Managing America's Public Lands: Proposals for the Future

by

James L. Huffman, Bob Ekey, Jon A. Souder,
and Sally K. Fairfax

Originally published in PUBLIC LAND & RESOURCES LAW REVIEW
18 PUB. LAND & RESOURCES L. REV. 143 (1997)

CONFERENCE

MANAGING AMERICA'S PUBLIC LANDS: PROPOSALS FOR THE FUTURE

INTRODUCTORY REMARKS*

James L. Huffman**

The presumption of this conference is that a new public lands policy is needed; that, as former EPA Chief Council Donald Elliott has said of our environmental laws, "you can't get there from here [using present methods]."[1] I believe this presumption is valid. Based upon a reading of their preliminary papers, I would say that all but one of our panel participants accepts this presumption. This means that our discussion will pass muster under the National Environmental Policy Act (NEPA)[2]—we will examine several alternatives including that of no action.[3]

My assignment is to describe our existing laws and, given the presumption of this conference, to explain what is wrong with them. Bob Keiter of the University of Utah has done an excellent job of providing some historical context. What Bob has described, at least from Gifford Pinchot and Teddy Roosevelt forward, is the product of Progressivism.[4]

---

* These introductory remarks were delivered by the author at a conference held October 24-25,1 1996 in Missoula, Montana. The conference was jointly sponsored by the Public Land & Resources Law Review of the University of Montana School of Law and the University of Montana School of Forestry.

** Dean and Professor of Law, Northwest School of Law, Lewis & Clark College; J.D., 1972, University of Chicago; M.A., 1969, Fletcher School of Law & Diplomacy, Tufts University; B.S., 1967, Montana State University.

1. E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program that Works!*, 92 MICH. L. REV. 1840, 1847-48 (1994).

2. 42 U.S.C. §§ 4321-4370d (1994).

3. NEPA regulations require that environmental impact statements present the impacts of the proposed action as well as all reasonable alternatives, including the "no action" alternative. *See* 40 C.F.R. § 1502.14 (1996).

4. The term refers to that ideology which emphasizes the role of government in the furtherance of humanistic reform. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1963).

Therein lies part of the failure of our public land laws.

The defining goals of our current public land policy are two: multiple use and sustainability. Nothing we have done since the Multiple-Use Sustained-Yield Act[5] has altered these guiding values. The Forest and Rangeland Renewable Resource Planning Act of 1974,[6] the National Forest Management Act of 1976 (NFMA),[7] and the Federal Land Policy and Management Act of 1976[8] are all Progressivist solutions to a perceived failure to achieve these values in our public lands management. In that same Progressivist tradition are NEPA, the Endangered Species Act[9] and most of the rest of our environmental laws.

Now two decades after NFMA, we are still in search of better public lands policies. Notwithstanding the creative proposals of some of our panelists, I will predict that we will continue in the Progressive tradition, and that we (or more likely others) can therefore expect to be back here two decades hence to again seek solutions to what by then will be well over a century of failed public lands policies. Why this "vicious circle," to borrow a phrase from Justice Stephen Breyer?[10]

The naivete of Progressivism is half of the problem. The other half is a failure to understand and respect the most basic teachings of the political theory of our national founders.

First, the naivete of Progressivism. The Progressives believed in scientific management. Not just that science could provide information and understanding which would be useful to public lands management, but that it could substitute for the messy politics which had dominated public land policy through the 19th century. The idea was simple. Good science would provide good information which would be used by good public officials to reach good decisions. Thus would be served the public interest.[11]

Most of the public lands and environmental legislation of this century has been firmly rooted in this scientific management tradition. Throughout, there have been constant objections that the public interest is not being served, that special interests are in control, that the public welfare is being sacrificed to partisan politics. Our solution has always been more of the same, but better. Even my colleague Michael Blumm acknowledges that

---

5. 16 U.S.C. §§ 528-531 (1994).

6. 16 U.S.C. §§ 1600-1614 (1994). The provisions of this Act were incorporated and revised by the National Forest Management Act. *See* "Short Title" notations following 16 U.S.C. § 1600.

7. 16 U.S.C. §§ 1600-1614 (1994).

8. 43 U.S.C. §§ 1701-1784 (1994).

9. 16 U.S.C. §§ 1531-1544 (1994).

10. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

11. *See, e.g.*, GIFFORD PINCHOT, BREAKING NEW GROUND 291-94 (Island Press 1987) (1947); *see also* Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 344 (1994).

the Multiple Use-Sustained Yield Act has failed,[12] and most will acknowledge that forest planning has been a nightmarish waste of resources and human energy. But we persevere. And now the scientific managers have finally hit upon the solution. They have finally gotten it right. Ecosystem management will assure that science buries politics once and for all.

This Progressivist search for the silver bullet of scientific management reminds me of a story I heard many years ago. A solo climber was ascending the North Face of Granite Peak in the Beartooth Mountains, just north of Yellowstone and, I should note, within the Greater Yellowstone Ecosystem, to which I will return later. As he neared the top he lost his footing and began to fall to certain death 2000 feet below. But fortune was on his side. As he fell, his hand managed to grasp a small outcropping of rock. And so he hung by one hand with no chance of climbing back up and only a matter of time before he lost his grip. In desperation he thought perhaps another climber might be on top of the mountain. If so, he might have a rope which he could lower to our stranded climber. "Is anyone up there?" he shouted. Silence. "IS ANYONE UP THERE?" he shouted a second time. To his surprise and delight a booming voice responded, "YES, I AM UP HERE, WHAT DO YOU WANT." "Please help me," said the climber. "DO YOU BELIEVE?" asked the booming voice. "Oh yes, I believe," said the climber. "IF YOU BELIEVE, LET GO OF THE ROCK." There was a long silence, and then our climber said "is anyone else up there?" Like the climber, our latter day Progressives are looking for better approaches to scientific management of our public lands.

Our public land managers have now embarked upon their most ambitious scientific management effort yet—ecosystem management. Notwithstanding that the public land laws do not authorize it, and I say that in spite of the fact that Judge Dwyer has found such authorization somewhere in the penumbras of those laws,[13] our public land managers are full swing into ecosystem planning and management. And they believe they are really doing it. For example, the manager of the Cabeza Prieta National Wildlife Refuge, the largest in the lower forty-eight states, has the temerity to say that "We're managing whole ecosystems with a staff of only six."[14] Greater hubris I cannot imagine. Nor can I imagine a greater

---

12. *See generally* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

13. *See* Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1310-11 (W.D. Wash. 1994) (finding authorization to manage ecosystems based on language of ESA and NFMA, and mention of ecosystems in NEPA regulations, which Dwyer interprets as allowing, if not requiring planning for entire biological communities).

14. *See* Douglas H. Chadwick, *Sanctuary: U.S. National Wildlife Refuges*, NAT'L GEOGRAPHIC,

threat to the fundamental values of liberty and freedom which founded this country and have been the envy of the world ever since.

The idea of ecosystem management is this. Because every action taken on the public lands will have unintended environmental effects on and off the public lands, and because every action taken on private and state lands will have similar unintended environmental consequences, these actions should only be taken in the context of an ecosystem plan. The purpose here is to assure that the ecosystem remains viable and sustainable.

The central assumption is that everything is connected to everything else, which is no doubt true in some ultimate sense. Of course this means that ecosystems are difficult to define, but assuming that we can agree on a definition (here we will turn to science for the answer), contemplate the task of the ecosystem planner and manager.

Take an example right here in the Northern Rockies—the Greater Yellowstone Ecosystem. Ah, the Greater Yellowstone Ecosystem, it already rolls off the tongue as if it really exists thanks to the concerted efforts over the last decade or so of the Greater Yellowstone Coalition.[15] The Greater Yellowstone Ecosystem encompasses parts of three states, probably a dozen counties, and perhaps a hundred municipalities. It also encompasses vast areas of federal land under the jurisdiction of several federal agencies and no doubt some state lands as well. I know all of this because I have seen the map of the Greater Yellowstone Ecosystem which appears regularly in the newsletter of the Greater Yellowstone Coalition. Not identified on that map, but an additional challenge for the ecosystem planners, are thousands of private properties.

Imagine that you are the ecosystem manager for the Greater Yellowstone ecosystem. Where do you begin? Perhaps you could undertake a biological survey after which you will know more than you know now, but certainly not everything there is to know. And what about the economy of the region and all of the governmental authorities and the private property owners? This is a challenge far greater than economic planning without regard for the environment, and we know how that has worked out wherever it has been tried.

How can we be so audacious or naive as to believe that we can really do ecosystem management? The variables are beyond counting, not to mention beyond management. But even if we could acquire the requisite knowledge and somehow make the decisions which are right for the eco-

---

Oct. 1996, at 6-7.

15. The Greater Yellowstone Coalition is a private conservation group dedicated to "preserve and protect the Greater Yellowstone Ecosystem and the unique quality of life it sustains." 13 *Greater Yellowstone Report* (a quarterly journal of the Greater Yellowstone Coalition) Summer 1996, at 2.

system (will science tell us what is right?), we do not have the political wisdom to implement those decisions.

Which brings me to the second reason why we are unlikely to reform our public lands laws to anyone's satisfaction. The Progressive belief in scientific management is rooted in an effort to escape political management. How often do we hear interests of all sides of the public lands debate lament that a particular decision is political and call for decisions based on good science? We hear a constant plea for bipartisan action in the public interest, or better yet, as Associate Justice Steven Breyer proposes in *Closing the Vicious Circle*, for expert decision making which can sidestep politics altogether.[16]

Let me remind you of a truth about government which our constitutional founders well understood. We cannot escape politics. Government is politics, particularly democratic government. Public lands are, as Rick Stroup taught me many years ago, political lands. That is the point. That is why they are public lands. Somewhere in the late Nineteenth century it was decided that these lands should not be left to private acquisition and management precisely because governmental, which is to say political, management was thought to be preferable. Numerous commissions and Congresses, including the just adjourned 104th, have revisited this issue with the same result.[17]

What our national founders understood about government is that we cannot escape politics. They understood, as a result of their experiences under both the English Crown and the Articles of Confederation, that, as much as we might appeal to the good will and civic republicanism of those who govern, the power of government must be constrained or it will be abused. The temptations of power corrupt even the best among us. And it is not just kings who abuse power. Madison warned of the tyranny of the majority, and, in an extended republic of multiple factions where the legislative process depends upon horse trading and log rolling, of the tyranny of minorities.

In the public lands context there is no better evidence of these political realities than the fact that a mere 25,000 holders of grazing permits[18]

---

16. *See supra* note 10 at 59.

17. The 104th Congress faced various proposals for the privatization of some or many public lands. *See, e.g.*, H.R. 257, 104th Cong., 1st Sess. (1995) (intent of bill was to transfer BLM lands to states and private entities); H.R. 1923, 104th Cong., 1st Sess. (1995) (intent of bill was to sell of public lands to reduce federal deficit). Similar proposals have been made throughout this century. *See generally* George Cameron Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1 (1983).

18. About 30,000 grazing permits and leases are issued for BLM and Forest Service rangelands. However, some of these permittees graze more than 1 allotment, and 15% graze both BLM and Forest Service lands. Thus, the actual number of permittees grazing BLM and Forest Service land in the 16

were able to stymie the early reform efforts of the Clinton administration.[19] As I have argued in an article in the *Colorado Law Review*, public lands law is the product of a history of competing private interests seeking to extract wealth, including the wealth of environmental quality, from the federal lands.[20] No matter how much we appeal to science and wise management in the public interest, we cannot escape the simple reality that public land management is politics.

True reform will only come with basic institutional change. The framers of the Constitution understood that structure is everything if we seek to limit opportunities for private interests to exploit the immense powers of government. For them it was the structure of separation of powers and federalism. Because these structural limits have been largely abrogated by an assertive Congress and Executive and a compliant Supreme Court, the challenge to reform federal lands management is daunting.

We have decades of Supreme Court precedent confirming the unlimited power of Congress and deferring to the expertise of agencies. The latter is a product of the Progressive faith in scientific management, the former of an ends-focused jurisprudence which has ignored the concept of enumerated powers, the Tenth Amendment, and the economic liberties explicit in the Constitution. Without these constitutional limits on the exercise of federal power, we have little hope of reining in the private interest rent-seeking which defines our public lands politics.

Our only hope for meaningful reform is to recognize that incentives matter and that institutional arrangements are critical to the incentives faced by both public and private resource managers. Without a return to constitutionally limited government, our prospects for institutional reform are dim. Perhaps the *Lopez*,[21] *Seminole Tribe*[22] and *Dolan*[23] cases offer

---

Western states is about 23,000. LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING 25 (1991) (citing COMMITTEE ON GOVERNMENT OPERATIONS, FEDERAL GRAZING PROGRAM: ALL IS NOT WELL ON THE RANGE, (1986)).

19. *See* Dover A. Norris-York, Comment, *The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?*, 26 ENVTL. L. 419, 434 n.125 (1996).

20. James Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241 (1994).

21. United States v. Lopez, 514 U.S. 549 (1995) (holding that law banning guns in school zones did not pass constitutional muster because prohibited activity did not substantially affect interstate commerce).

22. Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1127-31 (1996) (holding that the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, did not grant Congress power to abrogate the states' Eleventh Amendment immunity).

23. Dolan v. City of Tigard, 512 U.S. 374 (1994). The *Dolan* Court, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), stated that "one of the principle purposes of the Takings Clause is 'to bar Government from forcing people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 384. The Court suggests that governmental

a flicker of hope, but that small flame will surely be extinguished not too long after the almost certain reelection of Bill Clinton.

On that pessimistic note, which many will see as reason for optimism, we will now turn to the other members of our panel to propose institutional reforms which might well make a difference, if they can somehow overcome the obstacles of interest group politics.

---

entities may not effect a "taking" by requiring that private landowners dedicate their land to public use as a precondition to the granting of building permits, variances, and other such discretionary privileges, *unless* the required dedication is reasonably related to the impact of the proposed development *and* is "rough[ly] proportional[]" to the extent of the impact. *Id.* at 389-90.

THE NEW WORLD AGREEMENT: A CALL FOR REFORM OF THE 1872 MINING LAW

Bob Ekey*

[E]veryone can agree that Yellowstone is more precious than gold.
-President Clinton, August 12, 1996.[1]

I. INTRODUCTION

Geologic forces shaped the jagged peaks and serrated ridges surrounding Henderson Mountain, just three miles from Yellowstone National Park's northeast corner. Geologic forces also created both gold and iron sulfide—pyrite or fool's gold—deep inside Henderson Mountain near Yellowstone. The $800 million of gold and the high concentrations of pyrite prompted a fierce battle in the early 1990s over the future of the alpine area surrounding Henderson Mountain.

Henry David Thoreau once said, "a man is rich in proportion to the number of things which he can afford to let alone."[2] On August 12, 1996, President Bill Clinton demonstrated that we are a nation of great wealth and even greater wisdom when he travelled to Yellowstone National Park to announce a historic agreement between industry, government, and conservationists. That agreement provides that the federal government will reacquire the property around Henderson Mountain to protect Yellowstone and the surrounding environment from the threat of the proposed New World Mine.

The New World Agreement demonstrates more than the wealth of our nation and the wisdom of our citizenry. It points to the need for substantial reform of the 1872 General Mining Law.[3] In spite of the mine's obvious short- and long-term environmental threats to Yellowstone and the surrounding ecosystem, provisions of the Mining Law convinced some federal agencies they were powerless to stop it. In the end, it took a cre-

---

* Communications Director, Greater Yellowstone Coalition, Bozeman, Montana. Mr. Ekey was involved in the campaign to stop the New World Mine. An early version of this paper was presented at the conference entitled "Managing America's Public Lands: Proposals for the Future" sponsored by the Public Land & Resources Law Review, University of Montana School of Law, October 24-25, 1996.

1. Bob Ekey, *Victory at Yellowstone: Historic Agreement Stops the New World Mine*, GREATER YELLOWSTONE REPORT, Summer 1996, at 1.

2. HENRY D. THOREAU, WALDEN, OR LIFE IN THE WOODS 89 (Merrill Publishing Co. 1969) (1854).

3. Now codified at 30 U.S.C. §§ 21-54 (1994).

ative approach that required cooperation from historically opposing parties and intervention at the highest levels of government to prevent such a travesty from occurring. The saga of the New World Mine clearly illustrates the need to reform the 1872 Mining Law to allow some areas of public land to be judged and designated as unsuitable for mining—restoring balance to our public land laws.

This essay, in Part II, relates the saga of the battle to stop the New World Mine, culminating with the New World Mine Agreement. Part III describes the Agreement. Part IV discusses the reason why the Agreement was necessary, specifically, the shortcomings of the 1872 Mining Law. Part V concludes that, while the Agreement may avert the threats posed by the New World Mine, such threats will continue unless the underlying problems with the 1872 Law are addressed.

II. HISTORY OF NEW WORLD FIGHT

In 1989, the residents in Cooke City, Montana, learned that Noranda, a giant Canadian conglomerate,[4] wanted to develop a gold mine just outside of their town, on Yellowstone's doorstep. Noranda and its chain of subsidiaries wanted to build its mine on the flanks of Henderson Mountain—a triple divide for three headwater tributaries of the Yellowstone River.[5] Downstream from the proposed mine site, lay Yellowstone National Park, the Wild and Scenic Clarks Fork of the Yellowstone, and the Absaroka-Beartooth Wilderness.[6]

Cooke City had already experienced the roller coaster ride of the boom and bust economy that accompanies mining. Mining started in the New World Mining District over a century ago and continued on-and-off through the 1950s. Mining's legacy in the New World District has left mountainsides pockmarked with open pits and sterile streams flowing orange.[7] Mining exposes the iron sulfide, or fool's gold, to oxygen, creating a toxic acid runoff.[8] Noranda's plans caused concern because they

---

4. The corporate structure of the mining companies changed considerably over the life of the mine controversy. In 1994, the corporate chain ran from Crown Butte Mines, Inc. (Montana), which was owned entirely by Crown Butte Resources, Ltd. (Toronto), of which 60% was owned by Hemlo Gold Mines, Inc. (Toronto), which was in turn 46% owned by Noranda, Inc. (Toronto). In 1996, following the merger of Noranda and Battle Mountain Gold (Texas), the corporate chain ran from Crown Butte Mines, Inc., to Crown Butte Resources, Ltd., which was then 60% owned by Battle Mountain Gold, of which Noranda Inc. controlled 26%. *See* Michael Milstein, *Should Noranda be Liable?*, BILLINGS GAZETTE, Feb. 14, 1994, at 1.

5. Todd Wilkinson, *Fool's Gold*, NAT'L PARKS, July 1994, at 31.

6. *Id.*

7. Michael Satchell, *A New Battle Over Yellowstone Park: A Natural Wonder, A Mine and an 1872 Law*, U.S. NEWS & WORLD REP., March 13, 1995, at 34, 36, 42.

8. *See* Stephen H. Daniels, *Untried Designs Pushed Out West*, ENGINEERING NEWS RECORD, March 14, 1994, at 59.

dwarfed any previous mining activity. When first proposed, Noranda's plans called for mining two highly-acidic pits and then extracting gold, silver, and copper from the rock through a cyanide vat-leach process. This proposal quickly generated a motherlode of controversy and the mine company dropped the pits and cyanide process from its plans.

