
Chapter 4

**The Legal Framework for Forest
Planning and Management**

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The Legal Framework for Forest Planning and Management

During congressional oversight hearings in October 1989, Forest Service Chief Dale Robertson asserted that forest management had become increasingly ‘‘complicated’’ by the series of laws that govern forest planning and plan implementation. Chief Robertson stated that, while each law serves a particular worthwhile purpose, taken together they impose serious burdens on planning and implementation:

[T]rying to implement all of these laws does get to be an extremely difficult situation . . .

Sometimes we feel like we are almost in an impossible situation because when we face these legal requirements of National Forest Management Act, NEPA, Endangered Species Act, Archaeological Resource Protection Act, the Clean Water Act, Clean Air Act, and all of these other laws, . . . people can pick our weakest link, and challenge us on our decisions, and delay or stop the best laid plans (206).

Some critics question the utility and efficacy of forest planning laws, believing these laws have not contributed to solving problems related to resource management, and even suggesting that the laws be repealed (18, 187). They further charge that the complex legal requirements have imposed a cumbersome and costly burden on the agency, subjecting it to increased threat of appeals and litigation stifling resource management, and accomplishing few of the objectives it was designed to achieve (79). ‘‘Documentation, consistency, and correct procedure become far more important than a land manager’s solid, experienced judgment’’ (16).

Others defend the current legal framework as necessary to sustain the forest and rangeland ecosystems while accommodating uses and producing outputs. Some argue that the current problems exist because planning laws preserve too much agency discretion, and urge Congress to mandate more

prescriptive management laws (76). The agency’s current difficulties, they argue, result because the agency has failed to follow the spirit and intent of the existing environmental protection laws. Still others suggest that numerous administrative appeals and lawsuits result because the agency is not really listening to the public (277); the legal requirements might not seem so cumbersome, if the agency were more responsive to local public input and worked more closely with interested publics to solve conflict through deliberation and negotiation.

This chapter examines the general framework of laws governing land and resource management in the national forests and the implications of each on forest planning.¹ First, it examines the laws that primarily govern planning and management—the Forest Service Organic Act of 1897, the Multiple-Use Sustained-Yield Act of 1960, the National Environmental Policy Act of 1969, the Forest and Rangeland Renewable Resources Planning Act of 1974, and the National Forest Management Act of 1976. Then, it reviews certain laws that restrict activities to protect various resource values²—the 1964 Wilderness Act, the Wild and Scenic Rivers Act of 1968, the 1972 Clean Water Act, and the Endangered Species Act of 1973.

The chapter also briefly discusses the concern over the ‘‘cumulative impact’’ of these laws on Forest Service planning and management. The complex web of laws may make forest planning and activities slower, costlier, and less efficient than necessary to produce and protect the various resource values. Moreover, some laws guide the setting of management direction based on local conditions and public participation, while other laws establish requirements or standards for specific resources, values, or sites. The difficulties posed by this legal web will be examined, but the thorough legal analysis needed to evaluate whether alternative

¹A host of laws apply to some degree to forest management, including, but not limited to: the General Mining Law of 1872, the 1911 Weeks Law, the Migratory Bird Treaty Act of 1918, the Mineral Leasing Act of 1920, the Taylor Grazing Act of 1934, the 1955 Land and Water Conservation Fund Act, the Archaeological Resource Protection Act, the Federal Land Policy and Management Act of 1976, the Clean Air Act Amendments of 1977, the 1978 American Indian Religious Freedom Act, the Public Rangelands Improvement Act of 1978, the 1980 Alaska National Interest Lands Conservation Act, and the 1987 Federal Onshore Oil and Gas Leasing Act. More thorough listings, with copies of the laws, can be found in *The Principal Laws Relating to Forest Service Activities* (270) and *Wildlands Management Law* (232).

²Some of the planning/management laws, notably NFMA, also establish restrictions on planning and management. However, they are included as direction-setting laws, because management guidance is their primary purpose.

structures could provide comparable protection more efficiently is beyond the scope of this study.

SETTING DIRECTION FOR MANAGING THE NATIONAL FORESTS

Forest Service administration of the national forests is authorized and governed by several statutes that establish the agency's mission and generally define the scope of its regulatory and management authority. These laws include the 1897 Organic Act, the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), and the National Forest Management Act of 1976 (NFMA). The following discussion examines how each of these statutes has shaped the Forest Service's mission, the extent to which each directs the substance and procedure of planning and decision-making, and the extent to which each has broadened or narrowed the agency management authority and discretion. In addition, because of its important procedural requirements for forest planning, the National Environmental Policy Act of 1969 (NEPA) is also examined in this section.

The Forest Service Organic Act

In 1891, Congress gave the President the authority to reserve by proclamation any public domain lands "wholly or in part covered with timber or undergrowth, whether of commercial value or not . . ."³ This authority was narrowed in 1897 when Congress defined the purposes for which such public lands could be reserved. This act, which has become known as the Forest Service Organic Act, provided that:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . .

The forest reserves were created from public lands under the jurisdiction of the General Land Office in the Department of the Interior. Congress also authorized the Secretary of the Interior to manage and protect the lands by "mak[ing] such rules and

regulations and establishing] such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction" (89).

Early forest management focused primarily on the timber and range resources. Management planning for the forest reserves began in 1899, when the Department of the Interior began developing working plans" for timber harvesting in each of the established reserves (324). After the reserves and management agency were merged into the Bureau of Forestry in the Department of Agriculture in 1905, the chief of the newly created Forest Service, Gifford Pinchot, directed that working plans be developed for every timber sale, in part to facilitate timber harvesting, but also to avoid overcutting (324).

Forest Service planning and management of the range resources began largely in response to the perception that the public rangelands were being overgrazed by sheep. Thus, while the early timber planning efforts were to make timber available, the early range management efforts were more regulatory in nature, designed to protect water and other natural resources from the consequences of overgrazing (324). The agency charged fees for grazing rights to reduce overgrazing on some lands and withdrew certain other lands from grazing use entirely. The Organic Act and these early resource working plans firmly established both a utilitarian and protective tradition for resource management within the Forest Service, consistent with Chief Pinchot's views of proper resource management (196, 324).

