Issues in forest practice legislation

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ISSUES IN FOREST PRACTICE LEGISLATION

By

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ABSTRACT

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The study was undertaken to determine why legislation to regulate forest management practices on private land has failed in Montana, and what steps could be taken to increase its chances of adoption. A method of comparison was used: studying the similar laws and proposals of other governmental entities for the purpose of gaining knowledge useful in Montana.

Before studying the laws themselves, the discussion addresses two basic issues of forest practice legislation. It identifies the political interests involved and their attitudes. And it considers the purpose and rationale of such legislation.

Seven options were selected for study. In addition to Montana's proposed law, the laws of California, Washington, Oregon and Idaho, the Environmental Protection Agency's model law and a Sediment Control Ordinance proposal of Lewis and Clark County (Helena) Conservation District were reviewed and briefed.

Comparison of these options revealed that the laws could be arranged in two general categories: the stricter ones, as represented by California's, and the milder ones such as Oregon's. The outstanding portions of each proposal were studied in light of its applicability to Montana's natural and political environment. In the course of the discussion, recommendations concerning new or altered provisions were set forth.

Several broad conclusions have been made. The first is that political opposition to forest practice legislation is not necessarily a function of its merits. But nevertheless, drafters of a bill can work toward certain goals: simplicity of language, bureaucratic accountability, protection of individual rights and attitudes, and future flexibility.
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The people of Montana are blessed with over 22 million acres of forest land, and all of the associated benefits. Almost 90 percent of the land is classified as commercially valuable--able to produce timber. Virtually every acre is rich in resources beyond timber.

There are roughly four acres of public forest land for every one of private. But there is only a three to two ratio of public to private commercial forest. It follows that commercial forest on private lands forms a higher percentage of the whole than on public lands.

This private forest resource is not eternal; it can be abused. In our state, some four million acres needed restocking or TSI work in 1975. Apparently, many owners and operators are failing to use that resource up to its potential. To the extent their actions are damaging the resource and society's welfare, the government has a responsibility to guide and direct them. This involves social, political and legal conflicts. This study recognizes those conflicts and suggests a legal solution to them.
Legislation is a construct of political compromises aimed at solving a technical problem. The problem must be felt by society—in this case the citizens of Montana—before being acted upon. In recommending forest practice legislation for Montana, I believe that a study of the history and the politics of past legislation and current proposals can be useful.

This is a study of the ways that people perceive a problem and react to its solution. It is a social study, rather than a technical or economic one. As such, it is subjective. There are no formal analytics, no list of parameters, variables and measuring devices. It is a study of how different segments of society react to different aspects and viewpoints of the same problem.

My approach is more that of a club than a scalpel. In politics, one can seldom analyze one variable minutely while keeping the others constant. Everything changes. This study reflects the belief that a more accurate set of recommendations can result from attacking every aspect of the problem superficially than from looking at one aspect, e.g. the economic effects of forest practice laws, in every detail.

In this study, I intend to determine whether legislation designed for us in Montana could be effective in both protecting the resources and satisfying the objectives of the people. The value of my work can
be judged in three steps: first, to what extent does my research attack the problem areas; second, are the research based conclusions valid; and third, do the recommendations adequately implement the conclusions? But the final test will be in taking the recommendations out of the book and into the field.
PART I

THE ROLE OF GOVERNMENT IN FOREST PRACTICE REGULATION
In the first part of this study, I wish to explore the philosophical issues behind forest practice regulation. I believe that it is appropriate and necessary to my case that I set out the social, economic and legal justifications of such legislation before I begin to consider its legal technology.

The role of government is that of provider of goods to its subjects and mediator of disputes among conflicting interests. "Regulation of these various and interfering interests," wrote James Madison in the 18th Century, "forms the principal task of modern legislation." The forest practice debate is no exception. I hope to explain the character and role of each of the involved interests in the debate, drawing from the writings and analyses of the members of these respective interests.

Any government action will please some parties and anger others, or fail to please all, equally. Planning and regulation tend to expand the rights and liberties of one
group (e.g. amenity users) while restricting another's (e.g. forest operators). Before acting, any potential planner should seek to find out whether, and how, his action is justified. My own discussion of the forest practice problem is brief, but points to a few key considerations.

One aspect of the general land use debate highlights in exemplary fashion both the legal and social controversy. Discussants of the "Taking Issue," as it is called, argue to what extent the government is justified in limiting the uses (and thereby the value) of land without providing compensation to its owner. I found from my research that in forest practice legislation, as with many resource issues, the popular opinion of the issue is more to be feared than its legal interpretation.

There are many other aspects to the problem which should be considered were it not for time and space limitations. The reader should consider these three discussions as a cursory review of the field of legal philosophy, not as a comprehensive justification of the forest practice laws.
CHAPTER ONE

INTERESTS AND CONFLICT

The first step to policy-making should be an identification and an understanding of the interests involved. Each group has its own view of the problem/solution.

Lawmakers assume that their objective is to maximize the sum of benefits to these groups. They carefully weigh the input of these groups, their testimony of gain or loss. And "net social benefit" need not be a monetary measure; the economic assumption that each individual tries to maximize his own welfare extends to unvalued satisfactions as well.

Forest management, as a form of land use, is a good example. The "highest and best use" that the forest land assessor sees is not always the landowner's--simply because not all of his value lies in monetary returns.

Land resources are at their highest and best use when they are used in such a manner as to provide an optimum return to their operators or to society. Depending on the criteria used, this return may be measured in strictly monetary terms, in intangible and social values, or in some combination of these values.

* Notes to the text are numbered and collected by Part, and appear at the close of each.
Whose values are influenced by a forest practice policy? The landowners cited above are but one group. Timber operators, who depend on the forest for their livelihood, are another. Foresters, representing both the need for forest products and for protection of the environment, are a third. And the community at large, the "public," anomic and diffuse nevertheless has its own values.

Large landowners

I have classified forest landowners into two groups: the large owners, chiefly represented by corporate ownerships, and small ones, of whom most are individuals or families. But, though I am constrained by the research others to categorize owners by the size of holding, I feel strongly that the more important difference is in the objectives of the owner.

Large tracts of land generally signify some conscious capital investment. It is with this assumption that most authorities state that large landowners seek monetary economic benefit from their land. Either the land produces a regular crop of timber or it is held for speculation, high intensity recreation or some similar use. Forest lands in this state are generally of better than average site quality, well-managed and readily bought under intensive management. (President's Advisory Panel on Timber and the Environment, (PAPTE) 1973).

The objective of the large forest landowner may be summarized (with some simplification) in a word: profit.
As opposed to public ownerships and small landowners, whose investment lies elsewhere, the survival of the industrial forest enterprise depends on its ability to make money.

Corporations have, in theory, an infinite life; therefore they have an indefinite planning horizon. This is ideally suited to the growing of trees. An individual lacks sufficient time-preference to value the future growth of an 80 year crop. The corporation, with its indefinite planning horizon and a continually producing unit, can visualize its income as a rate of return instead of a lump sum.

Industrial owners, contrary to some popular thought, have a strong economic interest in protection of the environment; the days of "cut out and get out" are over. The future income of the factory depends on its present maintenance.

As economic entities, industries follow the policies most efficient in producing the product. Government regulation, particularly added restrictions on sound management practices (notice of harvests, for example) reduces cost-effectiveness of its policies and creates a burden. Though most industrial owners genuinely favor protection of the growing environment "recent overzealous attempts by the public to regulate forest practices threaten to impose constraints beyond those needed to assure rapid growth of new timber crops."
Such regulation can be a disincentive to good forest practices by imposing additional, unnecessary costs. It will raise the manager's level of uncertainty (by causing him to operate closer to the margin), reduce the market supply of products and reallocate human and natural resources. The industrial land manager naturally favors the forest practice policy which imposes the least cost on his operation.

The forest industry has taken the initiative in promoting good forestry and thus its own welfare. Associations of forest products firms aggressively promote good forest planning and practice, both nationally and locally.\(^5\)

Industrial foresters and the SAF joined forces in response to public demands in West Virginia to draw up voluntary standards. (Paxton, 1973) In Mississippi, industry didn't wait for public outcry; they adopted their own guides in 1973. (Siegal, 1974) In Washington, one company, stating a "permanent policy of buying pulp logs from neighboring . . . woodland owners" outlined in a series of pamphlets good forest practices for every region of the state. (Crown Zellerbach, undated)

In Montana, the Western Wood Products Association, outlining its members' efforts to "eliminate the environmental problems it helps to create," notes policies designed to recognize the non-monetary values of the forest.\(^6\) (State of Montana, 1972) One of these policies, concerning road building, was quoted as follows:
Roads shall be planned, located and constructed to provide a minimum disturbance of the land for the standard required. They shall be designed and constructed to minimize erosion and stream siltation.  

Summarizing, the forest products industry -- the large landowner -- has become one of the foremost proponents of good land management practices. While they would prefer self-regulation, and probably fight strict controls by the state, they have supported and helped to draft legislation, including Montana's, to set standards for good forestry.

Small landowners

A small woodland generally consists of less than 5,000 acres, though one source limits it to 2,500. (Frutchey, 1965) But the importance of the division is not in acreage, but purpose of ownership. Small ownerships vary in site characteristics, size of holding, ownership objectives and other factors. (PAPTE, 1973) But the dominant characteristic of small forest owners is that the forest is not their primary source of income.

The status of a private woodland is almost always the reflection of its owner's goals. Groups may buy land for open space, individuals for supplemental income or personal enjoyment. Farmers may keep the property as a hedge against unexpected debts or as a supply of posts, firewood and creek water.

Small owners practice "personal economics."  Their objectives are based not upon what will bring them the most money, but are a function of their characteristics, those
of the tract and the social and economic situation. On small
ownerships, in my opinion, management strategy is a function
of personal factors rather than market ones.

The study of small forest ownerships has a history all
its own, progressing from study of the property to study of
the owner's economic situation to study of his personal at­
titudes, as researchers gradually become more aware of what
actually influences owner's decisions. Keniston (1975)
wrote that studies which relate the management status of
the unit to property characteristics assume that every owner
wants to maximize his timber production. Industry, he said,
will run true to economics of the firm, but a private land­
owner runs on attitudes and motivation.

In Montana, private holdings both large and small are
confined to the bottomlands, the best growing sites. But
these are often the best -- and only -- growing sites for
subdivisions and new agriculture. These sites not only have
good timber potential, they are close to markets and easy
of access.

In Montana and the nation, small-time management stra­
tegies vary to extremes. Worrell (1975) claims that where
timber management is the goal, middle-class, well-educated
owners generally manage their tracts well and are open to
suggestions for improvement. But, "because of size, quality
and ownership objectives," says PAPTE, small tracts "are
unlikely to achieve the productivity levels of industrial
forests."
But again, we must look to the original objectives of the owners.

Some people place a high value on profits and the maximization of monetary returns per se. Most people, however, regard monetary returns as an intermediate rather than a final goal. For them, money is a means to the attainment of more ultimate ends. . . . Recognition of this factor is important, because it explains why landowners frequently fail to behave in a strictly economic manner even when it might be clearly in their financial interest.

There is no reason, economic or otherwise, for an owner to put his woodland under management if development of the area will produce less satisfaction than he enjoys now.

Even economically inclined small forest owners can give several reasons for not managing: lack of time, capital or technical knowledge. (Frutchey, 1965) They may feel that the returns on their efforts are too low, or they may be holding the land for speculation. (Anderson, 1975) For farmers, forest management must compete with other farm responsibilities.

Small forests are a great national resource only if managed and managed well. For the potential small forest manager, the understanding and adoption of good management practices may take time. Very possibly they won't, as PAPTE claimed, reach the productivity of large acreages. The ease with which these good practices are adopted depends again on attitudes and motivation.

Persuading the economically inclined small forest owner to, one, put his forest under management and, two, use good
methods, is a continuing headache for government planners. I've limited the scope of this study to consideration of forest practice legislation to achieve the latter objective; most authors, though, recognize that programs of assistance and group action are nearly as valuable.\(^{11}\) (Worrell, 1975)

Both large and small forest owners have interest in such legislation, as I have indicated. While large owners concern themselves more with profit margins, small owners are protective of their right to do what they want with their property. This is what the government planner hears. Forest operators

Forest operators, too, can be divided into large and small enterprises. But unlike some owners, every timber operation is out to eke a living from the forest.

Many small-time operators, known as "gyppos" in Montana, are landowners as well. They share the "rugged individual" image of the pioneer, the attitude that their livelihood is their own making and should be secure from unsolicited governmental interference.

The gynpo logger runs a marginal operation at best. He makes his living by his skill at getting the most footage out of the woods. Sometimes, it is to his economic advantage to high-grade the stand and leave marketable but submarginal logs and trees.\(^{12}\) At other times, a simple lack of technical knowledge or poor planning will produce the same results. (see PAPTE, 1973) When a logger goes into an
area too small or lightly stocked to assure a profit, bad practices invariably result.

We can normally expect the bitterest opposition to regulation from the small-time logger. (Cf. Ahner, 1974) Not only are we adding costs to his already shoestring operation, he says, but we are also trying to dictate how to conduct his own profession! No one enjoys being dictated to, particularly the individualists.

Corporate forestry is often split into both ownership and operation. That which I stated regarding large forest owners goes for their timber operations as well. Large operations do, for the most part, try to police themselves. Though individuals in the operation may not follow company policy, the attitude of the industry as a whole is identical to what I outlined earlier.

Foresters

The professional forest manager is the expert. In a public or private capacity, he decides how to allocate the resources under his power to competing uses -- to provide a continuous supply of them without deterioration of the "factory." The forester is conservationist in the original sense of the word -- ensuring preservation of future options by wise exercise of existing ones.

Forestry's objectives have shifted with the years and the changing scope and awareness of resource values. A 1956 Forest Service publication offered the following: "Objective:
each forest acre growing a commercial forest product." (U.S. Forest Service, 1956) Since that time, foresters have grown to understand that not all forest products are commercial; not all owners want to fulfill the same objectives.

Foresters have a responsibility to maintain a timber supply only insofar as that meets the objective of the landowner. Foresters are not free to direct resource use to their own wishes; their duty is to maximize the objective of the landowner within the constraints of the land. 13

Forestry is both a natural and a social science. Good forestry involves both good land use practices and consideration of the owner's overall objectives. Good foresters treat the natural environment and interact with the social one. One set of suggestions to extension foresters requests that their management program fit the owner's objectives before all else. (Frutchey, 1965)

Even on the National Forests, where the owner's objectives are supposedly more rigid, foresters are using new methods to integrate natural and social values. Shaping and limiting the size of clearcuts, road construction and harvesting supervision are some of the measures taken. (Kemper, 1976)

Because in any forest policy debate the forester must represent both the natural and social environment, his input is critical. Foresters have historically taken the lead in the formation of land use policies in Europe and America.
Organizations such as the Society of American Foresters (SAP) represent foresters in policy issues. They make their objectives felt in the policy-making process. Their objectives are, ideally, those of their clients tempered by the constraints of the land.

