

## Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives

This Article explores a central question in public lands governance: should Congress or bureaucracy be primarily responsible for resolving controversial political conflicts over public lands management? The question of institutional venue and decision making legitimacy is receiving increased attention, due in part to a number of high profile environmental conflicts that have been managed through administrative rulemaking and resource planning processes, like the United States Forest Service's (USFS) roadless rule and the issue of snowmobiles in Yellowstone National Park. In short, in what institutional venue should various issues and controversies in forest, park, rangeland, and wildlife management be addressed?

Public land agencies are increasingly being asked to resolve controversial political issues using processes outlined in the Administrative Procedure Act (APA),<sup>1</sup> the National Environmental Policy Act (NEPA),<sup>2</sup> and various resource planning statutes. This Article explores whether or not these types of issues should be answered by our public land agencies, by our political representatives in Congress, or through other institutional designs. It is written as a primer of sorts, one that I hope will be useful as more people begin debating this important question. Public land policy reform is currently a popular topic, with dozens of proposals seeking to change the land management regime in significant ways.<sup>3</sup> Important to most of those proposals, however, is the enduring tension between statutory detail and bureaucratic discretion in public lands management. Questions pertaining to decision making authority, legitimacy,

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\* Associate professor of natural resource policy, College of Forestry and Conservation, University of Montana, Missoula, MT 59812. A special thanks to Raymond Cross, the staff and editors at JELL, and the McIntire-Stennis Cooperative Forestry Research Program for its generous grant support. The author may be reached at [mnie@forestry.umt.edu](mailto:mnie@forestry.umt.edu).

<sup>1</sup> Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000).

<sup>2</sup> National Environmental Policy Act, 42 U.S.C. § 4321 (2000).

<sup>3</sup> See *infra* Part IV.F.

accountability, and the most appropriate venue for conflict resolution must be at the forefront of this important discussion.

This Article proceeds in three parts. Following the Introduction, Part I provides an overview of our dominant public land laws, including those governing forest, park, rangeland, and wildlife management. They are analyzed in terms of what they say and fail to say, and why this matters from a conflict management standpoint. The vagueness, ambiguity, contradiction, and over-extended commitments in some of these laws are the major reasons why administrative rulemaking and planning processes have become the dominant ways of dealing with public lands conflict.

Part II then reviews the political and philosophical debate over congressional delegation of authority and agency discretion as it applies to public lands-based political conflict. Do our public land management agencies have too much managerial discretion? Should Congress, bureaucracy, or some other governing arrangement resolve value and interest-based political disputes? This part explores those questions by reviewing the case for and against statutory detail and administrative discretion. This Article synthesizes the important work that has been done in that area and applies it to the problems and challenges of public lands governance.

Part III then sketches a broad “options and alternatives” framework. Alternatives in prescriptive law, administrative leadership and discretion, decentralization, comprehensive public land law review, and policy experimentation are discussed and analyzed. I make a cautious and qualified argument that there is too much administrative discretion delegated to agencies, and that Congress or other democratic institutions should resolve the essential value and interest-based political conflicts over public lands management. Public land agencies, using rulemaking, NEPA, and planning processes, are usually ill-equipped to resolve what are often deeply divisive and intractable political conflicts. They are not the most legitimate arbiters of the public good. Instead, our political representatives in Congress or reconstituted citizen-based democratic bodies should be making those choices. But, as illustrated throughout this Article, that is easier said than done, and the prescriptive cure might be worse than the disease.

A common response to this issue is “I agree in principle that Congress should decide—but let’s not have *this Congress* decide.” Related to this is the important distinction between political theory and practice. Instead of pitting a romanticized legislative ideal

against the modern administrative state, we should contrast the latter with how legislative decisions are made in practice. Once this is done, our enthusiasm for congressional responsibility is dimmed, and the statutory detail versus administrative discretion issue becomes more of a Hobson's choice.

## I

### STATUTORY GUIDANCE AND THE LACK THEREOF IN PUBLIC LANDS GOVERNANCE

#### A. *Forest Management*<sup>4</sup>

In making controversial decisions, agencies look to their statutory mission and mandate for guiding principles or explicit instructions from Congress. The 1897 Forest Service Organic Act, for example, states in 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[.]”<sup>5</sup> This broad mandate<sup>6</sup> provides little resolution because some interest groups emphasize the “protect” and “water flows” provisions, while others highlight the “supply of timber” component.<sup>7</sup>

Superimposed on top of the Organic Act is the Multiple Use Sustained Yield Act of 1960 (MUSYA).<sup>8</sup> Through MUSYA, Congress formally articulated the multiple use mission of the service: “It is the policy of the Congress that the national forests are

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<sup>4</sup> This forest management review section is taken from Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687 (2004).

<sup>5</sup> 16 U.S.C. § 475 (2000).

<sup>6</sup> What Congress intended by the USFS Organic Act has been open to some interpretation throughout the years. Note that the language actually puts forth three purposes for the National Forests, not just the commonly cited water flows and supply of timber purposes. And one would think that issues like wildlife would be impacted by the “improve and protect the forest” language found therein. *See* United States v. New Mexico, 438 U.S. 696 (1978) (Powell, J., dissenting in part) (discussing the intent of the USFS Organic Act to resolve a reserved water rights dispute).

<sup>7</sup> *See generally* Alan G. McQuillan, *Is National Forest Planning Incompatible With a Land Ethic*, 88 J. FORESTRY 31 (1990) (discussing the contested purposes of the forest reserves, and how preservationist John Muir would have emphasized the “improve and protect the forest” provision, while USFS Chief Gifford Pinchot would more likely have stressed the “furnish a continuous supply of timber” provision).

<sup>8</sup> 16 U.S.C. §§ 528-531 (2000).

established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”<sup>9</sup> The Act defines “multiple” use as:

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.<sup>10</sup>

This statutory language shows that there is relatively little in MUSYA directing or constraining forest managers.<sup>11</sup> They are to manage for multiple use and sustained yield, the latter meaning “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.”<sup>12</sup>

The contested language in MUSYA is easy to find. For instance, what are the *needs* of the American people and what constitutes the most *judicious* use of the land? What does providing “*due consideration*” of “the relative values of the various resources in particular areas” really mean?<sup>13</sup> More problematic is the Act’s failure to specify the spatial scale for implementing multiple use: either on a forest-by-forest level or on a national forest system level?<sup>14</sup> This is

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<sup>9</sup> *Id.* § 528.

<sup>10</sup> *Id.* § 531.

<sup>11</sup> See generally Michael C. Blumm, *Public Choice Theory and Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994) (“Since multiple use is founded upon a standardless delegation of authority to managers of public lands and waters, congressional endorsement of multiple use has created the archetypal ‘special interest’ legislation.”).

<sup>12</sup> 16 U.S.C. § 531(b).

<sup>13</sup> *Id.* § 529.

<sup>14</sup> A Society of American Foresters (SAF) review, for example, recommends that “Congress should clearly articulate in new legislation that the concept of multiple use is not necessarily appropriate on every management unit, but may be better applied in the aggregate across the national forests and public lands.” SOCIETY OF AMERICAN FORESTERS, *FOREST OF DISCORD: OPTIONS FOR GOVERNING OUR NATIONAL FORESTS AND FEDERAL PUBLIC LANDS* 54-55 (Donald W. Floyd ed., 1999).

not to say that MUSYA says nothing of importance, the multiple use mission later proved to be a major challenge for an agency that became focused primarily on dominant use timber production.<sup>15</sup> But, its abstractness has been used by the USFS over the years to defend everything from designating 58.5 million acres as protected roadless areas to proposing an 8.7 billion board foot timber sale in the Tongass National Forest in Southeast Alaska.<sup>16</sup> Multiple uses could be complimentary and not contradictory according to the USFS. For example, it could embrace clearcutting as a way to provide beneficial openings for browsing game species and simultaneously achieve its timber, wildlife, and recreation (hunting) purposes.<sup>17</sup>

The multiple use mandate was also used to justify the extensive clearcutting and terracing of hillsides in the Bitterroot National Forest in western Montana, though many saw it as more akin to “timber mining.”<sup>18</sup> That case provided one spark in what would eventually become the National Forest Management Act of 1976 (NFMA).<sup>19</sup> It is primarily a planning-based statute, calling for new interdisciplinary forest planning processes and expanded opportunities for public participation. Some important prescriptions are also found in the Act, including a limit on the size of clearcuts and a mandate to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives[.]”<sup>20</sup>

There has been a lot of debate in forestry, policy, and academic literature about NFMA’s impact on forest management. Some critics

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<sup>15</sup> DAVID A. CLARY, *TIMBER AND THE FOREST SERVICE* 156 (1986). Clary provides a critical history of the USFS and its unique bureaucratic timber-oriented culture as “a case of public service wherein the servant believed firmly that it knew better than the public what the public really wanted.” *Id.* at xii.

<sup>16</sup> See *Sierra Club v. Hardin*, 325 F. Supp. 99, 104 (D. Alaska 1971).

<sup>17</sup> See generally PAUL W. HIRT, *A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO* (1994).

<sup>18</sup> The “Bolle Report,” a major milestone in USFS history and requested by Senator Lee Metcalf of Montana, aptly summarized the situation: “Multiple use management, in fact, does not exist as the governing principle on the Bitterroot National Forest.” See *A University View of the Forest Service, A Select Committee of the University of Montana Presents Its Report on the Bitterroot National Forest*, Congressional Record, November 18, 1970, at 1. (on file with author).

<sup>19</sup> 16 U.S.C. §§ 1600-14 (2000). See Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. L. 149 (1996) (providing an overview of the NFMA).

<sup>20</sup> 16 U.S.C. § 1604(g)(3)(B).

contend that NFMA is a “solution to a nonexistent problem.”<sup>21</sup> The Bitterroot and Monongahela<sup>22</sup> cases had nothing to do with planning, says Richard Behan, so why “solve” these local site-specific problems with elaborate planning requirements?<sup>23</sup> Federico Cheever also argues that the forest management standards outlined in NFMA have failed to provide a significant check on USFS timber management practices because they have failed to communicate an intelligible message to the lawyers, Forest Service officials and federal judges who initiate, defend, and resolve claims asserted under them.<sup>24</sup> This failure to communicate generally intelligible content, says Cheever, is a “result of Congress’s commitment to Forest Service discretion in the legislative process that gave us NFMA.”<sup>25</sup> In a similar vein, Michael Mortimer argues that the problems currently afflicting the USFS result from Congress avoiding responsibility for difficult resource management decisions.<sup>26</sup> He places the blame on the goal-based statutes governing the USFS:

Congressional direction to the Forest Service has been less than specific, affording little in the way of a concrete agency mission. Consequently, the Forest Service’s attempts at resource management have been plagued by controversy and litigation, ultimately imbuing the agency with a sort of administrative schizophrenia, unable to identify or even recognize its mission.<sup>27</sup>

On the other hand, both Jack Tuholske and Beth Brennan argued a decade ago that this substantive environmental statute was beginning to fulfill its mandate.<sup>28</sup> They claim that it provides the direction the

<sup>21</sup> R.W. Behan, *The RPA/NFMA: Solution to a Nonexistent Problem*, 88(5) J. FORESTRY, 20-25 (May 1990).

<sup>22</sup> The famous Monongahela decision by the Fourth Circuit ruled that the 1897 Organic Act effectively prohibited clearcutting in national forests, and this eventually led to the passage of NFMA. *Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975). See generally Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 41-42, 73-74, 138, 154-55 (1985).

<sup>23</sup> RICHARD W. BEHAN, *PLUNDERED PROMISE* 193-94 (2001).

<sup>24</sup> Federico Cheever, *Four Failed Forest Standards: What We Can Learn from the History of the National Forest Management Act’s Substantive Timber Management Provisions*, 77 OR. L. REV. 601, 605 (1998).

<sup>25</sup> *Id.* at 606.

<sup>26</sup> Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 ADMIN. L. REV. 907, 912 (2002).

<sup>27</sup> *Id.* at 910.

<sup>28</sup> Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 130 (1994).

agency needs to adopt a more holistic and ecosystem-based approach to forest management. But for this to happen, courts must be willing to see it as having substance, enforce its underlying purpose, and “read and interpret the statute as a whole rather than analyze statutory sections in isolation from each other.”<sup>29</sup>

Others, like Charles Wilkinson, believe that while NFMA struggles to find a balance between statutory directives and agency discretion, it has had a substantive and procedural impact on forest management, and it is broad-textured and elastic enough to respond to future needs.<sup>30</sup> Another view, argued by the late Arnold Bolle, who played an important role in the Act’s creation, is that NFMA is a good law, but that its intent has not been faithfully implemented by the USFS.<sup>31</sup> In short, NFMA added a planning element to the forest management policies and multiple use mandates of the Organic Act and MUSYA. It did not take away a lot of management authority from the USFS, and it continues to be subject to a range of interpretations.<sup>32</sup>

The tension between congressional prescription and agency discretion was very apparent in drafting the NFMA and the ensuing debate in Congress.<sup>33</sup> The USFS favored the planning-based NFMA bill sponsored by Senator Hubert Humphrey of Minnesota,<sup>34</sup> and fought against the more prescriptive NFMA bill proposed by Senator Jennings Randolph of West Virginia.<sup>35</sup> Unlike Humphrey’s version,

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<sup>29</sup> *Id.* at 134.

<sup>30</sup> Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 677 (1997).

<sup>31</sup> Arnold W. Bolle, *The Bitterroot Revisited: “A University [Re]View of the Forest Service,”* in AMERICAN FORESTS: NATURE, CULTURE, AND POLITICS 163 (Char Miller ed., 1997) (arguing that NFMA is not the problem, rather the problem is the USFS’s “business as usual” response to NFMA).

<sup>32</sup> For example, the Wilderness Society interprets NFMA as Congress recognizing “the shortcomings of MUSYA’s broad [grant of] discretion and sought to insure that timber production would not take priority over other uses and resources.” ELIZABETH BEAVER ET AL., UNIVERSITY OF COLORADO, NATURAL RESOURCES LAW CENTER, SEEING THE FOREST SERVICE FOR THE TREES 13 (2000), available at [http://www.colorado.edu/law/centers/nrlc/publications/Forestry\\_Reforms\\_Report.pdf](http://www.colorado.edu/law/centers/nrlc/publications/Forestry_Reforms_Report.pdf) (last visited Nov. 23, 2004), quoting THE WILDERNESS SOCIETY, AMERICA’S NATIONAL FORESTS IN THE 21ST CENTURY, 19. But the Society of American Foresters contends that neither the 1974 Forest and Rangeland Renewable Resources Act (RPA) or NFMA “changed management philosophy in a significant way.” *Id.* at 14.

<sup>33</sup> See generally Wilkinson & Anderson, *supra* note 22.

<sup>34</sup> S. 3091, 94th Cong. (1976).

<sup>35</sup> S. 2926, 94th Cong. (1976); see generally Wilkinson & Anderson, *supra* note 22 at 42; DENNIS C. LE MASTER, DECADE OF CHANGE: THE REMAKING OF FOREST SERVICE STATUTORY AUTHORITY DURING THE 1970S (1984).

the Randolph bill provided for comprehensive reform that prescribed numerous specific standards for forest management, with a particular focus on fish and wildlife habitat and even-aged management.<sup>36</sup> While the two sponsors agreed that timber production had taken priority over other forest values, and that that needed to be fixed, they differed in how much discretion to give the USFS.<sup>37</sup> In the end, some compromises were made and Humphrey included the NFMA “diversity requirement” into his bill that would eventually become law.<sup>38</sup> Diversity, however, was not defined in the Act, and it was up to the USFS to give this term meaning in their regulations.<sup>39</sup>

The point of this statutory review is to illustrate the lack of explicit guidance in how the USFS should answer management questions that are value and interest based, and political to the core. The political might and leadership of Gifford Pinchot helps explain the broad mandate expressed in the 1897 Organic Act. According to Federico Cheever, Gifford Pinchot sought congressional support without congressional supervision and won it in the *carte blanche* given to him in the “paradoxical” USFS Organic Act.<sup>40</sup> It is in this statutory vacuum that Pinchot left his indelible signature on the Service.<sup>41</sup>

MUSYA and NFMA also failed to answer the central philosophical questions regarding forest management. This vacuum was instead filled by an opportunistic type of politics wherein the agency could promise everything to everyone in the name of “intensive management” and multiple use. Unrealistic promises made to multiple use constituencies and an overextended commitment to intensive management would become the Agency’s Achilles’ heel

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<sup>36</sup> S. 2926, 94th Cong. (1976).

<sup>37</sup> Wilkinson & Anderson, *supra* note 22, at 292-93.

<sup>38</sup> The provision requires the USFS to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives[.]” 16 U.S.C. § 1604(g)(3)(B) (2000).

<sup>39</sup> USFS Planning regulations on fish and wildlife resources state that: habitat “shall be managed to maintain viable populations” of existing species. 36 C.F.R. 219.19. *See generally* Michael A. Padilla, *The Mouse That Roared: How the National Forest Management Act Diversity of Species Provision is Changing Public Timber Harvesting*, 15 UCLA J. ENVTL. L. & POL’Y 113 (1996-1997).

<sup>40</sup> 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 (1997).

