USFS managers were unable to maintain dialogue. Certainly the enmity existing between certain stakeholders and certain BNF managers was a two-way street. Nonetheless, the ongoing dialogue and deliberative approach fostered by DNRC managers diminished the potential for critiques claiming aloofness, unilateralism, technocracy, or violation of laws promoting public participation.
Political Support and Funding

Beyond the DNRC's proactive, collaborative, and cooperative efforts, the agency and its salvage logging efforts enjoyed the open and outspoken political support of the Montana Governor's administration. This is a significant variable mostly because this support was backed by funding which would allow for immediate action. The BNF, on the other hand, and by virtue of long standing national forest administrative procedures, was not able to begin active salvage until the NEPA process had been completed.

Matters were, of course, exacerbated by unforeseen events relating to the court-ordered settlement agreement and subsequent fire season spending. In contrast to political support for the DNRC's salvage plans, political support for salvage logging on the BNF came in the form of public criticism of the BNF having to follow environmental laws such as the NEPA, and was not backed with immediate cash-in-hand to conduct work. In effect, political support for federal land salvage logging ignored legal-administrative realities, and pitted environmentalists against loggers.

This is an age-old polemic, and the results were predictable. Thus, the notion that the BNF could have acted with anywhere near the speed as did the DNRC is ill-conceived and exhibits significant ignorance of the many laws, regulations, and political realities under whose confines the BNF must operate.

Given the convoluted fact pattern and complex chain of events that comprised the post-fire conflicts, the BNF/USFS leadership might begin the process of institutional learning by opening a dialogue, establishing and maintaining relationships with stakeholder groups, and in general, injecting—as John Dewey prescribed—more
democracy into the established processes, frameworks, and political constraints under which it presently operates.
Afterword

In 2006, the scholarly journal *Science* published a study (Donato et al.) addressing post-fire salvage logging’s ecological ramifications. *Science* initially published an on-line version in *Science Express*. The on-line version of the study found that where ecological recovery is the management goal, post-fire salvage logging is not necessarily the most prudent management approach on burned forests (Donato et al. 2006). Prior to release of the study’s print-version, forestry professors and professionals attempted to delay, suppress, and/or qualify the study (*Associated Press* 2006, *Oregonian*, January 20, 2006).

*Science* Editor and former Stanford University President, Donald Kennedy, refused what he called attempts at “censorship” and published the print version of the study, noting that “those who dispute the findings can respond to the study once it is published” (*Associated Press* 2006). An *Oregonian* article noted that “James Karr, a professor of fisheries and biology at the University of Washington who has criticized logging after fires, said he is ‘appalled at the way this is playing out.’ He said the turmoil is having a chilling effect on other OSU researchers” (January 20, 2006).

Before the print-version of the study had been published, Hal Salwasser, Dean of Oregon State University’s College of Forestry, circulated a memo that made its way around the country, noting, “It is imperative that major policy decisions be made based on the full body of available research and after thorough scientific dialogue and review” (Salwasser 2006). Salwasser suggested that Donato et al.’s study lacked context (Salwasser 2006). Salwasser generally attempted to qualify or disqualify (depending upon one’s perspective) some of the study’s findings (Salwasser 2006).
Dean Salwasser has testified in favor of legislation that would accelerate logging after wildfires (Associated Press 2006, Oregonian, January 20, 2006).

Salwasser noted that he had asked the authors to make changes in the paper, i.e., he felt that Donato's paper went too far in its conclusions. However, Salwasser disagreed with attempts by some to keep the study out of Science (Oregonian, January 20, 2006). University of Washington Professor and noted fire ecologist James Agee stated, "[the OSU critics] have lost a little perspective on this. Donato works under Beverly Law, an associate professor in the College of Forestry and the senior author of the research paper" (Oregonian, January 20, 2006). As for Donato, he noted that the authors “stand behind their study and believe any response to their work should undergo the same scrutiny and review that their research did” (Oregonian, January 20, 2006).

Before publication of the print version of the paper in Science, the authors removed one controversial sentence that had appeared in the online version: "The results presented here suggest that postfire logging may conflict with ecosystem recovery goals." Donato would not explain why it was taken out (Oregonian, January 20, 2006).