The public

The community at large has a certain interest separable from its many private interests. Clean air and water and an aesthetic environment are "public goods" as the economist terms them. Society, too, has an interest in supply for future generations that few individuals could personally claim.

Environmental groups often like to represent themselves as spokesmen for the public. Insofar as the public is a diffuse group, often with no discernable financial interest in an issue, their claim may be valid. But the interest at stake is not just that of those who prefer to emphasize amenity uses of the land; it includes present and future needs for commercial as well as non-commercial forest products.

We see conflict between society and the individual every time the actions of a person in maximizing his own interest threaten the interests of the community. Community interests may be intangible; the private operator may not even recognize them. The decision-maker and the public planners must.
The social costs of forest management which the landowner fails to heed, economists call "spillovers." These costs (and sometimes benefits) are evidence of the failure of the market system to come to an allocation commensurate with demands. Society's interest is affected, but we have yet to devise a scheme for market allocation.\footnote{16}

The public decision-maker may wish to internalize these spillovers. Our public interest is too large and diffuse to accurately price its values. But the government must do so, weighing what they can from the public voice alongside those of the established economic interests.

There is no lobby, though, for the future. Our descendants are a community of interest without a spokesman.

At times the government plays the role of future advocate. The state is responsible, it argues, for the interests of future generations. The importance of this concept is clear to foresters. Because the development of a forest lasts for generations, a forest "cannot really be owned by one person."\footnote{17} It is owned by he and his unborn children.

The interest of the public is hard to express and evaluate. But its presence is clear. In creating a forest policy, law-makers must weigh the "power of public concern,"\footnote{18} along with the interests of landowners, operators and managers. That power is yet to be felt in Montana. (Moon, 1975) It will come, though, and bring with it a new and larger role for government.
CHAPTER TWO

THE GOVERNMENT AS REGULATOR

The role of arbiter for government brings with it the onus of regulator. Resolving a conflict requires either mutual agreement or imposing a solution. More and more, governments choose the latter option.

Historically, governments have justified their existence by guarding the rights and well-being of citizens. But society is growing—economically, socially and intellectually. "the drift of modern times" writes a forester "is toward increasing recognition of the public interest" and its protection by social action. (Clark, undated)

Forest practice regulations existed in Europe in the 14th Century. (FAPE, 1973) But only within the past 40 years, planners in America have shown less concern for protection of the individual welfare and more for protection of society's. 19

Barlowe (1958) suggests that society has an inherent interest in property use because 1) it was the original grantor of rights, 2) property has economic and social significance to society, and 3) government has a responsibility to maximize social welfare.
Society's interest is asserted through public planning and implemented through regulation. Planning is "the conscious direction of effort toward the attainment of a rationally desirable goal." But in order for any planning to be justified, we must prove its effectiveness in achieving our social and economic goals.

Under what conditions is social (governmental) action justified? My sources list several rationales. But they can all be summarized in two steps. Intervention in private affairs is justifiable only if:

1) the general welfare is not being served by the existing situation, and

2) the proposed action would result in a significant increase in general welfare.

We can clearly justify social action in cases of national need or the prevention of physical harm to others. But we find it harder to do so when confronted with problems in land use and resource development. Social values become less distinct; the social mandate is weaker and individual voices stronger.

This is the case in promotion of good forest practices. Though most resource managers will agree that good forest management pays off in increased social welfare, the most vocal opinion comes from those who pay the costs.

Nearly all increases in social welfare directly reduce some individual freedom. (Klemperer, 1971) The Constitution
and our legal tradition set out rights and freedoms of the individual. Though these rights are seldom fully understood, they are heartily defended. Forest policy, when it restricts land uses, restricts rights. Are the social benefits of the action worth the fight?

**Weakness of the individual**

The very complexity of modern society engenders one argument in favor of intervention. Our society is growing at a geometric rate, and with it the complexity of our relationships. We no longer buy groceries from the local farms and shoes from the town cobbler. We have grown interdependent to a critical degree. If California farmers get a drought, fruit becomes a rarity. If Mideastern oil producers cut off our supply, we are paralyzed.

A further product of our complex society is the superabundance of information. No individual can keep informed of all the developments that affect him. Each man's discipline and interests are growing, along with the number of decisions required of him. The more that decisions require increased data, the less able one person will be to make them.

As individuals we each make decisions, some well-informed some not. Each decision contributes to the problem. We are unaware, not only of the effects of our single decision, but that one on top of our previous one, and our neighbor's and the folks' in the next town. This "tyranny of small decisions" wastes energy and resources. The cumulative outcome
of these incremental decisions may be such that no decision-maker would have chosen that alternative had he known the consequences. (Klemperer, 1971)

This weakness in our society — weakness through necessary dependence on others — leads to susceptibility. The oil companies are too numerous and complex. No one person knows whether or not they are cheating us. And although we should have an interest in forest land, we have not the time or ability to check into it.

Government is the vehicle we look to, to intervene on our behalf. We, the public, cannot represent our personal interests effectively. Government has a more comprehensive perspective. So we pay it to bargain for our interests.

The objective of planning, says the economist, is to increase the efficiency of the output. The government's role as bargainer is far more efficient than if each of us tried to sit down and argue for all our interests with all those who influence them.

Costs and benefits

Ayer (1973) presents an excellent — and brief — summary of the economic rationale for regulation of private forest management. The government should act, he says, only if the actions of a group produce externalities which the free market cannot handle to the satisfaction of those affected. Albeit, the mechanism of government should be efficient. The costs to the state of setting up and running
a bureaucracy to administer the program, and to the private party, of compliance, must be balanced by the benefits. Is meeting the goal worth the public and private costs? If so, the action is justified.

In theory, government programs impose on operators a cost equivalent to the value of the external "bads" they produce. They now must pay for what used to be unnoticed consequences of their actions. The logger used to ignore the fate of his slash or roadfill. Now the government tells him that he will have to pay more attention, work more slowly and carefully and perform more tasks.

In other words, the government now charges him for what he used to do unobserved. It follows that the price of production will rise and the supply will drop. Producers of forest products will be less well off, as will buyers. But benefits to the general public will increase.

Klemperer evaluated Oregon's Forest Practice Act with regard to its public benefits. By summing the perceived public benefits, he estimated a gross benefit of $10 per forest acre from regulation. Though Montanans do not have the reputation of Oregonians for valuing the environmental amenities, we do receive the same benefits. On state and private lands alone our total benefit from forest practice regulation would reach $70,000,000.

But balance that against the costs: administration, increased management intensity and reduced supply. If
the cumulated social costs are less than the benefits, your law is economically justified.

Effect on operations

How will forest practice regulation affect the use of land? On areas suitable for forestry, it will intensify the existing forest uses. (Brock, 1975) On the more marginal areas and operations, usage will tend to shift away from forestry. On farm woodlots and other noncontinuous operations, it could eliminate forestry altogether unless private operators could be compensated for their increased costs.26

A program of regulation need not shift the operators' process of decision-making. It should not cause an arbitrary management decision. But, it should compel him to internalize costs of water pollution or forest degradation. (LeMaster, 1975a) In most cases, the operator's total cost will rise. Shutdown of marginal operations may result. A policy objective for foresters would ensure that those marginal shutdowns which occur are those which should otherwise fail solely because of poor practices. Such a policy would equate submarginal operations with those practicing destructive forestry.

Shortcomings of Government

Some arguments against regulation are less theoretical. For example, the government's inability or reluctance to act in a situation may be a de facto argument against its actions. The law-making process in state and federal legislatures is
a long and complex one. Its very complexity -- legislators feel responsible to examine every aspect of a problem -- works against it. The legislature thus at times abdicates its responsibility.

Our Montana legislature is a melting pot of ideas and desires. It is a "layman legislature" in its finest form. But factors other than the simple diversity of views can prevent the legislature from making good and timely policy decisions. The pressures of time (90 days every two years), span of issues and lack of staff all contribute to inadequate appraisal of any subject, from wildlife habitat to mental health.

Further, there are anti-government attitudes even among legislators. One, for example, in debating the 1975 forest practice bill, said "if you want to give the government of the State of Montana more authority over private land, vote for [the bill]."27

When a problem is serious enough to force action and the legislature stands still, the responsibilities usually devolve to the administrators. But bureaucracy has the reputation for taking action with little public cognizance. Government then becomes not one "of the people" but one of the bureaucrats.

Every new program requires a bureaucracy to make the day-to-day decisions and the detailed policies. Added costs argue against the program. There is also the incremental
increase in the complexity of government. Even politicians shrink at times from the intimidating process of bureaucratic decision-making.

The other alternative to the legislature is the local governmental entity. The movement to vest more power in the local governments is gaining support. But in Montana, most county governments have shown neither the will nor the expertise to lead new programs or take on new authority. (Tomlinson, 1972) County commissioners point out that some laws and regulations designed for county implementation are cost prohibitive in the smaller, poorer counties; they simply cannot afford the time or attention required of them by new programs. (Montana, 1974b)

Compensation a solution?

The concept of pareto-optimality states that a society is making most efficient use of its resources if no one can be made better off without another becoming worse off. A corollary, the pareto-optimality with compensation criterion, states that a shift is justified if the gainers from the move can more than compensate the losers.

Under the economic assumption that producers always try to maximize their profits, raising costs through regulation as discussed previously, might cause one to reassess his alternatives. Public planners might suddenly find that their policy of creating better forestry is instead causing conversion to other uses. (see Lundmark, 1975) The higher
cost of new practices retards the use of the land for forestry and favors more efficient uses. (Frutchey, 1965)

It is not socially or economically just for forest operators to pay for reducing negative spillovers. Their costs should decrease with better practices.

One solution lies in compensation. Since the public benefits, it, through the government, should compensate those who provide those benefits. There are two drawbacks to this solution, though. First is that of specifically identifying gainers and losers, and degree. Second is the possibility that compensation is causing suboptimization, that is, causing the marginal operations that should shut down to remain open. (Klemperer, 1971)

Still, direct compensation remains a plausible means of redistributing the costs equitably and incidentally, quieting those who vociferously cry "taking." The "taking issue" has shown itself to be one of the strongest and most persistant arguments in opposition to governmental planning and regulation. The chapter to follow will explain why.
"... the fear of the taking issue is stronger than the taking clause itself. It is an American fable or myth that a man can use his land any way he pleases regardless of his neighbors. The myth survives, even thrives, even though unsupported by the pattern of court decisions. Thus, attempts to resolve land use controversies must deal not only with the law but with the myth as well. 23/

There is no legal basis, historical or current, for the proposition that a man may do whatever he likes with his land. The concept of property includes separable rights, referred to in legal parlance as a "bundle of rights." But even the fee simple owner does not exercise exclusive control over his land. His rights are created and maintained only by the sanction of the sovereign. The sovereign may modify or appropriate these rights at any time.

Many landowners harbor the myth that their exclusive rights to ownership and use of land have existed from time immemorial, or at least since the established Constitutional state. But property was once held in common, and has only slowly and gradually evolved into an object that one might possess to exclusion. (see Barlowe, 1958) The concept of
exclusive ownership peaked in the early 1800's. About the same time, the taking question began to emerge.

In medieval England, where our concept of property emerged, "the idea that a man may do as he likes with his own would have been wholly denied by lawyers and philosophers of that day." The king had unquestioned right to use of private property, providing the public would benefit. The concept came to America intact. In fact, the only legal restriction to our sovereign's power to appropriate and use land is the self-imposed one:

"... nor shall private property be taken for public use without just compensation."

Early in the 19th Century, there existed no conflict between the exercise of the police power and taking by eminent domain. Courts construed the Fourth Amendment literally. No compensation need be made unless the land was actually, physically taken.

As the country grew and land became scarcer, its value for both public and private uses increased. With higher property values came recognition that simple regulation could have a severe, sometimes devastating impact on that value. Courts began to consider the apparent conflict. In December of 1922, Justice Oliver Wendell Holmes pronounced the now-famous rule:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.
In establishing this balancing test, Holmes had, says Bosselman (1973), rewritten the Fourth Amendment. But since the high court has decided few takings cases since that landmark one, lower courts are left to interpret the rule.

By and large, courts continue to uphold responsible regulation of land uses. (Bosselman, 1973) Four tests are in common use: If the land is physically invaded by governmental action, a taking occurs. If the owner(s) maintains a public nuisance, courts will be less likely to find a taking. Courts will often base their judgement on the diminution of value caused by the action, or balance the public good to be obtained against the private harm.

Courts will justify most land use regulation that is not arbitrary or discriminatory and is a reasonable and well-designed approach to the felt problem.

Forestry cases

The landmark forest practice case was a 1949 decision of the Washington (state) Supreme Court (State v. Dexter, 202 P.2d 906) which upheld the state's Forest Practice Act on a Constitutional challenge. It "clearly established that forest practice laws directed to private property are Constitutional and are justified by the need to preserve natural resources for the public welfare."32 In the case, a timber owner failed to stop the state from requiring that seed trees be left following a harvest.
Though Oregon's Forest Practice Act "opposed the philosophy of personal property rights" according to the State Forester (Schroeder, 1972) it was never challenged and was rewritten in 1971.

California's Act was declared unconstitutional in part (Bayside Timber Co. v. Board of Supervisors of San Mateo County, 97 Cal.Rptr. 431 (1971)). But the decision addressed only the delegation of authority by the state legislature for rule-making and enforcement, and not the land use issue. (Lundmark, 1975)

**Popular view**

Public opinion is often a stronger force than the sanction of law. Land use regulation is one case. In particular, the neo-individualists, prominent in most rural areas and quite so in Montana, have the unshakable opinion that their property is their own, and immune to regulation by the government. They have unconsciously allied with the land developers and get-rich-quick businessmen who have failed to do in the courts what the neo-individualists have done politically.\(^\text{33}\)

One result of the resistance of rural conservatives to land use regulation has been the appropriation (though "with compensation") and exploitation of the land by speculators with less conscientious regard for the land.

The neo-individualists may have a valid point in claiming that the government is treading on their personal
liberties. Barlowe (1958) has said that public planning is only exchanging the security of another's decisions for the personal freedom to make one's own. The private landowner does have rights. But realization is growing that society, too, has rights in his property. Thus, we come back to the conflict over which rights the owner claims and which society claims.