<sup>41</sup> *See generally* CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM (2001).



according to historian Paul Hirt, who views USFS history as a “conspiracy of optimism.”<sup>42</sup>

From Pinchot through NFMA, the USFS has fought for maximum levels of administrative discretion, and Congress has largely obliged. As a result, the venue of conflict has shifted from Congress to the administrative arena. And while discretion once gave the USFS unencumbered authority to manage the public lands under the guise of scientific management, it now plagues the Agency in unending lawsuits and administrative appeals because many interest groups believe that the USFS’s actions are inconsistent with congressional direction. While professional foresters once fought to preserve their discretion, many forest policy leaders are now calling for management priorities to be set through a political and legislative process.<sup>43</sup> A Society of American Foresters (SAF) review, for example, contends that “[t]he purposes of the national forests and public lands are no longer clear,” that the complex and serious problems of national forest management “cannot be resolved through regulatory reform or through the appropriations process,” and that “new legislation is warranted.”<sup>44</sup>

What about the hundreds of other laws, regulations, and court decisions constraining agency behavior?<sup>45</sup> The USFS has recently made “analysis paralysis” and “the process predicament” central to its case that the agency is forced to do more paperwork than on-the-ground forest management these days.<sup>46</sup> The argument goes that while MUSYA and NFMA might give the USFS some discretion in theory, it is lost upon the thick layering of other laws and regulations.<sup>47</sup> There is some truth to this claim, both Congress and the Agency’s own implementing regulations have added enormous procedural and analytical obligations. But, that does not change the

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<sup>42</sup> HIRT, *supra* note 17, at xxi.

<sup>43</sup> See generally SOCIETY OF AMERICAN FORESTERS, *supra* note 14.

<sup>44</sup> *Id.* at 50-51.

<sup>45</sup> See generally Forest Service Directives, available at <http://www.fs.fed.us/im/directives/> (last visited Nov. 21, 2004).

<sup>46</sup> USDA Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management* (June 2002), available at <http://www.fs.fed.us/projects/documents/Process-Predicament.pdf> (last visited Nov. 21, 2004).

<sup>47</sup> See *Conflicting Laws and Regulations: Gridlock on the National Forests, Oversight Hearing Before the House Subcommittee on Forests and Forest Health of the Committee on Resources*, 107th Cong. (Dec. 4, 2001) (Statement of Dale Bosworth, Chief, USDA Forest Service).

basic argument made here. Congress has passed additional substantive and mostly procedural laws while failing to confront the tough questions regarding forest management. The agency still has discretion, but it must now take numerous procedural steps to exercise it. It is a case study in inefficient discretion. Until Congress clarifies the central purpose of our national forest lands and the core mission of the USFS, procedural and decision making inefficiencies will be a fact of life.<sup>48</sup>

### ***B. National Park Management***

The USFS situation is not atypical—similar patterns emerge in park politics. The first seeds of confusion were perhaps planted in the nineteenth century. Congress created Yellowstone National Park in 1872 and dedicated it as a “public park or pleasuring ground for the benefit and enjoyment of the people.”<sup>49</sup> Less noted is language giving exclusive control to the Secretary of the Interior, whom “shall make regulations providing for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition.”<sup>50</sup>

After the piecemeal creation of Yellowstone and other parks, Congress tried to provide some general direction in the National Park Service (NPS) Organic Act of 1916. It declared that:

The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide

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<sup>48</sup> In an often-cited report, the General Accounting Office summarizes the decision making problem facing the Service:

Strengthening accountability for performance within the Forest Service and improving the efficiency and effectiveness of its decision-making is contingent on establishing long-term strategic goals that are based on clearly defined mission priorities. However, agreement does not exist on the agency’s long-term strategic goals. This lack of agreement is the result of a more fundamental disagreement, both inside and outside the Forest Service, over which uses the agency is to emphasize under its broad multiple-use and sustained-yield mandate and how best to ensure the long-term sustainability of these uses.

U.S. GENERAL ACCOUNTING OFFICE, FOREST SERVICE DECISION-MAKING: A FRAMEWORK FOR IMPROVING PERFORMANCE, GAO/RCED-97-71, at 5 (1997).

<sup>49</sup> 16 U.S.C. § 21 (2000).

<sup>50</sup> *Id.* § 22.

for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.<sup>51</sup>

Is the NPS Organic Act a contradictory mandate? Some say that it is not: when push comes to shove, preservation rules. Historian Robin Winks, for example, argues that despite the difficulties in ascertaining congressional intent, the 1916 Act is not contradictory, especially when we consider the gist of subsequent legislation<sup>52</sup> and its judicial interpretation. For him, the mandate to conserve and leave resources unimpaired takes precedence over providing means of access and public enjoyment.<sup>53</sup> But, others believe that the NPS's historical bias to recreational tourism has a statutory basis. Park historian Richard West Sellars contends that tourism and public use have explicit congressional sanction: "This authority was strongly reaffirmed in the National Park Service Act of 1916, with its emphasis on public use. Not only did Congress not challenge the Park Service's interpretation of the act during the ensuing decades, but it also encouraged development and use—at times aggressively."<sup>54</sup>

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<sup>51</sup> *Id.* § 1.

<sup>52</sup> See, e.g., National Park System General Authorities Act, Pub. L. No. 91-383, §1, 84 Stat. 825 (1970) (codified as amended at 16 U.S.C. §1a-1; The Redwood Act of 1978, Pub. L. No. 95-250, §101(b), 92 Stat. 166 (codified as amended at 16 U.S.C. §1a-1), provides additional language for park managers. In it Congress declares that:

These areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States; and that . . . the various areas of the National Park system shall be consistent with and founded in the purpose established by section 1 of this title, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

<sup>53</sup> Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575, 623 (1997).

<sup>54</sup> RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY 285 (1997).

[T]he legislative history of the Organic Act provides no evidence that either Congress or those who lobbied for the act sought a mandate for an exacting preservation of natural conditions. An examination of the motivations and perceptions of the Park Service's founders reveals that their principal concerns were the preservation of scenery, the economic benefits of tourism, and efficient management of the parks."

Historians are not the only ones to differ on the meaning of the 1916 Act. Different interests continue to cling to different language. The controversy over banning snowmobiles in Yellowstone and Grand Teton National Parks and the John D. Rockefeller, Jr., Memorial Parkway is a case in point. Public letters written in response to the NPS's Winter Use Plan, Supplemental Environmental Impact Statement illustrate how differently this park mandate is interpreted by various political actors. The Montana Tourism Coalition writes that:

We are opposed to the ban because it eliminates yet another access possibility for the people of the United States. At what point does Yellowstone become a wilderness ecosystem that can only be viewed from outside a bubble? Our forefathers intentions were clear when they said Yellowstone National Park was created as a 'public park or pleasuring-ground for the benefit and enjoyment of the people.' In order for the public to understand nature they need to see, hear, feel, smell and taste it.<sup>55</sup>

Turning these parks into de facto wilderness areas is a concern for other groups. The American Council of Snowmobile Associations writes that "[i]t is mind-boggling to think that 'The People's Park' is actually being turned into 'Wilderness' which will eventually allow no entrance to the first and one of the most fascinating National Parks in our Country."<sup>56</sup> Citizens for a User Friendly Forest (with the motto "Red Meat, Board Feet, Dig Deep, Drive Jeep") notes that "the fundamental purpose of the Park is to conserve park resources and values, while providing for the enjoyment of those resources and values by the American people. The dual purpose is coequal; neither is more important than the other."<sup>57</sup>

Those in favor of the ban also cite the Organic Act and other relevant policies to make their case. The Alliance for the Wild Rockies writes that "[t]he NPS Organic Act and numerous NPS Management Policies clearly illustrate that when presented with a conflict between resource protection and any other interest[s],

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*Id.* at 29. Sellars also suggests the park founders "assumed that, in effect, *undeveloped* lands were *unimpaired* lands—that where there was little or no development, natural conditions existed and need not be of special concern. The ongoing manipulation of the parks' backcountry resources, such as fish, forests, and wildlife seems not to have been viewed as impairing natural conditions." *Id.* at 45.

<sup>55</sup> NATIONAL PARK SERVICE, WINTER USE PLANS: FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, VOL. 2 130 (2003).

<sup>56</sup> *Id.* at 114.

<sup>57</sup> *Id.* at 122.

resource conservation is to be predominant. Therefore, snowmobiling, which has been irrefutably shown to cause resource degradation and pose human health risks, must be stopped.”<sup>58</sup> Comments of the Greater Yellowstone Coalition, Natural Resources Defense Council, The Wilderness Society, Defenders of Wildlife, Sierra Club, the Wyoming Outdoor Council, and other groups make the 1916 Organic Act and its prohibition on impairment central to their case against snowmobiling in the Park. They note the following:

The Park Service duty under governing law, regulation and policy is to assure that national park resources are protected in an unimpaired state for the benefit and enjoyment of this and future generations. The NPS mission was clearly elucidated by Congress and has been reaffirmed over the years . . . . In Yellowstone and Grand Teton National Parks, the highest standard of protection—Organic Act prohibition on impairment—is violated by snowmobile use . . . . The intent of Congress was to preserve the scenery, natural objects and wildlife of the National Parks . . . . The courts have time and again interpreted the Organic Act as holding conservation of park resources preeminent over enjoyment of them; visitor use must not cause impairment of park resources and values.<sup>59</sup>

The vacuum left by Congress and the Organic Act has been filled with various agency interpretations and management philosophies.<sup>60</sup> The NPS has historically prioritized its public use obligation over preservation as a way to build a supportive constituency. This helps explain its cozy relationship to the railroad industry, the elimination of wolves, suppression of fire, introduction of exotic game and fish species, and the road building frenzy of Mission ‘66. This “industrial recreation” model could be defended using the Organic Act, but so too could the preservationist philosophy espoused in the influential “Leopold Report” recommending the preservation and restoration of natural conditions so that national parks can represent “a vignette of primitive America.”<sup>61</sup> Both approaches to park management were somehow squared with the NPS’s mandate.

This contested language often leaves the NPS in politically dangerous territory. What happens when former Interior Secretary

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<sup>58</sup> *Id.* at 140.

<sup>59</sup> *Id.* at 157-58.

<sup>60</sup> For a few thoughtful discussions of these philosophies and management approaches see generally SELLARS, *supra* note 54; WILLIAM R. LOWRY, *THE CAPACITY FOR WONDER* (1994); ALFRED RUNTE, *NATIONAL PARKS: THE AMERICAN EXPERIENCE* (2d ed. 1987); JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS* (1980).

<sup>61</sup> See Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 *DENV. U. L. REV.* 649, 656 (1997).

James Watt claims that “[i]f I err, I’m going to be erring on the people side,” and the NPS Director William Penn Mott claims that “we must err on the side of preservation”?<sup>62</sup> Committed agency personnel are often caught in the crossfire. Some park visitors also feel discontent, for they believe that the NPS is not fulfilling its mandate to either preserve the resource or provide maximum recreational opportunities.

This paradoxical mandate has a history similar to that of Pinchot and the USFS. Cheever’s analysis is that Stephen Mather, the first Director of the NPS, fought for enthusiastic congressional support of the national parks without congressional participation in their management and won it in the *carte blanche* given to him in the Organic Act.<sup>63</sup> The problem, says Cheever, is that these broad mandates given to Pinchot and Mather for pursuing their own vision and philosophy now “allow interest groups to project *their* visions onto the congressional mandates.”<sup>64</sup> In short, times have changed: “ambiguity which once provided agencies necessary latitude before Congress and the Cabinet now inspire sophisticated western interest groups to challenge agency policy. Mandates which once contributed to the rise of agency discretion now contribute to its decline.”<sup>65</sup>

Politics and conflict are also driven by individually tailored establishment statutes governing specific park units.<sup>66</sup> While the Organic Act provides an overarching mandate for the NPS, Congress has increasingly provided specific management standards and obligations in park-by-park establishment legislation.<sup>67</sup> This means that organic legislation applies to all park system units to the extent that it does not conflict with provisions specifically applicable to them.<sup>68</sup> Many substantive and procedural mandates and exemptions are written into laws pertaining to one particular management unit. Examples include provisions allowing grazing, topics that must be addressed in general management plans, consultation requirements, and the creation of advisory commissions.

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<sup>62</sup> William R. Lowry, *National Parks Policy*, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 182 (Charles Davis ed., 2d ed., 2001).

<sup>63</sup> Cheever, *supra* note 40, at 633.

<sup>64</sup> *Id.* at 640.

<sup>65</sup> *Id.* at 630.

<sup>66</sup> See generally Robert Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 787-789 (1997) (describing the general trend in Congress in providing greater statutory detail in pollution control law and park establishment legislation).

<sup>67</sup> 16 U.S.C. § 1c (2000).

<sup>68</sup> *Id.* § 1c(b).

Establishment legislation, while often overlooked, is important for a number of reasons.<sup>69</sup> First, it shows the increasing tendency and ability of Congress to get involved in the details of public lands management. As discussed later, this can be seen as either a positive or negative development. For instance, while it places more responsibility and accountability on our elected representatives, it can also hamper comprehensive planning and dilute the importance of administrative and scientific expertise. Establishment legislation can also exacerbate park conflicts; not only is the NPS supposed to find the right tension between preservation and recreation, but in some cases it must also work in the particular and sometimes contradictory uses and exemptions, which are expressed in individualized park statutes.

We might also look at the park situation for lessons in public lands governance. It illustrates that making changes in an agency's organic act will not necessarily lead to changes on the ground because some public land units are also governed by unique establishment laws.<sup>70</sup> The situation could also foreshadow what might happen if Congress attempts to experiment with site-specific legislation governing one national forest or other land unit. The drawback of such an approach is that a public lands system would become less cohesive, integrated, and unified. Instead, we would get a balkanized patchwork that would make it difficult to understand the essential purpose of our national parks. The upside, however, is that individualized statutes might provide a way to protect places that would not otherwise be included in the national park system. In other words, the next era of place protection will be more difficult than the last, and it will require new ways of thinking and models of governance.

### *C. Rangeland Management*

The amount of land managed by the Bureau of Land Management (BLM) illustrates the importance of this Agency's statutory mission and mandate. It manages 262 million acres of land—roughly one-eighth of the U.S.—and another 300 million acres of subsurface

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<sup>69</sup> See Fischman, *supra* note 66, at 781-86.

<sup>70</sup> See *id.* at 782. "An examination of establishment legislation reveals that simple clarification of the Organic Act to stress the preservation prong of the Service's dual mandate, or even amending the Organic Act to embrace explicitly biological diversity, would not be sufficient to achieve comprehensive reform. Establishment legislation, which guides the management and planning for individual parks would also need to be revisited." *Id.*

mineral resources.<sup>71</sup> It primarily manages these lands according to the Federal Land Policy Management Act (FLPMA) of 1976.<sup>72</sup> This Act is referred to as the BLM Organic Act because it consolidated and articulated the Agency's mission and management responsibilities.

Added on top of FLPMA was the Public Rangelands Improvement Act of 1978 (PRIA).<sup>73</sup> This Act expressed concern about the productive potential and unsatisfactory condition of public rangelands, and it declared a national policy for improving the range. Specifically, it outlined steps to improve the range, including record-keeping requirements, increased funding for range improvement, and a new grazing fee formula.

FLPMA says a number of important things.<sup>74</sup> First, it explicitly states that "the public lands be retained in Federal ownership;"<sup>75</sup> thus, sending an unequivocal message to those advocating the release of federal lands to state or private ownership. It also states that "management be on the basis of multiple use and sustained yield unless otherwise specified by law."<sup>76</sup> Congress also stated what it meant by the term multiple use:

The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future 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; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with

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<sup>71</sup> BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS, Table 1.4 (2002), available at [www.blm.gov/natac/pls02/plsl-4\\_02.pdf](http://www.blm.gov/natac/pls02/plsl-4_02.pdf) (last visited Nov. 21, 2004).

<sup>72</sup> 43 U.S.C. § 1701 (2000).

<sup>73</sup> *Id.* §§ 1901-1908.

<sup>74</sup> See generally George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983) (analyzing FLPMA and its planning requirements).

<sup>75</sup> 43 U.S.C. § 1701(a)(1).

<sup>76</sup> *Id.* § 1701(a)(7). FLPMA reaffirmed the principle of multiple use and sustained yield originally found in the Classification and Multiple Use Act (CMU Act) of 1964. Pub. L. No. 88-607, 78 Stat. 986 (1964) (expired 1970).



consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.<sup>77</sup>

The term sustained yield “means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.”<sup>78</sup> Elsewhere in the Act, and after the mandate to protect various environmental, historical, and archeological values, Congress added that “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands.”<sup>79</sup>

One way of thinking about FLPMA is that Congress once again chose agency discretion in the form of planning rather than making explicit choices.<sup>80</sup> Instead of providing clear unequivocal guidance in the form of prescriptive law, Congress provided an array of criteria to be incorporated or merely *considered* in the development and revision of land-use plans. Multiple use and sustained yield principles would be achieved, for example, by using “a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.”<sup>81</sup> Discretion was also provided by simply asking the BLM to consider the “present and potential uses of the public lands,”<sup>82</sup> and “the relative scarcity of the values involved.”<sup>83</sup> Additionally, the BLM was asked to “rely, to the extent it is available, on the inventory of the public lands, their resources, and other values,”<sup>84</sup> and to “weigh long-term benefits to the public against short-term benefits.”<sup>85</sup> Some stronger language is also provided, like the directions to “give priority to the designation and

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<sup>77</sup> 43 U.S.C. § 1702(c).

<sup>78</sup> *Id.* § 1702(h).

<sup>79</sup> *Id.* § 1701(a)(12).

<sup>80</sup> See generally ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, MODERN PUBLIC LAND LAW 223 (1995) (contending that “[t]he statute lacks both procedural and substantive standards, particularly when compared with the NFMA.”); Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 834 (1993) (contending that FLPMA embodies a truce, because it “directed the BLM to consider disparate values in furthering the ‘national interest’ without demanding a specific result.”).

