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COMMENTS

BELOW-COST TIMBER SALES: PERSPECTIVE BASED ON THIRTY YEARS OF ENVIRONMENTAL LEGISLATION

Mark C. Phares*

The Role of the Forest Service in the management of the National Forest System is to act as a steward of the land, fully utilizing the scientific knowledge gained by research and experience on the forest and rangelands of this and other countries. **

I. INTRODUCTION

During late 1979 and early 1980, the lumber and plywood market "took a nose dive."¹ The cost of timber harvesting and manufacturing, however, did not decrease.² Since the early 1980s, a phenomenon called below-cost timber sales (hereinafter BCTS) has plagued the United States Department of Agriculture Forest Service (hereinafter FS). The BCTS problem continues into the present. In fiscal year 1990, 65 out of the 122 national forests lost money.³ Various land-management experts have defined these sales in many ways, including, but not limited to: (1) "a pejorative term which has been applied to selected timber sales that do not return the costs, as measured by short-term cash flow, of Forest Service timber sale planning and administration;"⁴ (2) "sales in which the value

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** S. Rep. No. 94-893, 94th Cong., 2nd Sess. 5, reprinted in 1976 U.S. Code & Cong. Admin. News 6662, 6669.

1. Combes, *The Forest Products Marketplace: A Changing Resource and Below-Cost Sales*, 12 Western Wildlands 6 (1986).

2. *Id.*

3. The Missoulain, March 2, 1991, at A-10, col. 2.

4. Risbrudt, *The Real Issue in Below-Cost Sales: Multiple-Use Management of Public Lands*,

for stumpage is less than the cost of sale preparation and administration, including a prorata share of road construction and engineering support costs;"⁵ (3) "sales in which the costs of sale development and administration exceed the timber sale receipts. . . most below-cost sales are a result of adherence to non-economic decision criteria applied to the most significant capital expenditure programs found in the U.S. Forest service today - the construction of forest roads;"⁶ (4) "it applies to national forest timber sales that fail to generate receipts high enough to cover the government's cost of making the timber available for harvest. This term has been applied to individual timber sales, to a series of timber sales, and on both forestwide and regional bases. The common denominator in all these situations is that moving publicly owned timber into the marketplace costs federal taxpayers more than they get in return;"⁷ (5) a timber sale that denies profit to the federal government;⁸ (6) "those in which proceeds exceed the appraised value of the timber but not the costs of administering the sale;"⁹ (7) "sales in which the U.S. Forest Service's costs of selling specific tracts of standing timber (stumpage) exceed the revenues these sales produce."¹⁰ The recurrent theme to all these definitions is that the purchase price on BCTS fail to cover the costs associated with implementing and administering these sales. Land-management experts have not reached agreement, however, on the causes of BCTS.

Christopher Risbrudt, Deputy Regional Forester for the FS's Northern Region, believes that the central issue to BCTS is land use and management.¹¹ Risbrudt also believes that construction of roads into unroaded areas plays a role in the BCTS issue.¹² Stacie DeWolf, a resource specialist in the FS's Northern Region Office agrees with Risbrudt. She says that the FS's multi-million dollar losses can be attributed to "dramatic increases in the cost of doing business."¹³ David H. Jackson, a professor of forest economics and management at the University of Montana School of Forestry, also concurs with Risbrudt. He believes that the BCTS debate

12 Western Wildlands 2 (1986).

5. Combes, *supra* note 1.

6. Jackson, *Below-Cost Sales: Causes and Solutions*, 12 Western Wildlands 11 (1986).

7. Emerson, *The Below-Cost Timber Sale Issue: Going Against the Grain?*, 12 Western Wildlands 16 (1986).

8. Reid, *Below-Cost Timber Sales: A No-Answer Policy Question?* 12 Western Wildlands 22 (1986).

9. Daniels and Daniels, *The Impact of Below-Cost Timber Sales On Community Stability*, 12 Western Wildlands 26, 27 (1986).

10. Dowdle, *Below-Cost Timber Sales: A Macro View*, 12 Western Wildlands 31 (1986)

11. Risbrudt, *supra* note 4.

12. *Id.*

13. Missoulain, *supra* note 3, at A-1, col. 1.

centers around "forest development."¹⁴ Others, including John A. Combes, the assistant director of timber management in the FS's Northern Region,¹⁵ believe that the decline in the lumber and plywood market, combined with increased harvesting costs, have caused the preponderance of BCTS.¹⁶ Others, however, blame the FS's appraisal system for the BCTS problem.

Peter M. Emerson, the vice president of Resource Planning and Economics for the Wilderness Society¹⁷ is a proponent of this theory. He says that the FS's "residual value" pricing appraisal system "calculates the minimum bid that a hypothetical purchaser of 'average' efficiency can afford to pay and still make a reasonable profit."¹⁸ Moreover, Emerson says that at stake is the terms under which the FS will make public timber available to private industry, the continued viability of large, wild roadless areas and the economic well being of communities dependent on timber harvesting, outdoor recreation or both.¹⁹

Steven E. and Barbara J. Daniels, assistant professor of resource policy in the College of Natural Resources at Utah State University and research associate at the Center for Resource and Environmental Policy Research at Duke University, respectively,²⁰ share Emerson's belief. They believe that bids issued under the "minimum acceptable bid" appraisal system ("residual value" appraisal) will likely not cover the FS's costs because the FS bases such bids on lumber prices and milling costs and not on the costs of selling the timber. The costs of selling timber include such things as "timber appraisal, environmental impact assessment, logging and transportation planning, reforestation, and administration of the sale contract."²¹ Beyond the land-based and management issues incorporated into the BCTS issue exists a system of public-land laws which have profound impacts on the FS and its management of these lands.

