ARTICLES

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The Oregon and California Lands Act: Revisiting the Concept of "Dominant Use"

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Since its enactment in 1937, the Oregon and California Lands Act (O&C Act)[1] has created a version of public lands management unique in the United States. The O&C Act's grant lands (O&C lands) are the only areas where the Bureau of Land Management (BLM)—rather than the Forest Service—oversees forest management. Unlike all other counties in which the federal government oversees timber harvest, counties within the O&C lands receive an additional percentage of the revenue from timber harvest conducted on O&C lands, and the welfare of local communities is listed as one of the specific purposes for which the Department of the Interior (DOI) must provide.[2] Within this unique scheme, the environmental sustainability of the O&C lands and the economic sustainability of its local communities are intertwined. Unfortunately, under the BLM's management, the O&C lands have failed to meet both forms of sustainability.

[1] 43 U.S.C. § 1181a-1181j (2006).
[2] Oregon and California Lands Act of 1937 § 201, 43 U.S.C. § 1181f.

Pacific Northwest logging communities faced a sharp decline in logging in the early 1990s, precipitated by court rulings on the spotted owl, modernization of the logging industry that reduced the need for workers, and a decreased demand for lumber due to housing declines in the 1980s.[3] These timber-dependent communities may face censure from urban centers, where loggers are often considered to be interested only in economic gain.[4] The federal government has failed to provide adequate support to these communities,[5] and is often more interested in what the loggers produce than in the loggers themselves.[6]

The BLM is currently using the O&C Act as a rationale to reduce or eliminate many of the protections in the Northwest Forest Plan (NFP), relying on several flawed interpretations of the Act that have concluded the law is a "dominant use" statute.[7] Pursuant to a settlement agreement with the American Forest Resources Council and others aligned with timber interests, the BLM is revising its Resource Management Plans (RMPs) in western Oregon.[8] Among other effects, these revisions are likely to largely eliminate Late-Successional Reserves and reduce stream buffers where logging has been largely prohibited and

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[3] Daniel S. Reimer, *The Role of "Community" in the Pacific Northwest Logging Debate*, 66 U. COLO. L. REV. 223, 225 (1995).

[4] *Id.* at 231.

[5] For example, funding for "Economic Action Programs"—federal assistance programs designed to "help rural communities build skills to address social, environmental, and economic changes," *see* USDA Forest Service, Economic Action Programs, http://www.fs.fed.us/spf/coop/programs/eap/eap_description.shtml (last visited Feb. 1, 2007)—have declined over the past several years, and the programs were finally defunded by Congress in 2006. *See* Continuing Appropriations Resolution, 2007, Pub. L. No. 109-289, § 101, 120 Stat. 1311, 1311 (2006) (a continuing resolution funding only programs that would have been funded by the 2007 DOI appropriations bill); *see also* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2007, H.R. 5386, 109th Cong. (as passed by House, May 18, 2006) (making no provision for economic action programs in fiscal year 2007); WENDY GERLITZ, NAT'L NETWORK OF FOREST PRACTITIONERS, WORKING PAPER 2, ECONOMIC ACTION PROGRAM: BRIEFING PAPER 2005, at 4, 6 (2004).

[6] Reimer, *supra* note 3, at 242. **R**

[7] *See* Bureau of Land Mgmt., Western Oregon Resource Management Plans, http://www.blm.gov/or/plans/wopr/ (last visited Feb. 1, 2007) (notifying the public of BLM's revision of several Oregon Resource Management Plans tiered to the NFP).

[8] AM. FOREST RES. COUNCIL ET AL., A GLOBAL FRAMEWORK FOR SETTLEMENT OF LITIGATION CHALLENGING FEDERAL AGENCY ACTIONS RELATING TO THE NORTHWEST FOREST PLAN, at ii-iii (2002), http://www.earthjustice.org/library/references/FOIA_Global_Framework.pdf [hereinafter GLOBAL FRAMEWORK].

strenuously regulated.[9] The O&C Act was wrongly used to justify this settlement agreement. A correct reading of the O&C Act is necessary to understand BLM's forest land-management obligations, and the legality of the RMP revisions.

Part I of this Article is a history of the O&C lands, and Part II describes the Act's legislative history, provisions, regulations, and amendments. Part III summarizes the various official interpretations of the O&C Act, including DOI Opinions, federal case law, and administrative appeals board decisions. Part IV argues that the Ninth Circuit's decision in *Headwaters v. Bureau of Land Management, Medford District* was wrongly decided, and that a fair reading of the case law and legislative history prompts a different conclusion than that drawn by the appellate court. Finally, Part V highlights a prescient opportunity for the public and the courts to reexamine the conventional wisdom that the O&C Act is a "dominant use" statute.

I

HISTORY OF THE O&C LANDS

During the nineteenth century, the U.S. government promoted a national policy of settlement and development of the West, primarily by granting land to companies in exchange for building wagon roads, railroads, and other public purpose construction.[10] Railroad companies were then required to sell the granted land to settlers to generate revenue to pay railroad construction costs. By the end of the Civil War, the United States had granted 130 million acres of land west of the Mississippi to a few private companies.[11]

In 1866, Congress established a land grant to build a railroad from the valleys of northern California to Portland, Oregon,

[9] *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, WESTERN OREGON PLAN REVISIONS: PROPOSED PLANNING CRITERIA AND STATE DIRECTOR GUIDANCE 21–29 (2006), *available at* http://www.blm.gov/or/plans/wopr/files/PlanningCriteriaDocument.pdf (discussing preliminary alternatives).

[10] BUREAU OF GOVERNMENTAL RESEARCH & SERV., UNIV. OF OR., THE O&C LANDS 1 (1981) [hereinafter THE O&C LANDS]; *see also Relating to the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands Situated in the State of Oregon: Hearings on H.R. 5858 Before the H. Comm. on the Public Lands*, 75th Cong. 4 (1937) [hereinafter *April Hearings on H.R. 5858*] (statement of Rufus G. Poole, Department of the Interior) (discussing nineteenth century land-grant policy).

[11] ELMO RICHARDSON, BLM'S BILLION-DOLLAR CHECKERBOARD: MANAGING THE O & C LANDS 1 (1980).

leaving the Oregon Legislature to designate a company to do the Oregon work.[12] Public land along the railway line was granted to the railroads in odd-numbered sections, in a strip twenty miles wide on each side. If a section was already occupied or otherwise disposed of, the company could locate and select equivalent acreage from an additional ten-mile strip on each side.[13] When twenty or more consecutive miles of railway line were completed, the President of the United States was to appoint commissioners to inspect and issue patents to the companies for the land.[14] The DOI was responsible for administration of the land grant.[15]

In 1869, a controversy between two competing Oregon railroads necessitated a congressional amendment to the 1866 grant.[16] By that time, the fever to fund railroads to aid in westward expansion had cooled considerably. The public lands committees of Congress used the amendment as an opportunity to reflect their greater concern for the national interest and "paramount interest of homesteaders."[17] Congress added three new conditions: (1) the railroad companies could sell the granted lands to "actual settlers only," (2) in quantities no greater than one-quarter section[18] per purchaser, and (3) for not more than $2.50 per acre.[19]

Around the same time, the two Oregon railroad companies merged and became the Oregon and California Railroad Company (O&C Railroad Company).[20] Throughout the 1870s and

12 Act of July 25, 1866, ch. 242, § 1, 14 Stat. 239, 239.

13 *Id.* § 2, 14 Stat. at 239. "Mineral lands" were exempted from the Act; the railways could not choose sections that were "mineral" except to the extent that they could use the timber thereon to construct the railway. *Id.* § 10, 14 Stat. at 241.

14 *Id.* § 4, 14 Stat. at 240.

15 *Id.* § 2, 14 Stat. at 239-40.

16 Congress officially designated the Oregon Central Railroad in 1866, but that same year another company called the Oregon Central Railroad also formed. RICHARDSON, *supra* note 11, at 3-4. One company built on the east side of the Willamette River, the other on the west side, and each company accused the other of illegal formation. *Id.* at 3. Due to pending litigation between the two companies, Oregon realized that it would not be able to name a company before the statutory time ran out. The 1869 amendment eliminated the statutory time frame. *Id.* at 3-4. R

17 *Id.* at 4.

18 One-quarter section = 160 acres.

19 Act of Apr. 10, 1869, ch. 27, 16 Stat. 47. These provisions mirrored the Homestead Act of 1862, which granted all eligible U.S. citizens the right to purchase 160 acres of unappropriated public land for $2.50 per acre. Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392 *repealed by* Federal Land Policy and Management Act of 1976 § 702, Pub. L. No. 94-579, 90 Stat. 2744, 2787.

20 RICHARDSON, *supra* note 11, at 4. R

into the early 1880s, the company encountered constant financial difficulties; it frequently suspended construction, once entered receivership, and ultimately was absorbed by the Southern Pacific Railway Company.[21] One of the causes of financial stress was the railroad's inability to sell its granted land.[22] The 1869 legislation assumed the grant lands would be marketable at the going rates for agricultural land—$2.50 per acre—but in fact, the steep, heavily forested lands were unsuited for agriculture.[23]

By the time construction was completed to the California border in 1887, the O&C Railroad Company had earned 3,728,000 acres of grant land.[24] Yet by 1890, it had sold only 300,000 acres.[25] Because the market for land was poor, the O&C Railroad Company did not bring most of its acreage to patent.[26] This left more than 3 million unpatented acres for which the counties received no taxes and which the O&C Railroad Company held at very little cost.[27]

The Railroad's financial prospects changed with the Oregon timber boom. By the end of the nineteenth century, the timber industry depleted the Great Lakes timber resources.[28] Timber cruisers from the former "northwest" of Minnesota, Michigan, and Wisconsin[29] were drawn to the new Northwest by reports of "simply prodigious" and "inexhaustible" amounts of timber.[30] Soon, Weyerhaeuser and other Great Lakes firms entered the Pacific Northwest. In the 1890s, the price of timbered O&C lands rose as high as $40 per acre, inflated by new legislation authorizing the President to reserve public domain land for for-

[21] THE O&C LANDS, *supra* note 10, at 4-5. The O&C Railroad Company was controlled by Southern Pacific Railway but was not completely absorbed by the larger corporation, so it continued to operate under the name O&C Railroad Company. *Id.* at 5. R

[22] *See id.* at 4-5 (discussing the O&C Railroad's difficulties in selling granted lands).

[23] *Id.* at 4.

[24] *Id.* at 5.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] DAVID A. CLARY, TIMBER AND THE FOREST SERVICE 14 (1986). The industry worked through the Great Lakes, then the South, went back to the Appalachians, and reached out to the Pacific Northwest. The timber industry was "mostly migratory, and it left behind denuded areas plagued by fires, soil erosion, and unemployment." *Id.*

[29] JOHN ISE, THE UNITED STATES FOREST POLICY 247 (1920).

[30] STATE BD. OF AGRIC., THE RESOURCES OF THE STATE OF OREGON 56 (1892).

est conservation purposes.[31] The sales that followed grossly violated the 1869 Homestead Act's conditions: land was sold to timber companies for well over $2.50 per acre, often in huge tracts, and the timber firms certainly were not "actual" settlers.[32] By 1903, Southern Pacific Railway (through the O&C Railroad Company) had sold 813,000 acres, and about 84% of the acreage sold violated the 1869 Act.[33]

In 1902, Southern Pacific withdrew all its lands from sale.[34] Because the timber boom was far from over, most Oregonians believed that the railroad company actually was "hedging against expected further price increases,"[35] which only added to Oregonians' distrust of the railroads. Oregon had become a leader in the Progressive movement, built on defending the "little" people against monopolistic corporations.[36] Already unpopular in Oregon for their tax-avoidance techniques, the railroads were a natural target for Progressives.[37] When the Portland *Oregonian* rediscovered the 1869 "actual settlers" clause, it set off a campaign against the railroads.[38] Around the same time, President Roosevelt initiated land-fraud investigations in Oregon and uncovered several decades of falsified records, bribery, and other illegal actions regarding Oregon's public domain timber. More than a thousand people were eventually indicted in the investigations.[39]

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31 In the early 1900s, President Roosevelt enlarged Oregon's forest reserves to 13 million acres. RICHARDSON, *supra* note 11, at 9-10. By July 1905, President Roosevelt had expanded the national reserves to 85.7 million acres, and by 1913, 187 million acres were in reserve. CLARY, *supra* note 28, at 3. While these reservations protected those forests, it also probably exacerbated the price of remaining timberlands and "heightened the anxieties of land-hungry Oregonians." THE O&C LANDS, *supra* note 10, at 6. R R R

32 BUREAU OF GOVERNMENTAL RESEARCH & SERV., UNIV. OF OR., THE SIGNIFICANCE OF THE O&C FOREST RESOURCE IN WESTERN OREGON 21 (1968) [hereinafter SIGNIFICANCE OF THE O&C].

33 *Id.* The misappropriated acres totaled approximately 685,000 acres. *Id.*

34 ISE, *supra* note 29, at 247.

35 THE O&C LANDS, *supra* note 10, at 6. R

36 *See* CLARY, *supra* note 28, at 15-16 (discussing the tenets of Progressive belief). R

37 BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, O&C SUSTAINED YIELD ACT: THE LAND, THE LAW, THE LEGACY 10 (1987) [hereinafter BUREAU OF LAND MGMT., O&C SUSTAINED YIELD ACT].