The agency's authority to regulate the use and occupancy of the national forests was first challenged by ranchers who objected to Federal control over and fees for grazing livestock on traditionally grazed lands. However, in 1911, the U.S. Supreme Court upheld the agency's authority to regulate grazing through the imposition of "reasonable" user fees (240). Of greater importance, the court recognized that under the Organic Act the agency possesses broad regulatory authority over the "occupancy and use" of the forest reserves. The court held that the Secretary of Agriculture is required to make rules and regulations to protect the forest reserves 'from depredations and harmful uses,' and

³Forest Reserve Act, Act of Mar. 3, 1891, ch. 561 (26 Stat. 1103; 16 U.S.C. 471). Repealed by section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of Oct. 21, 1976, Public Law 94-579 (90 Stat. 2743)).

concluded that the Secretary is authorized “to regulate the occupancy and use and to preserve the forests from destruction.”⁴

Since 1911, courts have consistently interpreted the occupancy-and-use language of the 1897 Organic Act as providing the agency with broad regulatory and management authority over the national forest lands. Courts have recognized that this authority includes, but is not limited to, the right to issue land use permits for large areas,⁵ to regulate motorized recreation use,⁶ and to regulate wildlife within the national forests⁷ (324).

The Multiple-Use Sustained-Yield Act of 1960

MUSYA expanded the express regulatory and management **authority of the Forest Service**. MUSYA directed the Forest Service to administer the national forests for “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” (For a discussion of these purposes, see ch. 3.) MUSYA was intended to be consistent with the 1897 Organic Act, and thus reflects and perpetuates the utilitarian and protective visions embodied in the agency’s traditions. In addition to recognizing principles of multiple use and sustained yield, MUSYA provided a clearer agency mission and established for the first time a statutory basis for the concept of integrated resource management. Nevertheless, MUSYA provided general guidance for national forest management without providing any specific substantive direction on how to balance the various resources or determine the appropriate mix of values generated by the national forests.

Courts have consistently recognized that MUSYA preserves the agency’s already broad regulatory authority and wide discretion over the occupancy, use, and protection of the forests. The Ninth Circuit Court of Appeals has held that the language of the MUSYA “breathe[s] discretion at every pore.”⁸

With MUSYA (and under the 1897 Organic Act), it was difficult to challenge Forest Service management decisions successfully. The Monongahela lawsuit successfully challenged long-standing Forest Service timber sale practices as violating specific requirements in the Organic Act for selling timber. However, agency discretion over management direction and the mix of resources values were virtually unchallengeable.

The National Environmental Policy Act of 1969

NEPA significantly altered the Forest Service’s planning and management discretion. NEPA seeks to assure that all Federal agencies will incorporate environmental concerns into their decisionmaking Processes.⁹ NEPA has been called “the first comprehensive commitment of any modern state toward the responsible custody of the environment” (39).

Section 102(2)(C) of NEPA specifically requires that all Federal agencies evaluate and prepare a detailed written statement on the environmental impact of all proposals “for legislation or other major Federal actions significantly affecting the quality of the human environment.” In 1978, pursuant to an Executive order from President Jimmy Carter, the Council on Environmental Quality promulgated regulations (40 CFR 1500-1508) setting more specific standards and guidelines governing the “NEPA process.” The regulations guide when environmental impact analyses and statements are required, direct that alternatives to the proposed action be evaluated, and set forth general standards for those processes.

The U.S. Supreme Court has held that NEPA has two objectives: 1) to obligate agencies to consider the environmental impacts of any proposed action, and 2) to require that the public be shown that the

⁴*United States v. Grimaud*, 220 U.S. 506, 522 (1911).

⁵1111915, Congress granted the Forest Service the authority to issue land use permits for areas up to 80 acres and for terms of up to 30 years (Act of Mar. 4, 1915, ch. 144 (38 Stat. 1101; 16 U.S.C. 497)). Courts have recognized the agency’s authority to issue permits for larger land areas under this act in conjunction with the 1897 Organic Act; see *Wilson v. Block*, 708 F. 2d 735 (D.C. Cir. 1983).

⁶*McMichael v. United States*, 355 F. 2d 283 (9th Cir. 1965).

⁷*Hunt v. United States*, 278 U.S. 96 (1928).

⁸*Perkins v. Bergland*, 608 F. 2d 803 (9th Cir. 1979). See also *Sierra Club v. Butz*, 3 ELR 20, 292 (9th Cir. 1973); *Hi-Ridge Lumber Co. v. United States*, 443 F. 2d 452 (9th Cir. 1971).

⁹Section 2 of NEPA specifies that the purposes of the act are: “To declare a national policy which will encourage productive and enjoyable harmony between man and his environment to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . .”

¹⁰*Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. at 97 (1982); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1982).

agency has considered an action's environmental consequences.¹⁰ The Court has also held that NEPA is a procedural rather than a substantive law, i.e., that it does not mandate certain outcomes or decisions. If an agency fully complies with the law's procedural requirements, the agency cannot be forced to modify its decision based on likely environmental effects or to mitigate those environmental impacts.¹¹ The procedural nature of NEPA has complicated its implementation, however, because the detailed NEPA requirements have largely evolved as "common law" in the Federal courts. To ensure that planning and decisionmaking procedures comply with NEPA standards, agencies must frequently consult an extensive and growing body of case law.

NEPA has had an extensive, though indirect, effect on national forest management. NEPA does not alter the Forest Service's mission, nor specifically narrow the agency's management and regulatory authority and discretion. It neither mandates certain mixes or combinations of resource values, nor requires the agency to select the most environmentally sound alternatives to proposed actions. Nonetheless, the impact of the extensive and complex NEPA procedures on agency decisionmaking should not be underestimated. NEPA has affected Forest Service planning and decisionmaking in two basic ways, consistent with the objectives of the act: consideration of environmental impacts, and full public disclosure.