This article will analyze the laws which most affect the FS's timber-related public-land management scheme. First, this article will review the Multiple-Use Sustained Yield Act of 1960²² and its effect on BCTS.

14. Jackson, *supra* note 6.

15. This was Combes' position when making this statement in the article at Combes, *supra* note 1.

16. Combes, *supra* note 1, at 9.

17. This was Emerson's position when making this statement in the article at Emerson, *supra* note 7.

18. Emerson, *supra* note 7, at 17.

19. *Id.*

20. These were Daniels' and Daniels' positions when making this statement in the article at Daniels and Daniels, *supra* note 9.

21. Daniels and Daniels, *supra* note 9.

22. Multiple Use Sustained Yield Act of 1960 (MUSYA), 16 U.S.C. § 528 (1988).

Second, this article will analyze the National Environmental Policy Act's²³ impact on the FS's decision whether to implement BCTS. Third, this article will evaluate whether the Endangered Species Act of 1973²⁴ has an effect on BCTS. Last, this article will analyze the implications of the Forest and Rangeland Renewable Resources Planning Act as amended by the National Forest Management Act of 1976²⁵ and these acts' effect on the BCTS issue.

II. ANALYSIS OF BELOW-COST TIMBER SALES IN LIGHT OF THE MULTIPLE-USE SUSTAINED-YIELD ACT OF 1960, THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, AND THE ENDANGERED SPECIES ACT OF 1973

A. *The Multiple-Use Sustained-Yield Act*

The Multiple-Use Sustained-Yield Act of 1960 (MUSYA) directs the FS to take five competing resources into consideration: outdoor recreation, range, timber, watershed, and wildlife and fish.²⁶ In some instances, the FS's mandate is not a difficult one. Many times, one or more of these five benefits are not present on any given timber sale. In other words, due to ecologic, geographic, and climatic conditions within individual timber sales, the areas in which these sales are found may be able to readily support one multiple-use benefit such as recreation, but will be incapable of supporting another multiple-use benefit such as range management. MUSYA addresses this scenario by stating:

'Multiple use' means the management of all the various renewable resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people. *some land will be used for less than all of the resources.* "(emphasis added).²⁷

The difficulty arises when, as on many sites, more than one or even all of the five competing resources *are* present. In such a circumstance, MUSYA directs the FS to use the resources in a combination that best meets the needs of the American people.²⁸ The FS claims that its timber program meets the needs of the American people because it provides multiple-use benefits such as "improved wildlife habitat, visual enhancement, increased

23. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (1988).

24. The Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544 (1988).

25. The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), 16 U.S.C. §§ 1601 *et seq.* (1988).

26. 16 U.S.C. § 528 (1988).

27. 16 U.S.C. § 531(a) (1988).

28. *Id.*

water, grazing and timber yields and reduction of insects, disease and fire."²⁹ Stacie DeWolf, a resource specialist in the FS's Northern Region Office says that national forests in the Northwest United States accumulate the most losses because "theirs are the most contentious timber sales."³⁰ DeWolf believes that supplying multiple-use benefits increases FS costs. She states that, "[w]e're (the Northwest U.S. national forests) the first to battle all the issues. [w]e've got to contend with roadless areas, wilderness, grizzly bears, wolves, old-growth trees and spotted owls. It's expensive."³¹ Multiple-use benefits are not the FS's only justification for BCTS.

Besides the non-timber multiple-use benefits, the FS justifies BCTS due to these sales' purported value in converting timber stands.³² Timber harvesting can remove poor quality timber and allow higher quality timber to regenerate.³³ Moreover, BCTS can combat forest disease and insect problems as harvesters will theoretically remove the affected trees.³⁴ The FS will realize these goals, however, only if timber-sale purchasers remove the diseased or insect-infested timber. This requires the FS to identify the affected timber so that purchasers can harvest it. This, in turn, will increase FS costs, due to the added time the FS will need to spend identifying the subpar timber, and perpetuate the BCTS problem.

The FS's timber program, and more specifically, its road construction and reconstruction program, often leads to BCTS. Professor David Jackson says the vast number of BCTS are caused by the construction of forest roads.³⁵ Jackson further elaborates that in areas such as Idaho and Montana, road construction costs represent approximately thirty percent of the FS's total budget, forty-five percent of the FS's timber-related expenditures; and that appropriations for road construction and reconstruction in the northern Rocky Mountains exceed timber sale receipts.³⁶ Jackson says that the FS's adherence to what it calls "maximum initial development" adds to this problem.

The FS designates certain areas for timber development. These areas contain certain numbers of proposed timber sales, each requiring a road system to access its timber. "Maximum initial development" occurs when the FS initiates harvesting, within the designated development area, on the

29. Risbrudt, *supra* note 4, at 3.

30. Missoulain, *supra* note 3, at A-1, col. 1.

31. *Id.*

32. Combes, *supra* note 1, at 10.

33. *Id.*

34. *Id.*

35. Jackson, *supra* note 6.

36. *Id.* (citing Jackson, *Divestitures, Harvest Expansion and Economic Efficiency: The National Forests in the Early 1980s*, Public Lands and the U.S. Economy (1984)).

farthest timber sale from an existing road. In order to access the timber sale, the FS will have to construct a road (R1) which leads from the existing road into this sale. In so doing, the FS will access some or perhaps all of the remaining timber sales that it will auction for sale at a later date. The FS, therefore, disposes of the need to construct roads into timber-sale areas already accessed by R1. This system, at first glance, appears efficient. In actuality, "maximum initial development" has at least two flaws. First, the increased roading increases road-construction costs and at the same time causes premature development of the timber-development area.³⁷ Second, "maximum initial development," because it calls for rapid development, reduces the amount of remaining roadless areas within the development area.³⁸ Professor Jackson summed up the budgetary implications of such a road-development system by stating:

[r]oad construction outlays are maximized in early budgetary periods, so the entire area is brought under management. The number of below-cost sales increases, and the overall time pattern of agency expenditures and receipts are twisted toward unnecessarily high expenditures during initial forest development.³⁹

"Maximum initial development" is not the only reason the F.S. carries out BCTS.

