The National Forest Management Act: Law of the Forest in the Year 2000

Staff Report

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The National Forest Management Act: Law of the Forest in the Year 2000*

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I. INTRODUCTION

The National Forest Management Act[1] (NFMA), passed in 1976, is the law of the forest in the year 2000. NFMA, arguably "the most detailed and participatory forest and rangeland planning process ever undertaken,"[2] was controversial at the time of its passage and remains so today.[3] The purpose of this article is to analyze the law at the center of this controversy, but before examining NFMA in detail, it is helpful to briefly explore the context of its passage.

"The first thing Europeans remarked on when they came to North America was the trees."[4] The majority of these trees in the United States are now found within the 191 million acres of "sacred lands" more commonly known as "America's national forests."[5] The first of these national forest reserves was created in 1891[6] in response to a "growing concern over the rapid deforestation of large parts of the public domain."[7] Six years later, Congress "entrusted the protection of the forest reserves to the Secretary of the Interior" when the Organic Act of 1897 (Organic Act)[8] was signed into law.[9] Finally, in 1905, management authority for the national forests was transferred to the Department of Agriculture and the Division of Forestry which would later be renamed the United States Forest Service (USFS).[10]

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[1] Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600–1687). NFMA "mandated an exclusive process for developing and revising forest plans and for managing national forest lands." W. Hugh O'Riordan & Scott W. Horngren, *The Minimum Management Requirements of Forest Planning*, 17 Envtl. L. 643, 644 (1987).

[2] Jennifer L. Sullivan, *The Spirit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 Alaska L. Rev. 127, 135 (2000).

[3] Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 U. Colo. L. Rev. 659, 659 (1997).

[4] Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 Tul. L. Rev. 2279, 2292 (1996). Christopher Columbus wrote about the trees he encountered in the New World in 1493. *Id.*

[5] Wilkinson, *supra* n. 3, at 659.

[6] Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified at 16 U.S.C. § 471). (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

[7] Tony Arjo, *Watershed and Quality Protection in National Forest Management*, 41 Hastings L.J. 1111, 1113 (1990). The Forest Reserve Act of 1891 allowed the president to set aside and reserve forest lands that were part of the public domain. In 1905, Theodore Roosevelt said, "[t]he American had but one thought about a tree . . . and that was to cut it down." Houck, *supra* n. 4, at 2292.

[8] Act of June 4, 1897, ch. 2, 30 Stat. 34, 35 (1897) (codified as amended at 16 U.S.C. §§ 471–481).

[9] Arjo, *supra* n. 7, at 1113.

[10] Transfer Act of February 1, 1905, ch. 288, § 1, 33 Stat. 628 (1905) (codified at 16 U.S.C. § 472).

The USFS, under the leadership of Gifford Pinchot,[11] radiated "an air of professionalism," was "decentralized and efficient," and enjoyed wide discretion in its management of these national forest lands.[12] In addition, Pinchot's management concepts led to policies now commonly referred to as "sustained-yield and multiple-use."[13] Sustained-yield promoted "maximum use of the forests" subject only to insuring the "permanence of these resources."[14] Multiple-use principles were "less pronounced in the early days," but "timber harvesting and livestock grazing" were regulated to protect "recreational spots, watersheds, and wildlife."[15]

With the development of the "National Plan" for forest management in 1933, multiple-use concepts became even more firmly entrenched in USFS management policies.[16] The "National Plan" defined multiple-uses as: "timber, watershed protection, recreation, wildlife, and grazing" and called for applying "all, or a combination of them . . . in the same area."[17]

USFS management under the principles of sustained-yield and multiple-use was relatively uncontroversial before 1950 because demands on the resources did not often lead to "competition between incompatible uses."[18] However, following World War II, recreational use intensified as did the demand for timber.[19] Consequently, the timber industry began to argue that the Organic Act required the USFS to manage forest lands only for the purposes of protecting watersheds and timber, and not for recreation. Since the USFS had no statutory authority for its sustained-yield and multiple-use policies, it urged Congress to

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[11] Gifford Pinchot, who is sometimes referred to as the "the father of modern forestry" implemented policies of conservation. Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 UALR L.J. 223, 230 (1996). Pinchot's management policies were founded upon principles of science and utilitarianism. Pinchot maintained that "all land is to be devoted to its most productive use for the permanent good of the whole people," and when "conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good for the greatest number in the long run." Arjo, *supra* n. 7, at 1114.

[12] Murphy, *supra* n. 11, at 229–30.

[13] Arjo, *supra* n. 7, at 1114.

[14] *Id.* at 1114–15. Pinchot saw sustained yield as an obligation to the "present generation" to supply "what it needs and all it needs" of forest resources while at the same time making sure that "our descendants shall not be deprived of what they need." *Id.* at 1115.

[15] *Id.* at 1115.

[16] *Id.*

[17] *Id.*

[18] *Id.* "Recreational use of the forests was limited" and the timber industry was suffering from "depressed prices." *Id.*

[19] *Id.* "Before World War II 'the Forest Service regarded itself as a custodian and protector of the forests rather than a prime producer' of timber for the nation. After the war, 'the posture of the Forest Service quickly changed from custodian to a production agency." Wilkinson, *supra* n. 3, at 664 (quoting *West Va. Div. of Izaak Walton League, Inc. v. Butz*, 522 F.2d 945 (4th Cir., 1975)).

legislate these principles. Congress reacted by passing the Multiple-Use, Sustained-Yield Act (MUSYA)[20] in 1960.[21]

MUSYA provides that the national forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes"[22] in a manner "supplemental to but not in derogation of" the purposes established by the Organic Act of 1897,[23] those purposes being, "improv[ing] and protect[ing] the forest[,] . . . or securing favorable conditions of water flows and . . . furnish[ing] a continuous supply of timber for the use and necessities of citizens of the United States."[24]

Based solely upon the language of MUSYA, it is arguable whether the Act imposed any substantive standards on USFS discretion. However, the legislative history of MUSYA supports an interpretation that the statute only ratified preexisting USFS multiple-use and sustained-yield policies.[25] Consequently, courts have treated MUSYA as "providing only minimal limitations on Forest Service discretion."[26]

Following the passage of MUSYA, "the public and the Congress became increasingly concerned over excessive clearcutting on national forests."[27] This

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[20] 16 U.S.C. §§ 528–531 (1994).

[21] Arjo, *supra* n. 7, at 1115. Multiple use is defined by MUSYA as the:

> [M]anagement of all the various renewable surface resources of the national forests so that they are utilized in a combination that will best meet the needs of the American People; making the most judicious use of the land for some or all of these resources or related services over areas larger enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. § 531(a).

MUSYA defines sustained yield as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." 16 U.S.C. § 531(b).

[22] 16 U.S.C. § 528. MUSYA, applied only to national forest lands, excluded "the use or administration" of "mineral resources." In addition, MUSYA clarified its purpose as not affecting the "jurisdiction or responsibilities of the several States" regarding the administration of fish and wildlife within the national forests. *Id.*

[23] *Id.*

[24] 16 U.S.C. § 475 (1994). In managing the "renewable surface resources of national forests," MUSYA also authorizes and directs the SOA to "develop and administer" these resources for the "several products and services" that can be obtained from the forests and to do so within the definitions of multiple-use and sustained-yield. The SOA must also give "due consideration" to "relative values of the various resources in particular areas" including wilderness areas. 16 U.S.C. § 529. Finally, the SOA was "authorized," but not directed to, "cooperate with interested State and local governmental agencies and others in the development and management of the national forests." *Id.* § 530.

[25] Arjo, *supra* n. 7, at 1116–17.

[26] *Id.*

[27] Julie A. Weis, *Eliminating the National Forest Management Act's Diversity Requirement as a*

concern led to the Bolle Report in 1970[28] and the Church Guidelines in 1972.[29] In addition, "concern with the continuing controversy surrounding the management of the National Forest System"[30] led Congress to enact the Forest and Rangeland Renewable Resources Planning Act (RPA) in 1974.[31] The RPA required long range planning[32] "on a nationwide basis."[33] The RPA required the secretary of agriculture (SOA) to make an "assessment of the availability [and] demand"[34] for renewable resources, formulate a "renewable resource program [specifying] objectives and output goals,"[35] and submit an "Annual Report to Congress."[36] The RPA, however, did not get an opportunity to modify USFS clearcutting practices because in *West Virginia Division of the Izaak Walton League v. Butz* (the Monongahela decision),[37] the Fourth Circuit held that clearcutting was a violation of the Organic Act.[38]

The Monongahela decision led to immediate legislative action. Federico Cheever characterizes the end product of this legislative action as a "train wreck" involving two political locomotives.[39] The first locomotive, driven by a move to

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Substantive Standard, 27 Envtl. L. 641, 646 (1997).

[28] Wilkinson, *supra* n. 3, at 663. In 1969, Senator Lee Metcalf asked a number of university colleagues to do an independent study and analysis of the timber production on the Bitterroot National Forest near Missoula, Montana. The completed study was called "A University View of the Forest Service" but was more commonly known as the "Bolle report" after Arnold Bolle, one of the authors of the report and the dean of the Montana School of Forestry. The group determined that multiple-use management did not exist "in fact" in the Bitterroot National Forest because "recreation, watershed, wildlife and grazing" were taking a back seat to high timber production. The Bolle report was not favorably received by the timber production companies but became a "rallying cry" for those looking for a change in the USFS policies towards conservation. *Id.* at 660–63.

[29] *Id.* at 664, n. 20. Another attempt to find a solution to this growing problem came from the subcommittee on Public Lands led by Senator Frank Church of Idaho. The subcommittee's proposals were broad but attempted to set higher standards for timber harvesting in the National Forests. *Id.* at 664.

[30] James F. Morrison, *The National Forest Management Act and Below Cost Timber Sales: Determining the Economic Suitability of Land for Timber*, 17 Envtl. L. 557, 561 (1987).

[31] Pub. L. No. 93-378, 88 Stat. 476 (amended by NFMA, 16 U.S.C. §§ 1600–1687).

[32] Stephanie M. Parent, *Out of the Woods and Back to the Courts?*, 22 Envtl. L. 699, 707 (1992).

[33] Weis, *supra* n. 27, at 646.

[34] 16 U.S.C. § 1601.

[35] *Id.* § 1602.

[36] *Id.* § 1606(c); Weis, *supra* n. 27, at 647. RPA was meant to direct the USFS to prepare documents periodically in order to allow Congress to provide the funds necessary to manage the National Forests. *See* George C. Coggins, Charles F. Wilkinson & John D. Leshy, *Federal Public Land and Resources Law* 645 (Foundation Press 1993).

[37] 522 F.2d 945, 954 (4th Cir. 1975).

[38] The Fourth Circuit affirmed the decision of the District Court of Virginia which held that the Organic Act only allowed the selling and cutting of trees by the Secretary of the Agriculture "if they are 'dead, matured or large growth' and then may be sold only when the sale serves the purpose of preserving and promoting the young growth of timber on the national forests." *Id.* at 948 (quoting *W. Va. Div. of Izaak Walton League v. Butz*, 367 F. Supp. 422 (W.D. Va. 1973)). The Fourth Circuit admitted that this section of the Organic Act might be outdated but insisted that it was Congress that needed to address the issue and not the courts. *Id.* at 955.

[39] Frederico Cheever, *Four Failed Forest Standards: What We Can Learn From the History of the National Forest Management Act's Substantive Timber Management Provisions*, 77 Or. L. Rev. 601, 633 (1998).

restrain "environmentally damaging management practices on the national forests," was supported by environmentalists and introduced in Congress as Senate Bill (S.B.) 2926. The second locomotive, driven by a move to allow further clearcutting on national forests, was supported by the timber industry, the USFS and "virtually every western Congressman" and was introduced in Congress as S.B. 3091.[40] When these two locomotives collided in the halls of Congress, the resulting train wreck produced NFMA, a combination of procedural standards and substantive law.

Despite being produced by a train wreck, NFMA has been described as "a well-written statute" roughly reflecting "the nation's collective view of the national forests as of October 1976."[41] At the time of its passage, NFMA repealed existing law, amended existing law, and enacted new law. In addition, since 1976, amendments have been added, regulations have been promulgated, and new planning regulations have just recently been issued, all of which are incorporated in this article. Part II of this article describes the sections of the United States Code repealed by NFMA, part III analyzes the sections of the United States Code amended by NFMA, and part IV discusses the sections of the United States Code enacted by NFMA. The conclusion adds that NFMA is undisputably a step in the direction of improved forest management.

II. SECTIONS OF THE UNITED STATES CODE REPEALED BY NFMA

A. 16 U.S.C. Section 476: Validation of Timber Sales Contracts

Section 476 was originally enacted as part of the Organic Act.[42] One of the main issues in pre-NFMA litigation during the late 1960s and 1970s dealt with the interpretation of section 476. In the Monongahela decision, the Fourth Circuit Court of Appeals interpreted section 476 to mean that the USFS could only authorize the sale and harvest of timber that was dead, physiologically mature, or large.[43] The USFS was also required to individually mark each tree that would be harvested as opposed to marking an entire area of trees.[44] In considering section 476, the court determined that the standards set back in 1897 by the Organic Act did not take into consideration new technology in the field of

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[40] *Id.* at 634.
[41] Wilkinson, *supra* n. 3, at 666.
[42] 30 Stat. at 35.
[43] *Izaak Walton League*, 522 F.2d at 948.
[44] *Id.* at 949.

silviculture or the studies of other related forest resources.[45] The Fourth Circuit recognized that the 1897 Act might be outdated when it stated:

> We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress.[46]

Congress ultimately repealed section 476 and replaced it with section 15 of NFMA.[47] Section 15 addressed the status of any existing contracts which were made under section 476 and, therefore, before NFMA's enactment.[48] Also, any revisions to these contracts would be made by the SOA and would have to be in harmony with guidelines and standards provided for in the RPA.[49]

B. 16 U.S.C. Section 513: Commission Functions Transferred to SOA

Section 513 consisted of sections 4 and 5 of the Watershed and Navigable Streams Act (1911 act)[50] which was passed in 1911 during the sixty-first Congress. Section 4 of the 1911 act provided for the creation and membership of the National Forest Reservation Commission (commission).[51] The commission was authorized to "fix the price or prices at which such lands may

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[45] Sen. Rpt. 94-893, at 9 (Aug. 25, Sept. 30, 1976) (reprinted in 1976 U.S.C.C.A.N. 6662, 6669).

[46] *Izaak Walton League*, 522 F.2d at 955.

[47] Pub. L. No. 94-588 at § 15.

[48] Pub. L. No. 94-588 at § 15 provided that:

> (a) Timber sales made pursuant to the Act of June 4, 1897 (30 Stat. 35, repealed by 16 U.S.C. § 476 (note b)), prior to the date of enactment of this section shall not be invalid if the timber was sold in accord with USFS silvicultural practices and sales procedures in effect at the time of the sale, subject to the provisions of subsection (b) of this section.

Thousands of good faith contracts had been made based on the Organic Act. Because of this Congress wanted to validate those contracts even though section 476 was repealed. Additionally there was special concern over three long-term timber sales contracts in Alaska, which is why section 15 was passed. *See* Sen. Rpt. 94-893, at 43, 1976 U.S.C.C.A.N. at 6702.

[49] Pub. L. No. 94-588 at § 15 (repealed) provided that:

> (b) The Secretary of Agriculture is directed, in developing five-year operating plans under the provisions of existing fifty-year timber sales contracts in Alaska, to revise such contracts to make them consistent with the guidelines and standards provided for in the [RPA of 1974], as amended, and to reflect such revisions in the contract price of timber. Any such action shall not be inconsistent with valid contract rights approved by the final judgment of a court of competent jurisdiction.

[50] 16 U.S.C. § 513 (repealed by Pub. L. No. 94-588 at § 17(a)(1)–(2)).

[51] Act of March 1, 1911, ch. 186, § 4, 36 Stat. 961, 962 (1911) (codified at 16 U.S.C. § 500).

be purchased."[52] Purchase of the lands had to be approved by the commission. Section 5 of the 1911 act required that the commission annually report its operations and expenditures to Congress during each fiscal year. In 1950, Congress made a minor amendment to the membership of the commission and designated an alternate committee member.[53]

Section 17 of NFMA, the Acquisition of National Forest System Lands, repealed section 4 of the 1911 act and transferred all the functions of the commission to the SOA.[54] Accordingly, section 5 of the 1911 act was repealed because the commission had been abolished.[55]

III. SECTIONS OF THE UNITED STATES CODE AMENDED BY NFMA

A. 16 U.S.C. Section 500: Payments to Counties for Schools and Roads

Section 500 was adopted in 1908 for the "friendly purpose [of creating] trusts for the benefit of counties in which the national forests are located in recognition of national interest in education and road building."[56] This section requires the federal government to pay twenty-five percent of the income generated by the national forests to the states on behalf of counties that contain national forest land.[57] Payments from this fund, commonly known as the "twenty-five percent fund,"[58] are to be distributed to the counties by the state for the improvement of public schools and roads.[59] The statute provides that when a national forest crosses state or county lines, the state or county receives a proportional share, based on the area of national forest within its boundaries, of the income generated.[60]

The amendments to section 500, including those enacted as part of NFMA, have left the original function of the statute largely intact. These amendments have changed only some of the details of the implementation of the

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[52] *Id.*

[53] Pub. L. No. 796, 64 Stat. 872, 872 (1950).

[54] Pub. L. No. 95-588.

[55] 122 Cong. Rec. 27616.

[56] *Trinity Indep. Sch. Dist. v. Walker County*, 287 S.W.2d 717, 722 (Tex. Civ. App. 1956).

[57] 16 U.S.C. § 500.

[58] H.R. Subcomm. on Forests & Forest Health of the Comm. on Energy & Resources, *County Schools Funding Revitalization Act of 1999: Hearings on H.R. 2389* [hereinafter *County Schools*], 106th Cong. 52 (July 13, 1999) (statement of Mike Dombeck, Chief, U.S. Forest Serv., U.S. Dept. of Agric.); H.R. Subcomm. on Forests & Forest Health of the Comm. on Energy & Resources, *Timber-Dependent Counties Stabilization Act of 1999: Hearings on H.R. 1185* [hereinafter *Timber-Dependent*], 106th Cong. 46 (Oct. 19, 1999) (statement of James R. Lyons, undersec., Nat. Resources & Env., U.S. Dept. of Agric.).

[59] *Id.*

[60] 16 U.S.C. § 500.

statute. Similarly, judicial interpretation of the statute has been somewhat limited because courts have generally tended to interpret the statue on its own four corners.[61]

Section 500 is a combination of the Department of Agriculture Appropriations Act of 1908,[62] and the act of 1911, allowing states to enter into agreements to conserve forests and watersheds.[63] There have been four minor amendments to the section since it was enacted.