The mining company no longer needed to mine the pits. It had discovered three high-grade underground ore bodies—one rich vein narrowly missed by miners of yesteryear. The new plans called for extracting $800 million in gold, silver, and copper from within Henderson Mountain.[9] The ore bodies themselves were located primarily in the Miller Creek drainage, upstream of Yellowstone National Park, while the mine entrance, mill, tailings impoundment, and work camp would all be located on the other side of Henderson Mountain in Fisher Creek, upstream from the Wild and Scenic Clarks Fork, and the Absaroka-Beartooth Wilderness. The mine plans called for a 300 person work force to construct the mine, and a 175-person work force to operate the mine for its estimated 15-18 year mine life.[10]

One of the most controversial features of the mine plan was the proposal to build a tailings impoundment in Fisher Creek the size of 70 football fields. The plans called for the impoundment to store 5.5 million tons of acidic mine waste, called tailings. Geologists and engineers questioned the plan because it called for re-routing Fisher Creek around the impoundment, and placing it in a high avalanche and earthquake-prone area.[11] The geologists also questioned the mine company's assertion that the impoundment would remain intact "forever."[12]

The mine proposal sparked almost universal opposition in local and regional communities and across the nation. Residents of the Cooke City area formed the Beartooth Alliance to oppose the mine, an effective grassroots group that wrote letters, conducted mine tours for officials and journalists, and gave nightly slide shows to tourists. Regional groups like the Greater Yellowstone Coalition (GYC) conducted scientific and technical reviews of the mine proposal, lobbied and helped orchestrate a national media campaign opposing the mine. Other regional and national groups also kicked into gear, including American Rivers, Northern Plains Resource Council, Mineral Policy Center, National Parks & Conservation Association, and local chapters of Trout Unlimited

Mine opponents received a big political boost when in 1993, Senator Max Baucus (D-MT) wrote a sharply worded letter spelling out his con-

---

9. Satchell, *supra* note 7, at 36.
10. *Id.* at 41.
11. *Id.* at 42.
12. *Id.*

cerns about the proposed mine:

> The proposed New World Mine on the rim of both Yellowstone National Park and the Absaroka-Beartooth Wilderness Area raises serious environmental concerns. In fact, I cannot think of an area more sensitive than that being proposed by the New World Mine. Yellowstone is the crown jewel of our treasured National Park system. Its value to us and to future generations is beyond measure. I am not willing to gamble with a national treasure for short term economic gain.[13]

A 1995 poll revealed that Montanans in general shared the views of Senator Baucus and opposed the mine by a two to one margin.[14] By 1995, practically every newspaper in Montana and Wyoming had editorialized against the mine. A Billings Gazette editorial reflected the view of most editorial boards when it asserted that "[w]e must keep voicing concerns until this plan for a mine in the worst possible place for a mine is stopped."[15]

In Wyoming, downstream from the proposed tailings impoundment, residents were outraged by the plan, which posed economic and environmental threats with no appreciable benefits. At the peak of the fight, fully 67% of the members of the Cody, Wyoming Chamber of Commerce said they opposed the proposed mine.[16] Local fishermen waged an on-going campaign against the mine, taking out ads in the local papers, and renting billboards throughout the area to display their messages of opposition. In 1994, Wyoming Governor Mike Sullivan wrote a letter to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) stating: "I believe that as presently constituted[,] the Crown Butte Mines, Inc.'s New World Mine near Yellowstone National Park poses an unacceptable risk to significant waters within the State of Wyoming, particularly the Clarks Fork [of the Yellowstone]."[17]

Even the otherwise conservative 1996 Wyoming legislature expressed its concern, passing one of the few overtly environmental statutes in its recent history.[18] The statute, an amendment to Wyoming's Industrial Siting Act, placed a ten dollar per ton surcharge on all mine wastes im-

---

13. Letter from Max Baucus, U.S. Senator, to Alex Balogh, CEO, Noranda Minerals (Oct. 25, 1993) (on file with author).

14. *Many Montanans Oppose Mine Plan*, LIVINGSTON ENTERPRISE, Dec. 28, 1995, at A3.

15. Gary Svee, Opinion Editor, *Gazette Opinion: The Park is More Precious Than Gold*, BILLINGS GAZETTE, March 21, 1995, at 4A.

16. Wyoming's Park County Commissioners also opposed the mine, specifically the plans to locate mine tailings in their backyard. Michael Milstein, *County Opposes Mine Plans*, BILLINGS GAZETTE, July 20, 1994, at 5C.

17. Letter from Mike Sullivan, Governor of Wyoming, to William Yellowtail, Regional Administrator, Region VIII, EPA (Dec. 30, 1994) (on file with author).

18. 1996 Wyo. Sess. Laws, ch. 60, § 1.

ported into the state for disposal.[19] The legislature made few efforts to hide the fact that their target was the New World Mine.[20] In the waning hours of the mine fight, Senator Craig Thomas (R-WY) announced his opposition to the mine, stating: "There is only so long you can withhold your opinion when in fact you have a strong conviction that this might be the worst place to site a mine."[21]

During the scoping for the National Environmental Policy Act (NEPA) process,[22] the EPA and other agencies began to raise serious concerns about the potential of the mine to pollute waters flowing into Yellowstone National Park, and about the instability of the proposed tailings impoundment.[23] The EPA was not alone in its concern about the environmental threats posed by the mine. Two independent geologists stated that it was not a question of *if* but *when* the tailings impoundment would fail.[24] That sentiment was echoed by the Engineering News Record, an industry trade publication, when it editorialized: "Henderson Mountain would be the first U.S. test of [the] submerged tailings system. . . . [D]on't experiment in a place where the price for failure is ruining a wild and scenic river or the oldest national park in the U.S."[25]

The National Park Service raised concerns about the New World Mine plan early on in the process. Stuart Coleman, Director of Resource Management for Yellowstone National Park, stated: "if you were going to throw a dart at a map of the United States and place a gold mine there, those mountains would probably be the worst place a dart could land."[26] It wasn't until late in 1994, however, when Mike Finley replaced Bob Barbee as Yellowstone National Park Superintendent, that Yellowstone found its voice. In March of 1995, Finley said: "I'm stunned this could be taking place, with such potentially devastating impacts . . . . How can the logical mind approve this?"[27] A month later, he was warning local papers

---

19. WYO. STAT. ANN. § 35-12-113(g) (1996).

20. *See Wyoming Keeps Pushing for Bigger Role*, LIVINGSTON ENTERPRISE, Feb. 27, 1996, at A4. The chair of the Senate Mining Committee is rumored to have stated that as he saw it, "Montana gets the gold and we [Wyoming] get the shaft."

21. Associated Press & Chronicle Staff, *Wyoming Senator Opposes Proposed New World Mine*, BOZEMAN DAILY CHRON., July 24, 1996, at 9.

22. NEPA's scoping requirements are found at 40 C.F.R. § 1501.7 (1996).

23. *See, e.g.*, Region VIII, EPA, Scoping Comments for the New World Mine EIS (Sept. 26, 1993) (on file with author).

24. Dennis Davis, *Geologists Say Tailings Impoundment for Proposed Mine Will Eventually Fail*, POWELL TRIB., Aug. 24, 1995, at 1, 3.

25. *What Price Lucre?*, ENGINEERING NEWS REC., Mar. 14, 1994, at 100. Concerns over potential pollution caused by the mine are all the more alarming in light of Noranda's pathetic record of environmental non-compliance in both the U.S. and Canada. *See* Satchell, *supra* note 7 at 36, 41.

26. Wilkinson, *supra* note 5, at 31.

27. Satchell, *supra* note 7, at 36. Likewise, Interior Secretary Bruce Babbitt was not shy in expressing his opinion of the proposed mine: "Placing a giant mine just across the boundary from

that "[t]his proposal poses a real threat to Yellowstone National Park. Worst of all, that threat may manifest itself when the company is not around to take care of the impacts, say twenty to thirty years from now."[28]

On June 1, 1995, President Clinton held a town meeting in Billings, Montana. During the meeting, he was asked by Sue Glidden, co-owner of the Cooke City General Store, what he would do to ensure the protection of Yellowstone. President Clinton, obviously aware of the mine proposal, said that he was monitoring the situation and that, in his opinion, "[n]o amount of gain that could come from it could possibly offset any permanent damage to Yellowstone."[29]

Two months later, as President Clinton planned a vacation in Jackson Hole, Wyoming, the New York Times and local Jackson Hole newspapers urged him to visit the site of the proposed mine. On August 25, 1995, President Clinton flew over the mine site with Mike Finley, Superintendent of Yellowstone National Park. Later, in the Lamar Valley of Yellowstone, President Clinton announced to a gathering of media and regional conservationists, that he was invoking his powers under the Federal Land Management Policy Act, and was withdrawing the New World District from future mining claims.[30] Because Crown Butte and others had already blanketed the area with claims, this Presidential action was not calculated to stop the mine, though it did send a clear signal to Crown Butte. The Associated Press said the action didn't kill the project, but it "tightened the noose."[31]

The withdrawal, as initially published in the Federal Register, was to encompass 19,100 acres of federal lands in the New World District—virtually all non-withdrawn federal lands in the area, with the exception of an area on the eastern side of the District.[32] The stated purpose of the withdrawal was to protect "the watersheds within the drainages of the Clarks Fork of the Yellowstone, Soda Butte Creek, and the Stillwater

---

Yellowstone is a bad idea, pure and simple." *Id.*

28. *Mine in Wrong Place at Wrong Time, Park Chief Says*, LIVINGSTON ENTERPRISE, April 19, 1995, at A1.

29. Todd Wilkinson, *Global Warning: Designation of Yellowstone National Park as Endangered*, NAT'L PARKS, March 1996, at 7, 12.

30. Bob Ekey, *Clinton Tours New World Mine: Historic Meeting with Conservationists*, GREATER YELLOWSTONE REPORT, Summer 1995, at 1; Jim Day, *Crowd Applauds Mining Ban Proposal*, LIVINGSTON ENTERPRISE, July 17, 1996, at A1.

31. *See Clinton "Tightens Noose" on New World*, BOZEMAN DAILY CHRON., August 27, 1995, at A6.

32. *See* Notice of Proposed Withdrawal; Montana, 60 Fed. Reg. 45732 (Dep't Interior 1995). Later, when the New World Agreement was announced, the U.S. Department of the Interior amended the withdrawal to include the area on the eastern side of the District, near Kersey Lake, and to include all private lands subsequently acquired by the federal government. *See* Amendment to Proposed Withdrawal; Montana, 61 Fed. Reg. 49480 (Dep't Interior 1996).

River, and the water quality and fresh water fishery resources within Yellowstone National Park."[33] This withdrawal was widely supported by the local residents in Cooke City. At a July 1996 hearing in the local Cooke City Fire Hall, over one hundred Cooke City residents turned out to support the President's action—no Cooke City residents spoke against the proposed withdrawal.[34]

On September 8, 1995, the World Heritage Committee visited Yellowstone National Park to review the proposed mine.[35] During its four-day visit, the Committee listened to a lengthy presentation from the mine company, toured the mine site with company officials, conservationists, and state and federal agencies, and heard a full day of expert testimony from all parties to the debate. During the visit, the National Park Service blasted the mine project and submitted written and technical testimony warning that the mine would harm water quantity and quality in Yellowstone National Park. Three months later, on December 5, 1995, the World Heritage Committee agreed with the National Park Service and designated Yellowstone as "in danger" due to the threats posed by the New World Mine and other activities.[36] Though this decision carried little legal weight, it did heighten national and international scrutiny of the mine proposal.

Conservationists were dealt another victory on October 13, 1995, in a decision by U.S. District Judge Jack Shanstrom.[37] Two years earlier, in September of 1993, nine conservation organizations, represented by the Sierra Club Legal Defense Fund, had filed suit against Crown Butte Mines, Inc., Crown Butte Resources, Ltd., Noranda Minerals Corp., and

---

33. 60 Fed. Reg. 45732.

34. Day, *supra* note 30.

35. *World Heritage Committee Determines Yellowstone in Danger*, West's Legal News, Dec. 14, 1995, *available in* WESTLAW, 1995 WL 911463. Conservation organizations invited the World Heritage Committee to visit the Park and the site of the proposed mine. *Id.* Since 1973, the United States has been a signatory to the World Heritage Convention Treaty. Under that treaty, member nations nominate culturally and environmentally significant sites within their borders as World Heritage Sites. If the World Heritage Committee votes to include the nominated site on the World Heritage list, the nominating nation pledges to protect the site as an internationally important resource. *See id.* In 1972, the United States designated Yellowstone National Park as a World Heritage Site under the World Heritage Treaty. Convention for the Protection of the World Cultural & Natural Heritage, Nov. 6, 1972, 27 U.S.T. 37. By inviting the World Heritage Committee to review Yellowstone's status as a World Heritage Site, the conservation organizations hoped to raise national and international awareness of the mine issue, and to obtain independent verification of the threats posed by the mine to Yellowstone. *See* West's Legal News, *supra; see also, generally*, Wilkinson, *supra* note 29.

36. Michael Milstein, *Group: Mine Plan Endangers Park, Burns Blasts Move by Heritage Panel*, BILLINGS GAZETTE, Dec. 6, 1995, at 1A; *see also, generally*, Wilkinson, *supra* note 29.

37. *See* Beartooth Alliance v. Crown Butte Mines, Inc. 904 F. Supp. 1168 (D. Mont. 1995). The decision was upheld by the Ninth Circuit on March 5, 1996 in an unpublished opinion. Kathleen N. Hellevik, *9th Circuit Upholds Ruling Against Crown Butte, Mine Company Must Clean Waste*, March 12, 1996, West's Legal News, *available in* WESTLAW, 1996 WL 443227.

Noranda, Inc. The suit alleged that these companies were violating the Clean Water Act because they owned or operated the New World District, yet did not have discharge permits for the ongoing water pollution at the site.[38] The ruling was in response to a motion for summary judgement, and it was an across-the-board victory for the conservationists. First, Judge Shanstrom found three "point sources" at the New World site (two historic pits and the Glengarry adit) which were discharging pollution into "waters of the United States."[39] Second, Judge Shanstrom held that the Crown Butte companies and, significantly, Noranda Minerals, were in violation of the law, because they owned or operated these three point sources but did not have the required discharge permits that would have regulated cleanup of the ongoing pollution.[40] Finally, Judge Shanstrom refused to grant Noranda, Inc.'s motion for summary judgment as to its liability, finding instead that there were material factual issues as to whether Noranda, Inc. should remain a party to the suit.[41]

This sweeping ruling was significant for a number of reasons. First, by finding Crown Butte liable for the existing pollution, regardless of the status of the proposed mine, the ruling devastated Crown Butte's argument that they were not liable for past pollution.[42] Second, by holding Noranda Minerals liable, and by refusing to dismiss Noranda, Inc., Judge Shanstrom shook Noranda's confidence that its corporate structure would shield it in the event of problems at the New World site. Finally, the ruling exposed the companies to massive liability both in the form of direct expenses for cleanup, and in the form of civil penalties which, under the Clean Water Act, could amount to over $100 million.[43]

In the wake of the President's action and the lawsuit decision, Greater Yellowstone Coalition Executive Director Mike Clark and other GYC board members traveled to Toronto in December, 1995, to ask whether the company would be willing to enter into discussions about withdrawing from the project with some compensation. The GYC delegation offered to join the company in approaching the federal government to seek to negotiate an out-of-court solution.

The prospect of the conservation community and mining industry voluntarily working together to find a solution to the New World project

---

38. *Beartooth Alliance*, 904 F. Supp. at 1171.

39. *Id.* at 1174. Someone wishing to legally discharge pollutants into "waters of the United States" must first obtain a permit from the United States. *Id.* at 1173 (citing 33 U.S.C. §§ 1311(a) & 1342(a) (1994) of the Clean Water Act).

40. *Id.* at 1174, 1176.

41. *See id.* at 1174-76.

42. *Id.* at 1175-76.

43. *See* Hellevik, *supra* note 37. *See also* 33 U.S.C. § 1319(d) (civil penalty provision); § 1319(c)(3)(A) (criminal penalty provision); § 1319(g) (administrative costs provision).

appealed to the President's Council for Environmental Quality (CEQ).[44] CEQ felt that a new approach with both sides working together toward a solution was worth pursuing.

The concept proposed by the conservation groups and the mining company was that the company would relinquish its assets in the New World Mining District in exchange for other federal properties. Nine conservation groups represented by GYC and the Sierra Club Legal Defense Fund were part of the talks, because settlement of the Clean Water Act lawsuit would be included as part of the agreement.

During the winter of 1995 and spring of 1996, the tenor and progress of the talks resembled a roller coaster ride. Negotiations progressed slowly with major issues being how liability for existing pollution at the site would be handled and how to value the property. Finally, the groups began making serious progress in July. Some all-night negotiating sessions in early August produced the final agreement.

The final agreement established a maximum price for compensating the mining company, established a fund for clean-up of the mine site, and established the conditions under which conservation groups would settle their Clean Water Act lawsuit against the companies.

III. SUMMARY OF THE AGREEMENT

The New World Agreement (Agreement) provides that the federal government will exchange $65 million worth of federal property or other assets for the New World District properties.[45] Because Crown Butte does not own all of the lands containing identified ore bodies, Crown Butte is responsible for acquiring additional mineral interests in the area from other land owners prior to the completion of the asset exchange.[46] Pending completion of the exchange, Crown Butte agrees to suspend all permitting activities for the proposed mine and, contingent upon successful completion of the exchange, Crown Butte covenants never to pursue mining in the New World District in the future.[47]

Under the terms of the Agreement, the $65 million figure serves as a cap on the value of the federal assets to be exchanged. Prior to completion of the exchange, the Agreement requires that an independent appraisal be

---

44. CEQ acts in an advisory capacity to the President and also coordinates interagency environmental policymaking. *Role of Council on Environmental Quality: Testimony Before the Subcomm. on Oversight and Investigations of the Senate Energy and Natural Resources Comm.*, 104th Cong., 1st Sess. (1995) (statement of Kathleen McGinty, Chair, CEQ).

45. Brian Kuehl, *Deal Protects Yellowstone, Cleans Up Site and Ensures Public Participation*, GREATER YELLOWSTONE REPORT, Summer 1996, at 6.

46. *Id.*

47. *Id.*

conducted to confirm the fair market value of the District properties. If the appraisal reveals that the properties are worth less than the anticipated $65 million, then the parties could renegotiate the relevant price terms to keep the agreement on track.[48]

In addition to the exchange provisions, the Agreement requires that, at the time of transfer of the properties, Crown Butte place $22.5 million into an escrow account to be used for cleanup of existing pollution at the New World site. In exchange for the funding of the escrow account, and contingent upon the successful exchange of properties, GYC and the other conservation organizations agreed to settle the remaining issues in their Clean Water Act suit, and agreed not to sue Crown Butte or the federal government for pollution problems at the New World site.[49]

IV. WHY THE AGREEMENT WAS NECESSARY

Federal lands are ostensibly managed for multiple uses. Through the Multiple-Use Sustained-Yield Act,[50] the National Forest Management Act,[51] and the Federal Land Policy and Management Act,[52] Congress has clearly expressed its intent that federal land managers should balance the various uses of federal lands.[53] Under this statutory structure, a federal land manager may prohibit one use on a parcel of federal land if necessary to protect other uses.[54] For example, a land manager can prohibit a timber sale, deny a grazing permit, close an area to recreational uses, or deny a request to lease oil, gas, coal, or any other leasable mineral, in favor of a competing use. However, there is only one use that federal land managers cannot effectively prevent—hardrock mining. Although federal lands are to be managed for multiple uses, hardrock mining is often viewed as the highest and best use of all federal lands.[55] Even if hardrock mining will displace other uses of the federal lands—grazing, logging, recreation,

---

48. *Id.*

49. *Id.* The Agreement was actually signed by only eight of the nine Plaintiffs in the Clean Water Act lawsuit. The ninth organization, Northern Plains Resource Council, has remained involved in the continuing Agreement negotiations, and it is anticipated that it will ultimately settle the Clean Water Act suit.

50. 16 U.S.C. §§ 528-531 (1994).

51. 16 U.S.C. §§ 1600-1614 (1994).

52. 43 U.S.C. §§ 1701-1784 (1994).

53. *See* James F. Morrison, *The National Forest Management Act and Below Cost Timber Sales: Determining the Economic Suitability of Land for Timber Production*, 17 ENVTL. L. 557, 563 (1987) (describing multiple-use provisions of the National Forest Management Act and the Multiple-Use Sustained-Yield Act); Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 795 (1996) (describing the Federal Land Policy and Management Acts's multiple-use, sustained yield criteria).