38 RICHARDSON, *supra* note 11, at 10. The *Oregonian* found the "actual settlers" clause in the Coos Bay Wagon Road grant, causing it to look for similar wording in the Oregon and California Railroad grant. *Id.* R

39 THE O&C LANDS, *supra* note 10, at 6-7. The land-fraud investigations took place in 1903. *Id.* at 6. R

In response to these events, the Oregon Legislature pushed hard for Congress to ensure compliance with the terms of the 1869 grant.[40] In 1908, Congress authorized the Attorney General to institute a forfeiture suit for the O&C Railroad Company's breach of the terms of its contract with the federal government.[41] In 1911, the Circuit Court for the District of Oregon held that the railroad company forfeited the contract set out in the 1866 Act by not following the conditions subsequent of the 1869 Act.[42] Upon this judgment, the O&C Railroad Company filed an appeal and stopped paying county taxes on its remaining holdings.[43] Five years later, the U.S. Supreme Court reversed the judgment, holding that the contract was not forfeited because the 1869 conditions were not conditions subsequent.[44] The Supreme Court enjoined the railroad from further violating the terms of the 1869 conditions or disposing of its land in any way until Congress provided legislation to solve the problem.[45]

Congress' solution was the 1916 Chamberlain-Ferris Act,[46] revesting ownership of unsold O&C lands in the federal government. The Act required the Secretary of the Interior to classify the O&C lands into three categories: (1) timberlands (land with at least 300,000 board feet of timber per 40-acre tract), (2) power-site lands (water power), and (3) agricultural lands (all land not in the other two categories).[47] The DOI was required to sell the timber "as rapidly as reasonable prices [could] be secured therefor in a normal market."[48] The federal government would pay the O&C Railroad for the revested land, but only at $2.50 per acre and less the amount of money already received for grant lands, including unpaid taxes.[49] The balance would be paid from the revenue generated by O&C timber sales.[50] After the O&C Railroad was paid in full and the U.S. Treasury was reimbursed for the county taxes it had paid on behalf of the O&C Railroad, 25% of revenue would go to the State treasurer, 25% to county

[40] *Id.* at 7.
[41] S.J. Res. 48, 60th Cong., 35 Stat. 571 (1908).
[42] United States v. Oregon & C. R. Co., 186 F. 861, 924 (C.C.D. Or. 1911).
[43] THE O&C LANDS, *supra* note 10, at 8. **R**
[44] Oregon & Cal. R.R. Co. v. United States, 238 U.S. 393, 423 (1915).
[45] *Id.* at 423.
[46] Act of June 8, 1916, ch. 137, 39 Stat. 218.
[47] *Id.* § 2, 39 Stat. at 219.
[48] *Id.* § 4, 39 Stat. at 220.
[49] *Id.* § 10, 39 Stat. at 222.
[50] *Id.*

treasurers, 40% to a Reclamation Act fund, and 10% to the general fund of the U.S. Treasury.[51] Applying the law in 1925, the Oregon District Court determined that the federal government owed the railroad at least $4,077,478.35 at the time of revestment.[52]

The Chamberlain-Ferris Act turned out to be a less than adequate solution. The Act's classification of "agricultural land," less than 300,000 board feet per 40-acre tract, was somewhat arbitrary and inflexible: much of the land fitting that description had plenty of timber or was barren ground and rocky mountain tops.[53] Of the 1,055,000 acres classified and advertised as agricultural, the DOI estimated that less than 1% was suitable for agriculture.[54] Homesteaders drawn by advertisements found the land "utterly unfit" for their needs.[55] Because of the high cost of clearing the timbered land—the average settler was able to clear only five to ten acres—the land was insufficient for subsistence farming.[56]

The Act also failed to sell enough timber to generate county revenue. The responsibility for implementing the Act fell to the DOI's General Land Office (GLO), a small office with one timber cruiser, one stenographer, and one administrator.[57] Although 1,232,000 acres were classified as timberlands that should be cut and sold "as rapidly" as possible, sales were slow.[58] The northwest timber industry had developed where timber was accessible at the lowest cost: mainly around Puget Sound where water transportation was nearby.[59] The O&C land's timber was

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[51] *Id.*

[52] United States v. Oregon & C. R. Co., 8 F.2d 645, 660 (D. Or. 1925).

[53] *Relating to the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands Situated in the State of Oregon: Hearings on H.R. 5858 Before the H. Comm. on the Public Lands*, 75th Cong. 20 (1937) [hereinafter *May & June Hearings on H.R. 5858*] (statement of Rufus G. Poole, Assistant Solicitor, Department of the Interior).

[54] *Id.* at 16.

[55] *April Hearings on H.R. 5858*, *supra* note 10, at 21 (statement of David T. Mason, Consulting Forester). **R**

[56] *May & June Hearings on H.R. 5858*, *supra* note 53, at 83 (statement of L.F. Kneipp, Assistant Chief, Forest Service). **R**

[57] CHARLES MCKINLEY, THE MANAGEMENT OF LAND AND RELATED WATER RESOURCES IN OREGON 192 (1965).

[58] *April Hearings on H.R. 5858*, *supra* note 10, at 5 (statement of Rufus G. Poole, Department of the Interior). **R**

[59] *April & May Hearings on H.R. 5858*, *supra* note 53, at 142 (statement of Guy Cordon). **R**

less accessible, and without enough GLO staff to cruise for timber and administer sales, timber sales simply did not happen.[60] Ten years after the law's enactment, the eighteen counties with revested O&C lands had not yet received any revenue, the U.S. government's tax advances to the counties on behalf of the railroads were not repaid, and the counties had lost the tax base of the railroads.[61]

In response to the counties' revenue crisis, the Association of O&C Counties (AOCC) was formed. Its main purpose was to secure an advance from the federal government in lieu of taxes.[62] The AOCC succeeded, and in 1926 Congress passed the Stanfield Act.[63] The Act gave the O&C counties a $7,135,000 advance for what would have been taxes from 1916 to 1926 had the land stayed in private ownership.[64] In 1937, county finances had not improved, and the counties received another $3,866,000 advance from the federal treasury, in lieu of taxes from 1927 to 1933.[65]

II

THE O&C LANDS ACT

A. Legislative History of the O&C Lands Act

Conservation became popular during the 1920s and 1930s among the general American population, as well as within the DOI and some of the private forestry community. The Great Depression had created a national sensitivity to overproduction in natural resource-based industries.[66] Secretary of the Interior Harold Ickes wanted to transform the DOI into the "Department of Conservation."[67] Ickes "ardently" desired to be considered an "enlightened forest conservationist,"[68] and took particular interest in the problems and the potential of the O&C lands. He

[60] *Id.* at 141-42.

[61] *Id.* at 141.

[62] THE O&C LANDS, *supra* note 10, at 13. R

[63] Act of July 13, 1926, ch. 897, 44 Stat. 915.

[64] MCKINLEY, *supra* note 57, at 191-92. The Stanfield Act provided that the money would be charged against the "Oregon and California land-grant fund" and repaid out of the proceeds from the sale of land and timber. Act of July 13, 1926, ch. 897, § 4, 44 Stat. at 916. R

[65] MCKINLEY, *supra* note 57, at 192. R

[66] THE O&C LANDS, *supra* note 10, at 14. The Dust Bowl created a desire among many citizens to conserve America's natural resources. BUREAU OF LAND MGMT., O&C SUSTAINED YIELD ACT, *supra* note 37, at 11. R R

[67] THE O&C LANDS, *supra* note 10, at 14. R

[68] BUREAU OF LAND MGMT., O&C SUSTAINED YIELD ACT, *supra* note 37, at 11. R

found a private forestry consultant in Portland, David Mason, who was a proponent of "sustained yield" management for the O&C lands.[69] The stage was set and the pieces were in place for new O&C legislation.

1. House Bill 5858

In 1937, the DOI drafted House Bill 5858, which permitted the federal government to retain the O&C lands and maintain them for conservation needs, instead of seeking to sell off the timber and dispose of the land.[70] Title I of the bill required that the timberlands

> be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.[71]

Title II detailed the revenue scheme for distributing the Oregon and California land-grant fund: 50% to counties; 25% to counties to pay the tax deficit until it was extinguished, then to the U.S. Treasury to reimburse accrued charges against the fund until that was satisfied, and then to the Oregon Treasurer for the school fund; 25% for administration of the Act; and any unused amounts to the U.S. Treasury.[72]

The bulk of the congressional hearings on House Bill 5858 involved Title II's controversies, including whether the DOI or the Department of Agriculture should have jurisdiction over the O&C lands;[73] whether the counties should receive revenue from timber sales or from the previous in-lieu-of-taxes formula;[74] whether Oregon counties should get any money in relation to the

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[69] *Id.*

[70] H.R. 5858, 75th Cong. § 3 (1937), *reprinted in April Hearings on H.R. 5858*, *supra* note 10, at 2. **R**

[71] *Id.* § 1.

[72] *Id.* § 201(a)-(c).

[73] *See May & June Hearings on H.R. 5858*, *supra* note 53, at 86-116 (statements of multiple witnesses and Representatives) (extensively discussing the merits and demerits of granting either department jurisdiction). **R**

[74] *See id.* at 17 (statement of Rep. James W. Mott, Member, House Comm. on the Public Lands) (expressing opposition to attempts to alter the distribution formula).

O&C lands;[75] whether the Forest Service should be housed under the DOI or Agriculture;[76] and whether Oregon was morally obliged to return taxes for the lands exceeding $2.50.[77] The hearings were contentious and often confusing.[78]

a. Conservation Measures in House Bill 5858

The sustained-yield management scheme was considered "not very controversial."[79] Of the thirteen days of hearings on House Bill 5858 in the House Committee on the Public Lands, only about one day was spent on Title I.[80] The Representatives and witnesses, including officials from the Departments of the Interior and Agriculture, west coast lumber representatives, and Oregon foresters and political figures, all supported the principle of sustained yield. Indeed, the transcript of the hearings is a litany of praise for sustained-yield management.

The Departments of the Interior and Agriculture may have battled over jurisdiction of the O&C lands, but they were united in their support for sustained-yield management. The DOI saw its bill as a "management plan for permanent forest protection,"[81] and sustained yield as an "abandonment of the old procedure which [had] characterized the cut-out and get-out policy that [had] dominated the American lumber industry."[82] The Department of Agriculture's Forest Service focused its testimony on the economic impacts of sustained-yield management but agreed that the "important thing about having the Government retain

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[75] *See id.* at 69-74 (statement of Rufus G. Poole, Assistant Solicitor, Department of the Interior) (extensively discussing whether the O&C lands should be treated differently from other federal lands for taxation purposes).

[76] *Id.* at 204-05 (statement of Rufus G. Poole, Assistant Solictor, Department of the Interior).

[77] *Id.* at 216.

[78] Wyoming Representative Paul Greever said at one point, "If I understand this, I will consider myself a genius." *Id.* at 63.

[79] *May & June Hearings on H.R. 5858*, *supra* note 53, at 48 (statement of Rep. James W. Mott, Member, H. Comm. on the Public Lands). **R**

[80] *See id.* at 33-48 (discussing Title I of the bill).

[81] *April Hearings on H.R. 5858*, *supra* note 10, at 6 (statement of Rufus G. Poole, Department of the Interior). **R**

[82] *May & June Hearings on H.R. 5858*, *supra* note 53, at 24 (written statement of the Department of the Interior). **R**

control is to preserve it, not to permit it to be destroyed, as has been the practice of lumber companies."[83]

The timber industry also supported sustained-yield management. The West Coast Lumbermen's Association enthusiastically supported it as an alternative to "liquidating" the forests.[84] The group's representative explained that the timber industry wanted to avoid the fate of the Lake states, with "unproductive land and idle towns and labor that has had to move out."[85] He likened the situation to a trust: the federal government would act as a trustee to conserve the productivity so that the people of Oregon would "live on the interest" and "keep the capital unimpaired."[86] An Oregon mill operator also spoke in favor of sustainable yield:

> [I]t is time for us to subject ourselves to the proper practices of forestry in [the] whole region. We do not any longer wish to be subject to the criticisms, the national criticisms, of our methods of handling those forests, and there is no reason why, with the proper cooperation on the part of any of these departments, that the industry itself will not go along on a fair basis, with a great deal of interest and enthusiasms toward carrying out a national program.[87]

Representatives of Oregon interests vehemently opposed Title II's revenue scheme, but supported sustained yield. Representative James Mott of Oregon opined that "it should have been put into effect long ago."[88] Judge Day of Jackson County, Oregon, said that not only was his county "not opposed to [Title I], but we think that something along that line should be done,"[89] though he also acknowledged that "there is a wide difference of opinion as to what a practical application of the sustained yield idea is."[90] Indeed, neither House Bill 5858 nor the O&C Act define sustained yield.

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[83] *Id.* at 85 (statement of Rep. Henry G. Teigan, Member, House Comm. on the Public Lands). L. F. Kneipp, the Assistant Chief of the Forest Service, concurred with Representative Teigan. *Id.*

[84] *April Hearings on H.R. 5858*, *supra* note 10, at 9-10 (statement of W.B. Greeley, Manager, West Coast Lumbermen's Association). **R**

[85] *Id.* at 11.

[86] *Id.* at 10.

[87] *May & June Hearings on H.R. 5858*, *supra* note 10, at 44 (statement of George T. Gerlinger, private mill operator). **R**

[88] *Id.* at 17 (statement of Rep. James W. Mott, Member, H. Comm. on the Public Lands).

[89] *Id.* at 198 (statement of Hon. Earl Day, Judge, Jackson County, Oregon).

[90] *Id.* at 180.

b. Economic Motivation for House Bill 5858

Along with recognizing the need for sustained yield to maintain Oregon's forests, witnesses at the hearing supported sustained yield for the effect it would have on the economic structure of Oregon communities. In 1937, approximately 62% of Oregon's payroll came from the forest industry.[91] The DOI contrasted "timber mining" with "timber culture." Timber mining created "overdeveloped lumber industries," depleted virgin forest in a few decades and moved on, "leaving a wake of stranded populations and impoverished communities."[92] House Bill 5858 would instead enable a timber culture, with smaller and less numerous mills, "solid and permanent in character."[93] The Forest Service identified the problem of industrial farms owning more than half the timber supply in the Pacific Northwest,[94] which meant the region was "cursed with excess mill capacity and excess production of timber."[95] The excess resulted in a "destructive form of exploitation in order to salvage values before they [were] consumed by carrying costs."[96] The bill would manage the "timber situation so that it [would] be cut only as economic need dictate[d], not cut to work out a finance problem of some insolvent company."[97]

The timber industry representatives likewise saw the bill as a boon for O&C communities and local industries.[98] They understood House Bill 5858 as the federal government entering into a "partnership with a local industry to maintain them on a perpetual footing."[99] The AOCC spokesman acknowledged that sustained yield was "unequivocally" necessary to the future of the

[91] *April Hearings on H.R. 5858*, *supra* note 10, at 9 (statement of W.B. Greeley, Manager, West Coast Lumbermen's Association). R

[92] *May & June Hearings on H.R. 5858*, *supra* note 53, at 24 (written statement of the Department of the Interior). R

[93] *Id.*

[94] *Id.* at 84 (statement of L. F. Kneipp, Assistant Chief, Forest Service).

[95] *Id.* at 87.

[96] *Id.* at 85.

[97] *Id.*

[98] One timber industry representative explained, "We want to know not only what happens to the soil, whether it remains productive or not, but also what is going to happen to the numerous communities whose livelihood is drawn mainly from the forest industry, and to the future of the thousands of workers whose job depends upon the forestry industry." *April Hearings on H.R. 5858*, *supra* note 10, at 9-10 (statement of W. B. Greeley, Manager, West Coast Lumbermen's Association). R

[99] *Id.* at 13.