Why the conflict over what is merely one more scientific paper? Why the defensive response from the forestry community? There is clearly more to this debate than science. Scientific studies such as Donato’s hold the potential to sway the political balance of power with regard to germane policy issues. Stakeholders stand to gain or lose standing in the court of public opinion based on the science they might either marshal to their cause or make the target of their slings and arrows.
All should admit that there is inherent complexity and uncertainty in ecological systems. Thus all might value some measure of scientific debate and dialogue. Beneath the science, however, this debate comes down to values. In the public lands context, those who would defend the right to log national forests, burned or green, will tend to support the notion that salvage logging is ecologically restorative. Those who question the assumption that human intervention is always the most prudent course of action are apt to support findings such as Donato et al.'s, which suggest nature often knows how best to restore its own systems after ecological disturbances. This dichotomy exists independent of scientific facts and debate. Nonetheless, values and science are oft-inter-tangled, but rarely labeled as such in public debate.

This debate is further complicated by the notion that those in support of salvage logging and active replanting after burns generally think of “recovery” as speeding a system to produce wood fiber for future harvest. Those in support of natural “recovery” would tend to support untrammeled ecological parts, processes, and interactions free of human intervention. Proponents of the latter value set would tend to be primarily concerned with issues such as sediment loading to streams and ecosystem responses to re-planting a burn site with seedlings of genetic stock foreign to the burn site’s native ecological communities. Proponents of the former value set would tend to be primarily concerned with issues such as seedling recruitment and mortality rates. This is so because long-term sustained-yield wood production is forestry’s primary goal.

The crux tension comes again to two different contingents using the same or similar language and concepts, e.g., “restoration” and “ecosystem recovery,” but
operating upon dramatically different underlying assumptions and definitions of key terms and concepts. Are national forest managers to leave burned tracts of public lands as untrammeled wilderness; to “restore” burns to monoculture tree farms of species demanded by commodity markets; or to manage for desired conditions comprising some middle ground between these two extremes?

Herein lies the rub. How are public land managers to approach burned areas? Were the communications effective, the dialogue honest, and the mission and management priorities of national forests clear, then much adversarial energy might be directed toward productive ends. There is, at present, a movement among the environmental and ecological communities to impress upon public lands agencies the idea that wildfire burns comprise an underrepresented ecological niche and should be seen as more than standing raw material for commodity production. There is certainly merit in the notion that burned areas may be an underserved ecological niche. Nonetheless, public and private forest management in the United States has traditionally viewed burns primarily as an opportunity for the salvage logging of trees that would otherwise fall down and rot. This is the mindset has long been the forestry status quo.

Ecologists and environmentalists would respond to such views, by noting that every variable within an ecosystem—burned or unburned—serves an important function, including standing and downed burned trees. “Nurse logs,” “snags & cavity nesting birds,” “coarse-woody debris,” and many other ecological concepts are associated with the very same ecosystem variables that traditional foresters might view as “decadent,” “rotting,” “over-mature,” and “wasteful.” Can public national
forest management bridge this cultural gap between ecologists and foresters, between preservation and use? The answer is yes, but we are not yet there.

Burned areas and associated species such as the black-backed woodpecker (*Picoides arcticus*) seem poised to become to the early 21st century what late succession old-growth stands and the northern spotted owl (*Strix occidentalis caurina*) were to the late 20th century. Burned forests seem to have become the most recent battle grounds in the traditional American conflict between proponents of public lands preservation and proponents of public lands use. Associated threatened and endangered species have before, and will again, become proxies for both leaving national forest ecosystems alone to serve as habitat and haven, and harnessing their commodity values for utilitarian purposes.

Where public lands are concerned, mission clarity and honest debate about underlying values would do much to elevate public lands management above such conflicts. Were there a clear mission, and perhaps one or two clear priorities, as to what Americans wanted of their burned public forests—lumber, habitat, jobs, all of the above?—such conflicts as the Bitterroot aftermath might remain within the realms of academe and natural resources professionals as opposed making their way into the judicial system.
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212


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Appendix A

Further Themes or Patterns of Understanding as Exhibited by Respondent-generated Data/Expressed by Respondents

DNRC

• The DNRC actively engages in ‘salvage to restore’ management also called budget maximizing behavior.

• The DNRC leadership actively promulgated the agency’s mission and priorities.