54. *Id.*

55. *See* George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 NAT. RESOURCES & ENV'T, Summer 1995, at 3, 5-6.

etc.—a federal land manager is required to permit the mining if the miner has perfected his rights under the 1872 Mining Law.[56]

In the case of the proposed New World Mine, the Forest Service made its views quite clear in the preliminary draft of the Environmental Impact Statement, when it stated that it interpreted the 1872 Mining Law to require that it issue a permit if the mine were to comply with all other federal laws: "If the plan is in compliance with these requirements, the Forest Service would have no statutory or regulatory authority to deny the plan."[57]

However, compliance with other statutes does not guarantee that the mine will not harm the environment, as the director of the National Park Service pointed out during the debate over the New World Mine. In 1993, Park Service Director Roger Kennedy said: "[I]t is quite possible that Noranda could comply with all Federal and state legal requirements with regard to siting, operating, and reclamation of the mine but still have long-term and undesirable effects on the Yellowstone ecosystem."[58]

In the New World Mine controversy, the EPA and the National Park Service raised questions about water quality, wetlands destruction and tailings impoundment design problems in relation to the proposed New World Mine. Although the Clinton Administration has been vigilant throughout this debate, would future administrations under changed political regimes be as vigilant? Even if a mine proposal were denied, the company could reconfigure the proposal and resubmit it—to agencies like the Forest Service who interpret the law to say it has no right to say no.[59]

There have been creative challenges to the 1872 Mining Law's "right to mine," specifically challenging the transfer of federal property to private hands, a process called patenting.[60] But the law now stands. It clearly

---

56. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 48 (1992).

57. GALLATIN NAT'L FOREST AND SHOSHONE NAT'L FOREST, U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, AND MONTANA DEP'T OF STATE LANDS, PRELIMINARY DRAFT ENVIRONMENTAL IMPACT STATEMENT, CROWN BUTTE MINES, INC., NEW WORLD PROJECT, 20 (1995).

58. Letter from Roger Kennedy, Director, National Park Service, Max Baucus, U.S. Senator (Dec. 16, 1993) (on file with author).

59. *See* WILKINSON, *supra* note 56, at 66-67.

60. *See* WILKINSON, *supra* note 56, at 48 (explaining patenting process).

Two administrative decisions provide examples of such challenges. In 1994, an Administrative Law Judge (ALJ) with the U.S. Dept. of Interior Office of Hearings and Appeals revived a long-unused test for the validity of mining claims known as the "comparative values test." In *United States v. United Mining Corp.*, the Bureau of Land Management challenged the validity of a number of mining claims filed under the Building Stone Act, 30 U.S.C. § 161 (1986). No.IDI-29807 (Dept. of Interior, Nov. 1, 1994) (on file with author). The ALJ invalidated the claims, holding that the Building Stone Act requires that the claimed lands be "chiefly valuable for building stone" and finding that, in this instance, the claimed land was "more valuable for geological and aesthetic purposes" than for building stone. *Id.* at 12. The ALJ found that, even if the claims in question were not invalid under the Build-

needs to be reformed.

One of the challenges to reforming the 1872 Mining Law is addressing the massive amounts of land that have already been claimed by miners. According to Charles F. Wilkinson, "there are 1.1 million alleged unpatented mining claims, 25 million acres in all, scattered across the West, and the Bureau of Land Management receives 90,000 new claims each year."[61] The requirements for maintaining a claim are ridiculously low.[62] The requirements should be much more rigorous so that those who do not develop their claims would likely relinquish them. Thus the land would revert back to public ownership and control.[63]

The 1872 Mining Law must also be reformed to require payment of royalties based on the gross value of minerals extracted. The fact that no royalties are paid for minerals extracted from what was once public land, and the low cost of patenting a claim—either $2.50 or $5.00 an acre[64]—clearly should be addressed when the law is reformed.

But the major issue that the New World Mine highlights is that there are some places about which federal agencies should be able to say "No, this is an inappropriate place to develop a mine." The authority to make such suitability determinations would put mining on par with all other uses on federal lands.[65] Agencies like the Forest Service should be made to ask whether, in a proposed location, a mine would be appropriate, or would be out of balance with water quality, recreation, wildlife and other values of the area.[66]

---

ing Stone Act, they would still be invalid because "[a] mining claim is invalid under the Act of 1872 if the claimed land is more valuable for purposes other than mining." *Id.* at 11, 13.

In 1995, American Rivers, Inc., Trout Unlimited, and a local outfitter challenged the validity of four lode claims that Crown Butte was attempting to patent. *See* Answer, American Rivers, Inc. v. Crown Butte Mines, Inc., No. MTM-83728 (Dept. of Interior, Feb. 1995) (on file with author). These claims, covering 27 acres on the top of Henderson Mountain, contained an estimated 10% of Crown Butte's targeted ore body. Because most of Crown Butte's mining claims were already patented, however, this challenge could not, by itself, stop the New World Mine. The Department of Interior has not yet ruled on this patent challenge.

61. WILKINSON, *supra* note 56, at 47.

62. Besides the filing of annual reports, the cost to the miner is a mere $100 per year. WILKINSON, *supra* note 56, at 47.

63. WILKINSON, *supra* note 56, at 57.

64. WILKINSON, *supra* note 56, at 48.

65. *Cf.* WILKINSON, *supra* note 56, at 66 (quoting former Forest Service Chief John R. McGuire, who felt powerless to stop mining on the national forests despite environmental harms).

66. See WILKINSON, *supra* note 56, at 67-74 for a discussion of other proposed reforms for the 1872 Mining Law. *See also* Joel A. Ferre, *Forest Service Regulations Governing Mining: Ecosystem Preservation Versus Economically Feasible Mining in the National Forests*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 351, 374 n. 145 (describing Interior Secretary Bruce Babbitt's proposed changes).

V. CONCLUSION

In the New World case, the mining company, conservationists and government sought a new way out of a classic environmental battle. Clearly the overwhelming public opposition to the mine and the success of the Clean Water Act lawsuit provided the company with incentive to negotiate. The prospect of stopping this proposed environmental threat forever provided incentive to both conservationists and the National Park Service.

Some critics of the settlement say that the U.S. government should not be blackmailed into stopping environmental degradation next to a National Park and that the Agreement sets a bad precedent—that it will prompt other companies or individuals to stake mining claims next to sensitive areas, and then demand payment.

However, it has long been the practice of the U.S. government to compensate property owners in order to remove an environmental threat. For example, the U.S. purchased a mining claim for a potential black marble stone quarry in the Maroon Bells-Snowmass Wilderness Area in southwestern Colorado.[67] On another occasion, the U.S. exchanged land with an individual who had an inholding in the West Elks Wilderness Area in Colorado, where he was using helicopters to ferry log home kits into the inholding. He received commercial property in exchange for his property in the wilderness area.[68] While such solutions are not new and they are by no means ideal, they point to a need for fundamental changes to our public land and resources laws.

Although President Clinton said the New World Mine Agreement was a model for a new way of approaching "America's challenges,"[69] asset exchanges clearly should not be a template for how to stop mines that threaten the environment. One effective and lasting way to combat the pollution and other environmental problems caused by mining is to reform the 1872 Mining Law.

Immediately following the announcement of the New World Agreement, newspapers across the country published editorials in favor of the Agreement, and called upon Congress to reform the 1872 Mining Law. The New York Times wrote:

> The narrow escape at Yellowstone underscores the urgency of reforming the antiquated 1872 Mining Act, which was signed into law by Ulysses S. Grant to encourage Western development. The law gives companies

---

67. *See* Dan Sullivan, *Retiree Finds Niche Protecting Lands: Trust Turns Parcels Over to Wilderness Areas*, DENVER POST, Jan. 2, 1997, at A1.

68. *See '93 Land Swap Pays Off in Millions for Developer: 107 Acres Sells for $4.2 Million, Six Times the Appraised Value*, ROCKY MOUNTAIN NEWS, Oct. 24, 1995, at 10A.

69. *See* Ekey, *supra* note 1, at 4.

> what amounts to an automatic right to extract gold, copper, and other minerals that they discover on Federal lands and to take title to that land for a few dollars an acre. The law does not provide for stringent suitability reviews to determine whether the site is environmentally dangerous or whether it could be used for some better purpose. . . . The perfect ending to the saga of the Yellowstone mine would be to get this law reformed.[70]

Coal miners kept canaries in the mines. If the canary died, it meant noxious gases threatened the miners, too. Let the New World Mine controversy and Agreement be our canary, telling us that there is something noxious about the 1872 Mining Law.

70. *Victory at Yellowstone*, NEW YORK TIMES, Aug. 13, 1996, at A1.

ARBITRARY ADMINISTRATORS, CAPRICIOUS BUREAUCRATS AND PRUDENT TRUSTEES: DOES IT MATTER IN THE REVIEW OF TIMBER SALVAGE SALES?

Jon A. Souder*
Sally K. Fairfax**

---

* Assistant Professor of Forest Policy and Economics, School of Forestry, College of Ecosystem Science and Management, Northern Arizona University, Flagstaff. Ph.D., M.S., University of California, Berkeley; B.S., Marlboro College, Vermont.

** Professor of Natural Resources Policy, Administration and Law, College of Environmental Design and College of Natural Resources, University of California, Berkeley. Ph.D., M.S., Duke University; M.A., New York University; B.S., Hood College, Maryland.

An early version of this paper was presented at the conference entitled "Managing America's Public Lands: Proposals for the Future" sponsored by the Public Land & Resources Law Review, University of Montana School of Law, October 24-25, 1996. In preparing this article we have benefited from a draft paper prepared by Scott Berman and Shona Armstrong entitled "Salvage Timber in the United States National Forests" (May, 1996) (on file with authors).

I. INTRODUCTION

The arrival of the 104th Congress' new Republican majority intensified long-standing public debate over appropriate ownership and management of federal public lands. The underlying issues are, as ever, what role local, state and federal governments should play in public lands resource allocation, management and, more basically, which groups and interests will dominate decision making. The familiar posturing of Sagebrush Rebels, Wise Users, state and local rights advocates, commodity interests great and small, and both grass roots and national environmental groups have been recast ever so slightly under the rubric of "forest health."[1] In addition, the emergence of community consensus groups such as the Quincy Library and Applegate Watershed Groups[2] have put unusual emphasis on understanding state and local alternatives to federal land management systems.[3] An increasingly important part of any position for or against the status quo is to evaluate institutional options.

In this article, we continue our efforts to explore the state trust land model as a major land management system in the western United States. While not all state lands fall under the trust mandate, about 135 million acres do.[4] Their treatment provides significant insight into management of all public resources.[5] We will compare a crucial subset of the larger decision-making apparatus operative on federal and state trust lands: the crite-

---

1. Most succinctly, forest ecosystem health can be defined as "the vigor or vitality of interacting biotic and abiotic elements of a system characterized by extensive tree cover that function together to sustain life and are isolated mentally for human purposes." Jay O'Laughlin et al., *Defining and Measuring Forest Health*, 2 J. SUSTAINABLE FORESTRY 65, 67 (1994); *see also* David Rapport, *What Constitutes Ecosystem Health?* 33 PERSPECTIVES IN BIOLOGY & MEDICINE 120 (1989); David Rapport et al., *Ecosystem Health: An Emerging Integrative Science, in* EVALUATING AND MONITORING THE HEALTH OF ECOSYSTEMS (1995). For an interesting narrative on forest health, see Langston, FOREST DREAMS, FOREST NIGHTMARES: THE PARADOX OF OLD GROWTH IN THE INLAND WEST (1995). A major aspect of the forest health issue is the growing realization that 100 years of fire suppression has led to an enormous build-up of fuel, and hence a growing risk of fire, throughout the western United States. This has led some environmentalists to fear that the timber industry will use fire risk as a wedge to open areas to harvest—either as a prophylactic measure or as salvage—where it would otherwise be inappropriate or illegal.

2. See generally Jack Shipley, Watershed Based Efforts: The Applegate Partnership of Southwest Oregon, a paper presented at a conference entitled "Challenging Federal Ownership and Management: Public Lands and Public Benefits," Natural Resources Law Center, University of Colorado School of Law, Boulder (Oct. 11-13, 1995) and Michael Jackson, Sharing Public Land Decision Making: Public-Private Partnerships II, a paper presented at the same conference.

3. Sally K. Fairfax, *Thinking the Unthinkable: States as Public Land Managers*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 249, 251 (1996).

4. For a discussion of the trust mandate, see Jon A. Souder & Sally K. Fairfax, THE STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE (1996), especially Chapter One [hereinafter STATE TRUST LANDS]. *See also* Jon A. Souder et al., *Sustainable Resources Management and State School Lands: The Quest for Guiding Principles*, 34 NAT. RESOURCES J. 271 (1994).

5. *See generally* STATE TRUST LANDS, *supra* note 4.

ria courts employ in reviewing land management decisions. Specifically, we will juxtapose review of federal multiple-use land manager's decisions under provisions of the Administrative Procedures Act (APA)[6] with equivalent criteria used to assess beneficiary challenges of trustee decisions on state trust lands. We will make these comparisons in the context of timber salvage sales on national forest land in Idaho and state trust land in Washington.

Two recent timber salvage cases provide an excellent point of departure for our inquiry into state and federal review criteria.[7] The salvage issue is an increasingly important focus of debate in forest policy in general. Recent challenges to federal salvage sales provide an exceptional opportunity to observe relatively unalloyed APA standards in action. This is because a major element of recent federal salvage sale policy has been the suspension of numerous substantive legal requirements and criteria.[8]

Modern administrative law delegates significant authority to administrative agencies and affords great deference to agency interpretation and exercise of that authority.[9] Judicial review focuses on three general questions: 1) is the action authorized by statute; 2) were proper procedures followed; and 3) is the action reasonable, as opposed to "arbitrary and capricious?"[10] Judicial interpretation of the third criterion has varied considerably over time. During the 1960s and increasingly after the passage of the National Environmental Policy Act (NEPA),[11] courts were inclined to take a "hard look" at agency actions, requiring administrators to: 1) consult widely with relevant public interest groups to assure that all relevant views were considered; and 2) assemble a comprehensive record of substantial evidence to demonstrate the reasonableness of their decisions.[12] At other times, courts have confined their review to what one

---

6. 5 U.S.C. §§ 551–559, 701–706 (1994).

7. The federal case is *Idaho Conservation League v. Thomas*, 917 F. Supp. 1458 (D. Idaho 1995), *aff'd*, 91 F.3d 1345 (9th Cir. 1996). The state case is *Okanogan County v. Belcher*, No. 95-2-00867-9 (Chelan County Sup. Ct. May 30, 1996).

8. *See infra*, notes 126-129 and accompanying text.

9. *See* Chevron, U.S.A. v. Natural Resources Defense Coun., 467 U.S. 837, 842-44 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

10. *See, e.g., id.* at 844 (citing United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424-26 (1977); AT&T v. United States, 299 U.S. 232, 235-37 (1936)).

11. 42 U.S.C. §§ 4321-4370d (1994). For a discussion of the relationship between NEPA and the APA, see Sally K. Fairfax, *A Disaster in the Environmental Movement*, 199 SCI. 743 (Feb. 17, 1978).

12. A standard reference point for the emergence of the hard look doctrine is *Scenic Hudson Preservation Conference v. Fed. Power Comm'n*, 354 F. 2d 608 (2nd Cir. 1965). For a discussion of the importance of public participation in agency decision making, see generally, Richard B. Stewart,

author has characterized as "idiot" or "lunacy" standards.[13]

In either of these judicial modes, agency decisions have generally enjoyed great latitude from the courts. This deference is based on two general assumptions: first, that the agency has sufficient expertise to make reasonable interpretations of and decisions under its mandate, while the court lacks appropriate expertise to conduct a de novo review; and second, that the separation of powers doctrine keeps the court at bay, requiring that it confine its review to interpretations of the law.[14] What tends to occur in recent practice is that the administrative agency concentrates on preparing a defensible record to justify its discretionary acts—which has the effect of forcing the agency to evince a level of certainty in its actions that may be unfounded.[15]

Trust land managers are reviewed under two sets of judicial criteria. This is because the trust land managers act as administrators, primarily when they deal with lessees of trust resources. In this capacity they are essentially no different from their federal counterparts. But they also act as trustees. As this article will demonstrate, the two review standards are quite different. Our analysis of trust land cases has revealed an important pattern in judicial review of trustee discretion: when the trustee is challenged by a lessee, the trustee is treated as an administrator and all the standards of review outlined above, as translated into the administrative procedure act of each state, are operative. However, when the trustee is challenged by the beneficiary, the criteria are different; the courts apply trust law and the standard of the "prudent trustee" to evaluate the trustee's action.[16] It is this latter set of cases that are of interest here.

Centuries of law defining appropriate trustee action turns on the requirement that a trustee act prudently, with undivided loyalty to the designated beneficiary of the trust. The trustee's first duty is to act prudently,

---

The Reformation of American Administrative Law, 88 HARV. L. REV. 1667 (June 1975).

13. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS (1988). Shapiro characterizes the standards of review as, "when a court in effect says, 'if you are going to try something as idiotic as this, you'll have to make a much better rule-making record'" and "a reviewing court was to intervene only if the agency had committed lunacy." *See id.* at 179 n.14 & 110.

14. On the general model and recent variants, see generally, Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359 (1947); Marla E. Mansfield, *The "New" Old Law of Judicial Access: Toward a Mirror-Image Nondelegation Theory*, 45 ADMIN. L. REV. 65, 89-94 (1993); Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97 (1987); Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Lands Cases*, 68 MICH. L. REV. 867 (1970); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992); Ann Woolhandler, *Judicial Deference to Administrative Action*, 43 ADMIN. L. REV. 197 (1991).

15. *See* SHAPIRO, *supra* note 13, at 151.

16. *See* STATE TRUST LANDS, *supra* note 4, at 30-36, 276-78.

that is, to "display the skill and prudence which an ordinarily capable and careful man would use in the conduct of his own business . . . ."[17] This concept is usually embellished with terms such as "carefulness, precaution, attentiveness, and good judgment, as applied to action or conduct."[18] Recent definitions of prudence have focused on the trustee's responsibility to weigh the relative risks of various courses of action, which can then be explicitly incorporated into the trustee's decisions.[19] If the trustee claims that she is possessed of "unusual capacities," she will be "required to display" them, and if a trustee "actually has greater than normal abilities, [s]he will be expected to use them in the performance of the trust."[20] The duty of loyalty, or undivided loyalty as it is frequently stated, requires the trustee to administer the trust "solely in the interests of the beneficiaries, and to exclude from consideration his own advantages and the welfare of third persons. . . . In enforcing the duty of loyalty, the court is primarily interested in . . . deterring trustees from getting into positions of conflict of interests, and only secondarily in preventing loss to particular beneficiaries or unjust enrichment of the trustee."[21]

There are a number of important differences between judicial review using APA standards and judicial review of a trustees' prudence. The first and most obvious differences have to do with issues of access to judicial review. Aggrieved beneficiaries do not have to demonstrate that their complaints are timely, that they have exhausted their administrative remedies, or make the preliminary showings that frequently bar those who would challenge federal administrative decisions. In general, for several reasons, the courts are more receptive to beneficiary challenges of trustee prudence than they are to average citizens' complaints about administrators. We will discuss two of those reasons. First, the issue of what law to apply does not arise in trust land disputes as frequently as it does in disputes concerning federal public lands. Courts do not find themselves unable to review actions that have been "committed by law"[22] to trustee discretion. Similarly, standing is far less important in challenging a trustee than challenging an administrator. Except in a few jurisdictions such as Idaho[23] and Minnesota,[24] a taxpayer in the state may obtain standing to

17. GEORGE T. BOGERT, TRUSTS § 93, at 334 (6th ed. 1987).

18. BLACK'S LAW DICTIONARY 1226 (6th ed. 1990).

19. *See* RESTATEMENT (THIRD) OF TRUSTS § 227 (1992) (Prudent Investor Rule).

20. BOGERT, *supra* note 17, at 334.

21. *Id.* at 341.

22. This language comes from *Heckler v. Chaney*, 470 U.S. at 830 (citing the APA, 5 U.S.C. § 701(a)(2). *See infra* notes 53-55 and accompanying text.

23. *See, e.g.*, Idaho Watershed Project, Inc. v. State Bd. of Land Comm'rs, No. CV 94-1171, (5th Jud. Dist. 1994), *discussed in* Sally K. Fairfax, Grazing Leasing on State Trust Lands: Four Current Conflicts, a paper prepared for the Political Economy Research Center's Forum on Environmentalism in the West, Lone Mountain Ranch, Big Sky, Montana (June 13-16, 1996) (on file with authors).

24. *See* Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*,

challenge the trustee on fiduciary issues. In prior decades the access issue has arguably been a distinction without a difference—it has not mattered much because federal courts were quite open to plaintiffs wanting to bring diverse challenges. However, if the federal courts continue to raise the bar on standing to citizen suits,[25] these apparently minor matters may take on added significance.

