# Growing a Greener Future: USDA and Natural Resource Conservation

by

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# GROWING A GREENER FUTURE? USDA AND NATURAL RESOURCE CONSERVATION

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*From fairly modest beginnings, the United States Department of Agriculture (USDA) has grown into a giant cluster of federal agencies with a large amount of control over some of the nation's key natural resources. Due to flawed legal mandates and organizational problems, USDA has all too often paid insufficient attention to protecting and conserving the natural resources within its power. This Comment examines the USDA farm support programs, which have had serious impacts upon soil and water resources, and the United States Forest Service's management of the nation's forests, which often has paid insufficient attention to resources other than timber. Despite the serious impacts that these programs have had in the past, this Comment concludes that there is a reason to believe that USDA may be ready to take on a more positive role in natural resource conservation. It discusses both the recent reorganization of USDA and the phase-out of the major farm support programs, viewing these as events that could fundamentally change the agency. This Comment concludes that USDA can and should retain its relevance by striving to become a natural resource agency with the mission of conserving the soil and water resources of the nation's rural areas.*

## I. INTRODUCTION

> There shall be at the seat of Government a Department of Agriculture, the general designs and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants.[1]

In 1862, President Lincoln signed the Act to Establish a Department of Agriculture (1862 Act).[2] With the country in the throes of the Civil War,

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[1] Department of Agriculture Organic Act of 1956, 7 U.S.C. § 2201 (1994). Other than the additions of "rural development, aquaculture, and human nutrition" and other slight changes, this basic authorizing provision is identical to Section 1 of the Act to Establish a Department of Agriculture (1862 Act). 12 Stat. 387 (1862).

[2] 12 Stat. 387 (1862).

the event was perhaps barely noticed at the time. But even the largest trees grow from tiny seeds.

The United States Department of Agriculture (USDA or Department) grew slowly at first, remaining fairly close to its roots for over seventy years. During this period, USDA was primarily a research and information agency, as was clearly contemplated in the 1862 Act. USDA gained full Cabinet status in 1889[3] and grew over the next few decades by expanding the scope of its research and by forming new agencies.[4] The most notable of these new agencies was the Bureau of Forestry, added in 1901 and renamed the United States Forest Service (USFS) in 1905.[5] USFS gained jurisdiction over the forest reserves of the Department of Interior in 1905 through the efforts of its first Chief, Gifford Pinchot.[6]

USDA oversight has always been a very informal affair. The Department spent its early years as a research organization made up of teams that focused upon various disciplines.[7] Constituent agencies like the Forest Service were largely independent, there being little reason for centralized oversight. For USFS and most other USDA agencies, independence has been the rule up to the present day.

The 1930s were a time of tremendous change for USDA. In that period, Congress called upon the Department to take a prominent new role as part of the expanding administrative state.[8] Though it retained its former mandate, it also grew enormously in size and importance, and its primary purpose shifted from research to service and action.[9] With a series of statutes, culminating in the Agricultural Adjustment Act of 1938,[10] Congress made USDA responsible for the very livelihood of the nation's farmers.[11] By this point, government officials were calling USDA "a new Department."[12] USDA's farm agencies, through their administration of the 1938 Act and its successors, have shaped American agriculture into what it is today.

USDA's growth has been a mixed blessing. Agricultural productivity has been the highest in history, and farm incomes have been stable. But the price has been a shift toward ever higher reliance upon chemical inputs such as fertilizers and pesticides, with corresponding severe damage to soil fertility, water quality, and other environmental amenities.[13] The

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3 WAYNE D. RASMUSSEN & GLADYS L. BAKER, THE DEPARTMENT OF AGRICULTURE 10-11 (1972).

4 *Id.* at 13-16.

5 *Id.* at 14.

6 *See* Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 633 (1997).

7 *See* RASMUSSEN & BAKER, *supra* note 3, at 6-9, 14-15.

8 *Id.* at 30-31.

9 *Id.* at 30-32.

10 7 U.S.C. § 1281 (1994).

11 RASMUSSEN & BAKER, *supra* note 3, at 23-42.

12 *Id.* at 42.

13 *See generally* George A. Gould, *Agriculture, Non-point Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 463-68 (1990) (giving a concise yet thorough account of the

farm agencies' tremendous control over the practice of agriculture has effectively made them natural resource agencies. But for most of the last sixty years they largely have been unable to admit that fact or take effective steps toward conserving the natural resources within their regulatory power. Instead, the farm agencies' programs have often caused the private owners of agricultural land to use resources in an unsustainable and damaging manner. USDA's few conservation mandates have been rendered largely ineffective by their fundamental conflicts with its farm programs.

Meanwhile, there has been little doubt that the Forest Service is a natural resource agency.[14] USFS differs from the farm agencies in that its programs and policies concern natural resources on public land—within the national forests. Its long-standing placement within USDA (despite outside efforts to shift the agency to the Department of the Interior, which administers most other public lands) has traditionally been justified by a belief that trees in the national forests are "crops" to be grown and harvested.[15] This position has prevented USFS, much like the farm agencies, from effectively conserving the natural resources within its power.[16]

The first half of this Comment discusses some of the ways that flawed legal mandates and organizational problems have kept USDA from effectively implementing science-based conservation in exercising its control

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negative environmental and human health problems created by agricultural pollution); John Charles Kluge, *Farming by the Foot: How Site-Specific Agriculture Can Reduce Non-point Source Water Pollution*, 23 COLUM. J. ENVTL. L. 89, 91-104 (1998) (providing an extensive discussion of the "enormous and seemingly intractable environmental problems" presented by fertilizer and pesticide use); Pamela S. Clarke & Stacey M. Cronk, *The Pennsylvania Nutrient Management Act: Pennsylvania Helps to "Save the Bay" through Non-point Source Pollution Management*, 6 VILL. ENVTL. L.J. 319, 324-25 n.35 (providing national statistics on the extent of non-point source pollution caused by agricultural sources).

[14] RASMUSSEN & BAKER, *supra* note 3, at 96-98; Norman W. Spaulding III, *Commodification and its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 318 (1997) (noting that the United States Forest Service (Forest Service or USFS) "is the largest natural resource agency in the federal government").

[15] Telephone Interview with Erin Ryan, Interpretive Ranger for the Mono Basin Scenic Area, United States Forest Service (Apr. 26, 1998) (not intended to be a statement of an official USFS position or policy) [hereinafter Erin Ryan Interview]; *see also* Heidi J. McIntosh, *National Forest Management: A New Approach Based on Biodiversity*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 257, 266, 308 (1997) (asserting that in times past, "timber production was the overriding priority" for the Forest Service, leading it to resist management approaches that differ from its "historical commodity-oriented approach"). The position that trees are crops to be harvested is easily traced to the Forest Service's first Chief, Gifford Pinchot and his conservationist philosophies. *See generally* James L. Huffman, *Do Species and Nature Have Rights?*, 13 PUB. LAND L. REV. 51, 69-70 (1992) (summarizing briefly Pinchot's advocacy for "sustained utilization" of public lands resources); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 77-78 (1996) (asserting that Pinchot's desire to "efficiently maximize resource extraction . . . formed 'the religion of public land management'" (quoting Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 346 (1994))). Pinchot's interest in the efficient harvest of trees can in turn be traced to European forest management practices, which Pinchot saw first-hand during a visit to Europe as a young man. GIFFORD PINCHOT, BREAKING NEW GROUND 13 (1947).

[16] McIntosh, *supra* note 15, at 265-66, 278-80.

over natural resources. Part II discusses the farm agencies and Part III discusses the Forest Service; each of these Parts will outline the major legal mandates and organizational issues, as well as resulting environmental problems.

The second half of this Comment discusses recent changes in USDA: changes that could prove to be the most significant the Department has undergone since the 1930s. These recent events provide reason to believe that USDA is moving toward a position of greater responsibility for conserving the natural resources under its care. Part IV discusses the Reorganization Act of 1994 (and related issues) and Part V discusses the 1996 Farm Bill and its potential impacts. This Comment concludes, in Part VI, with a discussion of whether a coordinated natural resource and conservation policy can and should ultimately be adopted within USDA.

## II. USDA FARM PROGRAMS—"HIGHLY INTENSIVE CROPPING AND INPUT USE"

### *A. Basic Elements of USDA's Farm Programs and Their Effects on Natural Resources*

While a detailed analysis of USDA's farm programs would require an entire book, it is necessary here to give a brief introduction to the basic elements of some of those programs and their effects on natural resources.[17] USDA conducts a wide variety of farm programs that are administered by numerous agencies within the Department. Major programs include price supports, crop insurance, agricultural research, food safety inspections, and marketing programs.[18]

The purpose of commodity programs is to stabilize farmers' incomes and thereby protect them from the effects of large shifts in crop prices. The commodity programs thus operate in tandem with federal crop insurance programs, which protect farmers from losses due to crop failures. In other words, crop insurance protects farmers against the vagaries of nature, while commodity programs protect them from the vagaries of the market. The commodity programs have focused upon just a few crops, the most important being wheat, corn, rice, and cotton.[19] The basic assumption of the programs is that if these market-dominating "commodity" crops are properly managed, the markets for the rest of the country's crops will follow.[20]

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[17] For a good and fairly brief summary of most of the programs existing as of 1990, see Joseph V. Kennedy & Jon Visser, *An Introduction to U.S. Agricultural Programs*, *in* AGRICULTURAL POLICIES IN A NEW DECADE 27 (Kristen Allen ed., 1990).

[18] *Id.* at 27-46; *see* Kristen Allen, *Reflections on the Past, Challenges for the Future: An Examination of U.S. Agricultural Policy Goals*, *in* AGRICULTURAL POLICIES IN A NEW DECADE, *supra* note 17, at 3-8. This Comment will focus primarily upon the first of these—price supports for certain crops through the so-called "commodity programs"—because these programs, much more so than the others, have had a major influence upon the nature of farming and thereby have significantly impacted natural resources.

[19] Kennedy & Visser, *supra* note 17, at 28; DAVID RAPP, HOW THE U.S. GOT INTO AGRICULTURE: AND WHY IT CAN'T GET OUT 34 (1988).

[20] RAPP, *supra* note 19, at 34-35.

Under a commodity program, the federal government effectively agrees to buy a participating farmer's products (crops) at an arranged price if the farmer is unable to sell those products on the market.[21] The program actually operates in the guise of a loan: the farmer agrees to keep his products off the market for a certain period in exchange for a nonrecourse loan. The amount of the loan is equal to the value of the products at a congressionally determined price, and the products are held as collateral for the loan. The farmer has the opportunity to try to sell the crops at a price higher than the loan value, but if he fails he can simply default on the loan and forfeit his products. Because there is no penalty for such a default, it is really just a sale to the government.[22] There is no incentive to sell at a lower price because all farmers can receive the loan rate. Prices are further stabilized because crop sales are spread throughout loan periods rather than concentrated around harvest times.[23]

Not all farmers participate in commodity programs. However, all farmers benefit from them—because the government buys so much of the commodities at prearranged prices, market prices for participants and nonparticipants alike rise to those prearranged levels.[24] Moreover, often Congress has explicitly set "target prices" for the commodity crops, with deficiency payments from the government available for farmers when market prices fall below the target levels.[25]

The final key elements of the commodity programs are the acreage reduction provisions. Perhaps the most notorious aspect of the programs, these provisions enable farmers to be paid for not growing crops. Quite simply, they are a means of controlling the supply of commodity crops. Under a commodity program, the government has to buy any unwanted surplus that is produced.[26] So, it makes sense to simply pay the farmer not to produce that surplus, rather than buy it and throw it away. Such payments are made by acreage—a farmer is paid for leaving a certain portion of his land unplanted. In theory this is also good for the soil, because the soil in the fallow land might have a chance to recover.[27]

But in reality, acreage reduction, and commodity programs as a whole, have had very serious impacts upon soil and other natural resources. By raising crop prices and simultaneously restricting the acreage that farmers can plant, these policies "encourage intensive cropping and input use on the land that is planted."[28] Continuous participation in a par-

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[21] *Id.* at 35.

[22] *Id.* at 35 (offering an excellent summary of the programs).

[23] Of course, this would not be possible for perishable products. Commodity crops all share the characteristic of storage capacity for fairly long periods. *Id.* at 12.

[24] *Id.* at 35.

[25] *Id.* at 6-37.

[26] *Id.* at 35.

[27] JOEL SOLKOFF, THE POLITICS OF FOOD 25 (1985).

[28] PAUL FAETH, GROWING GREEN: ENHANCING THE ECONOMIC AND ENVIRONMENTAL PERFORMANCE OF U.S. AGRICULTURE 24 (1995).

ticular program often leads to increased payments to the farmer.[29] As a result, the programs essentially penalize farmers for switching crops.

Commodity programs, therefore, tend to encourage farmers to grow one crop as intensely as possible. Highly intensive farming requires heavy use of chemical pesticides and fertilizers in order to maximize yields per acre. Meanwhile, continuous growth of a single crop seriously depletes the fertility of the soil. The result is a vicious cycle of dependence upon excessive use of chemical inputs. This is compounded by the loss of long-term soil fertility because chemical fertilizers can only provide short-term improvements.[30] Heavy chemical use also leads to contaminated runoff that creates water pollution, disruption of wetland and riparian ecosystems, and other forms of damage to natural resources and the environment.[31]

USDA has long been aware of these environmental problems with the commodity programs, but it has interpreted the mandate in a way that precludes addressing those problems by adjusting the programs. For example, in *Kings County Economic Community Development Ass'n v. Hardin*,[32] users of water polluted by pesticide and fertilizer runoff from farms sued USDA under the Clean Water Act (CWA)[33] and the National Environmental Policy Act (NEPA).[34] The district court had dismissed the claims because the actions polluting the water (and thus injuring the plaintiffs) were carried out by private farms, and not by USDA.[35] On appeal, the plaintiffs presented an innovative argument based upon section 103 of NEPA, which requires all federal agencies to review their statutory mandates, regulations, and policies for compliance with the goals of NEPA, and recommend any needed changes to the President by 1971.[36] This section, the plaintiffs argued, should have been read to require USDA to condition farm subsidies and loans upon the achievement of water quality standards by their recipients.[37]

USDA, and ultimately the circuit court, disagreed with this argument.[38] While USDA had conducted the required review of its programs and policies under NEPA section 103, it did not recommend placing environmental conditions upon commodity programs. In an affidavit, the As-

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29 This is a result of the allotment system, which essentially required USDA's sanction to grow a commodity crop on an area of land. Allotments were bought and sold along with the land, and could be worth more than the land itself, because they determined program eligibility. SOLKOFF, *supra* note 27, at 25.

