
Chapter 5

**Public Involvement
in Forest Planning**

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Public Involvement in Forest Planning

The National Forest Management Act of 1976 (NFMA) established a more direct and substantial role for the public in forest planning than had previously existed. Its public participation requirements complemented those already in place under the National Environmental Policy Act of 1969 (NEPA). Congress assumed that a more participatory planning process would lead to better, more acceptable management of the national forests, and that early and continual public involvement could help the agency resolve controversies in a more organized and timely fashion.

Despite NFMA, many conflicts and controversies over the management of the national forests remain. In October 1989, the Senate Committees on Agriculture, Nutrition, and Forestry and on Energy and Natural Resources convened a joint oversight hearing to review the planning process under NFMA. Several senators expressed frustration over the continuing controversies, and concern that many were being resolved outside of the planning process—in annual appropriations or in administrative appeals or litigation. In his introductory remarks, Senator Patrick Leahy (Vermont) stated:

I have been very concerned with the process in which forest controversies in the Northwest are being resolved; not in the planning process; not in the courts, but through the appropriations process by means of limiting judicial review (143).

Senators Mark Hatfield (Oregon) and James McClure (Idaho) concluded that the planning process had “broken down.” Prescriptions for reforming the current system vary widely, but the problem is commonly attributed to Forest Service failure to involve the public effectively in forest planning.

The legal and regulatory framework for public participation in forest planning is designed to encourage public involvement in three general stages of the process: 1) in plan development, review, and implementation; 2) through requests for administrative review of plans and decisions; and 3) through judicial review. In addition, NFMA instructs the agency to coordinate its planning process with those of other Federal agencies and State, tribal, and local governments. Taken together, these channels for public participation are intended

to expand and elevate the public’s historic role in Forest Service decisionmaking and to assure that public values, needs, and desires are reflected in forest plans.

This chapter will examine public involvement in forest planning at the stages referred to above. The first part examines public participation at the plan development and implementation stage. Specifically, it discusses the legal framework for public participation and Forest Service efforts to integrate the public in its decisionmaking. It also addresses why those efforts seem inadequate, and reviews alternative approaches to public involvement in Forest Service decisionmaking. The second part discusses the role that administrative appeals play in the planning process, and analyzes current issues and concerns surrounding the use of the appeals system. It also discusses the role of the judiciary in forest planning, and specifically addresses issues of judicial review. Finally, the third part of the chapter examines the additional requirements for coordinating Forest Service planning with other government activities.

PUBLIC PARTICIPATION IN FOREST SERVICE PLANNING

Legal Requirements

Forest Service land and resource planning and management is guided primarily by three laws: the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), NEPA, and NFMA. (See ch. 4 for a more thorough discussion of the legal framework for Forest Service planning and management.) Taken together, these statutes provide both a conceptual basis and a firm legal mandate for public involvement in the forest planning process. Common among these laws is the implicit recognition that planning and managing public resources is not solely a function of technical expertise and scientific decisionmaking. It is inherently a subjective process, dominated by social, political, and cultural questions (49, 51, 330). (See also ch. 3.) The Forest Service must involve the interested publics in a meaningful way, if the resulting plans are to respond to changing public needs and values (3, 49, 51, 231, 330).

The Multiple-Use Sustained-Yield Act of 1960

The passage of MUSYA in 1960 and several Federal statutes in the 1970s significantly opened up administrative agency procedures to closer public scrutiny and more active public involvement. Under MUSYA, the Forest Service retained primary authority and significant discretion over the management of the forest resources. Nevertheless, by expanding the number of public resources over which the agency had express management and regulatory authority, the act provided a stronger conceptual basis for agency responsiveness to pluralistic, public values than had previously existed.

MUSYA directs that, in managing the national forests, the Forest Service shall give “due consideration . . . to the relative values of the various resources, and shall assure that resources are ‘utilized in the combination that will best meet the needs of the American people.’” As discussed in chapter 3, the act embraced the concept that the public’s interest is best served by managing the national forests for many values. However, the act provided only the most general guidance to agency managers as to how to do this. (See ch. 4.)

MUSYA provided a theoretical framework for public participation by focusing agency attention on multiple resource management. This mandate placed the agency in a more visible position of weighing and balancing resource values and uses and of reconciling conflicts. And because planning and management decisions were supposed to be guided by the “needs of the American people,” MUSYA began a trend toward external, as opposed to bureaucratic, standards of accountability (231). However, it did not provide the general public with any legal right to participate in forest planning.

The National Environmental Policy Act of 1969

Throughout its history, the Forest Service had solicited public input into its decisionmaking processes, but often informally and infrequently (208). With the enactment of NEPA in 1970, the agency was expressly required to establish procedures for public involvement in planning and management.