<sup>81</sup> 43 U.S.C. § 1712(c)(2).

<sup>82</sup> *Id.* § 1712(c)(5).

<sup>83</sup> *Id.* § 1712(c)(6).

<sup>84</sup> *Id.* § 1712(c)(4).

<sup>85</sup> *Id.* § 1712(c)(7).

protection of areas of critical environmental concern,”<sup>86</sup> “provide for compliance with applicable pollution control laws,”<sup>87</sup> and to coordinate planning processes with other governments.<sup>88</sup> But other than the pollution control requirement, which can be quantified and monitored, and perhaps the priority given to areas of critical environmental concern, those criteria leave a statutory vacuum, which is filled by the BLM using its planning process.

Also noteworthy, due to the controversies surrounding its meaning, is the discretionary power given to the Secretary of the Interior to “take any action necessary to prevent *unnecessary or undue degradation of the lands*.”<sup>89</sup> Predictably, of course, over the years such a standard has swung widely from one presidential administration and solicitor’s opinion to another.<sup>90</sup> After all, major decisions pertaining to grazing, mining, and even sacred site protection depends in large part on whether the emphasis is placed on the “unnecessary” or “undue” prongs of this sentence.<sup>91</sup>

FLPMA is specific and detailed in many ways, especially when it comes to how decisions are to be made.<sup>92</sup> It says much less, however, about what decisions have actually been made by Congress. As one court put it, FLPMA and PRIA provide broad declarations of policy and goals, and express a concern and desire for range improvement, but their language “breathes discretion at every pore.”<sup>93</sup> The broad statutory language leaves the BLM open to “agency capture”<sup>94</sup> and

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<sup>86</sup> *Id.* § 1712(c)(3).

<sup>87</sup> *Id.* § 1712(c)(8).

<sup>88</sup> *Id.* § 1712(c)(9).

<sup>89</sup> *Id.* § 1732(b) (emphasis added).

<sup>90</sup> See Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 468-69 (2002) (analyzing such swings of interpretation as they apply to cultural resources management on public lands).

<sup>91</sup> *Id.*

<sup>92</sup> Bureau of Land Management, U.S. Department of Interior, *The Federal Land Policy and Management Act*, <http://www.blm.gov/flpma/> (last visited Nov. 21, 2004).

<sup>93</sup> *Natural Res. Def. Council, Inc. v. Hodel*, 624 F. Supp. 1045, 1058 (D. Nev. 1985). In this case, Judge Burns states that the broad discretionary language found in these laws does not provide helpful standards a court can use to adjudicate agency compliance. He also points his finger at our elected branches of government for why judges have become “masters” of various policy areas: “At bottom, however, the primary reason for the large scale unwillingness of the first two branches of our government—both state and federal—to fashion solutions for significant societal, environmental, and economic problems in America.” *Id.* at 1063.

<sup>94</sup> See generally GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* Ch. 7 (1966); PHILLIP O. FOSS, *POLITICS AND GRASS* (1960).

provides ammunition for various interest groups.<sup>95</sup> Conservationists, for example, cite various studies and statistics documenting what they believe is dominant use, not multiple use of public rangelands: that livestock grazing is allowed on 254 million acres of national forest and BLM land (and on these lands roughly 26,300 ranchers graze 3.2 million cattle),<sup>96</sup> that 94 percent of BLM lands in sixteen western states are grazed, and that 35 percent of federal wilderness areas have active livestock grazing allotments.<sup>97</sup> How is this multiple use they ask.

FLPMA can also be used to defend a much different landscape vision than the one embraced by the BLM. Public lands ranching critic and law professor, Debra Donahue, for example, argues that the various management guidelines in FLPMA “are compatible with a policy decision to preserve biodiversity across landscapes.”<sup>98</sup> But, public land ranchers and their supporters can also point to the multiple use mandate and the “nation’s need for domestic sources of food” language to make their case. And, where does it say anything in FLPMA about ranching being inimical to biodiversity and recreation?

FLPMA’s discretionary language has resulted in another policy vacuum filled by executive-level politics. President Clinton, embracing the environmental, historical, and cultural language of FLPMA, tried to bring the BLM out of its dominant use past by designating new monuments and adding management responsibilities (e.g., the Grand Staircase-Escalante National Monument).<sup>99</sup> President

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<sup>95</sup> See generally Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management’s Planning Process*, 26 ENVTL. L. 771 (1996). The “BLM’s vague mandate to manage lands for multiple uses also provides the agency with a great deal of discretion in making management decisions and leaves it vulnerable to pressure from consumptive users who want the agency to favor their preferred use.” *Id.* at 776-77. Among other things, Nolen recommends amending FLPMA “to provide greater guidance to BLM in its planning and management efforts.” *Id.* at 837.

<sup>96</sup> Paul Rogers & Jennifer LaFleur, *The Giveaway of the West*, SAN JOSE MERCURY NEWS, Nov. 7, 1999, at 1S.

<sup>97</sup> Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629, 630 (1994).

<sup>98</sup> DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED* 206 (1999). Several parts of FLPMA are important in this regard she says, including its admonition to consider the “relative values” of resources, its focus on the “present and future needs of the American people,” and the absence of any mention of local needs, its inclusion of “natural scenic, scientific, and historical values,” and the direction to manage all resources without impairing the land’s productivity or environmental quality, among others. *Id.*

<sup>99</sup> See generally Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems With the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 571 (2001) (“The

Bush, on the other hand, embraces the “nation’s needs” language in defending his expansive extractive use agenda.<sup>100</sup> The vacuum is then further filled as these interpretations and agendas are challenged in court.

#### *D. Fish and Wildlife Management*

The U.S. Fish and Wildlife Service (USFWS) has regulatory authority over the agencies discussed above and must therefore deal with the full array of public lands and resources law. But two laws, the 1997 National Wildlife Refuge System Improvement Act (Improvement Act) and the 1973 Endangered Species Act (ESA), are particularly important for purposes here and are discussed below.

##### *1. The National Wildlife Refuge System Improvement Act (1997)*

The 1997 Improvement Act,<sup>101</sup> an amendment to the National Wildlife Refuge System Administration Act of 1966,<sup>102</sup> is the most recent organic legislation for a public lands system. The National Wildlife Refuge System, while far flung and fragmented compared to other systems, is the “nation’s largest network of lands and most diverse array of ecosystems dedicated principally to nature protection.”<sup>103</sup> As Robert L. Fischman explains, there is a lot that can be learned from the Improvement Act, partly due to how it differs from other multiple use public land laws.<sup>104</sup>

A few things are worth quickly pointing out. First, it is a dominant use statute that is geared toward the protection of nature. Second, activities like recreation, oil and gas development, and grazing may occur generally only to the extent that they are compatible with this dominant use. Note, however, that the compatibility standard still

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Clinton monument designations are a conscious effort to force a tremendous shift in the agency toward management for lighter extractive uses compatible with conservation aims.”).

<sup>100</sup> See, e.g., National Energy Policy Development Group, *National Energy Policy* (May 2001), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf> (last visited Nov. 21, 2004)

<sup>101</sup> 16 U.S.C. § 668dd (2000).

<sup>102</sup> *Id.* §§ 668dd-668ee.

<sup>103</sup> Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 458 (2002).

<sup>104</sup> ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES* (2003). “The Refuge System’s ecological management criteria, the conflicts between primary and subsidiary uses, and the tension between site-specific standards and uniform national goals all offer important lessons for environmental governance generally.” *Id.* at xiii.

grants quite a bit of discretion to the USFWS based on its “sound professional judgment.”<sup>105</sup> Third, the Act builds on a tiered and hierarchical use framework, ranging from highest to lowest priority. This means that individual refuge purposes come before conservation, conservation comes before wildlife dependent recreation (e.g., hunting and fishing), and wildlife dependent recreation comes before other recreational uses and economic activities. Congress was quite clear, moreover, in stating that hunting and fishing, when practiced in accordance with sound fish and wildlife management, “are expected to continue to be generally compatible uses.”<sup>106</sup>

Finally, and perhaps most important, is the amount of statutory detail and substantive management criteria provided in the Improvement Act. This criteria, along with planning and participation requirements, includes compatibility; maintenance of biological integrity, diversity, and environmental health; acquisition of sufficient water rights; biological monitoring; and a general conservation stewardship mandate.<sup>107</sup> According to Fischman, “[t]he greater statutory detail and more binding management prescriptions in the 1997 Act, as compared with earlier organic legislation, reflects Congress’ greater interest in controlling public land management.”<sup>108</sup> These substantive management criterion not only limit agency discretion, but they also provide a foothold for litigation. They are also more specific than those pertaining to National Park and BLM lands, and even parts of NFMA.<sup>109</sup>

Put simply, the choices made and standards expressed in the Improvement Act demonstrate the willingness and ability of Congress to provide a greater degree of statutory detail. But, the Improvement Act does not resolve all of the issues and conflicts related to wildlife refuge management. Like the NPS situation, refuges have two sets of purposes: those articulated in the Improvement Act, and the specific purposes for which each refuge was created by Congress. There is, thus, a dual and potentially conflictual nature of the refuge system. In passing the Improvement Act, Congress sought to better integrate the system with an overarching statutory mission, while at the same time giving priority to specific refuge purposes. And if a conflict exists? “The conflict shall be resolved in a manner that first protects the

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<sup>105</sup> 16 U.S.C. § 668dd (5)(1).

<sup>106</sup> *Id.* § 668dd (2)(6).

<sup>107</sup> Fischman, *supra* note 103, at 544.

<sup>108</sup> *Id.* at 545.

<sup>109</sup> FISCHMAN, *supra* note 104, at 110.

purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System.”<sup>110</sup>

The Improvement Act, as Fischman explains, “[n]eglects to harmonize the underlying discord among the various units of the System”<sup>111</sup> and “reflects the continual struggle to counteract the centrifugal, divergent push of establishment mandates with the centripetal, coordinating pull of systemic management.”<sup>112</sup> For this reason, Fischman cautions that “organic legislation is no panacea for public land systems with divergent individual unit establishment mandates.”<sup>113</sup> As will be discussed later, this issue is of utmost importance to public lands governance, for many management units are governed under a common organic act and statutory framework, while sometimes also governed by individually tailored charters established by Congress.

## 2. *The Endangered Species Act (1973)*

Although not without its share of discretionary language, the ESA is also more detailed and specific than other public land and resources law. Its implementation by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (also known as NOAA Fisheries) is an important part of many environmental conflicts. The infamous snail darter-Tellico Dam case, the northern spotted owl, the red-cockaded woodpecker, carnivore reintroduction and management (including wolves, grizzly bears, and lynx), salmon restoration in the Pacific Northwest, and the Klamath River Basin controversy are but a few high profile cases illustrating the impact and controversy surrounding the ESA.

The U.S. Supreme Court has described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>114</sup> The ESA’s strict substantive provisions, how they have been implemented or not implemented by the USFWS and Fisheries, how they have been used by environmental interest groups, and how they have been interpreted by the courts, provides another helpful case in working our way through arguments for and against administrative and legislative control.

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<sup>110</sup> 16 U.S.C. § 668dd(a)(4)(d).

<sup>111</sup> Fischman, *supra* note 103, at 618.

<sup>112</sup> *Id.* at 462.

<sup>113</sup> *Id.* at 464.

<sup>114</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

The purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>115</sup> An endangered species is defined as “any species which is in danger of extinction throughout all or a significant portion of its range,”<sup>116</sup> while a threatened species “means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>117</sup> To conserve means to use “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>118</sup>

The “significant portion of its range” concept is a bit trickier and has become part of the “science wars” over the ESA. This concept was recently dealt with in *Defenders of Wildlife v. Norton*.<sup>119</sup> In that case, the Ninth Circuit provided the Secretary of the Interior some discretion in giving the concept meaning, since it is not defined in the statute nor entirely clear from congressional intent.<sup>120</sup> This concept has gained renewed attention as conflicts and litigation focus on the downlisting and delisting of wolves and grizzly bears.

Of course, what Congress meant by these terms, and what they intended with the ESA in general, is subject to debate. Shannon Petersen argues that the ESA has had unanticipated consequences.<sup>121</sup> In tracing its legislative history, he concludes that “Congress did not intend to pass a law that would protect seemingly insignificant species irrespective of economic considerations, halt federal development projects, and regulate private property.”<sup>122</sup> Instead, he says that:

most in Congress believed the Act to be a largely symbolic effort to protect charismatic megafauna representative of our national heritage, like bald eagles, bison, and grizzly bears. Congress believed it could accomplish this simply by preventing the direct

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<sup>115</sup> 16 U.S.C. § 1531(b).

<sup>116</sup> *Id.* § 1532(6).

<sup>117</sup> *Id.* § 1532(20).

<sup>118</sup> *Id.* § 1532(3).

<sup>119</sup> 258 F.3d 1136 (9th Cir. 2001).

<sup>120</sup> See Linda C. Maranzana, *Defenders of Wildlife v. Norton: A Closer Look at the ‘Significant Portion of Its Range’ Concept*, 29 *ECOLOGY L.Q.* 263 (2002) (assessing the extent of this discretion).

<sup>121</sup> Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 *ENVTL. L.* 463, 466 (1999).

<sup>122</sup> *Id.* at 466-67.

killing of endangered species and by halting the international trade in such species.<sup>123</sup>

Despite congressional intentions, Petersen says, the ESA became the “pit bull of environmental laws” due to two factors. “First, Congress and affected interest groups lacked the foresight to” see how the statute’s plain language would later be used to put obscure species on the list without economic consideration and to stop federal development projects.<sup>124</sup> Second, scientific developments after 1973, including work in ecology and the whole idea of biodiversity, presented an entirely different understanding of what it meant to “take” or “jeopardize” a species. “In 1973 it would have been difficult, if not impossible, for Congress to anticipate such a fundamental change in circumstances” says Petersen.<sup>125</sup>

Sections 4, 7, and 9 are the ESA’s foundation. In Section 4, the Secretary of the Interior (directing the USFWS) or Secretary of Commerce (directing Fisheries) is required to list species as either threatened or endangered “solely on the basis of the best scientific and commercial data available.”<sup>126</sup> This means that economic factors cannot be considered at the listing stage. Section 7 directs federal agencies to consult with the Secretary to “[e]nsure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species.”<sup>127</sup> Section 9 prohibits the “taking” of endangered species,<sup>128</sup> defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>129</sup>

It was left to the Secretary of the Interior to provide meaning to these terms. He did so by promulgating a regulation defining the term “harm” to include habitat modification or degradation.<sup>130</sup> This definition has proven to be very controversial because it gives the

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<sup>123</sup> *Id.* at 467.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 16 U.S.C. § 1533(b)(1)(A)(2000).

<sup>127</sup> *Id.* § 1536(a)(2).

<sup>128</sup> *Id.* § 1538(a).

<sup>129</sup> *Id.* § 1532(19).

<sup>130</sup> The regulations define harm as: “[A]n act which actually injures or kills wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3 (2003); *see Palila v. Hawaii Dep’t. of Land & Nat. Res.*, 852 F.2d 1106 (9th Cir. 1988) (upholding the lower court’s ruling that habitat destruction that could result in extinction is a taking).



USFWS and Fisheries the power to limit and regulate various land use activities and thus, sparked enduring debates over land management, private property rights, and government takings.

The relatively straightforward and prohibitive language found in Sections 4, 7, and 9 help explain much of the acrimony over the ESA.<sup>131</sup> This is not empty rhetoric devoid of meaning and direction. Courts have made that abundantly clear through the years, starting with the Supreme Court's reading of Section 7 as applied to the snail darter-Tellico dam case in *Tennessee Valley Authority v. Hill* in 1978.<sup>132</sup> Here, the Court held that Section 7 prohibited the completion of the Tellico dam on the Little Tennessee River because it would have jeopardized the snail darter, a three-inch perch listed by the FWS as endangered in 1975. Writing for the majority, Chief Justice Burger reasoned that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in section 7" and that "plain intent" is found "in literally every section of the statute" to "halt and reverse the trend toward species extinction, whatever the cost."<sup>133</sup> The message sent by *TVA* was not lost on the environmental community who have continued to use the ESA as a political battering ram, legal monkeywrench, and "tool for institutional disruption."<sup>134</sup>

Though the ESA is full of "plain language," it also has its share of vagueness and ambiguity. Due to its original language and the subsequent amendments to the ESA, the FWS and Fisheries have significant managerial discretion in some areas. The contentious issue of designating critical habitat provides a good example. The 1973 version of the ESA referenced it only once, directing federal agencies to

[e]nsure that actions authorized, funded, or carried out by them do not *jeopardize the continued existence* of... endangered species and threatened species or result in the *destruction or modification of*

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<sup>131</sup> See generally Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 872 (1997) ("Indeed, it might be said that the [ESA] is in trouble today not because it fails to address diversity and ecosystems, but instead because it is beginning to address them too well."); JOHN COPELAND NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 117 (2002) (reviewing the "unparalleled stringency of the ESA's provisions.").

<sup>132</sup> 437 U.S. 153 (1978).

<sup>133</sup> *Id.* at 173.

<sup>134</sup> Christopher McGrory Klyza & David J. Sousa, *Creating Chaos: The Endangered Species Act and the Politics of Institutional Disruption* (paper presented at the Annual Meeting of the Western Political Science Association, March 15-17, 2001, Las Vegas, NV) (on file with author).