30 FAETH, *supra* note 28, at 25.

31 Environmental problems, of course, are not the only source of criticism of the commodity programs. The most common target for criticism is their enormous cost—the programs offer a very poor return upon the government's investment. *Id.* at 1-2. According to Faeth's study, the budgetary savings from increased flexibility (essentially a euphemism for reductions in price supports) would be five times greater than the decrease in farm incomes. *Id.* at 18.

32 478 F.2d 478 (9th Cir. 1973).

33 Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1994).

34 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

35 *Kings County Econ. Community Dev. Ass'n*, 478 F.2d at 480.

36 42 U.S.C. § 4333 (1994).

37 *Kings County Econ. Community Dev. Ass'n*, 478 F.2d at 480.

38 *Id.* at 481.

sistant Secretary for International Affairs and Commodity Programs stated:

> We are of the opinion that these conditions are unrelated to the purposes for which the programs were adopted, namely to secure fair income for farmers, to provide for an adequate, but not excessive, supply of food and fibers and to provide more flexibility for farmers in making their own farm operating decisions. We believe that it would not be proper to impose conditions on participation in these programs as a means of inducing compliance with objectives that are foreign to the purposes for which the programs were established.[39]

Finding that this was a "wholly rational explanation," the court upheld USDA's decision.[40]

Had the effort to apply NEPA to the commodity programs succeeded, many of the environmental costs of those programs might have been mitigated. NEPA, under such an interpretation, would have served as an overarching mandate for natural resource conservation and pollution prevention in all of the programs of USDA (and other departments). While this would arguably fit within the broader goals of NEPA,[41] it goes well beyond the NEPA obligations that any present-day court would be able to impose upon an agency.

USDA clearly did not choose to adopt this broader view of NEPA, which would have allowed it to address the environmental problems of the commodity programs at their source. This is an example of a broader problem: USDA's pervasive tendency to view each of its mandates in isolation from one another. This tendency, a side effect of USDA's highly decentralized structure, has been a major obstacle to the achievement of any sort of coordinated conservation policy. Note, however, that should USDA overcome these problems and seek a broader conservation policy, it might do so by taking a broader view of its NEPA obligations.[42]

In spite of their enormous costs, both environmentally and fiscally, the commodity programs were an unavoidable part of American political reality over the last sixty years, and USDA was charged with the unenviable task of carrying them out.[43] The longtime political inviolability of commodity programs has, in large part, been due to an anachronistic view of American farming on the part of Congress and USDA leadership. In the 1930s, when the programs were created, agriculture was a large sector of the economy and a reasonably significant portion of the population was involved in agricultural production. At that time, much farming was still

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[39] *Id.*

[40] *Id.*

[41] 42 U.S.C. § 4321 (1994).

[42] *See infra* Part VI.

[43] At least one Secretary, Earl Butz, fought bitterly against the programs and actually achieved a fair degree of success until his tenure was cut short. By 1976, Butz had succeeded in having most government subsidies and control over farmers' use of cropland lifted. But within days after his resignation that year (as the result of an offensive racial remark), these measures began to be reversed. The first fiscal year after his resignation saw an enormous jump in price support program spending. The old system was quickly restored and remained solidly in place throughout the 1980s. SOLKOFF, *supra* note 27, at 157-58.

small-scale, and small farms are much more vulnerable to price fluctuations. During the Great Depression small family-run farms were hit particularly hard by the decrease in crop prices.[44]

Commodity programs, and other programs, were instituted primarily in order to keep small farms in business despite market price shifts. The programs, however, had an unintended side effect: because they were undiscriminating, large farms could also reap their benefits, and as a result, large farms grew larger and more powerful. Meanwhile, technological and other economic changes were increasing the scale upon which agriculture was conducted. Farms were becoming fewer in number and greater in size, and the commodity programs did nothing to halt this change. By the 1970s, the family farm was a rarity and agribusiness was the reality; Congress, however, was often reluctant to acknowledge this and many of its members still resorted to rhetoric about the ideal of the family farm.[45]

The commodity programs were born in the turmoil of the Great Depression and kept alive by the continued political salience of what was termed the "family farmer" long after most members of that class had been replaced by big businesses for which the programs were more of a windfall than a necessity. USDA bore the responsibility for the programs.[46] This responsibility was divided primarily between the Agricultural Stabilization and Conservation Service (ASCS) and the Commodity Credit Corporation (CCC).[47] Most administration was done by ASCS, but CCC was responsible for the loans.[48]

### *B. The Soil Conservation Service, and Other Efforts at Agricultural Conservation*

Despite their perpetuation of environmentally destructive farm programs, Congress and USDA have not been entirely blind to the environmental problems associated with agriculture. The problem, however, has been one of decentralized operation. ASCS and CCC have operated their programs as if in a vacuum, with no mandate to pay attention to natural resource issues. The responses to those issues have instead been assigned to other agencies. Chief among those agencies has been the Soil Conservation Service (SCS).[49]

SCS was established by the Soil Conservation Act of 1935,[50] and was given a four-part mandate: 1) research and publish results concerning soil erosion; 2) carry out preventive measures "including, but not limited to,

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[44] *Id.* at 35-36, 126.

[45] *Id.* at 8.

[46] *Id.* at 35-38.

[47] *See generally* RASMUSSEN & BAKER, *supra* note 3, at 101-03 (describing the price support system).

[48] *See id.* at 101-03, 237-38.

[49] *See* JEANNE N. CLARKE & DANIEL MCCOOL, STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCE AGENCIES 91-107 (1996) (discussing the establishment of the Soil Conservation Service (SCS)).

[50] Soil Conservation Act of 1935, Pub. L. No. 74-46, § 1, 49 Stat. 163 (codified at 16 U.S.C. § 590a (1994)).

engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land"; 3) provide assistance to agencies, organizations, or any other person for the purposes of this Act; and 4) acquire land for the purposes of this Act.[51] Toward those ends, SCS began to work with state and local governments to organize farmers to approach soil erosion problems through the formation of soil conservation districts that could regulate the farmers.[52]

Beyond this fairly successful program, though, SCS has been beset with problems for much of its history. While the decentralization of USDA allowed USFS to become a "bureaucratic superstar" in terms of agency power (though not conservation), it also helped turn SCS into an agency that would merely "muddle through."[53] This disparity between the two agencies' experiences has resulted from the nature of their mandates. The USFS mandate over the national forests, which are owned by the federal government, has a well-defined territorial jurisdiction, and hence has only limited overlap with other agencies.[54] The SCS mandate, by contrast, was highly diffuse and "inherently conflicted and overlapped with the work of several other federal agencies, including its closest competitor, [ASCS]."[55]

Farmers were already so much under the control of ASCS, through commodity and other programs, that there was little room for SCS to exert any authority over them. The fundamental conflicts between the farm price supports and soil conservation programs exacerbate this problem.[56] Had the two agencies been combined, or subject to more centralized USDA oversight, it might have been possible to reach a compromise between their mandates, but this is not how USDA traditionally operated.[57] Instead, the two mandates were simply given to different agencies, which then had to fight it out between themselves.[58]

Moreover, SCS faced numerous other conflicts throughout much of its history. Its power in the area of flood control waxed and waned through the decades. Through conflicts with USFS, SCS also played a role in broader conflicts among USDA, the Department of the Interior, and the Army Corps of Engineers.[59] In these and other interagency conflicts, SCS

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[51] *Id.*

[52] CLARKE & MCCOOL, *supra* note 49, at 93-95.

[53] *Id.* at 16.

[54] *Id.* at 50-52 (discussing the creation of USFS).

[55] *Id.* at 95.

[56] *See supra* Part II.A.

[57] *See* CLARKE & MCCOOL, *supra* note 49, at 95 (suggesting that ASCS and SCS be merged).

[58] Such conflicts are actually rather common within USDA. Its numerous marketing programs create numerous conflicts—it promotes many of the same products that it inspects for safety and purity. USFS has helped lumber companies increase their sales while at the same time protecting the national forests from which the lumber comes. *See* SOLKOFF, *supra* note 27, at 31. The proposed National Organic Program is meant to certify and thereby promote organic agriculture—originated largely in protest to the chemical-intensive practices that developed largely as a result of USDA commodity programs, research, and other farm programs.

[59] CLARKE & MCCOOL, *supra* note 49, at 97-99; *see also* ASHLEY L. SCHIFF, FIRE AND WATER: SCIENTIFIC HERESY IN THE FOREST SERVICE 140-41, 157-58 (1962).

frequently found itself dealing from a position of relative weakness, due to its limited constituent support. In the absence of a strong national lobby for soil conservation, SCS drew its primary source of support from soil conservation districts and other similar programs. Because these programs generally involve very localized interests, they do not provide much incentive or opportunity for the formulation of nationwide conservation policies.[60]

All of this might have changed with the passage of NEPA and the increased national attention to environmental issues in the 1970s. Had SCS embraced NEPA and the 1977 Soil and Water Resource Conservation Act, it might have found a true role as a conservation agency and gained an environmental constituency. Instead, it clung to its shrinking power base of local agricultural interests.[61] In the 1980s, SCS reached a nadir, as the Reagan administration brought it under political control and, more importantly, considered eliminating the agency altogether.[62]

But the 1980s also saw changes that ultimately enabled SCS to endure, after escaping elimination. With the 1985 and 1990 Farm Bills, Congress finally forced SCS to assume a broader conservation role and gain some environmental roots.[63] The Clean Water Act was also amended in 1987 to give USDA authority to work with the Environmental Protection Agency (EPA) in investigating ways to reduce agricultural pollution.[64] SCS carries out this program.[65]

The 1985 Farm Bill[66] was the most important of these statutes for SCS. It created a number of important new USDA conservation programs primarily administered by SCS. Two of these, the Conservation Reserve Program (CRP)[67] and the Wetlands Reserve Program (WRP),[68] are incentive programs. Farmers are paid to refrain from using portions of their land; and those areas are conserved either for their soil (*i.e.*, erosion prevention) or for their wetland value.[69] Other major instituted programs included the sodbuster and swampbuster programs, under which any farmer who raises a commodity crop on either highly erodible land (sodbuster) or converted wetlands (swampbuster) loses eligibility for commodity and

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[60] CLARKE & MCCOOL, *supra* note 49, at 101.

[61] *Id.* at 101-03.

[62] *Id.* at 104-05.

[63] *Id.* at 105.

[64] Clean Water Act, 33 U.S.C. § 1254(p) (1994).

[65] CLARKE & MCCOOL, *supra* note 49, at 105. Clarke and McCool actually claim that SCS was authorized to "monitor and control" such pollution; this is an overstatement. *Id.* The statute only provides authority for research to be conducted by EPA in cooperation with USDA, other agencies, and states. 33 U.S.C. § 1254(p) (1994).

[66] Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C. and 16 U.S.C.).

[67] 16 U.S.C. §§ 3831-3836a (1994 & Supp. II 1996).

[68] 16 U.S.C. §§ 3837-3837f (1994 & Supp. II 1996).

[69] Kennedy & Visser, *supra* note 17, at 44.

most other federal farm support programs.[70] SCS determines which lands fall under the provisions of these programs.[71]

These programs, especially the CRP, achieved their limited conservation goals fairly successfully.[72] They have, however, been insufficient on the whole to counteract the damage done by the commodity programs to soil, water, and other resources. Likewise, while SCS has successfully reached some conservation goals, its effectiveness has ultimately been limited by the fundamental conflict of its mandates with the effects of other USDA programs.[73]

### C. *Decentralization Mandated—The* Morgan Cases

Between 1936 and 1941, just as Congress was giving USDA greatly expanded legislative mandates, the Supreme Court decided an important series of cases involving the Department. These cases, collectively referred to as the *Morgan Cases*, would have major ramifications for the decision-making processes of all administrative agencies, including USDA.[74] In particular, the *Morgan Cases* may have reinforced (or perhaps even revived) USDA's pattern of highly decentralized decision making, and thereby helped to create an administrative structure that was unable effectively to deal with the conflicting mandates and other obstacles to natural resource conservation.[75]

The cases all involved the Secretary's authority to fix the rates paid by livestock market agencies buying and selling at stockyards.[76] This program was thus similar to the commodity programs, insofar as USDA was engaging in price fixing to protect agricultural interests from potential abuse at the (invisible) hands of the free market. Fifty of the market agencies brought suit against USDA to block the Secretary's order fixing rates for the Kansas City stockyards.[77] The agencies claimed that they had been denied a full hearing because, in relevant part, the Secretary had made his decision without considering any of the evidence that they had submitted and presented at USDA proceedings regarding the rates. The district court initially upheld the rate-fixing order, after striking all of the agencies' allegations.[78]

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[70] *Id.*

[71] *Id.*

[72] Sandra S. Batie & Daniel B. Taylor, *Cropland and Soil Sustainability*, *in* NATURAL RESOURCES FOR THE 21ST CENTURY 68 (R. Neil Sampson & Dwight Hair eds., 1990).

[73] *See infra* Parts III and IV (investigating how this may be changing).

[74] The four major Morgan cases are *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*), *Morgan v. United States*, 304 U.S. 1 (1938) (*Morgan II*), *United States v. Morgan*, 307 U.S. 183 (1939) (*Morgan III*), and *United States v. Morgan*, 313 U.S. 409 (1941) (*Morgan IV*). The discussion focuses upon the first two of these, with some reference to the fourth.

[75] *See* discussion *supra* Part II.A, I.B.

[76] *Morgan I*, 298 U.S. at 469; *Morgan II*, 304 U.S. at 13; *Morgan III*, 307 U.S. at 185; *Morgan IV*, 313 U.S. at 413.