Northwest; cutting all the timber would be a "death blow" to the economy.[100]

While the House of Representatives was keenly conscious of the role of timber in the Northwest economy, the members knew that timber sales from the O&C lands would not be a profit-making enterprise for the federal government. The DOI acknowledged that its budget would initially show a $50,000 deficit, and at most would some day balance.[101] In response to questioning on the propriety of such accounting, a DOI official indicated that the DOI's ability to balance its budget would be greater than that of the Forest Service, which spent "three times what they [took] in."[102] Furthermore, he explained that the forests were not revenue-builders, but rather a "national resource which we want to hold in perpetuity and protect as a reservoir for the timber needs of the United States."[103]

c. Logging Mandate and Disbursement Scheme

Nonetheless, Title I was not embraced in its entirety. While all parties agreed on the concept of sustained yield, there was less harmony regarding actual logging limits or requirements. Under the original proposal, the only limit on logging was that the land shall not produce more than 500 million board feet (MMbf) if the annual sustained yield was not yet determined.[104] The timber industry considered sustained yield a matter that only impacted the counties.[105] The AOCC and Representative Mott of Oregon saw the issue as preventing any guarantee of county revenue. Desperate for some "yardstick for advance measurement" in the face of Title II's uncertain revenue returns,[106] they offered amendments to Title I's 500 MMbf maximum. Ultimately, these efforts

[100] *May & June Hearings on H.R. 5858*, *supra* note 53, at 145-46 (statement of Guy Cordon). **R**

[101] *Id.* at 221 (statement of Rufus G. Poole, Assistant Solicitor, Department of the Interior).

[102] *Id.* Very little has changed for the Forest Service. *See* Robert E. Wolf, *National Forest Timber Sales and the Legacy of Gifford Pinchot: Managing a Forest and Making it Pay*, 60 U. COLO. L. REV. 1037, 1067 (1989) (noting that costs exceed receipts on many national forests).

[103] *May & June Hearings on H.R. 5858*, *supra* note 53, at 222 (statement of Rufus G. Poole, Assistant Solicitor, Department of the Interior). **R**

[104] H.R. 5858, 75th Cong. § 1 (1937), *reprinted in April Hearings on H.R. 5858*, *supra* note 10, at 1. **R**

[105] *May & June Hearings on H.R. 5858*, *supra* note 53, at 46 (statement of George T. Gerlinger). **R**

[106] *Id.* at 157 (statement of Guy Cordon).

were successful in amending the language: although there was still a provisional limit of 500 MMbf after the annual sustained yield was set, the DOI was required to sell *at least* 500 MMbf, or "not less than the maximum annual sustained yield capacity."[107] According to the testimony, the counties' desire for some guaranteed revenue was the *only* reason for the amendment. The AOCC worried that "[w]ithout the amendment it might be conceivable that the timber would be wholly or substantially withdrawn from sale and the proceeds . . . thereby greatly restricted or completely cut off."[108]

The same desire to guarantee revenue motivated Representative Mott's and the AOCC's plea to keep the Stanfield Act's scheme of paying the counties an in-lieu-of-tax amount from the O&C land grant fund, rather than the proposed direct percentage from the O&C timber revenue.[109] Under the Stanfield Act, even when there was not enough in the fund to pay the amount due, the counties could still plan their budgets accordingly, knowing that they would be paid "at some time or other."[110] Under House Bill 5858's direct percentage scheme,[111] which was ultimately adopted, counties risked fluctuations in revenue and no guarantee of base payments if revenues dropped precipitously.

2. House and Senate Report

The bill that the House and Senate ultimately passed was very similar to the DOI's House Bill 5858. The accompanying Senate and House Reports trumpeted the 1937 O&C Act as a "solution to the problems created by the Revestment Act [the 1916 Chamberlain-Ferris Act]."[112] Those problems are described as a lack of consideration for conservation and local economics:

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[107] *Id.* at 121-24.

[108] *Id.* at 124.

[109] *Id.* at 157. Representative Mott expressed his concerns about Title II, arguing that it would deprive the counties of "part of the revenue to which [they] are entitled." *April Hearings on H.R. 5858*, *supra* note 10, at 2 (statement of Rep. James W. Mott, Member, H. Comm. on the Public Lands). **R**

[110] *May & June Hearings on H.R. 5858*, *supra* note 53, at 157. **R**

[111] H.R. 5858, 75th Cong. § 201 (1937), *reprinted in April Hearings on H.R. 5858*, *supra* note 10, at 2. **R**

[112] S. REP. NO. 75-1231, at 3 (1937). With one exception, the Senate Report is identical to the House Report. *Compare* S. REP. NO. 75-1231 *with* H.R. REP. NO. 75-1119 (1937). However, the Senate Report contained a final paragraph not found in the House Report, explaining that the bill did not confer jurisdiction in the De-

> No provision was made for the administration of the land on a conservation basis looking toward the orderly use and preservation of its natural resources. . . . [Clear] cutting was contemplated. Seed trees were not to be preserved, nor was any provision made for the protection of stream flow. The probable effect of such a cutting policy on community industries was not considered.
>
> This policy is now believed to be wasteful and destructive of the best social interests of the State and Nation.[113]

The new bill presented an alternative of "conservation and scientific management" for the O&C lands.[114] Instead of destroying the timber assets by "early liquidation," they would be "conserved and perpetuated."[115] Managing classified timberlands according to sustained-yield basis would avoid "depletion of the forest capital" and "make for a more permanent type of community, contribute to the economic stability of local dependent industries, protect watersheds, and aid in regulating streamflow."[116] The O&C lands are described as a "vast, self-sustaining timber reservoir for the future, an asset to the Nation and the State of Oregon alike, all of which is financed by the lands themselves."[117] Early enactment was urged "in the interest of both conservation and economy."[118]

B. The O&C Act

The O&C Act[119] retained the DOI as the implementing entity. Under the Act, lands classified as timberlands and power-site lands valuable for timber were to be

> managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic sta-

partment of the Interior over use of waters, but rather "regulating stream flow" should be construed to mean protecting the water-beds and run-off of water. S. REP. NO. 75-1231, at 5.

113 *Id.* at 2.

114 *Id.*

115 *Id.* at 3.

116 *Id.* at 2.

117 *Id.* at 3.

118 *Id.*

119 43 U.S.C. §§ 1181a-1181j (2006). The law is also known as the Oregon and California Railroads Grant Act, McNary Act, and O&C Act.

> bility of local communities and industries, and providing recreational facilties [sic].[120]

The Act provided that until the annual productive capacity was determined, the "average annual cut therefrom shall not exceed one-half billion feet board measure."[121] Once the sustained yield was set, the Act stated that timber from O&C lands was to be sold annually at "not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared . . . or so much thereof as can be sold at reasonable prices on a normal market."[122]

The Act permitted the Secretary of the Interior to divide the O&C lands into "sustained-yield forest units:" boundary lines were to be drawn so that each forest unit provided a "permanent source of raw materials for the support of dependent communities and local industries of the region."[123] In subdividing the lands, the O&C Act states that the Secretary must give "[d]ue consideration" to "established lumbering operations . . . when necessary to protect the economic stability of dependent communities."[124] Timber sales were limited to the productive capacity of the respective forest unit.[125] In turn, the Act adopted House Bill 5858's proposed financial structure: the revenue from timber and land sales goes to an "Oregon and California land-grant fund," whereby 50% of the revenue goes to O&C counties; 25% to repay the money in lieu of taxes advanced by the U.S. Treasury until that tax indebtedness is extinguished, and then to the counties; and 25% for administrative purposes with any remaining money to the general fund of the U.S. Treasury.[126]

The O&C Act broke new ground in federal forest legislation. It was the first federal law to require something akin to multiple-use management of federal public lands.[127] It retained the DOI's control over western Oregon's forests, despite insistence by the Department of Agriculture and Forest Service that they were

120 *Id.* § 1181a.
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.* § 1181f.
127 3 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 20:47 (2003); Paul G. Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739, 755 (1987).

better suited for forest management.[128] And it introduced sustainable-yield management of forests, a new way to ensure sustained timber supply and promote conservation.

At the time of the Act's passage, the O&C lands consisted of 2.5 million acres in Oregon. The Committee on Public Lands and Surveys estimated that 87.5% were covered with forest, less than 1% was suited for agricultural uses, and 12% were nonproductive except for grazing.[129] The volume of timber was approximated at 46 billion board feet of mature saw timber, which was 3% of the total U.S. saw-timber supply.[130]

C. Regulations

The year after the O&C Act's enactment, the GLO published regulations for the Act.[131] The 1938 regulations provided for a competitive process of selling the O&C timber, including provisions for detailed examination and reports on the sale area, advertisement, a bidding system, graduated payment installations, and records and reports by the Chief Forester.[132] Today, the regulations governing the BLM's forest management are found in 43 C.F.R. part 5000, and describe the process for establishing sustained-yield forest units. The BLM must give notice of, and hold, a public hearing[133] and publish a notice describing the units.[134] A sustained-yield unit should contain enough land to "provide, insofar as practicable, a permanent source of raw materials to support local communities and industries, giving due consideration to established forest products operations."[135] The regulations create a scheme for competitive, advertised sales, as well as an allowance for unadvertised sales of limited size, "in the public interest," and for not less than the appraised value.[136]

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128 THE O&C LANDS, *supra* note 10, at 16. **R**

129 S. REP. NO. 75-1231, at 2 (1937).

130 *Id.*

131 Regulations and Forest Practice Rules for the Sale of Timber from the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands, 3 Fed. Reg. 1795 (July 21, 1938). The 1938 regulations are also referred to as Circular 1448.

132 *Id.* at 1796-97.

133 43 C.F.R. § 5040.2 (2006).

134 *Id.* § 5040.3.

135 *Id.* § 5040.1.

136 *Id.* § 5402.0-6.

D. Amendments and Changes to the 1937 Act

Since the O&C Act's adoption, three main changes have been made to the process for administering the O&C lands: (1) a new financial disbursement plan under the "County Payments" Act, (2) the Forest Service's administration of the controverted lands, and (3) new "no net loss" provisions. A failed proposal to transfer the O&C lands from the federal government to the State of Oregon is also briefly discussed below.

1. County Payments Act

Under the 1937 O&C Act, the O&C counties receive 50% of the timber revenues and an additional 25% after the U.S. Treasury's reimbursement for its tax advances.[137] In 1952, the Treasury was finally reimbursed, and the O&C Counties received the full 75% of the revenues for the first and only time.[138] That same year, Congress added a rider to the DOI's 1953 fiscal appropriation, reserving up to a one-third share of the counties' fund to cover the costs of roads and other capital improvements on the O&C lands.[139] The AOCC agreed to this arrangement, in part because it "deflected" Congress' growing interest in revising the O&C formula to give less money to the counties.[140] This "plow-back" money was initially used only for road construction and repair, but in 1956 the AOCC agreed to allocate 20% of the money for reforestation.[141] Through plow-back funds, the O&C counties contributed over $340 million from 1953 to 1981.[142] In 1981, Congress changed the system to stabilize management of the O&C lands; receipts were divided evenly between the O&C counties and the U.S. Treasury.[143]

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137 43 U.S.C. § 1181f (2006).

138 BUREAU OF MUN. RESEARCH AND SERV., UNIV. OF OR., O&C COUNTIES: POPULATION, ECONOMIC DEVELOPMENT, AND FINANCE 5 n.1 (1957).

139 *Id.*

140 THE O&C LANDS, *supra* note 10, at 26. In the 1970s, Clackamas County challenged this arrangement in federal court, suing the Secretary of the Interior and the Secretary of the Treasury for reimbursement of the plow-back funds since 1953. The city was unsuccessful. *See infra* notes 235-37 and accompanying text. **R**

141 MCKINLEY, *supra* note 57, at 191. **R**

142 Oregon State Office, Bureau of Land Mgmt., Overview of the Oregon and California (O&C) Grant Lands Act of 1937 (2005) (on file with authors).

143 BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND ANNUAL PERFORMANCE PLAN 2001, at IX-12 (2000), *available at* http://www.blm.gov/budget/2001just/o&c.pdf [hereinafter BUREAU OF LAND MGMT., 2001 BUDGET JUSTIFICATIONS].

By 1987, fifty years after the enactment of the O&C Act, $1.4 billion in returned revenues had gone to the O&C counties.[144] From the 1960s through the 1980s, the BLM regularly sold more than 1 billion board feet per year.[145] In the early 1990s, however, the volume of timber dropped dramatically. The BLM sold 418 MMbf in 1991, 49 MMbf in 1992 and 1993, and just 13 MMbf in 1994;[146] the floor had dropped out from beneath many of the O&C county economies.[147] To save floundering schools and crumbling county infrastructure, the federal government guaranteed "special payments" between fiscal years 1994 and 2000 to the O&C counties that were based on an annually decreasing percentage of an average of the payments from fiscal year 1986 to fiscal year 1990.[148]

The Secure Rural Schools and Community Self-Determination Act of 2000[149] (County Payments Act) was an effort to stabilize county payments and help counties cope with lost economic infrastructure and reduced O&C revenue.[150] The County Payments Act provided payments to O&C counties from fiscal year 2001 to fiscal year 2006, based on the average of a county's highest three payments between fiscal years 1986 and 1999.[151] Counties must spend 15%-20% of the payments on forest restoration on public lands or other county uses connected with BLM land.[152] The legislative history of the County Payments Act explicitly describes the Act as having "absolutely no incentive for

144 BUREAU OF LAND MGMT., O&C SUSTAINED YIELD ACT, *supra* note 37, at 14. **R**

145 Bureau of Land Mgmt., BLM Western Oregon Timber Sale Information 1950-2002 (2005) (on file with authors).

146 *Id.*

147 A study in the 1960s showed that the O&C receipts made up 50% or more of the total revenue in Jackson, Douglas, and Josephine Counties. SIGNIFICANCE OF THE O&C, *supra* note 32, at 77.

148 The special payments also went to other counties in Washington, Oregon, and California affected by dropping federal timber sales. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13982, 107 Stat. 312, 681-82.

149 Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat. 1607. This statute is also referred to as the County Payments Act.

150 *See* 146 CONG. REC. E1800 (daily ed. Oct. 10, 2000) (statement of Rep. Peter DeFazio).

151 Secure Rural Schools and Community Self-Determination Act §101(a)(2).

152 *Id.* §102(d).

increased logging."[153] The Act expired in 2006, and Congress is currently debating reauthorization.[154]

2. Controverted Lands

When the O&C lands were revested in the federal government, 462,000 acres lay inside National Forest boundaries.[155] Until 1938, the Department of Agriculture's Forest Service administered the lands as part of the national forests, without opposition from the DOI. In 1938, Interior Secretary Ickes realized that the Forest Service was selling timber from the lands. He declared that the lands were under his jurisdiction and began to advertise for bids through the GLO.[156] Naturally, the Forest Service took exception to Ickes' actions. In 1942, revenue from timber sales of the disputed lands was impounded until the GLO and Forest Service reached a settlement.[157]

In 1943, Senator Charles McNary of Oregon introduced a bill extending DOI's jurisdiction to the disputed lands.[158] During congressional hearings on the legislation, the AOCC based its arguments for the bill on conservation and local economics. AOCC touted the cooperative sustained-yield program as a

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[153] 146 CONG. REC. E1800 (statement of Rep. Peter DeFazio).