*habitat* of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.<sup>135</sup>

Congress neither defined nor explained what was meant by these key terms in 1973, so the Secretary of the Interior had to flesh them out in various regulations and guidelines.<sup>136</sup> Congress entered the fray again by providing additional qualifying and discretionary language in the ESA's 1978 amendment. The Secretary of the Interior is now able to designate critical habitat "to the maximum extent prudent and determinable."<sup>137</sup> Predictably, the parsing, determination, and designation of critical habitat has been politically agonizing.<sup>138</sup> According to Michael Bean and Melanie Rowland, "[i]t remains one of the Act's most contentious, ambiguous, and confusing concepts . . . [with] no clear, consistent, and shared understanding of what it means or what role it is to play in the Act's administration."<sup>139</sup> Moreover, "Congress has obscured, rather than clarified, the concept, and the courts . . . have never given more than superficial attention to the duties that arise from the designation of critical habitat."<sup>140</sup>

This means that Congress and the courts have placed the USFWS and Fisheries at the center of the political conflicts over critical habitat designation. How they have handled this responsibility has generally angered the environmental community. For example, using the "maximum extent prudent and determinable" language, the Congressional Research Service found that the USFWS designated critical habitat for only about 10 percent of listed domestic species, and that the Agency lost every case brought against them for failure to designate critical habitat.<sup>141</sup>

Congress has also explicitly chosen to give these agencies more managerial discretion in Section 10(j) of the ESA,<sup>142</sup> added in the 1982 amendments. This provision gives the Secretary of the Interior

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<sup>135</sup> Pub L. No. 93-205 § 7 (1973) (emphasis added).

<sup>136</sup> MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 251-62 (3d ed., 1997) (providing a history of the critical habitat issue).

<sup>137</sup> 16 U.S.C. § 1533(a)(3)(A) (2000).

<sup>138</sup> See generally Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 297 (1993).

<sup>139</sup> BEAN & ROWLAND, *supra* note 136, at 251.

<sup>140</sup> *Id.* at 252.

<sup>141</sup> M. Lynne Corn, Cong. Research Serv., *Endangered Species: Continuing Controversy* (Issue Brief 1310009, Nov. 21, 2000) (with other cases pending, as of 1999) (the brief also states that in 1999 the FWS placed critical habitat designation at the lowest priority in its listing budget).

<sup>142</sup> 16 U.S.C. § 1539(j).

the ability to list some endangered species as “experimental, non-essential populations,” meaning that they can be managed as threatened instead of endangered. To do so, various requirements need to be met, like having the experimental population “wholly separate geographically from nonexperimental populations of the same species.”<sup>143</sup> This provision was added as a way to give the USFWS more latitude and flexibility in its management of endangered species. It has done so, but it has also caused a great deal of controversy, as illustrated by the reintroduction of wolves into Yellowstone National Park and Idaho as experimental populations in the mid-1990s.<sup>144</sup> Some environmental groups argued that this provision as applied to wolves runs counter to the intent and obligations inherent in the ESA, and that the USFWS would simply use its discretion to appease ranchers.<sup>145</sup> Others supporting the experimental designation argued that it provided the USFWS the managerial flexibility needed to maneuver in a complicated and divisive political environment and, that in the end, it is not the intent of the Act that matters most but its successful implementation.

Assessing public land law in terms of legislative versus administrative control requires that we distinguish between the statute and its implementation. This distinction between good or bad law and good or bad implementation is important, and is a distinction that runs through public land law in general. With the ESA, Daniel Rohlf takes issue with the former and its administrative interpretation.<sup>146</sup> Much of Daniel Rohlf’s criticism is directed at the “biological deficiencies” of the ESA. For example, what constitutes in “danger of extinction?” The ESA “does not clearly define or specifically describe its security

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<sup>143</sup> Id. § 1539(j)(1). The meaning of this language was also contested during the reintroduction of wolves into Yellowstone National Park. The case eventually ended up in litigation as some environmental and wise use groups argued (unsuccessfully) that these reintroduced wolf populations were not “wholly separate geographically” from another endangered wolf population in the region. See *Wyo. Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349 (D.Wyo. 1997). The Tenth Circuit disagreed and argued that Congress did not specify what it meant by “wholly separate geographically” and thus left its interpretation to the FWS. It also reminded plaintiffs that Congress added section 10(j) as a way to provide additional flexibility and discretion in managing reintroduction efforts. See *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d. 1224, 1234-36 (10th Cir. 2000).

<sup>144</sup> See generally MARTIN A. NIE, *BEYOND WOLVES: THE POLITICS OF WOLF RECOVERY AND MANAGEMENT* (2003).

<sup>145</sup> See Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 HARV. ENVTL. L. REV. 101 (1992).

<sup>146</sup> See Daniel J. Rohlf, *Six Biological Reasons Why the Endangered Species Act Doesn’t Work—And What to Do About It*, 5(3) CONSERVATION BIOLOGY 273 (1991).

standard” says Rohlf, meaning “the degree of security afforded to species by the Act varies according to discretionary ad hoc determinations by the services.”<sup>147</sup>

Other assessments focus more on the law’s implementation.<sup>148</sup> The ESA, says Michael O’Connell in a response to Rohlf’s critique, is a “remarkably prescient statute that has been plagued since its adoption by ineffective implementation.”<sup>149</sup> The ESA is “sufficiently clear, uncomplicated and concise,” and its goals can be achieved with political will and adequate funding.<sup>150</sup> The lack of the latter, he says, is largely the cause of the ESA’s deficiencies. Steven Yaffee’s analysis also focuses on the highly prohibitive ESA being implemented in a nonprohibitive fashion.<sup>151</sup>

Most assessments of the ESA are subjective and situational. Groups will take issue with the vagueness of the statute when they believe it is not being implemented properly. In other words, they want detail and specificity when they do not trust those implementing the laws they like. If the agencies are trusted, however, such groups might see flexibility rather than trouble in vagueness.

As will be discussed in more detail below, the ESA also complicates the administrative versus legislative control debate. Congress, for example, would not be overly burdened by saying yes or no to snowmobiles in Yellowstone or by making similar policy choices. But, determining when a species merits listing or delisting is an altogether different policy choice, and one that is often mired in scientific disagreement, complexity, and uncertainty.<sup>152</sup>

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<sup>147</sup> *Id.* at 276.

<sup>148</sup> ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS (Tim W. Clark et al. eds., 1994).

<sup>149</sup> Michael O’Connell, *Response to: “Six Biological Reasons Why the Endangered Species Act Doesn’t Work—And What to Do About It”*, 6 CONSERVATION BIOLOGY 140 (1992).

<sup>150</sup> *Id.* at 142.

<sup>151</sup> See generally STEVEN L. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT (1982).

<sup>152</sup> See generally Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available Science Mandate*, 34 ENVTL. L. 397 (2004); Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy*, 75 WASH. U.L.Q. 1029 (1997); NAT’L RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT (1995) (evaluating the ESA and related policy debates in terms of contemporary scientific knowledge).

## II

## RETHINKING STATUTORY DETAIL AND ADMINISTRATIVE DISCRETION

This part reviews the political and philosophical debate over congressional delegation of authority and agency discretion as it applies to public lands-based political conflict. Do agencies like the USFS and NPS have too much discretion? Are they legitimate arbiters of competing claims to public lands? What might happen if Congress reasserted itself and provided more prescription, detail, and guidance in new legislation? Some of the central arguments reviewed in the case for and against administrative leadership and discretion qualify my argument for providing more statutory detail in the following section.

*A. Administrative Leadership and Discretion*

Article IV, Section 3 of the U.S. Constitution states: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular state.”<sup>153</sup> The federal government has proprietary and sovereign powers over its property (including public lands) and may regulate activity on private lands that affect its public lands. The Property Clause has been debated between those advocating a broad or narrow view of its powers.<sup>154</sup> But, the courts have been rather consistent in their reading of its scope and importance, going so far as to say that this congressional power over public lands is “without limitations.”<sup>155</sup>

The Property Clause changes things for some critics of congressional delegation.<sup>156</sup> While it might be unconstitutional for Congress to delegate too much responsibility to a federal agency

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<sup>153</sup> U.S. CONST. art. IV, § 3, Cl. 2.

<sup>154</sup> See generally Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001) (reviewing the history and potential of the Property Clause).

<sup>155</sup> *United States v. San Francisco*, 310 U.S. 16, 29 (1940). See also *Kleppe v. New Mexico* 426 U.S. 529, 539-40 (1976) (describing Congress’s broad powers under the Property Clause).

<sup>156</sup> Delegation critic David Schoenbrod makes an exception for the management of government property. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1226, 1265-72 (1985); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 186-89 (1993).

regulating private behavior, it has much more latitude when it does so concerning its own public lands. The executive acts as both proprietor and sovereign when executing delegated Property Clause powers. As noted by Sandra Zellmer, this means that “property management is not necessarily analogous to other types of lawmaking, and more leeway might be afforded executive agencies, acting not only as instruments of a tripartite government but also as proprietors, when public property is implicated.”<sup>157</sup> She also notes that courts have regularly cited this executive role as proprietor in ratifying sweeping exercises of power and that the broadly phrased National Forest Organic Act of 1897 was upheld by the Supreme Court against a nondelegation challenge.<sup>158</sup>

It is also possible to view public administration as another democratic check and balance. Administrative leaders can make sure that laws and democratic principles are adhered to, especially when they are being threatened by presidential and congressional power politics.<sup>159</sup> They are not mere pawns according to this view; rather, they are democratic trustees empowered with the public’s interest. They can advance this interest by implementing laws Congress intended, and if such laws are being threatened by the President or by members of Congress, they have the responsibility to inform the public. They will in essence say: if you want us to do that, you need to first pass a law saying so.

Administrative leadership can take other forms as well. Former Labor Secretary Robert Reich believes that higher-level public managers ought to stimulate public debate about what they do:

Public deliberation can help the manager clarify ambiguous mandates. More importantly, it can help the public discover latent contradictions and commonalities in what it wants to achieve. Thus the public manager’s job is not only, or simply, to make policy choices and implement them. It is also to participate in a system of

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<sup>157</sup> Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21<sup>st</sup> Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1025 (2000).

<sup>158</sup> *Id.* at 1025-26. See *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>159</sup> H. George Frederickson & David K. Hart, *The Public Service and the Patriotism of Benevolence*, 45 PUBLIC ADMIN. REV. 547-53 (1985) (discussing the role of public administration as a check on power, with an example of resistance by Danish civil servants to Nazi leaders during WWII German occupation). See also MICHAEL W. SPICER, *THE FOUNDERS, THE CONSTITUTION, AND PUBLIC ADMINISTRATION: A CONFLICT IN WORLDVIEWS* 69-70 (1995) (discussing visions and worldviews of public administration from an American Constitutional perspective).

democratic governance in which public values are continuously rearticulated and recreated.<sup>160</sup>

This is how Reich approaches the administrative discretion-democratic values challenge: public managers use this discretionary space or “running room” to engage the public in democratic deliberation about what it wants in a type of “civic discovery.”<sup>161</sup>

Administrative management, especially when channeled through rulemaking processes, can be more democratic and participatory than other forms of democratic decision making.<sup>162</sup> Democracy, after all, is a contested concept.<sup>163</sup> Administrative control might satisfy some conceptions of democracy, and fail others, but the same goes for legislative (representative) control.<sup>164</sup> The administrative rulemaking process, as outlined in the 1946 Administrative Procedures Act,<sup>165</sup> is integral to this case. It provides substantive opportunities for public participation—opportunities that are quite rare in legislative

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<sup>160</sup> Robert B. Reich, *Policy Making in a Democracy*, in *THE POWER OF PUBLIC IDEAS* 123-24 (Robert B. Reich ed., 1988).

<sup>161</sup> *Id.* at 144-47.

<sup>162</sup> A rule according to the Administrative Procedures Act (APA) “means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4) (2000). There are three important elements of rulemaking. First, information must be provided to the public in the form of a notice that is published in the *Federal Register*. Generally, the agency tells the public what it is proposing to do, under what authority and statute it is acting, and the time of the rulemaking period. Once the decision has been made, the agency is to also issue a general statement of the rule’s basis and purpose. Second, the participation requirement mandates that agencies give the public “an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.” Finally, accountability is an important element of rulemaking and is most explicit in the possibility of judicial review. The reviewing court can hold unlawful and set aside an agency action found to be “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.” For an extended analysis of rulemaking and accountability, see CORNELIUS M. KERWIN, *RULEMAKING* (1994).

<sup>163</sup> ROBERT A. DAHL, *ON DEMOCRACY* (1998) (exploring democracy in the ideal and in practice and the underlying conditions favoring and harming democracy).

<sup>164</sup> Dan M. Kahan, *Democracy Schmemocracy*, 20 *CARDOZO L. REV.* 795, 803-04 (1999) (arguing that democracy is an empty standard for evaluating the desirability and constitutionality of delegation: “Any argument that critiques delegation based on one conception of democracy will be answerable by an argument that defends delegation based on some other conception of democracy.”). *But see* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 *CARDOZO L. REV.* 731 (1999). Responding to Kahan, Schoenbrod notes that “[t]he effort to square delegation with democracy is pervasively futile because the drive for delegation, from the beginning of the twentieth century, stemmed from a desire to reduce government’s accountability to ordinary voters.” *Id.* at 732.

<sup>165</sup> 5 U.S.C. § 551 (2000).

proceedings. Furthermore, as opposed to vague legislation, the public has a chance to comment on specifics in rulemaking so that they are much more certain of how policy may affect them. Thus, it is easier to formulate meaningful positions. From an interest group standpoint, rulemaking can also be a very effective organizing tool because rules are so specific and thus, provide a focal point of the debate.

The rulemaking process is also a way to limit the power and discretion of bureaucrats. According to Cornelius Kerwin, “[r]ules set limits on the authority of public officials in all areas of their work, identifying what they can know, how they can learn it, when they must act, what they must do, when they must do it, and actions they can take against those who fail to comply.”<sup>166</sup> Thus, “[f]ears of unfettered discretion in the hands of willful or ignorant bureaucrats are largely unfounded in a system in which citizens can trust that rulemaking will occur subsequent to any legislative enactment and set effective and reasonable limits on the use of otherwise discretionary power.”<sup>167</sup> Rulemaking, in short, provides a way to ensure that agency actions are not “arbitrary and capricious.”<sup>168</sup>

Accountability is an essential part of this debate,<sup>169</sup> but there is no agreed upon notion of what it means exactly.<sup>170</sup> According to some

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<sup>166</sup> KERWIN, *supra* note 162, at 31.

<sup>167</sup> *Id.*

<sup>168</sup> See 5 U.S.C. § 706(2)(a) (2000) (discussing scope of review in the APA).

<sup>169</sup> See generally KERWIN, *supra* note 162, at 215 (providing a comprehensive review of executive, legislative, and judicial oversight of rulemaking).

<sup>170</sup> Edward P. Weber, *The Question of Accountability in Historical Perspective: From Jackson to Contemporary Grassroots Ecosystem Management*, 31 ADMIN. & SOC'Y 453, 480 (1999). Applying the concept of accountability to the move toward “grassroots ecosystem management.” In the end, the whole idea of accountability is as fluid and contextual as that of democracy. Weber traces our changing expectations and understanding of the accountability concept. What Weber finds is that “[e]ach conceptualization emphasizes different institutions and locates the ultimate authority for accountability in differing combinations and types of sectors (public, private, intermediary), processes, decision rules, knowledge, and values.” The eighteenth century Jacksonian model, for example, emphasized bottom-up and mass-based political parties and intermediary associations while the “public-interest-egalitarian” model focused more on centralized federal control and broader participation in bureaucratic decision making. The point is that accountability means different things to progressive-era New Dealers than it does to “neo-conservative, efficiency” types. While submitting “that an acceptable system of democratic accountability can take a variety of forms rather than adhering to some sacrosanct, overarching notion of accountability,” Weber also concludes that each model “relies on the Constitution as the preeminent authority in policy and political disputes” and that “[e]ach pays homage to the electoral connection between citizens and representatives and to the corollary primacy of elected officials over the bureaucracy as fundamental sources of legitimacy for American democracy.” *Id.*



critics who think there is too much congressional delegation, bureaucrats are largely unaccountable because they are not elected.<sup>171</sup> But others argue that public officials with delegated decision making powers are appointed by an elected President.<sup>172</sup> The case frequently cited here is *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, in which the Court stated that:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>173</sup>

This argument is straightforward: if Congress provides detail, end of story. But, if Congress leaves legislation general and vague, then it has in effect, deferred to the executive branch, and this branch is controlled by the President. In other words, delegation of power to administrators can in fact improve governmental responsiveness because Presidents are elected and heads of administrations.<sup>174</sup> In short, according to this view, presidential control of agency decision making provides democratic accountability through the ballot box.<sup>175</sup>

Defenders of administrative control also argue that legislative oversight of agencies provides another layer of accountability. This oversight happens in numerous ways.<sup>176</sup> First of course, Congress could control agency action by writing more detailed legislation. Second, its power of the purse is another important control mechanism. Congress often sends messages to agencies through the appropriations process. The agencies are accountable because they are not self-financing. Other methods include using deadlines for agency action; “hammer provisions” written into statutes that will

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<sup>171</sup> See *infra* Part III.B.

<sup>172</sup> See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

<sup>173</sup> 467 U.S. 837, 865-66 (1984).

<sup>174</sup> Mashaw, *supra* note 172, at 95.

<sup>175</sup> Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 407-08 (1987) (discussing the capabilities of the executive branch as it applies to delegation and democratic accountability).