[77] *Morgan I*, 298 U.S. at 471.

[78] *Id.* at 472.

In *Morgan I*, the Supreme Court reversed and remanded for a trial to determine whether USDA procedures were proper.[79] In so doing, it found that the proceeding was "quasi-judicial" and that, therefore, "the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations."[80] The government argued "the authority conferred by [the statute] is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order."[81] Rejecting this argument, the Court replied that "[t]he one who decides must hear [the evidence]."[82] This was the core holding of the *Morgan Cases*.

The Court stated clearly that the Secretary, or whoever assumed the authority to set rates, would have to consider the evidence in some "substantial manner."[83] The Court was careful to note that it was not trying to hinder "practicable administrative procedure,"[84] and that it was not expressing an opinion upon the Secretary's ability to delegate hearing duties to subordinates.[85] The Court further narrowed its holding by remarking that evidence in a hearing could still be taken by someone other than the Secretary if it was "sifted and analyzed by competent subordinates" and then presented to the Secretary for his consideration.[86]

In *Morgan II*, the case returned to the Supreme Court for a decision about the procedures that were actually used by USDA after the district court had held a trial (pursuant to *Morgan I*).[87] Applying the principles expounded in the previous decision, the Court examined the procedures used by USDA in setting the rates. The Secretary testified that he had "dipped into [the record] from time to time" and read the plaintiffs' briefs.[88] But of greater importance was the fact that he met with the USDA Solicitor and with officials in the Bureau of Animal Industry (the agency of USDA involved with making the findings for rate fixing under this statute). The Secretary ultimately described his order as his "own independent reactions to the findings of the men in the Bureau of Animal Industry."[89]

The Court held these procedures to be "fatally defective" and thus held the rate-fixing order invalid.[90] The Court, again seeing the situation as quasi-judicial, characterized the rate fixing as an action in which "the Government acting through the Bureau of Animal Industry of the Department

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[79] *Id.* at 482.

[80] *Id.* at 480.

[81] *Id.* at 481; *see also* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 291 (1996).

[82] *Morgan I*, 298 U.S. at 481.

[83] *Id.*

[84] *Id.* at 482.

[85] *Id.* at 478-79.

[86] *Id.* at 481-82.

[87] *Morgan II*, 304 U.S. 1, 13-14 (1938).

[88] *Id.* at 17.

[89] *Id.* at 18.

[90] *Id.* at 22.

was prosecuting the proceeding against the owners of the market agencies."[91] As such, the Court thought that it was wholly inappropriate for the Secretary to confer with officials of the Bureau, and with the Solicitor, in an ex parte manner without any opportunity for the plaintiffs to respond.[92] Because the Secretary's order was, by his own admission, based primarily upon these conferences, the order had been decided upon without a proper hearing and was therefore defective.[93]

Before discussing the implications of these cases for subsequent USDA policy, it is important to recognize their limitations. *Morgan II* contained a brief acknowledgement that the Court would not look into the "mental processes" behind a USDA decision.[94] In *Morgan IV*, the district court expanded upon this notion by requiring the Secretary to submit to detailed questioning "regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates."[95] Citing *Morgan II*, the Court rebuked the district court, stating that "[j]ust as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected."[96]

Finally, it must be acknowledged that the holdings in the *Morgan Cases* rest largely upon the fact that the proceeding at question was quasi-judicial in nature—a characterization that stemmed largely from a peculiarity of the Secretary's statutory mandate under the Packers and Stockyards Act.[97] Under the Act, the Secretary was to set rates only after determining that those rates already existing were unfair or otherwise harmful.[98] By contrast, most USDA regulatory mandates (including the commodity programs) give the Secretary general authority to set rates or prices, subject to certain broad requirements.[99]

The actual legal applicability of the *Morgan Cases* to most USDA programs (or at least to those programs with major impacts on natural resource conservation) may be rather limited. The Secretary's general authority under most of those programs means that regulatory actions within those programs are relatively free of the more individualized adjudicatory elements present in the *Morgan Cases*. These regulatory actions generally constitute simple rulemaking, which is usually not subject to the procedural requirements of the *Morgan Cases* and their successors.

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[91] *Id.* at 20.

[92] *Id.* at 21-22.

[93] *Id.* Because of this defect, the Court passed over the question of whether the Secretary's actual consideration of the evidence was adequate. However, it agreed that its function was not to "probe the mental processes of the Secretary" and thus indicated that it probably would have deferred to USDA on that issue had the problem of the plaintiffs' right to be heard not been at stake. *Id.* at 18-19.

[94] *See supra* note 93.

[95] *Morgan IV*, 313 U.S. at 422.

[96] *Id.*

[97] 7 U.S.C. § 228 (1994).

[98] *Id.* § 211.

[99] RAPP, *supra* note 19, at 135-36.

In spite of these legal limitations, the effect of the *Morgan Cases* on USDA may have been quite powerful. During its days as a collection of research teams, USDA had been quite decentralized, due to the differing priorities of each team or agency. But the facts of the *Morgan Cases* indicate that USDA, at least in the late 1920s and early 1930s, may have been trying to exert a greater degree of central control over the performance of its new regulatory duties.[100] Authority was apparently not delegated nearly as much as it is now: where the statute assigned a duty to "the Secretary," the Secretary actually assumed that duty.

These early efforts at greater centralization were dealt a sharp blow in *Morgan I* and *II*, which essentially told the Secretary that his participation in rate fixing had to be all or nothing: he could either assume control of the process and in so doing assume the time-consuming burden of analyzing evidence, or he could delegate the process to a subordinate.[101] The former was not a practical option—with USDA's size and functions expanding so greatly, the Secretary had less time to spend considering evidence, even if previously sifted by subordinates. The Secretary instead had to delegate, and has done so ever since. The *Morgan Cases* may share a significant portion of the blame for the decentralization that has characterized USDA because they rebuffed the Department's efforts at centralized oversight of regulation.

Such decentralization has had serious negative repercussions upon the conservation of natural resources. USDA regulatory programs, like the commodity programs, essentially operate in a vacuum without regard for their environmental consequences. Where conservation mandates exist, they are forced to operate at cross-purposes with these programs. Thus, as discussed previously, programs like the swampbuster and sodbuster programs, the CRP, and WRP are in large part responses to the environmental damage caused by agriculture as it was practiced under commodity programs.[102]

It would be more rational for USDA simply to address all of these issues together and formulate a set of policies that take both conservation values and farm support values into account. This, however, became a more difficult prospect, and hence less likely, with each new statutory mandate and each new agency that was added to USDA. The Department became too large and unwieldy to be capable of centralizing its operations in such a radical manner. Legislation was needed, but the conflicts be-

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[100] *Morgan I*, 298 U.S. 468, 472-77 (1936); *Morgan II*, 304 U.S. 1, 15-22 (1938); *Morgan III*, 307 U.S. 183, 185-88 (1941); *Morgan IV*, 313 U.S. 409, 413-15 (1941).

[101] *Morgan I*, 298 U.S. at 480-82; *Morgan II*, 304 U.S. at 17-19.

[102] *See supra* notes 66-73 and accompanying text. There are other examples as well. Many of USDA's research programs concern sustainable (*i.e.*, less-polluting) agriculture, which are efforts to find scientific solutions to the environmental problems of conventional agriculture as it has developed under USDA farm programs. The organic agriculture movement (and other similar movements) have developed as efforts to find alternatives to conventional agriculture. By proposing to regulate organic agriculture under its new National Organic Program, USDA proposes to enter into yet another mandate at cross-purposes with the commodity programs. National Organic Program, 62 Fed. Reg. 65849 (Dec. 16, 1997) (to be codified at 7 C.F.R. pt. 205).

tween commodity programs and conservation goals were low on Congress's list of priorities.[103] The 1994 Reorganization Act[104] and 1996 Farm Bill,[105] while they do not actually resolve these conflicts, may have created the best opportunity for change since the 1930s.[106]

## III. Forest Service Past—Still, Silent, Lifeless Places

### *A. Origins*

The original mandate of the United States Forest Service (USFS or Service) is found in the Organic Administration Act of 1897, which created the national forest system.[107] The Act provides, in relevant part, that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."[108] The Act was remarkably conservation-oriented for its time, before which unchecked logging and clearing had been the norm. The Bureau of Forestry, and USFS, were soon created to administer the new national forest system in accordance with the purposes expressed in the Act.[109]

While the Act indicates the importance of both timber values and conservation values, it does nothing to suggest whether and how to balance these values. That balancing was left to USFS. The language of the Act suggests safeguarding the following three purposes: 1) improvement/protection, 2) watershed preservation, and 3) sustainable timber production.[110] The wording gives sustainable timber production a somewhat higher priority because it is a *required* purpose.

For over fifty years, the Service sought to uphold that mandate through principles of "scientific forestry," taught at special schools and carried forward with an "aura of expertise" that originated in the power and independence secured for the Service by Gifford Pinchot.[111] The for-

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[103] This is perhaps an unavoidable result of the legislative process because political expediency tends to favor ignoring such conflicts between values. Members of Congress wish to help farmers on one day and help the environment on the next, and will thus treat the two as unrelated benefits. They do not wish to tell farmers and environmentalists that they are in conflict with each other and then create a compromise that may alienate both sides. Until voters realize the importance of such a conflict, it will often be ignored by Congress.

[104] Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 7 U.S.C. §§ 6901-7014 (1994). See *infra* Part IV for a full discussion of this statute.

[105] Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified as amended in scattered sections of 7 U.S.C.); *see* discussion *infra* Part V.

[106] See discussion *infra* Part VI on the prospect of greater USDA centralization around the goal of natural resource conservation.

[107] Organic Administration Act of 1897, ch. 2, § 1, 30 Stat. 34 (current version at 16 U.S.C. § 475 (1994)).

[108] 16 U.S.C. § 475 (1994). This section remains valid law, though it has in most cases been superseded by later statutes. *See* discussion *infra* note 137. Another section of the Act, 16 U.S.C. § 476, was repealed in 1976. *See* discussion *infra* note 146.

[109] Rasmussen & Baker, *supra* note 3, at 13-16.

[110] 16 U.S.C. § 475 (1994).

[111] Clarke & McCool, *supra* note 49, at 51-52.

estry of USFS was indeed scientific, but within very narrow limits. It focused almost solely upon the trees themselves and their value as timber. It was not, however, a complete pushover to logging interests: Herbert Kaufman's classic study comments that the Service was insulated from both lumber interests and conservation interests due to its position in USDA rather than the Department of the Interior.[112]

USDA did not demand much from the Service in return. The perception of USFS as a repository of unique expertise meant that it was largely left alone by its superiors in USDA. In the early years USDA was a collection of research teams, each with its own area of expertise, with little overlap among teams.[113] Apart from the comment cited above, and a reference downplaying the fact that the Chief of USFS was appointed by the Secretary of Agriculture,[114] Kaufman's study and those that have followed have regarded USFS as an essentially autonomous agency.[115] This is not at all surprising, given that decentralization never ceased to be a way of life at USDA.[116]

The structure of USFS has mirrored and even expanded upon the decentralization of its parent department. Kaufman indicates that decentralization was an ideology for USFS, whose effectiveness depended upon the efforts of the rangers in the field.[117] These rangers were faced with a "funnel" of vague legal mandates and sometimes conflicting directives from above, which they had to resolve.[118] Nevertheless, USFS did not fragment, and in fact managed to achieve remarkably consistent and integrated application of central Service policies by its rangers. One of the main reasons for this was that there was a remarkable degree of similarity between the employees of USFS; attitudes and beliefs were shared by most rangers in the field, as well as by their superiors.[119] These were the attitudes and beliefs of those schooled in professional scientific forestry, which became as much ideology as it was science.[120]

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112 HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR 226 (1960). Kaufman suggests that Pinchot anticipated this advantage, and that this is the reason that he fought so vigorously to have USFS kept as part of USDA. *Id.* at 226 n.11.

113 *Id.* at 25-47 (providing a profile of the Forest Service's responsibilities, activities, and organization).

114 *Id.* at 39. This still appears to be true, though Jack Ward Thomas, the predecessor of the current Chief (Mike Dombeck), was described as "half of a political appointee." CLARKE & MCCOOL, *supra* note 49, at 65. Thomas came into office after the Clinton administration pressured Dale Robertson, who was Chief under Presidents Reagan and Bush, to resign. *Id.* at 64-65.

115 CLARKE & MCCOOL, *supra* note 49, at 64 (noting that many scholars have acknowledged the high degree of autonomy given to USFS within the executive branch structure).

116 This may be in part because of the *Morgan Cases*, discussed *supra* Part II.C.

117 KAUFMAN, *supra* note 112, at 83-86.

118 *Id.* at 66-68.

119 *Id.* at 203-07.

120 CLARKE & MCCOOL, *supra* note 49, at 51-52.

### *B. Forestry as Crusade—Fire and Water*

Pursuant to the directive of the Organic Administration Act,[121] USFS was deeply concerned with the sustainability of timber harvests.[122] In particular, it was committed to reforesting cut and damaged areas, and preventing forest losses due to anything other than logging. The chief cause of such losses, of course, was fire. The crusade against forest fires was USFS's most publicly visible program, and also one of its most zealous. From early years in which fire was dubbed the red enemy of the forest, to the creation of Smokey Bear in the 1940s, USFS became practically a national firefighting agency in the public eye.

There has been a darker side to the USFS campaign against fire, however—a darker side that illustrates deep flaws within the Service's supposedly scientific forestry. From the start, USFS, even while trying to maintain the links between scientific research and forest administration, has suffered from a tension between research and public education.[123] Public education has generally been approached with a crusading, almost evangelistic, spirit. This spirit has often caused USFS to become set in its ways and resistant to new research that might contradict the lessons being supplied to the public. Fears about USFS's resistance to research and science have existed since USFS's inception.[124]

The Service's zeal to prevent forest fires and thereby preserve trees in the short run led to USFS tolerance of false scientific statements; the campaign against fires was seen as more important than scientific accuracy.[125] For decades USFS ignored or distorted the accumulating evidence that in many, if not most, forests, prescribed burning (small, controlled fires) was necessary to preserve forest health and minimize long-term fire risks by preventing large accumulations of fuel. Not until disastrous fires occurred in the South did USFS rethink its policy and begin to accept prescribed burning there.[126] In other regions, USFS remains reluctant to accept the value of prescribed burning, the result of which has been harmful upon all forest values, including timber.[127]

In fighting fire, USFS was trying (though not always succeeding) to protect the timber supply. USFS did not pursue the other portions of its mandate with such vigor. The improvement and protection purpose was essentially ignored or—probably more accurately—regarded as implicit in the other two purposes. This interpretation, though a disingenuous reading of the statutory language, was belatedly upheld by the Supreme Court

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121 16 U.S.C. § 473 (1994).