The Forest Service has long considered the balance among resource uses in its planning and decisionmaking; MUSYA merely confined a long-standing Forest Service tradition of considering resource tradeoffs. However, by requiring an assessment of environmental impacts, rather than just a balance among uses, NEPA added environmental protection (over and above the MUSYA requirement to maintain the productivity of the land) as a consideration in national forest management. NEPA served as a catalyst for the integrated planning and management contemplated 10 years earlier by MUSYA (1, 324). Section 102(2)(a) of NEPA directs the use of an interdisciplinary approach in Federal planning

and decisionmaking. This direction (together with similar direction in NFMA) has changed the agency's decisionmaking processes at all levels, and has prompted the agency to replace its traditional resource planning with planning for coordinated resource management (1). The requirements for interdisciplinary planning have also brought a more diverse collection of professionals to the agency.

The other significant impact on Forest Service planning and management is the full disclosure requirement. In response to NEPA, the Forest Service began to expand its public information and participation programs drastically (1, 231), and this, in turn, has meant closer public scrutiny. Furthermore, the agency's compliance with NEPA procedures are subject to closer judicial scrutiny than are decisions under management guidance. In 1976, the U.S. Supreme Court noted that courts will take a "hard look" at agency consideration of environmental impacts under NEPA, to assure that the decisions are not arbitrary and capricious.¹² Thus, through the closer public and judicial scrutiny of agency decisionmaking, NEPA has effectively required the Forest Service to keep a detailed and thorough record of its decisionmaking processes.

Finally, NEPA requires that environmental analyses be site-specific. This is difficult in forest planning, because the plans do not set forth specific activities and sites; such details are determined in project (or implementation) planning. Nonetheless, forest plans are required to be consistent with NEPA. The Forest Service now views the environmental impact statement accompanying the plans as "programmatic," assessing the impacts of the programs (the plans). Site-specific environmental analyses conducted for specific projects are "tiered" to the programmatic environmental impact analyses, without repeating the programmatic analyses.¹³ In part because programmatic analyses can be several years old, agencies must supplement them when significant new information becomes available. Thus, forest and project planning and NEPA analyses are parts of a "never-ending" interactive process (1, 280).

¹⁰*Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. at 97 (1982); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1982).

¹¹*Strycker's B., Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Robertson v. Methow Valley Citizens Council*, 19 ELR 20743 (USFS May 1, 1989).

¹²*Kleppa v. Sierra Club*, 427 U.S. 390 (1976).

¹³This view has evolved over the past few years, and thus many forest plans and accompanying environmental statements may not fit this description of the intertwined forest and project planning and environmental analysis.

The Forest and Rangeland Renewable Resources Planning Act of 1974

Congress enacted RPA to reassert its authority over Forest Service planning and decisionmaking. RPA applies to all four branches of the agency—the National Forest System, State and Private Forestry, Research, and International Forestry—and directs the agency to develop a long-term strategic planning process (259). As part of this strategic planning process, RPA required land and resource management plans for units of the National Forest System. However, except for requiring a “systematic interdisciplinary approach” in developing these plans, RPA provided no substantive or procedural standards and guidelines for their development, until it was amended by NFMA in 1976.

The National Forest Management Act of 1976

NFMA established a complex series of procedural and substantive requirements for developing the long-term land and resource management plans (forest plans) required by RPA. Although NFMA neither modifies the principles of MUSYA nor directs any particular balance or mix of resource values, the extensive planning requirements have led some to dub it the agency’s “new Organic Act” (324). By setting forth a host of procedural and substantive standards and guidelines for planning and implementation, NFMA significantly affects Forest Service management and to some extent narrows the agency’s regulatory and management discretion.

NFMA does not mandate specific output levels, determine the mix of values produced, or attempt to set priorities for resource managers. While embracing MUSYA, NFMA provides more substance to the principles of multiple use and sustained yield, and consequently offers additional guidance to the agency on forest planning. NFMA establishes a planning process to set goals and objectives for national forest management and to identify: 1) standards and guidelines for management, 2) proposed and possible activities, and 3) the necessary financial resources.

NFMA serves three basic functions. First, it directs the agency to prepare long-term integrated forest plans for each national forest, to be amended or revised as needed, but revised at least every 15 years. Next, it requires regulations establishing substantive standards and guidelines for timber

management and for the protection of water and other renewable resources. And finally, it expressly provides for active public involvement in the planning process. The following discussion examines these functions, and discusses their implications for managers.

Developing National Forest Plans

The forest planning process is comprised of three components: development, approval, and implementation. Section 6(f)(5) of NFMA directed the Forest Service to attempt to complete the initial round of forest plans by September 30, 1985, and to revise each plan at least every 15 years. When developing forest plans, the agency is required to adhere to the principles of MUSYA and to follow the procedural requirements of NEPA. NFMA embraces the concept of integrated planning through interdisciplinary analysis; each national forest shall employ an interdisciplinary planning team (section 6(f)(3)) to use a “systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences” (section 6(b)). Plans must be based on “inventory data on the various renewable resources” of the forest (section 6(g)(2)(B)). NFMA also directs that implementing regulations specify guidelines for forest plans to ensure that plans achieve the goals of the RPA program (section 6(g)(3)).

Once a plan has been developed (with public involvement), it must be approved by the regional forester who, after reviewing the plan, must submit a Record of Decision. If approved, the plan becomes final and implementation can begin. Under Forest Service regulations (36 CFR 217), final forest plans are subject to administrative appeals—an additional administrative review initiated by members of the public. (See ch. 5.) Plans are also subject to legal challenge, under the Administrative Procedures Act, since NFMA contains no specific provision for judicial review of forest plans.

Forest plans are developed using the principles of strategic planning—setting direction, developing targets for outputs and conditions, and establishing standards and guidelines for implementation. (See ch. 3.) Plans are generally programmatic in nature; rather than making site-specific decisions on uses and outputs, plans set general goals and guidelines, which direct activities on the ground. Nonetheless, section 6(f)(2) of NFMA also requires the plans to reflect “proposed and possible actions, including

the planned timber sale program . . . necessary to fulfill the plan.” The plan does not make such project decisions, but does set goals and objectives, establish management standards and guidelines, and identify management prescriptions (scheduled combinations of activities for management areas), and subsequent project decisions must be consistent with the plan.