First, in 1914, a department appropriations act changed the amount to be paid to the states from five to twenty-five percent.[64] Second, in 1944, a provision regarding the stumpage value of timber was added.[65] This provision provides that when forest products are sold, the number used in the calculation of the payment to the states is based on the value of the standing timber, or "stumpage" value.[66]

The third amendment removed the limitation on the maximum amount of money payable to the states. As originally written, the statute contained a provision providing that the money paid to a state on behalf of a county was limited to no more than forty percent of the county's income from all other sources.[67] In 1950, this provision was recognized as obsolete and was deleted.[68]

The most extensive amendment to section 500 was enacted in 1976 as part of NFMA.[69] Section 16 of NFMA expanded the sources of national forest derived income that could be used to calculate the twenty-five percent payment to the states and directed the SOA to periodically provide estimates of the payments to be made under Section 500.[70] Under NFMA, two more sources of income were also included: payments to the USFS under the Knutson-Vandenberg Act of 1930[71] and credits earned by timber purchasers in the construction of logging roads.[72]

The Knutson-Vandenberg Act gave the SOA authority to require purchasers of national forest timber to supply a deposit of money in addition to the cost of the timber.[73] The deposit money was to be used in reforestation and

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[61] *Trinity*, 287 S.W.2d at 724.
[62] Act of May 23, 1908, ch. 2, 35 Stat. 251, 260 (1908) (codified at 16 U.S.C. § 500).
[63] 36 Stat. at 963.
[64] Act of June 30, 1914, ch. 131, 38 Stat. 415, 441 (1914) (codified at 16 U.S.C. § 500).
[65] Pub. L. No. 78-425, Title II, § 212, 58 Stat. 734, 737 (1944) (codified at 16 U.S.C. § 500).
[66] *Id.*
[67] 35 Stat. at 260.
[68] Pub. L. No. 94-588 at § 16.
[69] *Id.*
[70] Act of June 9, 1930, ch. 416, § 3, 46 Stat. 527 (1930) (codified at 16 U.S.C. § 576(b)).
[71] Pub. L. No. 94-588 at § 16.
[72] 46 Stat. 527.
[73] *Id.*

management of the area used by the purchaser.[74] In *Alabama v. United States*,[75] the United States Court of Federal Claims held that the deposit was not to be used in calculating the twenty-five percent mandated by Section 500.[76] The court determined that the deposit was in addition to payment for the timber, and thus was not included in the receipts used to calculate the twenty-five percent.[77] NFMA overruled this decision by providing that "the term 'moneys received' shall include all collections under the [Knutson-Vandenberg] Act of June 9, 1930."[78]

The second provision added to section 500 by NFMA further expands the coverage of the statute. A purchaser of national forest timber is credited with the cost of any roads that must be constructed to harvest the timber.[79] Before the passage of NFMA, any credits were deducted from the cost of the timber prior to calculating the twenty-five percent. Following the passage of NFMA, the value of the constructed roads are considered receipts for use in the twenty-five percent calculation.

Several issues concerning section 500 were decided by the United States Supreme Court in *King County, Washington v. Seattle School District No. 1.*[80] The *King County* case dealt with funds distributed by the state of Washington that were paid into the twenty-five percent fund from 1908 through 1918.[81] In 1908, and from the years 1916 through 1918, the King County Commissioners directed that the funds received be distributed equally between the public schools and the public roads.[82] In the years 1909 through 1915, however, the entire fund went to the improvement of public roads. The King County school district sued to recover one-half of the twenty-five percent fund for these years.

In *King County*, the Court found that: (1) the federal district courts have jurisdiction over suits filed under Section 500;[83] (2) the money paid to a state pursuant to section 500 does not set up a trust with the school district as the beneficiary; rather, the money belongs to the state;[84] and (3) the statute does not

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[74] *Alabama v. U.S.*, 461 F.2d 1324 (Fed. Cl. 1972), *cert. denied*, 409 U.S. 1023 (1972).
[75] *Id.* at 1328.
[76] *Id.* at 1330.
[77] *Id.*
[78] Sen. Rpt. 94-893, at 22–23.
[79] 16 U.S.C. § 500.
[80] 263 U.S. 361 (1923).
[81] *Id.* at 362.
[82] *Id.* at 363.
[83] *Id.* at 363–64.
[84] *Id.* at 364. *But see Trinity*, 287 S.W.2d (717) (holding that 16 U.S.C. § 500 created a trust for the benefit of counties).

mandate that the funds be divided equally between schools and roads in a particular county.[85]

Much of the litigation concerning section 500 has dealt with the apportionment of the twenty-five percent fund among various counties and school districts. The Court in *King County* decided that the individual state legislatures have the discretion to decide how the twenty-five percent fund is distributed between public schools and public roads.[86]

The methods used to determine distribution of the twenty-five percent fund vary from state to state as exemplified by several court decisions. First, in *Anderson Union High School District v. Schreder*,[87] the California Supreme Court found that the courts could not overturn the decisions of state regulatory agencies as to county and district eligibility to receive twenty-five percent funds unless there had been an abuse of administrative discretion.[88] Second, the Oklahoma Supreme Court, in *Goodin v. Board of Education of Independent School District No. 14 of McCurtain County*, found that legislative intent governs the distribution of the funds among school districts.[89] Third, the Missouri Supreme Court, in *Eminence R-1 School District v. Hodge*, found that while the state legislature intended to distribute the twenty-five percent fund to all those counties containing national forests,[90] the county courts had discretion to determine the impact and distribution of funds.[91] In addition, a county court could find a county eligible to receive funds, but nevertheless distribute all of the funds to other counties.[92] The Mississippi Supreme Court, in *State ex rel. Arrington v. Board of Supervisors of Perry County*, also upheld the state's delegation of discretionary authority in the board of supervisors to distribute the twenty-five percent fund as long as fifty percent went to public schools and fifty percent went to public roads.[93] Finally, the Washington Supreme Court, in *Carroll v. Bruno*, upheld the practice of placing eighty-five percent of the twenty-five percent fund

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[85] *Id.* at 364–65. *King County* seems to overrule *Everett Sch. Dist. No. 24, Snohomish County v. Pearson*, 261 F. 631 (Wash. 1918) (holding that since there was no statutory language regarding the division of the fund, it was to be divided equally between schools and roads).

[86] *King County*, 263 U.S. at 364.

[87] 56 Cal. 3d 453 (Cal. 1976).

[88] *Id.* at 453. The decision in *Anderson* explicitly overruled *Oro Madre Unified Sch. Dist. v. Amador County Bd. of Ed.*, 8 Cal.3d 408 (Cal. 1970), which held that the issue of whether a district is "adjacent" to a national forest and thus eligible for twenty-five percent funds is an issue of fact for the court, and *Sonora Elementary Sch. Dist. v. Tuolumne County Bd. of Ed.*, 239 Cal. 2d 824 (Cal. App. 1966), which held that "adjacency" was an issue of statutory interpretation that was subject to judicial interpretation.

[89] *Goodin v. Bd. of Ed. of Ind. Sch. Dist. No. 14 of McCurtain County*, 601 P.2d 88, 91 (Okla. 1979), 91. *Goodin* arose from the merger of two school districts into one. Only one of the two districts had previously been eligible for funding.

[90] *Eminence R-1 Sch. Dist. v. Hodge*, 635 S.W.2d 10, 12 (Mo. 1982).

[91] *Id.* at 13.

[92] *Id.*

[93] *State v. Bd. of Supervisors of Perry County*, 73 So.2d 169, 172 (Miss. 1954).

in the state's "equalization" fund, even though this practice reduced the payment of other state monies to affected counties.[94]

Most of the state courts have defined payments made to states under section 500 as assistance grants, and not as payments-in-lieu of taxes which might have been collected by the state had the land not been located in a national forest.[95] Since several courts have ruled that section 500 does not provide payments-in-lieu of taxes, the states are allowed to collect taxes on national forest timber sold[96] and on privately held possessory interests in federally owned improvements on national forest land.[97]

The technique of using income from timber sales to compensate local governments for lost tax revenue was not questioned until the late 1980s. The late 1980s marked the beginning of a downturn of national forest timber production. In the Pacific Northwest, valuable timber was not cut so there would be habitat for the northern spotted owl, an endangered species. Continuing throughout the 1990s, changing social values and a better understanding of ecology have contributed to a marked decrease in logging on public lands. This situation has affected the incomes of counties receiving money from the twenty-five percent fund.[98] Payments from the twenty-five percent fund for public schools and roads in such counties has dropped considerably.

A fundamental shift in policy was realized with the passage of the "owl county safety-net"[99] provision of the Interior and Related Agencies Appropriations Act of 1991 (Appropriations Act).[100] Decisions made to protect the endangered northern spotted owl began to affect the income of local county governments because timber that would have previously been harvested was being preserved as habitat for the owl. The Appropriations Act attempted to reduce the loss of income to counties by providing that payments from the twenty-five percent fund to states with spotted owl populations in fiscal year 1991 would not be less than ninety percent of the average annual payments to the

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[94] *Carroll v. Bruno*, 499 P.2d 876, 879 (Wash. 1972).

[95] *See generally Anderson*, 56 Cal.3d at 458; *Tree Farmers Inc. v. Goeckner*, 385 P.2d 649, 651 (Idaho 1963); *Eminence*, 635 S.W.2d at 12–13; and *Bartlett v. Collector of Revenue*, 285 S.2d 346, 348 (La. App. 1973); *Trinity*, 287 S.W.2d at 720. *But see Carroll*, 499 P.2d at 876 (suggesting in dicta that the payment is in lieu of taxes).

[96] *Intl. Paper Co. v. County of Siskiyou*, 515 F.2d 285, 289 (9th Cir. 1974).

[97] *U.S. v. Fresno County*, 429 U.S. 452, 462 (1977).

[98] *County Schools, supra* n. 58, at 46; *Timber-Dependent, supra* n. 58, at 52.

[99] Sen. Subcomm. on Forests & Pub. Lands., of the Comm. on Energy and Nat. Resources, *Secure Rural Schools and Community Self-Determination Act: Hearings on S. 1608*, 106th Cong. 46 (October 19, 1999) (statement of James R. Lyons, undersec., Nat. Resources and Env., U.S. Dept. of Agric.).

[100] Pub. L. No. 101-512, Title III, § 316, 104 Stat. 1915, 1960 (1991).

states based on the receipts from the three previous years.[101] This provision was renewed every year, with reduced percentages, until 1999.[102]

In the Revenue Reconciliation Act of 1993,[103] Congress authorized a plan to continue compensating the states of Washington, Oregon, and California to make up for the income reductions caused by reduced timber removal.[104] The plan, which expires in 2003, provides for a decreasing but stable payment to those states which are dependent on income from timber sales.[105]

In recent years, receipts from national forest timber sales have dropped seventy percent, and the payments to state and local governments from the twenty-five percent fund have dropped thirty-six percent.[106] Congress, recognizing the need for continuing payments to the states and counties dependent on income from national forest lands, recently passed The Secure Rural Schools and Community Self-Determination Act of 2000[107] which is effective until 2006.

The purpose of the act is to stabilize payments to counties and "[t]o make additional investments in, and create additional employment opportunities through, projects that improve the maintenance of existing infrastructure, implement stewardship objectives that enhance forest ecosystems, and restore and improve land health and water quality."[108] Some examples of projects that meet the purpose of the act are road and trail maintenance or obliteration, watershed restoration, control of noxious weeds, soil improvement, and reestablishment of native species.[109]

The act allows counties to elect to continue to receive twenty-five percent payments or to receive a payment based on an average of the three highest twenty-five percent payments made during fiscal years 1986 through 1999 (full payment amount).[110] If a county elects to receive a full payment amount, the county can choose to use fifteen to twenty percent of the payment for purposes other than schools and roads.[111] Counties may expend the funds for search and rescue, community service work camps, easement purchases, forest related educational opportunities, fire prevention and county planning and community

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[101] *Id.*

[102] *County Schools*, *supra* n. 58, at 46; *Timber-Dependent*, *supra* n. 58, at 52.

[103] Part of the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, 107 Stat. 312, 681–82 (1992).

[104] *Id.*

[105] *County Schools*, *supra* n. 58; *Timber-Dependent*, *supra* n. 58, at 50–53.

[106] *Id.*

[107] Pub. L. No. 106-393, 114 Stat. 1607 (2000).

[108] *Id.* at § 2(b).

[109] *Id.*

[110] *Id.* at §§ 3, 101.

[111] *Id.* at § 102(d)(1)(A).

forest projects (Title III Projects).[112] If a county chooses to spend funds on Title III Projects, the county must publish a description of the project in a publication of record and provide a 45-day public comment period.[113] Counties can also choose to spend the fifteen to twenty percent of funds on forest related projects (Title II Projects). Title II Projects are submitted to the SOA by Resource Advisory Committees (RACs).[114] The RACs are composed of fifteen members who represent three broad categories of interests, such as labor, recreation, commercial timber, environmentalists, archaeological and historical, elected officials, and tribal members.[115] The RACs submit projects to the SOA that outline the purpose of the project, the length of the project, the cost, the proposed source of funding, the expected outcomes (for example, "how the project will meet or exceed desired ecological conditions"), provide a detailed monitoring plan, and "[a]n assessment that the project is in the public interest."[116] The SOA may only approve projects that comply with all "applicable Federal laws and regulations" and are consistent with other forest plans.[117] The SOA may also request that the RAC agree to use project funds "to pay for any environmental review, consultation or compliance with applicable environmental laws."[118] If the RAC refuses to pay, then the project is withdrawn from consideration by the SOA and deemed rejected.[119]

The act also has a provision for establishing a pilot program using separate contracts for the harvest and sale for merchantable timber.[120] This would allow the USFS to use one contractor to remove the timber from a site and deck it. The decked timber would then be sold under a different contract.

Congress continues to explore ways to stabilize payments to counties. In addition to passage of the act in 2000, in the most recent Department of the Interior appropriations bill,[121] Congress also established an advisory committee to develop recommendations for alternatives and substitutes to the twenty-five percent fund established by 16 U.S.C. section 500.

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[112] *Id.* at § 302.
[113] *Id.*
[114] *Id.* at § 205.
[115] *Id.*
[116] *Id.* at § 203.
[117] *Id.* at § 204.
[118] *Id.*
[119] *Id.*
[120] *Id.* at § 204(e)(3).
[121] Pub. L. No. 106-291, § 320, 114 Stat. 922 (2000).

B. 16 U.S.C. Section 515: Examination, Location, and Purchase of Lands by U.S.

Section 515[122] amended the Act of June 7, 1924[123] which had previously amended the Act of March 1, 1911 (Weeks Act).[124] In its current form, section 515 places a duty upon the SOA to "examine, locate, and purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber."[125] Before such purchase is made, section 515 requires the legislature of the state in which the land is located to give its consent.

Originally, the Weeks Act granted authority to the SOA to study lands "necessary to the regulation of the flow of navigable streams."[126] The Act of June 7, 1924 expanded this authority to include in its scope "lands necessary for the production of timber."[127]

NFMA amended section 515 in four areas. First, it changed the SOA's authority from a directive to "recommend for purchase" to a duty to "examine, locate, and purchase" lands that he found to be "necessary to the regulation of the flow of navigable streams or for the production of timber."[128] Second, it abolished a requirement directing the SOA to report the findings of the examination of the lands to the commission prior to proposing a purchase or exchange of such lands to Congress. Third, NFMA eliminated a requirement that the lands be examined by the director of the United States Geological Survey in cooperation with the SOA resulting in the production of a report to the commission. The joint report was previously required to show that the purchase of the land by the federal government promoted or protected "the navigation of streams."[129] In the alternative, a report by the SOA was required to demonstrate that timber production would be promoted by federal control of the land. Fourth, the amendment established that "no deed or other instrument of conveyance" would be "accepted or approved" by the SOA for the land unless the state legislature

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[122] Pub. L. No. 94-588 at § 17(a)(3).

[123] June 7, 1924, ch. 348, § 6, 43 Stat. 654 (1924).

[124] 36 Stat. at 962. The Weeks Forestry Act of 1911 was passed "for the purpose of conserving the forests and the water supply of the States entering into such agreement." *Id.* (codified as amended at 16 U.S.C. §§ 480, 500, 513–19, 521, 552, 563). The Weeks Act gave the SOA the "authority to acquire lands and led to the establishment of most of the eastern National Forests." *See* Pub. L. No. 94-588 at § 18.

[125] 16 U.S.C. § 515.

[126] 36 Stat. at 961.

[127] June 7, 1924, ch. 348, § 6, 43 Stat. 654 (1924).

[128] 16 U.S.C. § 515.

[129] *Id.*

where the land was located approved of its acquisition "by the United States for the purpose of preserving the navigability of navigable streams."[130]

The authority of the federal government to condemn land under section 515 has consistently been upheld as constitutional.[131] *United States v. Griffin*[132] held that section 515 is constitutional based upon Article 1, section 8, clauses 3 and 18 of the Constitution, giving Congress the authority to regulate interstate and foreign commerce and the power to make the laws "necessary and proper" to execute that authority.[133]

Finally, two important restrictions have been imposed on section 515. First, section 515 does not authorize the SOA to "approve purchases solely because the lands are valuable for recreational purposes or merely because [he] considered Federal ownership and control of such lands desirable or advisable for recreational uses" unless such lands accomplish another objective of the statute.[134] Second, acquisitions of land in Puerto Rico may not exceed fifty thousand acres pursuant to this section.[135]

C. 16 U.S.C. Section 516: Exchange of Lands

Section 516 was originally enacted as part of the Weeks Act.[136] This section lays out the necessary steps the SOA must take in order to acquire or accept land not previously under federal ownership or management. Under the original version of the statute, the commission had to approve any transfer or exchange.[137] NFMA repealed the commission and now requires that a notice of the proposed change be published in a newspaper of general circulation in the county or counties affected by the land exchange.[138]

Section 516 provides that the SOA "is hereby authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests, which, in his opinion, are chiefly valuable for the purposes of this Act."[139] The SOA's authority was confirmed by the attorney general in 1939, when he stated that the statute was "plain and unambiguous" when it "authorized the National Forest Reservation Commission

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[130] *Id.*
[131] *Young v. Anderson*, 160 F.2d 225, 227 (D.C. Cir. 1974).
[132] 58 F.2d 674 (W.D. Va. 1932).
[133] *Id.* at 675 (citing to U.S. Const. art. I, § 8).
[134] 39 Op. Atty. Gen. 369, 371 (1939).
[135] 16 U.S.C. § 582.
[136] 36 Stat. 961 (codified at 16 U.S.C. §§ 480, 500, 513–19, 521, 552, 563).
[137] *Id.* at 962.
[138] 16 U.S.C. § 516.
[139] *Id.*

[now SOA] to approve the purchase of lands."[140] The judgment of the SOA will not be questioned "so long as the lands are reasonably adapted for one of the purposes mentioned in the statute."[141] In exchange, the SOA may convey a portion of land by deed not to exceed an equal value of such national forest land in that same state.[142] A state may also exchange the land for an amount of timber to be cut, not to exceed an equal value of such national forest land. The values are to be determined by the SOA.