[154] *See* Dan Berman, *Administration Agrees to Extension of Rural Schools Program*, GREENWIRE, Aug. 8, 2006, at 1 (discussing congressional attempts to secure funding for an additional year). The Bush administration's agreement to support reauthorization of the County Payments Act came after a failed attempt to pay for the reauthorization by selling off significant portions of public lands, and with the caveat that Congress find "offsets" to fund the one-year reauthorization. *Id.* And, as at least one county commissioner noted, the agreement to fund County Payments for another year is still premised on finding elusive offsets in an election year: "[t]he agreement to work for a solution is not the same as a solution." Jeff Kosseff & Michael Milstein, *1-Year Deal Preserves Timber Payments*, OREGONIAN (Portland), Aug. 8, 2006, at A1; *see also* Memorandum from Gil Riddell, Ass'n of Or. Counties, and Rocky McVay, Executive Dir., Ass'n of O&C Counties, to All Oregon Safety-Net Receiving Counties (Aug. 8, 2006) (on file with authors) (noting the need to find a funding source for the off-sets). As of publication, Congress still has not acted to renew the County Payments Act, with the result that nearly all Oregon counties are preparing to close libraries, lay off staff, empty jails, and otherwise curtail county services. Harry Esteve, *Timber Counties Brace for Ax to Fall*, OREGONIAN (Portland), Feb. 18, 2007, at A1.

[155] MCKINLEY, *supra* note 57, at 192. R

[156] *Id.* at 193.

[157] THE O&C LANDS, *supra* note 10, at 29-30. R

[158] MCKINLEY, *supra* note 57, at 193. R

"forward-looking program of conservation," and urged that the disputed lands be added to the DOI's jurisdiction in order to "make this combination of action the full success it can be."[159] The AOCC pointed to the heavy cost of keeping up timber roads and showed how the O&C annual payments had "carried their share of this burden," while the national forest payments from "the last ten years would not build ten miles of these roads."[160] Nonetheless, the bill died in the House, and for the next six congresses, similar bills died similar deaths.

By 1952, the fund of impounded revenue totaled $4.5 million, a significant amount of money for the counties.[161] The political climate had also changed: in 1946 the Bureau of Land Management was born, taking over administration of the O&C Lands from the GLO. In 1954, tired of the fight, the two Departments settled for a compromise.[162] Under the Controverted Lands Act, the Department of Agriculture would continue to administer the disputed land as part of the National Forest System, subject to the laws, rules, and regulations of the national forests.[163] The revenues from timber sales, however, would be disbursed according to the 1937 O&C Act.[164]

3. No Net Loss

In 1998, Congress established a policy of "No Net Loss" for the O&C lands.[165] When selling, purchasing, or exchanging land, the BLM may not reduce the total acres of O&C land nor reduce the number of acres of O&C, Coos Bay Wagon Road, and public domain lands[166] that are available for timber harvest. The Secretary of the Interior must ensure that at the end of every ten

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159 *Id.*

160 *Id.*

161 *Id.* at 194.

162 *Id.*

163 Act of June 24, 1954, ch. 357, § 1(a), 68 Stat. 270, 270-71.

164 *Id.*

165 Oregon Public Lands Transfer and Protection Act of 1998, Pub. L. No. 105-321, § 3(b), 112 Stat. 3020, 3022-23.

166 "Public domain" lands are lands that have never left federal ownership since their original acquisition by the federal government (i.e., through treaty or war with Native Americans, Great Britain, Spain, or other sovereign nations). Stephen S. Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B.C. ENVTL. AFF. L. REV. 905, 914 (1982). These lands were "the lands no one wanted," and were never homesteaded, granted, or reserved. Telephone Interview with Andy Kerr, The Larch Company, in Ashland, Or. (June 21, 2006).

years, the amount of land under DOI's control and subject to harvest is the same as it was upon the bill's enactment.[167]

As originally proposed, the House bill prohibited the BLM from selling or exchanging O&C lands within a congressionally designated wilderness area, the National Wild and Scenic River System, or an area of critical environmental concern.[168] Also, public domain lands would be redesignated as O&C revested lands.[169] Although Oregon Representative Darlene Hooley considered the bill "noncontroversial" and simply a "common sense land transfer arrangement,"[170] an earlier Senate bill contained no limitations other than the "no net loss" provisions.[171] The Forest Service and the BLM were still strongly opposed to the bill, despite the removal of "some of the objectionable provisions."[172] The "no net loss" requirement was considered "unacceptable" because it could restrict land exchanges that help protect the timber base while securing habitat for listed species.[173]

Congress passed the "no net loss" provisions over the objections of the BLM and the Forest Service. Nonetheless, as the BLM implements "no net loss," the policy does not actually curtail most land exchanges. Under the Agency's interpretation, the BLM must maintain the total acreage of timberlands but has the flexibility to gain or lose O&C, Coos Bay Wagon Road, and public domain lands, so as long as the net amount at the end of ten years is not less than the initial amount.[174] Also, instead of identifying the initial number of acres, the BLM just keeps track of the fluctuations.[175] In effect, the BLM interpretation allows faster cutting of valuable O&C lands' old growth, balanced by gains in the less-merchantable public domain timber.

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167 Oregon Public Lands Transfer and Protection Act of 1998 § 3(b).

168 H.R. REP. NO. 105-810, at 2 (1998).

169 *Id.*

170 144 CONG. REC. E2254 (daily ed. Oct. 12, 1998) (extended remarks of Rep. Darlene Hooley).

171 *See* Oregon Public Land Transfer and Protection Act of 1998, S. 2513, 105th Cong. (as passed by Senate, Oct. 9, 1998).

172 S. REP. NO. 105-391, at 7 (1998).

173 *Id.*

174 Bureau of Land Mgmt., Dep't of the Interior, Instruction Memorandum No. OR-99-081 from Associate State Director to District Managers 1 (Aug. 4, 1999), *available at* http://www.blm.gov/nhp/efoia/or/fy99/IMs/m99081.htm.

175 *Id.* at 3.

4. Proposal to Transfer O&C Lands to the State of Oregon

In November 1994, the AOCC began circulating the idea of transferring the O&C lands to the State of Oregon.[176] The lands would be managed under the Oregon Forest Practices Act,[177] within the intent of the O&C Act. Proponents of the proposal estimated that, once the land was no longer subject to federal environmental laws, annual sustainable-harvest levels would approximate 594 MMbf.[178] Over the next few years, proponents of the O&C land-transfer concept introduced various bills in the U.S. House and Senate.[179] One of the most promising bills required Oregon to manage the lands for "permanent timber production" (instead of "forest" production), and for the primary purpose of achieving "economic stability of local communities."[180]

The AOCC has been the main proponent of transferring the O&C lands to Oregon. In a fact sheet drawn up for Oregon's governor, the BLM expressed its concerns, including a return to legal gridlock because of the impact on the NFP, increased costs to Oregon without guaranteed harvest levels, and a loss of connectivity for the northern spotted owl.[181] Environmental groups were vehemently opposed to a transfer, fearing lower environmental standards, a greater management emphasis on timber

176 Memorandum from Diana Wales on Proposed O&C Land Transfer Speech by Doug Robertson to Roseburg Chamber Forum 1 (Mar. 5, 1995) (on file with authors).

177 OR. REV. STAT. §§ 527.610-.992 (2005).

178 Memorandum from Diana Wales, *supra* note 176, at 2. **R**

179 *See* O&C Forest Transfer Act, H.R. 3769, 104th Cong. § 4(a) (1996) (requiring transfer of the O&C lands to the State of Oregon if certain conditions are met); *see also* S. 1031, 104th Cong. (1995) (requiring the transfer of all BLM lands to the states in which they are located); H.R. 2032, 104th Cong. (1995) (same).

180 O&C Forest Transfer Act, H.R. 3769, 104th Cong. § 5(a)(2); Michael C. Blumm & Jonathan Lovvorn, *The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions*, 32 LAND & WATER L. REV. 353, 380 (1997).

181 Bureau of Land Mgmt., O&C Lands Transfer Proposal: Facts and Analysis for the Governor 2-3 (March 1995) (information sheet, on file with authors). The BLM's concerns about the effects on the northern spotted owl resulting from the land exchange is interesting, given that the agency is currently proposing to reduce or eliminate protections for the spotted owl through BLM's Western Oregon Forest Plan Revision. BUREAU OF LAND MGMT., *supra* note 9, at 23-24. But, the BLM has not articulated similar concerns about a return to legal gridlock, the loss of spotted owl connectivity, or the overall well-being of the species. **R**

production, and fewer opportunities for public participation.[182] Legal scholars pointed to the likelihood of environmental degradation due to the loss of federal planning and regulation.[183]

The proposed House and Senate bills have all died in committee. In recent years, the proponents of the land transfer appear to have abandoned efforts to transfer O&C lands to the State of Oregon.[184]

III

INTERPRETATIONS OF THE O&C ACT

A. DOI Statements and Memoranda

The DOI has published a number of policy statements on the O&C Act, and its Solicitor has written numerous memoranda and opinions regarding the Act.

1. 1938 GLO Policy Statement

In 1938, the GLO published a policy statement along with its O&C Act regulations. The policy statement used strong language to describe the Act's conservation basis, saying that the O&C Act was "a measure providing for the conservation of land, water, forest and forage on a permanent basis, the prudent utilization of these resources for the purposes to which they are best adapted, and the realization of the highest current income consistent with undiminished future returns."[185] Instead of clear-cutting, the DOI was directed to cut under "rules of forest practice providing for partial or selective logging in its various forms of

[182] *See* Letter from Bob Freimark, The Wilderness Soc'y; Lisa Brown, Coast Range Ass'n; Julie K. Norman, Headwaters; Sally Cross, Or. Natural Res. Council Action; Barry Snitkin, Siskiyou Reg'l Educ. Project; & Jim Ince, Umpqua Watersheds, Inc., to Governor John Kitzhaber (Feb. 12, 1996) (on file with authors).

[183] *See* Blumm & Lovvorn, *supra* note 180, at 389-410. R

[184] Other proponents of removing the O&C lands from the BLM's management remain committed to this goal. Andy Kerr, Transferring Western Oregon Bureau of Land Management Forests to the National Forest System 13-16 (Feb. 11, 2007) *available at* http://andykerr.net/downloads/Larch2WestOrBLMlarge.pdf. For example, many environmentalists believe that the Forest Service would better meet the ecological and socioeconomic objectives of the O&C Act and that the O&C lands should be transferred to that agency. Andy Kerr, Transferring Forested Western Oregon BLM Lands to the National Forest System (May 14, 1996) (on file with authors).

[185] Regulations and Forest Practice Rules for the Sale of Timber from the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands, 3 Fed. Reg. 1795, 1796 (July 21, 1938).

tree, group and area selection."[186] Field officers were granted discretion in prescribing methods for management, but "destructive methods which may tend to prevent an early restocking of the area under development . . . will not be permitted."[187] "Prompt reforestation" was one of the stated "principal objectives" of sustained-yield management.[188]

The policy statement also expanded upon the Act's economic purpose: sustained-yield management was to provide "perpetual *forests* which [would] serve as a secure foundation for continuing industries and permanent communities," and the Act generally "provide[d] for the flow of a full measure of the benefits produced by a well managed forest to the people of the region."[189] When subdividing the property into sustained-yield units, the DOI was to give "full consideration to existing operations and the policy of stabilizing and perpetuating substantial dependent communities."[190]

The Act's listed purposes for cutting timber[191] were described as providing "certain secondary benefits of the forest which are to be conserved by the new plan of management."[192] For example, the policy statement states:

> In compliance with this mandate, all lands classified for continuous timber production shall be so managed as to maintain or restore on them the best obtainable forest cover, to the end that soil may be protected from erosion, rainfall stored and its run-off retarded, floods avoided, and the landscape kept green and attractive.[193]

Grazing was authorized only where "it [would] not interfere with the attainment of . . . a high sustained yield of commercial timber from all areas classified as permanent forest land."[194]

2. 1977 FLPMA Opinion

In 1977, the BLM asked the DOI's Solicitor whether the Federal Land and Policy Management Act's (FLPMA) wilderness-

186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.* (emphasis added).
190 *Id.*
191 These are described in the policy as "agricultural opportunities, recreational facilities, watershed protection, and stream-flow regulation." *Id.*
192 *Id.*
193 *Id.*
194 *Id.*

review provision[195] applied to the O&C lands. The Solicitor concluded that the O&C Act's requirement to manage for "commercial forestry" would prevail over the FLPMA provision.[196] To reach that conclusion, the Solicitor examined the nature of the O&C Act. While the O&C Act "is expressly not an exclusive use Act," it was "[l]ess clear" whether multiple-use or dominant-use was intended.[197] The Solicitor compared FLPMA's multiple-use definition—requiring equal, coordinated consideration of uses—with the O&C Act's requirements. Without much analysis, the Solicitor determined that the O&C Act was a dominant-use statute, requiring that lands "be managed for commercial forestry if suitable," while recreation and other uses "[were] allowed only when subordinated to commercial forestry management."[198]

3. 1979 Even Flow Opinion

Two years later in 1979, the BLM requested a legal opinion from the Solicitor as to whether the management of public lands under the principle of sustained yield required a policy of even flow of timber harvest, i.e., a constant or increasing level of timber harvest without planned decreases in the future.[199] The request for this opinion came as a result of the BLM's analysis under the National Environmental Policy Act (NEPA)[200] for the Josephine Sustained Yield Unit. One of the alternatives for the Josephine Unit analyzed accelerated harvest of old growth timber to make room for younger timber, followed by a deceleration in harvesting.[201] The Solicitor determined the O&C Act allowed for this kind of plan because the amount of cutting would not fall below the current "even flow" level, and because the plan would ultimately accelerate the movement toward logging at sustained yield capacity.[202]

The Solicitor examined what Congress intended by "sustained yield" in the O&C Act. The House and Senate Reports accom-

195 43 U.S.C. § 1782 (2006).

196 Memorandum from Deputy Solicitor, Dep't of the Interior, to Director, Bureau of Land Mgmt. 9-10 (June 1, 1977) (on file with authors).

197 *Id.* at 7.

198 *Id.* at 10.

199 Memorandum from Associate Solicitor, Dep't of the Interior, to Director, Bureau of Land Mgmt. 1 (Jan. 24, 1979) (on file with authors).

200 42 U.S.C. §§ 4321-4347 (2006).