The second major distinction has already been suggested. The APA standard of "arbitrary and capricious" requires the administrator to amass a record to support her decision; typically in the national forest context, that involves defending the choice of one option against others which the Forest Service has proposed and analyzed. This frequently leads to decision makers averring a certainty which they do not truly experience and which is not justifiable on the record. This APA standard differs importantly from the trustee's obligation to exercise prudence—that is, to weigh the risks and benefits of a proposed action and to exercise judgment. The former requires an accumulation of data and creation of a record of decision that appears to invite challenge—this fact or that was overlooked, improperly weighed, or misinterpreted. The latter allows for ambiguities and imperfections but also permits decision makers to explicitly make hard choices.

The third and major distinction between the standards of judicial review is a difference in the courts' response to an assertion of expertise. Roughly stated, administrative expertise invites and requires judicial deference and a recognition by the court of its own limited expertise. This deference is, as noted above, in part a reflection of the separation of powers, and is, as many commentators have noted, likely to intensify under the leadership of the Scalia Court.[26] In contrast, when a trustee asserts a high level of expertise, reviewing courts do not defer, but respond instead by requiring a higher level of performance.[27] The importance of this distinction lies in the location of the burden of proof. In administrative law,

---

22 ENVTL. L. 797, 850 n.194 (1992) (discussing Segner v. State Inv. Bd., No. 587-489319 (Ramsey County Dist. Ct., Minn., Aug 11, 1988)).

25. For an interesting discussion of standing issues see Gene R. Nichol Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); *see also* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), *discussed in* Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 Envtl. L. Rep. 10557 (December 1990) *and* John Treangen, *Standing: Closing the Doors of Judicial Review—Lujan v. National Wildlife Federation*, 36 S.D. L. REV. 136 (1991).

26. Scalia is clearly on the record. He wrote both *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see also* Scalia, *supra* note 25.

27. *See* RESTATEMENT (THIRD) OF TRUSTS § 227 (Prudent Investor Rule).

there is a presumption that the agency has made a decision based on its experience and the challenger must demonstrate otherwise. In trust law, the trustee is required to demonstrate that she is acting prudently.

Our task in this article is to demonstrate that these distinctions are meaningful in the judicial review of trustee and administrator decisions. We shall do so in the context of the salvage sales issue: both federal and state trust land managers are confronting issues surrounding the salvage of dead and dying timber. The issue is an ancient one, given renewed urgency and public visibility by the recent spate of sensational wildfires, and the resulting public concern about wildfires and accumulation of fire-damaged timber.

The concerns expressed by both state and federal agencies are similar: what is the extent of the damage; what is the value of the damaged trees, and how does this value deteriorate over time; what costs are involved in harvesting, and are they offset by the benefits; what other resource values are affected by potential actions (or inaction); and what is the relationship between current action and future forest condition? At the federal level, the issue has become the focus of major public debate as a result of legislation passed in 1995, in which Congress sought to compel the Forest Service to increase the pace of salvage logging operations.[28] We will compare litigation under that statute to a controversy surrounding salvage harvests on a trust-land forest in the State of Washington. Washington's Loomis Forest litigation, which we have selected as the focus of this analysis, is an uncommonly complex context in which the trustee has been required to demonstrate undivided loyalty. The case is particularly useful in demonstrating the differences between APA and trustee standards of review.

During the summer of 1994, almost 1.5 million acres of National Forest System land were burned by over 14,000 wildfires; 28 firefighters lost their lives suppressing the fires. Congress, concerned that the federal management agencies were insufficiently energetic in harvesting fire-killed trees, passed the "Salvage Rider" to the 1995 Rescissions Act.[27] This Act gave the managing agencies significant discretion in how they complied with environmental laws, particularly the Endangered Species Act (ESA)[28] and NEPA,[29] as well as their own organic legislation (most

28. *See* Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001, 109 Stat. 240 (1995) (found at "Statutory Note" to 16 U.S.C.A. § 1611 (1996)) [hereinafter Rescissions Act or Salvage Rider]. The Rescissions Act is discussed in detail *infra* at notes 120-132 and accompanying text.

27. *See* Rescissions Act, § 2001(b)(1).

28. 16 U.S.C. §§ 1531-1544 (1994).

29. 42 U.S.C. §§ 4321-4370d (1994).

prominently the National Forest Management Act[30] for the Forest Service, and the Federal Lands Policy and Management Act[31] for the BLM). The Act also required the agencies to maximize efforts to harvest salvageable timber for the two years of the program created by the Recessions Act.[32] We will examine the results of this legislation on Forest Service decision making, using salvage timber sales litigated under the Rescissions Act.

Over the two-year period covered by the Rescissions Act, 11,435 salvage timber sales were held by the Forest Service, with a total volume of 4.6 billion board feet.[33] These sales resulted in sixteen legal challenges.[34] We will examine one such challenge, *Idaho Conservation League v. Thomas*,[35] as an example of the outer bounds of actions that are considered valid under federal administrative law. Although this case is the most extreme, the contours of the arguments over administrative procedure are also found in other Rescissions Act cases.[36]

We will use a contrasting case concerning state trust lands to illustrate how the two review criteria differ. The Loomis State Forest in Washington suffered an infestation of mountain bark beetle in 1987, which intensified and became serious in 1992.[37] The Washington Department of Natural Resources (DNR), the managing agency for the trustee, established a two-track strategy of limited salvage while awaiting preparation of a landscape-level plan for the forest.[38] Believing that significant economic

---

30. 16 U.S.C. §§ 1600-1614 (1994).

31. 43 U.S.C. §§ 1701-1784 (1994).

32. Rescissions Act, § 2001(b)(1) ("During the emergency period, the Secretary concerned is to achieve, to the maximum extent feasible, a salvage timber sale volume level above the programmed level to reduce the backlogged volume of salvage timber.").

33. U.S. GENERAL ACCOUNTING OFFICE, EMERGENCY SALVAGE SALE PROGRAM–FOREST SERVICE MET ITS TARGET, BUT MORE TIMBER COULD HAVE BEEN OFFERED FOR SALE 4, 11 (Feb. 24, 1997).

34. *Id.* at 10.

35. 917 F. Supp. 1458 (D. Idaho 1995), *aff'd*, 91 F.3d 1345 (9th Cir. 1996).

36. For example, in *Kentucky Heartwood, Inc. v. United States Forest Service*, 906 F. Supp. 410, 412 (E.D. Ky. 1995), and *Inland Empire Public Lands Council v. Glickman*, 911 F. Supp. 431, 434 (D. Mont. 1995), the trial courts based their decisions on the arbitrary and capricious standard under the APA. However, the Ninth Circuit, in *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 701 (9th Cir. 1996), and *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996), framed the issue as whether there is, in fact, any other "law to apply" in reaching a decision under the Rescissions Act. Because the Ninth Circuit based its decision in *Idaho Conservation League* on that issue, *see* 91 F.3d 1345, 1349 (9th Cir. 1996), the case provides a suitable example.

37. Okanogan County v. Belcher, No. 95-2-00867-9, at 5 (Chelan County Sup. Ct. May 30, 1996).

38. The general evolution of forest planning is discussed in Jon A. Souder et al., *Is State Trust Land Timber Management Better Than Federal Timber Management?:The Best Case Analysis*, (unpublished manuscript on file with the authors). The specific detail of Loomis Forest planning is discussed in State Respondents' Brief in Opposition to Request for Mandamus Writ/Equitable or Injunctive Re-

values were at risk, some trust beneficiaries (one county and thirteen individual school districts) sued. In this suit, *Okanogan County v. Belcher*, plaintiffs alleged that the state imprudently held back economic benefits out of consideration for other resources that were not of direct benefit to them. In so doing, they alleged, the DNR risked catastrophic fire on the Loomis.[39] The DNR responded that: 1) they were considering not only present benefits, but also how management actions would affect future beneficiaries; and 2) they were required to comply with federal laws and state laws of general applicability, such as the Washington State Environmental Policy Act.[40]

A comparison of these two cases demonstrates that the distinction between "arbitrary and capricious" and "prudent" has real effects, both in agency decision-making processes and in judicial review. Our discussion will progress in three sections. In Section II, we will contrast the APA notion of "arbitrary and capricious" with trust principles summarized in the notion of "prudence." We will focus less on continuing Supreme Court reinterpretations of administrative law[41] than on how district courts have dealt with these issues. Our discussion of prudence will follow recent developments in the Prudent Investor Rule in standard trust law.[42] In Section III, we will discuss agency decisions in salvage timber sales, prior to and after Congress passed, in 1995, of the Salvage Timber Rider.

In Section IV, we will apply these concepts to evaluate two different management contexts. We will use two case studies to illustrate the differences in the review standards applied to federal land managers and those applied to state trust land trustees. In Section V, we will conclude by pointing to two consequences for land management which seem closely related to proceeding under one or another of these two types of review criteria. The primary ramification is that trust law appears to provide a clearer, more stable foundation for the exercise and review of managers' discretion. We will also argue that trust law provides greater assurance of sustainable resource production because of its explicit consideration of future beneficiaries.

---

lief at 5-14, Okanogan County v. Belcher (No. 95-2-00867-9).

39. *See* Memorandum in Support of Petitioners' Request for Mandatory and Injunctive Relief at 4-6, *Okanogan County*.

40. *See* State Respondents' Brief in Opposition to Request for Mandamus Writ/Equitable or Injunctive Relief at 17, 22-26, *Okanogan County*. Washington's Environmental Policy Act is codified at WASH. REV. CODE §§ 43.21C.010 - 43.21C.910 (1996).

41. The issue of standing has occasioned an enormous flowering of the literature. *See supra* notes 14 & 25; *see also* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L J. 1487 (1983).

42. The primary background for this discussion will be the evolution from the RESTATEMENT (SECOND) OF TRUSTS § 230 (1959) to the RESTATEMENT (THIRD) OF TRUSTS §§ 227-229 (1992) (Prudent Investor Rule).

II. REVIEW CRITERIA IN ADMINISTRATIVE LAW AND TRUST LAW

In the political science and public administration professions, a venerable body of literature compares the virtues of a rule-based, as opposed to an education- and discretion-based, system of bureaucratic control.[43] This distinction is visible in a gross comparison of federal and state trust land management: state trust land managers have a simple, clear goal and enormous discretion in how to reach that goal, while federal land managers are hemmed in by volumes of procedural rules, yet are directed to achieve ambiguous, often incompatible goals.[44] Salvage logging, as discussed herein, provides an excellent window into this rules/discretion debate. We shall peep through with an emphasis on understanding how judicial treatment of the theoretical dispute plays out on the ground in management of forest resources.

A. *Review of Federal Administrative Decisions*

The Administrative Procedures Act of 1946 (APA)[45] establishes rules that define the relationship between administrative agencies and reviewing courts.[46] Three types of agency actions are governed by the APA: formal rulemaking and agency adjudication,[47] informal rulemaking,[48] and a catch-all category for other informal actions.[49] Our

---

43. The basic literature is voluminous and is insightfully summarized in J. GRUBER, CONTROLLING BUREAUCRACIES: DILEMMAS IN DEMOCRATIC GOVERNANCE (1987), especially Chapter 1. The basic dispute has been personified as a face-off between Carl J. Friedrich, *Public Policy and the Nature of Administrative Responsibility*, in FRIEDRICH & MASON, PUB. POLICY (1940) and Herman Finer, *Administrative Responsibility in Democratic Government*, 1 PUB. ADMIN. REV. 335 (1941).

44. The authors are grateful to Rod Sandoe, now Director of the Minnesota Department of Natural Resources, for conversations over 15 years that highlight this distinction.

45. Pub. L. No. 104-333, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (1994)).

46. Shapiro, *supra* note 41, at 1490. Others view it less neutrally. *See* Robert B. Horwitz, *Judicial Review of Regulatory Decisions: The Changing Criteria*, 109 POL. SCI. Q. 133, 141 (1994) ("if businesses could not roll back the New Deal, at least they might reduce the power of regulatory agencies by increasing their own procedural rights"); *see also* Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946). A good indication of the nature of contemporaneous debate is found in KENNETH C. DAVIS, ADMINISTRATIVE LAW 1-25 (1973); *see also* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

47. 5 U.S.C. § 556-557 (1994).

48. § 553.

49. § 558. In formal rulemaking and adjudication, the agency's decision is based solely on the record established through public hearings and the public comment process. Informal rulemaking is the process used by most agencies to make decisions of the nature considered here: the agency provides public notice and an opportunity for comment, then is permitted to use all available data in making a decision which it is required to publish along with the reasons the agency arrived at its decision. These agency decisions are generally reviewed under the "arbitrary and capricious" standard. Finally, informal actions are defined as those that an agency makes on a daily basis, outside of the two categories described above. Shapiro, *supra* note 41, at 1488 n.8.

focus will be on informal rulemaking, since this was the most prevalent process used in the agency decisions we will analyze. Within that category, five threshold questions are important. First, does the party contesting the agency decision have standing to request court review? Second, did Congress provide the agency with discretion in how it makes the particular decision? Third, does the decision under review require the agency to use its technical expertise? Fourth, does the decision under review establish a new or different policy, or does it merely continue an existing one? And finally, is the decision required, or is this, too, discretionary? These five issues determine first whether a court will review the agency decision, and then what the court will consider in deciding whether the decision was arbitrary and capricious.

After exhausting all available administrative remedies, a party contesting an agency decision must first gain access to the courts, i.e., they must have standing. Standing may be easily obtained in many situations, depending on the applicable statute or agency regulation.[50] However, where standing is not liberally provided by law, the contesting party must show "harm in fact."[51] Direct harm from the agency action must be demonstrated to gain access to challenge the agency's decision. There is growing evidence that the courts are, as noted above, raising the bar on standing, making it more difficult for plaintiffs to establish injury.[52]

If the standing hurdle is cleared, courts typically examine the statutes that govern the agency's specific decision. The basic question is whether Congress has committed the specific decision or rule in question "to agency discretion."[53] Unless Congress has done so, in which case there is "no law to apply,"[54] the decision is reviewable under the provisions of the relevant statutes and regulations. "No law to apply" was a significant deterrent to a judicial challenge of an agency's discretion in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[55] When a court finds there is "no

---

50. For example, in standard decisions involving Forest Service decisions, the agency's regulations at 36 C.F.R. § 211.18 are silent regarding standing. However, § 211.18(e) requires that appellants state how they were affected by the agency decisions. On salvage decisions, "any individual or organization wishing to appeal a decision arising from resource removal, recovery, and rehabilitation activities resulting from natural catastrophe" may do so. § 211.16(c).

51. *See Lujan v. Nat'l Wildlife. Fed'n*, 497 U.S. 871, 883 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S 555, 560 (1992).

52. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871; *Lujan v. Defenders of Wildlife*, 504 U.S. 555.

53. 5 U.S.C. § 701(a)(2).

54. *See* Heckler v. Chaney, 470 U.S. 821, 828 (1985).

55. See *Heckler v. Chaney*, 470 U.S. at 830, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), which quotes S. Rep. 752, 79th Cong., 1st Sess. 26 (1945) to the effect that review of actions "committed to agency discretion" by law is limited to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *See*

law to apply," either Congress explicitly limited the applicability of the agency's other legislation, or there are no other applicable laws governing the agency's actions, or a combination of both exist. When this occurs, courts will find that the agency's actions are solely at the agency's discretion.[56] While Martin Shapiro suggests that there is nearly always some law to apply—generally in the agency's authorizing legislation[57]—the drafters of the Salvage Rider explicitly removed this possibility for court review.[58]

The third issue concerns the appropriate level of judicial deference to agency expertise. Deference is customary when the agency has technical expertise that may be applied to complex management or rulemaking problems in the absence of specific statutory guidance.[59] This standard was clearly enunciated in *Marsh v. Oregon Natural Resources Council*,[60] when the Court said, "because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'"[61] Expert agencies are entitled to this expertise-based discretion even "if, as an original matter, a court might find contrary views more persuasive."[62]

Deference is also due an agency's interpretation of its own statutes. In *Chevron, U.S.A. v. Natural Defense Council*, Supreme Court Justice Stevens clearly defined the test for when an agency must be accorded deference to interpret congressional language:

> [T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.[63]

The fourth issue arises when the deference due an agency varies according to whether the agency is continuing an old and established policy

---

also Shapiro, *supra* note 41, at 1490.

56. *See Overton Park*, 401 U.S. at 410.

57. *See* Shapiro, *supra* note 41, at 1490.

58. Note that in the Salvage Rider, § 2001, Congress explicitly gave the Forest Service sole discretion to determine how to fulfill its commitments relative to a wide range of its organic acts and environmental laws. *See infra* note 126-129 and accompanying text.

59. *See* Sunstein, *Law and Administration after Chevron*, *supra* note 14, at 2084; *see also* Horwitz, *supra* note 46, at 159.

60. 490 U.S. 360 (1989).

61. *Id.* at 377 (citing Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

62. *Id.* at 378. However, the court must satisfy itself that the agency did in fact consider the information in the record before reaching its decision. *Id.*

63. *Chevron*, 467 U.S. at 865 (citations omitted).

or embarking in a new direction.[64] However, as *Chevron* demonstrates, nothing prevents an agency from proceeding in new directions, or creating new policies, so long as they have made a permissible construction of the statute.[65] Thus, if the statute is silent or ambiguous, an agency may develop its own policies, even if its interpretations differ from ones that it used previously.[66]

Finally, courts have generally found that unless ordered to do something by Congress, agencies have the discretion under the APA to do nothing.[67] Justice Brennan, in his concurrence in *Heckler v. Chaney*, set four criteria for determining whether an agency's decision not to act is reviewable:

> (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct . . . ; (2) an agency engages in a pattern of non-enforcement of clear statutory language . . . ; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect . . . ; or (4) a non-enforcement decision violates constitutional rights . . . .[68]

It is the third criterion, under the arbitrary and capricious standard, that will become important in our subsequent discussion.

With these considerations in mind, the Supreme Court, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*,[69] established a four-part test for agency behavior.[70] An agency action will be found "arbitrary and capricious" if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[71]

State trust land administrators usually operate under equivalent state administrative law principles when they are acting primarily as administrators. These same issues generally emerge when the trustee is challenged by a lessee. However, trustees obligations to the beneficiaries are defined

---

64. *See* Sunstein, *Law and Administration after Chevron*, *supra* note 14, at 2101-02.

65. *See Chevron*, 467 U.S. at 843-44.

66. *See id.* at 865-66.

67. *See, e.g., Heckler*, 470 U.S. at 832-33. This classic Supreme Court case decided whether the federal Food and Drug Administration could be required under the APA to prevent uses of certain medicines for the purposes of lawful lethal injection. *See id.* at 823-24.

68. *Id.* at 839 (Brennan, J., concurring).

69. 463 U.S. 29 (1983).

70. *Id.* at 43.

71. *Id.*

by a set of trusteeship requirements that elaborate on, and occasionally redefine, the contours of the basic APA concepts.

B. *Review of State Land Trustees' Decisions*

To underscore the conceptual distinctions between administrators and trustees, we pose the same five questions, those that structured our APA discussion, to address the prudence standard: 1) who may ask for court review of the trustee's decisions; 2) how much discretion is invested in the trustee; 3) how does deference to the trustee's technical expertise work; 4) what are expectations for the trustee to adjust previous policies; and 5) can the trustee be required to take action? What we find is that most of these issues are either irrelevant, or they are collapsed into an evaluation of whether the trustee has acted prudently and with undivided loyalty to the beneficiary.

The first question, that of standing, arises in some jurisdictions in the trust context, but it is configured differently than under the APA. The question is not framed in terms of a plaintiff establishing sufficient injury to warrant a hearing, but in terms of the identifying beneficiaries of the trust in question. Almost without exception, taxpayers in a state are considered to be beneficiaries, and are found to have sufficient interest to challenge the trustee. For the two states which do not follow this rule—Minnesota and Idaho—the stricter standard has had significant consequences for trust management.[72] Accordingly the issue of standing rarely arises in trust lands cases,[73] which advantages those who would challenge a trustee.