Until they are amended or revised, final forest plans are the primary guidance for Forest Service actions on the ground. NFMA provides that if an amendment would result in a “significant change,” the agency must provide for public involvement comparable to that allowed for plan development (section 6(f)(4)). Entire plans shall be revised when the agency finds that conditions on a forest “have significantly changed,” but at least every 15 years (section 6(f)(5)). Whether such changes are “significant” is to be determined at the discretion of the agency. Pursuant to NFMA, the Secretary of Agriculture promulgated regulations in 1979 (revised in 1982), which set forth specific procedures for resource inventorying and monitoring, and for plan development and implementation. The Forest Service has begun the process of revising the planning regulations, with the “Advanced Notice of Proposed Rulemaking” published in the *Federal Register* on February 15, 1991.

Guidelines for Timber Management and for Resource Protection

Although NFMA is primarily a procedural law, it does require regulations setting forth substantive standards and guidelines. Most of the substantive requirements apply to timber management practices, while the others generally provide guidance for protecting water, plant, and animal resources. Many of these provisions narrow the agency’s management discretion to various degrees.

Because NFMA was passed largely in response to litigation over the agency’s timber management practices, it is no surprise that much of the law is focused upon regulating those practices. NFMA includes provisions that limit the location, methods, and amount of timber production that may take place within the national forests. NFMA requires regulations that specify that:

1. increases in harvest levels are based on intensified management practices, only if such practices can be done in accordance with MUSYA

- and are successfully implemented (section 6(g)(3)(D));
2. timber harvesting is allowed only on those lands where “soil, slope, or other watershed conditions will not be irreversibly damaged” (section 6(g)(3)(E)(i));
3. timber harvesting is allowed only where there is “assurance that such lands can be adequately restocked within 5 years” (section 6(g)(3)(E)(ii));
4. “protection is provided for streams, lakes, shorelines, and other wetlands from detrimental changes” from timber harvesting (section 6(g)(3)(E)(iii));
5. the harvesting system “is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber” (section 6(g)(3)(E)(iv));
6. clearcutting is used where “it is determined to be the optimum method . . . to meet the objectives and requirements of the relevant land management plan” (section 6(g)(3)(F)(i); and
7. “maximum size limits for areas to be cut in one harvest operation” are established (section 6(g)(3)(F)(iv)).

NFMA also generally prohibits the sale of timber from lands identified as not suited for timber production and generally limits sales to sustainable levels. Specifically, section 6(k) prohibits timber harvesting on lands identified as:

... not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible . . . except for salvage sales or sales necessitated to protect other multiple-use values . . .

Section 14(a) directs the Secretary to:

... limit the sale of timber from each national forest to a quantity equal to or less than a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis . . .

The annual sale quantity is allowed to fluctuate above and below the average for each decade. A plan can also depart from this “non-declining even flow” level of timber harvesting, if the departure is “consistent with the multiple-use management objectives . . . [and] made with public participation.”

Many of the evaluations and determinations admittedly require the professional judgment of agency personnel, and thus are substantially discretionary in nature. Nevertheless, these provisions

establish a mandatory framework for making decisions on timber harvesting, and consequently limit to some degree the traditional discretion of the agency to regulate and manage timber harvesting.

The various provisions that constrain timber management were enacted to limit the impacts of timber harvesting on other forest resources. Congress appeared especially concerned about the potential impacts of logging practices on water and fisheries. NFMA contains other provisions aimed at protecting resources from impacts of timber harvesting, mineral development, recreation, and other uses on forest resources. Section 6(g)(3)(B), for example, directs that forest plans should protect biological diversity within the national forests.¹⁴ Specifically, the regulations for forest planning should include guidelines to:

... provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives . . .

Section 6(g)(3)(C) essentially requires research and evaluation, through continuous monitoring and field assessment of the effects of management, to ensure that the productivity of the land is not substantially and permanently impaired.

Public Involvement

The third basic function of NFMA is to provide for active public involvement. NFMA (in conjunction with NEPA) seeks to assure that before proceeding with certain actions and programs, the agency informs and involves the public in decisionmaking. By opening up the agency's decisionmaking processes to closer public and congressional scrutiny, NFMA has increased agency accountability and decreased discretion. (See ch. 5).

Implications for Managers

NFMA and the other direction-setting laws provide guidance for establishing output and condition targets for the national forests and standards and guidelines for management with public participation. In forest planning, the agency must consider

alternative approaches for managing the lands and resources, and must evaluate the potential site-specific and cumulative impacts of management options. Failure to comply with NFMA procedures can prevent the agency from proceeding with a particular action. NEPA seeks to assure that environmental considerations become an integral part of decisionmaking, and NFMA adds the requirement that actions be implemented in a manner that does not seriously impair the forest lands, resources, or productivity.

The actual impacts of NFMA on Forest Service management discretion cannot be known precisely. While the law requires regulations constraining the use of certain practices that might have significant adverse impacts, the determination of significance is largely a matter of agency discretion. In addition, courts remain relatively deferential to the agency's management discretion under NFMA. In one example, the court acknowledged that soil erosion from a proposed road construction would have major consequences on the water of a nearby stream, but upheld the agency's decision to proceed with the project as planned, stating that, "[l]ike the Multiple Use, Sustained Yield Act [sic], the NFMA requires that national forest lands be managed with due consideration given to environmental values . . . Here, the balancing of competing values struck by the Forest Service . . . was not so insensitive to environmental concerns that it violates the NFMA."¹⁵

Relatively few court decisions have interpreted agency discretion under NFMA since the initial forest plans have been completed. Thus, it may be premature to speculate on the degree to which courts will defer to agency management discretion in the future. However, the numerous procedural and substantive NFMA requirements for forest planning make more agency decisions subject to administrative and judicial review. It is possible that the administrative and judicial challenges to agency plans and decisions will be unprecedented. The precise impacts of the threat of appeals and litigation on agency decisionmakers is unknown, but it is indisputable that increased accountability under

¹⁴The term "biological diversity" has become relatively common since the enactment of NFMA, and often encompasses diversity at a variety of levels, such as genetic diversity, species diversity, and ecosystem diversity. NFMA's term--diversity of plant and animal communities--is akin to ecosystem diversity for the national forests. The regulations go further, suggesting species diversity by requiring that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species" (36 CFR 219.19). In this report, biological diversity in national forest management is used as a synonym for the diversity of plant and animal communities.