• DNRC managers operated under a clear mission and system of resource prioritization.

• The DNRC’s clear mission simplified management priorities for both managers and public participants.

• The DNRC dealt with problems of spatial scale and socio-political and legal complexity that were less onerous than those BNF managers faced.

• Contrary to some rhetoric, DNRC management following the fires of 2000 was not “perfect.” There were pitfalls and controversial instances.

• The DNRC leadership actively encouraged proactive cooperation and collaboration with participating stakeholders.

• DNRC managers, in turn, proactively sought to involve stakeholders in management project planning.

• DNRC managers nurtured relationships with involved stakeholders before, during, and after salvage operations.

• DNRC managers involved stakeholders in actual planning processes, informally as well as formally.

• DNRC managers exhibited respect for those in opposition to the trust land management paradigm of revenue generation.

• The DNRC listened to stakeholder input and made compromises it was not (by law) required to make—in part to maintain working relationships with stakeholders it otherwise might alienate.

• The DNRC incorporated exogenous (NGO) concerns into its salvage operations.

• The DNRC kept/keeps its promises.
• DNRC managers did not generalize to or make assumptions about the broad, uninvolved population on the basis of those participating in comment, analysis, and project planning.

• DNRC managers did not marginalize participants as “squeaky wheel” or “vocal minority.”

• DNRC managers operated under auspices of open, transparent political support for salvage logging.

• DNRC managers do not feel political pressure to publicly portray resource extraction as other than resource extraction.

• DNRC managers do not tend to associate “salvage logging” with “restoration”/”forest health,” or view such terms as synonyms.

• The DNRC benefited from auspicious cold weather and frozen ground which helped to mitigate impact of mechanical treatments/salvage logging as well as public perceptions as to protection of ecological integrity.

• From the criteria of ecological disturbance the DNRC was the beneficiary of good (cold) weather and good fortune (frozen ground).

• The DNRC was also the beneficiary of its own planning, citizen involvement, and efforts to harvest during winter when ecological impact could be mitigated.

• The DNRC’s management mission and the specifics of trust land law contributed to the relative absence of political conflict in Montana Trust Land Management.

• The DNRC’s management mission, however, was among several factors that helped post-fire management occur with little conflict.

• The DNRC is results driven more than it is driven by process.

• The state trust land doctrine allowed management to focus more on results than process.

BNF/USFS

• The BNF/USFS actively engages in ‘salvage to restore’ management, also called budget maximizing behavior.

• There was pre-existing enmity between BNF managers and environmental interests prior to the fires of 2000.
• BNF Managers were/remain subject to significant political pressure in the form of direct contact from regional and national officials.

• USFS 'culture' frowns upon managers publicly discussing problems of budget, culture, political pressures, and values.

• BNF managers were/are subject to significant political pressure in the form of budgets favoring extractive projects such as timber salvage.

• USFS Managers had/have no formal, objective balancing tests for deciding on a preferred option under the NEPA/the APA/the ARA, thus agency culture, political pressures, and the decision maker's personal values can wield significant influence public land management projects.

• Washington D.C. officials are increasingly involved in regional and local project-level decisions on the BNF and other forests.

• Chief Bosworth, Undersecretary Rey, or Secretary Johanns could likely have mitigated the loss of restoration funds and the agency’s failure to quickly replace them. These high ranking officials did not consider doing so a priority.

• Supervisor Bull's decisions were/are largely tied by the budgets created for BNF by Congress.

• Budgets created for the BNF by Congress significantly influenced/influence Supervisor Bull's discretionary decisions.

• The BNF's marking of 2005's Middle East Fork Sale prior to completion of the public comment period strongly suggests a 'hollow' NEPA process on some or many BNF projects—that is to say, decisions seem largely to be decided prior to completion of the NEPA process.

• Political manipulation of natural resource rhetoric and semantic wordplay or "spin" encourages misunderstanding of forest management and ecological principals.

• By virtue of its recent actions, the BNF and its leadership appear to discount laws relating to public participation, such as the NEPA, the APA, & the ARA.

• USFS and congressional budget processes have encouraged resource extraction—not participatory measures or restoration projects.