The FS also carries out BCTS in order to provide "net public benefits."⁴⁰ Federal timber sales purportedly provide stability to small, timber-dependent communities.⁴¹ In fact, in fiscal year 1990, the FS says it supported 7,280 timber-related jobs in Montana. The FS claims that timber sales play a vital role in the economic well-being of many small communities throughout the Northern Rocky Mountains.⁴² The effect of BCTS on these timber-dependent communities can be illustrated by two diametrically opposed scenarios. In the first scenario, the FS carries out BCTS as a one time response to a drooping demand for wood products and the threat to a lumber dependent community which may accompany this drooping demand.⁴³ When the FS uses BCTS responsively in this manner, these sales may offset the negative impacts of changes in lumber prices and can decrease profit loss.⁴⁴ In other words, used as a responsive mechanism,

37. Jackson, *supra* note 6, at 13.

38. *Id.*

39. *Id.*

40. Daniels and Daniels, *supra* note 9, at 27; Emerson, *supra* note 6, at 17.

41. Missoulain, *supra* note 3, at A-1, col. 3.

42. Daniels and Daniels, *supra* note 9, at 28.

43. *Id.* at 27.

44. *Id.* at 30.

BCTS can be a positive force for community stability

In the second scenario, the FS uses BCTS as a permanent policy on a national forest due to a weakened market for mill output. In such a situation, there is very little stabilizing effect on the local community because the BCTS are nothing more than a "perpetual income transfer from the U.S. Treasury to timber-dependent communities."⁴⁶ Essentially, if the FS implements BCTS continually in a given community, this community's economy becomes immune to the positive effect that the responsive BCTS can have.

The FS mandate may not become a reality. On many timber sales, where all of MUSYA's resources may be present, the FS places timber in a position of dominance over the other resources and may even completely disregard these resources.⁴⁶ The FS's placement of timber in a dominant position over other resources is not, in and of itself, a violation of MUSYA. However, when the FS continually relegates the four non-timber MUSYA resources to an inferior position to that of the timber resource, it has violated MUSYA.⁴⁷ MUSYA's legislative history bears this out, stating:

[A] national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes. It is also clear that the Secretary of Agriculture shall administer the national forests for all of their renewable natural resources, and *none of these resources is given a statutory priority over the others.* (emphasis added).⁴⁸

Congress' obvious intention in enacting MUSYA was to provide for the act's listed resources and to end the resource exploitation that had occurred on the national forests prior to the adoption of MUSYA.⁴⁹ Congress posited this intent by stating:

In summary, we are strongly of the opinion that the Secretary of Agriculture should be directed to administer the national forests for sustained yield of its several products and services because. (c) such legislation would protect national forest resources from possible overutilization in the future as a result of economic pressures or those of single-interest groups.⁵⁰

Again, the act's legislative history states that the FS must give "equal

45. *Id.*

46. See *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Foundation for North American Wild Sheep v. U.S.*, 681 F.2d 1172 (9th Cir. 1982).

47. H.R. Rep. No. 1551, 86th Cong., 2nd Sess. 2, reprinted in 1960 U.S. Code Cong. & Admin. News 2377, 2380.

48. *Id.*

49. *Id.* at 2379.

50. *Id.* at 2382.

consideration" to MUSYA's multiple-use benefits and provide "harmonious and coordinated management of the various resources each with the other *without impairment of the productivity of the land*" (emphasis added).⁵¹ FS implementation of BCTS, however, may not provide the non-timber multiple-use benefits.

The Wilderness Society claims that the FS has overstated the multiple-use benefits imparted by timber harvesting.⁵² Although the FS asserts that it implements BCTS to provide multiple-use benefits, this may not be the case.⁵³ Many of the timber-harvest generated multiple-use benefits which the FS espouses, may not exist.⁵⁴

Draft EISs for the Beaverhead and Clearwater National Forests indicate that these forests' existing road capacity exceeds demands into the twenty-first century.⁵⁵ This means that new roads may increase the number of available recreation sites, and may even shift recreation activities from one site to another, but will not increase visitor use or impart additional multiple-use benefits unless they provide access to more enjoyable recreation opportunities.⁵⁶ You cannot impart benefit to a satiated person by offering her more food. For many recreationists, more enjoyable recreation opportunities lay in wilderness areas. However, the FS cannot construct roads in wilderness areas due to the 1964 Wilderness Act's mandate,⁵⁷ and wilderness advocates undoubtedly prefer to maintain wilderness areas in an unroaded condition.

The FS rebuts this charge by saying that BCTS do improve the non-timber multiple-use benefits such as recreation, and wildlife habitat.⁵⁸ The FS fulfills this duty by hiring a host of land-managers, ranging from timber specialists to range specialists to recreation specialists. Each of these specialists gives her input on FS projects (anything from a timber sale to the construction of a wilderness trail to the construction of a livestock fence) to ensure that the ultimate project decision is an informed one. In some circumstances, timber may be foremost on the FS's agenda.⁵⁹ But, if the FS has provided each resource manager's opinion concerning what will "best meet the needs of the American people,"⁶⁰ it has likely fulfilled MUSYA's mandate. This scenario would be fine in a Utopian world where

51. *Id.*

52. Emerson, *supra* note 7, at 19.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 16 U.S.C. § 1131(c) (1988).

58. Risbrudt, *supra* note 4.

59. See *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

60. 16 U.S.C. § 531(a) (1988).

land-management practices do not have an impact on the state of the environment. However, factors other than the FS's procedural fulfillment of an act come into play

Utopian ideas are undercut by such things as local lumber mills exerting extreme pressure on the FS to offer timber sales in order to uphold community stability. In a number of small communities, many people rely on timber for their livelihood. In such communities, the FS correctly argues that it should attempt to provide for "net public benefit." However, BCTS may prevent the FS from providing timber to these timber-reliant communities on a sustained-yield basis⁶¹ because if the FS uses BCTS permanently instead of responsively, it may deplete the timber source upon which these communities rely for their stability. This would inevitably lead to the same problem that the FS was trying to solve by delivering to these communities the economic support that timber provides. In the end, the FS has distinct problems justifying the depletion of our one truly renewable natural resource by providing "net public benefit."