Accordingly, timber given in exchange for land is still subject to the requirements set forth by the SOA. Land accepted by the SOA will, upon acceptance, become a part of the national forests.[143] According to the case *United States v. Graham & Irvine*,[144] when a state gives its consent to acquisition of land for forest reservation, the United States has constitutional authority to condemn land desired for such reservation in accordance with this section.[145] However, even when this land does become a part of the national forests, "the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States . . . save that the state [can] enact no law which would conflict with the powers reserved to the United States by the Constitution."[146] According to *Wilson*, the question of whether the lands acquired by the United States with the consent of the state are within the taxing jurisdiction of the state must be determined by interpreting section 516 and the local state statute governing the sale.[147]

Additionally, the United States government may enter into a contract for an option to purchase land from private owners. The Fourth Circuit Court of Appeals addressed the issue in *Wachovia Bank & Trust v. United States*.[148] The court found that the United States had the right to exercise an option agreed to by

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[140] 39 Op. Atty. Gen. 369, 371.

[141] *Id.*

[142] 16 U.S.C. § 516.

[143] *Id.*

[144] 250 F. 499 (D.C. Va. 1917). This case was initiated by two men who were unable to be located during the negotiation for prices of land to be condemned in Virginia. The reason they could not be found was because they were residing in West Virginia at the time. The court did allow the U.S. to condemn the land based on the fact that the men would obtain similar compensation as the other land owners whose land was condemned.

[145] *Id.* at 502–03.

[146] *Wilson v. Cook*, 327 U.S. 474, 487 (1946) (explaining that "[s]ince the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the constitutional provision." Also, since this land acquisition was not consented to by Arkansas, "the legislative authority of the state extended over the federally owned land within the state, to the same extent as over similar property held by private owners.).

[147] *Id.* at 486.

[148] 98 F.2d 609 (4th Cir. 1938).

both parties even though the twelve-month contract period had ended before condemnation proceedings occurred.[149]

Finally, 36 C.F.R. section 223.4[150] mandates that the exchange of timber and the cutting of exchanged timber must comply with purposes cited in section 223.3 of that chapter.[151] Therefore, exchange and cutting of timber must comply with standards set out in MUSYA.[152]

D. 16 U.S.C. Section 518: Acquisition of Lands Not Defeated by Pre-existing Rights

Section 518 states that all acquisitions by:

> [T]he United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which from their nature will, in the opinion of the Secretary of Agriculture,[153] in no manner interfere with the use of the lands so encumbered, for the purposes of this Act.[154]

Additionally, all such "rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration."[155]

Essentially, section 518 provides that any easement, right of way, or reservation retained by the original land owners shall not interfere with the uses

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[149] *Id.* at 611–12. In *Wachovia*, the plaintiffs claimed the option to purchase the land at the set price of $8.50 per acre had expired since condemnation proceedings did not start until after the 12-month period. The court upheld the option due to the fact that the U.S. had accepted the option before the 12-month deadline. The delay to start condemnation proceedings was due to a flaw in the title and not due to delay on the part of the U.S. 98 F.2d at 610.

[150] 36 C.F.R. § 223.4 (2000) states that "[t]rees, or portions of trees may be exchanged for land under laws authorizing the exchange of National Forest timber. Cutting of exchange timber must comply with the purposes cited in § 223.1."

[151] 36 C.F.R. at § 223.1 states that,"[t]rees, or portions of trees, and other forest products on National Forest System lands may be sold for the purpose of achieving the policies set forth in the Multiple-Use Sustained-Yield Act of 1960, as amended, and the [RPA of 1974], as amended, and the Program thereunder."

[152] *Id.* In 1976, with the passage of FLPMA, the definition of "multiple-use" and "sustained-yield" was modified. FLPMA lists not five but an open-ended number of uses, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values." 43 U.S.C. § 1702(c), (h).

[153] 16 U.S.C. § 518. Formerly in the opinion of both the SOA and the Commission. Amended to only the SOA when NFMA repealed 16 U.S.C. § 513.

[154] *Id.* The phrase "this Act" is referring to the Weeks Forestry Act of 1911.

[155] *Id.*

prescribed by the SOA.[156] These easements, rights of way, and reservations shall also be subject to all the rules and regulations expressed by the SOA.

E. 16 U.S.C. Section 521b: Report Required Prior to Land Acquisition

Section 521b has been amended twice since its inclusion in NFMA. First on August 20, 1988,[157] and again on November 2, 1994.[158] Section 521b prohibits the SOA from entering into "any land purchase or exchange relating to the National Forest System of $150,000 or more for the types of lands which have been heretofore approved by the National Forest Reservation Commission" prior to thirty days following the submission of a report detailing the proposed purchase or transfer to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate, unless approval has been given by both committees before such time.[159] The report must contain at least:

> (1) guidelines utilized by the Secretary in determining that the land should be acquired; (2) the location and size of the land; (3) the purchase price of the land and the criteria used by the Secretary in determining such price; (4) the person from whom the land is being acquired; and (5) any adjustment made by the Secretary of relative value pursuant to section 1716(f)(2)(B)(ii) of Title 43.[160]

The report is intended to provide information to aid Congress in carrying out its oversight responsibilities, and to improve the accountability of expenditures for forest land acquisitions.[161]

Prior to the 1988 amendment of this section, the SOA was required to gain approval by the House and Senate Committees for the purchases or exchanges of land valued at $25,000 or more.[162] The 1988 amendment increased the amount to $150,000.[163]

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[156] *Id.*
[157] Pub. L. No. 100-409, § 6, 102 Stat. 1086, 1090 (1988).
[158] Pub. L. No. 103-437, § 6(r), 108 Stat. 4587 (1994).
[159] 16 U.S.C. § 521b.
[160] *Id.*
[161] *Id.*
[162] Pub. L. No. 100-409 at § 6 (codified as amended at 16 U.S.C. § 521b).
[163] *Id.*

The 1994 amendment substituted the "Committee on Agriculture, Nutrition, and Forestry of the Senate" for the "Committee on Agriculture and Forestry of the Senate."[164] This amendment did not require a change in the text.[165]

Section 521b does not amend the Alaska Native Claims Settlement Act[166] or the Alaska National Interest Lands Conservation Act.[167] It also does not affect the amount of authority granted to the secretary of the interior (SOI) and the SOA with regard to exchanges, or alter the discretionary nature of land exchanges.[168] Nor does it prohibit either secretary, or any other involved party, from withdrawing at any time (unless the parties have committed otherwise in writing).

F. 16 U.S.C. Section 576b: Requirements of Purchasers of National Forest Timber

Section 576b, which amended section 3 of the Knutson-Vandenberg Act, allows the SOA, when in the interest of the public, to "require any purchaser of national forest timber to make deposits of money, in addition to payments for the timber [purchased]," to cover the cost of:

> (1) planting (including the production or purchase of young trees), (2) sowing with tree seeds (including the collection or purchase of such seeds), (3) cutting, destroying or otherwise removing undesirable trees or other growth, on the national-forest land cut over by the purchaser, in order to improve the future stand of timber, or (4) protecting and improving the future productivity of the renewable resources of the forest land on such sale area, including improvement operations, maintenance and construction, reforestation and wildlife habitat management.[169]

These deposits are held in a special fund in the Treasury to be appropriated and made available for the above purposes as the SOA may direct.[170] Deposits found in excess of those needed to accomplish such purposes should be transferred "to miscellaneous receipts, forest reserve fund, as a national-forest receipt of the fiscal year in which such transfer is made."[171] Additionally, upon the SOI's

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[164] Pub. L. No. 103-437 at § 6(r).
[165] 16 U.S.C. § 521b.
[166] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601–1629e).
[167] Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101–3107).
[168] Pub. L. No. 100-409 at § 5.
[169] 16 U.S.C. § 576b.
[170] *Id.*
[171] *Id.*

request, the SOA may provide seeds and/or young trees for replanting burned areas of any national park.

Section 576b amended the Knutson-Vandenberg Act in two respects. First, it removed a provision which limited the total amount of money any timber purchaser could be required to deposit to an amount not exceeding, on an acreage basis, the average cost of planting other comparable national forest lands during the previous three years.[172] By eliminating this provision, the United States can now receive monetary deposits which more reasonably represent the expense of replanting lands harvested by timber purchasers.[173] Second, the amendment allows the deposit to be applied to the cost of protecting and improving the future productivity of the renewable resources of the forest lands on the sale area, including sale area improvement operations, maintenance and construction, reforestation and forest habitat management.[174] This reflects MUSYA's broader approach to forest management, although funds collected must still meet the basic objectives of timber production.[175]

The use of Knutson-Vandenberg funds is conditioned on two things. First, any portion of a deposit found in excess of the cost of doing said work shall be transferred to the forest reserve fund as a national forest receipt of the fiscal year in which the transfer was made.[176] Second, that the SOA is authorized, upon application of the SOI, to furnish seedlings and/or young trees for the replanting of burned-over areas in any national park.[177]

G. 16 U.S.C. Section 1601: Renewable Resource Assessment

Section 1601 discusses the "Renewable Resource Assessment" which, in part, describes the renewable resources of all the nation's forest and rangelands. NFMA renumbered and amended section 1601 which was formerly section 2 of the RPA.[178] Section 2 mandates that a Renewable Resource Assessment (assessment) be prepared by the SOA.[179] The first assessment was to be prepared no later than December of 1975.[180] It was to be updated during 1979, and then updated again every ten years after that.[181] Generally, the assessment

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[172] Pub. L. No. 94-588 at § 17(a).
[173] 122 Cong. Rec. at 27607–27608.
[174] Pub. L. No. 94-588 at § 18.
[175] *Id.*
[176] 46 Stat. 527.
[177] *Id.*
[178] Pub. L. No. 94-588 at § 2 (codified as amended at 16 U.S.C. § 1601).
[179] *Id.*
[180] 16 U.S.C. § 1601(a).
[181] *Id.*

reviews future capabilities of the nation's forests and rangelands by assessing information generated during the regional, forest, and other planning processes.[182]

Subsection (a) requires that the assessment include, although it is not limited to, six components.[183] The first component, listed in subsection 1, is an "analysis of present and anticipated uses, demand for, and supply of the renewable resources."[184] This analysis must account for the international resource situation, while emphasizing the supply and demand and price relationship trends.[185] Subsection 2 requires an inventory of present and potential renewable resources.[186] This inventory, "based on information developed by the Forest Service," should include an evaluation of opportunities to improve the yield of these resources and estimate the investment costs and possible returns to the federal government.[187] Subsection 3 requires that the assessment include a "description of Forest Service programs and responsibilities in research, cooperative programs and management of the National Forest System, their interrelationships, and the relationship of these programs and responsibilities to public and private activities."[188] Subsection 4 requires "a discussion of important policy considerations, laws, regulations and other factors," if they are expected to influence the use, ownership, and management of the forest and other associated lands.[189]

In 1990, subsections 5 and 6 were added under Title XXIV, Global Climate Change, of the Food, Agriculture, Conservation, and Trade Act of 1990.[190] Subsection 5 calls for the assessment to include "an analysis of the potential effects of global climate change on the conditions of renewable resources on the forests and rangelands."[191] Subsection 6 calls for "an analysis of the rural and urban forestry opportunities to mitigate the buildup of atmospheric carbon dioxide and reduce the risk of global climate change."[192]

The first four subsections made for a relatively terse directive and were therefore expanded by NFMA. Subsection 5 and 6 also work to expand the directive of section 1601. NFMA amendments to section 1601(a) are found, in

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[182] *Id.* § 1601(a)(1–6).

[183] Subsections 1–4 were originally part of the RPA. Subsections 5 and 6 were passed in 1990. Pub. L. No. 101-624, § 2408(a), 164 Stat. 3359, 4061 (1990).

[184] 16 U.S.C. § 1601(a)(1).

[185] *Id.*

[186] *Id.* § 1601(a)(2).

[187] *Id.*

[188] *Id.* § 1601(a)(3).

[189] *Id.* § 1601(a)(4).

[190] Pub. L. No. 101-624, § 2408(a), 104 Stat. 3359, 4061 (1990).

[191] 16 U.S.C. § 1601(a)(5).

[192] *Id.* § 1601(a)(6).

part, in subsection (c) of 1601. Entitled "Contents of Assessments,"[193] the amendments require three additional reports from the SOA.[194] Subsection 1 requires the SOA to report on additional fiber potential in the national forest system.[195] In doing so, the SOA is not restricted to multiple use considerations.[196] Subsection 2 requires that the assessment include a report on the "potential for increased utilization of forest and wood product wastes in the national forest system and on other lands."[197] This includes information on urban wood wastes and recycling, as well as recommendations to Congress to increase use of material that is currently being wasted.[198] Subsection 3 calls for a report on "milling and other wood fiber product fabrication facilities," their location in the United States, their method of operation, and a recommendation for these facilities to improve wood fiber utilization.[199]

Public involvement is the focus of subsection (d) of section 1601.[200] It requires that the SOA, in developing the reports of subsection (c), provide the opportunity for public involvement.[201] The SOA is also required to "consult with other interested governmental departments and agencies."[202] The second subsection (d) requires that all forested lands be maintained in accordance with MUSYA.[203] Subsection 1 states that the SOA is to facilitate this by identifying all lands in the national forest system where there is a need to reforest.[204] The lands must be examined and, if necessary, treated in a way that secures an effective mix of multiple use benefits.[205] This report must be made to the Congress at the time of the submission of the president's budget and the annual report as defined in section 1606.[206]

Subsection 2 requires that the SOA annually transmit to Congress an estimate of the amount of money that will be required to replant and treat an area equal to the acreage to be cut over that year.[207] This estimate shall be provided for

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[193] *Id.* § 1601(c).

[194] Section 1601 does not have a subsection (b), because it has been omitted. Subsection (b) modified 16 U.S.C. § 581h, which has been repealed. It "set forth provisions relating to comprehensive survey and analysis of the present and prospective conditions of and requirements for renewable resources." Pub. L. No. 95-307, § 8(a), 92 Stat. 356, 357 (1978).

[195] 16 U.S.C. § 1601(c)(1).

[196] *Id.*

[197] *Id.* § 1601(c)(2).

[198] *Id.*

[199] *Id.* § 1601(a)(3).

[200] Two subsections (d) have been enacted.

[201] 16 U.S.C. § 1601(d).

[202] *Id.*

[203] *Id.*

[204] *Id.* § 1601(d)(1).

[205] *Id.*

[206] *Id.*

[207] *Id.* § 1601(d)(2).

"inclusion in the President's budget and shall also be transmitted to the Speaker of the House and the President of the Senate together with the annual report provided for under section 1606(c) of this title . . . ."[208]

Subsection (e) requires a report on herbicides and pesticides to be submitted by the SOA in an annual report to Congress.[209] The report is to include the "amounts, types, and uses of herbicides and pesticides used in the national Forest System, including the beneficial or adverse effects of such uses."[210]

The planning levels for the nation's forests and grasslands are regulated by rules and regulations established by the Department of Agriculture. On November 9, 2000, the Department of Agriculture issued a new rule describing the framework for national forest system land and natural resource planning.[211] This final rule replaces the 1982 planning rule. The new rule states that "[p]lanning may be undertaken at the national, regional, national forest or grassland, and/or ranger district administrative levels depending on the scope and scale of issues."[212] This section also specifies the responsible official for each level of planning.[213] Decision making is not tied to a specific position, because the Department of Agriculture believes that in most cases the Forest or Grassland supervisor is the most appropriate individual to make decisions regarding those particular lands.[214] The intention is to allow the process to be flexible, with solutions which fit "the scope and scale of needed action."[215]

In contrast, the former rule states that the planning levels are national, regional, and forest.[216] The former regulations specifically required the chief of the USFS to develop the assessment.[217] The new rule mandates that "the Chief of the Forest Service is responsible for national forest planning."[218] There is an attempt in the new rule to link the national level assessment to the other levels of

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[208] *Id.*
[209] *Id.* § 1601(e).
[210] *Id.*
[211] 65 Fed. Reg. 67514 (Nov. 9, 2000).
[212] *Id.* at 67569.
[213] *Id.*
[214] *Id.* at 67523.
[215] *Id.* at 67569.
[216] 36 C.F.R. § 219.4(a) (2000).
[217] *Id.* at § 219.4(b)(1).
[218] 65 Fed. Reg. at 67569.

planning more tightly than the former rule did.[219] Part of this link is accomplished through broad-scale assessments and local analysis.[220]

Both section 1601(d) and the section of the new planning rule entitled "Collaborative Planning for Sustainability"discuss public participation.[221] NFMA requires that the SOA "shall provide the opportunity for public involvement and shall consult with other interested governmental departments and agencies."[222] Public collaboration is one of the overriding themes of the new rule.[223] The Department of Agriculture believes that active public participation in the planning and management of USFS land is important because the land is the "'people's land.'"[224] Sections 219.12 to 219.18 of the new rule outline "opportunities for the public and others to be actively engaged in the Forest Service's land management planning process."[225] These sections mandate active public involvement in the development of landscape goals for forest planning; coordination among federal agencies; involvement of state and local governments; interaction with American Indian tribes, Alaska Natives, private landowners, and other interested individuals and organizations.[226]

The former rule, in contrast, outlined a formal procedure for engaging the public.[227] The various agencies and tribes merely received notice of the preparation of a land and resource management plan;[228] they were not required to be actively engaged. The formal procedure may have been appropriate when the former rules and regulations were issued, but since then "the number of federal, state and local agencies, Tribes, members of the public, and interested groups wanting to be involved in planning decisions and share stewardship responsibilities has skyrocketed."[229] The new rule provides a means to utilize

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[219] The relationship between national and local forest and rangeland needs has been described by Wilkinson and Anderson as "an uneasy compromise between the top-down and bottom-up theories." The top down approach starts with the president's Statement of Policy (16 U.S.C. § 1606) which is based on the RPA Program. According to 36 C.F.R. § 219.4(b)(1)(ii), the Program objectives are distributed by the USFS to the nine USFS regions. The individual regions then divide the Program objectives among the national forests. 36 C.F.R. § 219.4(b)(2) Then the national forests, according to 36 C.F.R. § 219.4(b)(3), each develop a "draft forest plan in which at least one alternative must incorporate the forest's share of its regional RPA objectives." The article goes on to note that "the Forest Service does not consider the RPA Program objectives to be legally binding on the local forest plans. If the selected alternative does not meet the forest's share of the RPA objectives, NFMA regulations provide for negotiation and adjustment of the objectives." Charles F. Wilkinson & Michael H. Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev., 1, 35–40 (1985).