On one side of the issue is 'society' demanding protection from the negative spillovers, and oftentimes staking an additional claim to the positive spillovers. On the other side we find the landowner, rarely malicious, but determined to claim the 'reasonable' uses that ownership has historically conferred upon him. Is there a solution to this conflict? If so, it lies in good design of regulation and good communication between those parties who claim rights and interests in the resource. Francois (1950) suggested one equitable solution: if we decide that society must compensate individuals for "takings," then, in justice, we should require entrepreneurs to compensate society for diminution of the social welfare in his own interest. Bosselman (1973) cites five alternative solutions, ranging from ignoring the issue to directing, through legislation, which situations require compensation.

We would like to design a law which simply does not restrict the rights of those who already practice good forestry, but which forces compliance on the transgressors. Courts and citizens would find this most palatable. It is but one of the ideas to keep in mind as we study the legal options available.
Notes:

1. This objective is echoed by foresters, particularly the SAF Task Force on Forest Practices, who recommends "the application of... knowledge and... principles in order that society can obtain the largest net sum of benefits from forest lands... reflect[ing] full consideration of both social and private costs and benefits." (SAF, 1975)


3. Francois (1950) divides forest ownerships into three classes: large, family holdings (usually hereditary and confined to Europe), commercial forests and farm forests. PAPTE (1973) differentiates only between "industrial" and "other private."

   Industrial lands comprise 13 percent of commercial forest land, mostly in the West and South, and are characterized by intensive management and slow ownership turnover. Small ownerships comprise 59 percent and are concentrated in the North and South. PAPTE divides small ownerships into farms and miscellaneous, noting that over 42 million acres have shifted out of farms between 1952 and 1970. The average holding is 71 acres.


5. One of the most notable of these is the American Forest Institute's Tree Farm program. Small landowners can receive assistance, technical and financial, from industry in turning their tract into a producing forest. (Skok, 1975)

6. WWPA estimates that less than ten percent of industry lands are being clearcut; other silvicultural systems are gaining favor. Line-skidding systems reduce the need for roads as well.


8. "Other private" land covers 296 million acres, generally of site class III and IV. In most regions, PAPTE found small forests understocked. In 1956, the Forest Service found just over half the ownerships in Oregon and Washington to be adequately (70 percent) stocked. But in the South, private non-industrial owners increased the growing stock on their acreages by 56 percent, compared to 36 percent for industry. (McComb, 1975)

9. My own term, coined to refer to decision-making based upon a person's characteristics, attitudes and inclinations rather than his economic possibilities.

11. To cite a few, the federal-state Cooperative Forest Management and cost-share and forest incentive programs. Government-sponsored community action groups, cooperatives and the Conservation Districts are examples of the latter.

12. The standard disincentive for this is a penalty of triple the stumpage value.

13. Despite this, PAPTE has given the nation's foresters a proposal for meeting the nation's timber and developed recreation needs while neglecting non-market values and ignoring private owner's rights and desires. By conveniently setting a goal of meeting the nation's timber demand, they proceeded to propose solutions which would be excellent timber management and poor people management.

14. The SAF Task Force on Forest Practices set forth a series of recommendations on forest practice legislation, some of which is highlighted later.

15. SAF's 1975 president, John Beale, remarked in a published letter that the SAF does not advocate a forest practice act, but would like to ensure that those enacted are competent ones. (Beale, 1975)


17. PAPTE, p. 24.

18. This term was used by Tomlinson, 1972.


21. The "significance" of the increase is invariably defined in economic terms.


23. Regarding forest policy, Ayers cites "indications that, due to market imperfections, some intervention is necessary if certain goals are to be achieved." P. 421

24. One study in Alberta noted that the costs of road construction nearly doubled after imposition of environmental constraints. (Otten, 1975) A study in the Teton and Boise National Forests showed increases in logging, administrative and regeneration costs of 26 and 14 percent, respectively, directly attributable to added environmental measures. (Kemper, 1976)
25. The distributive effects of such a program are significant. The benefits will accrue to the group too large and diverse to bargain for itself. More to the point, the consumers of amenities will benefit which, in our society, means those affluent enough to travel and buy recreational equipment. The losses will be felt by smaller groups centered around an economic interest, such as loggers and farmers.

26. Several writers propose that forest practice controls be directed only at lands capable of the largest marginal increase, rather than where management goals are questionable or sites unsuitable. (Worrell, 1975, PAPE, 1973) This leaves low stocked, good quality industrial lands as prime candidates. (But Cf. pp. 9-10)


29. ibid., p. 75.

30. This phenomenon may have caused the growth of the myth of exclusive and absolute ownership of property. But it also triggered social consciousness of the value of land for public benefit, as evidenced by movements to establish National Parks and Reserves, and protect forests and farmlands from owner abuse.


33. It is almost humorous to note that, though our neo-individualists profess loyalty to the basic institution of democracy as expressed in our Constitution, they deny the expression of that democracy in the actions of government. They will encourage any action or pronouncement that strengthens their concepts of rights and fight any trend in the opposite direction. They regard a relatively recent development as the Constitutional truth but choose to ignore a trend of longer standing -- the regulation of property for the public welfare.

34. Proponents of forest practice legislation have tried to include aesthetic rights as one of those protected for society. Though landowners would hardly admit that "aesthetics" is definable as a right, they have successfully fought handing over that right to society. (Lukes, 1977b, Mattock, 1977)

PART II

CURRENT OPTIONS
Within the past seven years, new forest practice legislation has been proposed in national, state and local governing bodies. This new surge of attention corresponds to the increased environmental awareness of the 70's. Prior forest practice laws dealt with regulation to ensure a productive timber resource. The new generation of laws and proposals recognize a more diverse set of needs.

In this Part, I will review a few of the exemplary options: their political and legal histories, assessments of their effectiveness or failure, and their shortcomings. I have chosen seven examples: EPA's model state forest practice act, the laws in California, Washington, Oregon and Idaho, Montana's proposal and a Lewis and Clark County Conservation District Sediment Control proposal. Each has its own unique history and features.

An overview of the evolution of federal, state and local responsibilities begins this discussion. As an aid to these options, I include also an outline of each.
CHAPTER FOUR

THE FIGHT FOR FOREST PRACTICE ADMINISTRATION

Historically, most power over the ownership and use of private land rests with the states who have, in turn, delegated much of it to local government. But the federal government has stepped in, in some forms and circumstances. Who has the power to regulate forest practices? Well, that question has yet to be answered—finally.

Each level has advantages and drawbacks. Federal government is often too far away from the problem and concerned with other issues. State government is traditionally less efficient, but can ensure stability and continuity better than local governments.\(^1\) Local officials must at the same time govern friends and neighbors and protect society’s interests. Local officials faced with land use policy decisions may fail to exercise the power, fearing the local citizenry. And they may be all too much aware of a decision’s impact on the local tax base. Any number of political reasons can influence a governing body.

Montana’s EQC has stated that planning and regulation should come from the lowest effective level of government, whether it be federal, state or local. Each program should
be viewed on a case-by-case basis. This is true in the case of forest practices.

Federal regulation

Skok (1975) says that "regulation at the national level has been a frequently discussed, proposed and rejected solution." The debate has surfaced in 1910, 1923, the early 40's and again in 1971. The 1923 controversy culminated in the passage in 1924 of the Clarke-McNary Act, providing cooperative forest fire protection with states to protect "forest and water resources and the continuous production of timber." (16 U.S.C.A. s 564)

In 1938 a bill to control forest practices was introduced into Congress and spurred a presidential study of the problem. (PAPTE, 1973) The states took notice; they (and industry) favored passage of state laws to forestall Congressional action.

Schroeder (1972) and Hamilton (1963) have cited the threat of federal regulation as a prime mover in passage of the Oregon and New York laws, respectively. The forest industry preferred state laws, too -- possibly because they were easier to circumvent.

The Forest Lands Restoration and Protection Act of 1971 (defeated) proposed licenses for professional foresters and mandatory harvesting plans for private lands. Again, the early 70's saw scurrying for reform and support of state laws. Passage of the EPCA in 1970, with its non-
point pollution provisions, requires still more of state government. And a draft bill being circulated for comment by the Forest Service (FS Draft: 12-23-76) will, at the least, revamp federal cooperative forestry programs.²

In most cases, though, the federal government is too far away from the people for effective strong-arming. Its major approach is now through financial and technical assistance. State control in forest practice administration has been tentatively, if not finally, established. The federal government can and should play a role in assistance programs; the state is taking the lead in enforcement of the policy. But local governments claim some role in forest practice regulation, too, with or without the authority.

Local control

"Local control" is a magic word in current political circles. But not all is praise. Local control can bear an assortment of connotations. (from Healy, 1976)

First, local control can mean the predominance of local interests. But community values seldom escape the influence of state control. Second, local control may mean control by local decision-makers. It implies that decisions on a person's land may be made by a drinking buddy, or by a local tyrant. Third, local control may mean no control. Even the mildest controls signify "taking" for a rural community where property is the first symbol of wealth. Few decision-makers would risk their necks over such an issue.
T.F. Arvola presents an exemplary model of local-state conflict in California. Counties in that state were fighting for control. Montana faces a different situation, though. For one thing, counties in Montana have no ordinance-making power unless authorized by the state legislature. In our state, a more likely avenue for local control is the state's conservation districts. CD's have been given the power to regulate by ordinance sediment and erosion control. They are just beginning to realize that power.

* * *

It seems apparent that any of the three levels of government would like to control the power to regulate forest practices, but none are enthusiastic about the responsibility. In the chapters to follow, I shall examine the most relevant offerings of the federal and state governments and the conservation districts.
CHAPTER FIVE

EPA'S MODEL STATE FOREST PRACTICES ACT

The Environmental Protection Agency is the federal agency created to oversee the federal role in environmental affairs. Nearly all the agency's powers derive from recent legislation such as the Clean Air Act Amendments of 1970 (42 U.S.C.A. 1857) and the Federal Water Pollution Control Act Amendments of 1972. (PL 92-500)

Section 203(b) of FWPCA requires states to prepare a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution . . . (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources.

The administrator of the EPA must (section 304(e)) issue to states . . . information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures and methods to control pollution resulting from—
(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands.

The agency chose to prepare an exemplary forest practice act as one approach to that duty. (Aronoff, 1975)

Actually, the EPA fulfilled its 304 charge via three separate approaches. First, the agency researched methods
of evaluation and control of silvicultural pollution. Two reports on this topic appeared in October, 1973. Secondly, a regional team came together in Seattle to consider "technical, legal and administrative mechanisms which can be used to minimize water pollution arising from forest management activities." Thirdly, the agency itself looked at existing federal and state legislation. The forest practice act is a result of both the second and third approaches. It aims to ensure that forest operators use the "best known management practices" thus preventing the cause of pollution rather than controlling the symptoms. (Agee, 1972)

Reaction

The agency offered its proposal as a vehicle for thought and discussion, it said, and without recommendation. (Agee, 1972) Discussion, it aroused. The first draft of the bill, in November of 1974, prompted several hundred written comments, mostly from the industry sector. (United States EPA, 1975b) Commentators criticized "scenic beauty" as a consideration, proportion of representation on forest practice boards and the administrative complications of the act. Many of these suggestions were heeded in the later drafts. (Aronoff, 1975)

In addition to comments on the language of the model act, some also questioned its purpose. Fred March, a counsel for EPA, pointed out that the act did not clearly state its purpose, viz. prevention of polluting practices. (Johnson,
1975) Several other commentators suggested also that FWPCA at least be cited as justification for the actions. Dennis LeMaster, in a *Journal of Forestry* article, noted that the proposal made no attempt to measure the degradation or restoration of water quality, and also that passage of the law in itself did not assure a state of meeting its 208 responsibilities. (LeMaster, 1975)

The latest draft of the EPA model has been neither endorsed nor adopted by any state-level entities. But it has stimulated discussion and some apprehension among professional forest managers and landowners on account of its provisions and approaches. It has offered new ideas and alternatives, some better than others when we apply them to Montana's case, as I shall in Part III.
STATE FOREST PRACTICES ACT (EPA DRAFT, March 13, 1975)

1) TITLE: ( ) Forest Practices Act.

2) POLICY/PURPOSE: Act encourages forest management serving the public need for timber and other forest products and the protection of water and soil. Purpose of act is to create a comprehensive system of regulation, and to achieve compliance with federal laws and regulations.

3) DEFINITIONS.

4) STATE FOREST PRACTICE BOARD: Appointed from the general public. Persons with direct financial interest in forestry may not form majority. Four-year, overlapping terms.

5) DUTIES OF BOARD: Divides state into districts based on geophysical similarities. Board makes regulations applicable to each district, with public review, and acts as appellate body.

6) DIRECTOR OF BOARD: State Forester.

7) REGULATIONS: Required for reforestation, streambank protection, erosion control, air and water quality, insect and pest control and timber harvesting plans. Interagency (state) cooperation. Individual variances allowed upon proof of non-degradation.

8) TIMBER HARVESTING PLAN: Professionally prepared plan required for operations over ( ). Plan is the responsibility of timber owner and must include description of silviculture used and plans for erosion control, reforestation and protection of unique areas. No state approval required.
9) NOTICE: Operator must notify state forester at least seven days prior to commencing operation.

10) INSPECTIONS: State forester or representative may make all necessary inspections.

11) VIOLATIONS: State forester notifies operator of the violation, includes order to cease and repair damages. State forester may, with board approval, perform needed repairs and charge costs as lien against property of operator and owner. Affected parties may appeal.

12) PENALTIES: Civil penalty for infraction of rules or failure to comply with orders.

13) LICENSING OF OPERATORS: Timber operators must have state-issued licenses, renewed annually. License may be denied or revoked for failure to operate with a license or non-compliance with rules and regulations.

14) CITIZEN'S SUITS: Citizens may bring suit against board or the state forester for failure to perform duties as required.
CHAPTER SIX

FOREST PRACTICE LAWS IN THE WESTERN STATES

In 1973, 16 of the 50 states had some form of forest practice law. In the Rocky Mountain-Pacific region, Colorado, Wyoming and Montana have no laws. Four states which do, I have singled out for study because of their physical and social similarities to Montana.

California

Of the four states, California is probably least like Montana. Pressures of population create demands for both timberland and open space. More people mean more pressures and more problems.

California enacted forest practice legislation in 1945, but amendments and criticism hindered the law. Environmental advocates claimed that the law's purpose, "to conserve and maintain the productivity of the timber lands," placed too little emphasis on non-market resources. Some landowners felt that the law was too strict and a violation of their property rights. And administrators pointed up the cumbersome enforcement procedures, loopholes and inadequate funding to carry out the law.7 (Arvola, 1970)
Beginning in 1967, the old forest practice law was scrutinized and revisions proposed by the SAF, industry and legislative committees. Not everyone was convinced that a new law was needed until, in 1973, the state Supreme Court declared parts of the old law unconstitutional.8

In that year, the California Legislature passed the Z'berg-Nagedly Forest Practice Act (Div. 4, Chap. 8, Public Resources Code). Many consider the new law to be the strictest in the nation. (Siegal, 1974) The law allows counties to enact their own regulations, requires timber harvesting plans approved by the state, sets up regional advisory committees and establishes some regulations concerning residual stocking, fire control measures and soil and water protection.