122 *Id.* § 529.

123 SCHIFF, *supra* note 59, at 3-5.

124 *Id.* at 13-14 (citing comments made in 1935 by Earle Clapp upon his promotion from Assistant Chief for Research to Associate Chief of USFS).

125 *Id.* at 83-86.

126 *Id.* at 95-96.

127 *See, e.g.*, United States Forest Service, Southwestern Region, Rocky Mountain Forest and Range Experiment Station, *An Assessment of Forest Ecosystem Health in the Southwest*, General Technical Report RM-GTR-295 (Cathy W. Dahms & Brian W. Geils eds., 1997) (visited Nov. 20, 1998) <http://www.rms.nau.edu/publications/rm_gtr_295>.

in *United States v. New Mexico*.[128] The dissenters responded that forests were not "the still, silent, lifeless places envisioned by the Court," and that protection of forests also included protection of their wildlife.[129] Such criticism could have been leveled at USFS during most points in its history.

USFS's response to the watershed portion of its Organic Administration Act mandate is illustrative of its traditionally negative attitude toward conservation science. USFS did not interpret away its watershed mandate, as it arguably did with whatever mandate it had under the improvement and protection clause of the Organic Administration Act. Instead, USFS has simply minimized the importance of its watershed mandate by conflating it with its timber mandate—USFS has tended to view watershed values and other forest values as interchangeable. It has done this out of a strong belief that water flow protection and flood prevention are inherent characteristics of forests.[130]

While there is some truth to USFS's belief, as long as there is no logging, it is not an absolute rule. Compounding the problem, for much of its existence USFS has refused to hire hydrologists or cooperate with outsiders in order to better research flood issues.[131] In the 1930s, the Service narrowly prevented the Soil Conservation Service (SCS) from gaining full authority over watershed studies by strongly emphasizing the role of forests in flood prevention.[132] The result was something of a compromise: authority was given to the Secretary of Agriculture.[133] By the 1950s, however, SCS ultimately took over the studies—a rare show of strength for it.[134]

Ultimately, USFS's attitudes toward forest fires and watershed issues were much the same. Though ostensibly scientific, USFS forestry was infected with a "crusading spirit" that sought to increase the long-term supply of available timber, even at the expense of other resource values.[135]

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[128] 438 U.S. 696 (1978). Although the case arose after the passage of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) and the National Forest Management Act of 1976 (NFMA), the Organic Administration Act of 1897 applied because the case involved the extent of the water rights reserved by the federal government at the establishment of the national forest in question predating the newer statutes. Justice Rehnquist, writing for the majority of the Court, rejected the argument by the United States that forest administration required water rights for "aesthetic, recreational, and fish-preservation purposes." *Id.* at 705. In the traditional USFS fashion, he read the "improve and protect" language not as a separate goal but as a subordinate component of the two other goals. *Id.* at 705-10. Under this reading, the Organic Act allowed national forests to be established and administered only for timber production or water flow. Thus, absent a specific congressional reservation of water rights (which had not occurred), the United States could not be entitled to any water rights beyond those needed for these two purposes.

[129] *Id.* at 719. As such, the dissenters argued, the Forest Service should have been entitled to reserve the water flows needed to protect fish and other natural resources. *Id.* at 718-21.

[130] SCHIFF, *supra* note 59, at 161.

[131] *Id.* at 150.

[132] *Id.* at 140-41.

[133] *Id.* at 142.

[134] *See generally id.* at 162-63 (discussing the role of SCS).

[135] *Id.* at 165-66.

While the nation's total forested area became somewhat more stable, forest ecosystems became far less diverse[136] and watersheds suffered due to the lack of proper research.

### C. New Mandates, Same Story

In 1960, USFS was given a new guiding mandate with the passage of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).[137] MUSYA declares that national forests are to be "administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes"[138] and that the Forest Service is "authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom."[139] The term "multiple use" means management that maximizes utility from forest resources, provides flexibility, and considers long-term productivity and relative resource values, but does "not necessarily" mean the "greatest dollar return or the greatest unit output."[140] Timber production and potential conservation values are thus to be balanced with an eye

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[136] This was in large part due to the loss of old-growth ecosystems, whose preservation does not fit into timber production management schemes very well. Because an old-growth forest grows very slowly, more wood can be harvested by logging all the large trees as soon as possible and replacing them with young new trees that will grow back relatively quickly. Replanted forests, however, often tend to be far less biologically diverse.

[137] 16 U.S.C. §§ 528-531 (1994). The National Forest Organic Act was not actually repealed, but was generally superseded by MUSYA. The Supreme Court majority acknowledged in *U.S. v. New Mexico*, 438 U.S. 696, 713 (1977), that MUSYA "was intended to broaden the purposes for which national forests had previously been administered." But the Court went on to hold that these broader purposes were irrelevant because the case presented a situation in which the Organic Administration Act alone (and not MUSYA) applied. The case concerned the extent of the rights reserved by the federal government when creating the national forest in question; and those rights were not subsequently expanded by MUSYA. *Id.* at 714-15. Except in such anomalous situations, MUSYA is the relevant mandate for USFS policy. *Id.* at 714.

[138] 16 U.S.C. § 528 (1994).

[139] *Id.* § 529 (1994).

[140] *Id.* § 531(a) (1994). The full text of section 531 is as follows:

> As used in sections 528 to 531 of this title the following terms shall have the following meanings:
>
> (a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.
>
> (b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

*Id.*

toward economic benefits, though qualitative considerations still play a role.

Although USFS was supposed to widen its focus, it retained essentially the same degree of discretion that it had in the past. It is directed to consider broader purposes including, most significantly, more conservation-oriented values. But at the same time, MUSYA's only guidance regarding the relative weighing of these values is the definition of the term "multiple use," which is so vague as to be almost meaningless.[141] As a result, USFS is left with enormous discretion to set the priorities.[142]

The open-ended principles of MUSYA dominate most aspects of USFS administration because they are incorporated into the Service's most important modern statutory mandate, the National Forest Management Act of 1976 (NFMA).[143] NFMA is primarily a procedural statute. Its most important provision is probably the requirement that USDA prepare and maintain land and resource management plans (LRMPs) for the national forests.[144] These LRMPs are to be developed in accordance with the principles of MUSYA. They must also comply with NEPA.[145]

NFMA imposes few substantive mandates upon USFS.[146] Perhaps the most significant is that timber sales may not be made in excess of annually sustainable quantities, except in cases of salvage harvesting of damaged (*e.g.*, by fire or weather) or threatened (*e.g.*, by disease or insects) timber.[147] Note, however, that the issue of sale prices is largely left open.

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[141] *Id.*

[142] There are a few exceptions to the applicability of the multiple-use mandate. For example, National Scenic Areas (such as the Mono Lake Basin in California) are administered under a conservation-oriented mandate that more closely resembles that for the national parks (which are administered by the Department of the Interior's National Park Service). Erin Ryan Interview, *supra* note 15. The majority of lands administered by USFS, however, comprise national forests, and it is these lands and the associated policies upon which this Comment focuses.

[143] Pub. L. No. 588, 90 Stat. 2949 (1976) (codified as amended in scattered sections of 16 U.S.C.). *See, e.g.*, 16 U.S.C. §§ 1600(3), 1602, 1604(g) (1994). The Forest Service has also incorporated the MUSYA principles directly into its regulations under NFMA. *See, e.g.*, 36 C.F.R. § 219.1-219.29 (1998) (regulations for development of land and resource management plans). Note that references to "NFMA" in this Comment include provisions that actually originated in its predecessor, the Forest and Rangeland Renewable Resources Planning Act of 1974. 16 U.S.C. §§ 1600-1687 (1994).

[144] 16 U.S.C. § 1604 (1994). Note that ultimate responsibility under both NFMA and MUSYA rests with the Secretary of Agriculture. In practice this has traditionally made little difference, because the actual administration of these statutes is delegated entirely to USFS with little oversight from its superiors in USDA.

[145] 16 U.S.C. § 1604(g)(1) (1994). Even in the absence of this provision, NEPA, by its own terms, would probably demand compliance.

[146] The passage of NFMA actually removed one major substantive limitation from USFS. In *West Virginia Div. of the Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), the court had held that clearcutting of timber violated § 476 of the Organic Administration Act, which required that trees that were to be cut had to be individually marked beforehand. Clearcutting in national forests thus came to a halt as a result of the decision. In passing NFMA, Congress repealed § 476 of the Organic Administration Act and also specifically indicated that clearcutting was a viable harvesting option, subject to certain limitations. 16 U.S.C. § 1604(g)(3)(F) (1994).

[147] 16 U.S.C. § 1611 (1994).

Though the Secretary, and hence USFS, are directed to develop long-term cost benefit analyses for timber sales[148] and include them in USFS's annual report, there is no provision preventing use of a below-market price in an individual timber sale. Indeed, MUSYA appears to contemplate that below-cost timber sales will occur relatively often.[149]

The Service's mandate thus contemplates its controversial practice of below-cost timber sales, which essentially represent subsidies to the timber industry. Such sales have been widely assailed as antithetical to conservation, because they may encourage logging that would not occur with market pricing. The pricing problem represents yet another example of how an overly vague mandate has often led USFS into environmentally problematic actions.

### *D. Natural Resource Conservation Posturing*

Somewhat surprisingly, the congressional findings incorporated in NFMA suggest a proactive conservation role for USFS:

> [T]he Forest Service, by virtue of its statutory authority for management of the National Forest System, research and cooperative programs, and its role as an agency in the Department of Agriculture, has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity . . . .[150]

USFS has not done especially well at fulfilling this responsibility, at least not with regard to natural resources other than the timber resource. Because the provision is just a congressional finding, it has no real substantive effect, and is merely hortatory.[151] But it is unfortunate that the Forest Service has, until recently, paid so little heed to this provision. The provision is also noteworthy for its implication that USDA as a whole should be a leader in natural resource conservation.[152]

The Service's resistance to the consideration of biological conservation principles has been especially troublesome. Such resistance to science that is outside the traditional scope of forestry is nothing new.[153] But the conservation biology problem has been of greater importance in the

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[148] *Id.* § 1604(*l*).

[149] *Id.* Section 1604(*l*)(2) directs the Service to include in the annual report "an identification on a representative sample basis of those advertised timber sales made below the estimated expenditure for such timber." *Id.*

[150] *Id.* § 1600(6).

[151] Compare the NFMA findings with the controversy over the implications of § 101 of NEPA, 42 U.S.C. § 4331 (1994), which after early debate was ultimately held to be primarily hortatory. *See, e.g.*, Bradley C. Bobertz & Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371, 422 (1993) (stating that subsection 102(1) makes it clear that the directives in 101(b) are not merely hortatory statements of policy). The NFMA provision should, if anything, be regarded as having even less substantive force, because a "Congressional finding" probably carries less weight than the "Congressional declaration of national environmental policy" in NEPA § 101.

[152] *See infra* Part VI.

[153] *See supra* Part III.B (discussing watershed issues).

last two decades, because it has hindered the Service's compliance with the Endangered Species Act (ESA), which was passed in 1973.[154] The ESA has been a particularly troubling statute for USFS because it is so powerful and so frequently conflicts with the Service's timber production orientation.

Because conservation biology often tends to unearth endangered species problems and thereby implicate the ESA, USFS has naturally been resistant to it. Traditionally, the only potential statutory check upon this resistance has been the Secretary of Agriculture's authority to appoint a committee of scientists from outside USFS to "assure that an effective interdisciplinary approach" is used in promulgating general forest planning regulations.[155] This authority, however, applies only to rule making, not to specific cases, and appears to have been seldom exercised.

USFS has been able to pick and choose which scientific principles to acknowledge because of the great deference afforded by its legal mandates. Courts have been reluctant to disturb this state of affairs. For example, while NFMA requires that LRMPs "provide for diversity of plant and animal communities,"[156] the term "diversity" is nowhere defined, nor does the statute suggest how it is to be determined.[157] The Service is essentially free to carry out this provision in any manner it wishes, as long as it appears somewhat scientific.

For example, in the 1995 case *Sierra Club v. Marita*,[158] the Seventh Circuit stated that "conservation biology is not a necessary element of diversity analysis insofar as the regulations do not dictate that the service analyze diversity in any specific way."[159] The court held that USFS did not have to consider certain specific conservation biology principles in its LRMPs for two forests in Wisconsin.[160] Though the case on its facts was perhaps not a difficult one, several of the court's statements (including the one just cited) appear broader than necessary to decide the case. It appears that the court was unable to distinguish the special principles urged by the Sierra Club[161] from the broader discipline of conservation biology.

Ironically, this case, and many others like it, arose and were decided during the tenure of Jack Ward Thomas as Chief of USFS. Thomas had written in 1990 that the government should strive toward "holistic management" of wildlife that would apply "knowledge about all species and their

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154 16 U.S.C. §§ 1531-1544 (1994).

155 16 U.S.C. § 1604(h) (1994).

156 16 U.S.C. § 1604(g)(3)(B) (1994).

157 16 U.S.C. § 1604 (1994); *see also* Glisson v. United States Forest Serv., 876 F. Supp. 1016, 1029 (S.D. Ill. 1993) (discussing lack of statutory definition and general difficulty in defining diversity).

158 46 F.3d 606 (7th Cir. 1995).

159 *Id.* at 620.