• The BNF prioritized salvage logging projects by shoring-up funds for such projects vis-à-vis signing work contracts, thus actuating criticism and claims of timber primacy.
• USFS hiring practices tend to favor internal candidates and other preferred applicant categories that are unrelated to an applicant’s expertise. In this respect USFS/government hiring seeks to fill positions based upon many criteria unrelated to a candidate’s resource management capacity.

• Many USFS decision makers are ill-equipped to balance complex decisions entailing thorough understanding of scientific disciplines, law, policy, economics, and politics.

• Many USFS employees consider claims of timber primacy to be unfounded based upon timber volume extracted from USFS lands as compared to volumes extracted during the 1980s.

Other

• Some critics of the USFS consider the ecological harm actuated by USFS management of public lands so significant, that the status quo timber harvest rates will not soon compensate for cumulative effects of past management.

• No participants in the court-ordered settlement agreement found it to be a fulfilling or successful process.

• All participants in the BAR settlement felt they had “lost.”
### Appendix B: Select Laws: Abbreviations and Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>APA</td>
<td>Administrative Procedure Act (1966)</td>
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<td>ARA</td>
<td>Appeals Reform Act (1992)</td>
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<td>ESA</td>
<td>Endangered Species Act (1973)</td>
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<tr>
<td>FLPMA</td>
<td>Federal Land Policy and Management Act (1976)</td>
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<tr>
<td>HFRA</td>
<td>Healthy Forest Restoration Act (2003)</td>
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<td>Mont. Const.</td>
<td>Montana Constitution (1973)</td>
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<td>MUSYA</td>
<td>Multiple Use and Sustained Yield Act (1960)</td>
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<tr>
<td>NEPA</td>
<td>National Environmental Policy Act (1969)</td>
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<td>NFMA</td>
<td>National Forest Management Act (1976)</td>
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<td>OA</td>
<td>United States Forest Service Organic Act (1897)</td>
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<tr>
<td>RPA</td>
<td>Forest and Rangeland Renewable Resources Planning Act (1974)</td>
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<tr>
<td>UMRA</td>
<td>Unfunded Mandates Reform Act (1995)</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>BAER</td>
<td>Burned Area Emergency Recovery (Team)</td>
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<td>BAR</td>
<td>Burned Area Recovery (Plan)</td>
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<td>BIRT</td>
<td>Bitterroot Interagency Recovery Team</td>
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<td>BBBF</td>
<td>Billions of Board Feet</td>
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<td>BLM</td>
<td>Bureau of Land Management</td>
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<td>BNF</td>
<td>Bitterroot National Forest</td>
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<td>BR</td>
<td>Bitterroot Restoration</td>
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<tr>
<td>CEQ</td>
<td>President's Council on Environmental Quality</td>
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<tr>
<td>CFR</td>
<td>Department of Natural Resources and Conservation (Montana)</td>
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<tr>
<td>DEIS</td>
<td>Draft Environmental Impact Statement</td>
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<td>EA</td>
<td>Environmental Assessment</td>
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<td>EIS</td>
<td>Environmental Impact Statement</td>
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<tr>
<td>FEIS</td>
<td>Final Environmental Impact Statement</td>
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<td>FWS</td>
<td>United States Fish and Wildlife Service</td>
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<td>FOB</td>
<td>Friends of the Bitterroot</td>
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<tr>
<td>FONSI</td>
<td>Finding of No Significant Impact</td>
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<td>LNF</td>
<td>Lolo National Forest</td>
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<tr>
<td>MMBF</td>
<td>Millions of Board Feet</td>
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<tr>
<td>NGO</td>
<td>Non-government Organization</td>
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<td>NFN</td>
<td>Native Forest Network</td>
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<td>NPS</td>
<td>National Park Service</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>OHV</td>
<td>Off Highway Vehicle</td>
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<td>ORV</td>
<td>Off Road Vehicle</td>
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<td>PAC</td>
<td>Political Action Committee</td>
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<td>ROD</td>
<td>Record of Decision</td>
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<td>SAF</td>
<td>Society of American Foresters</td>
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<td>SSF</td>
<td>Sula State Forest</td>
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<td>USDA</td>
<td>United States Department of Agriculture</td>
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<td>USFS</td>
<td>United States Forest Service</td>
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<tr>
<td>WUI</td>
<td>Wildland-Urban Interface</td>
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