The FS must, at some point, fail in providing for the "net public benefit" of these timber dependent communities because the FS would be unable to provide a continuous supply of timber for these communities to harvest. The FS would cut its own throat as it would have to delete totally harvested sites from its timber base (the timber on national forest lands that the FS designates for timber-harvesting operations). The FS would thereby put pressure on itself to find other timber harvesting sites to compensate for the void left by the lack of timber flowing from these over-harvested areas. This pressure may force the FS to add sites to its timber base, having possibly already determined these sites to be unfit for harvest, because it must meet its allowable cut (the FS's calculation of the maximum amount of timber that it can offer for sale each year).⁶² In so doing, the FS could burden lands that are unsuited for timber production. If this were so, the FS would harm the communities that rely on publicly-owned timber as their main source of income. Once a site can no longer provide timber, a timber-dependent community can no longer rely on the once steady source of income derived from the timber harvested from that site. This dilemma, in its extreme, has the potential to transform a once timber-dependent community into a "bust"⁶³ town; if the town's members cannot find new employment within their own community, they must move elsewhere. In such a circumstance, the FS is not providing for the "net public benefit," which is its stated goal. This problem is further exacerbated by the potential effect timber harvesting may have on the other

61. 16 U.S.C. § 531(b) (1988).

62. Davis and Johnson, *Forest Management* 702 (3d ed. 1986).

63. Borrowed from the "boom/bust" phraseology often associated with mining communities.

MUSYA resources.

After a large clearcut, the increased precipital runoff from the harvest site will carry sediment with it.⁶⁴ This will likely have a dramatic impact on the amount of sedimentation within streams adjacent to the cut.⁶⁵ The increased sedimentation may have negative impacts on fish populations, which would make it difficult or impossible for the FS to provide for MUSYA's fish resource requirement. Further, because commercially valuable timber tends to grow in close proximity to streams or rivers, the FS may have a hard time solving the problem of post-harvest increased sedimentation in these water sources. The FS can deal with this problem, however, by implementing environmentally-sensitive silvicultural prescriptions (i.e. implementing a schedule of activities for a particular parcel of forestland that controls its establishment, composition, structure, and growth in an environmentally-sound manner).⁶⁶

One logical silvicultural alternative to this problem is for the FS to implement more "no cut" prescriptions on sites which are close to or bordering riparian zones (areas where vegetation requires free-standing water). "No cut" prescriptions will also allow the FS to more effectively provide for MUSYA's non-timber resources, while also partially ameliorating the BCTS problem. The FS cannot create BCTS on sites upon which it will not allow timber harvesting.

B. *Wildlife Considerations and NEPA Procedures*

BCTS and the harvesting activities associated with them may adversely affect wildlife.⁶⁷ Many animals, notably the ungulates (animals such as elk, deer, moose and caribou), and in particular elk, will flee from harvesting operations.⁶⁸ Elk are particularly sensitive to the density of logging roads in their habitat.⁶⁹ Wildlife biologists have found that increased roading density results in the displacement of elk from the affected site.⁷⁰ Other wildlife species are likewise susceptible to timber-harvesting activities.

Grizzly bears move from areas in which harvesting activities are being carried out.⁷¹ Grizzly bear displacement may be due more to the human

64. Hewlett, *Principles of Forest Hydrology* 143 (1982).

65. *Id.*

66. Davis and Johnson, *supra* note 61, at 27; *see also* D.M. Smith, *The Practice of Silviculture* 128 (8th ed. 1986).

67. Speech by Dr. Jack L. Lyon, researcher at the United States Forest Service's Intermountain Forest and Range Experiment Station in Missoula, Montana (Apr. 16, 1987).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

presence than to the density of logging roads, but the effect is the same. The FS's decision to favor one multiple-use benefit (timber) over another multiple-use benefit (wildlife) was challenged on the Angeles National Forest.

In *Foundation for North American Wild Sheep v United States*,⁷² the FS failed to consider the adverse impacts that reconstruction of a mining road would have on a "sensitive" species of Desert Bighorn Sheep (*Ovis canadensis nelsoni*).⁷³ The road in question purportedly provided one of only two ways into the mine permittees' (Curtis Tungsten, Inc. (Curtis)) mine claim.⁷⁴ Curtis proposed to widen the road, clear it of vegetation and repair its washed-out areas.⁷⁵ Foundation opposed the reconstruction because it passed through an area critical to the "continued viability of the Bighorn herd" and because this species of Bighorn sheep was "peculiarly subject to stress-related diseases resulting from interaction with other species."⁷⁶

In response to Foundation's claims, the FS prepared an environmental assessment (EA),⁷⁷ as required by the National Environmental Policy Act of 1969,⁷⁸ to determine whether an EIS was necessary. The FS evaluated four alternatives, ranging from unlimited, year-round use of the road to absolutely no use of the road.⁷⁹ Upon completion of this evaluation, the FS decided to implement a plan that allowed use of the road for nine months per year and closure of the road for the three months the sheep "lambled" and reared their young.⁸⁰ The FS concluded that its chosen alternative adequately mitigated any potential adverse impacts on the sheep.⁸¹ Therefore, the FS issued a finding of no significant impact (FONSI)⁸² and decided not to prepare an environmental impact statement (EIS),⁸³ required when any federal project will have a significant impact on the quality of the human environment.⁸⁴ The Ninth Circuit addressed the EA's shortcomings.