160 *Id.*

161 The applicability of the particular principles urged by the Sierra Club to the forests at issue was unproven and appears to have been questionable. *Id.* at 619-24. Because the case could probably have been disposed of on narrow grounds, many of the court's generalizations appear overly broad.

environments into an integrated management approach."[162] He stated further that "[t]oo often, the human view of wildlife has lacked altruism."[163] In spite of these sentiments, USFS had significantly less success in incorporating conservation into its policies under Thomas than it has had under the current Chief, Mike Dombeck.[164]

The Seventh Circuit and other courts that have faced such issues, have usually appeared unwilling to consider that the scientific expertise of an agency like USFS might not lie in the particular area of science at issue. The court in *Sierra Club v. Marita* refused to compel USFS to use a different scientific methodology as long as there was *any* uncertainty as to the applicability of that methodology—even though USFS's own methodology probably contained some equally dubious elements.[165]

Given the vagueness and broad discretion of USFS's mandates, courts seldom find them to be violated.[166] And so, under the existing mandates, there appears to be little chance that USFS could be *compelled* to implement more conservation-oriented policies. USFS's great discretion, however, is a double-edged sword that could be used to promote conservation goals much more actively, should it so desire.

## IV. THE DEPARTMENT OF AGRICULTURE REORGANIZATION ACT OF 1994[167]

In 1993, Secretary Mike Espy formulated a plan to reorganize USDA in a way that he hoped would cut costs and simultaneously improve its responsiveness to the farmers and others that it served.[168] The plan was to serve as part of the Clinton administration's much-publicized initiative to "reinvent government." As part of the plan, Secretary Espy presented Congress with proposed legislation that would give him virtually unlimited authority to reorganize the Department.[169] The sun appeared to be setting upon the Department's unwieldy decentralization, in hopes that it would dawn upon a leaner, meaner Department.

Though the reality has probably fallen short of these lofty goals, the reorganization appears to have created great potential for improvements in USDA. Espy resigned in 1994, at nearly the same time Congress finally

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162 Jack Ward Thomas, *Wildlife, in* NATURAL RESOURCES FOR THE 21ST CENTURY, *supra* note 72, at 175, 194.

163 *Id.*

164 *See infra* Part IV (discussing the effects of the USDA reorganization).

165 For example, the court notes that "[t]he Service assessed animal diversity primarily on the basis of vegetative diversity." 46 F.3d at 617. This was potentially problematic because animals are much more likely to be affected by the conservation biology principles that were cited by the Sierra Club than are plants (*e.g.*, animals require larger areas of undisturbed habitat than plants). USFS's method of analysis may have been a way to tip the scales against conservation of large areas. Whether or not this was the case here is obviously unclear from the court's opinion, but the point is that courts are unwilling to look any deeper.

166 NEPA and ESA violations by USFS are more frequent, due to the more specific requirements of those statutes.

167 7 U.S.C. §§ 6901-7014 (1994).

168 Alan R. Malasky & William E. Penn, *USDA Reorganization—Fact or Fiction?*, 25 U. MEM. L. REV. 1161, 1162 (1995).

169 *Id.*

passed the legislation that he had requested.[170] Nevertheless, the reorganization went forward, and the basic organization of USDA today looks much like that envisioned in Espy's plan. USDA is now organized into the following six basic divisions: 1) Farm and Foreign Agricultural Services; 2) Rural Economic and Community Development; 3) Food Safety; 4) Food, Nutrition, and Consumer Services; 5) Natural Resources and Environment; and 6) Research, Education, and Economics.[171]

The most important changes made by the reorganization, at least for the purposes of this discussion, were in the Farm and Foreign Agricultural Services division (which houses the newly consolidated Farm Services Agency) and the Natural Resources and Environment division (which houses both the Forest Service and the newly created Natural Resources Conservation Service).[172]

### *A. The Farm Services Agency*

The most-heralded change made by the 1994 reorganization was the consolidation of all of the major farm service programs into a single agency—the Farm Services Agency (FSA).[173] This allowed the Department to reduce its costs by reducing the size of the bureaucratic staff. To farmers, the consolidation could be portrayed as cutting red tape and making the Department more user-friendly.[174]

Though it might have succeeded to some extent in this goal, the consolidation probably had little immediate effect on farm service programs, because the basic structure of most farm programs remained unchanged. The one major program that was changed by the Act was the crop insurance program, which was overhauled to increase the availability of crop insurance while restraining the future use of ad hoc legislation by Congress to address crop failures.[175] But for other programs, including commodity programs, little else was to be done in 1994. Not until 1996, when

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[170] Malasky & Penn, *supra* note 168, at 1163; *see also* Bob Benenson, *Long-Delayed Reorganization, Crop Insurance Bill Cleared*, 52 CONG. Q. WKLY. REP. 2871, 2872 (1994) (reporting passage of H.R. 4217 and resignation of Secretary Espy).

[171] *See, e.g.*, 7 C.F.R. pt. 2, Table of Contents (1998) (showing the main divisions of USDA). Note that the Espy plan's six "mission lines" were essentially the same, though with some name differences: "(1) farm and international trade services, (2) rural economic and community development, (3) food, nutrition, and consumer services, (4) natural resources and the environment, (5) marketing and inspection services, and (6) research and economics." Malasky & Penn, *supra* note 168, at 1164 (citation omitted).

[172] This, of course, is not to say that the programs of other divisions do not have environmental implications. The most significant of these will continue to be the commodity programs until their scheduled end in 2002. *See infra* Part V. Other programs also impact natural resource use. For example, the environmental impacts of agriculture in the future will no doubt be shaped by the findings of USDA research programs. This Comment, however, continues to focus primarily upon those programs which are the largest in terms of personnel, expenditures, and current environmental effects—farm service programs, conservation programs, and forestry.

[173] Malasky & Penn, *supra* note 168, at 1162-63.

[174] *Id.*

[175] *Id.* at 1165. The Department of Agriculture Reorganization Act of 1994 is the short title for Title II, and the Federal Crop Insurance Reform Act is the short title of Title I of the same

the most recent farm bill was (belatedly) passed,[176] would FSA receive a new general mandate for those programs.

### *B. The Natural Resources Conservation Service*

The most significant immediate effect of the 1994 reorganization was the creation of the Natural Resources Conservation Service (NRCS). Though primarily a renamed version of the Soil Conservation Service (SCS), NRCS inherited a wide variety of mandates. Congress specifically authorized it to administer the Water Bank Act, the Forestry incentive program, most of the Erodible Land and Wetland Conservation and Reserve Program, salinity control measures, the Farms for the Future Act of 1990, and "[s]uch other functions as the Secretary considers appropriate."[177] Specifically reserved from NRCS administration, however, was the Conservation Reserve Program (CRP).[178]

The story behind this exception, not surprisingly, appears to be one of compromise. The primary reason for creating NRCS appears to have been a desire to unite the numerous small conservation programs that were scattered throughout various USDA agencies, so that those programs could be carried out more efficiently.[179] As a locus for environmental expertise within the Department, NRCS would be better suited to make the planning decisions needed for effective conservation. Environmentalists supported the creation of NRCS for a somewhat different reason; they saw it as an agency that would be more responsive to their concerns, as well as potentially more powerful than SCS had been.[180]

For the same reason that environmentalists supported the creation of NRCS, many others were concerned about the new agency. In the past, some conservation programs had been administered by ASCS, which was traditionally responsive to farmers' concerns, while other programs were administered by SCS, which was perceived as more responsive to environmentalists.[181] These programs were to be united within a single agency whose mandate was primarily environmental. This structure was criticized by some who felt that it would ultimately lead to trouble because it apparently excluded representatives of production agriculture from decision making in the conservation programs.[182]

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piece of legislation. Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 7 U.S.C. §§ 1501, 6901 (1994).

[176] Federal Agriculture Improvement and Reform Act, Pub. L. No. 104-127, §§ 1-928, 110 Stat. 888 (1996) (codified as amended in scattered sections of the U.S.C.).

[177] 7 U.S.C. § 6962(b) (1994).

[178] *Id.* For the CRP provisions, see 16 U.S.C. §§ 3831-3836a (1994).

[179] *See* Malasky & Penn, *supra* note 168, at 1167.

[180] *Id.* at 1167, 1172-73.

[181] Malasky & Penn, *supra* note 168, at 1171-72. The proposition that SCS was more responsive to environmentalists than it was to farmers is historically inaccurate. *See supra* Part II. But it is plausible, at least, to say that SCS was seen as more environmentally oriented than ASCS.

[182] *Id.* at 1173.

One such critic was Representative Pat Roberts (R-Kan.) (at the time, the ranking minority member on the House Agriculture Committee), who sought to have NRCS incorporated into FSA. During the House debate on the reorganization legislation, Roberts expressed concern that separating NRCS from FSA would make it less responsive to farmers and would ultimately foster a more adversarial relationship between farmers and NRCS.[183] However, Roberts failed to mention that his proposal would have required more radical restructuring than the Espy plan because SCS has always been administered as part of a different division from the majority of the farm service programs.[184]

Even though the arguments voiced by Roberts may have been good politics, they did not have much to do with the rational administration of environmental law. Whether or not NRCS's relationship with farmers becomes adversarial should ideally be determined by the laws that the agency administers, and not by the agency's position in the Department. Making the agency more responsive to farmers should not be used as a pretext for weakening its authority to implement legally mandated conservation measures. Furthermore, Roberts's fears were possibly exaggerated because SCS did not seriously impair the farmers' interests during its prior decades of independence from the commodity- and program-implementing agencies.[185]

One potential advantage of Roberts's proposal was that it might have counteracted the problems of decentralization by placing the conflicting mandates of conservation and commodity programs together under one agency's roof. In theory, FSA might have found a rational policy balance between the two. But in practice, FSA was probably not up to this task. Given its domination by farm interests, FSA probably would have given conservation short shrift.

FSA is not a scientific agency. Rather, its expertise lies in the area of agricultural economics. Because conservation programs require many intrinsically scientific determinations, FSA is ill-equipped to administer them.[186] Successful administration of conservation programs requires—for now—that much of this expertise be concentrated within one agency of the Department.

Congress responded to the concerns raised by Roberts and others by keeping the CRP out of NRCS jurisdiction, and also requiring NRCS to get FSA's concurrence for actions mandated by its programs, like the Wet-

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[183] *Id.* at 1168.

[184] *See, e.g.*, USDA's 1972 Organization Chart, *reprinted in* RASMUSSEN & BAKER, *supra* note 3, at 53 (placing SCS under the Assistant Secretary for Rural Development & Conservation, while ASCS was placed under the Assistant Secretary for International Affairs & Commodity Programs).

[185] The main reason, of course, being that SCS was often a rather weak and ineffective agency. Perhaps what Roberts really feared was not that NRCS would be independent, but that it would be more effective than SCS had been. Such increased effectiveness appears to be a distinct possibility. CLARKE & MCCOOL, *supra* note 49, at 106-07.

[186] Part VI, *infra*, suggests that USDA should ultimately cultivate more conservation expertise in all of its agencies, but for the moment it must be acknowledged that such expertise is probably in relatively short supply within the Department.

lands Reserve Program.[187] Withholding of the CRP from NRCS was unfortunate, but it appears to have been a necessary compromise.

Ultimately, the concession is probably not a problem because the agency created an advisory role for NRCS under the CRP. While the authority to "formulate and carry out the Conservation Reserve Program" is delegated to the Undersecretary for Farm and Foreign Agricultural Services, the Undersecretary for Natural Resources and Environment (thus NRCS) is to provide "[t]echnical assistance related to soil and water conservation technology for the implementation and administration of the Conservation Reserve Program."[188] Whether or not this is what Congress intended, the Department's response appears to be a sensible one: retaining the benefits of NRCS expertise while technically remaining within the bounds of the (somewhat irrational) division of authority specified by the Reorganization Act.

### *C. Reorganization and the Forest Service*

The structural changes surrounding the creation of NRCS may have implications for Forest Service environmental policy. NRCS has been placed in the same division as USFS, under the Undersecretary for Natural Resources and Environment.[189]

At least in name, the new structure suggests the potential that the Natural Resources and Environment division could become a sort of natural resources agency within the Department, with USFS as its public lands component and NRCS as a private lands component.[190] But for now, a greater coordination of the two agencies is unlikely to develop from mere placement in the same division of the Department. After all, SCS and USFS were together in the same division for decades and did not engage in any significant coordination during that period.

However, a significant difference may result from the reorganization of 1994: a shift toward greater USDA centralization accompanied by diminished independence of USDA agencies, including USFS. This was clearly one of the goals sought by Espy in his discussions with Congress.[191]

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187 7 U.S.C. § 6962(c) (1994). Curiously enough, note that the forestry incentive program, which provides incentives for private reforestation, is another of these programs for which FSA concurrence is required. 16 U.S.C. § 2103 (1994). This represents a rare confluence of responsibilities within the Department—a program formerly administered and still potentially advised by USFS, currently administered by NRCS, and with veto power residing in FSA.

188 7 C.F.R. § 2.20(a)(3)(xiii)(B) (1999); *see also id.* § 2.16(a)(1)(xviii) (delegating to the Undersecretary for Farm and Foreign Agricultural Services the responsibility of "formulat[ing] and carry[ing] out the Conservation Reserve Program under the Food Security Act of 1985").

189 7 C.F.R. § 2.20 (1999).

190 See discussion *infra* Part VI on the merits of such a change.

191 For example, Espy sought to strip the USDA agencies of their autonomy as to public affairs. Under his suggestion, public affairs for all the agencies would be handled by a single office so that they all would be "singing from the same hymnal." *Reorganizing the Department of Agriculture: Hearing Before the Senate Comm. on Agric., Nutrition, & Forestry,*

The Reorganization Act nullified all prior delegations of power within the Department and revested all USDA powers in the Secretary, allowing him to delegate them as he saw fit.[192] The result was a delegation of authority following a hierarchical structure that is essentially the same as the Espy plan. For example, national forest administration was delegated from the Secretary to the Undersecretary for Natural Resources and Environment, who in turn delegated the national forest administration to the Chief of USFS.[193]

In the new regulations, however, each higher officer retains the authority to exercise any delegated power.[194] Hence, the Secretary and the Undersecretary both have the authority to overrule any decision of the USFS Chief. In the past such authority probably existed, but it was seldom, if ever, exercised due to the view of USFS as an independent and professional agency.