[220] 65 Fed. Reg. at 67523, 67570.

[221] 16 U.S.C. § 1601(d); 65 Fed. Reg. at 67572–67573.

[222] 16 U.S.C. § 1601(d).

[223] 65 Fed. Reg. at 67534.

[224] *Id.*

[225] *Id.*

[226] *Id.* at 67572–67573.

[227] 36 C.F.R. § 219.6.

[228] *Id.*

[229] 65 Fed. Reg. at 67516.

these various sources of information through providing opportunities for involvement and recognizing the relationship between the agencies.[230]

H. 16 U.S.C. Section 1602: Renewable Resource Program Transmitted to President

Section 1602 mandates that a "Renewable Resource Program" (program) shall be periodically[231] transmitted to the president by the SOA.[232] The program transmitted to the president "may include alternatives," but "shall" include a description of the means by which the "protection, management, and development of the National Forest System, including forest development roads" is to occur.[233] This program shall be developed in accordance with the principles of the National Environmental Policy Act (NEPA)[234] and MUSYA.[235] The program's content should address a variety of forest management issues including, but not limited to, "public and private program investments," the anticipated results and benefits of the program, the "priorities for accomplishment of inventoried program opportunities," and a list of the "personal requirements" needed to implement forest management programs.[236] Compliance with the instructions given in section 1602 allows for "periodic review" of the management and administration programs of the national forest system.[237]

NFMA renumbered and amended section 1602.[238] Section 4 of RPA was changed to section 5 of NFMA and some minor changes were made to the language of the section. Some of the words were stricken and replaced with other words,[239] and minor changes in grammar were implemented[240] making a more specific reading of the section possible. The grammatical changes were necessary to allow the addition of paragraph five which added recommendations that must be included in the program submitted to the president.[241]

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[230] *Id.* at 67534.

[231] The preparation of the initial program was required "not later than December 31, 1975," and was to pertain to a "four-year period beginning October 1, 1976" and address "at least" each of the following "four fiscal decades." In addition, all updates "shall" occur "no later than during the first half of the fiscal year ending September 30, 1980, and the first half of each fifth fiscal year thereafter . . . ." 16 U.S.C. § 1602.

[232] 16 U.S.C. § 1602.

[233] *Id.*

[234] 42 U.S.C. §§ 4321–4370 (1994).

[235] 16 U.S.C. § 1602.

[236] *Id.* § 1602(1)–(4).

[237] *Id.*

[238] Pub. L. No. 94-588 at § 5 (codified as amended at 16 U.S.C. § 1602).

[239] The word "and" was stricken from paragraph three. In paragraph four, the word "satisfy" was replaced with the words "implement and monitor." *Id.*

[240] The period at the end of paragraph four was replaced with a semicolon and the word "and." *Id.*

[241] 16 U.S.C. § 1602.

The recommendations included in paragraph five provide a more thorough description of USFS objectives. These objectives include, but are not limited to, the need: 1) to evaluate USFS programs "in order that multiple-use and sustained-yield can be determined;" 2) to provide for opportunities for participation in USFS programs by "owners of forest and rangeland;" 3) to implement programs which "improve the quality of soil, water, and air resources;" 4) to focus on "interrelationships" and "interdependence" among the renewable resources; and 5) to "evaluate the impact of the export and import of raw logs upon domestic timber supplies and prices."[242]

Section 1602 was later amended by the Act of November 28, 1990.[243] This amendment added an additional recommendation to paragraph five mandating that the program submitted to the president include an account of the "effects of global climate change on forest and rangeland conditions" for both species and forest and rangeland products.[244]

I. 16 U.S.C. Section 1603: Inventories as Part of Assessment

Section 1603, originally section 4, later section 5 of the RPA, was renumbered as section 2 of NFMA. Section 1603 requires the SOA to "develop and maintain on a continuing basis a comprehensive and appropriately detailed inventory of all National Forest System lands and renewable resources" as part of the assessment which SOA is directed to prepare.[245] Inventory data collected is intended to assist in identifying special conditions and hazards facing the forest system lands and resources.[246]

Section 1603 also requires this inventory to be kept up to date "so as to reflect changes in conditions and identify new and emerging resources and values."[247] Data collected on each resource should be examined in light of its relationship with other resources. "The display of inter-related data, rather than the present procedure of treating each resource or use as somehow independent, will do much to assure that professional and public understanding of goals can move the total Federal effort ahead more harmoniously."[248] "With new systems of information retrieval it is increasingly possible, and necessary, to maintain on

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[242] *Id.*
[243] Pub. L. No. 101-624, § 2408, 104 Stat. 4061 (1990).
[244] *Id.*
[245] 16 U.S.C. § 1603.
[246] 122 Cong. Rec. at 27607.
[247] 16 U.S.C. § 1603.
[248] Sen. Rpt. 93-686, at 12 (Feb. 18, 1974) (reprinted in 1974 U.S.C.C.A.N. 4060, 4071).

a continuing basis, comprehensive and detailed inventories of all of the National Forest System lands and renewable resources."[249]

J. 16 U.S.C. Section 1604: Land and Resource Management Plans

Section 1604 details the requirements for land and resource management plans (LRMP) in 13 subsections. The LRMPs are at the heart of USFS planning and have been the subject of extensive litigation because they provide for all the multiple uses of the national forests.[250] Subsections (a) and (b) were originally passed as section 5 of RPA,[251] while subsections (c) through (m) were enacted as section 6 of NFMA. Section 1604 was heavily amended by NFMA because it was concerned primarily with national planning.[252] Before the NFMA amendments, only the general terms for interdisciplinary, integrated local planning were established.[253] NFMA added an emphasis on local planning in subsections (c) through (m).[254]

Subsection (a) of section 1604 requires that the SOA "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System" as a part of the program required by section 1602.[255] The LRMPs must be "coordinated with the land and resource management planning processes of State and local governments and other Federal agencies."[256] Subsection (b) requires that the SOA use a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences" in the development of the plans.[257]

Subsection (c) sets out the manner in which NFMA standards were to be incorporated into existing forest and rangeland management plans.[258] The incorporation was to be completed by September 30, 1985.[259] While some plans were completed prior to 1985, not all were completed by the deadline.[260] Public Law 101-121 provides that "[t]he Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to

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[249] *Id.*
[250] *See* 16 U.S.C.A. § 1604 (Supp. 2000) (listing of recent cases associated with this section).
[251] Pub. L. No. 93-378 at § 5.
[252] Pub. L. No. 94-588 at § 6.
[253] Pub. L. No. 93-378 at § 5.
[254] Pub. L. No. 94-588 at § 6.
[255] 16 U.S.C. § 1604(a).
[256] *Id.*
[257] *Id.* § 1604(b).
[258] *Id.* § 1604(c).
[259] *Id.*
[260] Wilkinson & Anderson, *supra* n. 219, at 44.

meet all applicable statutory requirements."[261] Management under existing plans may continue, despite the date mentioned in subsection (c), pending the completion of new plans.[262]

Subsection (d) of section 1604 requires the SOA to "provide for public participation in the development, review, and revision of land management plans."[263] The plans or revisions must be available for public review for at least three months before they can be adopted.[264] During this period, public meetings must be publicized and held at locations that "foster public participation in the review of such plans or revisions."[265] Subsection (j) stipulates that any new LRMPs, or revisions to existing LRMPs, become effective thirty days after the completion of this public participation and public notification.[266]

The SOA is also required to assure that, in developing, maintaining and revising the LRMPs, the products and services which are obtained from the units of the national forest system are in accordance with MUSYA.[267] Furthermore, the plans must include coordination of "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."[268] Finally, subsection (e)(2) requires the SOA to:

> [D]etermine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms 'multiple use' and 'sustained yield' as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.[269]

LRMPs developed in accordance with section 1604 must contain five provisions, which are enumerated in subsection (f).[270] All the features required by this section must form one integrated plan for each unit of the national forest system.[271] The resulting one document, or one set of documents, must be made available to the public at convenient locations.[272] Subsection (f)(2) requires that the plans consist of suitable written material, such as maps and other descriptive

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[261] Pub. L. No. 101-121, § 312, 103 Stat. 701, 743 (1989).
[262] 16 U.S.C. § 1604(c).
[263] *Id.* § 1604(d).
[264] *Id.*
[265] *Id.*
[266] *Id.* § 1604(j).
[267] *Id.* § 1604(e).
[268] *Id.* § 1604(e)(1).
[269] *Id.* § 1604(e)(2).
[270] *Id.* § 1604(f).
[271] *Id.* § 1604(f)(1).
[272] *Id.*

documents.[273] The material should reflect proposed and possible actions, "including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan."[274] An interdisciplinary team must prepare each plan, based on inventories of the applicable resources of the forest.[275]

Another required provision provides that forest plans may be amended after public notice is given and adoption finalized, unless the amendment would result in a significant change.[276] If the amendment would result in a significant change, then the amendment must be in accordance with the required assurances of subsection (e) and with the required provisions of subsection (f).[277] The public involvement required for an amendment must be comparable to that required in subsection (d).[278] Finally, subsection (f)(5) requires that the plans be revised at least every fifteen years.[279] The plans can be revised more frequently if the SOA finds significant changes necessary in a unit.[280] Revision, like amendments, must be in accordance with subsections (e) and (f), and public involvement must be comparable to that required in subsection (d).[281]

Section 1604(g) contains the bulk of NFMA's planning provisions. Section 1604(g) requires the SOA to formally declare regulations setting out the "process for the development and revision of the land management plans."[282] These regulations must be developed in accordance with MUSYA and the guidelines and standards of this section and "must include but not be limited to" the requirements established in subsections (g)(1) through (g)(3).[283]

Subsection (g)(1) requires that the LRMPs are developed in conformity with NEPA's procedural requirements.[284] The regulations must also give "direction on when and for what plans an environmental impact statement . . . shall be prepared."[285]

Subsection (g)(2) requires that the promulgated regulations include three guidelines. First, lands that are suitable for resource management must be identified.[286] Next, the guidelines must "provide for obtaining inventory data on

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[273] *Id.* § 1604(f)(2).
[274] *Id.*
[275] *Id.* § 1604(f)(3).
[276] *Id.* § 1604(f)(4).
[277] *Id.*
[278] *Id.*
[279] *Id.* § 1604(f)(5).
[280] *Id.*
[281] *Id.*
[282] *Id.* § 1604(g).
[283] *Id.*
[284] *Id.* § 1604(g)(1).
[285] *Id.*
[286] *Id.* § 1604(g)(2)(A).

the various renewable resources, and soil and water."[287] This data is to include pertinent maps, geographic material and explanatory aids.[288] Finally, methods to identify hazards to the various resources, as well as their relationship to alternate activities, must be provided.[289]

The five subsections under subsection (g)(3) specify LRMP guidelines designed to "achieve the goals of the Program."[290] Guidelines for LRMPs must "insure consideration of the economic and environmental aspects" of resource management.[291] Toward this consideration of the economic and environmental aspects of resource management, NFMA mandates that the interdisciplinary approach defined in section 1604(b) be implemented.

The USFS must promulgate regulations defining how the forest plans are to provide for a diversity of plant and animal communities. This diversity must be maintained in accordance with overall multiple use objectives.[292] The requirement of section 1604(g)(3)(B) was the subject of litigation in *Seattle Audubon Society v. Evans*.[293] In that case, the USFS was sued by environmental groups for failing to adopt an LRMP that addressed the future survival of the northern spotted owl.[294] The USFS contended that once a species was declared threatened under the Endangered Species Act (ESA),[295] the USFS no longer needed to plan for the species because it is only required to plan for "viable" species.[296] The court held that the USFS's planning obligations under NFMA were not reduced by this listing under the ESA.[297]

In addition to providing for diversity of plant and animal communities, the LRMPs must insure that there is research and evaluation of the effects of each plan.[298] The goal is to avoid plans that produce "substantial and permanent impairment of the productivity of the land."[299] Land management plans must also permit increases in timber harvest levels based on "intensified management

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[287] *Id.* § 1604(g)(2)(B).
[288] *Id.*
[289] *Id.* § 1604(g)(2)(C).
[290] *Id.* § 1604(g)(3).
[291] *Id.* § 1604(g)(3)(A).
[292] *Id.* § 1604(g)(3)(B).
[293] 952 F.2d 297 (9th Cir. 1991).
[294] *Id.* at 298.
[295] 16 U.S.C. §§ 1531–1543 (1994).
[296] *Seattle Audubon Society*, 952 F.2d at 298 (discussing 36 C.F.R. § 219.19).
[297] *Id.* at 302. *Seattle Audubon Society* also discusses the USFS regulations that define how the forest management plans are to provide for a diversity of plant and animal species. *Id.* at 298. The regulations discuss "indicator species," a concept which has come under substantial criticism. 36 C.F.R. § 219.19. Monitoring of indicator species is no longer part of the planning regulations. The new rule, found at 65 Fed. Reg. 67574, emphasizes ecological sustainability instead.
[298] 16 U.S.C. § 1604(g)(3)(C).
[299] *Id.*

practices, such as reforestation, thinning, and tree improvement."[300] An increase in harvest levels may only occur in two situations. First, the increases must be in accordance with MUSYA.[301] Second, the harvest levels must be "decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned."[302]

Physical suitability guidelines for timber harvests are set out in subsection (g)(3)(E).[303] This section of NFMA gives clear statutory direction to prohibit timber production from areas of the national forest system that are environmentally sensitive and will suffer irreversible damage from timber harvest.[304] It requires that the USFS harvest timber only where harvesting does not irreversibly damage soils,[305] water conditions, or fish habitats.[306] However, this does not mean that temporary or short-term damage to soil and water conditions are prohibited. In *Citizens for Environmental Quality v. United States*,[307] environmental groups sought judicial review of the LRMP for the Rio Grande National Forest. The court held, in part, that timber harvesting may cause short-term or temporary damage if provisions are made to adequately repair such damage within a reasonable time.[308]

Subsection (g)(3)(E) also requires "assurance that such lands can be adequately restocked within five years after harvest."[309] This provision applies to all timber harvesting activity.[310] For instance, if a road must be built in order to harvest timber, then the road must be built in accordance with these guidelines.[311] Finally, subsection (g)(3)(E)(iv) states that "the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber."[312]

In addition to these timber harvesting provisions, NFMA includes provisions that were intended to resolve the controversy over clearcutting.[313]

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[300] *Id.* § 1604(g)(3)(D).
[301] *Id.*
[302] *Id.*
[303] *Id.* § 1604(g)(3)(E).
[304] *Id.*
[305] *Id.* § 1604(g)(3)(E)(i).
[306] *Id.* § 1604(g)(3)(E)(iii).
[307] 731 F. Supp. 970, 976 (D. Colo. 1989).
[308] *Id.* at 985.
[309] 16 U.S.C. § 1604(g)(3)(E)(ii).
[310] The subsections on soil erosion and reforestation came directly from the Church guidelines. However, NFMA provisions differ from the Church guidelines in that they apply to all timber harvesting, rather than just clearcutting, and they expand on soil erosion guidelines. Wilkinson & Anderson, *supra* n. 219, at 160.
[311] *Id.*
[312] 16 U.S.C. § 1604(g)(3)(E)(iv).
[313] Wilkinson & Anderson, *supra* n. 219, at 186.

Section 1604(g)(3)(F) directs the agency to insure that "clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands" only according to the listed provisions.[314] According to subsection (i), clearcutting may only be used if it is the "optimum method,"[315] and other methods need only be appropriate, to meet the objectives of the LRMP.[316] Before the chosen cutting method may be implemented, an interdisciplinary review must be completed and the "potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale arena" must be assessed.[317] Further, the timber sale must be consistent with the multiple use of the general area.[318] Cut areas are required to be shaped and blended to an "extent practicable with the natural terrain."[319] Subsection (iv) provides maximum size limits for acreage to be cut in harvest operations, and subsection (v) requires that the cuts are carried out so that they are "consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource."[320]

NFMA requires the SOA to appoint a committee of scientists to "provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and

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[314] 16 U.S.C. § 1604(g)(3)(F).

[315] *Id.* This guideline was the primary focus of controversy during the Senate markup. The phrase "optimum method" was "designed to broaden the scope of the Church guidelines by looking beyond silvicultural concerns and directing that other factors, such as aesthetics and wildlife, must be considered." Wilkinson & Anderson, *supra* n. 219, at 186–88.

[316] 16 U.S.C. § 1604(g)(3)(F)(i). This subsection has been the subject of much litigation. The court in *Krichbaum v. United States Forest Serv.*, 17 F. Supp. 2d 549, 561 (W.D. Va. 1998) discussed the recent litigation:

> The Fourth Circuit has approved the use of even-aged techniques under NFMA in the George Washington National Forest, not only in exceptional circumstances, but whenever the Forest Service has made the choice with due regard for its effects on the 'protection of soil, watershed, fish, wildlife, recreation, and esthetic resources.' *See Fener v. Hunt*, 971 F. Supp. 1025, 1033 (W.D.Va.1997) (Kiser, J.) aff'd. 151 F.3d 1028, 1998 WL 390162, (4th Cir.1998) (siding with the Fifth Circuit view on appropriate use of even-aged methods in *Sierra Club v. Espy*, 38 F.3d 792, 798–800 (1994) rather than the Sixth Circuit view in *Sierra Club v. Thomas*, 105 F.3d 248, 250 (1997)). The *Thomas* decision, which announced the Sixth Circuit view espoused by plaintiff that even-aged methods should be used only in exceptional circumstances, was vacated by the Supreme Court's decision in *Ohio Forestry Ass'n Inc. v. Sierra Club*, [523 U.S. 726], 118 S.Ct. 1665, 140 L. Ed. 2d 921 (1998). By statute, even-aged management may be employed where 'it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan.' 16 U.S.C. § 1604(g)(3)(F)(i).

[317] *Id.* § 1604(g)(3)(F)(ii).

[318] *Id.*

[319] *Id.* § 1604(g)(3)(F)(iii).