The EA failed to include an estimate of the amount of traffic that

72. 681 F.2d 1172 (9th Cir. 1982).

73. *Id.* at 1175.

74. *Id.* at 1174-75.

75. *Id.* at 1175.

76. *Id.* at 1176.

77. 40 C.F.R. § 1508.9 (1990).

78. 42 U.S.C. §§ 4321-4370 (1988).

79. 681 F.2d at 1176.

80. *Id.*

81. *Id.*

82. 40 C.F.R. § 1508.13 (1990).

83. 42 U.S.C. § 4332 (1988).

84. 42 U.S.C. § 4332(C) (1988).

would occupy the reconstructed road.⁸⁵ The EA also failed to quantify the amount of unauthorized traffic that would use the road or the effect this traffic would have on the sheep.⁸⁶ Further, the EA failed to give any indication that the FS adequately considered the "potentially differing reactions of the sheep depending upon whether" human's "intrusion was occasional or relatively constant."⁸⁷ The Ninth Circuit concluded its opinion by stating that the FS's decision not to prepare an EIS was clearly unreasonable.⁸⁸

The FS can decrease the frequency of wildlife displacement by identifying potential BCTS. If the FS can more effectively manage the sites of potential BCTS for wildlife than it can for timber production, it should remove such timber sales from harvesting consideration and manage the potential BCTS sites more intensively for wildlife protection and preservation. A suggestion is that the FS could intensively manage lands for wildlife protection when these lands represent something less than critical habitat.

Standing alone, this idea will not cure the BCTS problem. The FS will not, and as a practical matter, cannot remove all such areas from the timber base, because a large number of timber sale sites may be more suited for wildlife management than timber management. Removing them from the timber base would dramatically reduce the amount of timber the FS could sanction for harvest. Moreover, timber management and wildlife protection are not always mutually exclusive goals. However, this idea may reduce the number of BCTS and at the same time, fulfill the mandate of MUSYA and possibly the stronger mandate of the Endangered Species Act of 1973 (ESA).⁸⁹

C. *The Endangered Species Act and MUSYA*

Congress created the ESA, perhaps the most direct, far-reaching environmental act ever enacted by any country,⁹⁰ among other things, to enhance the country's environmental awareness. The ESA directs all federal agencies to carry out "conservation" techniques to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."⁹¹

85. 681 F.2d at 1178 n.30.

86. *Id.*

87. *Id.* at 1179.

88. *Id.* at 1183.

89. 16 U.S.C. §§ 1531-44 (1988).

90. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

91. 16 U.S.C. § 1532(3) (1988).

A prime example of the FS's inability to consider MUSYA's wildlife resource completely and the protective duties attendant under the ESA arose in the Jersey Jack area of Idaho's Nezperce National Forest.⁹² In *Thomas v. Peterson*, the FS failed to discuss the presence of the endangered Rocky Mountain Gray Wolf in an environmental assessment (EA) it had prepared pursuant to § 102 of NEPA.⁹³ The FS proposed the construction of a logging road in order to provide access to a timber sale. As mandated by NEPA, the FS prepared an EA and concluded that an EIS was not necessary.⁹⁴ Therefore, the FS issued a FONSI.⁹⁵ The FS's decision notice stated that "no known threatened or endangered plant or animal species have been found" within the area of the proposed timber sale.⁹⁶ The FS, however, overlooked the U.S. Fish and Wildlife Service's (F&WS) identification of the timber-sale area as being within a "recovery area" for the endangered Rocky Mountain Gray Wolf.

The ESA requires that any federal government agency that proposes to take an action must consult with the F&WS to determine whether any threatened or endangered plant or animal species may be present in the area of a proposed agency action.⁹⁷ The FS violated its responsibility under § 1536(c)(1) of the ESA. Moreover, even had the FS consulted with the F&WS and learned that the wolf may have been present in the area of the proposed logging road, the ESA required the FS to prepare a biological assessment.⁹⁸ The FS, however, did not prepare a biological assessment. As a result, the FS disregarded the strict wording of the ESA. It likewise violated MUSYA's mandate that the FS consider multiple-use benefits present within the national forest system.⁹⁹

Thomas demonstrates the FS's failure to correctly prioritize the four non-timber MUSYA resources. The case also exposes the FS's desire to grope forward with BCTS. Although the Ninth Circuit Court of Appeals did not label the timber sale in *Thomas* a BCTS, it did point out that the road-building cost was higher than the value of the timber it was proposed to access. Most BCTS occur because the FS adheres to its most significant capital-expenditure program: the construction of forest roads.¹⁰⁰ There is no reason to believe, based on this evidence, that the proposed timber sale within the Jersey Jack area would have been anything but below cost. If

92. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

93. 42 U.S.C. § 4332(2)(C) (1988).

94. *Thomas* 753 F.2d at 757.

95. 40 C.F.R. § 1508.13 (1990).

96. *Thomas*, 753 F.2d at 757.

97. 16 U.S.C. § 1536(c)(1) (1988).

98. *Id.*

99. 16 U.S.C. § 529 (1988).

100. Jackson, *supra* note 6.

this one cost was higher than the value of the only pecuniary gain the FS would see from the timber sale, the timber itself, the sale was destined to be a BCTS.