In addition to these organizational changes, the traditional independence of USFS has been under increasing assault on several other fronts. The Service's leadership was increasingly politicized over the last two decades. At the same time, professional diversification of the Service workforce has weakened the hold of the forestry profession upon the agency, leading to a broader but more contentious brand of expertise.[195] This weakening of professional forestry's hold on USFS may erode the perception that USFS's expertise is unique, and thus the superiors are less likely to defer to USFS's policies with which they disagree. But at the same time, politicized leadership may reduce conflicts of opinion by making USFS more likely to produce policies that are acceptable to its superiors—though within USFS itself, conflicts between career employees and political appointees may intensify.

It is difficult to predict exactly how the changes in agency structures will affect the position of USFS within USDA. While it appears likely that the Secretary will assert more direct control over USFS in the future, conflicts between the Secretary and the Chief may also be fairly rare when they are both political appointees of the same President.

Recent events suggest some of the changes that are in progress. USFS has generally appeared to be much more concerned with environmental issues of late, especially where rare or endangered species are concerned. For example, this past spring it has taken action to limit grazing in southwestern national forests in order to protect fourteen riparian species.[196] Even more significant is a plan to limit road building in the national for-

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103d Cong. 33 (1993) (statement of Mike Espy, Secretary, USDA). This way, Espy felt, "[e]ven if it is off tune occasionally, we are all singing from the same book." *Id.*

192 7 U.S.C. § 6912(a)(1) (1994). This appears to be standard practice for such departmental reorganizations. A similar formal procedure was used in the Reorganization Act of 1953. 7 U.S.C. § 2201 (1994).

193 7 C.F.R. §§ 2.20, 2.60 (1998).

194 *Id.* § 2.12.

195 CLARKE & MCCOOL, *supra* note 49, at 214-15.

196 *Grazing: USFS Proposes Grazing Limits on SW Forests*, GREENWIRE, Mar. 17, 1998, *available in* LEXIS, News Library, Greenwire File [hereinafter *Grazing Limits*].

ests, including an eighteen month moratorium in many areas.[197] Roads have caused serious damage to both soil and water in the national forests, by leading to erosion and sedimentation of rivers. Some within the Service feel that these actions against road building represent the most positive environmental tilt in USFS policy in decades.[198]

It is too soon to tell whether these measures are a result of changes in the professional composition of USFS, or simply a desire to avoid bitter public battles like those fought over the northern spotted owl and other species in the late 1980s and throughout the 1990s.[199] One group, the Southwest Center for Biological Diversity, found the initial USFS grazing limits plan inadequate, calling it "an insult to biology."[200] They also went over the Service's head, asking the Secretary to appoint an "independent team of scientists" to formulate a plan to protect the rare species.[201]

These responses appear to indicate that some still feel that the Service has a professional forestry bias that leads it to excessively favor commercial uses like timber or grazing. While the Secretary has had the authority to appoint independent (for example, non-USFS) scientific committees since 1974, it has rarely happened. Perhaps, in the context of the reorganized USDA, Secretary Glickman would be less hesitant. Note that the Southwest Center also planned to ask the Undersecretary for Natural Resources and Environment, James Lyons, to order a moratorium on grazing in riparian areas until the committee finishes its study.[202] An action of this sort would clearly demonstrate the diminished independence of USFS within the reorganized USDA.

It appears that the ultimate resolution of this grazing plan debate is coming through initiative taken by USFS itself, and not its superiors. USFS has entered into a settlement agreement with the Southwest Center for Biological Diversity that bans grazing along much of the riparian habitat, pending a biological opinion by the Fish and Wildlife Service.[203]

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197 Administration of the Forest Development Transportation System, 63 Fed. Reg. 4350 (Jan. 28, 1998); *see also National Forests: Controversy over Roads Ban Heats Up*, GREENWIRE, Mar. 20, 1998, at 5, *available in* LEXIS, News Library, Greenwire File (discussing the controversy surrounding the USFS plan to protect roadless areas in national forests).

198 Erin Ryan Interview, *supra* note 15.

199 *See, e.g.*, Boise Cascade Corp. v. Board of Forestry, 935 P.2d 422 (Or. 1997); Babbit v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995); Marbled Murrelet v. Babbit, 111 F.3d 1447 (9th Cir. 1997); Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294 (8th Cir. 1988); Southwest Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986).

200 *Grazing Limits*, *supra* note 196.

201 *Id.* Though the article does not include details, it appears that the Secretary will be asked to use his discretion under 16 U.S.C. § 1604(h)(1) to "appoint a committee of scientists who are not officers or employees of the Forest Service" in order to "assure that an effective interdisciplinary approach is proposed and adopted." *Id. See supra* Parts II.C, II.D.

202 *Grazing Limits*, *supra* note 196.

203 *Grazing: Feds, Enviros Forge Another Southwestern Pact*, GREENWIRE Apr. 17, 1998, *available in* LEXIS, News Library, Greenwire File [hereinafter *Southwestern Pact*]. An initial settlement proposal was rejected by a federal district court because ranching interests opposed it; it is unknown whether the judge will sign off on the newer settlement. *Grazing: Judge Rejects Enviro-USFS Cattle Pact*, GREENWIRE, Apr. 16, 1998, *available in* LEXIS,

The ultimate implications of USDA reorganization for USFS and its environmental policies are not yet clear. The Service has become much more of an instrument of environmental policy during the Clinton administration. However, it is difficult to predict what the organizational changes in USDA will mean for USFS environmental policy in future administrations. Certainly USFS's environmental performance in future years will be more closely tied to that of the presidential administration in power at the time.

Despite the environmental benefits now, this increased politicization of the Service could ultimately prove problematic in the long run. It is likely to create greater oscillation and ultimately greater conflict over issues such as timber management, unless the basic multiple use mandates are replaced with something a bit less malleable. Though the American public generally has become much more conservation-minded over the last few decades, it would still be naïve to ignore the likelihood that not every future presidential administration will be as conservation-oriented as the current one. In the hands of an administration that prefers heavy logging over other forest values, a more-politicized USFS will come to threaten conservation just as much as it is promoting conservation today.

While politicization may be a double-edged sword for the environment, the diversification of USFS staff represents a much more unequivocal benefit. As the Service shifts away from domination by professional forestry toward a more balanced perspective, its environmental policies can only get better. While professional forestry has always been concerned with sustainable harvests and forest renewal, it has generally failed to see the forest for the trees. It has focused primarily upon timber values (long-term though they may be) and downplayed watershed, recreational, and wildlife values, to name a few. The greater inclusion of biologists, hydrologists, and others will lead to a more balanced weighing of forest values and lead to more rational conservation policies.

### *D. The Office of Risk Assessment and Cost-Benefit Analysis*

Another step, perhaps intended to further rational conservation policies, was the creation of the Office of Risk Assessment and Cost-Benefit Analysis (Office). The establishment of this agency was one of the few specific organizational mandates imposed upon the Secretary by the 1994 Act.[204] It is not difficult to see why Congress demanded the creation of this agency. Although this was not yet the 104th Congress, there was nevertheless rising concern over the cost of environmental regulations, matched by fears that those costs did not always bring tangible (that is, politically saleable) benefits. Risk assessment and cost-benefit analysis

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News Library, Greenwire File. It is unclear whether or not the court has the power to block the settlement if it refuses to sign—the cattle associations appear likely to argue that it can. The settlement's provision for a Fish and Wildlife Service biological opinion probably means that no independent USDA scientific committee will be created, even if the Southwest Center for Biological Diversity were still to seek one.

[204] 7 U.S.C. § 2204e(a) (1994).

were becoming increasingly trendy responses to these problems in academia and already played increasing roles in government policy from the Carter administration onward.

Never before, though, had Congress mandated that an executive department create an office of this sort. It perhaps was not surprising that USDA, whose agencies were traditionally viewed by many as money pits, would be the first department to receive such an office. The creation of the Office is nonetheless important as a precedent for the disciplines of risk assessment and cost-benefit analysis.

Congress did not clearly specify the methodology that the Office was to use, instead opting to essentially combine the two somewhat different disciplines named in the Office's title. Thus, in assessing each proposed regulation, the Office is directed to consider the risks to health or the environment addressed by a regulation (including a consideration of how other similar risks are regulated), the costs imposed by the regulation, and the degree of risk reduction and other benefits generated by the regulation.[205]

What is perhaps most striking about the provision establishing the Office is that it is only to analyze those regulations "the primary purpose of which is to regulate issues of human health, human safety, or the environment."[206] While it is true that those are the sorts of regulations to which risk assessment is usually applied, it is also true that USDA's health and environmental regulations are generally the least of its problems in terms of cost. If Congress created the Office in order to rein in USDA spending, then it should have required the Office to assess all USDA regulations, including those relating to commodity program administration.[207]

It is also unclear how broadly the term "environment" is to be construed. In everyday usage, what are termed "environmental" issues generally include those related to conservation or exploitation of natural resources, and would certainly include most of the activities of USFS. Within the economic community, where risk assessment and cost-benefit analysis originated and are most applicable, the term "environmental" is sometimes reserved for pollution and public health issues, which are distinguished from natural resource or conservation issues. It is therefore not entirely clear whether the regulations of USFS should be subject to the Office's analysis. USFS does not appear to think so—its proposed regulations in the Federal Register[208] do

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[205] *Id.* § 2204e(b)(1).

[206] *Id.* The most important regulations affected will probably be the meat and produce inspection programs; any future agricultural waste regulations (*see infra* Part V.D) will also be affected.

[207] Because no one doubted that the commodity programs were costly, it was obvious that they would not look good under the scrutiny of the Office of Risk Assessment and Cost-Benefit Analysis. In 1994, at least, the programs apparently were still preserved from even such an indirect assault.

[208] *See, e.g.*, Administration of the Forest Development Transportation System, 63 Fed. Reg. 4350, 4351 (Jan. 28, 1998).

not appear to include the regulatory analysis specified by the 1994 Act.[209]

As a practical matter, it would be quite difficult for the Office to assess the activities of USFS, as well as many other USDA conservation regulations, because the disciplines of risk assessment and cost-benefit analysis have not yet developed effective techniques for quantitatively analyzing natural resource and conservation issues. Though some efforts have been made, they remain quite controversial. Last year, a group of scientists and economists announced the results of a study attempting to set a value on ecosystem services provided by nature, reaching a global average estimate of "at least $33 trillion."[210] While projects like this cannot avoid the controversies involved in valuing natural resources, at the very least they provide a useful method for framing the debates, which might ultimately prove useful to the Office, USFS, and other agencies. But for now, the Office and USFS will probably remain out of the fray and out of each other's way.

The ultimate question raised by the creation of the Office, then, is: So what? The Office, after all, has no substantive authority and in fact is not even allowed to slow down the promulgation of a regulation.[211] Its function is purely procedural—to ensure that certain regulations are accompanied by a certain type of regulatory analysis.[212] After that analysis is done, the implementing agency is technically free to proceed regardless of the outcome of the analysis.

Proponents of the Office no doubt felt that its creation would do for risk assessment in USDA what the National Environmental Policy Act did for environmental assessment.[213] That is, preparing a risk and cost analysis and then publicizing it will lead agencies to think more carefully about the effectiveness of their regulations before promulgating them and will increase their accountability for costly regulatory failures by making them more visible from the start. Moreover, it could set a precedent to be followed by other federal agencies that could lead to greater use of risk assessment and cost-benefit analysis in other departments of the government.[214] Despite all of its limitations, the Office may, therefore, ultimately prove to be a powerful innovation.

Whether the Office is good or bad for conservation when its review is applied to natural resource issues will depend upon the methodology that it ultimately chooses to apply. If it balances costs and benefits but assigns little or no value to conservation benefits that are difficult to quantify (a common drawback of many current techniques), then it will disfavor many environmentally friendly regulations and ultimately hinder conservation. But if it either reserves judgment (*e.g.*, by using comparative risk

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209 7 U.S.C. § 2204e (1994).

210 William K. Stevens, *How Much Is Nature Worth? For You, $33 Trillion*, N.Y. TIMES, May 20, 1997, at C1, C5.

211 7 U.S.C. § 2204e(b)(3) (1994).

212 *Id.* § 2204e(b).

213 42 U.S.C. § 4332 (1994).

214 Malasky & Penn, *supra* note 168, at 1187.

techniques) or determines some truly appropriate way to quantify these benefits, then it could lower the costs of conservation and prove beneficial.

## V. THE FEDERAL AGRICULTURAL IMPROVEMENT AND REFORM ACT (1996 FARM BILL)

The 1985 Farm Bill, with its swampbuster and conservation reserve programs,[215] was described in 1990 as "one of the toughest pieces of conservation legislation in decades."[216] The 1996 Farm Bill can hardly be granted the same title, as it actually scaled back some of those programs.[217] Nevertheless, it is ironically quite possible that this latest piece of farm legislation could ultimately do more for the environment than did any of its predecessors.

The reason is simple: in 1996, Congress finally found the political will to take on the commodity programs. Only once before, under the strong leadership of Secretary Earl Butz in the 1970s, had Congress come close to dismantling the programs, and those efforts had quickly withered after Butz's resignation.[218] In 1996, under the watchwords "freedom to farm" and "flexibility," Congress created a new program that gave farmers more ability to choose and mix their crops.[219] But more importantly, the new program aims to phase out commodity payments entirely.[220] In theory, American farmers will be weaned forcibly off payments and into a true market system after 2002.

### *A. The End of Commodity Payments*

The heart of the 1996 Farm Bill is the portion called the Agricultural Market Transition Act.[221] The primary purpose of these provisions is to "authorize the use of binding production flexibility contracts between the United States and agricultural producers to support farming certainty and flexibility while ensuring continued compliance with farm conservation and wetland protection requirements."[222] However, that description appears to be an exercise in spin: it tries to emphasize the benefits to farmers and assuage environmentalists' fears over the weakening of some

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215 *See generally* Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 66-69 (1997) (describing the swampbuster program, under which farmers who convert wetlands to crop production become ineligible for federal farm subsidies, and the Conservation Reserve Program, under which USDA contracts with farmers to take land out of production and plant vegetative cover instead).