¹⁵*Northwest Indian Cemetery Protective Association v. Peterson*, 565 F.Supp. 586, 606 (N.D. Cal. 1983), modified, 764 F.2d 581 (9th Cir. 1985), *rev'd in part sub nom, Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

Box 4-A—Special Congressional Attention for the Tongass National Forest

The Tongass National Forest, in southeast Alaska, has received more congressional attention and direction than any other national forest in the United States. The Tongass is unique in many ways. It is the largest national forest, encompassing more than 16.7 million acres, and is more than 5 times larger than any other forest (except the 5.7 million-acre Chugach, the other national forest in Alaska). It contains perhaps the largest stretch of undisturbed temperate rainforest in the world. It also has been the focus of Forest Service efforts to establish a timber industry since the 1920s (291).

The Tongass contains more designated wilderness than any other national forest. The 5.75 million acres account for more than a third of the land in the forest. In addition, Congress has created two national monuments with 3.25 million acres in the Tongass National Forest. Glacier Bay and Admiralty Island are the only major national monuments in the National Forest System.¹ (Other national monuments in the National Forest System were transferred to National Park Service management in 1933.) The Alaska National Interest Lands Conservation Act of 1980 (ANILCA)², which created these areas, contains substantial directions as to their management.

In addition to wilderness and national monument designations (and many other provisions), ANILCA established the Tongass Timber Supply Fund, a permanent appropriation (see ch. 8) of \$40 million annually to prepare 4.5 billion board feet of timber over the ensuing decade. The subsequent debate over financial losses from timber sales (below-cost sales) led many to question the appropriateness of this permanent appropriation. After several years of debates, Congress enacted the Tongass Timber Reform Act in 1990.³ This Act terminated the Tongass Timber Supply Fund, directed modification of the existing long-term timber sale contracts (scheduled to terminate in 2004 and 2011), and increased the amount of wilderness designated in the Tongass.

Thus, the Tongass National Forest is unique in size, forest type, extent of wilderness, presence of national monuments, and creation and subsequent termination of the timber fund. The management of this unique national forest has received unparalleled attention from Congress.

¹The National Forest System also contains the 80,682-acre Mount St. Helens National Volcanic Monument in Washington.

²Act of Dec. 2, 1980, Public Law 96-487 (94 Stat. 237).

³Act of Nov. 28, 1990, Public Law 101-626 (104 Stat. 4426).

NEPA and NFMA has lead to a greater emphasis on documenting decisions.

or site protection laws affecting Forest Service management.¹⁶

ADDITIONAL LEGAL CONSTRAINTS ON THE FOREST SERVICE

The laws examined above set out the general planning and management framework for the Forest Service. Most of these laws are procedural in nature and provide only general guidance to the agency on how to balance resource management. In addition to these laws, numerous statutes not specifically written for the national forests circumscribe forest planning and management. The purposes of these laws are typically to protect particular resources or sites, and thus the laws frequently impose substantive constraints or limitations on activities. (See box 4-A.) This section describes the four major resource

The Wilderness Act

The Wilderness Act, enacted in 1964, maybe the most law most restrictive to Forest Service management discretion, because it prohibits or restricts various uses in particular areas of the national forests. The purpose of the act is to preserve natural areas for recreation and other purposes. Lands are included in the National Wilderness Preservation System by act of Congress from those Federal lands where:

... the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of . . . undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habita-

¹⁶The national forests contain only two systems of special management areas — the National Wilderness Preservation System and the National Wild and Scenic Rivers System. The national forests also contain numerous other special management areas, typically designated by Congress individually and with particular management guidance for each area. For more on these areas, see *Special Management Areas in the National Forest System* (296).

tion, which is protected and managed so as to preserve its natural conditions (section 2(c)).

Congress did not view designated wilderness areas within national forests as conflicting with the general direction for national forest management. Section 4(a)(1) of the Wilderness Act specifically states that:

... [n]othing in this Act shall be deemed to be in interference with the purpose for which the national forests are established as set forth in the Act of June 4, 1897 [the Forest Service Organic Act], and the Multiple-Use Sustained-Yield Act of 1960.

Despite such statements, the Wilderness Act effectively limits Forest Service discretion for managing designated wilderness areas within the national forests. Section 4(b) states that:

... each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and . . . wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical uses.

To achieve these purposes, section 4(c) expressly prohibits commercial enterprise, permanent or temporary roads, motorized and mechanical transport, and structures and installations in wilderness areas, except for existing private rights and minimum administrative requirements. However, the Wilderness Act also provides numerous exemptions to these restrictions:

1. motorboat and aircraft access “may be permitted to continue, ’ where such use existed prior to designation (section 4(d)(1));
2. measures may be taken for “the control of fire, insects, and diseases” (section 4(d)(1));
3. mineral prospecting and information gathering on other resources is permitted ‘if such activity is carried on in a manner compatible with the preservation of the wilderness environment” (section 4(d)(2));
4. activities under valid existing mineral rights (which could be established on or before **December 31, 1983**) “*necessary* in exploring, drilling, producing, mining, and processing operations’ are permitted, “subject to such reasonable regulations governing ingress and egress as maybe prescribed” (section 4(d)(3));

5. the President may authorize water and power projects, and associated activities, “needed in the public interest” (section 4(d)(4)(1));
6. livestock grazing “shall be permitted to continue subject to such reasonable regulations as are deemed necessary’ (section 4(d)(4)(2)); and
7. “commercial services may be performed . . . for activities which are proper for realizing the recreational or other wilderness purposes of the areas” (section 4(d)(6)).

In addition, many of the subsequent statutes adding areas to the National Wilderness Preservation System have established similar exceptions for particular sites and activities, typically to permit existing uses to continue after the areas have been designated.

Nonetheless, the Wilderness Act clearly limits agency activities in planning and managing the designated areas. (See box 4-B.) Despite the numerous exemptions from the general restrictions, certain uses—most notably timber harvesting and developed recreation—are prohibited in wilderness areas. Furthermore, even for the exemptions, the agency is restricted as to the location and extent of permissible activities. Thus, the Wilderness Act significantly narrows Forest Service management discretion, and limits choices available in national forest planning for designated areas.