In limited circumstances the FS can favor timber over the other MUSYA resources. If it wishes to do so it must carefully weigh and balance all of the competing resources on the site and determine which management scheme will best meet the needs of the American people,¹⁰¹ and perhaps more importantly, the needs of the environment. Only after the FS has done this balancing test should it decide to favor one resource over another. The FS can oftentimes serve the best interests of the American people and the environment by forgoing timber sales in order to allow wildlife to prosper in its natural habitat or hikers to frequent their favorite backcountry trail. This would allow many American people a chance to fulfill the "net public benefit" by viewing the beauty of some of their country's pristine, untouched scenery and wildlife. Beyond this, the psychological satisfaction that people derive from the knowledge that the FS is actually protecting instead of exploiting resources is a part of the same "net public benefit," albeit a part to which economists cannot very readily attach a pricetag.

The National Forest System has become laden with BCTS in recent years.¹⁰² Although the FS is not mandated to put MUSYA's resources into a management scheme which will provide for the highest dollar return,¹⁰³ it is required to achieve and maintain a "high-level regular periodic output" of MUSYA's resources.¹⁰⁴ If the FS continues to implement BCTS at the rate that it has in recent years, the outdoor recreation, watershed, and wildlife and fish resources may take a lower rung on the ladder than timber

III. ANALYSIS OF BELOW-COST TIMBER SALES UNDER THE FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1974 AS AMENDED BY THE NATIONAL FOREST MANAGEMENT ACT OF 1976

BCTS have concerned Congress in recent years. In 1984, Representative Sidney Yates (D-Ohio), chair of the House Appropriations Subcommittee on Interior and Related Agencies took heed of the BCTS issue.¹⁰⁵ It was his interest in the matter as well as years of debate over wilderness management that has made BCTS such a volatile topic.¹⁰⁶ Moreover, the

101. 16 U.S.C. § 531(a) (1988).

102. Combes, *supra* note 1, at 8.

103. 16 U.S.C. § 531(a) (1988).

104. 16 U.S.C. § 531(b) (1988).

105. Emerson, *supra* note 7, at 17.

106. *Id.*

"Bolle Report," a study headed by the then Dean of the University of Montana School of Forestry, shed some light on forest mismanagement in Montana's Bitterroot National Forest. This report spurred a congressional Conference Committee to enact 16 U.S.C.A. § 1604(k) of the National Forest Management Act of 1976 (NFMA), which states:

In developing land management plans pursuant to this chapter, the Secretary *shall* identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and *shall* assure that, *except for salvage sales or sales necessitated to protect other multiple-use values*, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use values. The Secretary shall review his decision to classify these lands as not suited for timber production at least every 10 years and shall return these lands to timber production whenever he determines that conditions have changed so that they have become suitable for timber production. (emphasis added).¹⁰⁷

The Committee of Scientists, a Congressionally selected group of forestry experts, subsequently opined that BCTS must be limited by "rules of reason."¹⁰⁸

Section 1604(k),¹⁰⁹ appears to call for the end of BCTS. Section 1604(k) provides that the FS should conduct timber sales on marginally timber productive lands for only two reasons: (1) to carry out "salvage sales;" (cuttings made for the primary purpose of removing trees that have been or are in imminent danger of being killed or damaged by harmful forces other than the natural competition between the trees);¹¹⁰ and, (2) to protect other multiple-use benefits.¹¹¹ The FS does not carry out the majority of its BCTS to protect other multiple-use benefits. On the contrary, it carries out many of its BCTS to provide jobs within the timber industry.¹¹²

Congress' intent in enacting NFMA was clear. In this act's legislative history, Congress stated:

107. G.C. Coggins and C.F. Wilkinson, *Federal Public Land Law and Resources Law* 668 (2d ed. 1987) (quoting 16 U.S.C. § 1604(k) (1988)).

108. *Id.* at 668-69.

109. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1601 *et seq.* (1988).

110. D.M. Smith, *supra* note 65, at 167.

111. 16 U.S.C. § 1604(k) (1988).

112. Daniels and Daniels, *supra* note 9, at 27.

Timber production and sale are important aspects of the overall management of the National Forest System lands. *However, they are not the sole objectives of management planning Congress has been alert to changing land management philosophies as evidenced by the enactment of the Multiple-Use Sustained-Yield Act of 1960 and the Forest and Rangeland Renewable Resources Planning Act of 1974*

However, no single, comprehensive piece of legislation has been enacted that would provide the framework for the development and implementation of management plans developed through an interdisciplinary approach consistent with the principles of multiple-use and sustained-yield.

*The other resources of the forests, wildlife and fish habitats, water, air esthetics, wilderness must be protected and improved. Consideration of these resources is an integral part of the planning process (emphasis added).*¹¹³

It is with this backdrop that courts have interpreted NFMA.

Although these judicial interpretations have not yet addressed NFMA's economic suitability provision,¹¹⁴ the Ninth Circuit Court of Appeals has addressed a parallel issue.¹¹⁵ In *Thomas v Peterson*, the Ninth Circuit Court of Appeals bifurcated its economical analysis and its environmental analysis and addressed them in separate parts of its opinion. The court's ESA analysis was contrary to and unattached with its RPA "economical" roads analysis. In *Thomas*, the two issues were too closely connected for such a disjointed analysis. The FS did not fulfill its mandate under the RPA because that law states that the FS's road building shall be economically *and* environmentally sound.¹¹⁶ The court ignored the wording of the RPA in favor of a FS-created interpretation of the statute. The Ninth Circuit's interpretation of the RPA is clearly contrary to the act's wording and to its own interpretation of the ESA. The court's opinion indicates judicial willingness to allow the FS to carry out BCTS if the FS complies with the procedural mandate of laws that govern its actions.

In the economical roads analysis portion of *Thomas*,¹¹⁷ landowners, ranchers, outfitters, miners, hunters, anglers, recreation users, and conservation organizations (plaintiffs) claimed that, based on their own study and a FS cost-benefit analysis, a proposed FS logging road would cost more

113. S. Rep. No. 94-893, 94th Cong., 2nd Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 6662, 6671.

114. 16 U.S.C. § 1604(k) (1988).