The California Act seems an exercise in superfluous language. In briefing it, I found that several provisions are unnecessarily repeated as portions of others, and others are simply extraneous. Other critics, too, have pointed to the complexity and administrative burden of the law. In mid-January of 1975, a state court invalidated a later amendment to the law which had exempted it from the requirements of the California Environmental Quality Act. (California, 1975) These shortcomings impair the effectiveness of the law.

Since the enactment of its Act, the state has added 48 full-time foresters to its staff. During 1975, the
Division of Forestry issued 1,266 licenses to timber operators, made 5,668 inspections and reviewed 2,152 timber harvesting plans. In that year, the Division estimated a 96 percent compliance rate. (California, 1975) Most of the violations were operators failing to notify the Division of termination of their operations.

This year, the California Assembly is conducting oversight hearings, which the Division anticipates will result in amendments "oriented to more consideration of the environment in conducting of timber operations." (MacClean, 1976)

Washington

The state of Washington resembles Montana in physiography. It has its wet and dry, mountainous and flat regions. The state depends on the productivity of its forest lands for economic and social benefits. But the two states' social climate differs. Washington's urban population, and the way of thinking that goes with it, is spreading and growing. As urbanites grow in raw numbers and percentage of the population, their influence grows, too. As in California, their demand for all land uses grows in kind.

The state enacted forest practice legislation for the first time in 1945. The law was timber oriented. But cutting and regeneration standards were written into the law, making it difficult to alter as times changed. The 1945 law was the point in controversy in State v. Dexter, referred to on page 27.
In 1973, a revised forest practice law was introduced in the Washington Legislature. The bill reflected strong environmental interests, although "preservationists were rebuffed in attempts to include provision for wilderness...on private lands, criminal...penalties and a strict system of permits."  

The 1974 and 1975 sessions passed the current law. The Act has extensive legal requirements and options for enforcement and rule-making. Administratively, it is an expensive law, since it involves at least five agencies and several levels of regulation.

The state's Division of Forestry, which is the lead agency, had some doubts about the law, since resolved. Forester Bruce Monell (1977) commented that there were "rough spots" but the Act is now working well. Earlier, Don Lee Fraser (1974) -- the State Forester -- complained that the new law permitted too many agencies to have a "finger in the pie." But, he said, with a little effort it would be worked out.

I have not yet received figures on the costs or the effectiveness of the administration of the Act.

Oregon

Oregon and Washington are physiographic twins. Oregon stands out, though, with its strong reputation for environmental consciousness. Oregon's Forest Practice Law is not stricter as a result; it is easier to understand and enforce than either California's or Washington's.
Oregon's 1941 law, the Conservation Act, was one spurred by the threat of federal legislation. It had the early support of forest industries in the state, though it was considered "very progressive." (Schroeder, 1972) Its provisions were administered by a forest practices board, which had been formed in 1911 with seven members. The 1941 law had limited scope and effectiveness. It addressed only the timber supply problem, through reforestation. Enforcement was lacking -- forfeit of bond or payment of planting fees were the only penalties. And, like its contemporaries, it was too inflexible to meet the changes. (Siegal, 1974)

Concern over the law solidified in 1968 with a meeting of 41 forestry leaders to discuss and recommend changes. As a result of this meeting, the Board of Forestry in September recommended that

the early accomplishments of the Conservation Act . . . be recognized, but that it was now necessary to update the Act in keeping with broader public interests and increasing knowledge of the effect of forest conditions on the various forest benefits. 12

The Department of Forestry drafted a bill with the help of other interest groups. Surprisingly, when the Department's bill entered the legislature, industrial interests proposed a substitute bill. The opposing forces compromised, and the new version passed without trouble. (Mattock, 1977)

In a Ph.D. Dissertation the same year (completed before the new law passed), Dave Klemperer outlined the administrative goal of the new policy: costs should be minimized
through single agency administration, with minimal permit and inspection requirements. Gene Mattock (1977) of the State Forester's office stressed, too, the key goal of single agency administration. It seems the goal was achieved; Washington's Law involves at least five agencies, Oregon's one. Oregon's Law also emphasizes standards rather than practices. This approach has been favored lately, though California still emphasizes the latter. (Siegal, 1974) In the Board and agency rule-making, three goals come through:

1) the emphasis is on prevention of the damage rather than enforcement after the fact,
2) single agency administration is the goal, and
3) wherever possible, cooperation between agencies, industry and the public is encouraged. (Oregon, 1977)

Though by most accounts the Forest Practice Act is working well, some groups have attempted to change the direction of policy-making. HB 2997, introduced in the 1977 session, would reduce the number of persons having "economic interest" in forestry from six to "not more than four" on the state Board, and from 2/3 to "not more than 1/3" on local committees. Such a change would reduce not only the number of industry representatives; it would eliminate local landowners and operators as well.

Right now, the Act seems to be working the best of any in the Western states. Somewhat over 14 man-years were expended in enforcing the law in its first year, 2/3 in
inspections.\textsuperscript{15} Citations in the first year totaled 128, most of them for failure to submit a notice or inadequate stream protection. Violations split evenly between large and small operations. (Oregon, 1973) Over the first 14 months, the compliance rate was 93 percent, (Siegal, 1974) and rose to 98.3 percent in 1976. In that year, the agency made 8,760 contacts, about 11 percent of which required some form of remedial action. The budget for enforcement over the biennium was $1,263,460 including roughly 37 full time positions. (Oregon, 1977)

\textbf{Idaho}

Of the four states in my review, Idaho is nearest to Montana, both physically and sociologically. Besides bounding our state, it has the same open, dry plains and rocky, steep forests. It also has an urban population, but one which does not threaten to sweep over the rural communities, and landowners who fight tooth and nail to keep their government to a minimum. In fact, Idaho so resembles Montana that the state successfully adopted our forest practice proposal — almost unaltered — in their own legislature.

Idaho's first law, the 1937 Cooperative Sustained Yield Districts Act, established rules by legislation and was similar in structure to Washington's 1945 law.\textsuperscript{16} And, like its contemporaries, the much-amended law was criticized for being narrow, lenient and inflexible. (Siegal)
The current law passed the 1974 Legislature after sponsorship by the Idaho Forest Industries Council. The legislature made only one change in the bill; it removed landowners from the lien liability.

The politics of passage must have been fascinating. The Department of Lands (the lead agency) ignored the bill, fearing the label of "empire-building." And the environmental groups remained neutral; their support would have meant sure death in the conservative legislature. (Gillette, 1977) Though the Forest Practice Act met no opposition in the legislature, one state official described the subsequent rule-making hearings in Northern Idaho as "brutal." Landowners came loaded for bear, and the local right-wing element appeared in force. Because of this opposition, forest practice rules went into effect only last summer, and foresters have been instructed to enter lands only with the landowner's permission. (Gillette, 1977)

Several lawsuits were filed to enjoin the enforcement of the law, but all were dismissed for vagueness. (Moon, 1975b) The Department feels it may be facing the first legal challenge to its regulations in early 1977.

State Lands has hired five new foresters and spent an estimated $70,000 to administer the law, but is losing ground. It makes inspections, on a priority basis, of reported violations and high damage potential areas. Compliance is about 90 percent, with many violations minor.
1) **GENERAL PROVISIONS:** The State shall encourage management which considers the public need for all resources. Purpose of law is to create regulations which assure timber productivity and resource values. Counties have authority to create their own regulations. Annual reports from the Board.

2) **DEFINITIONS:** extensive.

3) **DISTRICTS AND COMMITTEES:** At least three districts, to be determined by physical similarities. Nine member district advisory committees, five from public, three from industry, one from range-livestock. None may have direct financial interest in timber.

4) **RULES AND REGULATIONS:** Board adopts district rules for fire control, erosion, water quality, stocking and harvest plans. Rules must be based on interdisciplinary study and public hearings.

5) **RESOURCE CONSERVATION STANDARDS:** Legislative standards governing residual stand stocking levels and fire protection zones. Directs the implementation of soil erosion studies and waterway protection rules.

6) **LICENSES:** For timber operators, renewed annually. License may be denied or revoked for failure to comply with rules.

7) **TIMBER HARVESTING:** Timber operations require harvest plan prepared by professional forester and approved by State Forester. Copies of plan go to State Board of Equalization and the county assessor. Professional forester must review and approve ongoing operations. Owner must submit notice of completion and, within five years, proof of restocking.
8) **PENALTIES AND ENFORCEMENT:** Violations are misdemeanors. State Forester must make site inspections before, during and after operations. He may obtain court order to halt operations and require corrections, or take action to correct damage himself, expenses becoming a lien on the timbered property.

9) **CONVERSION:** Only by application. If tract is zoned for timberland, conversion must be in public interest and have no adverse effects on environment. Landowner must receive permit from Board, and must comply with all harvesting requirements.
WASHINGTON FOREST PRACTICE ACT OF 1974 (as amended, 1975) (76.09 R.C.W.)

1) POLICY: It is in the public interest to manage forest lands so as to protect resources and maintain the forest industry, and to adopt comprehensive regulations to that effect.

2) DEFINITIONS: Moderate.

3) FOREST PRACTICES BOARD: Composed of the heads of the Departments of Public Lands, Commerce, Agriculture and Ecology, a county official and six members of the general public. Four-year, appointed terms.

4) DUTIES OF BOARD: Promulgate minimum forest practice standards, and water quality standards concurrent with Department of Ecology. Public hearings, and review by affected agencies and counties.

5) CLASSIFICATION OF PRACTICES: Class I, practices with no significant damage potential need no approval; Class II, practices with low potential for damage, written notice is necessary; Class III, other practices generally need Departmental approval before commencement; Class IV, practices on lands undergoing conversion or changes severe enough to necessitate EIS. Counties have veto power over Departmental approvals.

6) NOTICE AND APPLICATION: Documents must include type of practice proposed, reforestation plan and physiographic data. Long-range plans may cover a series of operations. Provisions for changes in operation, emergency practices and conversions.

7) REFORESTATION: Must be successfully established within three years under artificial techniques or five years if by natural means.
8) **STOP WORK ORDER:** Department may issue an order to stop violation of regulations or divergence from approved plan. Operators may appeal.

9) **NOTICE OF VIOLATION:** In place of a stop work order, the Department may notify operator of violation and measures needed to correct damage, if any.

10) **WATER QUALITY PROTECTION:** Department of Ecology may enforce, through Department of Natural Resources or appeals board, water quality regulations.

11) **DECISIONS:** Final decision of Department or appeals board is binding unless overturned.

12) **FAILURE TO TAKE ACTION:** If operator fails to correct damage, Department may do so and charge costs to operator and owner by lien.

13) **FAILURE TO OBEY STOP WORK ORDER:** Department may take immediate action to stop operation or avoid damage.

14) **ACTION TO ENFORCE:** Department or county may take legal action to enforce regulations.

15) **INSPECTIONS:** Department has right of entry and must make inspections before, during and after operation.

16) **DEPARTMENT OF ECOLOGY:** Right of entry to enforce.

17) **PENALTIES:** Violation of law or regulations subject of fine. Determination by Department, but may be appealed. Attorney general may bring legal action.

18) **DISPOSITION OF FINES:** Fines go to state general fund. Monies for reimbursement of damage correction costs go directly to Department.

19) **VIOLATIONS:** Gross Misdemeanor.
20) FOREST PRACTICE ADVISORY COMMITTEE: Appointed by Governor, includes educators, agencies, landowners and general public. Recommends regulations to Board. May designate from two to five regional committees to draft local rules.

21) APPEALS BOARD: Three members appointed by Governor, of which one must be a lawyer.

22) DUTIES OF APPEALS BOARD: Board may be either full- or part-time. Board will make written findings of fact for each case heard.

23) APPEALS PROCEDURE: Appellant may request formal or informal hearing. Board has all powers related to due process. De Novo judicial review available.

24) LOCAL GOVERNMENT: Local governments prohibited from passing forest practice regulations except incidental to land use planning, taxation, public health or Shoreline Protection Act powers.

25) PUBLIC EDUCATION: Board policy to orient and train individuals to good forest practices and regulations.

26) INTERGOVERNMENTAL COOPERATION: Department may co-operate with federal government and other states in studying forest practices.

27) RESEARCH: Department may recommend research needs.

28) RIGHT OF ENTRY FOR STREAM MAINTENENCE: Landowners must permit agency personnel to enter property for purpose of clearing log jams and debris from streams.
1) TITLE: Oregon Forest Practice Act.

2) DEFINITIONS: Brief.

3) POLICY: To encourage practices that maintain and enhance social and economic benefits, and to avoid confusion in the laws and regulations of agencies. Board has authority to adopt regional rules for sustained yield, protection of forest resources and interagency coordination.

4) FOREST REGIONS: Not less than three.

5) FOREST PRACTICE COMMITTEES: Advisory in each region. Members must be qualified by education/experience. At least 2/3 must be owners or operators of forest land. Three year terms.

6) COMMITTEE DUTIES: Recommends rules and regulations appropriate for the region.

7) NOTICE: Notification of State Forester prior to operation; he notifies Department of Revenue and county assessor. No approval needed for operation. Any change in operation requires further notice.

8) VIOLATION: State Forester will serve citation on operator specifying nature of violation and damage. The order will direct the operator to cease operations and repair damage, if possible. Owner or operator may appeal.

9) FAILURE TO COMPLY WITH ORDER: State Forester may, with Board authorization or owner's approval, repair damages and charge costs as lien against the operator and/or owner.
10) **APPEALS:** Owner or operator may appeal to committee of the Board and, further, to state circuit court.

11) **DUTIES OF BOARD:** Board must adopt minimum standards in each region covering reforestation, road construction, harvesting, chemical use and slash disposal. Provides for intergovernmental cooperation.

12) **PURPOSE OF RULES:** They shall be designed to meet the objectives of forest-related rules of other agencies.

13) **CONVERSION:** The law does not preclude conversion.

14) **PENALTIES:** Violation is a misdemeanor. Severity of penalty varies according to section violated.
1) TITLE: Idaho Forest Practice Act.

2) POLICY/PURPOSE: To encourage practices on forest land which maintain and enhance social and economic benefits; and to grant the Board of Land Commissioners authority to adopt rules for sustained yield and the protection of forest resources.

3) DEFINITIONS: Moderate.