201 Memorandum from Associate Solicitor to Director, *supra* note 199, at 1. **R**

202 *Id.* at 9.

panying the Act described sustained yield as limiting the amount cut to a volume not exceeding new annual growth.[203] This definition could not be taken at face value when interpreted in the context of the whole Act and its background, the Solicitor insisted, because its literal language would lead to low harvests.[204] In contrast, during the Act's hearings, the DOI reported that sustained-yield management would produce more timber, with a goal of the "largest possible volume."[205] Thus, the annual cut, as determined by sustained yield, must be based on more than just the annual volume of new growth: it must also consider the rotation age of the forest and the kind of management techniques used in reforestation.[206]

The Solicitor also quoted the 1937 hearing testimony of Representative Mott of Oregon, concluding that the requirement of harvesting the maximum annual sustained-yield "underline[d] one of the stated purposes of the Act; e.g., to provide revenue to local counties."[207] Consequently, the Solicitor reasoned, the closer the BLM could get to harvesting and selling the sustained-yield capacity, the closer the BLM would be to fully implementing the Act.[208]

4. 1979 Technical Revisions of Earlier Opinions

The 1979 Technical Revisions of earlier opinions, a short but important memorandum, resulted from the BLM Director's request that the Solicitor "reconsider" its earlier statement that the O&C Act mandated "commercial forestry."[209] Issued seven months after the first 1979 Opinion, the Solicitor acknowledged in the Technical Revisions that the term "commercial forestry" was not used in the O&C Act, nor was there support for the

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[203] S. REP. NO. 75-1282, at 2 (1937); H.R. REP. NO. 75-1119, at 2 (1937).

[204] Memorandum from Associate Solicitor to Director, *supra* note 199, at 3. **R**

[205] *April Hearings on H.R. 5858*, *supra* note 10, at 24-25. The Solicitor read the literal language of the Act to mean that "natural catastrophes such as fires would have a greater influence than BLM management on increasing the future growth and harvest of the forest by more rapidly replacing decadent timber with young, faster growing timber. Such an interpretation would appear to frustrate the stated purposes of the Act." Memorandum from Associate Solicitor to Director, *supra* note 199, at 3. **R** **R**

[206] *Id.* at 4-5.

[207] *Id.* at 7.

[208] *Id.*

[209] Memorandum from Associate Solicitor, Dep't of the Interior, to Director, Bureau of Land Mgmt. 1 (Aug. 27, 1979) (on file with authors).

dominant use of commercial forestry in legislative history or the BLM's administration of the O&C Act.[210] Instead, the Solicitor argued the phrase "permanent forest production" should have been used. Furthermore, there was no basis for the earlier conclusion that recreation was "always subordinate" to the other O&C Act purposes.[211]

Although the ultimate conclusions of the earlier 1977 and 1979 opinions remained intact, the Technical Revisions memo signaled a major change in the official interpretation of the O&C Act. By specifically reversing the primacy of "commercial forestry" and replacing it with "permanent forest production," the BLM and the Solicitor placed timber production on the same level as other O&C Act purposes, such as recreation.

5. 1981 BLM Policy Statement and Solicitor's Response

In 1981, the BLM drafted a policy statement for timber management on the O&C lands regarding policies that called for multiple-use planning.[212] In general, land classified as unsuitable for timber was to be "used to the fullest extent possible to meet nontimber needs."[213] Only if that land was inadequate to meet the nontimber needs could timberland be used for nontimber needs, with reduced or excluded timber harvest.[214] From the federal and state multiple-use requirements placed on the O&C lands, the BLM highlighted six specific resource objectives and policies, including maximizing timber production at the "highest level of management consistent with economic and environmental feasibility," maintaining water quality at federal and state standards, maintaining a minimal amount of suitable habitat for threatened or endangered species by limiting or excluding timber harvest, and protecting potential and developed high-value recreational areas.[215]

The BLM asked the Solicitor to comment on the legal adequacy of this proposed policy. Overall, the Solicitor found the

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210 *Id.* at 2.

211 *Id.*

212 Memorandum from Director, Bureau of Land Mgmt., to Solicitor, U.S. Dep't of the Interior, Policy Statement—Multiple-Use Management of the Oregon and California Railroad Grant Lands (O&C) (May 14, 1981) (on file with authors).

213 *Id.* at 3.

214 *Id.*

215 *Id.* at 3-5.

policy to be legally adequate,[216] but cautioned the BLM to ensure that its operations "meld[ed]" the required dominant use of forest production with the multiple uses of the O&C Act and other environmental legislation.[217] For example, protecting wetlands, one of the policy goals, fit with the O&C Act conservation mandate because "[e]ven if specific protection of wetlands had not been envisioned at the time of the Act's passage, it [was] clear from the legislative history that Congress intended the O&C lands to be managed in accordance with scientific principles of conservation."[218] The Solicitor explained that the Act required the BLM to use the best conservation techniques in managing the O&C lands. Similarly, maintaining and protecting potential and developed recreational areas was already a goal of the O&C Act, so the BLM already had the authority to manage for recreation "even if to do so were to come in conflict with managing for timber production."[219]

The Solicitor took the opportunity to set forth a "clear" enunciation of the DOI's interpretation of the O&C Act, recognizing that its earlier memoranda were not consistent.[220] The Solicitor confirmed the August 27, 1979, memo: commercial forestry was "only one of the components" for which timber was to be managed on the O&C lands.[221] Although timber was the "chief component of forest production," managing for "permanent forest production" required logging in conformity with principles of sustained yield, "so as not only to provide a permanent source of timber supply, but also to protect watershed, [sic] to regulate stream flow . . . to contribute to the economic stability of local communities and industries and to provide recreation."[222] Thus, it was "clear"—according to the Solicitor's response—that the O&C Act was "a conservation measure requiring a form of multiple use management."[223] Looking back at the O&C Act's legislative history, the Solicitor described the law as one envisioned to

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216 Memorandum from Solicitor, U.S. Dep't of the Interior, to Director, Bureau of Land Mgmt., Review of BLM Policy Statement for Multiple Use Management of the Oregon and California Railroad and Coos Bay Wagon Road Revested Lands (O&C Lands) 11 (Sept. 8, 1981) (on file with authors).

217 *Id.* at 1.

218 *Id.* at 7.

219 *Id.* at 9-10.

220 *Id.* at 2.

221 *Id.*

222 *Id.* at 3.

223 *Id.*

give the DOI authority to manage timber under conservation principles and to allow it to reserve land when necessary for reforestation, recreation, and other purposes.[224] Although the O&C Act was a "dominant use statute," the BLM was vested with the discretion to determine how best to meet the multiple-use goals of permanent timber production, watershed, stream flow, economic stability, and recreation.[225]

6. 1986 Spotted Owl Opinion

In 1986, the BLM asked for advice regarding the requirements that certain federal laws, including the O&C Act, would impose on a proposal to manage the northern spotted owl.[226] The 1986 Opinion again described the O&C Act as a "dominant use" statute, but instead of "permanent forest production," the Solicitor[227] used the term "timber production."[228] Because of timber production's dominance, the O&C Act would "preclude" the application of a program for the spotted owl that conflicted with producing timber on a sustained basis.[229]

In 2003, the timber industry,[230] the AOCC, and the BLM entered into a settlement agreement designed to increase logging levels on public lands in the Pacific Northwest.[231] In reaching

[224] *Id.* at 5.

[225] *Id.* at 6. The Solicitor also noted that the O&C Act "requires management for other interests *as well as timber supply*." *Id.* at 1 (emphasis added).

[226] Memorandum from Gale A. Norton, Assoc. Solicitor, U.S. Dep't of the Interior, & Constance B. Harriman, Assoc. Solicitor, U.S. Dep't of the Interior, to James Cason, Deputy Assistant Sec'y, U.S. Dep't of the Interior, Statutes Governing Management of the Northern Spotted Owl 1 (Oct. 20, 1986) (on file with authors).

[227] Writing for the Solicitor was a young Gale Norton, then the Associate Solicitor of the Division of Conservation and Wildlife. After a stint with the Mountain States Legal Foundation, Norton became Secretary of the Interior in the George W. Bush administration from 2001 to 2006. U.S. Dep't of the Interior, Past Secretaries of Interior, http://www.doi.gov/past_secretaries.html (last visited Feb. 14, 2007).

[228] Memorandum from Gale A. Norton & Constance B. Harriman to James Cason, *supra* note 226, at 5, 6. R

[229] *Id.* at 6.

[230] The timber industry was primarily represented by Portland attorney Mark Rutzick. Recommended for the job by Oregon Senator Gordon Smith, Rutzick went on to the position of "legal advisor" in charge of Pacific Northwest salmon recovery in the Bush administration's National Oceanic and Atmospheric Agency—Fisheries (NOAA Fisheries, formerly National Marine Fisheries Service). *Mark Rutzick Appointed Senior Legal Advisor to NOAA Fisheries*, WASH. TROUT (Wild Fish Conservancy, Duvall, Wash.), May 2003, http://www.washingtontrout.org/WFRmay03.shtml (last visited Feb. 14, 2007). Rutzick is currently in private legal practice in Portland, Oregon.

[231] *See infra* note 366 and accompanying text. R

that agreement, the timber industry relied heavily on the argument that from 1937 to 1994, the BLM, the DOI, and the Department of Justice had consistent interpretations of the O&C Act.[232] The timber industry's settlement proposal did not mention the 1979 or 1981 Opinions in which the Solicitor specifically amended past Opinions, admitted that there was no mandate for "commercial forestry," and stated that "permanent forest production" encompassed more than just timber production.[233] While none of these Solicitor opinions were legally binding, they had erroneously been used to justify an important BLM and Industry settlement, as discussed below in Part V.

B. Federal Courts

The DOI managed the O&C lands for fifty years with essentially "unchallenged administrative discretion."[234] Federal courts had no cause to oversee the implementation of the O&C Act, and, as a result, DOI's interpretation of the O&C Act controlled the management of O&C lands. With the development of environmental law, citizens' groups, the BLM, and timber industries have tried to use the O&C Act to suit their varied purposes. In response, the courts have minimally analyzed the O&C Act and generally done their best to ensure that no group could use the Act to further its interests.

In the 1970s, Clackamas County, Oregon, sued the Secretaries of the Interior and Treasury for reimbursement of the plow-back funds from 1953 to 1979, insisting that the counties were entitled to a full 75% of revenues under the O&C Act.[235] In *Skoko v. Andrus,* the Ninth Circuit made short shrift of this argument, holding that the counties had no right to the money, and the language of the appropriation riders was clear.[236] In dicta, the court noted that under the O&C Act, "most of the O & C lands would henceforth be managed for sustained-yield timber production."[237]

In 1987, the Ninth Circuit again contemplated the O&C Act. In *O'Neal v. United States*, a case in which hunters sued the BLM

[232] GLOBAL FRAMEWORK, *supra* note 8, at 7-10. **R**

[233] *Cf. id.* (containing no reference to Solicitor Opinions adverse to the timber industry's position).

[234] Blumm & Lovvorn, *supra* note 180, at 363. **R**

[235] Skoko v. Andrus, 638 F.2d 1154, 1156-57 (9th Cir. 1979).

[236] *Id.* at 1157.

[237] *Id.* at 1156.

for damages sustained when a BLM road collapsed,[238] the court noted in dicta that

> [t]he provisions of the [O&C Act] make it clear that the primary use of the revested lands is for timber production to be managed in conformity with the provision of sustained yield, and the provision of recreational facilities as a secondary use. No duty is thereby established to provide for recreational use. Indeed, the [BLM] has the power to close or restrict the use of public lands under its management and supervision.[239]

From this dicta, the Ninth Circuit built its seminal O&C Act interpretation, *Headwaters, Inc. v. Bureau of Land Management, Medford District*.[240] *Headwaters* involved the northern spotted owl and whether the risk to the species from timber sales in old growth forests was accurately reflected in the BLM's regional environmental impact statement addressing the management of the owl.[241] The plaintiff conservation organization also contended that the O&C Act required the BLM to manage the lands for multiple use, including wildlife conservation.[242] Headwaters argued that the phrase "forest production" encompassed more than timber production and thus included conservation values.[243] The Ninth Circuit, however, described the primacy of timber production in the O&C Act, adding emphasis to the line "*the timber thereon shall be sold, cut, and removed in conformity with the principal* [sic] *of sustained yield.*"[244]

On that basis, the court determined that exempting timber resources to serve as wildlife habitat was "inconsistent with the principle of sustained yield," and that there was "no indication that Congress intended 'forest' to mean anything beyond an ag-

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238 O'Neal v. United States, 814 F.2d 1285, 1286-87 (9th Cir. 1987).

239 *Id.* at 1287.

240 Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist., 914 F.2d 1174 (9th Cir. 1990).

241 *See supra* note 226 and accompanying text. **R**

242 *Headwaters*, 914 F.2d at 1183.

243 *Id.*

244 *Id.* The O&C Act provision further states that

> grant lands . . . shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [sic].

43 U.S.C. § 1181a (2006).

gregation of timber resources."[245] In its brief and incomplete review of the legislative history, the Ninth Circuit found two purposes for the O&C Act: to provide counties with a "stream of revenue," and to "halt previous practices of clear-cutting without reforestation."[246] The *Headwaters* court concluded that "Congress intended to use 'forest production' and 'timber production' synonymously. Nowhere [did] the legislative history suggest that wildlife habitat conservation or conservation of old growth forest [was] a goal on a par with timber production, or indeed that it [was] a goal of the O&C Act at all."[247]

The court's restrictive reading completely ignores the 1937 House and Senate reports and the extensive hearings on House Bill 5858. And, the decision overlooks congressional enthusiasm for "conserving and perpetuating" the timberlands, as well as creating a "more permanent type of community, contribut[ing] to the economic stability of local dependent industries, protect[ing] watersheds, and aid[ing] in regulating streamflow."[248] The court simply did not take a "hard look"[249] at the history of the O&C Act.

In *Portland Audubon Society v. Lujan*, the Ninth Circuit addressed the O&C Act's intersection with other environmental laws. In the district court, the BLM argued that the application of NEPA was restricted because the O&C Act "commanded" the BLM to sell no less than 500 MMbf.[250] Portland Audubon argued that the O&C Act provided the BLM with discretion to set an annual sustained yield of less than 500 MMbf.[251] Although the O&C Act "is not legislation designed to protect the environment," the district court determined that the language of the Act nonetheless did *not* mandate that the BLM sell a minimum of 500 MMbf annually. Instead, in making the annual sustained-yield determination, the BLM was bound to comply with applicable laws, including NEPA.[252] On appeal, the Ninth Circuit agreed, holding that the O&C Act did not deprive the BLM of its

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245 *Headwaters*, 914 F.2d at 1183.

246 *Id.*

247 *Id.* at 1184.

248 S. REP. NO. 75-1231, at 2 (1937).

249 See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989), for a description of the "hard look" doctrine.

250 Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1505 (D. Or. 1992).