216 Robert L. Thompson, *The Food Security Act of 1985 as the Basis for Future Farm Legislation*, *in* AGRICULTURAL POLICIES IN A NEW DECADE, *supra* note 17, at 90.

217 Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified as amended in scattered sections of 7 U.S.C.).

218 *See supra* note 43 and accompanying text.

219 H.R. REP. No. 104-462, at 43 (1996); Agricultural Market Transition Act, 7 U.S.C. § 7201(b)(1) (1994 & Supp. 1996).

220 H.R. REP. No. 104-462, at 43 (1996).

221 7 U.S.C. §§ 7201-7334 (1994).

222 *Id.* § 7201(b)(1).

conservation programs (for example, swampbuster) while downplaying the fact that "production flexibility contracts" represented the end of commodity programs as they had existed for some sixty years.[223]

Section 7211 authorizes the Secretary to enter into production flexibility contracts offering payments to those who farm eligible cropland and comply with conservation provisions—generally, those are farmers who have been law-abiding commodity program participants in the past.[224] Eligible cropland includes essentially the same land that would have been eligible under a continuation of the old system of commodity payments: that which was previously planted with or enrolled in an acreage reduction program for a commodity, or land coming out of an expiring conservation reserve contract.[225]

The key provisions are sections 7212 to 7214, which explain the mechanics of the contracts and ultimately indicate how they differ from prior programs.[226] Perhaps the most important provision is section 7212(b)(2), which simply states that unless earlier terminated, "[t]he term of a contract shall extend through the 2002 crop."[227] While commodity programs in earlier farm bills also tended to have limited duration, that was only because Congress intended them to be reexamined every five years when they came up for reauthorization. The 1996 Farm Bill did not reauthorize the programs in their traditional form, but instead replaced them with a one-time, explicit contractual arrangement.[228] Thus, because no provision was made for renewal of the contracts, the mandatory termination in 2002 is in effect a tacit death sentence for commodity payments.

Corresponding to the seven-year term of the contracts is a gradual decline in payments throughout that term, supposedly designed to wean farmers off the payments. Sections 7213 and 7214 establish the system by which farmers' payments under the contracts are calculated.[229] Payments to individual farmers are tied to their past receipts, in order to avoid an immediate income drop. The starting point for the calculations is section 7213(a), which acts as a bottom line by stating the total amount that the Secretary should spend on payments each year.[230] Section 7213(a) instructs the Secretary to spend $5.57 billion in 1996; in 2002, the last year of the contract payments, the figure only drops as far as $4.008 billion.[231] The contracts are thus probably not much of a "phase-out"—they are simply a transition or grace period followed by an abrupt cut-off of payments.

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223 *Id.*

224 *Id.* § 7211(a), (b).

225 *Id.* § 7211(d).

226 *Id.* §§ 7212-7215.

227 *Id.* § 7212(b)(2).

228 *Id.* § 7212(b).

229 *Id.* §§ 7213-7214.

230 The Secretary is directed to follow these numbers "to the maximum extent practicable." *Id.* § 7213(a). Presumably these words are simply intended as a hedge to allow for imperfections in bookkeeping, as well as to allow the Secretary to continue even in the event of an appropriations cut. Still, it is a somewhat vague and curious grant of discretion to the Secretary.

231 *Id.*

While some may have originally intended the program to wean farmers off commodity payments, in practice it does not appear that the program will accomplish that goal.

A more accurate explanation of what the program does is that it establishes an "adequate safety net" for farmers during the contract period.[232] During those seven years of continuing assured income, farmers can make "long term business decisions," according to Senator Grassley.[233] The subtext behind this statement is highly significant because the most plausible interpretation is that for many, these will likely be decisions to go out of business. The seven-year contract term is therefore a grace period for farmers to assess whether their operations can survive under a market system and prepare to cut their losses if they cannot.

Such statements, and indeed the entire market-transition orientation of the 1996 Farm Bill, indicate that Congress may finally be ending its obsession with the ideal of the family farm. In the past, commodity programs were often justified in large part as an effort to help smaller family farms survive and compete with big agribusinesses. However, agribusinesses also reaped the benefits of the programs and the already scarce small family farms continued to disappear. The 1996 Farm Bill indicates that Congress may finally be starting to acknowledge that the family farm it has been defending for so many years is largely a myth and should not be the basis of America's agricultural law and policy.

The major question is whether Congress will keep its word in 2002, or if it will be pressured into reviving some sort of commodity payment system. After all, Congress did leave in place much of the Secretary's statutory authority to administer price supports.[234] While there is no way to be sure, it seems probable that Congress's current antipathy toward major new spending programs will still exist at that time. For this reason it is unlikely that Congress will undertake any large-scale spending on anything like a new set of commodity programs. Though Congress might be pressured into creating a continuing safety net for some farmers, such a safety net would probably be small by comparison to the old programs. Nevertheless, the power of the agricultural lobbies should not be completely discounted, and it must be recognized that no farm bill is written in stone.

### *B. Flexibility*

Besides setting the stage for the end of commodity payments, the new program also is significant in that it introduces the idea of flexibility.[235] The program is politically motivated by the promise of "freedom to farm," and its basic idea is that commodity programs should not cause farmers to

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[232] Charles E. Grassley & James J. Jochum, *The Federal Agriculture Improvement and Reform Act of 1996: Reflections on the 1996 Farm Bill*, 1 DRAKE J. AGRIC. L. 1, 5 (1996).

[233] *Id.*

[234] 7 U.S.C. §1421 (1994).

[235] *Id.* § 7218.

become locked into growing just one crop. While the payment amount still varies from crop to crop, farmers no longer have to worry about reduced eligibility if they switch crops.

The terms of flexibility are set, somewhat circuitously, by section 7218, which begins with the rather broad and appealing proposition that "[s]ubject to subsection (b) of this section, any commodity or crop may be planted on contract acreage on a farm."[236] The subsection (b) exception, however, is rather large—it forbids the planting on contract acreage of fruits and vegetables, except for lentils, mung beans, and dry peas.[237] Paragraph (2) then lists a number of exceptions to the exception, but does not allow contract payments for land planted with fruits or vegetables unless they are being "double-cropped" with a commodity.[238]

While fruits and vegetables appear to be a rather large exclusion from a program purporting to create freedom to farm, the exclusion makes perfect sense as soon as one remembers that the purpose of the program is to eliminate commodity payments, not expand them. Congress thus had no desire to expand payments beyond those crops for which it had traditionally given payments (*i.e.*, commodities). The important aspect of flexibility is that farmers now can choose any mix of commodity crops without suffering any ill effects for making changes.

### *C. Environmental Implications of the 1996 Farm Bill*

The 1996 Farm Bill did not strengthen existing conservation programs. Though Congress made some expansions in the voluntary incentive programs, such as the conservation and wetlands reserve programs, Congress significantly weakened the swampbuster program.[239] These changes will probably be less significant for the environment than the changes in the commodity programs. Ending commodity programs should reduce the incentive to maximize production per acre and result in lighter use of chemical inputs. Because flexibility (followed by a market system) will make it easier to switch crops, the new system should reduce the incentives for farmers to use highly intensive monocropping.

Under the traditional commodity programs, farmers received an artificially high price for their crops, while the acreage they could plant was limited by acreage reduction programs. This gave farmers every incentive to squeeze as much production as possible out of the acreage planted.[240] This was accomplished primarily through highly intensive use of chemical fertilizers and pesticides. Because artificially high crop prices greatly magnified the value of small productivity increases, heavy use of chemical in-

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236 *Id.* § 7218(a).

237 Presumably these three vegetables are allowed for two reasons. First, they are similar to most commodity crops in that they produce a dry, relatively nonperishable product, easily sold by weight. Second, and perhaps more important, they are legumes (nitrogen fixers) and thus valuable for crop-rotation purposes.

238 7 U.S.C. § 7218(a)(2)(A) (1994).

239 The program is now more lenient, generally imposing fewer cut-offs of farm program benefits. *See* Karkkainen, *supra* note 215, at 67-68.

240 *See supra* Part II.A.

puts was a good deal for the farmer—the chemicals more than paid for themselves. Monocropping compounded the problem by speeding up soil depletion and ultimately leading to a need for more fertilizer use.

Ultimately, all of this intensive chemical use has led to significant environmental problems. Pesticides and fertilizers in agricultural runoff have created serious water pollution problems.[241] The soil depletion caused by chemical-intensive farming, besides creating a cycle of further chemical use, has raised serious questions as to the long-term sustainability of such practices.

It is far from certain that farmers, especially the large agricultural producers that dominate most markets, will change their growing practices even with the end of commodity programs. However, there is reason for optimism now that the commodity incentives that created many of these environmental problems are being eliminated. What happens now will largely depend upon how agricultural markets develop, especially after 2002. It is difficult to predict what the economics of pesticide and fertilizer use will look like after the prices that farmers receive for former commodity crops fall to market levels. Will chemical inputs continue to justify their cost, or will the value of the productivity gains fall to a low enough point that farmers stop using them?

There is reason to believe that growing practices will change. Recent reports indicate that the use of no-till farming techniques is on the rise.[242] These techniques maintain and improve the fertility of topsoil, and also decrease pesticide and fertilizer runoff. It has been suggested that the growing interest in no-till farming is a result of the 1996 Farm Bill, and a corresponding rise in farmers' interest in crop rotations and growing new crops.[243]

In addition, the end of commodity programs will free money in the federal budget. The $4 to 5 billion being spent on commodity payments will become available in 2002 for other uses.[244] Ideally, at least some portion of these funds will be used for conservation and pollution control programs in the agricultural sector. Even if Congress refuses to use any of these funds for environmental programs, the environment will still benefit to some extent, because existing environmental programs will not have to work against the distorted incentives created by commodity programs. As one economist stated, "environmental subsidies would be freed from the second-best remediation they currently provide, allowing for real performance gains and much greater efficiency in fiscal expenditures."[245]

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241 John Charles Kluge, *Farming by the Foot: How Site-Specific Agriculture Can Reduce Non-point Water Pollution*, 23 COLUM. J. ENVTL. L. 89, 90-104 (1998); John H. Davidson, *South Dakota Groundwater Protection Law*, 40 S.D. L. REV. 1, 11-12 (1995).

242 *Agriculture: Use of No-Till Methods Increasing—NYT*, GREENWIRE, Apr. 6, 1998, *available in* LEXIS, News Library, Greenwire File.

243 *Id.*

244 Tax reductions by not collecting the money in the first place will probably be a popular option.

245 FAETH, *supra* note 28, at 19.

The end of commodity programs will not be a panacea for agriculture's environmental problems because many other issues are involved. However, it will certainly be a step in the right direction, and it creates a unique opportunity for tremendous improvements if other important regulatory changes are also made.

### *D. Agricultural Pollution Issues After the 1996 Farm Bill*

Though the end of commodity programs has great potential to improve environmental performance of American agriculture, a number of other regulatory issues need to be resolved to fully realize that potential. Pesticides and fertilizers will continue to be overused, from a social perspective, if their cost of use does not incorporate the associated environmental harms that they cause. They are an almost textbook example of a product whose use carries negative externalities: the water pollution created as a result of pesticide and fertilizer residues in runoff does not seriously impact farmers, but it has serious environmental implications. Therefore, some sort of governmental action is needed, and will continue to be needed after 2002, to prevent the abuse and overuse of these products.

These problems, at least as to pesticides, are supposed to be addressed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[246] which imposes restrictions upon pesticides known to be environmentally harmful. It does so, however, with little regard to the magnitude of risks or environmental costs beyond a certain threshold, and thus may fail to create incentives to use less-harmful pesticides. FIFRA is administered primarily by EPA, and USDA's role in FIFRA administration is minimal; all USDA does is enforce some record keeping with regard to what are termed "restricted use" pesticides.[247] The main focus of EPA's FIFRA administration seems to be more upon human health risks,[248] and less upon broader environmental effects.[249]

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[246] Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) § 136a, 7 U.S.C. §§ 136-136y (1994 & Supp. II 1996); *see also* Judith E. Beach, *No "Killer Tomatoes": Easing Federal Regulation of Genetically Engineered Plants*, 53 FOOD & DRUG L.J. 181, 189 (1998).

[247] 7 U.S.C. §136i(1) (1994); *see also* Kimberly C. Cavanagh, Comment, *It's a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 164 nn.120-22 (1998) (noting broad authority of EPA within FIFRA).

[248] For example, FIFRA requires a pesticide to be registered before it may be marketed commercially. 7 U.S.C. § 136a (1994). Prior to registration, EPA must determine that the pesticide will not cause unreasonable adverse effects to "humans or the environment." *Id.* However, the statute defines "unreasonable adverse effect on environment" very narrowly to include any "unreasonable risk to man or the environment, taking into account economic costs . . . or a human dietary risk." *Id.* § 136b. There is, however, a great deal of scientific controversy regarding the extent of these risks, which has in turn engendered controversy over the adequacy of EPA's response to them.

[249] Moreover, FIFRA only covers pesticides and fertilizers that include pesticides but not pure fertilizer products. John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substance Control*, 91 COLUM. L. REV. 261, 263 (1991); 40 C.F.R. § 152.8 (1998) (excluding a fertilizer product not containing a pesticide from FIFRA coverage).