The second question—what, if anything, is "committed by law to agency discretion" and therefore unreviewable by the courts—also does not arise in review of trustees' decisions. That question arises from the separation of powers doctrine, which defines the appropriate relationship

---

72. *See supra* notes 23-24; *see also* Testimony of Charles Graham, U.S. Senate Subcommittee on Forests and Public Land Management, Workshop on Title VI Public Land Management Responsibility and Accountability Restoration Act, March 6, 1997; *see also* Selkirk-Priest Basin Ass'n, Inc. v. State of Idaho, 899 P.2d 949 (Idaho 1995). The court in *Selkirk-Priest* did leave one small crack open for the state's taxpayers to gain standing: the possibility that their interest in the public trust aspects of navigable streams running through the contested timber sale area might give them standing. The Idaho legislature acted promptly to exclude operation of the public trust doctrine from endowment and other state lands. The timber industry also successfully sought legislation providing that anyone seeking to enjoin a timber sale must post a 10% bond. Revisions to the Idaho APA, moreover, created an exception for endowment land timber sales, which are no longer subject to judicial review under the Idaho APA. Personal communication with Laird Lucas, Attorney for the Selkirk-Priest Basin Association, March 17, 1996, Boise, Idaho, and Steve Schuster, Idaho State Land Board attorney handling *Selkirk-Priest*, March 18, 1996.

73. *See* Souder et al., *supra* note 38, n.66 and text accompanying, regarding the meaning of the state constitutional phrase "in trust for all the people" for the issue of standing.

between the courts and the legislature in our system of government. The court is careful to stay within, or at least to talk about staying within, its constitutionally allocated domain. This question has no analogue in the trust setting where the courts are called upon to apply trust principles to what is essentially a contract framed by the trustor. Occasionally, terms in a specific trust instrument may take some steps toward defining the nature and extent of the trustee's discretion. Phrases such as "in the trustee's discretion," "all of the powers of an owner," "absolute" or "sole and uncontrolled" are common and can expand or contract the degree of caution required of the trustee. However, such terms never alter the trustee's duties of loyalty and care and general risk reduction.[74] Again, this seems to advantage those who would challenge the trustee.

Hence, the third question—the issue of deference to an agency's technical expertise—emerges as a central consideration in evaluating a trustee's decisions. However, the question of expertise has a significantly different shape in the context of prudence than in the APA setting. Three points seem crucial. First, unlike the APA standard, under which the administrator's discretion ebbs and flows depending on the disposition of the court at a given point in time, the standards for evaluating trustees vary according to the amount of expertise the trustee claims to, or appears to, possess. When the trustee is an expert in a specific field, and is compensated for her work in that field, then she is expected to make decisions with a higher degree of proficiency than an "average" prudent person. If the trustee is making decisions outside her field of expertise, then her actions will be evaluated against a more forgiving standard of care.[75] The basic decision-making criterion within trust law is normally expressed in terms of the "prudent person" or "prudent investor" rule: How would a person *of similar expertise* make a decision regarding his or her own funds?[76] Simply put, the courts expect more from Merrill Lynch when it

---

74. RESTATEMENT (THIRD) OF TRUSTS § 228 (cmt. g) (Prudent Investor Rule).

75. RESTATEMENT (THIRD) OF TRUSTS § 227, comment d states:

> The duty to exercise both care and skill in investment management may require knowledge and experience greater than that of an individual of ordinary intelligence, depending on the investment strategy to be employed. This does not prevent an ordinarily intelligent person from serving as a trustee. In that role, however, such a person may have to take reasonable steps to obtain sufficient competent advice, guidance, and assistance in order to meet the standards of this Section and to formulate and implement a prudent investment strategy for the particular trust.

76. *See* § 227(a). But this requirement isn't in isolation:

> To the extent necessary or appropriate to making of informed investment judgments by the particular trustee, care also involves securing and considering the advice of others on a reasonable basis. It is ordinarily satisfactory that this information and advice be obtained from sources on which prudent investors in the community customarily rely.

§ 227 (cmt. d).

is managing a fund for a minor child than when a friend of the family undertakes the same task.

A second point related to expertise is that rather than turning explicitly on the volume of data accumulated to support a specific decision, when alternative courses of action are available, trust law requires the explicit incorporation of risk/return analysis in the decision-making process.[77] Trust law has become increasingly sophisticated in the standards by which the courts judge appropriate incorporation of the relationship between risk and return. In the Second Restatement of Trusts, and for the last seventy-five to one hundred years, that matter was straightforward and confining: trustees were generally provided with an "approved list" of acceptable investments.[78] Trustees who made decisions based on the approved list were unquestionably acting prudently. More recently, with the growth of sophisticated financial markets, theories, and analytical tools, the concept of balancing risks in a diversified "portfolio" as a way to reduce financial risk has become prevalent. The principles of prudence have been restated to emphasize risk management: "sound diversification" of the portfolio; analysis of the degree of risk appropriate to the goals of the trust; avoidance of transaction costs; and balancing returns between production of current income and the protection of purchasing power.[79]

This is not only a different standard than that operative under the APA regarding agencies claiming to be expert in a particular field, it would seem to be both more specific and more demanding. This is because a court is under no compunction to defer to the expertise of the trustee. Frequently, the process of weighing the pros and cons of a trustee's decision has trappings similar to the review of an administrative decision. However, deference is not in the trust dictionary. The court applies the "Prudent Investor Rule," irrespective of how complex the matter becomes or how little or how much the trustee knows.

A third point related to the deference to expertise is worth mentioning: federal administrators are frequently required—either by interpretations of the APA, NEPA, or by the agency's authorizing statutes[80]—to propose and evaluate a number of alternatives and scenarios, including the alternative of taking no action, and other hypothetical options.[81] Trustees are not so constrained, although in practice, as we shall see below, they frequently perform a similar analysis. Finally, this should suggest that the

77. *See* § 227.

78. *See* discussion at § 227 (cmt. k).

79. *See* § 227 (introduction).

80. *See Scenic Hudson*, 354 F.2d at 620.

81. *See* U.S. GENERAL ACCOUNTING OFFICE PUBLIC TIMBER: FEDERAL AND STATE PROGRAMS DIFFER SIGNIFICANTLY IN PACIFIC NORTHWEST 4-6 (1996).

other category of deference—that owed to an agency's interpretation of its own statutory mandate—is also an empty cell. The courts are quite familiar with the nature of the trust doctrine and interpreting it is squarely within their domain.

The fourth question—the relationship between new versus established policy—does arise in the trust context. Trustees are expected to utilize the most recent information in the transaction of their duties.[82] The intent of the shift from the traditional practice of providing legally approved lists of prudent investments to relying on the "Prudent Investor Rule"—that is, the shift from the Second[83] to the Third Restatement of Trusts[84]—was to "liberat[e] expert trustees to pursue challenging, rewarding, non-traditional strategies when appropriate to the particular trust, [and to provide] reasonably clear guidance to safe harbors that are practical, adaptable, readily identifiable, and expectedly rewarding."[85] However, trustees are not freed from the requirement to act with care and diligence: trustees are warned that if they depart from widely used standards, they must make an informed and careful analysis of the risks.[86] Thus, the ability of the trustee to incorporate new knowledge and techniques is tempered by the fundamental requirement to carefully evaluate the risks associated with doing so.

The fifth key question—is the manager allowed to decline to pursue a course of action—commonly arises in trust law. Basically, the trustee has broad discretion not to act, as long as inaction can be demonstrated to be prudent. Can the trustee withhold resources from productive use, to wait for a better market or a clearer understanding of the risks? The answer is clearly yes: courts would likely not consider this inaction, but rather prudent action that is clearly acceptable trustee behavior if the risks outweigh the returns.[87] Inaction is also acceptable if the costs—"transaction costs"—outweigh the potential benefits.[88]

---

82. "Trust investment law should reflect and accommodate current knowledge and concepts. It should also avoid repeating the mistake of freezing its rules against future learning and developments." RESTATEMENT (THIRD) OF TRUSTS § 227.

83. RESTATEMENT (SECOND) OF TRUSTS § 230.

84. *See* RESTATEMENT (THIRD) OF TRUSTS § 227 (Prudent Investor Rule).

85. *Id.*

86. "Furthermore, although it is ordinarily helpful in justifying the reasonableness of a trustee's conduct to show that an investment or strategy is widely used by trustees in comparable trust situations, the absence of such use does not render imprudent the informed, careful use of unconventional assets or techniques." § 227 (cmt. e).

87. *See* § 229 (cmt. b); *see also* Souder et al., *supra* note 38.

88. *See* § 227(c)(3) ("incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship").

III. AGENCY DECISIONS IN SALVAGE TIMBER SALES

This background on the basic structure of judicial review of agency decisions has suggested some differences between the state trust land and Forest Service contexts. In this section we will provide background on salvage sales—the basic concept, and the peculiar chain of events that has caused so much controversy on federal lands. We will briefly examine salvage timber harvests from the inception of forest reserve "management" in 1897, through the *Monongahela* litigation, the National Forest Management Act, and implementation of the Rescissions Act. This discussion will put some meat on the bones of the cases to be discussed in the next section and, in addition, suggest why the salvage issue is such a good context for comparing judicial review of Forest Service and state trustee decisions.

A. *Pre-1994 Timber Salvage on Federal Lands*

Harvesting fire- and bug-killed and wind-thrown trees was traditionally undertaken with little controversy; usually the biggest concern was how to expeditiously remove these trees with as little damage to remaining live trees and as little loss in their salvage value as possible.[89] In fact, it is not too extreme to assert that the Forest Service's Organic Act (Organic Act)[90] authorized *primarily* salvage harvests.[91] In response to criticisms that the forest reserves were "locked up"[92] and unavailable to settlers, the 1897 Organic Act authorized the Secretary to promulgate regulations that would allow limited use of the resources in the forest reserves.[93] As the

---

89. *See* James W. Kimmey, "Rate of Deterioration of Fire-killed Timber in California," U.S.D.A. Forest Service Circular No. 962 (1955).

90. The Organic Act was repealed by the National Forest Management Act of 1976 (NFMA). *See* Pub. L. No. 94-588 § 13, 90 Stat. 2958 (1976)). NFMA is now codified at 16 U.S.C. §§ 1600-1614 (1994).

91. *See generally*, Sally K. Fairfax, "Legislative Intent and Forest Reserves," unpublished paper briefly summarized in Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 Idaho L. Rev. 509 (1979) (Fairfax paper on file with authors).

92. *See, e.g., Our Unavailable Public Lands*, 26 THE NATION 288 (May 2, 1878); JOHN ISE, THE UNITED STATES FOREST POLICY, 69 (1920). Ise describes the widely lamented Free Timber Act of 1891 (26 Stat. 1095) as being justified because:

> [O]ne reason why the western men felt that they were entitled to free timber, even for manufacturing purposes [i.e., as fuel for smelting], was that forest fires were destroying immense amounts of timber each year anyhow, and there was no apparent reason why timber should not be used rather than allowed to go up in smoke.

Id. at 69.

93. *See* Organic Act, 16 U.S.C. § 551. The debate was intense even within the western states where Congressmen would have been thought more sympathetic to logging:

> I myself should prefer that no clause should be retained in the bill permitting the cutting of a single thousand feet of either dead or matured timber. But it was represented to us that it is absolutely necessary that the dead timber should be eliminated from the forest . . . .

Statement of Representative Hermann of Oregon on the amendment to H.R. 119 (1893), which subsequently became the Organic Act. CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND

Forest Service discovered in the early 1970s *Monongahela* litigation,[94] the Organic Act did not in fact authorize manipulation of the vegetation to produce trees, nor did it allow clear-cutting or the harvest of green trees. Instead, the Organic Act stated that "[f]or the purpose of preserving the living and growing timber and promoting the younger growth," the Secretary could cause to be appraised, "dead, matured . . . trees" and could sell them if they were marked and designated, cut, and removed under the supervision of the Secretary's appointee.[95] Removal of dead and mature trees that are interfering with the living and growing timber is effectively a salvage sale.

After the forest reserves were transferred to the Department of Agriculture and brought under the umbrella of Gifford Pinchot's enthusiastic embrace of silviculture and "forestry in the woods," the limited extent of the grant of authority to cut timber was forgotten or ignored.[96] The Forest Service responded to increased demands for stumpage after World War II by clear-cutting,[97] which led in the mid-1970s to the *Monongahela* litigation. Conservationists challenged the management of young and growing timber in eastern National Forests. The court held, in what is frequently delimited as a decision on clear-cutting, that Forest Service's green timber sales program was illegal.[98] The case prompted Congress to rewrite the Forest Service's statutory authorities to allow for timber management beyond that authorized in the 1897 Organic Act.

The National Forest Management Act (NFMA),[99] which followed the *Monongahela* decision, defines a convoluted process for preparing forest management plans. Although salvage is discussed in NFMA in section 14(h),[100] salvage sales are lightly treated in the national forest planning documents.[101] Nevertheless, given the intensity of fire and insect infesta-

---

RESOURCE PLANNING IN THE NATIONAL FORESTS 50 & n.247 (1987) (citing 27 CONG. REC. 86 (1894)).

94. *See* West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975) (*Monongahela*).

95. Organic Act, 16 U.S.C. § 476 (repealed by NFMA, Pub. L. No. 94-588 § 13, 90 Stat. 2958 (1976)).

96. *See* ISE, *supra* note 92, at 143, 155, 161-62.

97. *Monongahela*, 522 F.2d at 954-55; *see also* WILKINSON & ANDERSON, *supra* note 93, at 136-39.

98. *See Monongahela*, 522 F.2d at 955.

99. 16 U.S.C. §§ 1600-1614 (1994).

100. *See* 16 U.S.C. § 472a(h). Specific salvage sale procedures are outlined in the FOREST SERVICE MANUAL, §§ 2435-2436, especially § 2435.3, entitled "Emergency Salvage Sales," and amendment 2400-9-6 to §§ 2435-2435.4 (September 24, 1996).

101. *See, e.g.*, PROPOSED KAIBAB (ARIZ.) NATIONAL FOREST PLAN (June, 1994). This plan mentions salvage in only two places: first under "Vegetative Treatment Practices," "[s]alvage cutting is applied in stands that have been devastated by wildfire, insect or disease." *Id.* at 22ff. As the name implies, this harvest is not anticipated and is applied to "salvage standing dead or dying trees for com-

tions in the 1980s and early 1990s, controversy over salvage timber harvesting intensified and became a central public resources management issue.[102] Figure 1 shows the increasing importance of salvage harvests in relation to green, "live tree" harvests on the National Forests over the past twenty years. It is important to note, therefore, that when salvage sales are referenced in NFMA, they appear primarily in the context of exceptions to the stringent requirements which accompany regular timber management.[103]

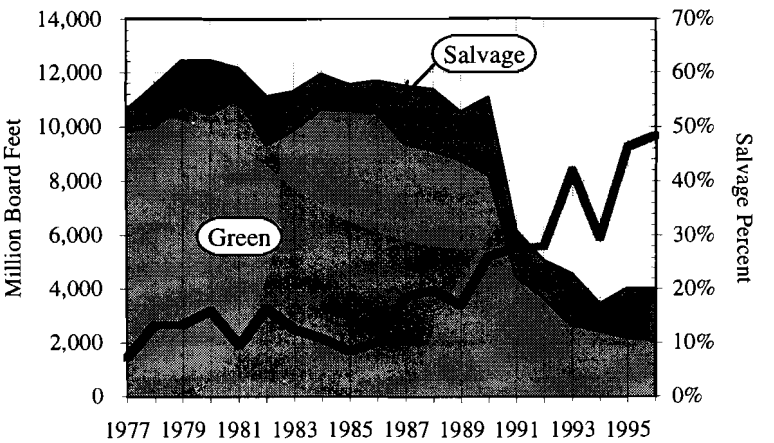

Figure 1. Timber salvage sales in relation to green timber sales on National Forests, 1977 - 1996.[104]

It is not surprising that salvage sales are exempted from NFMA requirements regarding the age at which trees can be harvested. The cutting age (or rotation age for even-aged stands) is defined as the "culmination of the mean annual increment of growth."[105] This point arrives when the annual biological growth rate of an individual tree reaches its peak and stabilizes or declines.[106] Clearly, when contemplating salvaging trees that

---

mercial purposes that would otherwise remain in the forest" *Id.* at 24. However, this practice is applied only in "Suitable Coniferous Forest Timberland," and not forest-wide. Second, according to the "Guidelines for Timber Resource Operations and Improvements," "[s]alvage stands, or parts thereof, that are moderately or severely damaged by dwarf mistletoe, insects, fire, or windthrow [are harvested] using the uniform shelterwood or clearcutting with planting methods . . . ." *Id.* at 42.

102. *See* Charles Taylor, *The Politics of Salvage Timber*, 93 J. FORESTRY 60 (July 1995).

103. The principal commentary on NFMA does not even mention salvage timber harvests. *See generally*, WILKINSON & ANDERSON, *supra* note 93.

104. Source: GAO REPORT, *supra* note 33, at App. I, at 20.

105. 16 U.S.C. § 1604(m).

106. L. DAVIS & K. JOHNSON, FOREST MANAGEMENT 51-52 (3d. ed. 1987).

are dead or dying for whatever reason, their biological growth rate is presumed to be zero. Salvage sales are therefore exempted from NFMA's harvest age requirements.[107]

A more significant exception in section 6 of NFMA exempts salvage sales from criteria and procedures for determining whether specific areas are "unsuitable for timber production."[108] This determination is based on physical and economic factors.[109] Even in areas considered to be "unsuitable" for timber harvest, salvage harvesting could be conducted if, by doing so, other multiple-use values were protected.[110]

Salvage sales are also exempted from calculations of the "allowable sale quantity" (ASQ). As a part of a forest plan, the agency is required to develop an ASQ based on the level that provides a sustained yield which does not vary significantly over time.[111] NFMA allows the Forest Service two options for dealing with salvage sales: salvage can be treated as replacement for green timber sales in considering the ASQ.[112] This has a certain intuitive appeal, since when trees die they no longer contribute to future sustained yields. But, alternately, the Forest Service may simply harvest the total ASQ of green trees in addition to any salvage.[113]

---

107. Section 6 states:

> The Secretary shall establish . . . standards to insure that, prior to harvest, stands of trees throughout the National Forest System shall generally have reached the culmination of mean annual increment of growth . . . : *Provided*, That these standards shall not preclude the use of sound silvicultural practices, such as thinning or other stand improvement measures: *Provided further*, That these standards shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack . . . .

16 U.S.C. § 1604(m)(1).

108. § 1604(k).

109. § 1604(g)(3)(E) places restrictions on areas suitable for harvesting where necessary to prevent damage due to unstable soils, to assure restocking capability of the land, and to protect streams and riparian areas.

110. 16 U.S.C. § 1611(b) provides:

> In developing land management plans pursuant to this Act, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use values.

111. 16 U.S.C. § 1611(a).

112. 16 U.S.C. § 1611(b) states:

> Nothing in subsection (a) of this section shall prohibit the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack. The Secretary may either substitute such timber for timber that would otherwise be sold under the plan or, if not feasible, sell such timber over and above the plan volume.

113. *Id.* This provision is pertinent to the discussion of the Rescissions Act. *See infra* note 124

Finally, salvage sales enjoy minor exceptions from the clear-cutting requirements of section 6. Clear-cutting is to be used *only* if it is the "optimum" method, or to meet management objectives;[114] and if environmental and other impacts *on each sale area* of even-aged management techniques are assessed by an inter-disciplinary team and determined to be consistent with multiple use of the area;[115] and the cutting patterns are blended with the natural terrain.[116] Even then, NFMA limits the size of cutting units;[117] and requires that planned harvesting be carried out in a manner that protects other resources and the regeneration potential for the site.[118] For the most part, salvage clear-cuts must meet the normal requirements, but they are exempted from the harvest size limits.[119]

Salvage sales are no longer regarded as normal timber sales after the passage of NFMA. They are subject to far less stringent review. In 1994, Congress, concerned (some would say irate) that the Forest Service was moving so slowly to harvest fire- and bug-kill timber, went even further to limit restrictions on salvage sales by passing the Recessions Act.

B. *The Rescissions Act Timber Salvage Rider*

After the 1994 fire season, the new Republican Congress was concerned that diverse environmental laws and regulations were inhibiting the Forest Service and the Bureau of Land Management (BLM) from expeditiously salvaging fire and insect damaged trees.[120] Congress attached a rider (the "Salvage Rider") onto an act rescinding the administration's previously authorized funding allocations (the Rescissions Act or the Act).[121] Intense controversy arose from the fact that the rider overrode

---

and accompanying text (quoting relevant language from the Rescissions Act).

114. 16 U.S.C. §§ 1604(g)(3)(F).