[320] *Id.* § 1604(g)(3)(F)(iv)–(v).

adopted."[321] The scientists may not be officers or employees of the USFS,[322] and their views must be included in the information that is supplied to the public when regulations are proposed for adoption or revision.[323] When regulations are promulgated, the committee shall terminate, but a similar committee may be appointed when revisions of the regulations are considered.[324] This subsection also provides for clerical and technical assistance and compensation for the members of the committee.[325]

NFMA's land management plans have important implications for range management because of section 1604(i).[326] This section requires that resource plans, permits, contracts, and other instruments be consistent with LRMPs, and that revision may be necessary to ensure consistency.[327] Implications for range planning arise because this section of NFMA governs individual grazing permits and the allotment management plans required by FLPMA.[328]

Section 1604(k) is more concerned with economically sound timber management than it is with the environmental safeguards which are the primary concern of NFMA.[329] It requires the SOA to take into consideration physical, economic, and other pertinent factors when identifying lands that are not suitable for timber production.[330] When lands are identified as unsuitable, the only sales allowed are salvage sales or sales necessary to protect other multiple-use values. Unsuitable lands must be treated for reforestation purposes.[331] The classification of these lands as unsuitable for timber production must be reviewed at least every ten years, allowing lands that have become suitable to be returned to production.[332] This section has not been interpreted to preclude uneconomical sales, but it does address concerns from the 1970s regarding unprofitable timber management, by requiring the USFS to minimize timber harvest of marginal lands.[333]

In accordance with NFMA, the SOA must:

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[321] *Id.* § 1604(h)(1).
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.* § 1604(i); Wilkinson & Anderson, *supra* n. 219, at 110.
[327] *Id.* § 1604(i).
[328] Wilkinson & Anderson, *supra* n. 219, at 110.
[329] *Id.* at 162; 16 U.S.C. § 1604(k).
[330] 16 U.S.C. § 1604(k).
[331] *Id.*
[332] *Id.*
[333] Wilkinson & Anderson, *supra* n. 219, at 168–69 (quoting *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

> [F]ormulate and implement . . . a process for estimating long-terms [sic] costs and benefits to support the program evaluation requirements of this subchapter. This process shall include requirements to provide information on a representative sample basis of estimated expenditures associated with the reforestation, timber stand improvement, and sale of timber from the National Forest System.[334]

These expenditures must be compared to the return to the government which results from timber sales.[335] In addition, subsection (l)(2) requires a summary of data to be included in the annual report required by section 1606(c).[336]

Finally, subsection (m) requires the SOA to establish a fixed number of years between the stocking of new trees and subsequent harvests.[337] Subsection (m)(1) requires that the trees have generally reached the culmination of mean annual increment of growth (CMAI).[338] The CMAI is defined as "the age at which the rate of growth among a stand of young trees peaks and after which annual growth remains level or declines."[339] Salvage harvests, however, are not precluded by the requirement of harvesting at the CMAI.[340] The SOA is also required to establish exceptions to the CMAI standard "after consideration has been given to the multiple uses of the forest including, but not limited to, recreation, wildlife habitat, and range and after completion of public participation processes utilizing the procedures of subsection (d) of this section."[341]

The new USFS regulations concerning section 1604 are extensive because of the central role the LRMPs play in forest planning. The focus of the final rule is on the requirements for forest planning and the creation of the LRMPs. These regulations for the procedure, content and process requirements of forest planning will be codified in 36 C.F.R. section 219.[342]

The "Framework for Planning" describes the key elements of USFS planning.[343] The new rules are less formalistic than the 1982 rules, and they provide "a flexible process that is responsive to issues associated with current conditions and experience with implementing the current plan."[344] According to

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[334] 16 U.S.C. § 1604(l)(1).

[335] *Id.*

[336] *Id.* § 1604(l)(2).

[337] *Id.* § 1604(m).

[338] *Id.* § 1604(m)(1); Wilkinson & Anderson, *supra* n. 219, at 125.

[339] Wilkinson & Anderson, *supra* n. 219, at 125.

[340] *Id.*; 16 U.S.C. § 1604(m)(1).

[341] 16 U.S.C. § 1604(m)(2).

[342] 65 Fed. Reg. 67514. *See Citizens for Envtl. Quality*, 731 F. Supp. at 976–78 (describing the regulatory background of NFMA under the former USFS rules and regulations).

[343] *Id.* at 67522.

[344] *Id.* at 67523.

the overview of the framework, planning involves integration of the role of science, and public participation and collaboration, in order to "contribute to sustainability in the use and enjoyment of National Forest System lands."[345] The key elements of the planning cycle are stated in section 219.3(d),[346] which requires that the planning process begin with "the identification and consideration of issues and concludes with the monitoring and evaluation of results."[347]

The particular elements of planning and regulating LRMPs are specified in sections 219.4 through 219.11.[348] First, the responsible official for the particular land determines whether an issue is appropriate for consideration, and, if so, to what extent it is appropriate.[349] If it is determined that an issue is appropriate, then the relevant information is reviewed and it is decided whether more information can and should be requested.[350] A broad-scale assessment or a local analysis may also be developed.[351] This information then aids the responsible official in the decision to propose that a particular plan be amended or revised.[352] Future action by the Department of Agriculture is guided or limited by plan decisions which "provide a framework for authorizing site-specific actions that may commit resources."[353] Moreover, the rule also stipulates that the USFS resources should be managed to serve the public interest while remaining true to MUSYA objectives.[354] This requirement is mandated by NFMA, which requires the SOA to assure that the plans "provide for multiple use and sustained yield of the products and services obtained therefrom and are in accordance with [MUSY]."[355]

Plan decisions are subject to amendment and revision under the new Department of Agriculture rules and regulations.[356] Section 1604(f) of NFMA requires an integrated plan for each forest unit and allows for plan amendment. When this section of NFMA was written, it was intended to drive the development of the first round of land and resource management plans.[357]

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[345] *Id.* at 67569 (internal citations omitted).
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] *Id.* at 67570.
[350] *Id.*
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] *Id.*
[355] 16 U.S.C. § 1604(e).
[356] 65 Fed. Reg. 67571.
[357] While forest planning was not a new concept in the mid-1970s when RPA and NFMA were passed, before the passage of these acts the USFS conducted land and resource planning under the 1897 Organic Act. This statute delegated broad regulatory power over forms of use in the forest reserves. During this period, the USFS's planning and management of forest resources was seldom intruded upon by Congress. In 1960 Congress passed MUSYA, which expanded USFS planning. Separate functional resource plans were written

Because the first round of plans are now in place, the final rule seeks to amend the regulations of subsection (f) by focusing on how to improve upon the plans that are in effect, rather than on how to create new plans.[358] Significant amendments must be determined through the NEPA criteria of context and intensity of effects.[359] Revision, required by 16 U.S.C. section 1604(f)(5), is an opportunity to consider the likely effects a particular plan might have on a forest unit, if it were to be implemented. The former rules did not require such an extensive review before public notice of the revision process was issued.[360]

If the public wants to challenge a proposed amendment or revision to a plan, then objections can be made under section 219.32 of the new rule.[361] This predecisional decision process is contrasted to the 1982 planning rule,[362] which allowed appeals after decisions were made.[363] There is not a specific time limit for resolving objections (although there is a time frame for filing them), other than the requirement that the "reviewing officer must respond . . . within a reasonable period of time."[364] If an amendment or revision is under objection, a decision must be reached and documented before approval is allowed.[365]

Finally, the new rule states that "[a]ll site-specific decisions . . . must be consistent with the applicable plan. If a proposed site-specific decision is not consistent with the applicable plan, the responsible official may modify the proposed decision to make it consistent with the plan, reject the proposal; or amend the plan to authorize the action."[366] Plans are then monitored and evaluated for ecological, social, and economic sustainability.[367]

The use of interdisciplinary teams in implementing public participation is required by 16 U.S.C. section 1604(f)(3) and regulated by section 219.2 of the final USFS rules.[368] The former rules also called for an interdisciplinary team, as well as access to the best available data.[369]

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for wildlife, recreation, and other resources, while experimentation with zoning of land uses began. These two types of planning have been described as "the parents of the integrated land and resource planning required by NFMA." Wilkinson, *supra* n. 219, at 31–37.

[358] 65 Fed. Reg. at 67571.

[359] *Id.*

[360] *Id.*

[361] 65 Fed. Reg. at 67562.

[362] 36 C.F.R. § 217.

[363] 65 Fed. Reg. at 67579.

[364] *Id.*

[365] *Id.*

[366] *Id.* at 67571–67572.

[367] *Id.* at 67572.

[368] *Id.* at 67569.

[369] 36 C.F.R. § 219.12(b).

This section was challenged in *Sierra Club v. Robertson*.[370] In *Robertson*, plaintiffs asserted that the USFS's inventory in their stand condition database "did not agree with the best information available."[371] The court said that "best available data" does not mean an ideal type of data, but the best information available to the agency while keeping the assessment brief and low budget.[372] The final rule adds the term "and analysis" after the phrase "best available scientific information," a change which was intended to be within the same meaning.[373] The significant difference between the final and the former rule is in the inclusion of scientists at every stage of the planning process.[374]

NFMA mandates that a committee of scientists be appointed in the planning process.[375] While the role of scientists was a bit ambiguous in the former rule,[376] the final rule utilizes science and scientists in nearly every stage of the planning process.[377] The section of the final rule entitled "The Contribution of Science" calls on scientists to play a critical role in helping to identify new issues, evaluate the significance of new information, and assist in developing strategies to obtain inventory data.[378] The final rule further requires that each planning process undergo a scientific review in order to ensure consistency in the interpretation and application of the data and analysis.[379] The final rule also establishes a National Science Advisory Board to monitor the implementation of plan decisions for lands in question and to help provide consistency.[380] When it is "appropriate and practicable," independent scientific peer reviews of the findings and conclusions, which originate from a broad-scale assessment, may be implemented.[381]

The final rule takes an ecological systems approach, requiring that the responsible official "ensure that plans provide for maintenance or restoration of ecosystems at appropriate spatial and temporal scales determined by the responsible official."[382] The Committee of Scientists, involved in proposing the new rule, acknowledged that "providing for sustainability of ecological systems on national forests and grasslands is an imprecise process with many unknowns

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[370] 784 F. Supp. 593 (W.D. Ark. 1991).
[371] *Id.* at 608.
[372] *Id.*
[373] 65 Fed. Reg. at 67576.
[374] *Id.* at 67553.
[375] 16 U.S.C. § 1604(h).
[376] 64 Fed. Reg. at 54089.
[377] 65 Fed. Reg. at 67553.
[378] *Id.*
[379] *Id.* at 67576.
[380] *Id.* at 67577.
[381] *Id.* at 67596.
[382] *Id.* at 67574.

and potential pitfalls that are not under the control of resource managers."[383] To help combat this, the final rule provides a list of the information and analyses that must be developed or supplemented in making plan revisions.[384] The responsible official must consider characteristics of ecosystem and species diversity, and evaluate ecological sustainability.[385] The former rule listed program-specific direction for many resources, such as soil, water, wildlife and fish.[386] According to the former rule, the diversity of plant and animal communities, in accordance with NFMA requirements, is accomplished through providing habitat and maintain viable populations of native and desired non-native vertebrate species.[387]

This section of the final rule, "Ecological Sustainability," also requires the implementation of a monitoring strategy to evaluate the effectiveness of management decisions in light of the goal of ecological sustainability.[388] The former regulations only required monitoring of population trends in management indicator species.[389] Management indicator species are defined in the former rule as species which shall be selected "because their population changes are believed to indicate the effects of management activities."[390] However, this concept has come under substantial criticism, and is not included in the final regulation.[391]

Rather than monitoring for the management indicator species, the final rule requires the USFS to monitor for focal species and species-at-risk. This comprehensive monitoring incorporates the plan monitoring strategy of the framework for planning discussed above.[392] Continuous monitoring and assessment is essential to NFMA under both the final and the former rules. NFMA mandates that the management systems be researched and evaluated so that the effects of the land management plan do not produce "substantial and permanent impairment of the productivity of the land."[393] This mandate is briefly

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[383] 64 Fed. Reg. at 54087.

[384] 65 Fed. Reg. at 67574.

[385] *Id.*

[386] 36 C.F.R. §§ 219.26, 219.27(g).

[387] *Id.*; 36 C.F.R. § 219.19.

[388] 65 Fed. Reg. at 67547.

[389] 36 C.F.R. at § 219.19.; 64 Fed. Reg. at 54088.

[390] 36 C.F.R. at § 219.19(a)(1).

[391] 64 Fed. Reg. at 54088; 65 Fed. Reg. at 67574, 67575. *See Or. Nat. Resources Council v. Lowe*, 109 F.3d 521 (9th Cir. 1997) (finding USFS did not comply with NFMA when it neglected to evaluate the LRMP within the theoretical range of the pileated woodpecker, a management indicator species, and instead considered percentage of old growth to remain in the area); *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998) (holding USFS did not violate NFMA when it did not designate the whiteheaded woodpecker as management indicator species because other requirements in the LRMP would adequately protect the species).

[392] 65 Fed. Reg. at 67572.

[393] 16 U.S.C. 1604(g)(3)(C).

mentioned in the existing regulations,[394] but is emphasized throughout the final rule.

Timber regulations are discussed in both the former and the final regulations. The existing regulations discuss standards to ensure culmination of mean annual increment of growth, the practice of sound silvicultural systems, and direction for salvage or sanitation harvests.[395] The final regulations define both land where timber harvest is permitted, and land which is not suited for timber production.[396]

K. 16 U.S.C. Section 1605: Renewable Resource Assistance

This section was previously section 7 of RPA and was renumbered by NFMA. Congress did not want only the USFS to benefit from the assessment created by the Department of Agriculture under section 1601.[397] Accordingly, Congress authorized the SOA "to assist States and other organizations in proposing the planning for the protection, use, and management of renewable resources on non-Federal land."[398] Commenting on this topic, the Committee on Agriculture and Forestry stated that "[t]he Committee does not in any way intend the Forest Service to assume the management of private timber lands. However, the Committee does intend that the USFS will make its knowledge and experience available to the private land owners toward improved management on these lands."[399] Section 211.3 of the regulations addresses the USFS's goal to cooperate with state officials of all kinds.[400] Section 1605 of the NFMA demonstrates that Congress intended the USFS to be a leader and example for timber management not only in the national forests, but also for all state and private timber production outside federally owned and managed land.[401]

L. 16 U.S.C. Section 1606: Budget Requests

RPA requires the USFS to periodically prepare three planning documents.[402] The first is the assessment, detailed in section 1601.[403] The second

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[394] 36 C.F.R. § 219.27(b)(5).
[395] *Id.* at § 219.16.(a)(2)(iii).
[396] 65 Fed. Reg. at 67577–67578.
[397] 16 U.S.C. § 1605.
[398] *Id.*
[399] Sen. Rpt. 94-1335 at 32 (reprinted in 1976 U.S.C.C.A.N. at 6691).
[400] 36 C.F.R. § 211.3 (2000).
[401] Sen. Rpt. 94-1335, at 32.
[402] Wilkinson & Anderson, *supra* n. 219, at 37–40.
[403] 16 U.S.C. §§ 1601, 1606.

is the program proposing long-range objectives of all USFS activities, detailed in section 1602.[404] The third is the annual report evaluating USFS activities, detailed in section 1606.[405]

Subsection (a) of 1606 requires that the president submit a Statement of Policy (statement) to be used in framing budget requests for USFS activities.[406] The statement reflects the administration's plans, in light of the assessment and the program, for USFS programs and activities. This statement must be submitted every five or ten years at the discretion of the president.[407] Either house of Congress may disapprove of the statement within ninety days of its issuance.[408] Congress may also use conventional legislation to modify the statement.[409]

Subsection (b) requires the president to submit an explanation for each budget that does not request the funds necessary to achieve the objectives of the statement.[410] In addition, every budget must express "in qualitative and quantitative terms the extent to which the programs and policies projected under the budget meet the policies approved by the Congress."[411] If the proposed budget does not meet the projected programs and policies, then the president "shall specifically set forth the reason or reasons for requesting the Congress to approve the lesser programs or policies presented."[412]

These requirements were challenged in *National Wildlife Federation v. United States*.[413] In that case, the plaintiffs challenged President Carter's alleged noncompliance with subsection 1606.[414] The suit asserted that the president's budget request did not "'express in qualitative and quantitative terms the extent to which the programs and policies'" fell short of the statement.[415] The suit also alleged that the reasons for requesting congressional approval of lesser programs

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[404] *Id.* §§ 1602, 1606.

[405] *Id.* § 1606.

[406] *Id.* § 1606(a). RPA was first introduced by Senator Hubert Humphrey of Minnesota on July 31, 1973 (S. 2296, 93d Cong., 1st Sess. (1973), 119 Cong. Rec. 26797 (1973)). Humphrey put the goals for forest use into a "Statement of Policy" because he hoped that it would ensure consistently higher appropriations to meet the goals. He believed that congressional involvement would solve the problems that were fatal to the USFS's 1959 budget program. The house bill, ultimately accepted by the conference committee, was similar to the senate bill, except for the statement of provision. House Resolution 15,283 "[r]equired the President, rather than Congress, to formulate the Statement of Policy." According to the bill, the president's statement would go into effect unless Congress modified or amended it or if either the Senate or House adopted a resolution disapproving the statement. Despite the intentions of revising the USFS budgetary process, there was no fundamental change. Wilkinson & Anderson, *supra* n. 219, at 37–40.

[407] *Id.* § 1606(a).

[408] *Id.*

[409] *Id.*

[410] *Id.* § 1606(b).

[411] *Id.*

[412] *Id.*

[413] 626 F.2d 917 (D.C. Cir. 1980).

[414] *Id.* at 918.

[415] *Id.* at 922 (quoting 16 U.S.C. § 1606(b)).

or policies were not set forth.[416] Declaratory and mandamus relief were denied by the district court, and the ruling was affirmed by the D.C. Court of Appeals.[417] The court held that judicial restraint properly precluded issuance of mandamus and declaratory relief because it would require them to "intervene in wrangling over the federal budget and budget procedures . . . [and] [s]uch matters are the archetype of those best resolved through bargaining and accommodation between the legislative and the executive branches."[418] The adequacy of the president's submissions under the act were not addressed.

Subsections (c) through (f) require several other annual reports.[419] Subsection (c) requires a report that describes the findings and status of major research projects.[420] Subsection (d) specifies the required contents of the annual evaluation report.[421] It is to include progress in implementing the program and accomplishments of the program relating to objectives of the assessment. These shall be reported "in qualitative and quantitative terms."[422] The report shall also take into account the "balance between economic factors and environmental quality factors."[423] Subsection (e) requires that plans for implementing corrective actions and recommendations for new legislation be included in the report.[424] Finally, subsection (f) requires that the report be written in "concise summary form."[425] The regulations promulgated under this section authorize "Conservation and Environmental Programs,"[426] and regulate the cost of carrying out specific programs, such as those that may be encompassed in the budget requests of 16 U.S.C. section 1606.[427]

M. 16 U.S.C. Section 1607: Multiple Use and Sustained Yield

NFMA renumbered section 1607. The former section 8 of RPA was changed to section 9 of NFMA.[428] Section 1607 states that the SOA must ensure that programs of the national forest system incorporate the multiple-use and sustained-yield concepts for "products and services as set forth in" MUSYA.[429]

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[416] *Id.*
[417] *Id.* at 928.
[418] *Id.* at 924.
[419] 16 U.S.C. § 1606(c)–(f).
[420] *Id.* § 1606(c).
[421] *Id.* § 1606(d).
[422] *Id.*
[423] *Id.*
[424] *Id.* § 1606(e).
[425] *Id.* § 1606(f).
[426] 7 C.F.R. §§ 701.1–701.86 (2000).
[427] *Id.* at §§ 701.4–701.6.
[428] Pub. L. No. 94-588 at § 9 (codified as amended at 16 U.S.C. § 1607).
[429] 16 U.S.C. 1607.