The other federal statute that one might expect to address pollution from pesticide and fertilizer runoff is the Clean Water Act.[250] However, the Clean Water Act specifically excludes agricultural stormwater discharges and return flows from irrigated agriculture from its definition of "point source."[251] It also specifically exempts agricultural dischargers from the point source permit requirement.[252] Moreover, agricultural runoff can be treated as a nonpoint source and included in nonpoint source management programs, which are developed on the state level and approved by EPA.[253] These nonpoint source programs have not proven effective, especially when it comes to agricultural pollution. The original Clean Water Act lacked substantive provisions for nonpoint sources. The current provision for nonpoint source programs puts responsibility upon states but does not offer them much guidance.[254] Significantly, USDA's only role under the Clean Water Act is to cooperate with research on agricultural pollution control, and no further measures against agricultural pollution are included.[255]

There are promising signs that the regulatory gap as to agricultural pollution may be about to change. On April 3, 1998, the Senate heard testimony from state and local officials who asked for national agricultural waste disposal standards.[256] These officials, including the Governor of Maryland and the Mayor of Tulsa, felt that national standards were needed due to the interstate dimensions of water pollution and the potential for what could be called the "race to the bottom" implications of continued state-level regulation.[257] Meanwhile, EPA issued new pollution standards this past March for the nation's largest livestock operations, though it has yet to issue such standards for fertilizer or pesticide runoff.[258]

Perhaps the most interesting recent development is the bill introduced by Senator Harkin (D-Iowa), which would set stricter standards than those set by EPA and would give oversight of the program to USDA.[259] While Senator Harkin's bill appears to be directed only at animal waste, and not at crop runoff or agricultural pollution as a whole, it nonetheless raises some important organizational issues.[260] In the past, many

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250 Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1994).

251 33 U.S.C. § 1362(14) (1994).

252 *Id.* § 1342(*l*)(1).

253 *Id.* § 1329.

254 *Id.*

255 *Id.* §1254(p). *See supra* note 65.

256 *Ag Waste: Senate Hears Testimony on Federal Regulation*, GREENWIRE, Apr. 3, 1998, *available in* LEXIS, News Library, Greenwire File [hereinafter *Senate Hears Testimony*].

257 *Id.* This should not be read, however, to denigrate the importance of efforts to also regulate agricultural waste at the state level. A number of states have recently made efforts at stronger regulation, particularly regarding animal waste, with varying levels of success. *Ag Waste: State Lawmakers Work to Boost Farm Regulation*, GREENWIRE, Apr. 17, 1998, *available in* LEXIS, News Library, Greenwire File.

258 *Senate Hears Testimony*, *supra* note 256.

259 *Id.*

260 This is not meant to belittle the problem of animal waste from livestock operations, which presents just as serious an environmental problem as fertilizer and pesticide runoff. Pollution from animal waste is essentially a pure disposal problem (because the wastes

would have been reluctant to place such a pollution program in USDA's hands. Indeed, some still share this feeling, including, interestingly enough, USDA Acting Deputy Undersecretary Craig Cox, who testified before the Senate committee that EPA should administer regulation of agricultural wastes.[261] In the case of animal waste, which is more of a basic waste disposal issue, EPA jurisdiction may indeed be more appropriate.

In areas such as pesticide and fertilizer runoff, much of the necessary expertise appears to reside in USDA. Additionally, USDA is better situated to take regulatory action to encourage the use (or nonuse) of pesticides and fertilizers in a manner that reduces pollution. EPA may be the best agency for addressing pollution problems at the end of the pipe, but when the best solutions lie in changed production methods, USDA may have an advantage. Weighed against these advantages, of course, is the Department's traditional bias toward the agricultural industry—for most of its history, it has existed primarily to provide services for farmers.

But this bias may be ready to change. The Forest Service's traditional bias toward timber interests may be disappearing.[262] The Farm Service Agency (FSA) and other farm-oriented agencies within the Department may be ready for an analogous change. The greatest impetus for such a change may be structural. For more than half a century, commodity programs have been the most significant (and expensive) program for the farm agencies. With these programs ending in 2002, FSA and other agencies will need to redefine their mission and refocus their energies.

While crop insurance, research, and agricultural marketing will continue to be important, the conservation programs will continue to be important as well. If incentive-based conservation programs like the Conservation Reserve Program and Wetlands Reserve Program work as well as Congress expects, they may command an increasing share of the agencies' attention. FSA and other agencies may ultimately become more sympathetic to conservation as it occupies more of their time. The end of the commodity programs thus has the potential to reshape the face of USDA by making conservation and natural resources a higher priority.

## VI. A Natural Resource Agency for the Twenty-First Century?

Historically, USDA's decentralization has presented a serious obstacle to its ability to implement natural resource conservation programs. Congress gave USDA a wide variety of legal mandates, many of which are ambiguous and conflicting, and assigned these to various agencies within the Department. By leaving each agency to pursue its own mandate independently, without centralized oversight, USDA has created a situation where might makes right, and the policies implemented by the strongest agencies are the most significant.

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themselves are unavoidable), whereas pollution from pesticides and fertilizers can be addressed through controls on their use (which is to some degree avoidable).

261 *Senate Hears Testimony*, *supra* note 256.

262 *See supra* Part IV.D.

Those agencies with well-defined, politically vocal constituencies can create an "iron triangle" of agency, constituency lobby, and congressional committee—a self-sustaining source of agency power that can be extremely resistant to change.[263] This power is even greater if the agency has a mandate that is flexible enough to allow for adaptation to changed circumstances, but circumscribed enough to create a defined sense of purpose and avoid encroachment by other agencies.[264]

Historically, the Forest Service and the farm support agencies have possessed most of these characteristics and thus have been very powerful agencies. Because that power has been derived from particular constituencies, namely lumber interests and agribusiness,[265] agency policies have primarily tended to fit the interests of those constituencies. The legal mandates dictated agency policies for the farm agencies, and they did not extend their policies beyond those mandates.[266] For the Forest Service, the legal mandates were ambiguous; the agency, exercising its discretion, tailored its policies to fit the interests of the timber industry.[267] Conservation interests were not a dominant part of either agency's historical constituency. As a result, the policies of these agencies were often insensitive to, or even incompatible with, conservation of natural resources.

The Soil Conservation Service (SCS), by contrast, had a conservation mandate and conducted programs intended to effectuate that mandate. However, it lacked the iron triangle elements of the farm agencies: its constituencies were small and localized, and its mandate was diffuse and encouraged overlap and conflict with other agencies. As a result, it was considerably weaker and unable to make much headway against the effects of the programs of its stronger sister agencies.

Thus, the strongest USDA agencies historically have not been leaders (and indeed, sometimes not even followers) in natural resource conservation. Their policies and programs, among USDA's most significant, have had serious environmental impacts.

The power structure of the Department appears to have started to shift in the last few years and may shift even more radically in the next few. The Forest Service appears to be reinterpreting its multiple use man-

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263 CLARKE & MCCOOL, *supra* note 49, at 14.

264 *Id.* at 9-11. Clarke and McCool also ascribe a great deal of importance to the presence of a perceived expertise, which comes from a professionalized workforce. They argue that the domination of USFS by professional forestry turned it into a unique repository of expertise and greatly increased its power. *Id.* at 52-53. But note that even though domination by professional foresters may have made USFS strong for many decades, that domination also made the Service overly resistant to other scientific disciplines and hindered resource conservation. In the late 1980s and early 1990s this ultimately began to undermine the Service's authority and lead to serious questions regarding the value of its narrow expertise. Clarke and McCool ultimately acknowledge this, and recognize that the Service's recent openness to other disciplines will make it stronger, not weaker. *Id.* at 64-66.

265 Though the farm agencies were in theory supposed to serve small or family farms, agribusiness has claimed most of their attention, because it has captured most of the markets. *See supra* note 45 and accompanying text.

266 *See supra* Part II.

267 *See supra* Part III.

date in a manner that is much more favorable to conservation and less solicitous of timber interests. SCS (now the Natural Resources Conservation Service (NRCS)) has been potentially revitalized and given a somewhat broader mandate that may reduce the problems of overlap with other agencies. Most importantly, the fact that commodity programs are scheduled to end in four years offers hope that some of their harmful environmental effects will subside. When (and if) they go, the influence of the Farm Service Agency (FSA) will probably shrink and the Department will have lost its largest program in terms of expenditures and economic importance.

The question, then, is what USDA should do as a result of these changes. Because the commodity programs are not likely to be replaced by any sort of analogous large-scale economic intervention program, USDA faces the serious prospect of shrinkage—both in budget and in personnel. In the face of this prospect, USDA will probably seek a new mission.

Organizations such as USDA have a "budget-maximizing incentive to broaden their service line."[268] In addition, while excessive specialization is to be avoided, an organization like USDA does have an incentive to seek monopoly power in a particular field.[269] These principles indicate that the loss of the commodity programs will create pressure to develop new programs. If those new programs, when combined with existing ones, can give USDA primary authority over a particular field, they will help preserve its power, prestige, and budget. In order to best accomplish this, USDA will need a central principle around which to organize its old efforts and concentrate its new efforts.

Natural resources conservation can and should be this central principle. USDA is well situated to become a national leader in determining rational patterns of use and conservation of soil and water in rural areas and on public lands.[270] FSA, even after the end of commodity programs, will exercise a significant degree of influence over farmers through crop insurance, loans, and other programs. The research, marketing, and inspection agencies will likewise continue to influence farming practices. NRCS continues to have a mandate to conserve the soil, as well as wetlands and other natural amenities. In addition, USFS is becoming much more proactive in its role as steward of the natural resource values within national forests, including soil and water.[271]

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268 WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 111 (1971).

269 *Id.*

270 USDA does not appear to have the capacity to become an overarching natural resources agency, entrusted to safeguard all of the nation's natural resources. While the creation of such an agency might well be a worthy goal, it would require a radical reorganization of several federal agencies and is beyond the scope of this discussion. This Comment stands for the more limited proposition that USDA may be well suited to administer the nation's soil and water resources in rural areas—a task that is by no means trivial.

271 The recent road-building moratorium provides an excellent example. *See supra* note 197 and accompanying text.

A coordinated effort by all of these agencies could go a long way toward protecting clean water and fertile soil in the nation's rural areas. This would be good not only for the nation, but also for USDA, which would be hard-pressed to find a more logical goal around which to organize itself. There has historically been too little common ground among its agencies, but conservation of soil and water, two of the most fundamental elements of agriculture, could represent such a common ground. USDA should not pass up this opportunity to increase its effectiveness.

Such a change would not be an easy one. Several potential interdepartmental conflicts could develop from such a recasting of USDA policies. For example, the Forest Service's recent turn toward greater conservation may lead to a renewal of efforts to merge it with the Department of the Interior's Bureau of Land Management. This would create a single public lands agency with a somewhat greater conservation orientation than the Forest Service.[272]

A transfer such as this would provide the advantage of better coordination of national public land policies. It would also sacrifice the potential synergies that could arise from coordination of USFS policies, which affect public lands, with those of the NRCS, which primarily affect private, rural lands. The additional transfer of NRCS to the Department of the Interior would address this criticism, but is unlikely because the Department of the Interior traditionally has only administered public lands.

There is another potential conflict with EPA, which administers the Clean Water Act. At present, USDA's only role under that act is a consultative one with regard to agricultural pollution. Given USDA's traditional record on environmental issues, the administration of the Clean Water Act by EPA was quite sensible in the past. But if USDA really is changing, this arrangement may need to be changed in order to enable USDA to take on some greater responsibility for the protection of water resources. An example of the beginning recognition of required change is Senator Harkin's animal waste control bill, which would give oversight of the program to USDA.[273]

There would of course be a problem of line drawing if the administration of the Clean Water Act was to be divided between USDA and EPA. However, this problem would not be an insurmountable one. USDA's administrative role would cover agricultural areas, national forests, and other rural areas where the same issues may be concerned. EPA would administer the Clean Water Act in urban and suburban areas, and would presumably be the default agency whenever USDA administration was not appropriate.[274]

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[272] Erin Ryan Interview, *supra* note 15.

[273] *See supra* Part V.

[274] Note that this line-drawing question is partly a result of the dual nature of the clean water problem. Clean water is both a public health and safety problem and a natural resource problem; we are, for example, worried both about whether it is safe to drink water and whether our streams are clear and full of fish. EPA administration tends to focus upon public safety problems. Administration by a conservation-oriented USDA would presumably tend to focus more upon natural resource values. In urban areas public health issues assume

Finally, apart from these interdepartmental concerns, there is a general question of statutory authority for the suggested changes in USDA conservation policies. The basic multiple use mandate for the national forests appears to afford USFS all the discretion it needs to implement greater conservation, when it so chooses.[275] And NRCS, of course, already has specific proconservation mandates—it simply needs a greater voice within the Department.

The farm agencies (including FSA, which, despite its probable reduced size after the end of commodity programs, will still exist) may present a greater problem. Their legal mandates tend to ignore natural resource conservation issues. For example, the *Kings County*[276] court held that the Agricultural Stabilization and Conservation Service (ASCS) could not be compelled under NEPA to condition provision of its services upon farmers' environmental behavior.[277]

This does not mean, however, that a farm agency may not choose to adopt a more expansive interpretation of its NEPA obligations. The *Kings County* court deferred to ASCS's interpretation of its duties under NEPA.[278] It would appear that such deference would similarly be warranted if FSA were to change its attitude toward its NEPA duties. If FSA began requiring farmers to act with greater regard for natural resource values, and used this requirement as a condition for their receipt of its services, it would be no less entitled to deference by the courts than it was in *Kings County*. Thus, it appears that NEPA provides the authority for more conservation-sensitive policies by FSA and other farm agencies, as long as those policies do not overly frustrate the fulfillment of the agencies' primary mandates.

USDA's legal mandates and organizational problems have, for most of this century, caused it to promote policies that have been overly exploitative of natural resources. Now, on the brink of the twenty-first century, USDA is poised for major changes. It has a unique opportunity to redefine itself as a guardian of the nation's soil and water, and thereby ensure that agriculture and all of the other uses of the nation's open spaces can be sustained for future generations. The task will not be easy and will take the Department a long way from both its research roots and the economic intervention mandates of the 1930s. Agriculture in the next century will need research aid and economic intervention far less than it will need fertile soil and clean water. There is no better reason than this for USDA to take up the challenge.

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greater relative importance, while in rural areas natural resource values assume a more significant role. This represents a deeper rationale for drawing the line.

275 Congress could change this. But while several voices in Congress (primarily western Republicans) have spoken against recent USFS policies, at the moment there does not seem to be much consensus for changing its statutory mandate. It is, however, quite possible that USFS will face efforts to slash its budget, especially in light of its recent bookkeeping problems.

276 Kings County Econ. Community Dev. Ass'n v. Hardin, 478 F.2d 478 (9th Cir. 1973).

277 *See supra* Part II.

278 *Kings County Econ. Community Dev. Ass'n*, 478 F.2d at 481.