115. § 1604(g)(3)(F)(ii) (emphasis added).

116. § 1604(g)(3)(F)(iii).

117. § 1604(g)(3)(F)(iv).

118. § 1604(g)(3)(F)(v).

119. In this even-aged management criteria, the Forest Service is required to:

> [E]stablish[] according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including . . . appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: Provided, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm . . .

§ 1604(g)(3)(F)(iv).

120. *See supra* note 28 and accompanying text.

121. *Id.* Some environmentalists objected to the fact that the salvage program was developed as a "rider" to an appropriation's bill, but such concerns are formulaic. The 1891 act setting apart forest reserves, and the 1897 Organic Act also passed as riders on appropriation bills. *See* Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279, 2293 & n.75; CELIA CAMPBELL-MOHN ET AL., SUSTAINABLE ENVIRONMENTAL LAW § 9.1 & n.71 (1993).

many of the laws[122] which environmentalists traditionally used to challenge the Forest Service's predilection to focus on timber over other resources.[123]

The Rescissions Act defines a "salvage timber sale" as:

> [A] timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence.[124]

The Forest Service was required to put up for sale four and a half billion board feet [plus or minus twenty-five percent] over the two year period established by the Act. Evincing their impatience with Forest Service foot-dragging on salvage operations, Congress required the agency to report every six months on regional and forest-level progress towards meeting that target.[125]

The most important provisions of the Salvage Rider directs that a combined environmental analysis (EA) and biological evaluation (BE) be prepared as part of each salvage sale, but grants the relevant Secretaries absolute discretion to define the intensity and content of those analyses:

> . . . a document embodying decisions relating to salvage timber sales proposed under authority of this section shall, at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible, consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species, and to the extent the Secretary concerned, at his sole discretion, considers appropriate and feasible, be consistent with any standards and guidelines from the management plans applicable to the National Forest . . . on which the salvage timber sale occurs.[126]

---

122. *See Salvage Timber & Forest Health-Part II: Oversight Hearings Before the Task Force on Salvage Timber & Forest Health of the Committee on Resources*, 104th Cong., 1st Sess. 248 (1996) (statement of Patti Goldman, Sierra Club Legal Defense Fund, "Logging Without Laws Rider: Lawlessness Fuels the Industry's Greed at the Expense of Our Nation's Forests").

123. *See* ELISE S. JONES & CAMERON P. TAYLOR, *Litigating Agency Change: The Impact of the Courts and Administrative Appeals on the Forest Service*, 23 POL'Y STUD. J. 310, 312-14 (1995).

124. Rescissions Act, § 2001(a)(3) (found as "Statutory Note" at 16 U.S.C.A § 1611(a)(3) (1996 & Supp. 1997)).

125. *See* Rescissions Act, § 2001(c)(3); *see, e.g.*, U.S. Forest Service, *Report to Congress*, (February 29, 1996).

126. Rescissions Act, § 2001(c)(1)(A).

The requirements of *all* federal environmental and natural resource laws are satisfied by completion of the combined EA/BE.[127] Administrative appeals of the EA/BE and their Decision Notice are expressly prohibited,[128] although courts can apply provisions of the APA to review challenges to the exercise of administrative discretion.[129]

The Salvage Rider also exempts sales under its provisions from standard contracting requirements, including competitive bidding, federal acquisition regulations, notice and publication requirements, and any implementing regulations and departmental acquisition regulations.[130] Finally, salvage sales under this Salvage Rider are not required to be cost effective.[131] The Salvage Rider expired on December 31, 1996, although it remains in effect until the timber sold pursuant to its provisions is harvested.[132]

C. *How Salvage Timber is Handled Under the Rescissions Act*

Three additional documents govern how the Forest Service conducts salvage sales under the Rescissions Act. First, the Departments of Agriculture, Interior, Commerce, and the Environmental Protection Agency (EPA) entered into a Memorandum of Agreement (MOA) which specified how the Departments and relevant agencies (Forest Service, BLM, U.S. Fish & Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS)) will conduct operations in the altered legal environment created by the Rescissions Bill.[133] In addition, a year after passage of the original Bill, in July, 1996, the Secretary of Agriculture and the Chief of the Forest Service each provided specific clarification on how salvage sales were to be conducted.

The MOA describes how agencies which sell timber under the Salvage Rider (the Forest Service and BLM) coordinate with the agencies they consult on normal harvests: USFWS and NMFS regarding endangered species, and the EPA for the Clear Air Act and Clean Water Act aspects of timber harvesting. The MOA announced five key principles:

1. Salvage sales will be implemented with the same substantive environmental protections that would otherwise be accorded.

---

127. § 2001(i)(8).
128. § 2001(e).
129. § 2001(f)(4).
130. *See* § 2001(c)(5)(b) (citing, *inter alia*, 41 U.S.C. §§ 253-254).
131. *See* § 2001(b)(1).
132. *See* § 2001(j).
133. *See* Memorandum of Agreement on Timber Salvage Related Activities Under Public Law 104-19 Between the United States Department of Agriculture, United States Department of Interior, United States Department of Commerce, and United States Environmental Protection Agency (August 9, 1995) (on file with the authors).

2. The public will be involved early in the process so that input can be provided in the design of the projects; this provision specifically requires a higher degree of input because administrative appeals are prohibited.
3. The agency will perform a scoping period during preparation of the salvage projects, and circulation of the EA/BE and a twenty-day comment period for projects that would normally have an environmental assessment (i.e., no significant environmental impact) and thirty days for documents that would normally have an environmental impact statement prepared. The decision maker must respond to substantive comments in the final EA/BE, but circulation of this final document is not required.
4. Monitoring and evaluation of the timber sale objectives and mitigation will be performed as an integral part of the salvage sales; monitoring must follow applicable Forest Plans, Land Use Plans, and agency direction. Public and stakeholder involvement in monitoring and evaluation is encouraged.
5. Recognize that, given the flexibility granted the agencies, "care must be taken to avoid abuse by including trees or areas not consistent with current environmental lands and existing standards and guidelines . . . ."[134]

In response to public concerns raised about implementation of the Salvage Rider, the Secretary of Agriculture provided new guidelines to the Forest Service on July 2, 1996. The new guidelines provide specific direction on where salvage logging may not occur under the Rider, what trees are to be considered harvestable, and additional details about public involvement. Three items are key:

1. No salvage sales may occur in inventoried roadless areas.
2. Sale preparation, including marking, may proceed prior to the Decision Notice so that the planned action can be clearly displayed to the public.
3. Justification for including green trees and trees "imminently susceptible" to insect attack or fire must be included in the environmental assessment using a systematic process to demonstrate that the decision is "well reasoned and well founded." This system should provide a vehicle for public participation.[135]

---

134. *Id.*

135. Memorandum from the Secretary, U.S. Dept. of Agriculture, to Jack Ward Thomas, Chief, U.S. Forest Service, *Revised Direction for Emergency Timber Salvage Sales Conducted Under Section 2001(b) of P.L.* 104-19 (July 2, 1996) *reprinted as* Exhibit 2, Interim Directive 2430-96-1, FOREST SERVICE MANUAL (July 17, 1996).

One week later, the Secretary of Agriculture provided additional clarification of the timing of Forest Service salvage projects. The Secretary stated that all salvage sales then being offered must be offered under the provisions of Salvage Rider until its expiration.[136] However, any sales that had not been advertised as of December 13, 1996 were to be withdrawn.[137] The Salvage Rider came to an end on Forest Service lands a full two weeks prior to its intended expiration date. Thus, twenty-six sales totaling thirty million board feet that were ready for sale, and could have been advertised under the Rider prior to its expiration, were put on hold. These, in some form or another, are likely to be sold under standard NFMA salvage provisions, with the usual NEPA analysis, after January 1, 1997.[138]

In the end, the primary impact of the Salvage Rider on salvage sales has been two fold. First, pre-Rescissions Act appeal regulations were nullified as they applied to salvage sales. Second, because many operating statutory mandates were suspended, judicial review of agency decisions was largely restricted to an application of APA criteria. Hence, the review of Rescission Act salvage operations provides an excellent opportunity to view the APA operating almost in isolation.

IV. CASE STUDIES OF STATE AND FEDERAL SALVAGE PROJECTS

The combination of a brief introduction to judicial criteria for review of agency and trustee decisions and to salvage sales and the Salvage Rider gets us to the heart of the matter: how does the difference between the APA and the trust doctrine play out in review of comparable policies? We will focus on two cases: the Thunderbolt Timber Salvage Sale in the Boise and Payette National Forests in central Idaho, and the Loomis State Forest in north-central Washington.

A. *Judicial Review Under the APA— Idaho Conservation League v. Thomas*

Timber salvage operations conducted under the Rescissions Act spawned a huge public outcry and a number of court challenges.[139] Each

---

136. *See id.*

137. Memorandum from the Undersecretary for Natural Resources and Environment, U.S. Dept. of Agriculture, to the Chief, U.S. Forest Service, (December 13, 1996) *cited in* GAO Report, *supra* note 33, at 7.

138. *Id.* at 6-7.

139. *See, e.g.*, Kentucky Heartwood v. United States Forest Service, 906 F.Supp. 410 (E.D. Ky. 1995); Inland Empire Public Lands Council v. Glickman, 911 F.Supp. 431 (D. Mont. 1995), *aff'd*, 88 F.3d 697 (9th Cir. 1996); Idaho Conservation League v. Thomas, 917 F.Supp. 1458 (D. Idaho 1995), *aff'd*, 91 F.3d 1345 (9th Cir. 1996); Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996).

case raises a number of issues particular to the fact pattern—whether the Forest Service was adequately protecting endangered species during its salvage sales,[140] whether the Secretary had to personally approve each sale,[141] and whether a particular project, if it had environmental documentation released to the public prior to enactment of the Salvage Rider, qualified as "backlogged" salvage allowable under the Rescissions Act.[142] The Idaho Conservation League's challenge to the Thunderbolt Sale provides a clear juxtaposition to the Loomis State Forest controversy.

1. *The Thunderbolt Sale*

The sale at issue, within a sensitive drainage of the South Fork Salmon River in the Boise and Payette National Forests, had a long history even before the salvage sale issue presented itself.[143] The area surrounding the South Fork Salmon River provides critical habitat for the federally-threatened Snake River spring/summer chinook salmon.[144] Severe sedimentation problems caused by past land management activities, especially logging and associated road building, were therefore of special concern.[145] To address potential problems in the drainage, the Forest Service developed special guidelines in the late-1980s. "The South Fork of the Salmon River: An Area of Critical Concern" was the result of collaboration with scientific experts and representatives from the timber industry, other state and federal agencies, Indian tribes and environmental groups.[146] The Forest Service then amended the Boise and Payette National Forest Plans to include those guidelines.[147] A key component of the guidelines is the conclusion that "any new major land-disturbing actions . . . [would be] prohibited until restoration actions have improved in-river conditions."[148] In addition, the South Fork guidelines state that:

> Impacts from a fire, or other natural events, may be unavoidable and stabilizing the source of natural disturbance is not always biologically desirable for aquatic ecosystems. More important is maintaining natural

---

140. *See Kentucky Heartwood*, 906 F. Supp. at 414.

141. This was a common complaint among the Salvage Rider cases. *See, e.g., Inland Empire*, 911 F. Supp. at 436; *Inland Empire*, 86 F.3d at 698; *Idaho Conservation League*, 91 F.3d at 1345.

142. *See Kentucky Heartwood*, 906 F. Supp. at 413.

143. Brief for Federal Appellees at 8-9, *Idaho Conservation League*, 91 F.3d 1345 (9th Cir. 1996).

144. *Idaho Conservation League*, 91 F.3d at 1347. The listing decision is at 56 Fed. Reg. 14,653, 14, 657, and 14,660 (1992).

145. 91 F.3d at 1347.

146. *Id.*

147. Opening Brief of Plaintiffs-Appellants at 8, *Idaho Conservation League*.

148. *Idaho Conservation League*, 91 F.3d at 1347.

stream dynamics.[149]

Thus it would appear that any harvest operations in the drainage would be problematic at best, and probably prohibited until the water quality problems could be adequately addressed.[150]

Forest Service planning for the area was interrupted by a spectacular fire in 1994 that burned about 150,000 acres in the South Fork Salmon River watershed, Payette and Boise National Forests, in central Idaho.[151] The Thunderbolt Fire burned 18,827 acres[152] of this 150,000 acre total, including 5,935 acres that burned at high intensity.[153] The agency responded to the Thunderbolt Fire by establishing a Landscape Assessment Team to "assess how the fires affected various resources, and to determine what management actions could be taken to meet the Forest Plan goal of restoration of salmon and trout populations."[154] The resulting Thunderbolt Wildfire Recovery Project was intended to use management tools, including salvage sales, to rehabilitate the area and improve water quality, while capturing some of the value of dead and dying timber:

> [T]o improve the long term fish habitat, rehabilitate existing sediment sources, improve hydrologic conditions of affected watersheds, protect long term soil productivity, promote revegetation of trees on burned acres, and recover the economic value of dead and imminently dead trees as a means of financing the ecosystem restoration and sediment reduction projects.[155]

To fund the Recovery Project, the Forest Service proposed the salvage of timber on 3,237 acres, harvesting 14 million board feet.[156] The sale would provide approximately $780,000 to ameliorate existing sediment sources on roads and landings, to replant trees, and for other sediment-reduction projects.[157] In addition to partially funding restoration projects, the timber salvage would also support timber-related jobs in local communities.[158]

The salvage proposal was first submitted as a Draft Environmental Impact Statement (DEIS) with an accompanying Biological Assessment in

---

149. *Id.* (quoting the South Fork guidelines).
150. *See* Opening Brief of Plaintiffs-Appellants at 8-9, *Idaho Conservation League.*
151. *Idaho Conservation League*, 91 F.3d at 1347.
152. *Id.*
153. *Idaho Conservation League*, 917 F. Supp. at 1461.
154. Brief for Federal Appellees at 10, *Idaho Conservation League.*
155. *Id.* at 11.
156. Opening Brief for Plaintiffs-Appellants at 10, *Idaho Conservation League.*
157. Brief for Federal Appellees at 33-35, *Idaho Conservation League.*
158. Brief of Appellee-Defendant-Intervenor Intermountain Forest Industry Association at 19, *Idaho Conservation League.*

March 1995, four months before the Salvage Rider passed. The proposed harvest alternative "drew harsh and substantial criticism" from the EPA, NMFS, and the USFWS, as well as from the Idaho Department of Game and Fish.[159] "In the unanimous opinion of these agencies, the environmental risks posed by using salvage logging to finance restoration projects were too great to render the Project acceptable."[160] NMFS issued a Biological Opinion which stated that the salvage harvests would jeopardize the continued existence of the spring/summer chinook salmon, and adversely modify the salmon's critical habitat on the South Fork Salmon River.[161] The EPA stated that the proposed salvage timber harvests would "further aggravate the already critically degraded habitat for threatened salmon," and that "the proposed action was inconsistent with collective agency decisions and resource protection goals for the South Fork Salmon River Watershed."[162] The USFWS similarly opposed the project because it concluded the proposed actions would negate or delay any restorative benefits that might result from the project.[163]

One month before the Forest Service released the DEIS in March, it convened an inter-agency "Blue Ribbon Panel" to review the science applied to the soil and fisheries analysis in the rehabilitation proposals.[164] This panel consisted of scientists affiliated with the EPA, USFWS, and the Forest Service—but interestingly NMFS and Idaho Game and Fish were not included. The panel was unable to reach a consensus because "the action was not consistent with the LRMPs [Land and Resource Management Plans] and would increase short-term risks of sediment and fuel spills in trade-off for unproven long-term benefits."[165] Faced with this result, the Forest Service established a panel of its own employees to examine the scientific standards for soils and fisheries analyses of the project (the Science Panel). The Science Panel was "unable to conclude that the analysis performed could support the DEIS prediction for long-term habitat improvement in spawning and rearing habitat of anadromous fish."[166] The Science Panel made six recommendations that its leader felt

159. *Idaho Conservation League*, 917 F. Supp. at 1461.

160. The Forest Service took issue with this characterization, saying that the modified proposals in its Record of Decision (ROD) were approved by the Idaho Division of Environmental Quality, which is important because that agency implements the Clean Water Act for the state. Brief of Federal Appellees at 27, *Idaho Conservation League*.

161. Opening Brief for Plaintiffs-Appellants at 13, *Idaho Conservation League*.

162. *Idaho Conservation League*, 917 F. Supp. at 1461-62.

163. *Id.* at 1462. The Idaho Dep't. of Fish and Game took a similar position. *Id.*

164. Brief for Federal Appellees at 13, *Idaho Conservation League*.

165. Opening Brief for Plaintiffs-Appellants at 16 n.5, *Idaho Conservative League*.

166. *Idaho Conservation League*, 91 F.3d. at 1348. The Science Panel did, however, determine that the Forest Service had used "the best analytical methods available for estimating erosion and sediment delivery." *Id.*

"were the best technically available."[167]

Between the Thunderbolt Salvage DEIS (released in March, 1995) and the Final Environmental Impact Statement (FEIS) (released on September 12, 1995) and Record of Decision (ROD) (October 5, 1995), the Rescissions Act was passed (July 25, 1995). As we have seen, it grants the relevant Secretaries expanded discretion to identify means to meet the goals of various review and consultation requirements which had previously governed salvage timber harvests.[168] When the Forest Service could not agree with NMFS regarding its Biological Opinion, the two agencies used MOA procedures to elevate the dispute to regional office level. When a month of negotiations failed to resolve the issue, the Forest Service unilaterally elevated the dispute to a committee of agency heads in Washington D.C.[169] After reviewing the FEIS for two weeks, the Assistant Administrator of NMFS "decided to defer to the Forest Service with regard to the decision to proceed with the Thunderbolt Project."[170] Given the history of the sale and the events following the Thunderbolt fire, particularly the disagreement with NMFS over its jeopardy Biological Opinion, and the fact that the project proposal was inconsistent with the Forest Plans for the two National Forests, it seems reasonable to conclude that the Forest Service could not have gone forward with the project absent the discretion given to it under the Rescissions Act.[171]

2. *The Challenge*

After the ROD for the Thunderbolt Project was signed, the Idaho Conservation League and the Wilderness Society brought suit to enjoin the sale. The plaintiffs alleged that the Forest Service's decision was arbitrary and capricious for four reasons: 1) because it departed from past practices and agreements; 2) because the receipts from the sale would not pay for the recovery projects; 3) because the Forest Service did not concur with the opinion of other agencies who had expertise and authority, both under standard practices as well as under the Rider, regarding scientific interpretations of potential project effects; and 4) because the agency proceeded with the sale without resolving these differences of opinion. Of these the second is the most important to our discussion. In arguing that the receipts would not cover the costs of the restoration of the fire area, the plaintiffs

---

167. Brief for Federal Appellees at 14, *Idaho Conservation League*.

168. *See supra* notes 126-131 and accompanying text.

169. Brief for Federal Appellees at 16-17, *Idaho Conservation League*.

170. *Id.* at 17.

171. Plaintiffs contended that the Forest Service had to amend the Forest Plans to legally proceed with the sales. *See* Opening Brief of the Plaintiffs-Appellants at 11, *Idaho Conservation League*. The Forest Service responded that Forest Plans are continually amended as new conditions arise. *See* Brief of Federal Appellees at 31-32, *Idaho Conservation League*.

specifically and explicitly argued that the benefits were not adequate to justify incurring known risks to what all admitted was a sensitive area.[172] The court's treatment of this argument is central to our discussion of the differences between prudential and APA evaluations of decisions.

The plaintiffs also charged that the Secretary of Agriculture had to personally approve each salvage sale, and that certain documents which were not in the agency's record should be admitted by the court as evidence to substantiate their position.[173] The district court quickly denied injunctive relief.[174] The conservation groups appealed this decision to the Ninth Circuit, using the same basic arguments. The appeals court, relying largely upon the district court's opinion, rejected again the plaintiff's claims in all three areas.[175] Because the court of appeals affirmed the district court on all issues, we will discuss the two stages of the litigation together.