The Wild and Scenic Rivers Act of 1968

The Wild and Scenic Rivers Act of 1968 is intended to preserve and protect the unique values of certain rivers and their surrounding lands. Specifically, section 1(b) of the act directs that selected rivers with “outstandingly remarkable scenic, recreation, geologic, fish and wildlife, historic, cultural, or other similar values, be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefits and enjoyment of present and future generations.’ The act requires agencies (including the Forest Service) to report to the President on the suitability or nonsuitability of rivers within their jurisdiction for addition to the National Wild and Scenic Rivers System, and the President makes recommendations to Congress. Congress then designates components

**Box 4-B—Release Language and Management of Roadless Areas Not Included
in the National Wilderness Preservation System**

In addition to planning for the management of wilderness areas, the National Wilderness Preservation System affects national forest planning in another way. The Wilderness Act reserved to Congress the authority to designate wilderness areas, but directed the Forest Service to present recommendations on the wilderness suitability of the existing primitive areas within the national forests.¹ In addition, section 2 of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) acknowledged that “The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.” Since wilderness is an accepted use of national forests under MUSYA, potential wilderness designations are to be examined in the forest planning process under the National Forest Management Act of 1976 (NFMA), along with other possible uses of the national forests.

Historical Developments

In 1970, the Forest Service chose to expand the required primitive area review to include many roadless areas, but this first Roadless Area Review and Evaluation (RARE I) was abandoned in 1972 because of a lawsuit asserting that the Forest Service violated the National Environmental Policy Act (NEPA) in deciding which lands to review (299). In 1977, the Forest Service began a second roadless area review. RARE II differed from the first review, because it was intended to accelerate this aspect of the NFMA planning process, and thus was to be consistent with MUSYA and NEPA.

The Forest Service presented its RARE II recommendations in an environmental impact statement (EIS) on January 4, 1979, and President Jimmy Carter presented those recommendations to Congress, with some modifications, on April 16. The State of California challenged the Forest Service RARE II recommendations for 47 areas to nonwilderness uses in July. In January 1980, the court ruled that the RARE II EIS violated NEPA, and the decision was substantially upheld on appeal in October 1982.² Because of this ruling, the Reagan Administration chose to reevaluate the RARE II recommendations in the ongoing NFMA planning process, except in those States with wilderness laws containing certain provisions.

The California lawsuit raised questions about limitations on management activities in areas not recommended for wilderness. Congress chose to address the issues with two provisions in wilderness laws. The first, known as “sufficiency” language, proclaimed the RARE II EIS as sufficient to meet Congress’ needs for the specified areas (typically all national forest lands in a State), and preclude judicial review of RARE II for those areas.

The second provision, known as “release” language, provided guidance on the timing of future wilderness reviews and on the interim management of roadless areas. Several versions of release language were developed, but the 1980 version and 1984 modification are the only two enacted (294). Both of these versions were permissive. First, the Forest Service was not required to review the wilderness suitability of released roadless areas until the initial NFMA plans were revised, unless the agency chose to conduct such a review. Also, the Forest Service was not required to protect the wilderness characteristics of released roadless areas, at least if the forest plan called for activities that would modify the area’s characteristics.³

¹The Forest Service had administratively created a system of wilderness, wild, and primitive areas beginning in 1924. The Wilderness Act established the National Wilderness Preservation System with the existing 9.1 million acres of administratively designated wilderness and wild areas, and directed the evaluation of wilderness suitability of the primitive areas.

²*California v. Bergland*, 483 F. Supp. 46S (E.D. Cal. 1980), *aff’d in part, rev’d in part*, *California v. Block*, 690 F. 2d 753 (9th Cir. 1982).

³Alternative versions would have prohibited subsequent reviews of wilderness suitability, forever or until a specified date, and may have required development of released areas.

of the System, based on, but not limited to, agency and Presidential recommendations.¹⁷

The Wild and Scenic Rivers Act establishes guidelines for managing the lands surrounding designated rivers. The agency charged with administering the river is directed to establish boundaries

around the selected river (within the limits specified in the act), and to develop a management plan for protecting the area. In particular, section 10 specifies that:

- (a) Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which

¹⁷In contrast to the National Wilderness Preservation System, where only Congress can designate areas, State legislatures can designate additions to the National Wild and Scenic Rivers System, with the approval of the U.S. Secretary of the Interior.

Current Issues

Since the RARE II recommendations were issued in 1979, Congress has enacted statutes designating wilderness and containing sufficiency and release provisions for most States. For the few States without such laws, such as Idaho and Montana, the legal status of the RARE II EIS is irrelevant, because the RARE II recommendations have been supplanted by recommendations in NFMA plans for the national forests in those States. Clearly, sufficiency language to insulate the RARE II EIS from judicial review is no longer relevant. However, it is unclear whether release language is necessary for forest plan decisions to develop areas not recommended for wilderness.

Is Release Language Needed?

In some respects, release language is appropriate. The Wilderness Act reserves to Congress the right to decide on the extent and location of the National Wilderness Preservation System. The Forest Service provides Congress with recommendations, developed through the planning process to consider site-specific tradeoffs and with public involvement. Nonetheless, they are only recommendations. Congress is the final arbiter, and perhaps should decide on the areas released from wilderness protection, as well as on those to be protected.

In addition, release language seems to work. The Forest Service has not been successfully sued over decisions to develop roadless areas because of the need to protect wilderness characteristics. In the only case involving release language,⁴ the court held that the release language in the Alaska National Interest Lands Conservation Act of 1980 excused the Forest Service from having to examine the wilderness option for Tongass National Forest lands until the NFMA plan for the Tongass was revised (98). However, the plan was still required to consider a range of management intensities, from primitive conditions through environmentally compatible activities to intensive management, and release language did not permit the agency to develop areas without considering other environmental protection laws.

Is Release Language Unnecessary?

On the other hand, release language may be unnecessary. Release and sufficiency provisions were developed, because RARE II violated NEPA, in part because RARE II contained inadequate site-specific information on the consequences of the recommendations. However, forest planning under NFMA is required to conform with the requirements of NEPA. Thus, if forest planning fulfills the legal conditions, wilderness recommendations in forest plans will not be subject to lawsuits under the precedent established in the California lawsuit. Furthermore, it is questionable whether forest planning and Forest Service decisions should be exempt from judicial review, and there may be little basis for exempting wilderness recommendations but not other decisions.