4) DUTIES OF THE BOARD: The Board will adopt regional standards for harvesting, road construction, regeneration, chemical use and slash disposal.

5) DUTIES OF DEPARTMENT: Department of Lands will enforce the law, appoint advisory committees, assist the Board, coordinate agencies and assist landowners.

6) NOTIFICATION OF FOREST PRACTICES: Notice required before commencement or changes in operation. No approval needed. No notice required if operation complies with approved management plan. Notices are valid for two years, renewable.

7) NOTICE OF VIOLATION: Department will make determination and notify landowner. It may order operator to cease and repair damage. Provision for appeal.

8) REPAIR OF DAMAGE: Department may repair damages and charge costs against operator, and owner, as authorized by the board.

9) DUTY OF PURCHASER: Initial purchaser must be able to furnish proof of operator's notice.

10) VIOLATIONS: Misdemeanor.

11) ENFORCEMENT: Department of Lands is responsible.

12) CONVERSION: The law does not preclude conversion.
Montanans have tried and failed to enact comprehensive forest practice legislation. In 1973, the state Division of Forestry sponsored a bill (SB 405)—defeated in 1974. The 1975 version (SB 157), made some changes; it was primarily sponsored by industrial interests, but had broad support from other organizations.

Both environmental and industry groups supported the 1975 bill. Why, then, did it fail? In Oregon and California, the battle line for forest practice legislation was drawn (and still exists) between these two interests. In Montana, the adversity seems to be more between the population in general and certain members of the governing body. Two in particular, George McCallum and Chris Stobie, have opposed a law unalterably. And though these two both claim to represent the Sanders County population, the evidence and my experience both indicate that resistance from that area may result more from their provocation than from a democratic groundswell of opinion.

Our 1973 proposal was modelled closely on Oregon's Act. The State Forester chose to try introducing it in
the Senate because, he reasoned, it would encounter more resistance there. He was correct. The bill met a hostile Natural Resources Committee and languished until 1974. In late 1973, Montana's JUC endorsed it (Montana, 1973) which effect on the legislators was doubtful. The bill was finally defeated on the floor, 29-19, February 6, 1974.

An historical note from the Division of Forestry (1975) listed some of the objections raised to the bill. Legislators felt the enforcement by lien against property was too harsh a measure. Also, they said, the identification of "scenic values" as a public resource could lead directly to conflicts with private property rights, since the term does not yet have a precise definition. There was some question about the effect of the bill on extant operations, though that question was clarified by amendment during the '73 session. Finally, George McCallum worried that his Christmas Tree Farm would fall under the Act's auspices.

The bill as introduced in 1975 was strongly and publicly supported by industry, conservation, environmental and public interest groups. (Moon, 1975b) Changes in the bill accommodated every objection raised, though it weakened the proposal considerably. No liens or scenic values were mentioned, and ongoing operations and Christmas Tree farms were exempted.

Senator Roskie, apparently a supporter of the bill, asked the Division of Forestry for fodder for his floor
debate. He asked the Division whether it had any sort of incentive proposals to offset the coercive aspects of the bill. He felt that if landowners could be compensated for their increased costs, it might take some of the sting out of regulation. (Moon, 1975a)

Though the Division did apparently invent a quick study proposal, the bill went down to defeat on March 5th, by a vote of 32-17. The vote made it clear, said Gary Moon (1975b), that the bill's demise was more a result of "determined opposition of several small forest practices (sic) operators, small forest landowners and ranchers" than a logical appraisal of the measure. Accomodating every objection had not made the slightest difference.

An informal survey by Mark Ahner (1975) for the Division of Forestry shortly after the Senate's action disclosed that resistance was, indeed, small but vocal. Of several groups that he visited, only the Flathead Christmas Tree Growers Association was violently opposed to the bill — not surprising since George McCallum is its president. But all other groups, including Lions Clubs, the Lincoln County Committee for Rural Development and the Western Montana Loggers Association all believed in the proposal as a benefit to Montana and Montanans. Even county commissioners in Western Montana were quoted as supporting the "concept," though preferring incentive-based approaches. (Intermountain Logging News, 1974)
The proposal at this writing is not dead; its sponsors are waiting for an opportune time to make a third attempt. But it remains to be seen, what manner of legislation will satisfy the illogical opposition of a determined few with the balance of power and yet effectively serve the needs of the industry, the public and the resource. Possibly, state law is not the answer in Montana.
A BILL RELATING TO FOREST PRACTICES (SB 157, 44th Session)

1) TITLE: Montana Forest Practice Act (1975).

2) POLICY/PURPOSE: To encourage forest practices which maintain social and economic benefits and resources. Board granted authority to adopt rules for sustained yield and the protection of forest resources.

3) DEFINITIONS: Minimal.

4) DUTIES OF BOARD: Board must adopt regional rules governing harvesting, road construction, reforestation, chemical use and slash disposal.

5) POWERS AND DUTIES OF DEPARTMENT: Department will appoint an advisory council and enforce the act.

6) NOTICE: Operator must notify Department before commencement of operation. No approval needed. A single, annual notice may be substituted.

7) DUTY OF PURCHASER: Commercial purchaser must be able to furnish proof of notice by operator.

8) VIOLATION: Department may order operator to cease violating practice or operation. Provision for appeal. Operators may continue non-violating action.

9) MISDEMEANOR: Failure to file notice or comply with Departmental rules. Indictment by Department.

10) LEGAL ASSISTANCE: Available to Department from state.

11) PEACE OFFICERS: Departmental authority.

12) CONVERSION: Conversion to other uses must be done within time normally required for reforestation.
CHAPTER EIGHT

THE LOCAL CONTROL ALTERNATIVE

In the 1940's, one author wrote that "local supervision" is best; the supervisors are more closely in touch with the problem and can better grasp, and work to achieve, the goals we set. (Recknagel, 1945) He was referring to a preference for state law over federal. Thirty years later, we are using the same reasoning to go one step further—to the county level. The general purpose government and the conservation districts are prime candidates.

County planning

County level land use planning is not a new concept. In 1935, almost 300 county planning commissions existed in the U.S. In 1938, the Department of Agriculture began a "grassroots system of planning," hoping to bring awareness and a sense of participation to local citizens.

The program mushroomed until, by 1941, almost 2/3 of all the agricultural counties in the nation had locally-sponsored planning committees. These committees were charged with gathering information, classifying resources and preparing plans to solve the specific problems of their
focused attention on the merits of community self-evaluation and . . . local remedial action programs. . . and resulted in the better integration of several state and federal programs at the local level. 

In that year, though, the federal government withdrew its support, claiming lack of local commitment. Some of the committees survived, most faded away. Only where the local citizens felt a need, instead of having it suggested to them from above, was the program a continuing success. (Barlowe, 1953)

Montana county governments have never, to my knowledge, expressed a desire to assume the responsibility for administering a forest practice program. Most county governments in Montana are part-time affairs; they have neither the expertise to administer a policy themselves nor the time or money to delegate that responsibility to others. Furthermore, counties in Montana have no legislative power. Though the commissioners form a county legislature in name, they have no power to make law until and unless approved by the state.

The new (1973) Constitution and House Bill 110 might have changed that. Counties could have assumed self-government powers through the voter review process. But only a small handful even attempted it so far. As it stands, no county has full powers of law-making yet.
In short, counties have neither the power nor the expertise to implement and administer a forest practice policy. The future may hold a different story; expanded financial fitness and authority could put Montana counties in the spotlight. But at present, they are dead ends.

Soil conservation districts

About the same time county planning was tried, the federal government experimented with another approach to local involvement. In 1937, the Department of Agriculture proposed a model state Soil Conservation Districts Law. Conservation districts would be an autonomous branch of state government, electing their own officers from local landowners and having certain powers to guide — by persuasion and regulation — the use of land.

In 1952, fifteen years later, 2,300 districts were in existence. Most were given power to enact land use ordinances, but only fifteen had passed any.

There has been no rush on the part of the districts to adopt land use ordinances. Major emphasis has thus far been placed on voluntary measures to foster soil conservation. But the existence of authority . . . suggests . . . possibilities for the expanded use of regulations of this type in the direction of land resource use practices in the future. 22/

The opportunity to use this power to guide agricultural, forest and construction practices in Montana is becoming apparent.

Montana enacted its Soil Conservation Districts Law in 1939 (Title 76, R.C.M. 1947). The law gave the power
of ordinance-making to the districts in section 76-109. No district has yet exercised this power. With the passage of FWPCA and its mandate to eliminate nonpoint pollution, several researchers have noted that conservation districts have untapped potential. "Since erosion . . . is the leading source of nonpoint pollution, this [ordinance-making] authority could be vital." 23

Are the districts ready to pick up the ball? In a recent survey, district supervisors responded that there were already too many laws, too much bureaucracy and confusion and infringements of rights, and a lack of cooperation. All but eight of the 39 said that local government is the best level for land use administration. (Montana, 1974b)

In 1974, the legislature defeated a proposed Sediment Control Law (SB 401) which would have set up local sediment control programs along lines similar to the Streambed Protection Act of 1975 (26-4710 et seq. R.C.M. 1947). (Johnson, 1977a, Montana DNRC, 1975) Instead, SJR 52 was approved, establishing a study of alternatives in statewide sediment control. A committee of the DNRC reported in 1975 that it had chosen to experiment with "local administration" of sediment control and had applied to EPA for a grant to test it. (Montana DNRC, 1975)

EPA responded with a $145,000 grant for a "first in the nation" attempt at letting the conservation districts take the lead. Lewis and Clark County Conservation District
was selected from among volunteers to develop a pilot ordinance, primarily because of its agricultural and physiographic diversity. In its second report to the legislature in April, 1977, the DNRC committee reported that

approval of Lewis and Clark CD's Sediment Control Ordinance may influence the course of . . . planning agencies by demonstrating that conservation districts are ready and willing to accept the responsibility of . . . their own programs. 24/

The ordinance, developed by an intergovernmental staff, is worthy of study. It proposes to comply with the intent of FWPCA and to follow the recommendation that conservation districts assume sediment control responsibility. And, though its primary purpose is control of erosion, it does all that a state forest practices act would do.

Proponents claim that the ordinance, if approved, will mean the chance for local residents to have control over a federal mandate. It will provide a standard for operators to live up to and give authority the the district to deal with violators of that standard. But above all it will "not dictate land use to the landowner, but is designed to help protect land occupiers within the district from damage caused by accelerated soil erosion." 25

Fate of the ordinance

Will the proposal pass? Even the staff that drafted it has no answer beyond optimism. (Johnson, 1977b) The principal opposition, as expected, comes from the right-wing groups who question the Constitutionality of any land
use planning and particularly the FWPCA. The drafters' judgment is that the ordinance will have a harder time of passage in Lewis and Clark County than elsewhere. If it does pass, they speculate that it will be easily and rapidly adopted by other districts.

The staff plans to carry out an intensive education and information program, with interviews and ads in the local media, bumper stickers, leaflets and even litter bags. They believe that, even if the propaganda effort fails to carry the vote, it will at least serve a purpose in making the people aware of the existence and purpose of conservation districts.

All other districts, says Bill Johnson of the staff, are watching and waiting to see how the proposal fares. If it does not pass, the next legislative session will make sediment control regulation mandatory, he thinks, either by statewide legislation or amendment of the Conservation Districts Law to require Sediment Control Ordinances. In effect, if landowners fail to take this chance, regulation will be imposed on them whether they like it or not.

The attempt, Johnson claims, is to let the problems be solved by neighbors instead of the government. But will conservation districts do this effectively? Individual district ordinances would, besides adding administrative costs, require manpower for preparing conservation plans, approving forest operations and providing expertise
where the local districts fall short, e.g. in soil analysis, fisheries and disease control. The estimate is that, even assuming that all 59 districts pass ordinances -- that no gaps exist -- the costs of manpower to the Division of Forestry would double, compared to statewide administration, and overall costs would increase $2\frac{1}{2}$ times. (Lukes, 1977b) If local control becomes a viable and effective means of involving and educating local landowners in the maintenance and use of their forest land resource, the costs will be worth the effort.
LEWIS AND CLARK COUNTY CONSERVATION DISTRICT SEDIMENT
CONTROL ORDINANCE (#77-01 as proposed 4-15-77)

1) TITLE: Lewis and Clark County Conservation District
Sediment Control Ordinance, as authorized by
Montana law.

2) POLICY: Control and prevent accelerated soil erosion.

3) PURPOSE: A comprehensive program will use land up to
its capabilities, prevent degradation of resources
and promote the general welfare.

4) DEFINITIONS: Moderate.

5) CONSERVATION STANDARDS: Minimum standards shall be
those set by the SCS for erosion control and the
State Forestry Committee for timber harvesting, but
may be repealed or amended by the supervisors.

6) AGRICULTURAL ACTIVITIES: (not applicable)

7) FORESTRY ACTIVITIES: Any land occupier operating in
accordance with district-approved woodlot conservation plan complies with regulations. Those without
plan must submit notice of proposed operations to
the district, whose supervisors may require review
of the proposal by a team. Team will make on-site
inspection to determine whether plan is necessary.

8) CONSTRUCTION/SUBDIVISION ACTIVITIES: (not applicable)

9) EMERGENCY LAND MANAGEMENT ACTIVITIES: Practices in
response to natural emergencies need no prior ap­
proval. Five days allowed for notice.

10) COMPLAINTS: Land occupiers, the supervisors or gov­
ernment officials may file complaint alleging
violation of standards.
11) **ACTION INITIATED BY COMPLAINTS:** Supervisors determine by investigation with land occupier and complainant whether violation actually exists. If so, the supervisors and violator will try to work out voluntary corrective measures.

12) **BOARD OF ADJUSTMENT:** Three member Board of Adjustment (appeals board) appointed by DNRC.

13) **APPEAL TO BOARD OF ADJUSTMENT:** Land occupiers may appeal decision of supervisors to the board, which has authority to grant variances. The supervisors may appeal a board decision to district court.

14) **ORDER TO CEASE AND DESIST OPERATIONS:** Supervisors may issue order to violators to cease operations.

15) **COMPLIANCE WITH OTHER LAWS:** Approval by district does not preclude compliance with other laws.

16) **PENALTY:** Misdemeanor, punishable by fine.

17) **FINANCIAL ASSISTANCE:** Because of additional costs imposed on land occupier by good conservation practices, district supervisors may assist him in finding public funding. Lack of available funds is possible justification for variance.