3. *The Courts' Decisions*

The district court quickly struck most of the materials that the plaintiffs wanted entered into the record,[176] and dispatched the peripheral concerns about who should sign the salvage sale documents.[177] The Ninth Circuit Court rejected an argument that the district court exceeded its discretion in striking extra-record documents that were submitted as evidence.[178] Two other issues are more important for our argument; the first is standing. Protestations about standing post-*Lujan*[179] to the contrary, standing was never an issue, either for the conservation groups or for the timber industry intervenors. If there are at some future point going to be important distinctions between review of trustees and administrators under the two review regimes, it is not apparent in this set of cases. At least in the salvage sale setting, this remains a distinction without a difference.

The courts focussed more on the plaintiffs' arguments that the Forest Service's decision to proceed with the sales in the face of considerable disagreement with its sister agencies was arbitrary and capricious.[180] The courts also considered the question of whether the sale would generate adequate funds to pay for the identified restoration activities.[181] And be-

---

172. *See Idaho Conservation League*, 917 F. Supp. 1458, 1466 n.6 (D. Idaho 1995).
173. *See Idaho Conservation League*, 917 F. Supp. at 1460; 91 F.3d 1345, 1349 (9th Cir. 1996).
174. 917 F. Supp. at 1469.
175. 91 F.3d at 1349-50.
176. 917 F. Supp. at 1469.
177. *Id.* at 1468.
178. 91 F.3d at 1350.
179. *See supra* note 25 and accompanying text.
180. *See Idaho Conservation League*, 917 F. Supp. at 1463-65; 91 F.3d at 1349-50.
181. 917 F. Supp. at 1466-67; 91 F.3d at 1349-50.

cause the findings on this funding issue directly relate to the comparison between "arbitrary and capricious" and "prudent," we will focus on the plaintiffs' argument and the defendant's response. However, we also want to notice how the issue of receipts was addressed. Nowhere in the proceedings is there a suggestion that either court considered the issue of the agency's technical conclusions about the financial consequences of the harvest, as the plaintiffs urged. The courts never addressed the issue of whether the harvest was an undeniable risk which was justified by the returns—the funding the sale would provide for large-scale restoration of the fire-scarred but crucial watershed. It is in this context that APA review is most clearly different from the trust-based review.

Was the agency decision to essentially abrogate previous policies, both the "South Fork guidelines" and the Forest Plan Amendments that incorporated these guidelines, arbitrary and capricious?[182] The plaintiffs argued that they had invested considerable time and effort over a number of years to achieve the "consensus" guidelines. Their incorporation into the Forest Service's management of the watersheds was an important element of the Forest Service's authority.[183] The Forest Service, on the other hand, argued that the fires had significantly changed watershed conditions, much beyond anything anticipated in the Forest Plans, and that these changed conditions justified its decisions to proceed with the salvage project.[184]

On this issue, both courts supported the agency.[185] "The Forest Service conceded that the proposed Salvage Sale, which would authorize logging from landslide prone Riparian Conservation Habitat Areas (RCHAs), was inconsistent with established management policies for the watershed."[186] The district court agreed, noting that without "the Rescissions Act, the Salvage Sale could not be implemented without amending the Land Resource Management Plans (LRMPs) for the Boise and Payette National Forests."[187] However, the Forest Service satisfied the court that the changed conditions which resulted from the fire justified harvesting, even though the area did not meet the interim Forest Plan standards.[188] Both courts allowed the Forest Service to alter its management because it determined that the extent of the fires justified departure from previous

182. "When a Federal agency abruptly changes a long-standing, fundamental land management policy, is that decision arbitrary and capricious if the agency provides no valid reason for changing course in mid-stream?" Reply Brief of Plaintiffs-Appellants at 2, *Idaho Conservation League*.

183. Opening Brief of Plaintiffs-Appellants at 8-9, *Idaho Conservation League*.

184. *Id.* at 10, 30-32.

185. *Idaho Conservation League*, 91 F.3d at 1349; 917 F. Supp. at 1464-67.

186. *See Idaho Conservation League*, 917 F. Supp. at 1465.

187. *Id.* at 1465-66.

188. *Id.*

standards.[189] This result was based solely on the extent of the fire, and not on how the action would affect fish habitat.[190]

But what were the "changed conditions" that resulted from the fires, and how would the actions proposed by the Forest Service either benefit or hamper the recovery of the South Fork for suitable salmon and trout habitat? The Forest Service contended that the 150,000-acre fire, and especially those burned areas contiguous to the South Fork resulted in changed conditions, particularly because only an average of four trees per acre were likely to survive the effects of the fire.[191] While the plaintiff conservation groups did not disagree, they contended that the activities proposed by the Forest Service would exacerbate erosion and sedimentation problems.[192] The defendants replied that logging activities associated with harvesting the dead and dying trees would break up the "hydrophobic"[193] soil condition to allow water to infiltrate rather than run off, and that limbs left on the slopes after the trunks are removed will slow down surface flows. Because the salvage would be removed by helicopter, the Forest Service contended that its operations would be "light on the land."[194] None of these assertions, however, satisfied any of the other federal agencies, who still considered the risk of harvesting to outweigh any benefits, either geological or financial, that would result.[195]

The district court decision was filled with a familiar pastiche of standard APA interpretation verbiage—the agency has not "failed to articulate 'a rational connection between the facts found and the choice made.'"[196] The district court then found—and again the appeals court concurred—that the Forest Service expert's analysis "provides the rational connection to the Forest Service's decision to proceed."[197] The court noted that under the arbitrary and capricious standard, review is "searching and careful, but narrow, and the court may not substitute its judgment for that of the agency."[198]

---

189. *Id.*; 91 F.3d at 1349.

190. *See* 917 F. Supp. at 1466; 91 F.3d at 1349.

191. Brief of Federal Appellees at 30, *Idaho Conservation League.*

192. Opening Brief of Plaintiffs-Appellants at 14, *Idaho Conservation League.*

193. Hydrophobic, or "water repelling" soils may be created after fires if vegetative litter on the soil surface contains high levels of volatile organic compounds. These compounds are vaporized and driven by high heat levels down into the soil where they condense to form a water repellent barrier. TOTO KOZLOWSKI ET AL., THE PHYSIOLOGICAL ECOLOGY OF WOODY PLANTS, 411-12 (1991).

194. *See* Brief of Federal Appellees at 27, *Idaho Conservation League.*

195. *See Idaho Conservation League*, 917 F. Supp. at 1461-62.

196. *Id.* at 1464 (quoting Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co., 463 US 29, 43 (1983)).

197. *Idaho Conservation League*, 917 F. Supp. at 1465; 91 F.3d at 1349. Notably, neither court used the Rescissions Act deference to agency interpretation as a basis for its decision.

198. 917 F. Supp. at 1464 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360,

Next, the district court relied upon *Marsh v. Oregon Natural Resources Council*, which embraced familiar language from *Overton Park*: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive."[199] The district court held that the Forest Service had adequately addressed NMFS' Biological Opinion concerns about the risk associated with salvage harvesting.[200] The court found: "The [Forest Service's] analysis concluded that harvest activities will not significantly reduce the probability of a landslide occurring. The analysis concluded that harvest activities will not significantly reduce LWD recruitment due to full retention of trees within streamside RHCA's."[201]

The district court followed the same logic in evaluating the plaintiffs argument that the decision was arbitrary and capricious because the sale "will not raise enough revenue to fund the restoration projects deemed critical by the Forest Service in the FEIS or required by . . . the Recessions Act."[202] The court noted the express language of the Recessions Act which provides that "salvage timber sales 'shall not be precluded because the costs of such activities are likely to exceed the revenues derived from such activities.'"[203] Plaintiffs had asserted that when, "as here, the Forest Service's only justification for the salvage sale is the generation of funding for restoration projects, costs and revenues must be considered."[204] But because the court had already concluded "that the Forest Service's decision to use the Salvage Sale to fund restoration is not arbitrary and capricious," it declined to decide "whether [the] Recessions Act would prohibit a contrary ruling."[205]

Most of this reasoning was relegated to a footnote. The court went on to simply agree with the Forest Service's numbers regarding funding for the sale, finding itself:

> [P]ersuaded that using the anticipated revenues from the Salvage Sale, together with [other funds], the Forest Service will be able to fund the specific projects to which it committed in the ROD. Accordingly, the

---

378 (1989)).

199. 917 F. Supp. at 1464 (citing *Marsh*, 490 U.S. at 378, which cited *Overton Park*, 401 U.S. at 416).

200. *Idaho Conservation League*, 917 F. Supp. at 1465. The justification for concern over landslides does not address landslides, per se, but instead the recruitment of large woody debris vis-à-vis the tree mortality marking guidelines. *Id.*

201. *Id.* (quoting the Forest Service's ROD, at 4).

202. *Id.* at 1466.

203. *Id.* at 1466 n.6.

204. *Id.*

205. *Id.*

> court finds that the Forest Service's decision to use the Salvage Sale to finance the restoration projects was not arbitrary and capricious.[206]

Thus, the courts determined that the Rescissions Act does not forbid salvage sales just because the costs exceed the revenues. The point for us here is that without ever getting to the effect of the Recessions Act on the weighing of risks and benefits, the courts held that balancing risks and benefits is not a part of the arbitrary and capricious analysis.

This brings us to the third issue: how is technical expertise to be considered by the courts in deciding whether an agency's behavior was arbitrary and capricious under the law? First, the Rescissions Act explicitly deferred to the agency to decide whether a proposed action will meet the standards required by the various environmental and natural resources laws,[207] some of which—like the ESA—were administered by other federal agencies. So at least the authority to interpret laws under the Rescissions Act is clear: it lies with the Forest Service.[208] But the plaintiffs argued that the Forest Service must still consider the opinions of outside scientists.[209] The Forest Service said that it did consider such opinions—"for as long as it was productive"[210]—but that in the end, it was entitled to rely on the expertise of its own employees.[211] The NMFS, the EPAA, and the USFWS all have, as does the Forest Service, recognized expertise in the areas of fisheries, fish habitat and water quality. The Forest Service also has expertise related to the effects of silvicultural operations on soils. But the court deferred not simply to the most expert, but to the agency responsible for the action. Basing its decision on *Mount Graham Red Squirrel v. Espy*,[212] the district court gave deference to the agency when it had "substantial" expertise.[213] In the end, the district court found that "nothwithstanding substantial interagency disagreement, the Forest Service was entitled to rely on the opinions and analysis of its own experts."[214]

The *Idaho Conservation League* dispute provides a rare opportunity to observe the courts applying APA standards with relatively little distortion from surrounding authorizing statutes. Under those standards, the

---

206. *Id.* at 1467.

207. Rescissions Act, § 2001(c)(1)(4). *See supra* note 126-129 and accompanying text.

208. *See* Rescissions Act, § 2001(c)(1)(4).

209. *See* Opposition Brief for Plaintiffs-Appellants at 26-30, *Idaho Conservation League* (arguing that the Rescissions Act, § 2001(c)(4), requires decisions to be based on the analysis of the administrative record, including comments from outside agencies).

210. *See* Brief for Federal Appellees at 29, *Idaho Conservation League.*

211. *Id.* at 29-30.

212. 986 F.2d 1568 (9th Cir. 1993).

213. *Idaho Conservation League*, 917 F. Supp. at 1464.

214. *Id.*

courts deferred without much hesitation to the Forest Service's position.

B. *Judicial Review Under the Prudence Standard—Okanogan County v. Belcher*

The context of the *Okanogan County* case[215] is quite different from that of the Thunderbolt dispute. In *Okanogan County*, beneficiaries of the common school trust[216] sued the Washington Department of Natural Resources (DNR), which acts as the manager of the trust lands and resources. The issue was not the familiar challenge to an allegedly undesirable timber harvest, but the opposite. Plaintiffs complained that the DNR was wrongly *withholding timber from harvest.* They charged that the trustee was putting environmental interests ahead of its fundamental duty—to act with undivided loyalty to the beneficiaries of the trust[217]—by over-complying with environmental requirements, specifically, the ESA.[218] This was a salvage issue because it arose in the context of a serious pine beetle epidemic and an ostensibly accompanying fire hazard. The plaintiffs charged that the trustee's delay in harvesting dead and damaged trees caused both a loss of value in the infested timber and an acute risk of catastrophic fire.[219]

1. *State Management of the Loomis Forest*

Prior to the late 1970s, the DNR did relatively little public planning for the use of trust land resources. This rather casual approach, which extended to timber harvest on state trust lands, ended when federal agencies developed regulations and plans under the newly enacted NEPA, NFMA and FLPMA forest planning statutes. Environmentalists challenged DNR's claim that, because of the trust status of the lands, DNR was exempt from the requirements of Washington's Environmental Policy Act (SEPA), the state's "little NEPA."[220] The DNR's putative exemption was overturned in *Noel v. Cole.*[221] The DNR responded to that adverse

---

215. Okanogan County v. Belcher, Court's Memorandum Decision (Chelan County Sup. Ct. May 30, 1996) (No. 95-2-00867-9) [hereinafter Mem. Decision].

216. For a background on Washington State Forest issues and programs, see WASHINGTON STATE BOARD OF NATURAL RESOURCES INDEPENDENT REVIEW COMMITTEE, *Report to the Washington State Board of Natural Resources from the Independent Review Committee* (June 22, 1995) (on file with author), and Souder et al., *supra* note 38. The beneficiaries who brought the case include Okanogan County and fourteen school districts.

217. The trustees' obligations are discussed briefly in this article, *supra* notes 74-79, 82-88 and accompanying text, and more fully in STATE TRUST LANDS, *supra* note 4, at ch. 3.

218. *See* Memorandum in Support of Petitioner's Request for Mandatory and Injunctive Relief at 23-254, *Okanogan County.*

219. *See id.* at 2.

220. SEPA is codified at WASH. REV. CODE §§ 43.21C.010 - 43.21C.910 (1996).

221. Noel v. Cole, Mem. Op. No. 9806, (Island County Super. Ct., Wash., June 23, 1978), and

decision, in early 1979, by withdrawing all timber sales and developing a complex forest planning process. The planning process included the Forest Land Management Program, which yielded the first Forest Land Management Plan, accompanied by a programmatic environmental impact statement (EIS) as required by SEPA. In October 1979, environmentalists filed suit claiming that the EIS was inadequate.[222] The DNR responded by designing a process to produce a series of planning documents, reports, and revised documents that are familiar to students of federal land management planning. The evolution of the state process is summarized in Table 1.[223] It is important to note that this planning process is not required by statute. Rather, the trustee developed the planning regime as a prudent response to stop public outcry.

1979	Forest Land Management Program (& Final EIS).
1982	1983-1992 Forest Land Management Program (FLMP).
1983	Proposed Forest Land Management Program, 1984-1993.
1984	Final Forest Land Management Program, 1984-1993 (& Final EIS)
1987	State Forest Board Lands: A Report to the Counties.
1989	Commission on Old Growth Alternatives for Washington's Forested Trust Lands Final Report.
1992	Final Forest Resource Policy Plan, 1992-2002 (& Final EIS).
1996	Habitat Conservation Plan (& Final EIS).

Table 1. Washingon DNR Timber Planning Policy Documents.[224]

Harvesting on the Loomis became an issue just as the long-delayed sales program was taking shape. The Loomis Forest is the largest of the DNR's trust land units, consisting of 134,000 acres in North Central Washington. Although it constitutes about five percent of the 2.1 million acres managed by the DNR, it is also among the least valuable trust properties. Until the early 1990s, the lodgepole pine, which dominates the site

Order Granting Summ. J. (January 3, 1979).

222. The litigation was known as *2.1 Million Acres of Trees v. Cole*, (Thurston County Sup. Ct. 1979) (No. 79-2-01135-2). This case never went to trial because the DNR reached a settlement agreement (on file with the authors) with the plaintiffs. The provisions in this agreement were subsequently incorporated in the 1983 Forest Land Management Plan. Telephone conversation with Mr. Jerry Otto, Director of Policy, DNR, April 17, 1997.

223. This evolution is discussed in great detail in Souder, et al., *supra* note 38, *passim*.

224. Source: Souder et al., *supra* note 38.

and the dispute, was considered to have little or no commercial value. In 1992 and 1993, the value of the timber increased, and the DNR began offering sales. The sales were immediately challenged by both environmental groups and the Washington Department of Fish and Wildlife. In late 1992, former DNR Commissioner Bryan Boyle withdrew the remaining sales.[225] The issue then became a salvage sale problem when the Loomis experienced the outbreak of pine beetles. The new DNR Commissioner Jennifer Belcher responded with yet another planning process. This time, a citizens group reviewed the resources of the Loomis and recommended goals and objectives for managing the forest. This citizen's review provided a framework for a draft Loomis State Forest Landscape Plan and accompanying EIS, which were published in March, 1994. The final plan was published in June, 1996, about a week after the district court rendered its first opinion in the *Okanogan County* case.[226]

2. *The Challenge*

In *Okanogan County*, the plaintiffs argued that the DNR's self-designed planning process was a tactic demonstrating "that the DNR has chosen to favor the interests of its environmental constituents over its legally mandated trust responsibilities."[227] Specifically, the plaintiffs argued that the trustee was avoiding harvest in order to protect endangered species, notably the lynx. This, plaintiffs asserted, was a violation of their duty of undivided loyalty to the beneficiary. The plaintiffs sought three remedies. First, they requested a writ of mandamus ordering DNR to comply with a state law that directs them to "determine if the sale of the damaged timber is in the best interests of the trust for which the land is held." State law requires DNR to make the determination within seven months from when DNR identified the damage. Plaintiffs charged that such determination was being arbitrarily and capriciously withheld.[228] Second, "because the Respondents have proven themselves incapable of acting as prudent trust managers," the plaintiffs asked the court to "require the DNR to undertake a commercially reasonable and prudent program of harvest and salvage." Specifically, the plaintiffs presented an alternative plan for managing the Loomis which they requested the court to enjoin the DNR to adopt. Finally, the plaintiffs requested the court to retain jurisdiction of the

225. Declaration of Roy Henderson, DNR, at 4, *Okanogan County*.

226. *See* WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, *Natural Resources Board Adopts Long-Term Plan for Managing Loomis State Forest* (Press Release), June 4, 1996.

227. Memorandum in Support of Petitioner's Request for Mandatory and Injunctive Relief at 24, *Okanogan County*. Petitioners asked for an injunction and a writ of mandamus. *Id.* at 33-34. This discussion focuses not on the legal requirements defining those forms of relief in Washington, which were obviously much debated, but on the trustee's duty of prudent management of the trust.

228. *Id.* at 8-9.

case and consider damages resulting from DNR's failure to act in a timely manner.[229]

The plaintiffs' core argument is a difficult one to sustain technically. The plaintiffs asserted that there is an unvarying process of natural succession at work on the Loomis State Forest: when the trees, primarily lodgepole pine, reach maturity, they become vulnerable to insect infestation. Infected trees, if not harvested, will inevitably burn, making way for a new forest and a repetition of the cycle. Plaintiffs also contended that there is only one prudent way to respond to this inevitable chain of events: the "only way out," their brief asserts repeatedly, is to harvest as much lodgepole as possible before it is killed, and then to accelerate the harvest of dead and dying timber before "a fire explodes which no amount of human intervention can control."[230]

The heart of their argument is that ecosystem processes are absolutely predictable and managing them is a no-brainer. The trustee has no option but to harvest, to maximize returns for the beneficiary rather than let assets die and burn. One petitioner argued that "if long-term maximization of timber revenues consistent with the general laws results in the total destruction of lynx habitat in the Loomis Forest, then the lynx must go. They are not trust beneficiaries."[231]

The DNR responded with a discourse on prudence. In response to the plaintiffs' assertion that managing the Loomis presents no option but to harvest in response to the unvarying cycle from pest crisis to catastrophic fire, the agency described the complex biological, economic and political factors surrounding the forest. The DNR asserted that prudence was required first and foremost in the face of biological complexity and uncertainty. The trustee obviously did not argue that it had an obligation to the lynx or to achieve any other biodiversity goal. It did, however, tie overall health of the forest ecosystem to long-term trust productivity.[232] Accord-

229. *Id.* at 3, 34.

230. *Id.* at 6, 20-21.