<sup>176</sup> The legislative veto, struck down by the Supreme Court in *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), provided what was perhaps the strongest type of Congressional control over agency rulemaking. Veto provisions were written into statutes requiring agencies to submit proposed rules for congressional review and approval.

take effect if an agency fails to do what Congress wants it to; oversight and program reauthorization hearings; staff investigations and field studies; communication with agency personnel; casework review; agency reports required by Congress; and program evaluations done by agencies, committee staff, and nongovernmental personnel.<sup>177</sup>

The problem with such oversight, though, is that it has led to an increasingly rigid, inflexible, and “ossified” rulemaking process.<sup>178</sup> Instead of stepping forth and tackling the controversial policy issues of the day, Congress instead tries to control the decisions public land agencies make by forcing them to go through dozens of procedural and analytical steps.<sup>179</sup> And, if this fails to work, it uses the appropriations process to get what it wants. These procedural provisions are sometimes designed to thwart the legislative mandates agencies must implement.<sup>180</sup> And, if this was not enough, Congress

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<sup>177</sup> See generally JAMES R. BOWERS, *REGULATING THE REGULATORS* (1990); JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 132 (1990). Such oversight could be categorized as “police patrol” or of the “fire alarm” variety. The former is more proactive in nature, while the latter is set off by a disgruntled constituent or interest group. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165-79 (1984).

<sup>178</sup> See generally Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385 (1992)

<sup>179</sup> Congress has imposed a number of analytical requirements, like having agencies go through the EIS process and prepare analyses required by the Regulatory Flexibility Act, all in an effort to exercise control over agency decision making. Add on top of this a number of analytical requirements imposed by the White House. These are often issued in the form of Executive Orders mandating agencies to conduct such things as regulatory impact analyses and to evaluate rules in terms of private property rights, trade, and federalism, among other things. Another layer consists of scientific review requirements that agencies use to solicit outside expertise and to peer review scientific and technical rules. Once these analytical requirements are met, they are then subject to congressional, judicial, and executive review. President Reagan’s Executive Order 12,291, for example, requires that agencies submit all rules to the Office of Management and Budget (OMB) for review so that they are in compliance with the Order’s cost-benefit analytical requirements. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 19, 1981). Yet another layer of review came with President Bush’s Council of Competitiveness. These are two examples of how the executive competes with Congress for control over agency decision making. According to McGarity’s analysis, ossification results from these requirements and reviews. McGarity, *supra* note 178.

<sup>180</sup> See GARY C. BRYNER, *BUREAUCRATIC DISCRETION* 3 (1987). Bryner asserts that:

[t]he broad scope of administrative power has invited political intervention in administrative proceedings and has produced an enormous superstructure of procedural mechanisms designed to create the illusion of legitimacy for administrative government, which fails to limit and direct administrative power and threatens the ability of agencies to accomplish their statutory mandates.

then often complains about the bureaucratic red tape, paperwork, and inefficiencies resulting from such processes.<sup>181</sup> This is not to suggest that these steps are not beneficial, but that there is a more legitimate way of controlling administrative discretion—by making choices in legislation.

The federal judiciary provides the most obvious form of administrative oversight. It makes sure that agencies behave legally, and that they follow substantive and procedural rules. Two questions are asked: is this rule or action permissible under the agency's congressional mission, mandate, and authorizing legislation? And, did the agency follow the appropriate procedures in carrying out this rule or action? The mere existence of the courts and the threat of litigation affects bureaucratic behavior through the law of anticipated reaction.<sup>182</sup> But, when cases are brought before them, courts often look to the important provisions of the APA. The APA directs the reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law<sup>183</sup> [and/or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>184</sup> Predictably, courts give different meaning to this language. Some adopt a “hard look” standard in which they are quite searching, skeptical, vigilant, and aggressive in their review of agency rulemaking.<sup>185</sup> They will scrutinize agency decisions and play a more active role in the process. But, the more dominant view is much less likely to intervene in agency rulemaking, seeing it as judicial usurpation of agency discretion.<sup>186</sup> As long as agencies stay within their statutory mandates and do not egregiously mess up procedures, courts adopting this view will generally give the agency the benefit of the doubt.<sup>187</sup> Thus, one view grants great latitude to the judiciary, while the other to agencies.

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*Id.*

<sup>181</sup> See generally Bosworth, *supra* note 47.

<sup>182</sup> See generally PAUL J. CULHANE, PUBLIC LANDS POLITICS (1981).

<sup>183</sup> 5 U.S.C. § 706(2)(a) (2000).

<sup>184</sup> *Id.* § 706(2)(c).

<sup>185</sup> See, e.g., *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>186</sup> See, e.g., *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>187</sup> See Vic Sher, *Breaking Out of the Box: Toxic Risk, Government Actions, and Constitutional Rights*, 13 J. ENVTL. L. & LITIG. 145 (1998) (analyzing the limitations of litigating under the extremely deferential standard set forth in the APA).

For purposes here, it is enough to point out the real and potential role of the judiciary in checking the powers of administrative control. But while judicial oversight is an essential feature of the checks and balances system, the courtroom is not the most appropriate venue for resolving some political conflicts. However, given the amount of administrative discretion provided to public land agencies and our hyperpluralistic and litigious political culture, the courts have become dominant players in public lands governance.<sup>188</sup> In many ways, the often cited “iron triangle” comprised of private interests, agencies, and congressional committees has been replaced by a “judicial iron triangle” because of the important role judges play in the process.<sup>189</sup> There is a dominant sequence in public lands politics: (1) vague, ambiguous or contradictory laws leave many central political questions unanswered; (2) land management agencies try to answer these questions using the less-than-perfect administrative rulemaking process; (3) they are sued; (4) courts implicitly or explicitly answer the political questions avoided by Congress; (5) depending on the court’s interpretation, they are either championed as guardians of democracy or vilified as judicial activists. This recurring pattern raises an important question of when judicial oversight becomes judicial control.<sup>190</sup>

It is also important to consider whether or not the hyper-complex nature of social and ecological systems precludes Congress from providing any meaningful detail and specificity in legislation. In other words, might the complexity of environmental problems necessarily lead to Congress delegating authority to resource professionals and scientific experts in federal agencies? If so, it would be unwise to provide too much detail and prescription in such a complex and rapidly changing environment. This argument is well worn and found its most forceful articulation in the Progressive Era:

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<sup>188</sup> See generally GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* (5th ed. 2002).

<sup>189</sup> Jeanne Nienaber Clarke & Kurt Angersbach, *The Federal Four: Change and Continuity in the Bureau of Land Management, Fish and Wildlife Service, Forest Service, and National Park Service, 1970-2000*, in *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* 35 (Charles Davis, ed., 2001).

<sup>190</sup> See generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003) (analyzing how courts came to govern various policy areas and the growth of “institutional reform litigation”).

that the science of conservation must be left to the professionally trained and apolitical experts in federal agencies.<sup>191</sup>

It is worth asking, however, if many of our controversial resource decisions are all that technical and complex. Should snowmobiles be allowed in Yellowstone? Should we ban road construction (with permissible exemptions and mitigations) in inventoried roadless areas? Should we allow drilling along Montana's controversial Rocky Mountain Front? These are value and interest-based political questions, not technical ones. Surely there is a level of complexity involved, but the core questions are hardly beyond the grasp of our elected representatives. Nonetheless, there are questions and issues that would challenge any national representative body, such as the scientific complexities surrounding the ESA illustrate.<sup>192</sup>

A case can also be made—at least in theory—that increased administrative control is more conducive to adaptation and flexibility. Rulemaking, process, and litigation notwithstanding, agencies might be better positioned than Congress to adapt to the changing and site-specific contexts, problems, and goals of public lands management. Though preached more than practiced, the science of adaptive management necessitates agency flexibility. This means that policies and management decisions are experiments that we learn from. Practitioners are explicit in what they expect: information is collected and analyzed so that expectations can be compared to the actuality; then finally, they correct errors, learn, and change actions and plans.<sup>193</sup> Might the principles of adaptive management be inimical to the tedious and uncertain nature of congressional policymaking? It would be unrealistic to expect Congress to provide this sort of micromanagement, or to have it vote various management decisions up or down along the way. On the other hand, it is also necessary to ask if the theory of adaptive management is even possible in the modern administrative state.

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<sup>191</sup> See generally SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959).

<sup>192</sup> See *supra* Part II.

<sup>193</sup> See KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT 9 (1993). Lee comments:

I have come to think of science and democracy as compass and gyroscope—navigational aids in the quest for sustainability. Science linked to human purpose is a compass: a way to gauge directions when sailing beyond the maps. Democracy, with its contentious stability, is a gyroscope: a way to maintain our bearing through turbulent seas.

*Id.* at 5-6.

Differences between theory and practice are also important when thinking about alternatives to administrative control. The demands on Congress often exceed its institutional capacity, and finding agreement, even a slim majority, in this body is usually difficult.

Given this reality, one possibility is that if Congress could not delegate authority to agencies in providing detail and specificity, it would subdelegate this responsibility to congressional committees or subcommittees. For Richard Stewart, such subdelegation to subcommittees raises accountability concerns because it shifts power to senior committee chairs and staff, and their interest group allies. "Policy is made through a submerged micropolitical process without open and regular procedures."<sup>194</sup>

Congress might also provide this necessary statutory detail by tacking substantive policy riders onto appropriations bills. Instead of building a majority to support their policy goals, rider provisions allow representatives to bury the detail in other voluminous (often omnibus) bills.<sup>195</sup> Since such appropriations bills have to pass each year to keep the government working, they provide an opportune vehicle for representatives who are unwilling or unable to forward policy through more traditional processes.

This illustrates why it is so important to contrast the agency rulemaking process to the real way policy is often made in Congress. The procedural and participatory requirements of federal rulemaking can be more regular, predictable, open, responsive, transparent, and democratic than some questionable legislative practices. As Stewart notes, unlike rulemaking, subdelegated congressional decision making is often not subject to public input through regularly established procedures, not required to be based on a public record, and not subject to "hard look" judicial review.<sup>196</sup> In sum, if we are going to debate the case for and against statutory detail and

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<sup>194</sup> Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323, 332 (1987).

<sup>195</sup> The use of appropriations riders in natural resource policy is alarming. See generally Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997) (arguing that the appropriations process is not a suitable way to formulate major changes in policy and for establishing national priorities); Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L. 329 (1990) (examining the use of riders to exempt various forest management actions from judicial review).

<sup>196</sup> Stewart, *supra* note 194, at 333.

administrative discretion, let us compare these venues in theory and practice.

### ***B. The Case for Additional Statutory Detail***

Many of the above arguments should give us pause before demanding a more active role for Congress in public lands management. There are serious limits on what Congress can do in this area, and a legislative “fix” might make things worse. But, the following discussion also shows the limits of administrative leadership and discretion when it comes to public lands conflict resolution. Good law, after all, is essential for a representative democracy. As noted by Theodore Lowi, a persistent and often cited critic of administrative control and its “constitutional derangements:” “Policy without law is what a broad delegation of power is.”<sup>197</sup> The rise of administrative law and the decline of good statutory law is the most troublesome development for Lowi, who sees “[t]he move from concreteness to abstractness in the definition of public policy [as] probably the most important single change in the entire history of public control in the United States.”<sup>198</sup> Laws change the rules of the game, says Lowi:

A good clear statute puts the government on one side as opposed to other sides, it redistributes advantages and disadvantages, it slants and redefines the terms of bargaining. It can even eliminate bargaining, as this term is currently defined. Laws set priorities. Laws deliberately set some goals and values above others.<sup>199</sup>

The broad delegation of power runs contrary to this rule of law, and “has wrapped public policies in shrouds of illegitimacy and ineffectiveness.”<sup>200</sup> A good clear law will eliminate politics at certain points. Vague, meaningless law, in contrast, politicizes the entire policymaking process from Congress to the low-level agency representatives who endlessly negotiate with agency “clients.” The problem is clear according to Lowi: “modern law has become a series of instructions to administrators rather than a series of commands to

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<sup>197</sup> THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 93 (2d ed., 1979). For the importance of Lowi’s work and the impression it made, see *Theodore J. Lowi and Juridical Democracy*, 23 *PS: POL. SCI. & POL.* 563 (1990).

<sup>198</sup> LOWI, *supra* note 197, at 100.

<sup>199</sup> *Id.* at 92.

<sup>200</sup> *Id.* at 93.

citizens.”<sup>201</sup> Juridical democracy—the rule of law operating in institutions—is put forth by Lowi as the fix to this problem.<sup>202</sup> The principle on which it stands is quite clear: “the institutions of government ought to say what they are going to do to us before they do it; and if they cannot say they cannot act.”<sup>203</sup>

Process and public participation is also not a substitute for good law. Calling for more process and interest representation is an easy out for political representatives who are responsible for making tough choices. For Lowi, the representation focus—including the “new halo words” of cooperation, partnership, local option, creative federalism, community action and participatory democracy—is a “pathological adjustment to the problem,” and converts government from a moralistic to a mechanistic institution.<sup>204</sup> The use of public participation in the rulemaking process is also a rather weak proxy for authentic democratic decision making. That argument is very relevant to the collaborative conservation movement and the increasing use of public participation in agency decision making.<sup>205</sup> Instead of our political representatives taking responsibility for the tough choices that must be made, they can pass them along to agencies who in turn pass them along to their “clients” or other self-selected stakeholders who are only accountable to the special interests they represent.

For critics, this is yet another pathology of interest group liberalism that does not meet the public interest. Law Professor George Coggins, for example, is emphatic that the devolution and collaborative movement is an abdication of congressional, judicial, and executive responsibilities.<sup>206</sup> First, he notes that Congress routinely ducks the hard allocation questions by delegating nearly standardless management powers to the USFS and BLM.<sup>207</sup> Then, judges abdicate their judicial function by deferring to an agency’s choices and interpretations. And now, bureaucrats are passing the

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<sup>201</sup> *Id.* at 106.

<sup>202</sup> *Id.* at 298.

<sup>203</sup> *Id.* at 299.

<sup>204</sup> *Id.* at 62.

<sup>205</sup> See generally THOMAS C. BEIERLE & JERRY CAYFORD, *DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS* (2002).

<sup>206</sup> George Cameron Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOLOGY L. Q.* 602 (1999).

<sup>207</sup> See George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of “Multiple Use, Sustained Yield” for Public Land Management*, 53 *U.COLO. L. REV.* 229, 230 (1981).



buck on controversial issues to devolved collaborative groups. So what should happen according to Coggins? “All interests will be better off if Congress actually decides the political resource allocation questions, the executive carries out the letter and spirit of the law, and the courts make sure the executive does just that.”<sup>208</sup>

We must also not be fooled by lengthy laws, which simply delegate in great detail while failing to address central policy choices. David Schoenbrod, another prominent critic of too much congressional delegation, argues that most delegating statutes do not “simply pass the buck but rather passes it along with complicated instructions.”<sup>209</sup> He makes a distinction between broad and narrow delegation, and uses the Clean Air Act of 1970 as an example of the latter. This law, says Schoenbrod, simply delegates in a new way by giving the Environmental Protection Agency (EPA) “elaborate instructions about the goals that it should achieve and the procedures for promulgating them.”<sup>210</sup> Narrow delegation is also evident in public lands law. FLPMA, for example, articulates general principles of multiple use management, while providing very specific instructions in how the Interior Secretary and BLM should go about making decisions.<sup>211</sup>

Narrow delegation can often be identified by its goal and instruction-oriented design. This allows political representatives to stand behind the principle of clean air, for instance, then go a step further by agreeing to an emissions reduction target, and then specifying what steps and procedures the EPA must use to achieve this goal. But, the hard choices of how to achieve those emissions reductions and regulate various sources of pollution were delegated to the EPA and left to the states. Schoenbrod also argues that narrow delegation has “the perverse side-effect of delaying, complicating, and rigidifying the process of making environmental laws.”<sup>212</sup> But why make agencies jump through so many hoops in meeting these goals? “[C]ompllicated instructions often serve to camouflage the buck passing because legislators can hardly claim credit for solving a problem when the statute hands the problem to an agency without

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<sup>208</sup> Coggins, *supra* note 206, at 610.

<sup>209</sup> David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355, 367 (1987).

<sup>210</sup> SCHOENBROD, *supra* note 156, at 58.

<sup>211</sup> See 43 U.S.C. § 1701 (2000).

<sup>212</sup> SCHOENBROD, *supra* note 156, at 59.

saying more[, and it] obscures the legislative mandate requiring agencies to reconcile irreconcilable goals.”<sup>213</sup>

The goal-based statutes governing the USFS are particularly relevant to this case. Those laws generally state goals, which often conflict, and then delegate the job of reconciling those conflicts to agencies.<sup>214</sup> In MUSYA and NFMA, for example, Congress can stand behind the vague goal of multiple use without having to decide how to balance outdoor recreation, range, timber, watershed, and fish and wildlife values. The tough and politically risky decisions are again left to the agency.

In the case for more statutory detail, it is made explicit that Congress is currently abdicating its responsibilities to make the tough choices and necessary trade-offs required of it. Congress is compromising through statutory vagueness. Congress leaves laws vague to please interested parties or leads those parties to believe that they can get what they want by following the applicable process. In sum, delegation gets politicians off the hook—they can promise everything to everyone, and when promises go unfulfilled they have a convenient bureaucratic scapegoat. Self-interested political representatives have learned that taking sides on policy issues creates political opposition and entails real costs and risks. Delegation thus encourages Congress to enact unnecessarily ambiguous or contradictory laws. It encourages bad laws, says Schoenbrod, because “members of Congress do not have to take responsibility for the rules of conduct that eventually emerge from the delegation process. So long as delegation allows politicians to enact laws that promise all things to all people, exhorting them to delegate in a different way is spitting into the wind.”<sup>215</sup>

Daniel Rohlf makes that argument in his critique of the ESA. He sees strengthening this statute as an uphill battle given what the current text now gives lawmakers. He says,

[a]s is common in other contexts, Congress has said one thing about species protection yet actually done another. The Act makes general commitments to preserve biodiversity but transfers important policy decisions to those not directly accountable to the electorate. This permits politicians to point to their solid environmental voting record while at the same time pressuring administrative agencies responsible for implementing the Act not to

<sup>213</sup> Schoenbrod, *supra* note 209, at 368.