Congress enacted NEPA at a time when the public was demanding more access to administrative decisionmaking. NEPA requires Federal agencies to assess the environmental effects of any proposed major Federal action that would significantly affect the human environment. NEPA emphasizes “full

disclosure’ of agency decisions—findings from environmental assessments and impact statements. An examination of alternatives to the proposed action, and comments from reviewing State and Federal agencies, must also be made available to the public.

NEPA does not provide standards and guidelines for public involvement, nor does it specify that public meetings must be convened. It treats the public principally as a recipient of information, rather than a participant in decisionmaking (231). Under the law as written, Federal agencies have a duty to make environmental impact statements available for review, but are not required to solicit feedback from the public.

Nonetheless, public awareness of potential environmental consequences of proposed programs or actions makes agencies more accountable to public concerns and more sensitive to the environment (231). President Richard Nixon made it clear that Federal agencies were to actively seek public views before making final decisions. His Executive order to implement NEPA directed agencies to:

Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact *in order to obtain the views of interested parties*. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action (183) (emphasis added).

President Nixon had instructed the Council on Environmental Quality (CEQ) to issue *guidelines* to Federal agencies for preparing Environmental Impact Statements rather than regulations. Regulations to implement NEPA were subsequently issued under President Carter in 1978. These regulations provide clearer guidance to agencies on the purpose of public involvement, and give the public a more participatory, consultative role than the vague “inform and educate” language of the law had done. The regulations provide that:

Federal agencies shall to the fullest extent possible. . . [encourage and facilitate public involvement in decisions which affect the quality of the human environment (40 CFR 1500.2(d)).

Agencies shall (40 CFR 1506.6):

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents . . .

(c) Hold or sponsor public hearings or public meetings whenever appropriate . . .

(d) Solicit appropriate information from the public . . .

(e) Explain . . . where interested persons can get information or status reports on environmental impact statements . . . and

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public . . .

under the regulations, agencies are thus responsible for *involving* the public in decisions affecting the human environment.

NEPA regulations also direct a process to facilitate decisionmaking, not to justify predetermined decisions. “NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken” (40 CFR 1500.1(b)) (emphasis added). The regulations also require that agencies solicit public input early in planning and decisionmaking through “scoping” — ‘an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action’ (40 CFR 1501.7). Furthermore, NEPA regulations direct agencies to ‘integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts’ (40 CFR 1501.2).

While the regulations set forth clearer guidance to agencies on why to involve the public in planning and decisionmaking, standards for public participation in forest planning are evolving largely through case law. (See ch. 4.) Courts have provided some guidance as to NEPA’s public participation requirements. In *California v. Block*,¹ the court noted that: 1) the Forest Service was required to present a broad range of alternatives to allow full public participation in decisionmaking, and 2) information from the public was not only to be collected, but was also to be considered in decisionmaking (92). Nonetheless, two important questions regarding public participa-

tion in forest planning under NEPA remain largely unanswered:

1. What is the role of the public (*vis-a-vis* agency responsibility) in Forest Service decisionmaking?
2. How must the Forest Service demonstrate its response to public comments in its final forest plans and decisions?

The National Forest Management Act of 1976

With the passage of NFMA in 1976, Congress reinforced the public’s right to participate in Forest Service planning and decisionmaking. Enactment of the law was largely triggered by the Monongahela decision² and other court decisions that threatened to halt certain timber harvesting practices in the national forests. (See ch. 3.) However, the controversy in the Monongahela National Forest of West Virginia was not unique, but rather an indication of widespread public dissatisfaction with Forest Service Management practices (80). Lawsuits were filed in Alaska, Texas, and several other States. Disputes about management of the Bitterroot National Forest in Montana led Congress to commission an independent evaluation of Forest Service practices (264).

The Monongahela and Bitterroot controversies involved not only the legitimacy of timber management practices under the 1897 Forest Service Organic Act, but also questioned the agency’s interpretation of its multiple-use and sustained-yield mandates. The uproar over clearcutting was “but the focal point for groups with a broad range of interests in reforming national forest management” (80). These conflicts demonstrated public perceptions of the agency as insensitive to nontimber values, and public demands for greater agency accountability in upholding its multiple-use mandate.

NFMA embraces the notion set forth in the NEPA regulations—that many conflicts can be reconciled by integrating the public into the decisionmaking process early and continuously. Upon submitting the conference report on NFMA to the Senate, Hubert Humphrey, the chief sponsor of the bill, characterized the public as “advisers” to agency planners and decisionmakers:

¹*California v. Bergland*, 483 F. Supp. 465 (E. D. Cal. 1980), *aff’d in part, rev’d in part*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

²*West Virginia Division of the Izaak Walton League, Inc. v. Butz*, 367 F. Supp. 422; 522 F.2d 945 (4th Cir. 1975).