In addition, this section establishes 2000 as the target year in which the renewable resources program will be in an operating condition "whereby all backlogs of needed treatment for their restoration shall be reduced to a current basis."[430] In addition, the procedures concerning multiple-use sustained-yield management "shall be installed and operating on an environmentally-sound basis."[431] In order to prevent backlogs, the annual budget "shall contain requests for funds for an orderly program."[432] The budget may be adjusted in one of three situations: 1) an elimination of backlog areas "that will benefit by such treatment;" 2) "the cost of treating the remainder of such area exceeds the economic and environmental benefits to be secured from their treatment;" or 3) the future needs of the American people can be met by "the total supplies of the renewable resources."[433]

N. 16 U.S.C. Section 1608: Transportation System

In subsection (a) section 1608, Congress declares that a system of transportation on the national forest system shall be executed "in time to meet anticipated needs on an economical and environmentally sound basis."[434] Local, regional, and national benefits should be enhanced by the chosen method for financing the construction. This mandate was challenged in *Thomas v. Peterson*,[435] when the plaintiffs brought an action to bar construction of a logging road.[436] The court did not bar the construction, despite the argument that the road was not "economical" because the cost to build it was more than the value of the timber it would access.[437] The court deferred to the USFS's interpretation of "economical" that permits "consideration of benefits other than timber access, such as motorized recreation, firewood gathering, and access to the area by local residents."[438] Section 1608(a), originally part of RPA, was amended in 1981 by adding that "limitations on the level of obligations for construction of forest roads by timber purchasers shall be established in annual appropriation Acts."[439]

When RPA was amended by NFMA, sections 1608(b) and (c) were added.[440] Subsection (b) requires that roads constructed on national forest system land in connection with a timber contract or other permit or lease shall "be

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[430] *Id.*
[431] *Id.*
[432] *Id.*
[433] *Id.*
[434] *Id.* § 1608(a).
[435] 753 F.2d 754 (9th Cir. 1985).
[436] *Id.* at 757.
[437] *Id.* at 762.
[438] *Id.*
[439] 16 U.S.C. § 1608(a).
[440] *Id.*

designed with the goal of reestablishing vegetative cover" on any areas where the vegetative cover has been disturbed within ten years after the termination of the contract.[441] However, if the road is needed as part of the national forest transportation system, then this procedure is not necessary. Subsection (c) requires that roadway construction be of appropriate standards for the intended use.[442] Safety, cost and impacts on land and resources must be considered in the standards.[443]

Section 1608 was the subject of litigation in *Cedar Lumber, Inc. v. United States*.[444] Cedar Lumber had a timber removal contract with the USFS.[445] Under the contract, the USFS was to construct the access roads to the tracts, as authorized by section 1608. The contracts specified that if the roads were not completed within one year of a given date, the contractor could request a rate redetermination for the remaining volume of timber. The contractor made a claim for rate redetermination. The court vacated and remanded the claim to the Agriculture Board of Contract Appeals (AGBCA). It further held that:

> AGBCA should have the opportunity to determine the appeal to it on the merits, assuming proper claim certification, by resolving the fact issue of whether the roads had been reasonably completed for Cedar's use in harvesting timber, under such requirements as applicable thereto, and if so whether Cedar was given timely notice and whether Cedar, considering its lack of performance, has stated a claim under the contract or for breach.[446]

O. 16 U.S.C. Section 1609: National Forest System

Section 1609 defines the land which qualifies as part of the national forest system.[447] Originally enacted with RPA, section 1609 was amended by

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[441] *Id.* § 1608(b).

[442] *Id.* § 1608(c).

[443] *Id.*; *see also* 23 C.F.R. §§ 660.101–660.117 (2000) (discussing the regulation of the Forest Highway Program).

[444] 799 F.2d 743 (Fed. Cir. 1986).

[445] *Id.* at 744.

[446] *Id.* at 745.

[447] According to the statute, the land must consist of:

> [U]nits of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of this section to include all such areas into one integral system. The "National Forest System" shall include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act, and other lands, waters, or interests

NFMA.[448] Subsection (a) of 1609 was amended in 1976. The amendment limits the president's authority to return previously withdrawn land back to the public domain.[449] As a result, section 1609 prohibits the return of lands to the public domain without congressional consent. The amendment states:

> [N]otwithstanding the provisions of section 473[[450]] of this title, no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to section 471[[451]] of this title, or any act supplementary to and amendatory thereof, shall be returned to the public domain *except by an act of Congress.*[452]

As the legislative history states, this is not unusual since "[o]ther National Forest lands already have Congressional status through specific Acts, such as the Weeks Act."[453] It is important to note also that this amendment does not affect the president's authority to "combine National Forests, separate a forest into two or more National Forests, or change the boundary lines of a forest, providing such changes do not remove lands from National Forest Status."[454]

Additionally, this section addresses the location of field service offices. It states that these offices shall be "so situated as to provide the optimum level of convenient, useful services to the public."[455] The purpose of these offices is to provide useful services while "giving priority to the maintenance and location of facilities in rural areas and towns near the national forest and Forest Service program locations."[456]

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therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system.

16 U.S.C. § 1609(a).

[448] 16 U.S.C. § 1609.

[449] *Id.*

[450] 16 U.S.C. § 473 states:

The President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under section 471 of this title, from time to time as he shall deem best for the public interests. By such modification he may reduce the area or change the boundary lines, or may vacate altogether any order creating [a national forest].

[451] *Id.* § 471 (repealed 1976).

[452] *Id.* § 1609 (emphasis added).

[453] Sen. Rpt. 94-893, at 19.

[454] *Id.*

[455] 16 U.S.C. § 1609(b).

[456] *Id.*

P. 16 U.S.C. Section 1610: Utilization of Information From Others

Section 1610 is largely derived from RPA.[457] It requires the SOA to coordinate with other federal, state and private organizations.[458] The intention is to avoid overlap and duplication of resource assessment and program planning. The final USFS regulations discuss this requirement in several sections, mostly under the heading "Collaborative Planning for Sustainability."[459] As mentioned previously, there is an emphasis on collaboration, participation and coordination in the final rule.[460] The former rule states that the "objectives of other Federal, State and local governments, and Indian tribes" should be considered.[461] In contrast, the final rule provides for the involvement of other federal natural resource agencies, tribal governments, state and local governments, interested organizations and the public in a continuing process of discussion and collaboration.[462]

IV. SECTIONS OF THE UNITED STATES CODE ENACTED BY NFMA

A. 16 U.S.C. Section 472a: Timber Sales

The following is a subsection by subsection analysis of section 472a which addresses timber sales on national forest land.[463] The authority given by this section to allow the USFS to sell timber is an independent sale authority and thus federal procurement statutes and regulations do not apply.[464] For timber sales in the national forests of Oregon and Washington, the environmental requirements of section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990[465] replaced NFMA environmental requirements with less restrictive requirements.[466]

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[457] *Id.* § 1610.

[458] *Id.*

[459] 65 Fed. Reg. at 67572.

[460] *Id.* at 67572–67573.

[461] 36 C.F.R. § 219.7(c)(1).

[462] 65 Fed. Reg. at 67572–67573.

[463] 16 U.S.C. § 472a.

[464] *Monchamp Corp. v. U.S.*, 19 Ct. Cl. 797, 801 (1990) (discussing the Contract Disputes Acts of 1978, 41 U.S.C. §§ 601(4), 609(a)(1) (1982)).

[465] Pub. L. No. 101-121 at § 318.

[466] *Scott Timber Co. v. U.S.*, 44 Fed. Cl. 170, 179 (1999). Section 318 was enacted in response to a timber shortage in the Pacific Northwest that was caused by stringent federal regulations protecting the endangered northern spotted owl. *Id.* at 175. Section 318 releases for harvest "sufficient Federal timber to prevent the economic ruin of communities that depend on this timber." *Id.* (quoting statement of Rep. Unsoeld, 135 Cong. Rec. 22823 (1989)). Section 318 is not limited to the northern spotted owl and applies to all species.

Section 472a, subsection (a) authorizes the SOA to promulgate regulations and sell "trees, portions of trees, or forest products" in the national forests at a minimum price established by their "appraised value."[467] This subsection was enacted to achieve the policies set forth in MUSYA and RPA. It was also enacted in response to the Fourth Circuit Court of Appeals' interpretation of the Organic Act in *Izaak Walton League*. The Fourth Circuit's strict interpretation of section 476 of the Organic Act would have tied the hands of the SOA when it came to managing the national forests and also could have negatively affected the economy.[468] First, it would have prevented the SOA from using forest management techniques, such as thinning, because they involve cutting live trees that are not fully matured.[469] Thinning is a management tool that "is essential to promot[ing] growth and vigor of the stand . . . it opens [up] the stand to allow sunlight to reach the forest floor and promotes growth of wildlife food."[470] Second, if the SOA was limited to selling only dead, physiologically mature or large trees, the harvest levels in the West would have been reduced to about fifty percent of current harvest levels resulting in a ten percent reduction of the total supply.[471] This would have led to "a 15-percent increase in wholesale lumber prices," which would have had severe financial impact on local economies that depend on lumber.[472]

Federal regulations define the National Forest System as comprising "about 188 million acres of land in the National Forests, National Grasslands, and other areas which have been transferred to the USFS for administration."[473] The regulations also describe methods to estimate the fair market value of products and timber within the national forest system.[474] Appraisals are used by the USFS in order to determine fair market values. Various appraisal methods include, "transaction evidence appraisals, . . . comparison appraisals, and independent

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Id. at 177–78.

[467] 16 U.S.C. § 472a. Subsection (a) of § 472a provides:

> For the purpose of achieving the policies set forth in the Multiple-Use Sustained-Yield Act of 1960 (74 Stat. 215; 16 U.S.C. [§§] 528–531) and the Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 476), the Secretary of Agriculture, under such rules and regulations as he may prescribe, may sell, at not less than appraised value, trees, portions of trees, or forest products located on National Forest System lands.

[468] Letter from SOA, to Herman E. Tallmadge, Chairman, Comm. on Agric. and Forestry, *U.S. Dept. of Agric. Supp. State* 48-50 (Mar. 19, 1976) (reprinted in 1976 U.S.C.C.A.N. 6702, 6708).

[469] *Id.* at 50.

[470] *Id.*

[471] Sen. Rpt. 94-893, at 10.

[472] *Id.*

[473] 36 C.F.R. § 200.3(b)(2)(ii) (2000). The National Forest System includes twenty national grass lands, fifty-one Purchase Units, eight Land Utilization Projects, twenty Research and Experimental Areas, and thirty-three other areas. *Id.* at § 200.1(c)(2).

[474] *Id.* at § 223.60.

estimates based on average investments."[475] Timber can also "be appraised and sold at a lump-sum value or at a rate per unit of measure which rate may be adjusted during the period of the contract" for reasons specified by federal regulations.[476] Another regulation requires that timber "shall be sold for appraised value or minimum stumpage rates, whichever is higher."[477] This is designed to insure that timber and forest products will not be sold for less than the appraised value.[478]

Section 472a, subsection (b) requires "[a]ll advertised timber sales" to be located on maps and "be available to the public and interested potential bidders" in the form of a prospectus.[479] The requirements of this subsection were already being followed by the USFS in a majority of its timber sales and Congress simply wanted the procedures for all USFS timber sales to be uniform.[480]

Some of the contents required in timber sales advertisements are:

> (1) the location and estimated quantities of timber or forest products for sale, (2) [t]he time and place at which sealed bids will be opened in public or at which sealed bill will be opened in public . . . followed by an oral auction[,] . . . and notice that a prospectus is available.[481]

Some of the information required in a prospectus "is the minimum acceptable stumpage or other unit prices[,] . . . the method of bidding[,] . . . and the contract form used."[482]

Section 472a, subsection (c) establishes that the terms and duration of timber contracts must "promote orderly harvesting" consistent with section 1604.[483] Contracts are limited to a maximum duration of ten years unless the

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[475] *Id.* Other factors to be considered when estimating the fair market value are: "prices paid and valuations established for comparable timber, selling value of products produced, estimated operating costs, operating difficulties, and quality of timber." *Id.*

[476] *Id.* at § 223.64. Some of the reasons that the rates may be adjusted are for "variations in lumber or other product value indices between the price index base specified in the contract and the price index actually experienced during the cutting of the timber [or] [v]ariance between advertised rates and rates redetermined by appraisal at dates specified in the contract." *Id.*

[477] *Id.* at § 223.61. Minimum stumpage rates are base rates established for species and products on National Forests. *Id.*

[478] *Sierra Club v. Hardin*, 325 F. Supp. 99, 119–21 (D. Alaska 1971) (holding that the construction and operation of a mill was an acceptable contract condition, even though it diminished the fair market value of the timber). Although timber may not be sold at less than fair market value, the SOA may attach conditions to timber sales that are designed to foster economic development even if the conditions reduce the price which prospective purchasers are willing to bid and thus diminishes the market value of the timber

[479] 16 U.S.C. § 472a(b).

[480] Sen. Rpt. 94-893, at 20–21.

[481] 36 C.F.R. at § 223.82(a)(1)–(5).

[482] *Id.* at § 223.83(a)(1), (8), (9).

[483] 16 U.S.C. § 472a(c).

secretary finds that a longer duration is required to achieve a "better utilization of various forest resources."[484] The improved use of renewable resources must comply with the requirements set forth in MUSYA. The SOA may also extend the ten-year period to compensate for "time delays caused by an act of an agent of the United States or by other circumstances beyond the control of the purchaser."[485] This subsection also requires that "as soon as practicable" after a contract is signed, purchasers of timber sales must file operation plans that require the SOA's approval "for any advertised sale with a term of two years or more."[486] Finally, the SOA is prevented by this subsection from extending any contract with a duration of two or more years without a prior finding that the purchaser has exercised due diligence based upon the authorized operation plan or that the "public interest justifies the extension."[487]

There are numerous federal regulations that have been promulgated for subsection (c).[488] Federal regulations require that the plan of operation be general in nature and outline the "expected timing and order of sale development, including such major operations as road construction, felling and removal of timber, distribution of timber, and [the] contractual requirements for erosion prevention and slash disposal."[489] Additional regulations provide for the adjustment of the contract termination date in order "to compensate for delays in road construction and timber removal due to those causes beyond the purchaser's control, which may include but are not limited to acts of God, acts of the public enemy, acts of the Government, labor disputes, fires, insurrections or floods."[490] Market-related conditions, such as drastic wood product price reductions, may also justify the extension of timber sales contracts beyond their termination date.[491]

Other regulations require that: 1) forest products be paid for in advance of cutting, (unless the contract allows the purchaser to provide a payment guarantee);[492] 2) down payments be made at the time a timber contract is executed;[493] and 3) periodic payments (with the exception of lump sum sales) be

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[484] *Id.*
[485] *Id.*
[486] *Id.*
[487] *Id.*
[488] 36 C.F.R. at §§ 223.30–223.118.
[489] *Id.* at § 223.32.
[490] *Id.* at § 223.46.
[491] *Id.* at § 223.52.
[492] *Id.* at § 223.34.
[493] *Id.* at § 223.49. The minimum downpayment "shall be equivalent to 10 percent of the total advertised value of each sale, plus 20 percent of the bid premium, except [where] . . . it is necessary to increase the amount of the down payment in order to deter speculation." *Id.* at § 223.49(c). Bid premium is defined as "the amount in excess of the advertised value that a purchaser bids for timber." *Id.* at § 223.49(3). Minimum down payment requirements may be increased to twenty percent of the total advertised value of the sale, plus

provided for in each contract that lasts more than one full operating season.[494] The USFS may also "require the purchaser to furnish a performance bond for satisfactory compliance" with the terms of the timber sale contract.[495]

There are also several regulations that require contracts to include terms and conditions to protect the environment.[496] Each contract with terms longer than two years must have a cancellation clause that can be invoked in order to prevent severe environmental damage, or invoked if the contract becomes "significantly inconsistent with land management plans adopted or revised in accordance with section 6 of [RPA]."[497] Timber sales contracts must require the purchaser to treat temporary roads in a manner that will allow revegetation of the roads after the contract has expired.[498]

Section 472a, subsection (d) requires all timber sales to be advertised unless the SOA either makes a finding of "extraordinary conditions" based upon a definition of this term in established regulations, or "if the appraised value of the sale is less than $10,000." If the sale is properly offered for bid "or the bidder fails to complete the purchase," no additional advertising is required before the sale is "offered and sold."[499]

The enactment of this subsection repealed several provisions previously required under the Organic Act. First, it abolished the requirement that advertisements be in one or more newspapers of general circulation for thirty days.[500] This has given the SOA greater flexibility in determining the length of

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forty percent of the bid premium if the purchaser meets the criteria of 36 C.F.R. § 223.49(e). *Id.* at § 223.49(g).

[494] *Id.* at § 223.50. The following excerpts from the federal regulations help explain the periodic payment requirements in greater detail: "The number of periodic payments required will be dependent upon the number of normal operating seasons within the contract, but shall not exceed two such payments during the course of the contract." *Id.* at § 223.50(b). "Each timber sale contract shall require the initial periodic payment to equal 35 percent of the total contract value or 50 percent of the bid premium, whichever is greater." *Id.* at § at 223.50(c). "Where an additional period payment is required by the timber sale contract, this payment will equal 75 percent of the total contract value." *Id.* at § 223.50(d).

[495] *Id.* at § 223.35.

[496] *Id.* at §§ 223.111, 223.113.

[497] *Id.* at § 223.40. *See also Reservation Ranch v. U.S.*, 39 Fed. Cl. 696, 709 (1997) (upholding the implementation of this regulation where the USFS had adopted a contract term which provided that species considerations may preempt harvesting. The court ruled that this "was a permissible implementation of its statutory charge [given by NFMA] to manage the timber program in a manner which insures the maintenance of wildlife diversity."). Having these cancellation or preemption clauses in a contract is important, because once a contract is signed, the government cannot unilaterally modify it after the discovery of a negative impact to the environment. *Louisiana-Pacific Corp. v. U.S.*, 656 F.2d 650, 654 (Ct. Cl. 1981). If there is not a cancellation or preemption clause, the only way that the contract can be modified is through bilateral agreement. *Peters v. U.S.*, 694 F.2d 687, 693 (Fed. Cir. 1982) (having the authority to make contracts inherently includes the power to modify them). *See also* 36 C.F.R. at §§ 223.112–223.113 (permitting the modification of contracts).