<sup>214</sup> See generally David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

<sup>215</sup> Schoenbrod, *supra* note 209, at 370.

make decisions that significantly curtail economic activities, particularly in their districts. Reduced protections for biodiversity are then passed off as “science” rather than conscious, politically driven policy choices . . . . Conservation biologists and others need to redouble their efforts to impress upon elected officials and the public the worth of saving imperiled species. However, until policy decisions—the degree of security to give listed species, for example—are taken away from administrative agencies and given to politically accountable decision-makers, such efforts will have limited influence.<sup>216</sup>

A similar logic can be applied to the case of multiple use. Here, we have a situation in which congressional members lend rhetorical support for this broad mandate while historically acting on behalf of organized special interests.<sup>217</sup>

These critiques rely heavily upon the notion of Congressional “credit claiming.” As “single-minded seekers of reelection,” Congress members engage in certain types of behavior that will help them achieve that goal.<sup>218</sup> This includes advertising a favorable image to constituents (one often devoid of content), partaking in constituent casework (with favors being returned), taking strategic positions on issues, and then claiming credit for various political accomplishments. The latter is often done by particularizing benefits or the practice of concentrating rewards and dispersing costs.

For those subscribing to this view, delegation provides the perfect vehicle for self-interested congressional members. They can vote on some vague law, claim credit for doing something, and then follow it with a targeted advertising campaign. Of course, the law will be vague enough that bureaucrats will have to answer the toughest questions and make the hardest choices. Because of this, members can work quietly behind the scenes influencing agency behavior and doing more casework. In sum, it gives politicians a way to dodge the trade-offs and instead, talk about fuzzy ideological abstractions,

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<sup>216</sup> Rohlf, *supra* note 146, at 280.

<sup>217</sup> See Blumm, *supra* note 11. Blumm argues that “public choice theory supports the proposition that multiple use cannot fulfill its promise because it is inherently biased toward commodity users” and that “[s]ince multiple use is founded upon a standardless delegation of authority to managers of public lands and waters, congressional endorsement of multiple use has created the archetypal ‘special interest’ legislation.” *Id.* at 405, 407.

<sup>218</sup> See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION, Ch. 1 (1974). *But see* Steven Kelman, *Why Public Ideas Matter*, in THE POWER OF PUBLIC IDEAS 31 (Robert B. Reich, ed., 1988). Taking issue with the public choice explanation of all congressional behavior and arguing that as a general rule, “self-interest becomes a less powerful influence as the importance of a policy choice increases.” *Id.* at 39.

values, and goals that are broad enough to catch favorable political winds.

Relatively clear, understandable, and unambiguous law is also an important factor necessary for effective policy implementation (along with budgets, political support, etc.). Much of the scholarly literature focusing on implementation emphasizes the importance of precision, clear policy goals, and the ranking of statutory objectives.<sup>219</sup> Of course, without such goals and objectives in place, it is impossible to judge whether or not the agency in question is achieving them. And, without some type of prioritizing of objectives, including an indication of how statutes are supposed to work together, new directives may be given low priority or become lost in the shuffle.<sup>220</sup> This certainly makes intuitive sense and takes some heat off of our public land agencies. The remedy here is also simple: write clearer statutes and expect relatively better implementation.

Excessive administrative control using byzantine rulemaking and planning processes might also lead to increased political alienation among citizens. Schoenbrod believes that delegation is partially responsible for voter apathy, alienation, and the sense held among many people that our political system is often impervious to public direction. With delegation, he says, "lawmaking even on the most controversial subjects becomes, for most of us, an incomprehensible bore."<sup>221</sup> Why should voters invest the time and energy to become knowledgeable about the policy positions of candidates if the most important decisions are not made legislatively but rather through some labyrinthine rulemaking process? Furthermore, why participate in a time-intensive process when public comment may not matter all that much anyway?

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<sup>219</sup> See generally Donald S. Van Meter & Carl E. Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 ADMIN. & SOCIETY 445 (1975) (discussing the importance of policy objectives and standards); ROBERT T. NAKAMURA & FRANK SMALLWOOD, *THE POLITICS OF POLICY IMPLEMENTATION* 33 (1980) (discussing the importance of clarity in policy instructions and directives, meaning being specific about what is to be achieved and how); GEORGE C. EDWARDS, *IMPLEMENTING PUBLIC POLICY* 10 (1980) (stating that "[f]or implementation to be effective, those whose responsibility it is to implement a decision must know what they are supposed to do.").

<sup>220</sup> See Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 POL'Y STUD. J. 538, 545 (1980) ("In short, to the extent that a statute provides precise and clearly ranked instructions to implementing officials and other actors . . . the more likely that the policy outputs of the implementing agencies and ultimately the behavior of target groups will be consistent with those directives.").

<sup>221</sup> SCHOENBROD, *supra* note 156, at 20.

Communities and industries that are particularly dependent on public lands might also find a degree of predictability in increased statutory detail. One of the most enduring questions in public lands conflict is what obligation our land agencies have in providing community stability and economic development. Should our national forests, for example, be managed in a way to benefit local timber industries and communities? And should our national parks be managed for the “gateway communities” that become economically dependent upon them? If so, where have those decisions been made and have they been codified by Congress?

The volatility surrounding public lands politics is at least one disincentive for industries and communities to rely too heavily on the public domain. In forest policy, for example, uncertainty resulting from litigation, administrative appeals, and changing administrative priorities—all partially stemming from legislative language issues—leaves some interests unwilling to make serious investments and long-term plans. Why, for instance, invest in new technology capable of handling small diameter trees if the next administration changes course and gives different meaning to multiple use and forest health? Providing a new level of statutory detail might help things, then, partly because it is so much harder for Congress to reassemble majorities and rewrite laws than it is for an agency to promulgate new rules.

This argument can also be taken too far however. With national forests, for instance, securing community stability and predictability might be but a pipedream. There are simply too many factors complicating these goals, including the unpredictable nature of fire, insect outbreaks and disease, new scientific knowledge, swings in public opinion, drought, climate change, agency budgets and congressional appropriations, market demand, housing starts, and globalized timber markets, to name a few. For former USFS Chief Jack Ward Thomas, “[g]iven the myriad of interacting variables, it is time for concerned citizens and leaders to accept the reality that the dream of a stable timber supply from public lands is an illusion.”<sup>222</sup> But, predictability could be increased, he says, in part by Congress dealing squarely with the issue of biodiversity protection, which he believes has become the overriding de facto policy of federal lands management.<sup>223</sup> If that is our policy, he says, “it should be clearly

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<sup>222</sup> Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 14 (1996).

<sup>223</sup> *Id.* at 15.

stated, recognized openly, and the consequences accepted. If biodiversity protection is not a desired national policy, that should also be stated. A clear declaration of policy regarding biodiversity is one key to the 'stability' debate."<sup>224</sup>

There is a widespread assumption that national forest management ought to promote community stability and economic development.<sup>225</sup> This belief has influenced USFS policies and has certainly been a common theme in conflicts over owls, old growth forests, and other issues. But, there exists little explicit statutory guidance on how large a role it should play in USFS decision making.<sup>226</sup> NFMA provides some direction here,<sup>227</sup> but much of this emphasis on community stability stemmed from USFS planning regulations, like the one calling for the maximization of net public benefits<sup>228</sup> and the consideration of public comment (much of it coming from these communities). But while planning regulations call for its consideration, there is very limited explicit statutory authority to do so. Of course, Congress has said a number of things about this matter over the years (in the *Congressional Record*, during floor debate, and in other places), but it has not been explicit where this goal ranks in

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<sup>224</sup> *Id.*

<sup>225</sup> See generally *Hearing on Impact of Federal Land Use Policies on Rural Communities, Hearing Before the House Committee on Resources*, 105<sup>th</sup> Cong. 2d sess. (1998).

<sup>226</sup> See Con H. Schallau & Richard M. Alston, *The Commitment to Community Stability: A Policy or Shibboleth*, 17 ENVTL. L. 429 (1987). Noting that "[p]ublic land legislation contains a general theme of concern for the economic stability of communities. However, there is little explicit statutory direction on how large a role community stability concerns should play in Forest Service decisions." *Id.* at 460. They go on to say that "[c]onfusion about community stability stems from the fact that although Congress frequently reaffirms its desire to achieve community stability, it has not provided any operational guidelines for doing so." *Id.* at 479. See also *Report of the Society of American Foresters National Task Force on Community Stability* 13 (1989) (on file with author) (noting that "the agency's community stability policy is permissive rather than prescriptive."); James P. Perry, *Community Stability: Is There a Statutory Solution?*, in *COMMUNITY STABILITY IN FOREST-BASED ECONOMICS* (Dennis C. Le Master & John H. Beuter, eds., 1989). Perry notes that "Congress has not, in any legislation which applies generally to all National Forest System lands, provided any direction that requires the agencies to meet a community stability requirement." *Id.* at 32.

<sup>227</sup> In conducting timber sales, the NFMA directs the Secretary of Agriculture to select bidding methods that, among other things, "consider the economic stability of communities whose economies are dependent on such national forest materials, or achieve such other objectives as the Secretary deems necessary"; and "are consistent with the objectives of this Act and other Federal statutes." 16 U.S.C. § 472a(e)(1)(C), (D) (2000).

<sup>228</sup> See 36 C.F.R. § 219.1.

multiple use, nor has it provided any operational guidelines for how it is to be achieved or reconciled with other goals.

Another questionable assumption in public lands governance, perhaps even an oxymoron, is that of “scientific management.” The historic rationale for administrative control was provided by progressive-era thinkers advocating managerial efficiency and a science of administration. Their “politics/administration dichotomy” clearly separated the political responsibilities of elected representatives from the science of administration practiced by public administrators.<sup>229</sup> “Scientific management” thus became the “secular religion” of many resource (and other) agencies shaped by this political philosophy.<sup>230</sup> The USFS provides an example, says USFS critic Robert Nelson: “It was to be an organization run by professionals kept well separated from politics. This separation would allow foresters to put science to use in the national forests in the service of the public interest.”<sup>231</sup> In other words, broad goals might be charted by Congress, but politics ought never influence the science and efficiency of forest management.

The fatal flaw in such thinking is that “[b]road discretion makes a politician out of a bureaucrat.”<sup>232</sup> For Lowi, “every delegation of discretion away from electorally responsible levels of government to professional career administrative agencies is a calculated risk because politics will always flow to the point of discretion.”<sup>233</sup> Thus, broad delegation of power to agencies contradicts the core arguments of political neutrality and expertise made by those advocating more administrative control. Lowi also notes the paradox of this scientific management defense, for whatever substantive specialization and professional judgment agencies might have, they are often displaced by formula decision making, formalistic analysis, systems language,

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<sup>229</sup> See Frank J. Goodnow, *Politics and Administration* in CLASSICS OF PUBLIC ADMINISTRATION 25 (Jay M. Shafritz and Albert C. Hyde, eds., 3d ed. 1992) (contending that “[p]olitics has to do with policies or expressions of the state will. Administration has to do with the execution of these policies.”).

<sup>230</sup> Robert H. Nelson, *The Religion of Forestry: Scientific Management*, 97(11) J. FORESTRY 4-8 (Nov. 1999) (discussing why the paradigm no longer works for the USFS). See generally HAYS, *supra* note 191; ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS (1995).

<sup>231</sup> Nelson, *The Religion of Forestry*, *supra* note 230, at 5.

<sup>232</sup> LOWI, *supra* note 197, at 304.

<sup>233</sup> Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295, 297 (1987).

and economic reductionism.<sup>234</sup> These methodologies and cookbook decision making formulas are thus “replacing the very professional judgments for which Congress claims to be so respectful when it leaves its statutes so inadequately constructed.”<sup>235</sup>

These politicized bureaucrats also find themselves in a particular organizational culture with its own values, worldview, and priorities. This culture is shaped by the political and historic context in which it was born, its statutory mission and mandate, and the type of professionals and personnel within it. These values matter a great deal, especially when an agency is given a broad and ambiguous mission and is subject to “capture” by the interest it is supposed to be regulating. The organizational cultures of our public land agencies requires little reiteration,<sup>236</sup> but a few examples are in order. Wildlife management was long dominated by the “agricultural paradigm” in which game species were cultivated as a renewable crop to be harvested by the agency’s most politically and financially important clients—hunters, fishers, and trappers.<sup>237</sup> The Corps of Engineers’ motto is “essayons,” French for “let us try.” It is unsurprising, then, that the Corps’ conception of progress is pro-growth and construction, and the control of nature through engineering.<sup>238</sup>

The USFS provides what is perhaps the most studied example. USFS historian David Clary asserts that the Agency’s culture is more like a religion: its sacred mission was to provide wood to the world and avert a “timber famine.”<sup>239</sup> This religious conviction, says Clary, explains much of the controversy surrounding national forest management in that the servant (USFS) “believed firmly that it knew better than the public what the public really wanted.”<sup>240</sup> It thus found itself preaching the science and efficiency of forestry when the public demanded values other than timber. The bottom line is that “value-free implementation” is often a sham, and that unelected bureaucrats

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<sup>234</sup> *Id.* at 305.

<sup>235</sup> *Id.*

<sup>236</sup> See generally JEANNE NIENABER CLARKE & DANIEL MCCOOL, *STAKING OUT THE TERRAIN* (1985) (analyzing seven natural resource agencies from an organizational culture and political power perspective).

<sup>237</sup> Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64 PUB. ADMIN. REV. 221, 223 (2004).

<sup>238</sup> Michael Grunwald, *Engineers of Power: An Agency of Unchecked Clout*, WASHINGTON POST, Sept. 10, 2000, at A1. (investigating the power and politics surrounding the Corps).

<sup>239</sup> CLARY, *supra* note 15, at xi.

<sup>240</sup> *Id.* at xii.



with personal values and a worldview (that may be contrary to the public's) should not be delegated too much discretionary power.

To finish our review, a few additional words must be said about accountability and administrative discretion. As mentioned earlier, the issue is not as tidy as many people make it out to be; there are multiple conceptions of accountability, and our textbook understanding of it rarely happens in practice.<sup>241</sup> Nevertheless, too much congressional delegation to agencies poses a real threat to basic democratic principles. This is a multipart challenge. First, there is the myth of executive-based accountability. Accountability is not guaranteed just because a President appoints senior level administrators. There is also the myth of the presidential mandate. Presidents may claim that their supposed mandate from the people gives them the legitimacy and public support needed to forward various policies. But, this is silly, Presidents are elected for numerous reasons and policy positions that come bundled with others. Furthermore, when we look at the big electoral picture, including half of the American public who usually fail to vote, those voting against the winner, and the strange calculus of the electoral college, this supposed mandate is as hollow as it looks. We might also want to contrast presidential campaign rhetoric to the policy changes actually advanced in office. And finally, it is worth asking whether the executive-based accountability approach could lead to a type of "imperial Presidency" that so scared the founders of the Republic.<sup>242</sup>

Second, is the problem of effective legislative oversight. Lowi believes that "[e]ither it has a marginal influence on substantial problems or a significant influence on marginal problems."<sup>243</sup> Rarely is a substantive review of an agency or program done, and rarely do the tough questions get asked.

What about control through the appropriations process? This certainly happens, but it is more an example of what is wrong with modern policymaking than one of effective democratic control. It is not usually a case of Congress exerting its collective will and power of the purse, but rather a case of a few powerful members of Congress sitting on key appropriations committees exerting brute political power for minority special interests.

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<sup>241</sup> See WEBER, *infra* note 276.

<sup>242</sup> See generally JAMES MADISON ET AL., THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).

<sup>243</sup> LOWI, *supra* note 197, at 308.

What about the Congressional Review Act (CRA)?<sup>244</sup> In theory, it is a useful new tool that Congress can use to review and possibly disapprove of federal agency rules. In practice, however, it is rarely used due to a number of impediments.<sup>245</sup> There is also the suggestion that confused administrators can go back and reconstruct the original intent of Congress in passing the vague and/or contradictory law. But as our review of the ESA illustrates, this is problematic in numerous ways. First, there is no one intent to do anything in this body. Multiple reasons for passing a law will be stated during the debate, if there is one. And the game often played is to leave laws vague, then insert “intent” into the mostly phony *Congressional Record*—intent that was never expressed on the House or Senate floor during debate.<sup>246</sup>

### III OPTIONS AND ALTERNATIVES

There are various options and alternatives to administrative rulemaking and resource planning as a dominant approach to public lands conflict resolution. The preferred alternative will depend on how compelling one finds the above arguments. Five broad alternatives are sketched here: prescriptive law (with choice-based, goal and standard-based, systemic, and unit-level options); administrative leadership and discretion; decentralization; comprehensive public lands law review; and policy experimentation. This organization is for conceptual purposes only. Many of these alternatives and options are crosscutting and many principles and ideas found within them could be integrated into another coherent package. But what is clear, from my standpoint, is the centrality of the statutory detail/administrative discretion issue in the future of environmental conflict and public lands governance.