18) **LIABILITY:** Approval of plan does not remove land occupier from liability nor place liability on district for subsequent damage to private property.
Notes:
1. This is an argument favoring federal over state, too.
2. Most federal proposals, such as the draft bill, now focus on the federal government as a source of assistance rather than control. Albeit, one commentator has proposed a federal forest practice act with regulations by EPA and mandatory state compliance. (Johnson, 1975)
3. Some counties had forest practice controls as early as 1937. But in 1956, the Attorney General ruled that the power to regulate forest practices, except for fire control, rested exclusively with the state. And a 1957 amendment to the Act made it official. In 1970, the Act was amended to give three counties regulatory power. The new law now gives all counties this power (s.4516). (Arvola, 1970)
4. "Much has been made of the considerable land use planning authority that has been quietly amassed by . . . EPA. National laws governing air quality, water quality, solid waste disposal, noise pollution and transportation have authorized broad powers over land uses." Healy, 1976. P. 148-9.
5. One other provision of FWPCA narrowly avoided affecting forest management. Section 404 of the Act gave the Corps of Engineers authority to regulate by permit "the discharge of dredged or fill material into the navigable waters at specified disposal sites." Subsequent Corps regulations excluded forest management activities (except some aspects of road building) from the permit process. The National Forest Products Association relievedly stated that a permit program would have discouraged forestry. (NFPA, 1975)
7. The state suffered bad damage to timberlands in two major floods in the early 60's. Some blamed poor forest practices. The agitation for a Redwood National Park increased and rode the swell of the environmental movement in the late 60's. And local governments were lobbying for more power. (see note 3, above)
8. The Bayside Timber case, see p. 28.
9. In the Eastern District, operators could not cut Ponderosa pine (P. ponderosa) under 16 inches in diameter. Operators, by law, had to post a $24 bond to ensure regeneration within five years. (PAPTE, 1973)
11. The Act was passed in 1974 and added to in 1975.


13. Forest practice regulations require multi-agency inspections of some operations, but instances have decreased steadily since 1972 — attributed to increased expertise in the State Forester's office. (Oregon, 1977)

14. The bill, introduced at the request of Forestry for Oregon's Tomorrow, apparently is aimed at reducing perceived industry domination of forest policy. But some question whether this theory is wise or even valid. (Oregon C. of C., 1977b) As one commentator pointed out, why shouldn't persons with a direct interest be on the boards, when the policy they make affects their own (private) lands? (Klemperer, 1971)

15. The law did not specifically require inspections.

16. The 1937 legislation applied to all areas over five acres in size and imposed a $50 fine for each acre left without seed trees. (PAPTE, 1973)

17. Of Niarada and Thompson Falls, respectively. The latter was not elected until last year, but had been quite vocal before.

18. The proposal also would have amended our Hazard Reduction Law, by correcting antiquated and conflicting language and shifting responsibility for slash disposal from the State to the operator. Because of the bill, increased public awareness of the problem resulted in the rewriting of the law.

19. An EQC survey of these two groups showed an overwhelming concern for preservation of the agricultural land base. Only 11 of 39 supervisors failed to mark it number one. Many in both groups expressed frustration with upper level red tape; many purposely failed to enforce laws and regulations for this reason. (Montana, 1974a)


21. HB 110, 811 pages before amendments, would have rebuilt the local government code of R.C.M. One of its effects would have been to liberalize county legislative powers. The bill died an agonizing death.


25. from the Introduction accompanying the proposal.

26. State officials are divided on the question. (Bergmeier)
PART III

A COMPARATIVE ANALYSIS
Each of the acts or proposals that I reviewed in Part II has individually unique features to cope with the special problems it addresses. Since this study is concerned with the appropriateness of a law for Montana, the purpose of Part III is to focus on these alternatives, and their acceptability in the Montana milieu.

My study shows that all the proposals except the Conservation District's Ordinance fall into two general categories. "California Class" laws are generally more explicit: California's, Washington's and the EPA model. "Oregon Class" laws are not as restrictive: Oregon's, Idaho's and Montana's bill. But each offering has major and minor variations of its own.

To let the reader compare for himself the alternatives, I will present a tabularized outline of the options in each provision. Recommendations are included, also, as to which, if any, alternative fits the political and ecological climate in Montana.
## CHAPTER NINE

### STATEMENT OF POLICY AND PURPOSE, DEFINITIONS

<table>
<thead>
<tr>
<th>State/Region</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EPA's Model</strong></td>
<td>Comprehensive; includes consideration of every conceivable resource and benefit. Creates a comprehensive regulatory system.</td>
</tr>
<tr>
<td><strong>CALIFORNIA's Law</strong></td>
<td>Extensive consideration of all forest resources while maintaining timber productivity.</td>
</tr>
<tr>
<td><strong>WASHINGTON's Law</strong></td>
<td>Viable timber industry must be compatible with sound natural resource management. Need for system of regulation to do so.</td>
</tr>
<tr>
<td><strong>OREGON's Law</strong></td>
<td>Encourage forest practices that enhance social, economic benefits while assuring continuous growing and harvesting of trees.</td>
</tr>
<tr>
<td><strong>IDAHO's Law</strong></td>
<td>Encourage forest practices that enhance social, economic benefits while assuring continuous growing and harvesting of trees.</td>
</tr>
<tr>
<td><strong>MONTANA's 1975 Bill</strong></td>
<td>Encourage forest practices that enhance social, economic benefits while assuring continuous growing and harvesting of trees.</td>
</tr>
<tr>
<td><strong>LEWIS &amp; CLARK CD Ordinance</strong></td>
<td>Create a program to conserve soil and water resources and prevent accelerated soil erosion.</td>
</tr>
</tbody>
</table>
A statement of policy is the guide to any law. It sets forth the motivations of the state and the standards for the rest of the law meet. It is the necessary first step to law-building. It should, in fact, be well in mind before the rest of the law is even conceived. The law is the attack on the problem; the statement of policy is the definition and limitation of the problem.

What should be set out in a forest practice statement of policy? It depends to a great extent on our use of the forest resource. Timber productivity and the maintenance of air and water quality are items that should always appear. Soil protection, recreational use, aesthetics and scientific values are suggested at times, too.\(^2\) (Francois, 1950; SAF, 1975)

The inclusion of scenic/aesthetic resources, in particular, has been a point of controversy in much legislation. In Oregon, the aesthetics provision was struck from the list for political reasons. (Mattock, 1977) In Montana, "aesthetics" provoked the response that a purely subjective criterion could and should not appear among the objects of rule-making. (Montana, 1975a)

The policy statement should also reflect the objectives of the agency which will administer the law. The policy of Montana's Division of Forestry seems to be to encourage the production of timber on all suitable lands to the extent that it does not harm the environment. In this case,
a policy statement should orient the non-market resource values only in their relation to growing timber.

The Lewis and Clark Sediment Control Ordinance (hereafter referred to as "CD ordinance") has a different perspective. The orientation of its policy statement is toward soil protection, not timber production.

The EPA model reads as follows:

The legislature thus declares that it is the policy of this state to encourage prudent and responsible forest management calculated to serve the public's need for timber and other forest products, protection of water quality and quantity, watershed protection, protection of soils, air, recreational opportunities, fisheries and wildlife.

It is the purpose of this act to create and maintain a comprehensive system of regulation and use of all timberlands so as to assure that where feasible the productivity of timberlands is restored, enhanced and maintained and to assure that water quality and quantity, soils, watersheds, air, recreational opportunities, wildlife and fisheries are protected.

It is further the purpose of this act to achieve compliance with all applicable requirements of federal and state laws with respect to nonpoint sources of pollution from forest practices.

The section states that the legislature endorses timber production only subject to the constraints of resource protection. The list is long, and a little repetitive, but EPA favors the "clean, comprehensive statement of policy over condensed versions."\(^3\) A Montana adaption of EPA's policy statement would stress the economic value of timber more, and other resources less.

California Class laws, such as EPA's, read much the same. Washington's reads:
It is in the public interest for public and private commercial forest lands to be managed consistent with sound policies of natural resource protection; that coincident with the maintenance of a viable forest products industry, it is important to afford protection to forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation and scenic beauty.

The statements of the Oregon Class laws are also similar to each other. Idaho's, for example, reads:

Recognizing that state and private forest lands make a vital contribution to Idaho by providing jobs, products, tax base, and other social and economic benefits . . . it is the public policy of this state to encourage forest practices on these lands which maintain and enhance those benefits.

. . . it is the purpose of this chapter to vest in the Board of Land Commissioners authority to adopt rules designed to assure the continuous growing and harvesting of forest tree species and to protect and maintain the forest . . . resources.

Oregon's adds the provision that it is "essential to avoid uncertainty and confusion" in implementing forest laws between and among agencies, and that coordination is a goal.

The CD Ordinance, after setting out a simple policy to "provide for the conservation of soil and water resources" states its purpose as follows:

It is the purpose of this ordinance to enact a . . . program . . . and thereby (a) use the land in accordance with its capabilities and treat it according to its needs; (b) prevent degradation of lands, streams, reservoirs, and lakes; and (c) protect and promote the health, safety, environment and general welfare of the people.

There is one essential difference in wording between laws: the California Class laws propose "an effective and comprehensive system of regulation and use" while the
Oregon Class laws specifically delegate "authority to adopt rules" to their respective administrative structures. The conservation district, of course, cannot delegate authority — they are at the bottom of the pecking order.

RECOMMENDATION:

My review of the established options shows that nearly all of them place timber production first, and make it subject to varying constraint. A Montana law would not only do this, emphasizing the economic benefit of timber, but would go further in stating that private citizens have a right and duty to manage lands as they see fit, albeit letting professionals (the state) demonstrate how to get the most out of management, resource-wise. A policy statement might also include Oregon's goal of simplifying and minimizing bureaucracy.

Definitions

Every law provides definitions of the terms used in order to clarify language or assign responsibility (e.g. "Board," "agency"). Most forest practice laws agree on basic definitions such as "landowner" and "timber operator." The CD Ordinance adds a new dimension by defining land occupier in place of landowner:

...any person, firm, corporation, municipality, or other legal entity who shall hold title to, or shall be in possession of, any lands lying within the conservation district, whether as owner, lessee, renter, tenant, or otherwise...the term shall include both the owner and occupier of the land when they are not the same.
California and Oregon Class laws differ slightly over the term "forest land." Oregon defines it as "land for which a primary use is growing trees." California includes land "capable of" growing trees for which another use is not already present. The latter term would seem more appropriate except that few forest practices could be conducted on land that is not actively growing trees. The definition of forest land should also include the extent of lands covered, viz. state, federal or Indian.

Perhaps the most important term to specify is "forest practice." Most definitions list road-building, harvesting, reforestation, use of chemicals and slash disposal. (Lukes, 1977a; WPCA, 1975) Montana's, for example:

Forest practice means
(a) the harvesting of forest tree species;
(b) road construction which requires the cutting or removal of forest tree species;
(c) reforestation;
(d) the use of chemicals or fertilizer . . .
(e) the disposal of slashings.

A list such as this is very easy for administration; one can classify practices by whether or not they fall into these categories. Were it not for administrative problems, though, we could do better to define forest practices ecologically rather than generically.

RECOMMENDATION:

Forest practices shall include all activities on forest land which have potential for alteration of land or water resources.
## CHAPTER TEN

### THE ADMINISTRATIVE STRUCTURE

<table>
<thead>
<tr>
<th>State Forest Practice Board</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>EPA's Model</td>
<td>State forest practice Board appointed from general public, authority to make regional rules and hear appeals.</td>
</tr>
<tr>
<td>California's Law</td>
<td>State Board of forestry, with district advisory committees appointed from specified areas of expertise.</td>
</tr>
<tr>
<td>Washington's Law</td>
<td>State forest practice board composed of government officials and general public. Appointed statewide advisory committee.</td>
</tr>
<tr>
<td>Oregon's Law</td>
<td>State Board of forestry, with regional advisory committees made up of appointed landowners and general public.</td>
</tr>
<tr>
<td>Idaho's Law</td>
<td>Board of Land Commissioners, with state advisory committee equally represented by North and South districts.</td>
</tr>
<tr>
<td>Montana's 1975 Bill</td>
<td>Board of Natural Resources, with state advisory committee equally represented by East and West Districts.</td>
</tr>
<tr>
<td>Lewis &amp; Clark CD Ordinance</td>
<td>District supervisors may amend basic regulations of the SCS and state forestry committee previously in effect.</td>
</tr>
</tbody>
</table>
Forest practice laws must provide for a structure of administration and rule-making unless rules are written into the law. But any one of a number of administrative structures is possible. Who is responsible for setting the standards, and the procedure they use, is an important consideration. They may be set by the legislature, by an agency or by a professional/citizen board. They may cover the entire state or be very localized. Several factors influence the choice: the status quo, popular attitudes and economics.

**Administrative body**

There seems to be consensus in the existing laws that a single entity must make policy decisions, such as a board, and an agency must enforce them. In setting policy, there is a certain mix of technical knowledge and public opinion which will produce politically and environmentally sound decisions.

An agency has the ideal concentration of professional personnel to make technical decisions. If standards were to be set by purely technical criteria, one would prefer assigning the job to the agency. But a single agency often lacks the diversity of expertise required. Nor does it have an institutionalized means of weighing the force of public opinion. The limited professional and political scope of the agency may deter it from reaching a policy which is best suited for the political and ecological times.
A citizen board is more visible and accountable. If we are to set standards which are not purely technical but reflect the popular will, then we must involve the public. Public input can be either formal, through representation on the board, or informal, through public hearings and solicitations.

The best option is to create a body with just the right proportion of expertise and public opinion represented. But the laws and sources I have studied differ on just what that right proportion is.

EPA's proposal reads:

members . . . shall be selected and approved on the basis of their educational and professional qualifications . . . [They] shall be selected from the general public and represent the general interest. . . At no time shall a majority of the members be persons with a direct financial interest in timberlands.

But commentators on earlier drafts favored strong representation by government officials and industry on the board. (EPA, 1975) The SAF Task Force recommended that, while a board should represent the general public interest, it should reflect a "majority of expertise." (SAF, 1975)

Bruce Monell of Washington advocates a board with a broad spectrum of interests and expertise. His state's law reads:

(1) There is hereby created the forest practice board of the state of Washington as an agency of state government consisting of members as follows:
(a) the commissioner of public lands . . .
(b) the director of the department of commerce and economic development . . .
(c) the director of the department of agriculture,
(d) the director of the department of ecology,
(e) an elected member of a county legislative
authority appointed by the governor . . .
(f) six members of the general public appointed
by the governor, one of whom shall be an
owner of not more than five hundred acres
of forest land and one of whom shall be
an independent logging contractor.

There are five representatives of government interests on
the board. And it is conceivable that the forestry pro-
Fession might not be represented.

Montana's proposal gives the DNRC the authority to
appoint a seven member advisory council to the Board of
Natural Resources, qualified only by "experience or edu-
cation to provide advice related to forest practices."