[498] 36 C.F.R. at § 223.37.

[499] 16 U.S.C. § 472a(d).

[500] Sen. Rpt. 94-893, at § 14(d). Note that although Congress abolished the thirty-day requirement, the regulations require that timber sales that exceed $10,000 in value "be made only after advertisement for a period of 30 days or, if in the opinion of the officer authorizing the sale, the quantity, value or other conditions

time and the means used in advertising timber sales. Next, subsection (d) increased the dollar amount for unadvertised sales from sales less than $2,000 to sales less than $10,000.[501] Finally, the provision in the Organic Act that "timber previously advertised but unpurchased may be sold 'in quantities to suit purchasers' . . . [was] eliminated."[502] Subsection (d) provides that if, upon proper offering, there has not been a satisfactory bid, or if the bidder failed to complete the purchase, the timber may be sold without further advertisement.[503]

Federal regulations define "extraordinary conditions" as including "potential harm to natural resources, including fish and wildlife, and related circumstances arising as a result of the awards or release of timber sale contracts pursuant to section 2001(k) of Public Law 104-19."[504] Although advertising is not required for extraordinary situations, there remains an advertising requirement for "emergency situations."[505] Shorter advertising periods (no less than seven days) are required for emergency situations where prompt removal of timber is necessary to avoid deterioration or to prevent the spread of insects.

Section 472a, subsection (e) requires the SOA to choose bidding methods that "insure open and fair competition . . . [and] insure that the Federal Government receive not less than the appraised value."[506] The SOA must select bidding methods that take into consideration the "economic stability of communities whose economies are dependent on" national forest materials.[507] If the SOA selects the oral bidding method, all "prospective purchasers" are required to "submit written sealed qualifying bids."[508] Only the qualifying bids that are greater or equal to the appraised value of the national forest materials being sold are allowed to engage in the oral bidding. Subsection (e) also requires that the SOA monitor the bidding patterns in order to detect "collusive bidding practices."[509] If the SOA has a "reasonable belief" that collusive bidding practices are occurring, then the SOA must report his/her findings to the United States attorney general and take any action that he/she "deems necessary to eliminate such practices within the affected area."[510]

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justify, a longer period." 36 C.F.R. at § 223.80.

[501] *Id.*

[502] *Id.*

[503] *Id.*

[504] 36 C.F.R. at § 223.85(b).

[505] *Id.* at § 223.81.

[506] 16 U.S.C. § 472a(c).

[507] *Id.*

[508] *Id.*

[509] *Id.*

[510] *Id.*

Subsection (e) was amended in 1978.[511] Prior to being amended, this subsection required "sealed bidding on all sales except where the Secretary determines otherwise by regulation."[512] While sealed bidding may be effective at deterring collusive bidding activities, it has a detrimental impact on timber purchasers in communities dependent on timber from national forests.[513] The problem with sealed bidding was that it allowed timber purchasers to make only one bid on the timber offered for sale and thus a "timber purchaser could participate—actively and competently—in several successive national forest timber sales in the market in which he operate[d] and not make a single purchase."[514] If a timber purchaser with no alternative source of timber from private land were to lose a succession of bids, the probable result would be the closing of the purchaser's timber processing plant. Consequently, those communities economically dependent on the processing plant would be negatively impacted.

On the other hand, the use of oral auctions has the desirable effect of allowing timber purchasers to make several bids rather than one. This is desirable because a purchaser "who needs the timber to keep his plant in operation can react to the bids of other purchasers and insure his supply of raw material."[515] Congress, therefore, amended subsection (e) to allow oral bidding and added protective measures to deter the possible collusive bidding practices that might result from the amendment.[516]

Federal regulations detail which bids will be considered responsive for a sale of timber.[517] First, in order for a bid to be considered responsive for a sale of timber, each bidder must certify that they are "eligible to purchase timber from National Forest System lands consistent with the Forest Resources Conservation and Shortage Relief Act of 1990."[518] Second, purchasers of timber may be debarred or suspended from bidding on timber sales if they have been convicted of theft, fraud, or have failed to perform in accordance with previous contracts.[519] Finally, unless otherwise provided by regulation, "no bid will be considered in

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[511] Pub. L. No. 95-233, 92 Stat. 32 (1978).

[512] Pub. L. No. 94-588 at § 14(e)(2).

[513] Sen. Rpt. 95-333, at 4 (July 6, 1977).

[514] *Id.*

[515] *Id.*

[516] *Id.* at 5.

[517] 36 C.F.R. at §§ 223.86–223.87, 223.137. While the USFS may have substantial discretion in considering responsive bids, this authority is not limitless. *See Prineville Sawmill Co., Inc. v. U.S.*, 859 F.2d. 905, 909 (Fed. Cir. 1988) (holding that the "open and fair" bidding requirements of 472a(e)(A) require the government to fairly and honestly consider all responsive bids that it receives; also holding that the standard of review for the rejection of responsive bids is whether the rejection was arbitrary and capricious.).

[518] *Id.* at § 223.87.

[519] *Id.* at § 223.137. For a detailed description of the debarment and suspension process and a complete list of actions that justify debarment or suspensions, *see* 36 C.F.R. at §§ 223.130–223.145.

the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract."[520]

The regulations also provide guidelines on how a bidder is awarded a timber sales contract.[521] A timber sales contract will not be awarded until the contracting officer determines that the perspective purchaser is responsible.[522] Factors that determine if a perspective purchaser is responsible include determining whether: 1) the purchaser has adequate finances and ability to perform the contract; 2) the purchaser has a satisfactory performance record on timber sale contracts; and 3) the purchaser has or can obtain equipment and supplies suitable for logging the timber and for complying with the resource protection provisions of the contract.[523] A contract for advertised sales is usually awarded to the highest bidder.[524] There are several reasons, however, why the highest bidder may not be awarded the contract. For example, if the highest bidder is notoriously careless with fire, or if awarding the contract to the highest bidder would result in a monopoly injurious to the public welfare, the highest bidder may not be awarded the contract.[525] If the highest bid is not accepted, all bids may be rejected and the sale readvertised, or if "the highest bidder cannot meet the requirements under which the timber was advertised . . . [the] bid may be offered to the next highest qualified bidder or to the other qualified bidders in order of their bids."[526]

Section 472a, subsection (f) authorizes the SOA to dispose of, "by sale, or otherwise, trees, portions of trees, or other forest products related to research and demonstration projects."[527] This gave the SOA new authority; however, "[t]his new authority does not preclude the Secretary from using any other authority he [had] ."[528]

Section 472a, subsection (g) requires "[d]esignation, marking when necessary," and supervision of the "harvesting of trees, portions of trees, or forest products" by agriculture employees.[529] However, these employees cannot be

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[520] *Id.* at § 223.86. *See also Siller Brothers, Inc. v. U.S.*, 655 F.2d 1039, 1042 (Ct. Cl. 1981) (upholding the Forest Supervisor's decision to bar a defaulting bidder from rebidding).

[521] *Id.* at §§ 223.100–223.102.

[522] *Id.* at § 223.101.

[523] *Id.* at § 223.101(b)(1), (3), (5).

[524] *Id.* at § 223.100.

[525] *Id. See also* 36 C.F.R. § 223.100(c)(d) (stating that if there are equal bids which are the highest bids, then lots will be drawn in order to determine who is awarded the contract).

[526] 36 C.F.R. at § 223.102.

[527] 16 U.S.C. § 472a(f).

[528] Sen. Rpt. 94-893, at 21.

[529] 16 U.S.C. § 472a(g).

"directly or indirectly" employed by the purchaser or have a "personal interest in the purchase or harvest [of forest products]."[530]

Congress enacted subsection (g) in response to the *Izaak Walton League* decision. In *Izaak Walton League*, the court interpreted the Organic Act to require that each tree be individually marked prior to cutting and that each tree be completely removed.[531] The Department of Agriculture objected to this interpretation claiming that the requirement of individually marking trees was merely a question of efficiency.[532]

The Department of Agriculture claimed that their "present practice of marking boundaries of clearcutting areas or of marking 'leave trees' when shelterwood, seed tree, or thinning is planned assures that only the desired trees will be cut."[533] Congress responded to these objections by removing the requirement of individual marking and complete removal of trees.[534]

Section 472a, subsection (h) mandates that the SOA "develop utilization standards, methods of measurement, and harvesting practices" for the removal of trees and forest products in order to provide the "optimum practical use of the wood material."[535] When insect-infested, dead, or damaged timber is being salvaged, the SOA can require the timber purchaser to make "monetary deposits, as a part of the payment for the timber."[536] These money deposits are to be used to cover the costs to the United States and the USFS that are associated with building roads for the salvage of this timber and the costs involved in the sale preparation and harvesting of such timber. Without the money available from the deposits provided for in this subsection, the USFS may be unable to salvage timber from the forests to the extent intended.[537]

Section 472a, subsection (i) sets forth the requirements governing timber sales that include "provision[s] for purchaser credit for construction of permanent roads with an estimated cost in excess of $20,000."[538] For these types of sales, the SOA is required to "promulgate regulations" that will give notice to timber purchasers that qualify as "small business concerns under the Small Business Act," an estimate of the "cost and the right, when submitting a bid, to elect that the Secretary build the proposed road."[539] If the SOA is elected to build the road,

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[530] *Id.*
[531] *Izaak Walton League*, 522 F.2d at 949–50.
[532] Letter from Sec. of Agric., *supra* n. 468, at 48.
[533] *Id.* at 49.
[534] 16 U.S.C. § 472a(g).
[535] *Id.* § 472a(h)
[536] *Id.*
[537] Sen. Rpt. 94-893, at 22.
[538] 16 U.S.C. § 472a(i).
[539] *Id.*

then the "price subsequently paid for the timber shall include all of the estimated cost of the road."[540] Subsection (i) also requires that in the "notice of sale, the Secretary of Agriculture shall set a date when such road shall be completed which shall be applicable to either construction by the purchaser or the Secretary, depending on the election."[541]

B. 16 U.S.C. Section 1600: Congressional Findings

This section contains the congressional findings at the time NFMA was passed.[542] The section was an addition to RPA and sets forth seven congressional findings regarding the Nation's renewable natural resources.[543]

The first finding recognizes that the "management of the Nation's renewable resources is highly complex and that the uses, demand for, and supply of the various resources are subject to change over time."[544] The Committee on Agriculture and Forestry continually reviewed the actions of the USFS at the time of enactment and realized the importance of being able to adapt to changes.[545] They also realized that these changes led to a need for constant reassessment. In the second finding, Congress states that an assessment of "the Nation's renewable resources"[546]and a national program for such resources, prepared by the USFS "in cooperation with other agencies,"[547] is in the public's interest.[548] It is also important to note that Congress found it important that this assessment be "periodically reviewed and updated."[549]

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[540] *Id.*

[541] *Id.*

[542] 16 U.S.C. § 1600.

[543] Sen Rpt. 94-893, at 12.

[544] 16 U.S.C. § 1600(1).

[545] Sen. Rpt. 94-893, at 25.

[546] 16 U.S.C. § 1600(2).

[547] 36 C.F.R. at §§ 211.3–211.5.

> All forest officers will cooperate with State officials . . . [and] are authorized to accept appointments, without compensation, as deputy State fire wardens, game wardens, and/or health officers whenever in the judgment of the Chief of the Forest Service the performance of these duties . . . will not interfere with their duties as Federal forest officers."

Id. at § 211.3. Also:

> The Forest Service shall, whenever possible, and is hereby authorized to enter into such agreements with private owners of timber, with railroads, and with other industrial concerns operating in or near the national forests as will result in mutual benefit in the prevention and suppression of forest fires: *Provided*, that the service required of each party by such agreements shall be in proportion to the benefits conferred.

Id. at § 211.4.

[548] 16 U.S.C. § 1600(2).

[549] *Id.*

The third finding states that in order to serve the national interest, a general comprehensive assessment must be made of "present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands."[550] The program must carefully analyze the economic and environmental impacts and "must coordinate . . . multiple use and sustained yield opportunities as provided in [MUSYA]."[551] Congress concluded that this should be done in conjunction with public participation in the development of the program.[552] The Committee on Agriculture and Forestry emphasized the importance of managing lands in "a manner consistent with the principles of multiple use and sustained yield."[553]

The fourth finding recognizes the benefits of coordinating both "public and private research programs," which would promote "a sound technical and ecological base."[554] Congress believed this coordination would promote "effective management, use, and protection of the Nation's renewable resources."[555]

The fifth finding provides that the USFS should encourage private, state, and local governmental management groups to meet the goals of "efficient long-term use and improvement of [these] lands and their renewable resources."[556] The USFS should also assist these groups in making goals and plans "consistent with the principles of sustained yield and multiple use."[557]

The sixth finding recognizes that the USFS "has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of [the Nation's] people," including future generations.[558]

The last finding addresses the importance of recycled timber product as a renewable resource, and recognizes the ability to extend timber and timber fiber resources while reducing pressures on the need to harvest on federal lands.[559] In this finding, Congress directs the USFS to "expand its research in the use of

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[550] *Id.* § 1600(3).

[551] *Id.* In 1976, with the passage of FLPMA, the definition of "multiple-use" and "sustained-yield" was modified. FLPMA lists an open-ended number of uses, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c), (h) (1994).

[552] *Id.* § 1600(3). Public participation is addressed in more depth in 16 U.S.C. § 1602 and is not new with NFMA. RPA also addressed public participation in § 7 of the Act. (Pub. L. No. 93-378, § 7, 88 Stat. 476 (1974)).

[553] Sen. Rpt. 94-893, at 25.

[554] 16 U.S.C. § 1600(4).

[555] *Id.*

[556] *Id.* § 1600(5).

[557] *Id.*

[558] *Id.* § 1600(6).

[559] *Id.* § 1600(7).

recycled and waste timber product materials, develop techniques for the substitution of these secondary materials, . . . and promote and encourage the use of recycled timber product materials."[560]

C. 16 U.S.C. Section 1611: Salvage Harvesting and Limitations on Timber Removal

NFMA established new guidelines for timber removal.[561] Section 1611 provides the guidelines for the "a) limitations on removal [and] b) salvage harvesting" of timber.[562] The limitations on removal stated in section 1611(a) provide that the SOA "shall limit the sale of timber from each national forest"[563] which is "equal to or less than" an annual removal quantity which will maintain a sustained yield.[564] In establishing this limit, the SOA may establish a sale quantity of timber "for any decade which departs from the projected long-term average sale quantity that would otherwise be established," so long as this departure is consistent with the multiple-use objectives as stated in the land management plans.[565] These variations of the allowable sale quantity of timber must be consistent with the public participation requirements found in "section 1604(d) of this title."[566] In addition, the SOA may sell a quantity exceeding the established annual sale quantity "so long as the average sale quantities of timber from such national forest over the decade covered by the plan do not exceed such quantity limitation."[567]

Section 1611(b) states that the restrictions placed on timber removal in section 1611(a) shall not prohibit the SOA from proceeding with the salvage harvesting of substantially damaged timber.[568] If salvage harvesting occurs, the SOA may provide a substitution which "would otherwise be sold under the plan."[569] Or, if this option is not feasible, the SOA may sell the damaged timber "over and above the plan volume."[570]

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[560] *Id.*

[561] Pub. L. No. 94-588, at § 13.

[562] *Id.*

[563] 16 U.S.C. § 1611(a) (stating that if a forest contains less than "two hundred thousand acres of commercial forest land, the Secretary may use two or more forests" in calculating a sustained yield).

[564] *Id.*

[565] *Id.*

[566] *Id.*

[567] *Id.*

[568] *Id.* § 1611(b) (stating damaged timber includes timber "damaged by fire, windthrow, other catastrophe, or . . . [timber] in imminent danger from insect or disease attack.").

[569] *Id.*

[570] *Id.*

The Emergency Salvage Timber Sale Program[571] amended section 1611. This program allowed the "secretary"[572] to create contracts for salvage timber sales from July 27, 1995 to December 30, 1997.[573] Congress provided numerous exceptions to regular timber sale contracts in order to expedite salvage sales. When preparing the salvage timber contracts, the secretary was allowed to combine: 1) "an environmental assessment under section 102(2)" of NEPA; 2) "a biological evaluation under section 7(a)(2)" of the ESA; and 3) "applicable Federal law and implementing regulations."[574] The secretary was given the sole authority to determine if documents had to be prepared which considered the effects of the salvage sales on threatened or endangered species, if the sales were consistent with land management plans, and the scope and content of information to be prepared for the documents.[575] In addition, the salvage timber sales were exempt from the Competition in Contracting Act, Federal Acquisition Regulations, notice and publication requirements and the Small Business Act.[576] Finally, the secretary could not withhold salvage timber sales because "the costs of such activities [were] likely to exceed the revenues" gained from such sales.[577]

Congress also put restrictions on legal challenges. The review of salvage timber sale procedures and the decisions of the secretary were not "subject to administrative review."[578] Instead, judicial review was used as the appropriate means for reviewing decisions regarding salvage sales.[579] However, judicial review had to take place "in the United States district court for the district in which the affected Federal lands [were] located" and the courts were not allowed to issue a restraining order, preliminary injunction, or injunction of the salvage sales unless the sale was arbitrary and capricious or not in accordance with applicable law.[580] The courts were also mandated to have a hearing as soon as possible and could assign Special Masters to help the courts meet deadlines so that timber could be salvaged.[581]

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[571] Pub. L. No. 104-19, § 2001, 109 Stat. 240 (1995).

[572] The term "secretary" refers to both the SOA and the SOI. *Id.* at § 2001(a)(4).

[573] *Id.* at § 2001(a)(2).

[574] *Id.* at § 2001(c)(1)(A).

[575] *Id.* at § 2001(c)(1)(A), 2001(c)(C).

[576] *Id.* at § 2001(c)(5)(B)(i)–(ii).

[577] *Id.* at § 2001(c)(6).

[578] *Id.* at § 2001(e).

[579] *Id.* at § 2001(f).