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<sup>244</sup> The CRA was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857-74 (codified at 5 U.S.C. §§ 801-808 (Supp. III 1997)). The CRA provides Congress with a certain amount of time to review and possibly disapprove a rule that is defined as “major.” *Id.* § 801(a)(3). Under this Act, a major rule cannot become effective for at least 60 days after its publication so that Congress can consider the rule and possibly deal with it legislatively. *Id.*

<sup>245</sup> Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1058 (1999) (reviewing the major structural impediments to the effective use of the CRA. He found in his 1999 analysis that out of 222 major rules and 15,199 non-major rules, as defined in the CRA, only eight joint resolutions of disapproval had been introduced related to six rules, and that none had been passed by either house).

<sup>246</sup> LOWI, *supra* note 197, at 308.

Of course, the question of whether Congress should provide more statutory detail is much different than to question whether it is able to do so. These days it seems as though Congress disagrees on the day of the week. To be useful, then, we must go beyond providing unrealistic scholarly admonitions. So instead, the following discussion describes a broader menu of choices ranging in possible effectiveness and political feasibility.

### *A. Prescriptive Law Alternatives*

#### *1. The Choice-based Prescriptive Law Alternative*

The prescriptive law alternative calls for Congress to write more detailed and specific public land laws. It would speak clearly and forcefully about the purpose and goals of our public lands and natural resources in the Twenty-First Century. Choices would be made and trade-offs accepted. Some might claim that Congress is incapable of drafting such language because of the ecological and social diversity of the public-lands system.

For example, no one-size-fits-all prescriptive law can resolve the site-specific forest management conflicts found in 155 national forests. Well enough. But how difficult would it be for Congress to take the lead and say yes or no to roadless area protection, or yes or no to snowmobiles in Yellowstone? These are not hyper-technical questions that will challenge a busy Congress, but rather value and interest-based political questions that are most appropriate for legislative debate and resolution. Moreover, what some might criticize as one-size-fits-all prescription, others might see as providing consistency. This alternative follows the logic of Professor Lowi's call for "juridical democracy" and "democratic formalism."<sup>247</sup> That is, Congress has the responsibility of making these hard decisions, and it is very capable of doing so.

The problem with the neat prescriptive law alternative is that many public land issues are messy, scientifically complex, and site-specific. Controversy surrounding ESA listing and delisting questions fall into this category. The prescriptive law alternative will also prove a challenge if Congress again mandates multiple use without prioritizing, since finding the right balance of uses in our diverse national forests and rangelands cannot be done with a uniform legislative package. Thus, the challenge with this alternative would

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<sup>247</sup> LOWI, *supra* note 197, at 298-313.

be to tease out the major policy choices for congressional resolution, while leaving other issues to alternative decision making venues (perhaps through more decentralized, collaborative-based approaches).

Note that such choices can and have been isolated by Congress in the past. For instance, the practice of clearcutting was central to NFMA's formulation and debate.<sup>248</sup> Alaska's Arctic National Wildlife Refuge (ANWR) provides another example. Section 1003 of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 prohibits oil and gas development in the ANWR unless authorized by Congress.<sup>249</sup> Congress, not the USFWS, has taken responsibility for the future of ANWR and can either designate the area as wilderness, permit oil and gas leasing, or simply take no action (leaving it in protected, albeit vulnerable status). The point is that Congress has defined the issue as a legislative one and has not placed the USFWS in the line of fire.<sup>250</sup>

## 2. *The Goal and Standard-based Prescriptive Law Alternative*

There is also a weaker but more flexible version of the prescriptive law alternative. Following the logic of environmental laws like the Clean Air Act,<sup>251</sup> it would be possible for Congress to pass laws mandating strict ends while leaving the means to achieve them as open and flexible as possible. For example, look at motorized recreation, which is proving to be one of the biggest controversies on public lands today.<sup>252</sup> Congress could find and declare that motorized recreation is deteriorating the integrity of the national forest system, and thus place further restrictions on its use. It could do this by clearly stating acceptable use levels or by mandating that these vehicles be allowed on major forest roads only. Then, it would be up to the service, forest planners, and perhaps some type of collaborative

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<sup>248</sup> See generally Wilkinson & Anderson, *supra* note 22. Congress had the option of choosing a more prescriptive or planning-based statute and chose the latter. See *supra* Part II.A.

<sup>249</sup> Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101-3233 (2000)).

<sup>250</sup> Note, however, how Congress has dealt with such an enormous responsibility. Questionable legislative tactics, like rider provisions, have become the norm because a supermajority vote to open the refuge for oil and gas exploration has been difficult to achieve.

<sup>251</sup> Current version found at 42 U.S.C. § 7401 (2000).

<sup>252</sup> See generally Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY* L. Q. 140 (1999).

arrangement to figure out a way to meet these use levels or decide what roads to open and close. The point is that Congress would articulate its values and goals while also recognizing the need for flexibility in implementation.

On the other hand, critics might argue that such a goal-based approach results in Congress, once again, dodging the really tough choices. Mandating use limits, they would argue, is much different than deciding that a particular road, in a particular Congressional district, will close.

Writing more intelligible and enforceable standards into public lands law is another possibility. This could be done in a number of ways. One option is to emulate the approach taken by Congress in passing the 1997 National Wildlife Refuge System Improvement Act.<sup>253</sup> As discussed above, relatively specific management criteria were provided in this organic act, such as the mandate to maintain biological integrity, diversity, and environmental health. Of course, for this option to work, such standards would have to be more meaningful than the ones already provided in law, such as the “unnecessary and undue degradation” standard provided in FLPMA.<sup>254</sup>

Another option is to pass a standards-based organic act serving as an umbrella for all public-land agencies. Such a law would supplement rather than displace existing public-land laws. Robert Keiter has advanced such an approach for some time.<sup>255</sup> He sees this option, perhaps in the form of a National Ecosystem Management and Restoration Act, as a way to provide agencies with new authority and responsibility for ecosystem management.<sup>256</sup> Such a law, among other things, would establish clear priorities among multiple uses, acknowledge the need for coordinated landscape-level planning, and include at least two statutory standards: a *nonimpairment standard* establishing a threshold basis for evaluating management proposals, and a *biodiversity conservation standard* imposing an affirmative obligation on the agencies to protect and restore species diversity.<sup>257</sup> “Framed as management standards rather than hard-and-fast rules,” says Keiter, “the proposal seeks to protect ecological components and

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<sup>253</sup> See FISCHMAN, *supra* note 105, at 79.

<sup>254</sup> 43 U.S.C. § 1732(b) (2000).

<sup>255</sup> See Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293 (1994).

<sup>256</sup> ROBERT B. KEITER, KEEPING FAITH WITH NATURE 308 (2003).

<sup>257</sup> *Id.* at 309.

processes without placing land managers in a straitjacket, rendering them unable to respond to unique local conditions or exceptional circumstances.”<sup>258</sup>

### 3. *Systemic or Unit-level Prescriptive Law*

The issue of scale is also important to this alternative. Should Congress focus on making choices and setting goals at the public lands system level or at lower levels of governance and administration? As discussed in Part II, we can glean quite a few lessons from the national park and national wildlife refuge experiences. Within those systems, there is a tension between the unifying philosophies in their organic charters, and the piecemeal establishment legislation that creates individual parks and refuges. There is certainly something to be gained by an agency and system having a recognizable and consistent mission integrating far flung units. Without one, there is a risk of disintegration because no cohesive philosophy holds the parts together. This would lead to recommending that Congress make choices or set goals at the system-wide level. But as discussed earlier, rewriting an agency’s organic act may not be enough because of other priorities set in establishment legislation. If Congress went down this road, it would have to provide language in a new organic charter that would trump incompatible uses and goals expressed in establishment legislation.

The other option is for Congress to make choices or set goals at lower levels through continued use of establishment legislation and similar approaches. This could be done by disaggregating a public lands system into its component parts and making choices on an individualized level. Instead of making one systemic decision, Congress would be making dozens of piecemeal decisions. Prescription would still be provided, but it would be more tailored and site-specific than if done across the board at the system level.

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<sup>258</sup> *Id.* Keiter continues:

The statutory proposal does not envision a radical restructuring of agencies or boundaries; the proposed legal standards are not new, nor do the procedural or enforcement mechanisms depart from existing law. By linking the nonimpairment standard with an ecosystem restoration obligation, the proposal should help promote truly sustainable resource management policies, thus enhancing community stability and perhaps restoring some peace on the public domain.

*Id.* at 310.

### ***B. The Administrative Discretion Alternative***

At the opposite end of the continuum is the administrative discretion alternative. This is rather straightforward and might be seen as the equivalent of the no change alternative, or changes could be made giving agencies even greater levels of discretionary freedom. Taken further, this alternative suggests that we be more explicit, and some might say more honest, about the role of politics in agency rulemaking. That is to say, we should recognize that professional expertise and public opinion takes a back seat to the politics and ideology of the party in power. We should simply acknowledge that the “synoptic” decision making ideal found in NEPA and rulemaking is for the most part an impossibility. This is the ideal model in which a decision maker collects all relevant facts, considers all alternative policies and possible consequences of each, and then chooses the policy with the highest probability of achieving the agreed goal in the most efficient way.<sup>259</sup> It is an ideal deeply entrenched in environmental impact statements and statutes specifying that agencies make rules on the basis of “the best available evidence” or “substantial evidence on the rulemaking record as a whole.”<sup>260</sup> Instead of asking the impossible, the public would come to expect that our public land agencies, staying within the broad contours of the law, will be pulled this way and that depending on party politics. They will be conservation-oriented in some terms, less so in others. This alternative, in short, will view rulemaking as it really is, delegated legislation, and agencies for what they really are, subordinate legislatures.

Such an acknowledgement would certainly change the way agencies do business. No longer would they have to make value and interest-based political choices and then hide them in mountains of scientific and technical information, in an effort to get by the courts that demand synoptic decision making. Instead, agencies will come clean and make choices that might not be rational in the synoptic sense, but reasonable and well within the broad guidelines of the law. Martin Shapiro explains what an agency could do with such an alternative:

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<sup>259</sup> MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? 14-15 (1988) (analyzing the changing relationship between the judicial branch and public administration, with a thorough discussion of pluralist, synoptic, and prudential approaches to administrative decision making).

<sup>260</sup> *Id.* at 15.

It will be allowed to say: “Six years ago in a Democratic administration, this agency chose B because B was a good guess in line with Democratic political beliefs. B was a perfectly respectable and legal choice. If Republicans had been in control then, or if the agency’s prudential estimates had been a little different then, the agency would have chosen C. C would have been a perfectly respectable and legal choice. And it follows that because, if we had been running things then, we would have chosen C rather than B, we can respectably and legally now replace B with C without having to pretend B was ‘wrong’ and C is ‘right.’”<sup>261</sup>

This alternative is contingent upon the courts changing the way that they evaluate agency decision making. According to Shapiro, courts treat agencies as if they were “engaged in a true science of synoptic public administration[.]”<sup>262</sup> Instead, “[a]gencies ought to be allowed to act and to admit that they act as subordinate legislatures making a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments.”<sup>263</sup>

This alternative may not be as radical as it might sound. It does not suggest that agencies be free to do whatever they want, and that science, analysis, and rigor be dammed—though that is a danger. Rather, it moves agencies from the synoptic charade to “prudential deliberation.”<sup>264</sup> Just like legislatures, they will do their best with tough issues in a complex and uncertain world. Shapiro explains the prudential tradition as a particularly useful way to deal with the values, science, and uncertainty important to administrative law.<sup>265</sup> It need not be cynical nor relativist. Rather, through moral discourse and political deliberation and debate, agencies, like legislatures, can

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<sup>261</sup> *Id.* at 170-71.

<sup>262</sup> *Id.* at 171. According to Shapiro, courts have come to expect that agencies defend their chosen rules synoptically.

So instead of telling the truth, agencies can lie; this is mostly what they do these days. They can dress each of their guestimates about the facts, their choices among statutory ambiguities, their compromises to facilitate implementation, and their limitation on alternatives considered in enormous, multilayered costumes of technocratic rationality . . . [i]t is much easier to eventually win court approval by piling on more and more synopticism than by persisting in telling the truth.

*Id.* at 151-52.

<sup>263</sup> *Id.* at 171.

<sup>264</sup> Shapiro explains prudence as the belief that we “can achieve some intermediate level of assurance about moral values that lies far short of ‘scientific certainty,’ but far beyond mere personal assertion. The belief that moral discourse can lead to sound moral judgment . . . is part of this prudential tradition.” *Id.* at 135-36.

<sup>265</sup> *Id.*



make prudential policy judgments. The alternative, in essence, recommends that courts view statutes as saying to an agency: “You may not go beyond certain boundaries, but within those boundaries you are free to do what we the Congress normally do—our prudential best. You may not do X or Y but you are free to choose prudentially among A, B, C and D.”<sup>266</sup>

The problem with such an alternative is especially clear in the environmental arena. Those advocating conservation are at a perpetual disadvantage because development is often permanent. Or as environmentalists remind us, extinction is forever. Roads, for example, cannot be built and then removed after every four-year election cycle. A decision to build roads today is forcing roads on future generations that may or may not want them, while a decision not to build keeps that option open for the future. Thus, this alternative seems to give those advocating development and extraction a dangerous advantage, for it basically legitimizes permanent losses. One side must only win once.

### *C. The Decentralization Alternative*

Another possibility is the decentralization of public lands management. Perhaps too much congressional delegation stems from the federal government’s over-reliance on prescriptive strategies of centralized command-and-control regulation.<sup>267</sup> The delegation debate merely focuses on symptoms says Richard Stewart, “[i]nstead, we should focus on the underlying problem of excessive reliance on centralized directives to legislate conduct throughout a vast and varied nation.”<sup>268</sup> This, says Stewart, has led to “political overload at the center” and this overload “has resulted in a massive transfer of decisional power to federal administrative bureaucracies.”<sup>269</sup>

The reasoning behind this alternative is that demands for less agency rulemaking and more centralized prescriptive law will end up making the overload situation worse. First, centralized and prescriptive federal rules often fail to make sense in such a complex and diverse society. There is also the concern that if Congress was asked to write more prescriptive laws it would do so by subdelegating its responsibilities to committees. So what is the alternative? For

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<sup>266</sup> *Id.* at 170.

<sup>267</sup> See Stewart, *supra* note 194, at 328.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 329.

Stewart, “[t]he only real solution is to forswear our excessive addiction to centralized prescription.”<sup>270</sup> For him the solution lies in “reconstitutive strategies” such as outright deregulation or devolution to state and local governments.<sup>271</sup> But, because markets, states, and local governments cannot always advance social goals such as environmental protection, the alternative is to reconstitute institutions “in order to ensure that national goals are served without detailed central prescription of conduct.”<sup>272</sup> This means that most relevant decisions will be made within subsystems rather than at the center, and that delegation will still happen, but decisions will be delegated to reconstituted subsystems rather than to administrative agencies.<sup>273</sup> Stewart summarizes:

We need broad delegations to achieve national goals. The delegations required by prescriptive regulation, however, are the wrong type of delegation to the wrong people. Rather than giving federal agencies and reviewing courts the responsibility for designing detailed conduct blueprints or subdelegating power within Congress and the presidency, we should give decisional power back to various decision makers within the various economic, governmental, and social institutions of our society, transmitting the delegation through new structures that will align their decisions with national goals.<sup>274</sup>

This alternative will be attractive to those advocating more regional or localized collaborative environmental strategies,<sup>275</sup> and those concerned about one-size-fits-all political edicts. It might also prove a useful way to deal with the multiple use dilemma. Instead of wrestling with the concept and its abstractions in Congress, multiple use would be given meaning from the bottom-up. It will mean different things in different places, as it does now, but it will be legitimized by reconstituted institutions rather than by a centralized agency. The rationale behind this alternative, in sum, is that congressional delegation and resulting agency discretion stem from a

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<sup>270</sup> *Id.* at 335.

<sup>271</sup> *See id.* at 335-43.

<sup>272</sup> *Id.* at 336.

<sup>273</sup> *Id.* at 337.

<sup>274</sup> *Id.* at 342. *See* Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986) (describing reconstitutive strategies).

<sup>275</sup> *See generally* DANIEL KEMMIS, *THIS SOVEREIGN LAND* (2001) (exploring the possibility of decentralizing public lands management from the national to regional level); *ACROSS THE GREAT DIVIDE* (Philip Brick et al. eds., 2001) (reviewing the growth of collaborative conservation in Western environmental management); Behan, *supra* note 21 (advocating a more localized approach to natural resource policy and conflict resolution).

larger problem—the federal government trying to do too much and often doing it poorly.

Instead of delegating the tough choices to bureaucracy, those choices would be delegated to collaborative and decentralized institutions and/or groups. Note, however, that the central question posed here—how much detail and prescription should be provided in public lands law—must still be addressed. Few, if any, proposals recommend that collaborative processes completely replace the larger national environmental policy and legal framework. Instead, proponents of these processes often try to show how decentralized and collaborative processes are *supplementary* to national environmental laws, and how they can be used to more effectively implement those laws.<sup>276</sup> In other words, these collaborative proposals are most often championed within the context of national environmental standards.<sup>277</sup> They thus operate within the decision making space provided by NEPA, the ESA, NFMA, FLPMA and other public land laws. The point is that as long as collaborative groups recognize the necessity of national environmental standards and federal public land laws, we will still have to deal with the statutory detail/administrative discretion issue.