Furthermore, wilderness recommendations in forest plans may not be subject to judicial review. In a recent case,⁵ the court held that the forest plan does not make an irrevocable commitment to development of specific areas, and that judicial review of NEPA compliance should be deferred to project-level decisions (280). Broadly applied, this decision could make release language, at least for wilderness recommendations in forest plans, irrelevant.

⁴*City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985).

⁵*Idaho Conservation League v. Mumma*, CV 88-197-M-CCL (D. Mont. decided Aug. 7, 1990).

caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeological, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

Section 12(a) then adds that each agency:

0.. shall take such action respecting management policies, regulations, contracts, [and] plans, affecting

such areas ... as may be necessary to protect such rivers in accordance with the purposes of this Act. . . Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this Act.

In contrast to the Wilderness Act, the Wild and Scenic Rivers Act is neither prescriptive nor proscriptive; rather it allows the Forest Service to determine what management goals and activities are consistent with the purposes of the act. Nonetheless, the act does emphasize management for esthetic, scenic, historic, archaeological, and scientific val-

ues, and requires protecting and enhancing the values that led to the river being designated. Consequently, Forest Service discretion in planning for the management of these areas is narrowed significantly.

The Clean Water Act

Congress established stricter standards for protecting the Nation's water resources in 1972 when it revised the Federal Water Pollution Control Act, also known as the Clean Water Act.¹⁸ The purpose of the Clean Water Act is to enhance water quality by imposing limitations on sources of pollution. The act allows States to set their own water quality standards, equal to or more restrictive than the Federal standards, and requires Federal agencies to comply with the State standards.

The Clean Water Act provisions having the greatest impact on Forest Service management are those regulating nonpoint source pollution. Unlike point source pollution, which originates from a discrete, identifiable source such as a ditch or pipe, nonpoint source pollution refers to pollution originating over a widespread land area, such as from agricultural, mining, or silvicultural activities. National forest activities that might generate nonpoint source pollution include, but are not limited to, timber harvesting, livestock grazing, off-road vehicle use, and road and trail construction and maintenance.

The Clean Water Act was amended in the Water Quality Act of 1987¹⁹ to require the States to develop standards for regulating nonpoint source pollution. When combined with the requirement for Federal agencies to comply with State water quality standards, the State standards for nonpoint source pollution become a critical consideration for the Forest Service (6). While NEPA only requires the Forest Service to evaluate and consider the impacts of management activities on watersheds and water quality, the Clean Water Act prohibits the agency from engaging in activities that would cause impacts in excess of Federal or State water quality standards. Thus, Federal and State water quality laws impose

substantive, enforceable limits on national forest management—the State water quality standards represent a minimum level of protection, which the Forest Service must observe. Consequently, in forest planning, the Forest Service is not allowed the discretion simply to weigh the impacts on water quality against the anticipated benefits from a particular use.

The Forest Service has attempted to meet State water quality standards by requiring forest plans to include Best Management Practices (BMPs) for protecting water quality. However, courts have ruled that, even when the U.S. Environmental Protection Agency and the relevant State agency approve the BMPs, the use of BMPs does not guarantee compliance with State water quality standards.²⁰ BMPs are only a means to achieve those standards, not a replacement for the standards (6, 7). The Forest Service must not only plan to use BMPs, but must also show that their practices comply with State water quality standards. Thus, the Clean Water Act substantially narrows agency discretion.

The Endangered Species Act of 1973

The Endangered Species Act of 1973 (ESA) is another environmental protection law with potentially serious implications for forest planning and management. As is apparent in the current controversies over the northern spotted owl in the Pacific Northwest and the red-cockaded woodpecker in the Southeast, the designation of a plant or animal species as threatened or endangered under ESA can alter Forest Service planning considerations and management discretion.

ESA recognizes that various species of fish, wildlife, and plants “have been so depleted in numbers that they are in danger of or threatened with extinction” (section 2(a)(2)), but they are of “esthetic, ecological, educational, historical, recreational, and scientific value” (section 2(a)(3)). The purposes of the act are to provide: 1) a mechanism for conserving “the ecosystems upon which endangered species or threatened species depend,” and 2) a program for conserving those species (section

¹⁸The Federal Water Pollution Control Act had been enacted in 1948 (Act of June 30, 1948, ch. 758 (62 Stat. 1155)) and amended numerous times prior to its complete revision in the Federal Water Pollution Control Act Amendments of 1972. This revision was subsequently amended in the Clean Water Act of 1977, and the combination is commonly referred to as the Clean Water Act.

¹⁹Act of Feb. 4, 1987, Public Law 100-4 (101 Stat. 7; 33 U.S.C. 1251 et seq.).

²⁰*Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp. 586, 606 (N.D. Cal. 1983), modified, 764 F.2d 581 (9th Cir. 1985), *rev'd in part sub nom. Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

2(b)). ESA also defines conserving the species as bringing “any endangered species or threatened species to **the** point at which the measures provided pursuant to this act are no longer necessary” (section 3(3)). Thus, for ESA, conservation is synonymous with recovery of the species.

ESA is administered by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Section 4(a)(1) of the act requires USFWS and NMFS to determine if species are threatened or endangered by: 1) destruction or modification of habitat, 2) overutilization, 3) disease or predation, 4) inadequate regulatory mechanisms, or 5) other natural or human factors. The determination is to be based “solely on the best scientific and commercial data available” (section 4(b)(1)(A)). Congress gave specific directions *not* to include economic effects in determining if species are threatened or endangered; the report on the 1982 ESA amendments from the House Committee on Merchant Marine and Fisheries states:

The addition of the word “solely” is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The Committee strongly believes that economic considerations have no relevance to determinations regarding the status of species and intends that economic analysis requirements . . . not apply (258).

Section 4(a)(3)(A) requires the designation of “any habitat of such species which is then considered to be critical habitat. Critical habitat is also to be based on the best scientific data available, but in contrast to the listing decision, the USFWS or NMFS is to consider ‘the economic impact, and any other relevant impact, of specifying any particular area as critical habitat” (section 4(b)(2)).