[580] *Id.* at § 2001(f)(l)–(4). Since the enactment of the Emergency Salvage Timber Sale Program, a number of cases have arisen in which the petitioners argued that the choice of salvage timber sites was arbitrary and capricious. Courts have generally upheld the USFS' decisions in this area. *See Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697 (9th Cir. 1996); *S.W. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443 (9th Cir. 1996); *Armuchee Alliance v. King*, 922 F. Supp. 1541 (N.D. Ga. 1996); *Idaho Conservation League v. Thomas*, 917 F. Supp. 1458 (D. Idaho 1995); *Kentucky Heartwood, Inc. v. U.S. Forest Serv.*, 906 F. Supp. 410 (E.D. Ky. 1995).

[581] *Id.* at § 2001(f)(5).

The Emergency Salvage Timber Sale Program was a more recent controversy. Various other controversies concerning section 1611 ensued shortly after the passage of NFMA in 1976. One controversial issue was below-cost timber sales. These occur when revenue received from timber sales falls short of the cost required in the growing and harvesting of timber. Environmentalists have objected to instances where extensive road systems have been built in areas merely to facilitate below-cost timber sales. In *Thomas v. Peterson*,[582] the plaintiffs argued that NFMA supported the view that the USFS should only be allowed to sell timber from areas where the sales of timber exceeded the road building costs. The *Thomas* court rejected this interpretation of NFMA stating, "[T]he statute does not define 'economical' . . . [NFMA does not require] that the value of the accessed timber exceed the cost of the road. We assume that if Congress wanted to include such a specific requirement it would have done so."[583] The holding in *Thomas* gives the USFS discretion, when balancing economic factors against the other public benefits to be gained, in deciding which forest lands should be harvested.

A second controversial issue which has escalated since the enactment of NFMA concerns timber dependent communities.[584] These are small communities whose economies depend upon timber harvesting on national forest lands. Excessive clearcutting jeopardizes long-term job security. Sustained-yield management of timber over a long period of time ensures job security for timber-dependent communities.[585]

The former regulations explaining section 1611 state that lands shall be identified which are "not suited for timber production."[586] The criteria for these lands are: 1) "[t]he land is not forest land;" 2) technology cannot prevent "irreversible resource damage to soils productivity, or watershed conditions;" 3) timber production would prevent the land from being adequately restocked; and 4) Congress, the SOA, or the chief of the USFS has withdrawn the land.[587] For lands not falling into one of these four categories, an assessment shall be made "to determine the costs and benefits for a range of management intensities for

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[582] 753 F.2d 754 (9th Cir. 1985).

[583] *Id.* at 761.

[584] Coggins, *supra* n. 36, at 645.

[585] *Id.*

[586] 36 C.F.R. at § 219.14. The designation of lands not suited for timber production "shall be reviewed at least every 10 years." *Id.* Also, lands may be reviewed and redesignated at any time "according to the criteria in paragraphs (a) and (c) of this section." *Id.* at § 219.14(d).

[587] *Id.* at §§ 219.14(a)(1–4).

timber production."[588] These lands shall be classified according to "categories of land with similar management costs and returns."[589] Furthermore:

> This analysis shall identify the management intensity for timber production for each category of land which results in the largest excess of discounted benefits less the discounted costs and shall compare the direct costs of growing and harvesting trees, including capital expenditures required for timber production, to the anticipated receipts to the government.[590]

When making this analysis, the "costs and returns of managing the existing timber inventory" must be considered in addition to the long-term yield.[591]

Concerning the formulation of alternatives, the evaluations shall meet multiple-use objectives, and "shall consider the costs and benefits of alternative management intensities for timber production."[592] Lands for timber production shall not be used "to meet objectives of the alternative"management intensities if:[593] 1) "based upon a consideration of multiple-use objectives for the alternative, the land is proposed for resource uses that preclude timber production, such as wilderness;"[594] 2) "the alternative limit timber production" prevents the management requirements of section 219.27 from being met;[595] 3) the alternative lands chosen are not "cost-efficient . . . in meeting forest objectives;"[596] and 4) "[l]ands identified as not suited for timber production in paragraph (a) of this section . . . shall be designated as not suited for timber production in the preferred alternative."[597]

The new regulations relating to 16 U.S.C. section 1611 were issued by the USFS on November 9, 2000.[598] Section 219.28, "Determination of land suitable for timber harvest,"[599] and section 219.29, "Limitation on timber harvest"[600] specifically relate to 16 U.S.C. section 1611. Those conditions and requirements found in sections 219.28 and 219.29 replace the former requirements found at 36 C.F.R. section 219.14 (1999).

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[588] *Id.* at § 219.14(b).
[589] *Id.*
[590] *Id.*
[591] *Id.* at § 219.14(b)(3).
[592] *Id.* at § 219.14(c).
[593] *Id.*
[594] *Id.* at § 219.14(c)(1).
[595] *Id.* at § 219.14(c)(2).
[596] *Id.* at § 219.14(c)(3).
[597] *Id.* at § 219.14(d).
[598] 65 Fed. Reg. at 67514.
[599] *Id.* at 67577.
[600] *Id.* at 67578.

Section 219.28 defines three classifications of lands to be used in determining which lands are suitable for timber harvest.[601] The first classification is "[l]ands where timber may not be harvested," the second classification is "[l]ands where timber may be harvested for timber production," and the third classification is "[l]ands where timber may be harvested for other multiple-use values."[602]

The first classification of land lists three categories of lands where timber cannot be harvested.[603] Harvesting cannot occur on lands: 1) which have previously been withdrawn by statute, executive order or regulation, or lands withdrawn by the SOA or the chief of the USFS;[604] 2) where technology is not available to conduct timber harvesting without causing "irreversible damage to soil, slope, or other watershed conditions or produce substantial and permanent impairment of the productivity of the land;"[605] and 3) land, which if harvested, cannot "be adequately restocked within 5 years after harvest."[606]

The second classification of land states that "[t]he responsible official may establish timber production as a multiple-use plan . . . if the costs of timber production are justified by the ecological, social, or economic benefits[607] [considering] physical, economic, and other pertinent factors to the extent feasible."[608] If lands do not fall within this "plan objective," they are considered unsuitable for timber production.[609] In addition, this section mandates that the responsible official review those lands which failed to meet the requirements of the plan objective "at least once every ten years, or as prescribed by law."[610] The responsible official is to consider "physical, economic, and other pertinent factors to the extent feasible" to determine whether new developments have resulted

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[601] *Id.* at 67577.

[602] *Id.*

[603] *Id.* at 67577.

[604] *Id.* The SOA and the chief of the USFS have been given the authority to withdraw lands from timber harvest "for specific reasons such as, but not limited to, public health and safety, accomplishments of other multiple-use objectives, and other appropriate uses of the land." *Id.* at 67559.

[605] *Id.* at 67577. In response to the argument that 219.28(a)(2) does not take into account the fact that technology is always changing, the USFS points out that this concern is addressed and alleviated by the regulation [65 Fed. Reg. at 67577] which requires that lands determined not suitable for timber production are to be reviewed at least every ten years. *Id.* at 67559.

[606] *Id.* at 67577. This requirement supports the goal of sustainability which is emphasized throughout the final 2000 regulations.

[607] "With regard to individual timber sales, no economic test is required on lands where timber production has been established as a plan objective based on plan-level analysis. On lands where timber production is not an objective, analysis must be used to determine that timber harvest is necessary to achieve other objectives. However, the Department does not believe this rule should limit use of timber harvest as a management tool in these situations based on the ability to recover economic costs." *Id.* at 67559.

[608] 65 Fed. Reg at 67577.

[609] *Id.*

[610] *Id.*

which will allow harvesting on lands previously deemed unsuitable for timber production.[611] Lastly, "[b]ased on this review, timber production may be established as a plan objective for [lands previously deemed unsuitable for timber] through amendment or revision of the plan."[612]

The third classification of land states that lands which are not identified in the plan objective can nevertheless be harvested if "based on a site-specific analysis, the responsible official determines and documents that such timber harvest would contribute to achievement of desired conditions and ecological sustainability, and [harvesting] is necessary to protect multiple-use values other than timber production."[613] The term "ecological sustainability"[614] in this section replaces the term "ecological integrity" as found in the former regulations.[615] The meaning of the term "ecological sustainability" for NFMA purposes is discussed in great detail in section 219.20 of the final regulations.[616]

Section 219.29(a) of the final regulations, entitled "Limitation on timber harvest," states that "[t]he responsible official must estimate the amount of timber that can be sold annually in perpetuity on a sustained-yield basis from National Forest System lands other than those identified in § 219.28(a)."[617] This calculation is made by determining "the yield of timber that can be removed consistent with achievement of objectives or desired conditions in the applicable plan."[618] If a national forest contains "less than 200,000 acres of forested land . . . two or more national forests may be combined for the purpose of estimating" the sustained-yield amount of timber which can be sold annually.[619] "Estimations for lands where timber production is established as a plan objective under § 219.28(b) and estimations for lands identified in § 219.28(c) cannot be combined."[620] Under section 219.29(b), for lands where timber harvesting has been identified, "[t]he responsible official must limit the sale of timber . . . to a quantity equal to or less than that estimated in [section 219.29(a)]."[621] Under section 219.29(c), "the responsible official may sell timber from areas that are substantially affected by fire, wind, or other events, or for which there is an imminent threat from insects or disease, and may either substitute such timber for timber that would otherwise be sold or, if not feasible, sell such timber over and

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[611] *Id.*
[612] *Id.*
[613] *Id.*
[614] *Id.*
[615] *Id.* at 67559.
[616] *Id.* at 67574.
[617] *Id.* at 67578.
[618] *Id.*
[619] *Id.*
[620] *Id.*
[621] *Id.*

above the plan limit established in [section 219.29(b)]."[622] Lastly, according to section 219.29(c), "If departure from the quantity of timber removal established in [section 219.29(b)] is necessary to meet overall multiple-use objectives, the requirements in 16 U.S.C. section 1611 must be followed."[623]

There are three significant differences between the former regulations for 16 U.S.C. section 1611, and the recently issued final regulations. First, concerning the identification of lands suited for timber, the final regulations emphasize that three classifications of land need to be identified. This emphasis on three classifications is different from the former regulations which identified only one classification concerning timber harvesting—lands not suited for timber production.[624] The reason the current regulations added two new classifications is that the new classifications "better incorporate the intent of the NFMA," and "accommodate innovative management approaches to achieving sustainability."[625]

Second, unlike the former regulations, the new regulations emphasize the procedure to be used when determining lands which are suitable for harvesting. The final regulations state that it is under the authority of "a responsible official" to determine whether land can be harvested by looking at a variety of factors.[626] Thus, the final regulations emphasize the view seen in *Thomas*, that land suitable for timber is to be determined by looking at factors other than economic concerns.[627]

Third, the final regulations replace the term "ecological integrity" with the term "ecological sustainability." A detailed description of the means for achieving ecological sustainability is found in Section 219.20.[628] Generally, achieving ecological sustainability depends in part upon achieving "ecosystem diversity, which includes many characteristics such as distribution and abundance of successional stages of vegetation."[629]

In contrast to the former regulations, the final regulations also address more specifically the clear cutting controversy[630] which has intensified since the

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[622] *Id.* This section addresses the implementation of salvage timber harvests into NFMA which are required by 16 U.S.C. § 1611.

[623] 65 Fed. Reg at 67578. The requirements concerning departure timber sales stated in 16 U.S.C. section 1611 state that "plans for variations in the allowable sale quantity must be made with public participation . . . [i]n addition, within any decade, the Secretary may sell a quantity in excess of the annual allowable sale quantity so long as the average sale of timber from such national forest over the decade covered by the plan do not exceed such quantity limitation." 16 U.S.C. § 1611.

[624] 36 C.F.R. at § 219.14.

[625] 65 Fed. Reg. at 67559.

[626] *Id.* at 67577.

[627] 73 F.2d at 761.

[628] 65 Fed. Reg. at 67574.

[629] *Id.* at 67560.

[630] The Department of Agriculture's view towards clearcutting is that:
Clearcutting is a legitimate and sometimes needed silvicultural tool for managing certain

enactment of the 1976 NFMA. The requirement in the final regulations concerning the need to determine harvest levels according to the goal of maintaining long term sustained-yield capacities appears to address the fears of those against excessive clearcutting. In general, a comparison of the present and former regulations shows that the final regulations provide more specific requirements concerning which lands are and are not suitable for timber harvesting.

D. 16 U.S.C. Section 1612: Public Participation

Section 1612 was originally section 14 of RPA.[631] Section 1612(a) states that there should be "public participation in the planning for and management of the National Forest System."[632] It also requires the SOA to "establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment on the formulation of standards, criteria, and guidelines applicable to Forest Service programs."[633] This provision is intended to inform the public before changes occur on the land.[634]

Section 1612(b), pursuant to the Federal Advisory Committee Act (FACA)[635] and other applicable law, requires the SOA to "establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities."[636] The SOA is responsible for assuring that such advisory boards consist of a "cross section of groups interested in the planning for and management of the National Forest System and the various types of use and enjoyment of the lands thereof."[637] Interested groups include the general public as well as special interest groups.[638] This provision does not require that every group with an interest at stake have its members on each advisory board so long as the membership of each board reflects a cross section

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> forested landscapes. Forest silviculture and ecosystem disturbance ecology support this view. At the same time, the Department shares the concerns over inappropriate application of clearcutting. The Department is confident that the planning framework and the collaborative, science-based approach to ecological diversity it contains will result in clearcutting being used appropriately. It remains agency policy that clearcutting be used only when and where it is appropriate and fully supported by science.

Id. at 67561.

[631] Pub. L. No. 94-588 at § 11.

[632] 16 U.S.C. § 1612(b).

[633] *Id.* § 1612(a).

[634] 122 Cong. Rec. at 27606.

[635] Pub. L. No. 92-463, 86 Stat. 770 (1972).

[636] Pub. L. No. 94-588 at § 11.

[637] *Id.* at § 14(b)

[638] Sen. Rpt. 94-893.

of groups with an interest at stake. In establishing this section, the Senate Committee on Interior and Insular Affairs expressed an intent that advisory boards would be established at the national level and for each region and National Forest. Each advisory board is subject to FACA.

The procedures used to provide for public, federal, state, and local government involvement in formulating USFS's standards, criteria, and guidelines as set out in the *Forest Service Manual* are found in 36 C.F.R. section 216.1–216.8 (2000).

E. 16 U.S.C. Section 1613: Promulgation of Regulations

Section 1613 was originally section 15 of RPA.[639] Section 1613 authorizes the SOA to prescribe regulations which he believes are necessary and desirable to carry out the provisions of NFMA.[640] The applicability and procedures guiding this authority are outlined in 36 C.F.R. section 219.1–219.29 (2000).

F. 16 U.S.C. Section 1614: Severability

Section 1614 addresses the issue of severability. Severability means that if one section is inapplicable or "invalid" to any "persons or circumstances," the application or validity of other sections are not affected.[641] Thus, each of the sections before section 1614 are treated as individual sections conferring individual legal duties and rights. A severability section can prevent problematic legal cases from arising where a person disavows responsibility for a legal duty as a result of reading a section where a legal duty did not apply to him or her.

V. CONCLUSION

NFMA has imposed both procedural and substantive standards upon USFS management decisions. From its inception, the USFS managed the national forests according to the principles of multiple-use and sustained-yield. Furthermore, in implementing these policies, the USFS exercised virtually unlimited discretion. This discretion reached a point where some saw USFS management practices as "antidemocratic."[642] In 1969, when "high-yield cutting

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[639] Pub. L. No. 94-588 at § 11.
[640] 16 U.S.C. § 1613.
[641] *Id.* § 1614.
[642] Wilkinson, *supra* n. 3, at 662.

was raising hackles all across the West," the "[f]oresters were making all of the decisions, without the benefit of the perspectives of other disciplines" and more importantly, without the benefit provided by public participation.[643] Arnold Bolle, author of the Bolle Report, believed that the USFS should have the discretion to decide "how a clearcut ought to be planned and carried out," but not "whether there should be a clearcut in the first place" because that decision was not a "technical" decision but "a social decision."[644] NFMA has since enacted procedural and substantive standards that have altered how these social decisions are made.

Nevertheless, some argue that the substantive standards are "inadequate" and "have failed to provide a significant judicial check on Forest Service timber management practices" because "[t]hey have failed to communicate an intelligible message to the lawyers, Forest Service officials and federal judges who initiate, defend, and resolve claims asserted under them."[645] This may be true, although unquestionably the public now has much more input, and the USFS has less discretion in making decisions than it did prior to the passage of NFMA. For this reason alone, NFMA is a move toward the greater democratization of the social decisions Arnold Bolle associated with forest management.

Others continue to argue that the multiple-use policies ratified by MUSYA and NFMA, "means management by bureaucrats with little or no oversight by Congress."[646] However, Congress chose to ratify the multiple-use policies and to limit its oversight in these matters—a majoritarian decision. Congress may have made this decision because forest management is a highly technical field or for some other reason. For whatever reason, it is likely that the agency will always have discretion. Charles F. Wilkinson states, "more national forest law has been, and always will be, made in Forest Service offices and on the ground than in Congress or the courthouses."[647]

NFMA repealed, amended, and enacted many laws for the purpose of altering the management practices of the USFS. Amendments to NFMA enacted since 1976 have further modified USFS management practices. In addition, management practices will probably be modified even more by future amendments to NFMA and by proposed and future modifications to agency rules and regulations.

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[643] *Id.*

[644] *Id.*

[645] Cheever, *supra* n. 39, at 705.

[646] Michael C. Blum, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 Harv. Envtl. L. Rev. 405, 414 (1994).

[647] Wilkinson, *supra* n. 3, at 673.

Importantly, NFMA has already accomplished several of its goals. First, NFMA has "achieved some considerable success in engaging the public's participation in planning."[648]and has imposed substantive standards upon some USFS management decisions. Second, the USFS itself has changed in the twenty years since the passage of NFMA "and to some degree NFMA has spurred its evolution."[649] For example, "[b]iologists, ecologists and members of other disciplines form a larger and more influential contingent" and the agency is no longer controlled by foresters.[650] Third, "the amount of clearcutting has been considerably reduced"[651] and the level of the timber being cut has "dropped from eleven billion board feet" in 1989 to "between four to five billion board feet" in 1997.[652] Finally, NFMA appears to have the necessary flexibility to "respond to future needs."[653] Based upon these accomplishments and predictions, NFMA appears to have achieved improved forest management practices and remains the law of the forest in the year 2000.

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[648] *Id.*

[649] *Id.*

[650] *Id.*

[651] *Id.* at 674.

[652] *Id.* at 676. It is true that the presence of the northern spotted owl contributed to this reduced timber cut. However:

> It was the work of Jack Ward Thomas and other biologists in researching and implementing the biological diversity provision of NFMA and the indicator species requirements of NFMA regulations, that brought the northern spotted owl and biodiversity into a central position in the making of timber policy in the Pacific Northwest.

Id. at 674.

[653] *Id.* at 677.