231. Trial Brief of the Timber Counties at 10, *Okanogan County*.

232. State Respondents' Brief in Opposition to Request for Mandamus Writ at 23, *Okanogan County* (citing the FOREST RESOURCE PLAN (FRP), Appendix A at 12-19); *see also* Declaration of James A. Stearns, Assistant Manager for the Community and Landowner Assistance Section, Resource Protection Division, Washington State DNR, at 12. This conclusion is supported by a recent Washington Attorney General's Opinion on the precise subject: "Though providing economic support to the beneficiaries remains the primary purpose of the Department's responsibilities with regard to the federal grant lands, this purpose does not exclude all other considerations so long as such considerations are consistent with protecting the economic value and productivity of the federal grant land trusts. 1996 Op. Att'y Gen. 11, at 49. The opinion also cites with approval the recent findings of the Utah Supreme Court:

> To the extent that preservation of non-economic values does not constitute a diversion of trust assets or resources, such an activity may be prudently undertaken. To the extent . . .

ing to the state's assessment of risk and benefit, it is not necessary for the lynx to be a beneficiary. Protecting the lynx is prudent for two reasons. First, the trustee would be imprudent to foreclose the possibility that the lynx would some day become a marketable and valuable trust resource. Second, in the face of real ambiguities about the effects of intervening by harvest on forest ecosystems, maintaining the forest ecosystem is necessary to maintaining the long-term productivity of the timber resource.[233]

The second element of the DNR's arguments concerning prudence centered on economic factors. As the Loomis State Forest "contains much of the *least* productive trust forest land in the state in terms of timber growth potential and return on investments," one high DNR official pointed out, "the Loomis Forest historically has not been a high priority for investment of limited trust management funds . . . opportunity costs must be considered. Funds invested for low return or net-cost salvage operations in the Loomis are funds that cannot be invested elsewhere for perhaps greater returns."[234]

Third, the DNR discussed its planning process in terms of "political prudence." DNR argued that it was prudent to proceed in a way that allowed it to continue to operate, citing opposition to harvest as a factor that was "greatly hampering the DNR's ability to manage the forest for the benefit of the trust with any predictability or degree of success."[235] The DNR noted the need for careful planning, and trust building among interested parties, arguing that the planning process that it had developed, almost totally without statutory direction or parameters, was in the best interests of the trust.[236]

Finally, the trustee emphasized the long-term nature of its management responsibilities. Long-term productivity is a central element in trust

---

> that the protection of non-economic values is necessary for maximizing the economic value of the property, such protection may be prudently undertaken. When such preservation or protection results in a diversion of assets or loss of economic opportunity, a breach of duty is indicated.

Id. at 48 (citing National Parks & Conservation Ass'n. v. Board of State Lands, 869 P.2d 909, 916 (Utah 1993)).

233. For example, conifer boughs sales, pole sales, mushroom harvesting leases, and small diameter timber sales serve as examples of current revenue sources which did not appear feasible in the past. DNR previously recognized the value of native genetic material and set aside 2,417 acres of gene pool reserves to ensure that native genetic material, well adapted to local conditions, will be available to the trusts in the future. DNR attempts to maintain the production capacity of trust assets. State Respondent's Brief in Opposition at 29, *Okanogan County* (citing FRP, *supra* note 232, App. A at 18-19).

234. Stearns Declaration, *supra* note 234, at 3, 11; *see also* Declaration of Wes Culp, Regional Manager for the Northeast Region, DNR at 2-3, *Okanogan County*.

235. Culp Declaration, *supra* note 234, at 2.

236. Declaration of Charles I. Johnson, Highlands District Manager, Northeastern Region, DNR at 4, *Okanogan County*.

land management because of the school trust's close relationship to the permanent school fund—both the lands and the funds which land management produces are a part of the trust which must be managed in perpetuity.[237] This commitment to perpetuity justifies extremely conservative management: there are no effective ways to predict the future—biological, economic or social—nor is there anything like a clear understanding of what the long-term consequences of intense harvesting or alteration of forest systems might be. Therefore, the trustee's efforts to protect and maintain a functioning forest ecosystem system in light of the long-term commitments of the trust is prudent.[238]

The issue of political prudence raises the question of how far a trustee can go in over-complying with environmental standards and requirements. Are they limited to merely meeting the minimum standard, or can they over-comply, doing more than is required to protect watersheds, endangered species, or cultural resources? Can they hold off, or withdraw sales, as Commissioners Belcher and Boyle both did, in an effort to forestall criticism and more draconian regulation, even if it reduces returns to the beneficiary, either in the short term or over time? DNR argued that it was prudent in some cases to exceed minimum standards, even though it imposed short-term costs on the trust. Finally, DNR asserted that it may undertake some actions that do not produce profit for the trust simply to maintain working relations in the community: "Strong emphasis was put on involvement of other state agencies and interested parties in order to develop a level of trust that would allow timber sale operations to successfully advance to more appropriate levels."[239]

3. *The Decision*

As noted in Section II of this article, three of the five issues that shape judicial review under APA standards—the issue of standing, the issue of what law to apply, and the issue of whether the trustee is pursuing an old or a new policy initiative—simply do not come up in discussions of a trustee's discretion. However, the other two issues—the shape of the trustee's expertise and how it figures into the review, and the option of withholding action—are both interesting and generally found in trustee

---

237. *See* STATE TRUST LANDS, *supra* note 4, at 3, 69, 242-44, 278-98.

238. "The biology of forest ecosystems is not a perfect science," asserted declarant Stearns. "There are potential risks to the trusts in being more aggressive in the harvesting of timber to maximize value. There are potential risks to the trusts in being more protective of wildlife habitat and other public resources. The anticipated Loomis Plan is intended to strike a balance of risks at this point in time while creating and maintaining flexibility as more reliable biological information is available in the future." Stearns Declaration, *supra* note 232, at 9-10.

239. Culp Declaration, *supra* note 234, at 4.

decision review and in the present case.

As to the plaintiffs' gross assertions about managing the forest—that is regarding the basic issue of the need for any exercise of prudence, the court was quite clear. The court unequivocally rejected the plaintiffs' assertion that managing the Loomis is a no-brainer. Quotes around the term *managing* suggesting what DNR had argued, the court concluded that "[a]fter reviewing all of the technical reports . . . , it is apparent to the Court that 'managing' a forest of this size and diversity is a very complex and vast undertaking."[240] On another familiar but relevant threshold issue, the court rejected the plaintiffs' assertion that the trustee's primary goal is to maximize current return for the beneficiaries. While noting that the "State is prohibited from actions with regard to trust assets that provide benefits to others at the expense of trust beneficiaries," the court stated that "[t]here is nothing in the law that requires the Department to maximize current income."[241] The court emphasized the same long-term commitments as did DNR, noting that the trustees obligations were to all beneficiaries, "current and future, though the needs and desires of present beneficiaries m[a]y [sic] conflict with the needs and desires of future beneficiaries."[242] Although the court held over for trial a final decision on whether the trustee was "placing environmental interests above those interests of the beneficiaries,"[243] the court also concluded that "the Department must conserve and enhance natural resources in State forest trust lands to attain the highest long-term net income from these lands. In exercising its duties, the Department, as trust manager, must act in a manner that is equitable to all generations, including acting reasonably to avoid foreclosing future options of generating income from the trust assets for future generations."[244]

The trustee's expertise has a significantly different texture in the court's discussions than the Forest Service's expertise in *Idaho Conservation League*. The *Okanogan County* court ignored the normal trust law formulation regarding escalating expectations for ostensibly expert trustees.[245] Instead, the court stated that the "Department is bound to display the skill and prudence which an ordinarily capable and careful person would use in the conduct of managing a trust of like character with similar objectives."[246] That having been said, neither the trustees' expertise nor court deference to it is ever mentioned in the decision.

---

240. Mem. Decision, *supra* note 215, at 7.
241. *Id.* at 8.
242. *Id.*
243. *Id.* at 13.
244. *Id.* at 9.
245. *See supra* notes 75-76 and accompanying text.
246. *Id.*

The court is clear that the plaintiffs "do not need to prove that the Department acted arbitrarily or capriciously."[247] The court noted, in an interesting twist on the APA's formulation of a familiar phrase, that "the Court may not permit the beneficiaries of the trust to substitute their judgment for that of the trustee's judgment. However," the court continued, "the beneficiaries are entitled to a trustee that does not abuse its discretion in the exercise of its duties."[248] An abuse of discretion was not defined in terms of the amount of data presented, how it is weighed, or in the presence or absence of disagreement among experts. Rather, an abuse of discretion was defined simply as a breach of the duties that the trustee owes to the trust beneficiaries.[249] Thus, the court is not required to find either the agency or the plaintiff "more" right on the facts; nor is the court required to decide whether or not its agrees with the agency's decision, even though it finds others more persuasive. And the trustee is not required to fake or simulate certainty as to its choice among the considered options when almost any observer can see that there are real ambiguities. The criterion is not the perfection of the data but the credibility of the assertion that the decision was made with the long- and short-term benefits to the beneficiaries clearly in mind. This would seem to put the burden of proof on the trustee to show that it was acting prudently. This is, as we have noted elsewhere, where the burden lies in most cases of this type.[250]

This advantage to the complainant was somewhat mitigated in this particular dispute by the remedy which they sought. Indeed, the discussion of prudence most closely resembles the APA-type assessment of the agency's expertise when the court assesses whether the plaintiff has made an adequate showing that a clear legal or equitable right is about to be invaded in a way that causes real and substantial injury to the plaintiff. This they must do in order to meet the state standards for a preliminary injunction.[251] Thus, the proof requirements for the remedy sought by plaintiffs put an interesting torque on the burden of proof. This appears to have shifted the outcome in favor of the trustee.

The court noted that the plaintiffs' assertions (about the trustee's discretion and lack of loyalty to the beneficiary) contained two major errors. First, in devising the alternative management plan which plaintiffs urged the court to impose on DNR, plaintiffs' consultant had proceeded, incorrectly, as if the trustee were not required to comply with SEPA's envi-

247. *Id.* at 10.

248. *Id.*

249. ". . . the Court cannot find that the Department clearly breached the duties it owes to the trust beneficiaries, i.e., abused its discretion." *Id.*

250. *See* STATE TRUST LANDS, *supra* note 4, at 277-78.

251. Mem. Decision, *supra* note 215, at 10.

ronmental assessment requirements.[252] Second, the same consultant had failed to provide an analysis of the damages which his clients would suffer:

> Without an economic analysis having been completed by Mr. Ebel, it is impossible for the Court to determine whether or not the failure to harvest in the area . . . will result in actual and substantial injury to any of the beneficiaries, even those not named as plaintiffs. Consequently, the Petitioners have failed to prove that the actions or inaction of the Department . . . will result in actual and substantial injury . . . .[253]

While this case casts new light on our previous suggestions about burden of proof advantages to the plaintiff in trust cases, the plaintiffs here probably lost their advantage because of these errors. The burden of proof advantage presumably still exists, even in instances where plaintiffs seek an injunction.

Despite their errors, the plaintiffs ultimately prevailed on the mandamus issue. State law requires that once the DNR has identified that timber has been damaged by fire, wind, flood or any other cause, DNR has seven months to "determine if the sale of the damaged timber is in the best interests of the trust for which the land is held."[254] The DNR must, the court concluded, decide whether or not to harvest timber. The court declined to suggest what the decision should be or to identify an appropriate timeframe for the decision.[255] It was, curiously, inclined to hold hearings on what the timeframe should be. Given the delay already created by the planning process, the court suggested "a short time period to be appropriate."[256]

V. CONCLUSIONS

The *Okanogan County* court's discussion of the trustee's discretion in timber salvage sales differs significantly both from what we encountered in judicial review of federal land managers' decisions, and, to a lesser extent, from what we expected review of trustees's decisions to be. Many of the observed distinctions arise from the quite different origins of the administrative regime. Although the status of the state trust lands as public property masks some of the contextual differences, the traditions of trust law are essentially private. The courts act to protect the beneficiary from a wayward trustee in an arena defined by a contract-like instrument. In

252. *Id.* at 7. The plaintiffs' attorneys did not, however, miss the point. *See* Memorandum in Support of Petitioners' Request for Mandatory and Injunctive Relief at 33-34, *Okanagan County*.

253. Mem. Decision, *supra* note 215, at 13.

254. WASH. REV. CODE § 79.01.795 (1996).

255. Mem. Decision, *supra* note 215, at 9-10.

256. *Id.* at 10.

contrast, when reviewing public administrators, the courts' own role is defined in relationship to the foundation architecture of the separation of powers. Some of these basic distinctions appear to have been trumped by the subject matter—irrespective of whether public forests are managed by a federal bureaucrat or a state trustee, they are public lands, and a set of procedural expectations that has evolved over the last thirty years defines not only what is legally required of the administrator, but also what is politically prudent for the trustee. It is not surprising that both trustees and administrators produce piles of planning documents and engage in intense and extensive public dialogue regarding the management of public lands. It is significant, however, that the courts look as these quite similar assemblages in different ways.

We argued at the outset that it is easier for plaintiffs challenging trustees to gain access to court than it is for those challenging administrators. This was in part based on the idea that the issue of what "law to apply" does not come up on trust lands as it does on the federal public lands. This difference is readily observable in the salvage cases reviewed. Courts do not find themselves unable to review actions that have been "committed by law" to trustee discretion. However, our argument that standing is less important as a prerequisite for challenging a trustee than for challenging an administrator looks better in the abstract than in the case studies. Although the theoretical distinctions did not affect the cases under review, we believe that this issue bears continuing scrutiny.

The second major distinction which we anticipated was in the record amassed and the court's use of it. The APA, we argued, requires the administrator to compile a record to support her decision, to defend the choice of one option as against others proposed and analyzed. This requires, we asserted further, administrators to evince a certainty which they do not always feel, and which is not justifiable on the record. This is significantly different from the trustee's obligation to prudently weigh the risks and benefits of a proposed action and to exercise judgment. If this suggested that the state trustee was immune from the data wars and piles of documents that surround federal administrators, we have demonstrated the contrary. Perhaps because public expectations have been defined by the elaborate planning and public involvement process on federal lands, trustees in Washington found it prudent to engage in a lengthy planning and public comment program not unlike the federal efforts. Because the state process is defined by the trustee rather than by statute, the state trustee appears less vulnerable than the federal administrator to merely procedural claims—who signed this document or that one, or should have? Being a trustee does not, we may conclude, indemnify the state from meeting public expectations as well as professional criteria for adequate planning, circulation and discussion of relevant documents. The difference

here—and it is crucial—is that the trustee does not have to pretend to be sure. The trustee is supposed to identify risks and make choices. The emphasis on analyzing risks and benefits, as compared to defending as scientifically correct one of many options, emerges as significant in these cases.

Third, we hypothesized that a difference in a court's response to an assertion of expertise is significant. Under the APA, courts are required to defer to administrative expertise, in part because of their own limited technical expertise and in part because of the separation of powers. In contrast, we expected that when a trustee asserts a high level of expertise, reviewing courts would respond by requiring a higher level of performance. This would, we argued, have important ramifications for the burden of proof. In administrative law we saw a presumption that the agency knows what it is doing, thus requiring the challenger to demonstrate the contrary. In trust law, the trustee is required to demonstrate that she is acting prudently. This distinction also emerged as important in our case studies. The courts deferred almost absolutely to Forest Service expertise, in spite of very clear evidence that other agencies, with considerable relevant expertise, disagreed uniformly with the Forest Service's judgment. Even when the contest is constructed, not as a choice between court and agency expertise, but between the unanimous opinion of multiple relevant agencies and one responsible agency, the responsible agency has a preference.

In the trust case, expertise did not play out precisely as the hornbooks would suggest. The court ignored the utterly routine guideline that those alleging expertise will be held to a higher standard than an ordinarily prudent person; it at least nominally evaluated DNR decisions against a ordinary prudence standard. This occurred largely without discussion, most likely because of the specific factual situation confronting the court. Because the plaintiffs had made such an extreme argument—that no prudence was required to manage inevitable ecological cycles—the court was merely required to notice that ecosystem management is complex rather than hold the DNR to *any* particular standard of care. The situation was further confused by the remedy sought—standards for gaining an injunction appear to have pushed the court's analysis in the direction of an APA-like apportioning of the burden of proof.

Fourth, we explored whether the agent may be censured for not taking action. This was squarely at issue in the Loomis case, and the agency was in fact ordered by the court to make judgments about the advisability of a harvest of damaged timber. This was, however, in response to a specific statutory directive that the trustee do so within a specified period after determining that stands within the Forest contained dead trees. But the DNR in this instance decided to delay a full-scale salvage program (at

least in the eyes of the plaintiffs) until such time as they determined through their landscape-level analysis that it would be in the best long-term interest of the trust. So the court determined that their taking no immediate action was clearly within deference owed to the DNR in its trustee capacity.

In the contrasting Federal example from the Thunderbolt salvage sale, the Forest Service defendants felt that they were required to expeditiously act to capture the value of the timber before it deteriorated. They characterized requests for additional analysis from their previously collaborating agencies, and the plaintiffs, as "paralysis through analysis." But as *Heckler* illustrates,[257] they would have been equally within the deference given them by Congress to decide not to harvest timber as to decide that harvesting was desirable.

Finally—and related to deference to agency expertise—if an agency has embarked on a policy or strategy, is it required to continue it? It is worth noting that the Washington DNR, having announced that it would undertake a landscape-scale plan for the Loomis State Forest, believed that it was required to do so. We cannot, based on the present analyses, speak to the issue of whether a trustee would be forced to proceed with a previously announced course of action if it concluded that it was not prudent to do so. However, it seems so unlikely as to be irrelevant. In a different factual context, the Forest Service contended that "changed circumstances" resulting from catastrophic fires allowed it to abrogate previous policies and inter-agency agreements. The Forest Service stated in the Boise National Forest Plan "Standards for the South Fork Salmon River Drainage" that it would consider the recommendations of the host of other public agencies and incorporate their consensus recommendations prior to implementing any timber sales or land-disturbing activities.[258] It even justified this strategy in the face of adverse public comments in the Plan's Environmental Impact Statement:

> The Boise and Payette National Forests have worked cooperatively, and used extensive public participation to arrive at the language for management of the South Fork Salmon River drainage found in Chapter IV of the Forest Plan, which will demonstrate restoration of the South Fork. We want to acknowledge the dedication of, and thank those agencies, Indian tribal, timber industry, and environmental representatives, and those interested individuals who gave many hours of their time to help with this effort."[259]

---

257. *Supra* notes 54-55, 67-68 and accompanying text.

258. *See* USDA FOREST SERVICE, BOISE NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN, IV, at 76-77 (1990).

259. USDA FOREST SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT, BOISE NATIONAL

That the Forest Service could then assert that it had the sole expertise to determine whether the salvage sales could go forward—and have the courts defer to its expertise—points to the fundamental difference in the burden of proof required of trustees under the trust doctrine and administrators under the APA, when the manager asserts expertise.

We use these conclusions regarding judicial review of management decisions to make one further suggestion concerning the impact of differences in judicial review criteria for trust land and federal agency land management. This is a background notion concerning the role of the legislature. As we have argued elsewhere,[260] one of the key elements of the trust mandate is that it is clear, unqualified, and therefore relatively simple to interpret. And because it is the product of an intersection between ancient common law notions of the trust and grants and commitments made largely, but not exclusively, in state constitutions during the accession process, it is relatively immune from episodic legislative redefinition. For good or for ill, depending on one's policy preferences and what the trustee is doing at any point, trust land management is on a clearly marked path which is familiar to the courts. No agency flim-flamming about the exotic repositories of expertise in ecosystem management will divert the court from its essential role of assuring undivided loyalty to the beneficiary. We see real differences in how the federal and state managers approached the salvage sale issue and how the courts responded to their decisions. However, a primary ingredient is that the legislature has a different role,which inserts greater stability into the trustee's decision-making environment.[261]

These are subtle differences, not night and day. No one who has looked at the reams of documents that the trustee produced in the course of its planning for Washington State Forests in general and the Loomis in particular would argue that the trust mandate puts administration of the state's granted lands on a wholly different administrative footing than federal public lands. However, as the high water mark on the "hard look" doctrine and easy standing for plaintiffs recedes, we anticipate that these distinctions will become sharper and more important in the future.

FOREST LAND AND RESOURCE MANAGEMENT PLAN, VI-53 (1990).

260. *See generally* Souder et al., *supra* note 4.

261. *See* County of Skamania v. Washington, 685 P.2d 576 (Wash. 1984) (where the court struck down as violative of the state's duty as trustee, a law which allowed timber contractors to default on or modify their timber contracts when falling timber prices made the contracts financially difficult to fulfill).