ESA establishes three considerations of endangered or threatened species for national forest planning and management. First, a recovery plan is to be developed for endangered and threatened species (section 4(f)), focusing on species that “conflict with construction or other developmental projects or other forms of economic activity.” The services of ‘appropriate public and private agencies and institutions, and other qualified individuals’ are to be procured, but recovery teams are exempt from the Federal Advisory Committee Act (FACA). When national forest lands are involved, Forest Service employees are likely to be included in

recovery planning teams, and thus, recovery plans and national forest planning can be coordinated.

The second ESA consideration in forest planning, in section 9 of the act, is a prohibition on the “taking” of any species which has been designated as endangered. “Taking” is defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (section 3(18)). Section 10 defines conditions under which the taking of an endangered species would be permitted.

Finally, section 7(a)(2) of ESA directly affects Federal agency actions by specifying that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Interior and of Commerce], insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . .

Following the consultation, the Secretary is to issue an opinion on whether the actions will jeopardize the endangered or threatened species or will adversely modify the designated critical habitat. If jeopardy or adverse modification is identified, the Secretary must then suggest a reasonable alternative for achieving the results without jeopardizing the species or adversely modifying its critical habitat. Specifically, section 7(b)(3)(A) states that:

Promptly after conclusion of the consultation . . . the Secretary shall provide . . . a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest . . . reasonable and prudent alternatives . . .

The Endangered Species Act could have serious implications for Forest Service management and planning. Recovery plans can affect national forest plans, since NFMA requires forest plans to be “coordinated with the land and resource management planning processes of . . . other Federal agencies” (section 6(a)). Furthermore, any action that constitutes a ‘taking’ under ESA is strictly prohibited. Finally, the Forest Service is required to consult with the Fish and Wildlife Service on plans and activities that might jeopardize threatened or endangered species or that might adversely modify critical

habitat. Because of the programmatic and strategic nature of forest planning, it is virtually impossible to determine in advance whether particular management activities under the plan will lead to a finding of jeopardy or adverse modification. Thus, the section 7 consultation process is an ongoing one. To the extent that national forest plans and activities conflict with ESA's requirements, amendments and/or revisions to the plans may be necessary.

SUMMARY AND CONCLUSIONS

The legal framework for national forest planning and management consists of two types of laws: direction-setting laws and protection-standards laws. The direction-setting laws include the 1897 Forest Service Organic Act, the Multiple-Use Sustained-Yield Act of 1960, the Forest and Rangeland Renewable Resources Planning Act of 1974, and the National Forest Management Act of 1976. These laws essentially create an open planning process through which values are balanced and tradeoffs are evaluated in national forest management. The National Environmental Policy Act of 1969 augments these direction-setting laws by requiring the Forest Service to consider environmental impacts and to show the public how those impacts were considered.

The protection-standards laws typically apply to much more than just the Forest Service, and establish standards for protecting particular resources or sites. Some of the most important ones for national forest planning and management include the Wilderness Act, the Wild and Scenic Rivers Act of 1968, the Clean Water Act, and the Endangered Species Act of 1973. These statutes differ from the direction-setting laws, because they are not premised on balancing resource values, but on maintaining minimum standards for resource or site protection. Furthermore, these laws were passed at different times over the past few decades, and serve different, sometimes overlapping or even contradictory, purposes. Nonetheless, because these laws establish specific standards or restrictions, the Forest Service must comply with their legal requirements.

The complex web of laws, some requiring a balancing of values and others establishing standards or restrictions, has raised two concerns. The first, articulated by Forest Service Chief Dale Robertson, is that the numerous compounding and possibly conflicting requirements make national forest planning and management an exceedingly

complicated task. At the extreme, the sum total of the various protection standards and restrictions may make any on-the-ground management actions infeasible.

To date, the "cumulative impact" of the various laws on Forest Service management has not been extensively analyzed, nor is it known whether the collective purposes of these laws can be realistically achieved while maintaining historic levels of national forest uses and outputs. However, such legal analyses are beyond the scope of this study. Congress could consider commissioning such analyses by an independent organization with the necessary legal expertise. Congress could even consider modifying the protection-standards laws for national forest management, to allow the goals of these laws to be balanced with other values in national forest planning. Again, however, analyzing the implications of such an option is beyond the scope of this study and of OTA's mandate.

The second concern is that the complexity of the legal framework, and especially of the process laws such as NFMA and NEPA, lead agency managers to focus on "bomb-proofing" their management plans. Planning must follow correct procedures and be thoroughly documented, and decisions must be consistent—regardless of the validity, appropriateness, or acceptability of the plans and decisions—because proper procedure, documentation, and consistency are necessary to demonstrate that the decisions are not arbitrary and capricious (16).

This concern is predicated on two assumptions. The first is that the judicial system examines only whether the agency has followed the letter of the law. When agencies are sued, the courts do rule on whether agencies have fulfilled their legal requirements, especially for laws with specific standards or constraints. For example, the Forest Service *must* meet State water quality standards, and it *must* consult with the Fish and Wildlife Service (or NMFS) when its actions might affect an endangered species. However, courts also grant substantial deference to an agency when the laws grant discretion to the agency. For example, the Forest Service *must consider the* relative values of the various resources, and *must consider* physical and economic factors in identifying lands not suited for timber production. For forest planning, the Forest Service should identify the legal requirements that must be

fulfilled, prior to considering alternative management direction for the national forests.

The second assumption underlying the perceived need for bomb-proofing is that various interests will sue if their desires are not met in forest planning. However, this assumption is inaccurate, in two respects. First, the Forest Service is facing relatively few lawsuits. In fiscal year 1989, only 11 of approximately 500 forest plan appeals and only 32 of 525,000 timber sales were litigated (300). (See ch.

5.) Second, and more importantly, people typically sue only if they believe the agency is being arbitrary or unfair. Such beliefs can generally be overcome through an open, honest exchange of desires and concerns among the agency and the various interested and affected individuals and groups, leading to understanding and acceptance of the possibilities and limitations for managing the national forests. This is the purpose behind NFMA's requirement for public participation in national forest planning.