251 *Id.*

252 *Id.* at 1506.

discretion, "with regard to either the volume requirements of the Act or the management of the lands entrusted to its care."[253]

Two years later, in *Seattle Audubon Society v. Lyons*, the National Forest Resources Association (NFRA)[254] claimed that the 1994 Record of Decision for the NFP violated the O&C Act because it designated some parts of the O&C lands as Late-Successional Reserves and Riparian Reserves.[255] The NFRA relied upon *Headwaters* for the concept that land could not be reserved for non-timber uses. The district court rejected this argument and distinguished *Headwaters* from NFRA's claim. Judge Dwyer explained that *Headwaters* addressed allocating more than 50% of the management unit to non-timber uses, and dealt only with the O&C Act; but in the present case, the BLM had a duty to comply with other applicable statutes as well, which in turn could compel the creation of Late-Successional and Riparian Reserves.[256] The NFRA also argued that the Endangered Species Act could not empower the BLM to do something it has no power to do under its enabling statute. The district court rejected this argument too, noting the "broad authority" of the Secretary of the Interior to manage the O&C lands: "the BLM is steward of these lands, not merely a regulator. Management under [the O&C Act] must look not only to annual timber production but also to protecting watersheds, contributing to economic stability, and providing recreational facilities."[257]

Most recently, the courts considered the O&C Act in *Klamath Siskiyou Wildlands Center v. Boody*.[258] Klamath-Siskiyou Wildlands Center argued that the BLM had an obligation to comply with NEPA, regardless of the involvement of O&C lands. Responding to a motion for a preliminary injunction of a timber sale in old growth forests, the BLM pointed out that the sale

253 Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 709 (9th Cir. 1992). Babbitt replaced Lujan as the Secretary of the Interior during the pendency of the case. *See* FED. R. CIV. P. 25(d)(1) (providing for the substitution of a public official's name upon death or resignation); FED. R. APP. P. 43(c)(2) (same).

254 The NFRA eventually became the American Forest Resources Council, a party to the settlement agreement discussed *infra* Part V.

255 Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1313 (W.D. Wash. 1994).

256 *Id.* at 1314.

257 *Id.* It is interesting to note that the NFRA chose to not proceed with an appeal of this adverse ruling, which also upheld the legality of the NFP and decreased timber harvest on federal lands generally.

258 Siskiyou Wildlands Ctr. v. Boody, No. 03-3124-CO, 2004 WL 1146538 (D. Or. May 18, 2004).

would provide socioeconomic benefits and fulfill its statutory duties under the O&C Act, and that its NEPA obligations were subservient to the O&C Act—essentially, that the BLM need not comply with NEPA because of the O&C Act.[259] Acknowledging the economic aspects of the Act, the court nonetheless found that these interests were outweighed by the "public's interest in ensuring that resources are not irretrievably committed without observance of required procedures" mandated by NEPA.[260]

Courts have restricted the O&C Act's usefulness to environmentalists, the timber industry, and the BLM. *Headwaters* is the high-water mark, establishing the most conservative interpretation of the O&C Act, and curtailing—erroneously—the BLM's authority to manage O&C lands for non-timber purposes. But the courts also have not allowed the BLM or the timber industry to use the O&C Act to avoid following NEPA, the Endangered Species Act, and other federal environmental statutes, thus limiting the impact of *Headwaters*. Because the courts have not reexamined the assumptions upon which *Headwaters* is based, the underlying fallacy regarding the O&C Act's "dominant use" prescription remains.

C. Interior Board of Land Appeals

The Interior Board of Land Appeals (IBLA) hears administrative appeals of BLM decisions involving forest management. Appellants have attempted to use the O&C Act as a tool to overturn BLM decisions but, like the federal courts, the IBLA has been reluctant to vest the O&C Act with such power. There are more than fifty IBLA decisions involving the O&C Act, and a few key decisions are discussed below.

In 1980, one year after the Ninth Circuit made its first, limited pronouncement on the O&C Act,[261] the IBLA also labeled the Act as a "dominant use" statute, and that dominant use was timber production. In *Oregon Wilderness Coalition*, the IBLA described the Act's language as a "clear directive to 'sell, cut, and remove' the timber on revested O&C lands in conformity with the principle of sustained yield."[262] The "remaining uses"—protecting watersheds, regulating stream flow, contributing to the

[259] *Id.* at *8.
[260] *Id.*
[261] *See supra* note 235 and accompanying text. **R**
[262] Or. Wilderness Coal., 45 I.B.L.A. 347, 350 (1980).

economic stability, and providing recreational facilities—were listed simply to "reflect a Congressional finding that permanent forest production would be conducive [sic] to such uses."[263] Although "likely to occur as a result of prudent cutting consistent with sustained yield," they were nonetheless "subordinate uses."[264]

In 1982, Applegate Citizens Opposed to Toxic Sprays appealed a dismissal of their protests of a timber sale.[265] One of Applegate Citizens' claims was that the proposed timber sale violated the O&C Act's "multiple-use guidelines."[266] The IBLA noted that the O&C Act does not define "sustained yield,"[267] but because it *was* defined in FLPMA, and FLPMA is generally construed as giving the BLM "substantial discretion," the BLM's decision could not be overturned unless it was clearly erroneous.[268]

In the 1983 case *In re Lick Gulch Timber Sale*, the IBLA explored the O&C Act more thoroughly.[269] After giving a brief history of the Act, the IBLA again addressed the term "sustained yield," but this time described the meaning as "not particularly arcane."[270] The Board referred to the DOI's Circular No. 1448 that described the Act as providing for conservation on a permanent basis and providing for perpetual forests.[271] The IBLA's *In re Lick Gulch Timber Sale* decision defined "sustained yield" as a level of harvesting such that "a constant amount of timber [would] be annually available on an indefinite basis,"[272] asserted again that the Act's dominant purpose was timber production, and described other factors, such as watershed protection and economic stability, as "complementary values" that will "necessa-

263 *Id.*

264 *Id.*

265 A.C.O.T.S., 61 I.B.L.A. 166, 167 (1982).

266 *Id.*

267 The IBLA did not explore the implications of the O&C Act's use of "sustained yield," instead adopting FLPMA's definition of the same term. *Id.* at 169. The O&C Act does not define the term; instead, the definition of sustained yield is found in 43 U.S.C. § 1702(h): "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."

268 *Id.* at 168.

269 *In re* Lick Gulch Timber Sale, 90 Interior Dec. 189 (1983).

270 *Id.* at 193.

271 *Id.* See *supra* Part II.C. for more on Circular 1448.

272 *Id.*

rily result through proper implementation" of sustained yield.[273] The appellant in the case used the O&C Act to criticize the economic basis of the sales, emphasizing that timber production was of declining economic importance while tourism and recreational uses were increasing in importance, and that the timber sale would reduce the economic returns and impair user enjoyment.[274] The BLM responded that the sale was within its Visual Resource Management land-use allocation, and that meeting standards and guidelines for this allocation would protect user values. The IBLA agreed, explaining that there would not be "significant adverse effects on the recreational values presently available in Lick Gulch" so long as the BLM complied with its own management requirements.[275]

In 1990, the Oregon Natural Resources Council[276] argued that proposed timber sales violated the multiple-use mandates of FLPMA and the O&C Act because they would remove old growth trees and thus threaten the recreational, scenic, wildlife, and water resources of the areas.[277] The IBLA responded:

> ONRC would have us construe the phrase "permanent forest production" to encompass the protection of timber resources from harvesting, in order to promote other general uses of the land. However, section 1 of the O & C Act makes it clear that permanent forest production is intended only to permit timber harvesting so as to ensure a sustained yield over time. . . .
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> . . . .
>
> The O & C Act also makes reference to various "purpose[s]," including protecting watersheds and providing for recreational facilities, but only in the context of what the harvesting of timber is intended to accomplish.[278]

The IBLA quoted *Headwaters* in support of the BLM's interpretation of the O&C Act as a timber-dominant statute, and thus pronounced that "management of the lands for permanent forest

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[273] *Id.*

[274] *Id.* at 212.

[275] *Id.* at 213.

[276] The Oregon Wilderness Coalition, discussed *supra* note 262, changed its name to the Oregon Natural Resources Council in 1982. The organization is now known as Oregon Wild. Oregon Wild, About Oregon Wild, http://oregonwild.org/about (last visited Feb. 15, 2007). **R**

[277] Or. Natural Res. Council, 116 I.B.L.A. 355, 371 (1990).

[278] *Id.* at 371-72.

production, rather than multiple uses, is to take precedence where these forms of management conflict."[279]

The next year, an environmental group again asserted that the O&C Act called for multiple use of the O&C lands, and again the IBLA denied the assertion.[280] The IBLA cited *Lujan*, *Headwaters*, and its own decision in *Oregon Natural Resources Council* as proof that timber production is the dominant use of the O&C Act, but did not revisit any of the underlying documents or history that led to the passage of the O&C Act.[281]

In *Swanson-Superior Forest Products, Inc.*, the appellant was not an environmental group, but a timber company opposed to a proposed exchange of land between the BLM and another timber company.[282] Swanson-Superior argued that, because the government timberland in the exchange was O&C land, it was "improper" for the BLM to consider wildlife habitat and other uses in making its decision to approve the exchange.[283] The IBLA held that while the "main consideration" must be to facilitate timber management, the BLM could consider other relevant factors in managing O&C lands, including "conservation of wildlife habitat, and protection of threatened and endangered species, among other environmental values considered integral to BLM's forest resources management policy under the O & C Act."[284]

The IBLA addressed the BLM's "socio-economic commitment" arising under the O&C Act in the 2002 *Umpqua Watersheds, Inc.* decision.[285] Umpqua Watersheds claimed that because timber prices were at an all-time low, the BLM failed to show how the challenged timber sale would meet local and national socio-economic needs when the best returns would not be realized, and the value of private timber would be further depressed by the sales.[286] The IBLA, however, was satisfied that the sales would "[a]ddress" the O&C Act socio-economic commitment "by providing for the production of merchantable timber in economically depressed times," and claimed that there was

279 *Id.* at 372.
280 *In re* Bar First Go Round Salvage Sale, 121 I.B.L.A. 347, 353 (1991).
281 *Id.*
282 Swanson-Superior Forest Products, Inc., 127 I.B.L.A. 379, 380 (1993).
283 *Id.* at 380-81.
284 *Id.* at 385.
285 Umpqua Watersheds, Inc., 158 I.B.L.A. 62 (2003).
286 *Id.* at 69.

no statutory requirement to maximize sale prices by withholding timber from sale.[287]

Overall, the IBLA decisions are just as conservative—if not more so—than the federal court decisions interpreting the O&C Act. The IBLA conducts very little analysis of the Act's language or legislative history, misinterprets the legislative history, and builds on its own thinly supported determinations that the O&C Act is a dominant-use statute.

IV

REVISITING *HEADWATERS*

The Ninth Circuit Court of Appeals' *Headwaters* decision quotes past dicta that timber production is the dominant use of the O&C Act while recreation is only one of the secondary uses, and claims that "forest" refers to nothing more than an "aggregation of timber resources."[288] The court concluded that neither wildlife habitat protection, nor conservation of old growth forests, are goals of the O&C Act.[289] Because subsequent judicial and IBLA decisions have not reexamined the assumptions upon which *Headwaters* is based, the underlying fallacy about the purpose of the O&C Act remains.

In actuality, a different outcome than that of *Headwaters* results when one examines the plain language of the Act, its legislative history, and the changes resulting from the County Payments Act. The international movement toward sustainable forest management should also give courts and the BLM pause before automatically assuming that the O&C Act is a dominant-use law.

A. Plain Language and Legislative History of the O&C Act

The plain language of the O&C Act mandates "managing" O&C lands for permanent "forest" production, not "timber" production.[290] Such "management" involves selling, cutting, and removing timber following the principle of sustained yield *and* for purposes specified in the Act. This is a far more nuanced commandment than a blanket mandate to commercially harvest

[287] *Id.* at 70.

[288] Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist., 914 F.2d 1174, 1183 (9th Cir. 1990).

[289] *Id.* at 1184.

[290] 43 U.S.C. § 1181a (2006).

timber from the O&C lands. Logging is not urged for the sake of logging, but only as a means to further certain purposes.

For example, the act of cutting and removing timber is an unruly event, usually one that can disturb the soil, cause erosion, and disrupt watersheds and stream flow. Timber removal and cutting "for the purpose of . . . protecting watersheds"[291] must therefore refer to more than just the actual physical cutting and removal process. The phrase logically refers to managing forests to protect the watershed: sometimes making the deliberate choice to not cut timber, to avoid using certain logging methods that are most disruptive, or to cut small-diameter trees to reduce the risk of wildfire.

Similarly, economic stability is not always achieved by choosing to harvest public forests. Oregon's natural resources bring significant income from tourism and recreational activities, and by drawing in people who move to Oregon for the landscape and quality of life.[292] Also, as demonstrated by the Midwestern areas over-logged at the turn of the twentieth century, a cut-and-run logging philosophy leaves communities stranded.[293] Such "boom and bust" cycles are not unusual among natural resources-dependent communities,[294] but the O&C Act was enacted specifically to avoid such fluctuations and to provide socio-economic stability.[295]

Another aspect of the IBLA's and Ninth Circuit's interpretations of the O&C Act that is counter to the Act's plain language is the notion of "primary" and "secondary" purposes, which has given rise to the "dominant use" concept. In *O'Neal v. United States*, the Ninth Circuit declared that the O&C Act designated timber production as the primary use of the lands and the other purposes as secondary uses only.[296] The courts and the IBLA have since relied on that declaration. The language of the Act,

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[291] *Id.*

[292] ECONOMIC WELL-BEING AND ENVIRONMENTAL PROTECTION IN THE PACIFIC NORTHWEST, at ii-iii (T.M. Power ed., 1995).

[293] *See supra* note 85 and accompanying text. **R**

[294] MATTHEW S. CARROLL, COMMUNITY AND THE NORTHWESTERN LOGGER 24 (1995).

[295] *See May & June Hearings on H.R. 5858*, *supra* note 53, at 24 (written statement of the Department of the Interior). House Bill 5858 was intended to avoid an overdeveloped, unsustainable timber industry which left "impoverished communities" in its wake. *Id.* **R**

[296] O'Neal v. United States, 814 F.2d 1285, 1287 (9th Cir. 1987).

however, does not indicate any such preference or ranking among the purposes. It states that the lands

> shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [sic].[297]

There are no congressional indications that the order in which the purposes are listed is intended to be important. While it is plain from the Act that timber harvest will occur on O&C lands, the courts have misread the plain language of the Act. Rather than reading the phrase "managed . . . for permanent forest production" as the overall purpose of the Act with the subsequent list of functions as equally important means to achieve that purpose, courts have interpreted the phrase as the Act's "primary" purpose.

Indeed, the legislative history demonstrates that the impetus for the O&C Act was a desire for forest conservation and local economic stability, not strictly—or even predominately—timber production. The O&C Act was a product of citizenry scarred by the Dust Bowl and fearful of a timber drought, as well as a Secretary who wanted to transform his DOI into the "Department of Conservation."[298] Naturally, "conservation" as it was envisioned in 1937 is different than the "conservation" many environmentalists seek today; then, forest ecosystems were not valued because of their intrinsic worth or their ability to support biodiversity. Rather, the O&C Act says exactly why forests are valued: as a way to protect watersheds and regulate stream flow, a means to stabilize and sustain local economies, a source of recreation, and a permanent source of wood fiber.[299] Today, ecology and economics have developed so that those components have a deeper, more scientifically grounded understanding than they did in 1937. Even the BLM has acknowledged that Congress intended the O&C lands to be managed under contemporary principles of ecology and conservation.[300] Thus, the ability of a forest to support biodiversity should be taken into account in managing the

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297 43 U.S.C. § 1181a (2006).