115. *Thomas*, 753 F.2d 754 (9th Cir. 1985).

116. 16 U.S.C. § 1608(a) (1988).

117. 753 F.2d 754.

than the timber it would access would return.¹¹⁸ The court referred to the Forest and Rangeland Renewable Resources Planning Act of 1974¹¹⁹ (RPA),¹²⁰ in concluding that the value of timber that the FS offers for sale need not exceed the cost of the roads that access the timber.¹²¹ The relevant section of the RPA which plaintiffs relied on states that transportation systems shall be constructed to meet future needs on an economically and environmentally sound basis.¹²² Plaintiffs interpreted this to say that if road construction costs exceed the value of timber it is to access, the road is uneconomical.¹²³ The Ninth Circuit Court of Appeals disagreed, however

The court stated that the section of the RPA on which plaintiffs relied¹²⁴ was not a "specific prescription," but a "declaration."¹²⁵ However, the Ninth Circuit seemed to have misread § 1608(a), as it says that the FS *shall* provide transportation systems in an economically and environmentally sound basis.¹²⁶ "Shall" does not leave the FS an escape in fulfilling its obligation to construct economically and environmentally-sound transportation systems. If the Congress had intended § 1608(a) to be a declaration, it would have provided that transportation systems *may*, instead of *shall*, be provided in an economically and environmentally sound basis. Moreover, FS roadbuilding regulations call for environmentally-sound roadbuilding. These regulations define a "forest road" as:

a road wholly or partly within, or adjacent to, and serving the National Forest System and which is necessary for the *protection*, administration, and utilization of the National Forest System and the use and development of its resources (emphasis added).¹²⁷

In *Thomas*, the FS provided for the "utilization" of timber, but it did not provide "protection" for the National Forest System. Wolves are wildlife, one of MUSYA's multiple-use benefits, and as such, are part of the National Forest System. In *Thomas*, the FS did not provide this national-forest resource protection until mandated to do so by a judicial decree.

The Ninth Circuit Court of Appeals said that the actions to which the

118. *Id.* at 761.

119. 16 U.S.C. §§ 1601 *et seq.* (1988).

120. The court mistakenly referred to the RPA as the NFMA. Its confusion was due to the fact that the NFMA was an amendment to the RPA and the two are sometimes referred to collectively as the NFMA. G. C. Coggins and C. F. Wilkinson, *supra* note 105, at 671.

121. *Thomas*, 753 F.2d at 762.

122. *Id.* at 761 (construing 16 U.S.C. § 1608(a) (1988)).

123. *Id.*

124. 16 U.S.C. § 1608(a) (1988).

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

126. 16 U.S.C. § 1608(a) (1988).

127. 23 C.F.R. § 660.103(c) (1990).

quoted sections¹²⁸ refer contained "more specific requirements about forest road financing."¹²⁹ However, the court failed to list any of these requirements or how they made the FS's actions reasonable. The court did not halt the FS's plans to construct the road under the RPA (although it did do so under the ESA) because plaintiffs could not produce a statutory requirement mandating the FS to call off road construction if the road's costs exceeded the value of the timber it accessed. The court essentially disallowed any judicial review of the FS's definition of "economical" and allowed the FS to rationalize its own interpretation of "economical" based on benefits other than timber access.

The *Thomas* court cited *Udall v Tallman*,¹³⁰ a United States Supreme Court opinion, for the proposition that courts should give "substantial deference" to agency interpretations of statutes that Congress has charged an agency with administering.¹³¹ It is interesting to note that *Udall* was a 1965 Bureau of Land Management (BLM) oil-leasing case that the BLM administered under the Mineral Leasing Act of 1920 (MLA).¹³² RPA's and NFMA's directives are far more detailed than those of MLA. Therefore, the court perhaps should not have been so quick in upholding the FS's interpretation of what is a detailed statute due to a reliance upon its reading of a case that dealt with another agency's interpretation of a less-detailed statute. The FS's interpretation of "economical" in *Thomas* allowed it to consider benefits other than timber access in determining whether to construct the logging road at issue. The court said that the FS's decision was "clearly reasonable," and therefore, upheld the FS's interpretation of "economical." Certainly, "economical" may extend beyond a pecuniary meaning, and this idea is supported by MUSYA.¹³³ If the FS had considered benefits other than timber access, such as the Rocky Mountain Gray Wolf, in its decision to construct the logging road, it would have consulted with the F&WS concerning the presence of this animal, as mandated by the ESA.¹³⁴ The FS's failure to address the presence of the wolf in the Jersey Jack area appears to mirror its lack of concern for this resource.

The court in *Thomas* considered the meaning of "economically and environmentally sound" based solely on the term "economically." Clearly the FS's decision was not an environmentally sound one because the Ninth Circuit condemned the FS's failure to prepare a biological assessment on

128. 16 U.S.C. §§ 535, 537, 538 (1988).

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

130. 380 U.S. 1 (1965).

131. *Thomas*, 753 F.2d at 762.

132. Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.* (1988).

133. 16 U.S.C. § 531(a) (1988).

134. 16 U.S.C. § 1536(a)(3) (1988).

the presence of the Rocky Mountain Gray Wolf in the Jersey Jack area. However, since the FS's decision was one that fit into its interpretation of "economically sound" under the RPA, the Ninth Circuit did not compel the FS to consider the environmental soundness of its decision to construct a logging road.

The FS's failure to consider a statutorily protected resource (the Rocky Mountain Gray Wolf) in *Thomas* combined with the uneconomical nature of its proposed logging road into the Jersey Jack area, leads to the conclusion that the FS had not met even its own interpretation of "economical." Although the court agreed that the FS could not construct the logging road until it had complied with the ESA, it could have reached the same conclusion based on the wording "economically and environmentally sound" within the RPA.