There are myriad roles that Congress and public land agencies could play in this alternative. One possibility is for Congress to retain the broad multiple-use mandate while giving charge and sanction to collaborative groups to find new ways of moving forward. As long as national laws are upheld, these groups would have some assurance that their plans would be faithfully implemented by agencies and funded by Congress. Such collaborative arrangements would be very site-specific and have to be passed by Congress and signed by the President, ensuring additional layers of legitimacy and accountability. We would still have a case of congressional delegation of authority, but this time the decentralized, collaborative groups would get more decision making discretion, not bureaucracy. Another option is for

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<sup>276</sup> See EDWARD P. WEBER, BRINGING SOCIETY BACK IN 247 (2003) (analyzing how three prominent collaborative groups provided a supplementary system of accountability by being nested within larger state and federal statutes and systems of accountability: Grassroots ecosystem management “can be a mechanism for translating top-down, one-size-fits-all laws into a place-specific form without violating them.”).

<sup>277</sup> After all, these environmental laws and standards have partly sparked the collaborative movement by giving non-industry stakeholders a seat at the negotiating table. See generally BARB CESTERO, BEYOND THE HUNDREDTH MEETING 84 (1999) (“In this way, collaboration can be a tool to implement, or adapt, but not circumvent, public land laws[.]”).

public land agencies to take the lead and use collaborative groups to give site-specific meaning to the national goals and discretionary language.

As discussed above, this alternative raises the hackles of some who would like more congressional responsibility and accountability in public lands law.<sup>278</sup> Not only is Congress passing the buck to agencies, they argue, but now these agencies are passing it along to self-selected and largely unaccountable stakeholders. While this issue is beyond the scope of this Article, it is important to note that the accountability issue is more complicated than it first appears. Notions of democratic accountability have changed throughout the years, and there exists no consensual understanding of what it means.<sup>279</sup> One could argue that the status quo is a prime example of too little accountability provided by top-down federal lands management. After all, accountability is often obscured by our system of checks and balances; separation of powers; divided party government; congressional committees; and various planning, funding and budget problems. How often does our textbook understanding of democratic accountability—that our elected political representatives will pay the price for poor environmental management decisions—happen in reality? Finally, while this alternative does not negate the importance of the statutory detail/administrative discretion issue, it does offer a host of new ways of thinking about it.

#### *D. The Comprehensive Review Alternative*

Convening another public lands law review commission is another alternative worth considering. Some believe that the current statutory and regulatory framework has become impractical, and that it is time to embark on a systematic review of our public land laws.<sup>280</sup> Perhaps it is time to jettison the idea of multiple use and formally embrace what some consider to be the de facto governing principle of ecosystem and biodiversity-based management?<sup>281</sup> Or perhaps we should retain the multiple use mandate, and instead figure out ways to

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<sup>278</sup> See Coggins, *supra* note 206; LOWI, *supra* note 197.

<sup>279</sup> See Weber, *supra* note 276.

<sup>280</sup> In August of 2003, several leading natural resource professionals, academics, and interest group representatives met at the "Montana Summit" to consider public lands governance and the possibility of convening another public lands law review commission. See James Burchfield & Perry Brown, Montana Summit White Paper, (Dec. 11, 2003) (unpublished manuscript) (on file with University of Montana and on file with author).

<sup>281</sup> See Thomas, *supra* note 222.

streamline cumbersome or redundant decision making and analytical processes?<sup>282</sup> Should a compatibility standard and tiered use framework, as found in the National Wildlife Refuge Improvement Act, be applied elsewhere? These and a host of other questions are ripe for comprehensive and careful review.

Much of the supposed “gridlock” found in public lands governance—one of the factors driving the renewed interest in convening another commission—can be partly traced back to statutory language. While other intervening forces are at work, there is a sequence in which problematic and/or evasive statutory language leads to a lot of planning and promulgating of rules and regulations, which are then challenged by interest groups in court. Such interest groups contend that agencies are not doing what Congress intended them to do. And, as discussed above, courts have increasingly asked agencies to meticulously defend their decisions in synoptic-comprehensive-rational ways. This has resulted in agencies spending a lot of time producing “the best available evidence” and “substantial evidence on the rulemaking record as a whole.”<sup>283</sup> The story is more complex than this, but providing more detail and specificity in statutory language would most likely change this chain of events.

A commission might help focus attention on problematic statutory language or lack of congressional direction. It could also survey many of the archaic laws, or what Charles Wilkinson calls “the lords of yesterday,”<sup>284</sup> and assess how well they fit into today’s political landscape. There have been a number of such public land law commissions used in the past, but it has been nearly 40 years since the last one—the longest period ever separating their use.<sup>285</sup>

An increasing number of people are calling for some type of comprehensive review for a number of reasons.<sup>286</sup> First, the public

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<sup>282</sup> See USDA FOREST SERVICE, *supra* note 46.

<sup>283</sup> See *supra* Part IV.B.

<sup>284</sup> CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN* 20 (1992).

<sup>285</sup> See Perry R. Hagenstein, *Commissions and Public Land Policies: Setting the Stage for Change*, 54 *DENV. L. J.* 619, 620 (1977) (describing history of public land law commissions).

<sup>286</sup> See Jerome C. Muys & John D. Leshy, *Whither the Public Lands?*, in *ROCKY MOUNTAIN MINERAL LAW FORTY-FIRST ANNUAL INSTITUTE* § 3.01 (1995) (contending that “the time is ripe for another review of the appropriate legislative and administrative policies for the future of the public lands”); see also Mark B. Lambert, *Public Land Commissions: Historical Lessons and Future Considerations* (2003) (Master’s Thesis, University of Montana) (providing a more recent assessment of arguments for and against convening another commission) (on file with the University of Montana).

lands problem might not stem from any particular law, but from how they work or don't work together with other laws. Therefore, it might be necessary to stand back and evaluate the full canon of environmental and public land laws, administrative rules, executive orders, and judicial decisions to evaluate their true impact on land management and policy implementation. The formation of a commission might also encourage productive debate and deliberation, and maybe even some compromise among stakeholders and the public-at-large. Though it is impossible to "de-politicize" such an undertaking, a commission might provide the type of critical analysis and reflection that has become rare in Washington. Certainly a lot has changed in the past 40 years, from the emergence of conservation biology and ecosystem management to new law governing the National Wildlife Refuge System, so there is much to learn and apply.

### *E. The Policy Experimentation Alternative*

Another alternative is to begin a period of deliberate and careful policy experimentation in which various options and alternatives are tried and evaluated. In other words, let us experiment with a number of different approaches to public lands governance on a small scale and monitor what happens. We can seek out cases of innovation in governance and perhaps diffuse and adapt them to different contexts.<sup>287</sup> Experimentation is already taking place in numerous forms, like stewardship contracting on the national forests,<sup>288</sup> collaborative conservation,<sup>289</sup> and conservation trusts.<sup>290</sup> These, and dozens of other innovative ideas, could be tested within the safe harbor provided by federal environmental standards and laws.<sup>291</sup> The

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<sup>287</sup> See generally Ronald D. Brunner & Christine H. Colburn, *Harvesting Experience*, in FINDING COMMON GROUND Ch. 6 (Ronald D. Brunner et al. eds., 2002) (examining the process of innovation, diffusion and adaptation in collaborative conservation and natural resources governance).

<sup>288</sup> See USDA FOREST SERVICE STEWARDSHIP CONTRACTING, at <http://www.fs.fed.us/forestmanagement/projects/stewardship/index.shtml> (last visited Nov. 23, 2004); see generally PINCHOT INSTITUTE, at <http://www.pinchot.org/> (last visited Nov. 23, 2004).

<sup>289</sup> See generally ACROSS THE GREAT DIVIDE, *supra* note 275; BRUNNER & COLBURN, *supra* note 287; JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK (2000).

<sup>290</sup> See generally SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS (2001).

<sup>291</sup> See BEAVER, *supra* note 32. The Natural Resources Law Center has surveyed and organized the various proposals for changing National Forest policy. Some of these proposals include: new planning and budgeting approaches, divestment of the federal estate, additions to or consolidations of the public lands, changing the USFS mission (and

administrative fragmentation of the public lands system is often criticized, partly because of the difficulties presented to ecosystem and landscape-level management. But, when thinking about experimentation, this fragmentation becomes diversity, and these public land units become laboratories of democracy. In short, we need more case examples of innovation and sustainability, and many public land units governed by individualized establishment legislation could serve that function.

Of course, not all public lands governance problems are related to statutory language.<sup>292</sup> In many landscapes with checkerboard and mixed land ownership patterns, the challenges of governance go well beyond the lack of specificity in public lands law.<sup>293</sup> But in these cases, experimentation becomes even more important as it has become increasingly obvious that we must look beyond federal boundaries if we are serious about ecosystem and community health.<sup>294</sup> For these complex patchworks of land, we need to try a mix of institutional arrangements that are uniquely fitted to place and context.

But despite its limitations, experimentation focusing explicitly on statutory detail and the lack thereof is also necessary. As a first step, it might be advisable to begin asking the American public what it thinks about public lands management and the ideas of multiple use, biodiversity, and what sustainability means in the Twenty-First Century. This could be done, in the spirit of experimentation, not with the typical public opinion survey, but with the systematic use of “deliberative polling.”<sup>295</sup> This approach eschews the sort of

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different ways that it could be done), prioritizing among multiple uses, market-oriented reforms, and adaptive management procedures. Another example is provided by the Forest Options Group, a collection of interest group leaders, agency officials, and policy analysts whom have proposed a number of pilot projects in the areas of entrepreneurial budgeting, collaborative management, collaborative planning, forest trusts, and funding models based out of gross receipts and user fees set by a rate board. See THOREAU INSTITUTE, THE SECOND CENTURY REPORT (2003), available at <http://www.ti.org/2c.html> (last visited Nov. 23, 2004)

<sup>292</sup> See generally Martin Nie, *Drivers of Natural Resource-based Political Conflict*, 36 POL’Y SCIENCES 307 (2003) (analyzing twelve drivers of “wicked” environmental conflicts in natural resources management).

<sup>293</sup> See, e.g., Sally K. Fairfax et. al., *The Federal Forests are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 ECOLOGY L. Q. 630 (1999) (showing the limitations of focusing solely on federal ownership, jurisdiction and decision making in improving federal lands management).

<sup>294</sup> See generally STEWARDSHIP ACROSS BOUNDARIES (Richard L. Knight & Peter B. Landes eds., 1998)

<sup>295</sup> See JAMES S. FISHKIN, THE VOICE OF THE PEOPLE (1995).

unconsidered “doorstep opinion” in which we have become so accustomed, and instead asks a sample of the public to seriously reflect and analyze policy issues after a prolonged period of study. It is in many ways deliberative democracy in action, and it could certainly help in considering the values, beliefs, and opinions of the American public on these issues. Perhaps the public is more comfortable with less resource use than more, or vice versa, but we will not know until we ask the public to seriously consider these choices and their trade-offs. Such an experiment, perhaps part of a comprehensive public lands law review, may crystallize some of the central issues and choices in the debate and provide an important cue to decision makers.

Another possibility is to provide statutory clarification and new legislative language on one land unit or administrative area. What would happen, for example, if we applied the approach outlined in the Refuge Improvement Act to a national forest unit? What might a tiered use framework look like in this situation, and what political coalitions and majorities might form? (For example, perhaps such an arrangement would mobilize a stronger coalition among the environmental, hunting, and fishing communities.) The strong move in collaborative conservation provides myriad examples of what this alternative might look like on the ground. In the Sierra Nevada, for instance, the controversial Quincy Library Group eventually won congressional endorsement of its plan for three national forests.<sup>296</sup> There is relatively detailed language in this legislation,<sup>297</sup> though it seems unclear at this point of how it is supposed to fit with other statutory obligations held by the USFS. But, as discussed earlier, there are also potential drawbacks to this approach. If the Quincy model becomes a trend, our national forest system could become as fragmented and disintegrated as our national park and refuge system lands, governed as they are by a hodgepodge of establishment legislation.

There are also a number of innovative ways in which we might meld the strengths of legislative and bureaucratic leadership. The administrative rulemaking, NEPA and resource planning processes, for example, could become much more inclusive and participatory in

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<sup>296</sup> See generally Dave Owen, *Prescriptive Laws, Uncertain Science, and Political Stories: Forest Management in the Sierra Nevada*, 29 *ECOLOGY L.Q.* 747 (2002).

<sup>297</sup> See Herger-Feinstein Quincy Library Group Forest Recovery Act, 16 U.S.C. § 2104 (2000).



the future.<sup>298</sup> This could bring them closer to the democratic ideal, providing an important level of accountability while also allowing room for administrative leadership and expertise to flourish.

NEPA is currently receiving this type of attention. A number of environmental professionals have shown great interest in the prospect of using collaborative processes to improve NEPA decision making.<sup>299</sup> The U.S. Institute for Environmental Conflict Resolution has taken this proposal a step forward, moreover, and is investigating “how pilot projects can be used to evaluate the potential role of collaboration, consensus building, and appropriate dispute resolution processes in improving implementation of [NEPA], specifically within the context of federal lands and natural resource management.”<sup>300</sup>

A “diversified policy portfolio” is one way of thinking about this alternative.<sup>301</sup> Daniel Kemmis uses this term to capture the sort of approach that might be needed at the moment:

Investors dealing with similar complexity in the financial arena keep some money in stocks, some in bonds, and some in real estate to maximize the chances of substantial gains while diminishing the risk of losing all their investments. By a similar logic, a public lands policy portfolio should probably now include at least three simultaneous elements: comprehensive review of the entire public lands system, incremental reform of the system, and a deliberate period of experimentation.<sup>302</sup>

Regarding the latter, Kemmis reviews a number of proposals calling “for legislatively authorized experiments or pilot projects that are to be implemented, monitored and evaluated through various forms of collaborative governance.”<sup>303</sup> In forest management, for

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<sup>298</sup> See Nie, *supra* note 4 (reviewing changes that could be made to rulemaking and planning processes, like electronic rulemaking, ambitious scoping, and embedding collaborative groups into the rulemaking process, among others).

<sup>299</sup> O'Connor Center for the Rocky Mountain West and Institute for Environment and Natural Resources, *Reclaiming NEPA's Potential: Can Collaborative Processes Improve Environmental Decision Making?* (2000), available at <http://www.uwyo.edu/enr/ienr/nepamain.html> (last visited Nov. 23, 2004).

<sup>300</sup> U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, REPORT AND RECOMMENDATIONS ON A NEPA PILOT PROJECTS INITIATIVE 4 (August 29, 2001), available at <http://www.ecr.gov/pdf/USIECR%20Report%20to%20Senators%208-30-01.pdf> (last visited Nov. 23, 2004).

<sup>301</sup> Daniel Kemmis, *Region 7: An Innovative Approach to Planning on or Near Public Lands*, 55 No. 8 LAND USE & ZONING DIGEST 3, 4 (August 2003).

<sup>302</sup> *Id.* at 4.

<sup>303</sup> *Id.* at 5.

instance, the idea of a “Region 7” is explored as a way to test new and innovative approaches within an existing administrative unit in the USFS.<sup>304</sup> A number of experiments, trials, and pilot projects could flow from the bottom-up and be housed within this virtual region (region 7 of the USFS was split into regions 8 and 9 and thus basically disappeared). After receiving congressional authorization and a mandate to experiment, a number of different trials would be selected based on what could be learned.

The experimental alternative is radical in the sense that it acknowledges the need for fundamental change in public lands governance, while also conservative in its scope and application. It offers an opportunity to try new methods of problem solving and conflict resolution, without betting it all on one highly uncertain solution. In so doing, it might also help de-escalate conflict and minimize some risks related to changes in governance. Perhaps this is why experimentation in the form of pilot projects has received support from organizations like the Society of American Foresters<sup>305</sup> and the Western Governor’s Association.<sup>306</sup> Of course, such support from groups like this may scare part of the environmental community. This is understandable, partly because much of the problem in governance is caused by poor implementation, not just indecisive legislative language. But experimentation could also be beneficial as a way to advance the next generation of conservation goals, ones that will be more complex and require new tools and ways of thinking.

### CONCLUSION

The enduring question of how much detail to provide in laws, and how much discretion to delegate to land management agencies, is

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<sup>304</sup> *Id.* at 3-9; see *Community-Based Land Management and Charter Forests: Oversight Hearing Before the House Subcommittee on Forests and Forest Health of the Committee on Resources*, 107th Cong. 2d sess. (2002) (statement of former Congressman Pat Williams).

<sup>305</sup> Society of American Foresters (SAF), Pilot Projects for Evaluating Innovative Federal Land Management Opportunities, Adopted by the Executive Committee of the SAF Council on August 4, 2003 (on file with author) (Advocating “the development, authorization, and implementation of pilot projects to test alternative approaches for managing federal forest lands . . . to address and help resolve the ecological, economic, and social challenges presented by the currently complex and confusing statutory and regulatory framework that encumbers federal lands management decision making.”).

<sup>306</sup> Western Governor’s Association, Forest Health Summit Recommendations (June 19, 2003), available at <http://www.westgov.org/wga/initiatives/fire/forest-summit-recs-fin.pdf> (last visited Oct. 20, 2004) (recommending the use of experimental pilot projects as a way to address forest health).

central to any analysis of environmental conflict and public lands governance. Many divisive environmental conflicts are exacerbated by problematic statutory language that tell our public land agencies relatively little about what they should be doing and a lot about how they should go about doing it. At the very least, this language explains why our public land agencies have become the central brokers of conflict resolution and why administrative rulemaking and resource planning processes are the dominant venues in which these conflicts are managed. The result is that these processes are stressed to their limits and agencies continually find themselves in political quagmires. Each of the alternatives discussed above have something to offer and come bundled with various risks and uncertainties. Each also varies in potential effectiveness and political feasibility. Whatever the preferred alternative, the statutory detail-administrative discretion challenge will, and must, be a central part of the debate. It is a tension that must be continually revisited, and perhaps recalibrated, and now might be a particularly good time to do so.