298 *See supra* notes 66-68 and accompanying text. **R**

299 43 U.S.C. § 1181a.

300 Memorandum from Solicitor to BLM Director, *supra* note 216, at 7. **R**

O&C lands because of biodiversity's importance to recreation, in protecting watersheds, and for the nontimber-based economic benefits of the forest to local communities.

Legislative history also highlights the importance of regional and local economic stability to the drafters of the O&C Act. The witnesses at the hearings and members of Congress understood a healthy "timber culture" to encompass primarily smaller, locally owned mills without large capacity that would have a steady stream of work.[301] For example, at a hearing in Eugene, Oregon, in 1948 on the O&C Act, one of the main issues raised was the lack of local ownership of the O&C timber—approximately one-twentieth of one percent of the total forestland owners owned about one-third of the total value of the timber in the O&C lands.[302]

B. Impact of the County Payments Act

Since the early 1990s, payments to counties have been "decoupled" from O&C timber sale revenues by the County Payments Act.[303] If Title II[304] of the O&C Act, which lays out the disbursement scheme, is no longer relevant to the Act due to County Payment's decoupling, this changes how Title I[305] should be interpreted.

The BLM describes County Payments' purpose as "provid[ing] fiscal predictability to the O&C counties."[306] County Payments presented counties with the choice between receiving their O&C Act 50% share of the O&C timber revenues or receiving guaranteed payments determined by the County Payments Act through fiscal year 2006.[307] The counties have chosen predictable, guar-

301 *See supra* notes 93-97 and accompanying text. **R**

302 *Sustained Timber Yield: Hearings Before a Subcomm. of the S. Comm. on Interior and Insular Affairs*, 80th Cong. 20 (1948) (statement by R. T. Titus, Western Forest Industries Association).

303 *See supra* Part II.D.1.

304 43 U.S.C. § 1181f.

305 *Id.* § 1181a.

306 BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND ANNUAL PERFORMANCE PLAN 2001, at VIII-12 (2004), *available at* http://www.blm.gov/budget/2004just/o&c.pdf.

307 Secure Rural Schools and Community Self-Determination Act § 103(a)-(b), 16 U.S.C. § 500 note (2006).

anteed payments,[308] just as they had originally requested during the 1937 hearings.[309]

The O&C Act's legislative history shows that the counties' desire to guarantee revenue was the *only* incentive for mandating logging of the entire annual sustainable-yield.[310] This impetus does not obviate the O&C Act's language that an amount "not less than the annual sustained yield capacity" shall be sold if possible at "reasonable prices on a normal market."[311] It does, however, soften the mandate, which is already flexible because of language such as "if possible," "reasonable," and "normal market," all of which are subjective terms. Even the concept of "annual sustained yield" is a loose one that was never clearly defined by the O&C Act.

C. Changing Ideas of Sustainable Forestry and Sustainable Communities

Under the O&C Act, timber is to be harvested for the "purpose of . . . contributing to the economic stability of local communities and industries."[312] Economic stability has taken on new meaning in the decades since the drafting of the O&C Act. On the international level, the experiences of forest-dependent communities have shaped a new rhetoric for "sustainable" forestry. As this international discourse unfolds, individual countries are exploring the utility of community forestry in sustaining local communities and their forests.

Forestry has economic, ecological, and cultural implications. Although other issues with similar implications are the subject of international agreements and conventions (for example, climate change and international trade in endangered species), no such

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308 The loss of the amounts guaranteed by the County Payments Act has caused severe financial distress in the O&C counties. *See generally* Ass'n of Oregon Counties, Home, http://www.aocweb.org (last visited Mar. 1, 2007) (discussing the impact on the loss of federal funds on Oregon counties' budgets). The resumption of these payments is not assured. The County Payments Act is currently up for reauthorization, and the AOCC has put significant effort toward its implementation and reauthorization. Memorandum from Rocky McVay, Executive Dir., and Kevin Davis, Legal Counsel, to All Member Counties of the Association 5 (Mar. 5, 2004) (on file with authors); *see also supra* note 154 and accompanying text. R

309 *See supra* notes 108-10 and accompanying text. R

310 *See supra* notes 104-08 and accompanying text. R

311 43 U.S.C. § 1181a.

312 *Id.*

international forestry conventions or treaties exist.[313] There are, however, non-binding intergovernmental agreements on forestry, as well as sustainable-forest management criteria and indicators that have been widely accepted. These "soft law" documents demonstrate a trend toward increased inclusion of local communities in decision making, greater cohesion of environmental and economic goals, and a long-term view of economic conditions.

At the 1992 United Nations Conference on Environment and Development, participating countries agreed to a number of legally binding agreements, but none regarding forests.[314] Instead, countries endorsed some soft-law agreements regarding forest management, including Agenda 21,[315] the Rio Declaration,[316] and the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Rio Forest Principles).[317]

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313 *See* Ronnie D. Lipschutz, *Why Is There No International Forestry Law?: An Examination of International Forestry Regulation, Both Public and Private,* 19 UCLA J. ENVTL. L. & POL'Y 153, 163-64 (2000/2001) (noting that international regulation of forestry practice has been "limited"). The United States and a number of NGOs have resisted a world treaty. Opponents contend that a world treaty would: (1) "[e]nshrin[e] weak standards," (2) "avoid[ ] some of the world's most critical and controversial forest problems," and (3) "stall[ ] or block[ ] action on a wide range of critical forest problems during years of lengthy debate." Robert L. Hendricks, *International Dialogue on Sustainable Forest Management: The U.S. Response*, J. FORESTRY, July/Aug. 2003, at 46-47.

314 Godber W. Tumushabe, *Country Experiences in the Implementation of the Rio Forest Principles: A Case Study of the East African Community States*, 32 GOLDEN GATE U. L. REV. 665, 676 (2002).

315 Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21: Programme of Action for Sustainable Development*, U.N. Doc. A/CONF.151/26, *available at* http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm. Chapter 11, entitled "Combating Deforestation," recognizes the multiple roles—including ecological, economic, social, and cultural—that trees, forests, and forestlands play. Governments should enhance institutional capacity to promote those multiple roles and functions. *Id.* ¶¶ 11.1, 11.5.

316 Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), (Aug. 12, 1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm. Although the Rio Declaration does not specifically mention forestry, it does address management of environmental resources in general, urging participation by indigenous and other local communities, women, and other underrepresented communities.

317 Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF.151/6/Rev.1 (Vol. III) (Aug. 14, 1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm.

The Rio Forest Principles contain a number of provisions relevant to sustainable development and the role of local communities in forest management. The first paragraph of the Rio Forest Principles preamble acknowledges that the subject of forests includes a range of environmental and development issues, "including the right to socio-economic development on a sustainable basis."[318] Governments are urged to "promote and provide" opportunities for a wide variety of persons to participate in national forest policies planning and implementation.[319] The Rio Forest Principles also call for environmental protection and economic development to be "integrated and comprehensive,"[320] and for national forest policies to "recognize and duly support the identity, culture and the rights of indigenous people, their communities, and other communities and forest dwellers."[321] If the O&C Act had been written in 1992, it is quite possible that the "purposes" of permanent forest production would look similar to the Rio Forest Principles:

> Forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products.[322]

Since the Conference on Environment and Development, the U.N. has maintained its focus on forest management. The Intergovernmental Panel on Forests existed from 1995 to 1997, ultimately devising 130 proposals for action.[323] The Intergovernmental Panel on Forests Proposals stress the role of local communities, by encouraging countries to recognize and respect the customary and traditional rights of indigenous people and local communities,[324] create systems for involving local communities

[318] *Id.* pmbl. (a).

[319] *Id.* ¶ 2(d). Governments "should promote and provide opportunities for the participation of interested parties, including local communities and indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies." *Id.*

[320] *Id.* ¶ 3(c).

[321] *Id.* ¶ 5(a).

[322] *Id.* ¶ 2(b).

[323] *See* United Nations, IPF Proposals for Action, http://www.un.org/esa/forests/pdf/ipf-iff-proposalsforaction.pdf (last visited Feb. 15, 2007).

[324] *Id.* (proposal 17(a)).

and others in meaningful decision-making,[325] formulate policies to secure land tenure for local communities,[326] and adopt certification schemes that include the requirement of local community participation.[327] The Proposals also encourage countries to integrate sustainable forest management into their national forest programs.[328] Countries should take into account the "wide range of benefits provided by forests [that] are not adequately covered by present valuation methodology," because "economic valuation cannot become a substitute for the process of political decision, which includes consideration of wide-ranging environmental, socio-economic, ethical, cultural and religious concerns."[329]

After the Intergovernmental Panel on Forests, the Intergovernmental Forum on Forests formed, which in turn established the U.N. Forum on Forests. The Forum on Forests had a five-year mandate (from 2000 to 2005).[330] The 2002 World Summit on Sustainable Development supported the Forum's work, describing sustainable forest management as "an essential goal of sustainable development."[331]

In 1995, twelve countries,[332] representing 90% of the world's temperate and boreal forests, endorsed a set of criteria and indicators for forest conservation and sustainable management of temperate and boreal forests called the Montreal Process.[333] One of the criterion is the "[m]aintenance and enhancement of

325 *Id.* (proposal 17(f)).

326 *Id.* (proposal 29(c)).

327 *Id.* (proposal 133(c)(v)).

328 *Id.* (proposal 17(d)).

329 *Id.* (proposal 104(a)).

330 The Forests and the European Union Resource Network, UNFF: Background, http://www.fern.org/pages/unff/backg.html (last visited Feb. 15, 2007).

331 World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, U.N. Doc., A/CONF.199/20, ¶ 45 (Jan. 8, 2003), *available at* http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf.

332 Argentina, Australia, Canada, Chile, China, Japan, the Republic of Korea, Mexico, New Zealand, Russian Federation, United States of America, and Uruguay. The Montreal Process, Who Is Involved?, http://www.mpci.org/whois_e.html (last visited Feb. 15, 2007).

333 Working Group on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forest, *Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests* (Feb. 3, 1995), http://www.mpci.org/rep-pub/1995/santiago_e.html. The criteria offer categories of conditions or processes by which countries can assess sustainable forest management, while the indicators are a way to measure aspects of the criterion.

long-term multiple socio-economic benefits to meet the needs of societies."[334] Indicators used to measure this criterion include not only production and consumption of wood and wood products, but also: the area and percent of forest land managed for general recreation and tourism, the value of the investment in forest health and forest growing, the area and percent of land managed to protect "cultural, social and spiritual needs and values," and the "viability and adaptability to changing economic conditions, of forest dependent communities." Another criterion, an economic framework for forest conservation and sustainable management, is measured by the extent to which the regulatory environment meets "long-term demands for forest products and services" through market signals, non-market economic valuations, and public policy decisions.[335]

The International Tropical Timber Organization developed another key set of criteria and indicators. The original 1992 criteria focused primarily on sustainable management "for the *production of timber*," and by 1998 the Timber Organization found it necessary to establish criteria that covered the "full range of forest goods and services."[336] Under the 1998 criterion, participation by local communities, public participation in planning and decision making, and increased public awareness of forest policies and practices were important indicators of "[e]nabling [c]onditions for [s]ustainable [f]orest [m]anagement."[337] The extent of participation by local communities in economic activities, and the number of agreements in which local communities are given co-management responsibilities are indicators of the economic, social, and cultural aspects of forest management.[338] Since the early 1990s, other regional agreements have been made, setting forth more criteria and indicators of sustainable forest management.[339]

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334 *Id.* § 3.6 (criterion 6).

335 *Id.* § 4.1 (criterion 7).

336 INT'L TROPICAL TIMBER ORG., PUBL'N NO. 7, CRITERIA AND INDICATORS FOR SUSTAINABLE MANAGEMENT OF NATURAL TROPICAL FORESTS 1 (1998), *available at* http://www.itto.or.jp/live/Live_Server/151/ps07e.doc.

337 *Id.* at 6-7 (criterion 1).

338 *Id.* at 18 (criterion 7).

339 *See, e.g.*, Ministerial Conference on the Protection of Forests in Europe, Geneva, Switz., Oct. 7-8, 2002, *Improved Pan-European Indicators for Sustainable Forest Management*, *available at* http://www.mcpfe.org/publications/pdf/improved_indicators.pdf.

D. Forest Certification

As soft law, these principles and criteria do not bind countries to take any specific steps, and the degree of their implementation varies widely among countries.[340] Timber certification programs, on the other hand, offer a concrete way to follow the building of an international understanding of sustainable forestry and the role of local communities and environmental concerns. The first, and arguably still the most legitimate, certification program for forest products is the Forest Stewardship Council (FSC).[341] To become FSC certified, a forest must pass an independent body's inspection, certifying that it meets the FSC principles and standards.[342] The FSC's criteria and principles for forest stewardship require respect for local communities' tenure, use, and workers' rights.[343] The social and economic well-being of local communities and forest workers must be maintained or enhanced by forest management operation.[344]

Other certification programs include the Canadian Standards Association and Sustainable Forestry Initiative. The Sustainable Forest Initiative, created by the American Forest and Paper Association,[345] has been vigorously criticized by environmental groups. Conservationists claim that the Sustainable Forest Initiative has weak standards that do not protect old growth forests or endangered-species habitat, and do not require sufficient verification processes. They are also critical that the regulated industry itself controls the certification process and has much weaker social and economic standards than the FSC.[346] Consequently, it

340 Tumushabe, *supra* note 314, at 676-77; *see also* Hendricks, *supra* note 313, at 48 (discussing difficulties with treaty implementation in the United States). R

341 *See* Lipschutz, *supra* note 313, at 167-70 (providing additional information on the FSC). R

342 Forest Stewardship Council, Become FSC Certified, http://www.fsc.org/en/getting_involved/become_certified/get_certification (last visited Feb. 16, 2007).

343 INT'L CTR., FOREST STEWARDSHIP COUNCIL, FSC INTERNATIONAL STANDARD: FSC PRINCIPLES AND CRITERIA FOR FOREST STEWARDSHIP, FSC-STD-01-001 4-5 (2004), *available at* http://www.fsc.org/keepout/en/content_areas/77/134/files/FSC_STD_01_001_V4_0_EN_FSC_Principles_and_Criteria.pdf (principles 2 and 4).

344 *Id.* at 5 (principle 4).

345 Am. Forest & Paper Org., Sustainable Forestry Initiative, http://www.afandpa.org/Content/NavigationMenu/Environment_and_Recycling/SFI/SFI.htm (last visited Feb. 16, 2007).