In a more recent opinion,¹³⁵ the United States District Court for the District of Montana followed the lead of the Ninth Circuit Court of Appeals. In *Big Hole Ranchers Association*, plaintiff ranchers contended that the FS was carrying out BCTS and was not providing off setting multiple-use benefits, and therefore, had violated NFMA.¹³⁶ In his opinion, Judge Hatfield first said that plaintiffs lacked standing to bring their claim.¹³⁷ He said that the FS must have caused "injury in-fact" to plaintiffs.¹³⁸ Moreover, Judge Hatfield stated that plaintiffs must prove that the FS's implementation of BCTS caused plaintiffs "specific and perceptible harm."¹³⁹ Judge Hatfield concluded that the FS's actions had not harmed plaintiffs.¹⁴⁰

Although plaintiffs lacked standing, Judge Hatfield addressed plaintiff's NFMA¹⁴¹ "economical" road claim. He opined that nothing in the NFMA¹⁴² forbids the FS from constructing roads the cost of which exceed the value of the timber which the roads are proposed to access.¹⁴³ He dealt a telling blow to further anti-BCTS claims by stating that he "is unaware of any statute or regulation which requires the FS to only proceed with a timber sale on a positive cash flow basis."¹⁴⁴ Judge Hatfield said that the FS is entitled to substantial deference in interpreting statutes Congress has

135. *Big Hole Ranchers Association, Inc. v. U.S. Forest Service*, 686 F.Supp. 256 (D. Mont. 1988).

136. *Id.* at 263.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Judge Hatfield may have made the same mistake that the Ninth Circuit made in *Thomas* in referring to the NFMA instead of the RPA.

143. *Big Hole Ranchers Assoc.*, 686 F Supp. at 263.

144. *Id.*

charged it with administering,¹⁴⁵ and that courts cannot substitute their own statutory interpretation for that of an agency's if the agency's interpretation is reasonable.¹⁴⁶

In light of *Thomas* and *Big Hole Ranchers*, it is becoming increasingly clear that the answer to the BCTS problem will not come from the courts. There are two possible out-of-court solutions to the problem: (1) FS management that is more conscious of non-timber resources; and if necessary (2) legislative action. The FS must continue in its attempt to provide "net public benefit" to small timber-dependent communities. It can provide timber to such communities, but not in a fashion that is continually deleterious to other natural resources.

The BCTS problem is not simply an economic one. It also involves the exploitation of the environment; something that has no tangible economic value. The FS all too often favors short-term economic benefit over long-term environmental integrity, as can be seen in *Thomas*¹⁴⁷ and *Foundation for North American Wild Sheep*.¹⁴⁸ One possible solution to the BCTS problem is for the FS to implement decisions that are more conscious of non-timber resources.

Another solution to the BCTS problem is for Congress to enact legislation that would require the FS to adhere to exacting standards when considering the administration of BCTS. These standards might, for example, abolish BCTS. This alternative is unlikely BCTS can impart "net public benefit" to timber-dependent communities when used as a responsive mechanism to reduced timber demand or a slumping economy.¹⁴⁹ Therefore, such sales may be wise management decisions in limited circumstances. Congress could require the FS to consider non-economic factors that provide environmental protection more frequently than it does. For example, forgoing timber sales in certain circumstances will reduce resource damage. So too will reductions in the number of board feet harvested in individual timber sales.

Congress could lower the standard under which courts would be allowed to overturn FS decisions. Congress could form non-FS committees that review each FS timber-sale decision. Such committees could be comprised of private and federal agency natural resource/public-land management experts whose objectives would be to allow timber harvesting, prevent environmental degradation and make the FS more accountable for where it spends public money and the benefits such spending will impart to

145. *Id.*

146. *Id.* at 264.

147. 753 F.2d 754 (9th Cir. 1985).

148. 681 F.2d 1172 (9th Cir. 1982).

149. Daniels and Daniels, *supra* note 9, at 30.

the public. These are simply examples and by no means an exhaustion of Congress's possible alternatives. They may provide guidance for Congress in its quest to end examples such as those set by the FS in *Thomas*¹⁵⁰ and *Foundation for North American Wild Sheep*.¹⁵¹

IV CONCLUSION

A major concern of the United States Forest Service within recent years has been the issue of the below-cost timber sale. Below-cost timber sales occur when the value of timber stumpage is less than the cost of sale preparation and administration. Many groups¹⁵² have debated whether the Forest Service should continue administering these sales. Some say that the benefits imparted to other resources such as wildlife and recreation outweigh the negative effects of BCTS. Others disagree and say that the Forest Service does not impart benefits to other resources because of BCTS and should cease administration of these sales.

While the debate over BCTS continues, so too does the FS's practice of BCTS. Plaintiffs suing the Forest Service under the NFMA or the RPA, have not been successful and likely will not be successful unless the Congress amends the economic suitability¹⁵³ provision of the NFMA or the economical roads¹⁵⁴ provision of the RPA. Perhaps the best solution to the BCTS problem lies not in legislation and litigation, but in a commitment by the Forest Service to protect all resources and cease being so conscious of the timber resource.

150. 753 F.2d 754 (9th Cir. 1985).

151. 681 F.2d 1172 (9th Cir. 1982).

152. Such as plaintiffs in *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Foundation for North American Wild Sheep v. United States*, 681 F.2d 1172 (9th Cir. 1982), and *Big Hole Ranchers Association, Inc. v. United States Forest Service*, 686 F. Supp. 256 (D. Mont. 1988). Also included in this group are those communities that rely on public timber as a means of pecuniary support.

153. 16 U.S.C. § 1604(k) (1988).

154. 16 U.S.C. § 1608(a) (1988).