California sets strict limitations on members of advisory
committees:

At no time shall a majority of the members,
nor any of the members selected from the general
public, be persons with a direct personal finan-
cial interest.

In Oregon, the legislature is questioning its system.
Though the law now reads "six members shall be chosen from
persons actively and principally engaged" in the forest
products industry, (526.010) HB 2997 would amend that
to read "not more than four of the voting members shall
have an economic interest in the primary wood products
industry," removing a voting majority from the state board.
The bill would also change the composition of local boards,
from the current "not less than 2/3 of the nine member
committee shall be private landowners," to "not more than
three . . . shall have an economic interest."^ Current status of the bill is unavailable.

RECOMMENDATION:

The chief opposition to forest practice legislation in Montana comes from small landowners and timber operators. They protest that the government is without justification appropriating their property rights. It is logical to conclude that a board or advisory committee composed of local landowners would be more responsive, but also more sympathetic, to the needs of this group.

The present Board of Natural Resources, though billed as a citizen board, is just as far away from the average citizen as the State Forester. Members of an administrative board should be visible and responsive to the community. Local officials, such as representatives of the conservation districts, would serve this purpose.

Finally, I recommend that a state official be chairman, if only on account of his acquaintance with bureaucracy and red tape at the state level.

Local boards

Most forest practice boards (or those that serve the purpose) are appointed by and responsible to the governor. In this manner, says Ayer (1973), the "ultimate responsibility" rests on a public, appointive board and the whole state's interests are represented. But policy makers agree that rules cannot be made and applied statewide in all
cases. Because of geographical, biological and political reasons, the state must be divided into regions. These divisions serve two functions: they bring local problems into perspective, and they allow rules to address areas of ecological similarity.

EPA's model, for example, reads:

Insofar as possible, the board shall group together lands that have substantially similar characteristics and that will best be served by substantially similar regulations.

Advisory committees are usually established in each district, as in California and Oregon. In Montana, one advisory committee would have been composed of "seven members, three residing in the West forest region and three residing in the East forest region. [one at large]" Montana's setup was evidently an attempt to reduce the potential for added bureaucracy.

The CD Ordinance gives rule-making power to the local board of supervisors. This act would reinforce a local bureaucracy and work against the goal of smaller government. But government would be smaller in another sense; it would be more visible to the people.

RECOMMENDATION:

We are faced with a tradeoff. Would we prefer the added administrative costs of many, smaller governmental entities or the possible mistreatment of local concerns by a larger one? There are benefits to both alternatives.
Regional administration

The ideal means of regulating forest practices, according to Klemperer (1971), is on an acre-by-acre basis. But the costs are prohibitive. The alternatives are statewide regulation or regional regulation. If regulation were imposed over the whole state, it would be detrimental both politically and ecologically. The state should be broken down into regions for rule-making and other administrative purposes. Ideally, these regions would be based on ecological similarity.

Can regions in Montana be established on this criteria? Montana's proposed law would have created two regions: east of the divide and west of the divide. But most of our land area is east and most of our forest west. A plan of this sort, though less costly, is also too broad for Montana.

The EQC has divided the state into ecological regions for analysis and planning purposes. The most important forested regions are the Columbia Rockies, the Yellowstone Rockies, the Broad Valley Rockies and the Rocky Mountain Foreland. These regions would meet the criterion of ecological similarity. And only four individual sets of regulations would be required. But there is a fatal flaw. These regions do not correspond to political boundaries. Their creation would involve a whole new level of administration, with associated problems. In possible anticipation, the EQC, in its Fourth Annual Report, states
that these are only environmental regions and are by no means to be considered new state districts. (Montana, 1975)

There is another alternative. We now have in Montana twelve multi-county districts. These districts were established by the governor to facilitate regional administration. Regional programs as well as the Councils of Government (COGs) utilize these districts. District boundaries are drawn along county lines, but at the same time group together areas of similar physiography. Roughly five of them would suffice the state's main timber country. However, the Division of Forestry is not set up for these districts; to them, it would still be a whole new system.

The final alternative is the use of the conservation districts -- purely local administration. Local boards have a history of participating in land use decisions. Siegel (1974) endorses the concept, saying that in general, local regulations developed by local boards for local conditions have worked the best. However, one analysis of New York State's statute concluded that the program there had lost its dynamism partly because of local apathy. (Hamilton, 1963)

The Streambed and Land Preservation Act of 1975 (26-1510) gave the conservation districts authority to administer regulations governing that aspect of land use. Some districts took some initiative; others simply adopted the minimums prescribed by DNRC. In most districts,
administration of the act nearly tripled the workload. (Johnson, 1977b) If districts were to adopt the proposed sediment control ordinance, their administrative structures -- and costs -- would expand considerably.

In a survey of land use issues conducted in 1974, at least seven of the districts responding cited their lack of knowledge and qualifications to deal with current issues. But they were conscious of them and prepared to do something. Several respondents offered suggestions for new programs to protect special resources. One district wanted new regulations that would protect the rights of ownership and at the same time society's interest for future generations. The same district proposed that regulation begin with local initiative, and that the superior financial and organizational resources of the state could then be marshalled against locally identified problems. (Montana, 1974a) This indicates a certain amount of political savvy.

RECOMMENDATION: District-level administration is closest to the problem. But districts often lack the time, money and resources to take the lead. And when they do, it is often with a distinct local bias. But local rule-making is a politically sound move. One alternative might be to establish local rules, but enable the right of review by a statewide entity such as the Board of Natural Resources.
Many of the older laws, since rewritten, set standards in the legislature. This is still the case to some extent in California, where legislated rules are disguised under the term "resource conservation standards."

Amidst the rising clamor of concern about the lack of openness and accountability in the administrative branch, legislative standards gain some credence. Administrative rule-making, it is claimed, is unjust because it subverts the rule of law; it places the decisions of one man or a few men beyond the reach of the people. The apparent solution is to set our standards in the halls of the legislature, where everybody has a chance to participate.

Legislators are responsive to public demands. But they are hardly qualified to make forest practice policy. Some are barbers, some teachers, some pharmacists. They deal with land use issues, business regulation, taxes and interstate commerce. They cannot take the time -- even if they had it -- to become even routinely knowledgable about forestry issues.

Regulation established by law is less flexible than that created administratively. New technologies and approaches come into being faster than a legislature can amend its rules. One good example is that of the National Forest Organic Act of 1897, out of date long before Congress even became aware of the problem.
Rules established by the legislature would tend to be more politically sound. They would reflect the will of the people to the extent that the legislature does. But the politics of the legislature simply preclude a technically sound decision as well. The proper function of the legislature, says the SAF Task Force (1975), is in establishing procedures and guidelines for regulations, not in writing them into the law.

RECOMMENDATION:

Montana's Legislature, particularly restricted by time and staffing limitations, should not retain the responsibility for setting and updating forest practice rules. But it should keep a clearly established oversight responsibility over actions and pronouncements of state administrators. This need not be written into a forest practice law; it should be implied in every delegation of power.
**CHAPTER ELEVEN**

**RULE-MAKING AND ENFORCEMENT**

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<tr>
<td><strong>EPA's Model</strong></td>
<td>Plan required for large operations, notice only for small. Inspections as necessary. Board may allow state to repair damage.</td>
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<tr>
<td><strong>CALIFORNIA's Law</strong></td>
<td>Professionally prepared plan required. Inspections before, during and after. Court order to stop violators and repair.</td>
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<tr>
<td><strong>WASHINGTON's Law</strong></td>
<td>Plan/notice/EIS varying according to potential for damage. Inspections before, during and after. Stop work order, may make repairs.</td>
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<tr>
<td><strong>OREGON's Law</strong></td>
<td>Notice of operation required. Stop work order for violators. Board may allow department to repair damages.</td>
</tr>
<tr>
<td><strong>IDAHO's Law</strong></td>
<td>Notification or management plan required. Department may issue stop work order and repair damages.</td>
</tr>
<tr>
<td><strong>MONTANA's 1975 Bill</strong></td>
<td>Notice of operation required. Department may issue stop work order and repair damages on its own.</td>
</tr>
<tr>
<td><strong>LEWIS &amp; CLARK CD Ordinance</strong></td>
<td>Operator must have conservation plan or else notify supervisors. &quot;Team&quot; inspection. Voluntary solutions to violations stressed.</td>
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Forest practice laws must include provisions designed as guidelines for administration. A law must state whether a management plan, harvesting plan or only a notice is to be required. It must state who will review the plans and whether they have right of approval. It may require agencies to follow a procedure in correcting violations. But it must also provide a clear appellate procedure.

Plan vs. notice

The administering agency must be able to evaluate private forestry operations. In general, laws have required either timber harvesting plans or a notice of operations. Klemperer (1971) commenting on the effectiveness of a regulatory system, said we are "unable to quantify net regional benefits in common units, but we should be able to rank forest management plans according to preference." In other words, plans are the measure of how effective forest practice regulations are.

The Oregon Forest Practice Act requires that:

An operator, timber owner or landowner, before commencing an operation, shall notify the State Forester.

An operator . . . shall notify the State Forester of any subsequent change.

This is the "notice" requirement; California's requirement for "plans" reads:

No person shall conduct timber operations unless a timber harvesting plan prepared by a registered professional forester has been submitted for such operations to the State Forester.
EPA's model requires the same "plan" for larger operations, but requires only a notice for smaller ones.6

There is a tradeoff between the costs to the landowner and administrators, of harvesting plans, and the possible loss of effectiveness by requiring only notice. In the state of Washington, a combined approach was tried. The law allows the board to classify forest practices according to their potential for damage.

Class I: Minimal or specific forest practices that have no direct potential for damaging a public resource may be conducted without submitting an application or notification;

Class II: Forest practices which have a less than ordinary potential for damaging a public resource . . . may begin five calendar days . . . after written notification by the operator . . .

Class III: Forest practices other than those contained in class I, II or IV. A class III application must be approved or disapproved by the department within fourteen calendar days.

Class IV: Forest practices . . . on platted lands . . . lands being converted to another use . . . or which have a potential for substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the state Environmental Policy Act.

Though the wording is a little confusing, it is clear that the legislature tried to combine effectiveness with efficiency. But the plan has potential for turning into an administrative nightmare.

Montana's proposal required only a notice of operation.

It also provided that:

With written approval of the department, an operator may include in the notice required . . . any or all forest practices commenced during the calendar year.
This provision, if applied to industry operations within the state, would allow them to file a single notice covering all their Montana operations.

Another alternative is proposed by the CD Ordinance. In attempting to integrate the law with existing programs and reduce costs, it provides that:

Any land occupier who has a district-approved conservation plan which includes an erosion and sediment control section, or any land occupier who has a long-range timber harvesting plan which includes an erosion and sediment control section approved by the district . . . shall be deemed to be in compliance with this ordinance.

Land occupiers without conservation or timber harvesting plans must either agree to draft one or submit a written notice of operations to the district.7

This provision could be utilized also in a state law. The law could use either the same requirement, or could require state-approved plans. Neither would increase the bureaucracy radically, since state unit foresters presently provide management planning service to anyone who asks.

The Idaho law -- and Montana's proposal -- contains what Gary Moon (1975b) called an "excellent administrative feature." The provision reads:

The initial purchaser of forest tree species which have been harvested from forest lands . . . must receive and keep on file a copy of the notice . . . relating to the harvesting practice. Such notice shall be available for inspection upon request by the department at all reasonable times.

Such a provision increases the costs of public and private
administration. Does it pay for itself in increased effectiveness? The apparent objective was to let the industry itself police the gypso logger.

RECOMMENDATION:

Over the short run, the best regulatory strategy for Montana is a simple notice requirement. But a notice of operations does not assure good forestry. Over the long haul, an overall management plan provides good forestry and a better future. If managers could see the advantage in it— a provision in the law that operations with long-range management plans need not file notices— they would support such an option.

Approvals

Receipt of notice or plan triggers one of two options by the administering agency. In the California Class laws, the agency must approve or reject the harvesting plans. In the Oregon Class laws, no action by the agency is provided for.

Which option is preferable? From the standpoint of foresters, the plan or notice should be seen by professionals somewhere along the route. If the plan has been prepared by a professional, as in California, it would mean unnecessary duplication of effort for foresters in the government to review it. But if the notice or plan is a spontaneous creation of the operator, it should be checked. But none of the laws work this way. Those that have less
stringent notification requirements also require less administrative approval.

From the bureaucrat's point of view, the administrative burden would increase substantially with the higher level of action called for. They may view increased responsibility with relish or dread. If there is adequate funding, bureaucrats seldom balk at taking on new powers.

The SAP Task Force (1975) recommends that administrative procedures should not act to inhibit, or "overmanage" the landowner's plans. Administration should be invisible to the good manager, but stop the bad one. Efficiency, then, is a consideration. Rules which require extensive delays or approval where potential for damage is small, work to the operator's disadvantage.

RECOMMENDATION:

For operations which are insignificant or acceptable, there should be no delays caused by administrative requirements. But administrative officers should have clear responsibility -- written into the law if necessary -- to halt or prevent an operation on the basis of the notice or plan filed, if it shows the operation to be damaging.

Inspections

Inspections provide the next step in enforcement of forest practice regulations. How many are warranted, how often held and how intensive should they be?
The laws which require strict review of operations also require more inspections. California's law requires inspections before, during and after the operations. So does Washington's. The EPA proposal requires only that "the director shall make such inspections as he deems necessary to enforce the provisions of this act." Several commentators on EPA's first draft recommended reducing administrative costs by dropping a specified number of required inspections, such as three.\(^8\) (Johnson, 1975)

Oregon's law does not require any inspections. However, the Forestry Department divides operations into high, medium and low priorities, inspecting them three, two and one time, respectively.\(^9\) (Mattock, 1977)

Idaho's law does not require inspections, either. Jack Gillette states that inspections are done on a random basis, priorities assigned to reported violations and areas of high damage potential.

RECOMMENDATION:

A requirement for inspections in a Montana Forest Practice law might provoke added opposition. But it might also, if passed, give the agency administering the act a legal basis for requesting added appropriations in order to carry out inspections, which apparently they do anyway.
The inspection may turn up violations of the law, or violations may be reported to the agency. A forest practice act must provide a procedure to halt the violations and correct any damage.

In most acts, department representatives are given the right of entry upon private land. The provision is probably superfluous since the department is delegated enforcement powers anyway. Once it has confirmed a violation, the department must take action.

The EPA model reads:

When the department determines that an operator has violated this act . . . it shall serve a notice of violation upon the operator . . . specifying the nature of the violation.

When a notice of violation is served . . . the director (a) shall issue and serve an order upon the operator directing that the operator cease further violation . . . (b) may issue and serve an order upon the operator . . . directing the operator to repair the damage or correct the unsatisfactory condition.