346 *See generally* Don't Buy SFI, Loopholes in the SFI (2006), http://dontbuysfi.com/fileadmin/materials/old_growth/dont_buy_sfi/sfi_facts/factsheets/factsheets/Loopholes_in_the_SFI.pdf.

is unclear whether an alternative method of certification to the FSC will gain popular support.

The Forest Service is currently reviewing two national forests in Oregon for certification under the FSC protocol.[347] Regardless of whether these forests secure certification, it is noteworthy that the U.S. government has begun to embrace international forestry standards in some capacity. This fact in and of itself should counsel the "mightiest economy on earth"[348] to review its unfounded conclusion that the O&C act is a dominant-use law.

E. An International Example of Community Forestry

As criteria and indicators for sustainable forest management are developed on the international scene, many countries are coping with immediate forest crises by embracing community involvement in forests. Although forests and their local communities in other countries face different threats and challenges than those in the Pacific Northwest,[349] some of their solutions are relevant to Oregon.

Conventional forestry, with its focus on timber and exclusive responsibility to professional foresters, is largely a product of European forestry.[350] Those tenets were spread through colonialism and took root in the United States, as well as in many other colonized countries. In the 1970s, the concept of community forestry began to evolve in developing countries where conventional forestry most egregiously failed to stem the degradation and destruction of forests, and also attempted to meet the needs of local communities.[351] Since then, community forestry has spread as national governments have recognized that returning control to local communities can "reconnect the costs and benefits of forest management," thus providing an alternative to a system in which the majority of financial benefits go to private entities, and the

347 Pinchot Institute for Conservation, National Forest Certification Studies FAQ, http://www.pinchot.org/project/58 (last visited Feb. 16, 2007).

348 Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991).

349 Issues faced by other regions, but not the Pacific Northwest, include the role of indigenous peoples and forest dwellers in forest management, illegal logging under the cover of night, and subsistence communities that rely on the physical forest for sustenance.

350 Lane Krahl & Doug Henderson, *Uncertain Steps Toward Community Forestry: A Case Study in Northern New Mexico*, 38 NAT. RESOURCES J. 53, 54 (1998).

351 *Id.*

economic, social, and environmental losses are felt by the greater society.[352]

Community involvement in forest management can vary, from no responsibility or decision-making authority, to joint forest management in which the government collaborates with communities to manage the forest resources, to complete local control in which the local residents develop the institutions, norms, and rules for protecting and using a specified area.[353] Broadly defined, community forestry includes local community empowerment and participation, sustainable forestry, and community economic development.[354]

For example, Nepal has utilized a form of community forestry for almost thirty years.[355] In "forest user groups," communities and the Department of Forest together assess the forest and traditional household uses of the forest, develop operational plans, specify users and rights, and create user communities that manage the forest;[356] a staggering 10,000 forest user groups have been formed in Nepal.[357] Community forestry in Nepal has brought positive economic and social impacts as well as desired ecological characteristics, but it is not without problems. Marginalized community members, particularly at the bottom of Nepal's caste system, experience bias in the decision-making process.[358] Additionally, the benefits of community forestry are more likely to be felt by the wealthy—development activities such as roads benefit the more powerful—while the poor bear the losses, such as limited access to fuelwood.[359]

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[352] JANET N. ABRAMOVITZ, PUBL'N NO. 140, TAKING A STAND: CULTIVATING A NEW RELATIONSHIP WITH THE WORLD'S FORESTS 60 (1998).

[353] IUCN, COMMUNITIES AND FOREST MANAGEMENT: A REPORT OF THE IUCN WORKING GROUP ON COMMUNITY INVOLVEMENT IN FOREST MANAGEMENT, WITH RECOMMENDATIONS TO THE INTERGOVERNMENTAL PANEL ON FORESTS 12 (Mark Poffenberger ed., 1996).

[354] Matthew Betts & David Coon, *Working with the Woods: Restoring Forests and Community in New Brunswick, in* FORESTS FOR THE FUTURE: LOCAL STRATEGIES FOR FOREST PRODUCTION, ECONOMIC WELFARE AND SOCIAL JUSTICE 188, 195 (Paul Wolvekamp ed., 1999).

[355] IUCN, *supra* note 353, at 18. R

[356] Patrick D. Smith, Bir Bahadur Khanal Chhetri, & Bimal Regmi, *Meeting the Needs of Nepal's Poor: Creating Local Criteria and Indicators of Community Forestry*, J. FORESTRY, July/August 2003, at 24, 24.

[357] *Id.*

[358] More poor people than rich feel that the current processes lack transparency and a consensus basis. As one such person explained, "[s]trong people's stones will roll uphill, but the poor's won't even go downhill." *Id.* at 29.

[359] *Id.* at 26-27.

Any model of community involvement in sustainable forestry cannot be a panacea; they require resources, commitment to the process, and a willingness to collaborate and work through conflicts. Still, community-based forestry offers a more complex, more engaging view of what a community requires from its local forests than the simplistic "logging = jobs = community stability" logic of the BLM and Forest Service. Although the Forest Service is constrained in its ability to address the needs of forest-based communities,[360] the O&C Act explicitly includes the economic stability of local communities as one of its purposes. This offers a unique opportunity for the U.S. government to dip its toes into community forestry.

V

A Contemporary Opportunity to Get the O&C Act Right

The BLM is currently engaging in the Western Oregon Forest Plan Revision[361] process to revise the six western Oregon BLM District RMPs. These RMPs—like their Forest Service cousins, Land and Resource Management Plans—provide standards and guidelines that direct all land management on each BLM District. Of the 2.55 million acres included in these planning areas,

[360] A National Wildlife Federation publication pointed out that the Forest Service was in a "difficult position concerning policy toward forest-based communities" because it lacked a legal mandate to look after those communities' well-being. Nat'l Wildlife Fed'n, Recommendations of the National Wildlife Federation to the Forest Service Reinvention Team 25 (1994). In 1944, the Sustained Yield Forest Management Act was passed with little support from the Forest Service. The Act was designed to constrain timber production, but mainly for the benefit of the timber industry. The Sustained Yield Act's requirement to create Cooperative Sustained Yield Units and Federal Sustained Yield Units was not welcomed by small operators, organized labor, or local communities; ultimately very few units were established and the program ended. The Forest Service has not included community stability or development as a primary goal of national forest management since the 1950s. Krahl & Henderson, *supra* note 350, at 57-58. However, this trend may be changing, with innovative "new takes" on the old Sustained Yield Unit concept. *See* Red Lodge Clearing House, Lakeview Stewardship Group, http://www.redlodgeclearinghouse.org/stories/lakeview.html (last visited Feb. 16, 2007) (chronicling the shift toward collaborative forest management of the "Lakeview Federal Stewardship Unit," reborn out of the old Lakeview Sustained Yield Unit). R

[361] This acronym is coincidentally shared with another ominous sounding "WOPR," War Operations Planned Response from the movie WarGames (MGM 1983).

2.2 million acres are O&C lands.[362] The formal public scoping process began in the summer of 2005, and the draft RMPs and environmental impact statement are expected to be available for public review early in 2007.[363]

In 2003, a Freedom of Information Act request by Earthjustice unearthed a series of industry settlement proposals for litigation relating to the NFP.[364] According to these documents, the effort to revise the BLM's western Oregon RMPs is just one part of an overall framework for enabling the Forest Service and BLM to offer 1.1 billion board feet per year from public lands managed under the NFP.[365] The Freedom of Information Act documents disclose that the BLM is conducting the RMP revisions pursuant to a 2003 Settlement Agreement with the American Forest Resource Council (AFRC) and the AOCC that resolved a lawsuit brought by the AFRC in the D.C. Circuit against the BLM.[366] In its case, the AFRC alleged that by approving the 1994 Record of Decision implementing the NFP, the BLM violated a number of laws, including FLPMA, NEPA, the Federal Advisory Committee Act, and the O&C Act.[367] The AFRC's principal argument

362 Notice of Intent to Prepare Resource Management Plan Revisions and an Associated Environmental Impact Statement for Six Western Oregon Districts of the Bureau of Land Management, 70 Fed. Reg. 53,249, 53,249 (Sept. 7, 2005).

363 *A Summary of the Western Oregon Plan Revisions*, W. OR. PLAN REVISION NEWS (Bureau of Land Mgmt., Portland, Or.), Oct. 2006, at 1, *available at* http://www.blm.gov/or/plans/wopr/files/Newsletter5.pdf. The BLM will prepare one environmental impact statement for all six BLM districts, and six separate RMPs. Notice of Intent to Prepare Resource Management Plan Revisions and an Associated Environmental Impact Statement for Six Western Oregon Districts of the Bureau of Land Management, 70 Fed. Reg. at 53,249.

364 Press Release, Earthjustice, Documents Expose Timber Industry Control of Northwest Forest Plan Rollbacks 1-2 (Apr. 22, 2003), *available at* http://www.earthjustice.org/library/factsheets/Industry_Influence.pdf.

365 GLOBAL FRAMEWORK, *supra* note 8, at ii. **R**

366 Settlement Agreement ¶ 3.5, Am. Forest Res. Council v. Clarke, No. 94-1031-TPJ (D.D.C. 2003) [hereinafter 2003 Settlement Agreement] (on file with authors). A copy of the settlement agreement is also available at http://www.blm.gov/or/plans/wopr/files/settlement_agreement_image.pdf. In 1997, the AOCC signed a settlement agreement with the DOI, in which the BLM agreed that any major revisions to the RMPs would include an alternative that "emphasizes sustained-yield production on the O&C lands." Settlement Agreement ¶ 2, Ass'n of O&C Counties v. Babbitt, No. 94-1044 (D.D.C. 1997). The 2003 Settlement Agreement amended the 1997 agreement, bringing it into conformity with the new one. 2003 Settlement Agreement, *supra*, ¶ 2.17.

367 2003 Settlement Agreement, *supra* note 366, ¶ 2.16. The AFRC and the AOCC litigated and lost these claims in at least two other cases: *American Forest Resources Council v. Shea*, 172 F. Supp. 2d 24 (D.D.C. 2001), and *Ass'n of O&C Counties v. Babbitt*, No. C94-1044 (D.D.C. May 22, 1996). Arguably, raising previ- **R**

regarding the O&C Act was that from 1937 to 1994, the Departments of the Interior and Justice and the courts consistently interpreted the O&C Act as a dominant-use statute requiring management of timberlands for timber production over other uses.[368] As described above, this dominant/subservient dichotomy of purposes is not found in the plain language of the Act. Furthermore, the notion that there was an unswerving federal interpretation of the O&C Act from 1937 to 1994 is false: the 1979 and 1981 Solicitor opinions rescinded past opinions that the O&C Act stated "commercial forestry" and argued that the O&C Act was clearly a "conservation measure" requiring multiple-use management.[369]

Along with using the Agency's best efforts to offer timber sales equal to the annual probable sale quantity and thinning sales from the Late-Successional Reserves,[370] the 2003 Settlement Agreement requires the BLM to revise the RMPs by the end of 2008.[371] The Agreement obligates the BLM to consider at least one alternative that will not create any reserves on O&C lands "except to the extent required to avoid jeopardy under the [Endangered Species Act]."[372] Under the 2003 Settlement Agreement, "[a]ll" of the RMP alternatives must be "consistent with the O & C Act as interpreted by the 9th Circuit Court of Appeals."[373] Predictably, *Headwaters* is cited as the Ninth Circuit's interpretation of the O&C Act.[374]

Based on the letters between the parties leading up to the 2003 Settlement Agreement, it is clear that the timber industry considers such "consistency" to mean no reserves (late-successional, riparian, or otherwise) beyond what is required to comply with the Endangered Species Act.[375] This ignores *Seattle Audubon Society v. Lyons*, a district court case that dispensed with the same claim that putting land into reserved status violated the O&C Act. In that case, Judge Dwyer determined that the O&C Act

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ously adjudicated claims under a more favorable administration just to obtain a favorable settlement flies in the face of the principle of estoppel.

[368] GLOBAL FRAMEWORK, *supra* note 8, at 8-12. **R**

[369] *See* notes 209–25 and accompanying text. **R**

[370] 2003 Settlement Agreement, *supra* note 366, ¶ 3.2. **R**

[371] *Id.* ¶ 3.5.

[372] GLOBAL FRAMEWORK, *supra* note 8, at 2. **R**

[373] 2003 Settlement Agreement, *supra* note 366, ¶ 3.5. **R**

[374] *Id.* ¶ 2.20.

[375] Letter from Rich Nolan, Ball Janik LLP, to Wells Burgess, U.S. Dep't of Justice 4 (Aug. 13, 2002) (on file with authors).

did not restrict the BLM from setting aside land from logging,[376] holding that the BLM has broad authority to manage the O&C lands not only for timber production but also for the other purposes such as economic stability, recreation, and biodiversity.[377]

Rather than using the Western Oregon Plan Revision process to encourage divisiveness and to implement a plainly erroneous interpretation of the O&C Act that is sure to invite legal challenge and more uncertainty, the BLM has the opportunity to finally get the O&C Act right. For example, the Agency should remain faithful to ecological reserves, protect high-quality waters, and embrace forest restoration that would create healthy forests as well as a sustainable local timber industry. The result would be robust rural communities that have a stake in permanent forest production, and that would resist the invitation to return to a scheme of unsustainable federal forest management based on a fictitious interpretation of the law.

VI

CONCLUSION

The Oregon and California Lands Act requires the BLM to manage the O&C lands with the purpose of creating sustainable communities, industries, and forests. The Agency has arguably failed to do so, and now finds itself—pursuant to a sweetheart settlement agreement—entangled in a highly contentious forest plan revision process that is unlikely to escape litigation from all "sides" of the issue.[378] Given the political pressure surrounding the BLM's Western Oregon Forest Plan Revision, it is likely that the environmental protections that make "permanent *forest* protection" possible—reserves for wildlife and water quality, areas of critical environmental concern that limit activity on sensitive soils, and similar land allocation set-asides—will be eliminated, or at least severely curtailed. That these reserves have been adjudicated as necessary for the viability of several species[379] places

[376] Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994). Riparian Reserves and Late-Successional Reserves *are* open to timber harvest, albeit under limited conditions. *Id.* at 1305.

[377] *Id.* at 1314.

[378] *See generally* Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Productions on Public Lands*, [2004] 34 Envtl. L. Rep. (Envtl. Law Inst.) 10,397 (2004) (discussing the Bush administration's history of sweetheart settlements).

[379] *Seattle Audubon Soc'y*, 871 F. Supp. 1291.

in jeopardy not only the uneasy truce in the Pacific Northwest spotted owl wars, but also the viability of rural communities that have attempted, some with significant success, to recover from the boom-and-bust reality brought about by those wars.

The O&C Act was designed by its drafters to avoid this situation and not to be used as a weapon to reopen and exacerbate old wounds. A faithful and contextual reading of the Act and its legislative history compels a different outcome: sustainable forestry carried out with the long-term health of the forest and its rural communities as paramount concerns.