In California, the agency must go into court:

The State Forester may bring an action to enjoin the violation, or threatened violation, of any provision of this chapter . . . the court may issue a temporary restraining order . . . The court may . . . order the defendant to take appropriate emergency corrective action, authorize the State Forester to order the defendant to take such action, or authorize the State Forester to take emergency action.

Thus, in California authorities must obtain a court order. This incurs more delay and expense as well as tying up the courts. But it also motivates both parties to seek a voluntary solution rather than coercive action.
Oregon's provision is almost identical to the EPA's, calling for a mandatory stop work order and discretionary order to repair damages. But, in practice, the rule is not as rigid. In FY76, Oregon reported only 157 violations out of 8,760 contacts. But there were 991, or 11.3 percent, which required "remedial action." In fact, this 11.3 percent were violators, but the department chose to try to achieve voluntary compliance. (Oregon, 1977)

The CD Ordinance, again, has a unique approach:

Where the supervisors determine that the conservation standards are not being observed, they will proceed to seek a voluntary solution to the problem, using the following sequence:

1) ... written notification to the land occupier that an apparent violation exists ...
2) ... discuss alternative solutions with the land occupier, offer technical assistance and provide information regarding financial assistance.
3) ... specify, in writing, a reasonable length of time to complete the corrective measures.
4) ... land occupier ... may use other than district assistance.

Failing these measures, the conservation district may petition the district court to stop the violation.

Repairing damage caused by violations costs time and money. It requires a certain degree of legal coercion to assign the costs of correction to the proper party. In every law, the department is allowed to make corrections and collect the costs in the form of a lien against the owner or operator.

The California Class laws allow the department to correct any damages and charge the parties. In
Oregon and Idaho, the board must first approve the action and expenditure. In Oregon, the state has spent $150,000 in four years on damage repair, but no data was available on how difficult it was to procure reimbursement.

The Idaho law reads that the lien should not be placed on the landowner unless the resources of the operator are insufficient. In this manner, says Gillette (1977), the landowner is not penalized for wrongdoings by the operator. But such a provision would also not motivate a landowner to take an active interest in how his land is treated.

Montana's 1973 bill contained provisions for liens to recover damage repair costs. As one of the chief items of controversy, it was dropped from the 1975 version. But its absence left the department with no legal means of paying the cost of repairs. If the bill had passed and the situation arisen, the Division would be hesitant to move to effectuate repairs. 10

RECOMMENDATION:

Legal avenues to stop violations are necessary. But they should not incur unnecessary delay and hardship. A provision to recover the state's costs of damage correction is vital. Its absence creates potential for an unacceptable decline in effectiveness.

Appeals process

A just and efficient appellate process to ensure fair (and lawful) treatment of landowners and operators must be
provided by law. The WPCA Task Force (1975) recommended that the appeals process should not direct the appellant to the same board or agency making the original decision. It should comply with all requirements of due process, and avoid or provide for the possibility of conflicts of interest.

In the EPA model, Idaho's law and Montana's bill, aggrieved parties would appeal to a board and beyond that to the courts. Oregon's Legislature created a committee of the board to hear appeals, with judicial review available. Washington has a separate appeals board, with a lengthy set of procedures. Hearings before the board may be formal or informal; if appeal is taken to the courts, informal hearings receive de novo review. California's legislature, apparently feeling that judicial determination of violations in the first instance was adequate, did not provide for appeal.

RECOMMENDATION:

The simplest procedures are invariably the best from the bureaucrats point of view. They are also the cheapest and easiest to understand for owners and operators. Legal recognition of due process and court appeal is also a good political maneuver.
CHAPTER TWELVE

MISCELLANEOUS PROVISIONS

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<tr>
<th>State or Ordinance</th>
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<td>CALIFORNIA's Law</td>
<td>Operator licenses, zoned timberland requires permit for conversion. Variance from rules provided for.</td>
</tr>
<tr>
<td>WASHINGTON's Law</td>
<td>Board must set policy on public education and training, recommends needed research. Conversion classified type IV practice.</td>
</tr>
<tr>
<td>OREGON's Law</td>
<td>Does not preclude conversion.</td>
</tr>
<tr>
<td>IDAHO's Law</td>
<td>Does not preclude conversion.</td>
</tr>
<tr>
<td>MONTANA's 1975 Bill</td>
<td>Time limit on conversions is normal amount of time allowed for reforestation.</td>
</tr>
<tr>
<td>LEWIS &amp; CLARK CD Ordinance</td>
<td>Supervisors may help land occupier in seeking financial assistance.</td>
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Worrell (1975) writes that some form of forest practice program can be designed to meet any obstacles. Governments have tried tax incentives, technical assistance, cost-share plans and marketing aids, to name a few. There is a federal assistance program to meet most recognized problems. There should be a means of integrating federal, state and local programs into a forest practice law.

The CD Ordinance makes an attempt at this:

When a land occupier is required to apply conservation practices for the control of soil erosion and sediment damage, as specified by the supervisors, the supervisors may assist the land occupier to obtain available cost-share funds from existing sources.

The supervisors may delay the implementation deadline for corrective action until such time as funds from federal or state sources become available. Through this provision, the district prevents costs from being a disincentive to good management.

A similar provision could be written into state law. Such an inclusion may be quite effective for publicity and political purposes. State unit foresters already perform these functions, but are not utilized fully.

In addition, Montana has no legal authorization to perform CFM functions. A legal statement of the purpose and policy of the CFM program may serve a purpose.

Costs are the main disincentive to improved management and increased costs one of the most serious arguments against
a forest practice act. Any provision serving to reduce costs would improve the acceptability of the law. Comments on the EPA's model pointed out that small landowners simply could not afford to comply with the act; they do not have the financial resources for management practices without outside aid, and they do not keep accurate or consistent enough records to make good economic decisions. In addition, they lack knowledge of the legal requirements, and sometimes they just plain forget to report. (U.S. EPA, 1975)

County commissioners in northwestern Montana endorse "the concept of good forest practices." But they prefer the incentive approach, particularly the funding of state nurseries to provide more planting stock for private owners. (Intermountain Logging News, 1974)

Some laws, such as California's, require harvesting plans designed by professionals. Small landowners just cannot afford them. Many are cutting their woodlots only for the emergency income; they cannot pay for professional planning and other environmental constraints -- and they should not if the public is receiving the benefits. Writing the law so that professionals in government do the planning, or approve the operation, reduces the cost to the landowner and increases his inclination to abide by the law.

RECOMMENDATION:

The landowners and operators are paying the full costs of regulation and the public is receiving a majority of
the benefits. Forest practice legislation, while not designed as incentive legislation, could benefit from provisions clarifying assistance programs and their relationship to the good management required by the act.

Variance

Some legislatures have written into law a provision for variance from forest practice rules. By doing this, they are ensuring a degree of flexibility in enforcement. Not all managers have the same objectives. They may choose to vary rotation age, harvesting practices or other stand characteristics to fit the product they are growing. Their practices will differ accordingly.

We have two options. We may write separate regulations for every conceivable management situation. Or we could allow, by law, a manager to propose certain practices he thinks would fit his purposes.

The EPA model, in response to comment, includes a provision for variances:

Permission to conduct forest practices in a manner different from that required by the regulations may be granted . . . upon a determination by the director that operations conducted pursuant to that permission will be as effective or more effective in protecting the environment.

California's Forest Practice Act allows the Board to exempt altogether certain management practices.

The board may exempt activities limited to the cutting or removal of trees for the purpose of constructing or maintaining a right-of-way for utility lines or the planting, growing,
nurturing, shaping, shearing, removal or harvest of immature trees for Christmas Trees or other ornamental purposes or minor forest products, including fuelwood.

RECOMMENDATION:

A brief statement approving the use of alternative management practices in certain situations would be an excellent political and administrative strategy.

Conversion

The SAF Task Force (1975) recommended that every forest practice act include a provision for conversion of land to other uses after timber operations. Its absence would lend fuel to the "takeings" argument.

The Oregon Class laws very simply allow conversion. Idaho's states "this act does not preclude the conversion of forest land to any other use." California's law is more involved. Potential converters must file an application for conversion with the board. If the areas are already zoned for timberland, the board can only approve the application if:

(1) the conversion would be in the public interest; and

(2) the conversion would not have a substantial and unmitigated adverse affect upon the continued timber-growing use or open space use of other land . . . ; and

(3) the soils, slopes and watershed conditions would be suitable for the uses proposed.

The existence of an opportunity for alternative uses or the uneconomic character of the present use are not
sufficient grounds for approval of conversions in the law. Strict regulations over the shifting of land uses is the evident objective in California.

Washington's law simply states that a notice of operations or application (depending on the Class) may specify that a conversion is likely to take place. The practice then becomes Class IV, subject to a review for the need for an EIS.

RECOMMENDATION:

Unplanned conversion, says the U.S. Forest Service (1956), "may adversely affect future timber supply." But restricting conversions may not be politically feasible in Montana. Individuals should have a right to change the use of his land for whatever reason he chooses. But he must not be allowed to damage other people's property or resources by his action. The solution lies in providing that conversion may take place without restriction as long as the landowner still abides by all forest practice standards in effect for the practices he undertakes.
Notes:

1. "California Class" is a term I have coined to refer to the laws of California and Washington and the EPA model which, as I state in the text, are inclined to be more coercive than "Oregon Class" laws, which include the laws of Oregon and Idaho and Montana's bill.

2. The policy of the Federation of Rocky Mountain States is an example of meaningless terms: "prompt and complete implementation of multiple- and coordinated-use concepts." (Lamm, 1975)


4. See page 49.

5. One industry-sponsored newsletter finds nothing wrong with the present operation. It quotes the Dean of the OSU Forestry School as saying that he thinks industry members on the board speed acceptance of and cooperation with the rules in the community. One citizen member believes that the board needs the expertise of the industry members to keep from being overrun by the Forestry Department propaganda. (Oregon C.ofC., 1977±)


6. EPA's opinion is that site-specific management plans should be approved by the state's water quality agency rather than by foresters. (Agee, 1975)

7. Since 60 percent of the bona-fide farmers in the county already have conservation plans, it would not place an excessive burden on these managers, but only on those which have yet to join the program.

8. One person pointed out that there are over 10,000 timber operations in Oregon and Washington alone, a figure which argues against numerous inspections. (Johnson, 1975)

9. A recent progress report showed 35 percent success rate at these goals. But much of the other 65 percent were discretionary determinations. The operations did not receive the full treatment because of the brevity of activity a low damage potential or the established reliability of the operator. (Oregon, 1977)

10. Note that the Slash Disposal Law, passed in the wake of forest practice defeat, did contain the same lien provision -- unargued. (S. 28-407, R.C.M.)
CHAPTER THIRTEEN

CONCLUSIONS AND ADDITIONAL RECOMMENDATIONS

Over the course of this study, I have made several observations and conclusions. These, I would like to clarify and summarize in the following chapter. In addition, I would like to enlarge my recommendations with practical suggestions for forest practice law.

One of the chief conclusions to be drawn from a study of Montana's legislation regards its political viability. There are strong indications that political opposition is based not upon the merits of any bill, but on the legalistic philosophy they represent. It is not the form of regulation that is opposed; it is the practice itself.

On paper, the objections look reasonable: Liens, scenic values, variances for Christmas Tree farms. But in the 1975 version of the bill, every objection was answered—to the detriment of the quality—yet the opposition did not weaken.

If this conclusion is valid this thesis, centered around comparisons with other, similar, legislation, is useful only as an introduction to the future where such opposition has withered.
In spite of such opposition, or perhaps because of it, there are several goals toward which we can work in prescribing legislation. The formulation of these goals is the result of this study, and I have incorporated them into my recommendations.

Goal #1: Keep it simple. The clearer and more understandable a piece of legislation is, the easier it will be for legislators and landowners to judge it on its merits. Obscure or conflicting wording and complicated procedures serve only to frustrate the subjects of the law, increasing negative attitudes.

On this count, Oregon Class laws rate highly. The language is relatively clear and brief; the procedures are not too hard to follow.

The value of rule-making in light of this goal is not clear. Legislative rules tend to complicate the law, but the alternative, administrative rules, is not nearly as simple. There is but one solution: the legislature should not make the rules itself, but should state in the law that administrators be restricted both politically and procedurally from making the process too complex.

Goal #2: Keep bureaucracy and administrative costs to a minimum. This goal links in with the preceding one; it has value also in the potential increases in efficiency and effectiveness of administration. Its political value stems from the growing popular fear of burgeoning and
uncontrollable government. The reduction of bureaucracy should be a permanent policy goal for all legislation. Drafters should take every opportunity to tie new programs into existing ones, eliminate useless ones and reduce the need for interagency red tape if the benefits are not worth the added hassle. It will pay off in political acceptance.

For forest practice legislation, satisfaction of this goal requires working the new program into existing jobs and administrative structure. For instance, a requirement for management plans would not be unjustified; state unit foresters are set up to do this service currently. But a new requirement for approval, of either plans or notices, would be less acceptable.

The administering agency, though, must not be restricted in its duties. It must be able, if it perceives a possible violation from reviewing the notice, to act upon that information, either by restraining the landowner or conducting a followup inspection. This provision was not written into past Montana proposals.

Goal #3: Protect the rights and liberties of the Individual. The choice of regulatory means to enforce policy cannot be justified simply by noting that the "Taking Issue" is a red herring. A government is what the people want it to be; if the majority favored exclusive property rights, that is the system we would have. But government also attends to its minorities. Just because the group
that advocates exclusive property rights is in the minority, that is insufficient reason to ignore them.

The place to put this goal into practice is not in the statement of policy. It is in the involvement of the governed in their own decisions. Throughout these recommendations, I have taken every opportunity to write the local citizen, logger and landowner into the process. Local boards should have decision-making authority and, vandalizing the "jury of one's peers" concept, should have a majority of people who are personally involved in the questions that will come before it. These boards should not act as appellate bodies on their own decisions; a statewide board is needed. But that, too, must be composed of persons fully knowledgeable of the techniques and practical problems involved.

The CD Ordinance is a good example of the use of local law designed to get local citizens to make their own decisions. The local supervisors are responsible citizens who at the same time have their livings to make from the land. Their decisions are likely to be biased in favor of the local residents and economic base. But it is the choice of the citizens rather than administrators or political appointees.

Goal #4: Ensure future flexibility. Forestry is rapidly changing, in both scope and technology. Not only are there constantly new technologies to replace old ones,
there is a continuous discovery of new resources and values that can be gained from the woods. Achieving this goal means not just preferring administratively flexible standards to legislated ones; it means replacing any hidebound rule-making system with one that reflects accurately the wants of the people and the needs of the resource.
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