This is an act that assures that our public forests are managed with advice from the several publics, and managed in a framework that makes ecological and environmental sense . . .

It creates the policy machinery for making certain that professional expertise and public desires are brought together in the public interest (120).

President Gerald Ford echoed the Senator's remarks: "Emphasis throughout the act is on a balanced consideration of all resources in the land management process. Of equal importance, this act guarantees the full opportunity to participate in National Forest land and resource planning" (87).

NFMA directs the Secretary of Agriculture to promulgate regulations specifying procedures to ensure that forest plans are developed in accordance with NEPA, although such regulations have never been promulgated. The conference report on NFMA emphasized that the purpose of this provision was not to amend or modify NEPA, but to assure "uniform guidance . . . as to what constitutes a major Federal action for which an environmental impact statement is required" (266).

In addition, rather than just referring to NEPA for guidance on public participation, section 6(d) of NFMA specifically requires public participation 'in the development, review, and revision' of forest plans. This provision directs the Secretary at least to make the documents available at convenient locations and to "hold public meetings or comparable processes . . . that foster public participation in the review of such plans or revisions." Furthermore, Congress conferred an additional opportunity for the public to influence the regulations implementing NFMA in section 6(h), by providing for advice and counsel from an independent committee of scientists "to assure that an effective interdisciplinary approach is proposed and adopted."

Finally, section 14 authorizes and encourages the use of advisory boards in planning and managing the national forests. Section 14(b) specifies:

In providing for public participation in the planning for and management of the National Forest System, the Secretary. . . shall establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities. The membership of such boards shall be representative of a cross section of groups interested in the planning for and manage-

ment of the National Forests System and the various types of use and enjoyment of the lands thereof.

Despite such direction, the Forest Service has not used any formally designated advisory boards for national forest planning or management since the late 1970s. In one case, the White Mountain National Forest in New Hampshire, an existing advisory board that was officially disbanded in the late 1970s has continued meeting without explicit Forest Service coordination and assistance as an Ad Hoc Advisory Committee. The Forest Service has stated that the requirement to conform with the Federal Advisory Committee Act (FACA) inhibits their use of advisory boards, but how and why FACA inhibits advisory board use has not been explained or demonstrated.

Taken together, these several sections of NFMA project the public as an integral component of forest planning and implementation. While the law preserves agency decisionmaking authority, it casts the public in the role of advisers and consultants to the planning and decisionmaking processes.

NFMA Regulations

In the fall of 1979, the Secretary of Agriculture promulgated regulations to govern the implementation of NFMA. These regulations provide substantial guidance on public participation, and furthered Congress' intent that public involvement should constitute more than a mere exchange of information. Section 219.7(a) sets forth the intent of public participation to:

- (1) ensure that the Forest Service understands the needs and concerns of the public;
- (2) inform the public of Forest Service land and resource planning activities;
- (3) provide the public with an understanding of Forest Service programs and proposed actions;
- (4) broaden the information base upon which land and resource management planning decisions are made; and
- (5) demonstrate that public issues and inputs are considered and evaluated in reaching planning decisions.

Section 219.7(e) provides further that "conclusions about [public] comments will be used to the extent practicable in decisions that are made." This constitutes the first time that the agency was explicitly required to reflect public input in forest management plans and decisions.

The regulations provide reasonably clear guidance to agency managers on the purposes and objectives of public involvement, but also provide the agency with significant discretion in choosing the best methods for public participation. Section 219.7(c) states, “Public participation, *as deemed appropriate by the responsible official*, will be used early and often throughout the development, revision, and significant amendment of the plans (emphasis added). Nonetheless, the Forest Service must demonstrate that it has considered public input in reaching its final decisions. Thus, section 219.7(a)(5) was of special significance, because it forced action in response to public comments—the agency was specifically required to be “responsive” to public participation.

The NFMA regulations were significantly changed in 1982, as part of the sweeping changes recommended by President Ronald Reagan’s Task Force on Regulatory Reform. The Task Force recommended that much of section 219.7 be eliminated or changed (269). Section 219.7(a) would have been reduced to a single, broad statement of purpose: “public participation throughout the planning process is encouraged.” Because of strong public criticism, however, the Forest Service retained most of the original language (92). Nonetheless, the sections that most strongly required Forest Service responsiveness to the public—section 219.7(a)(5) to demonstrate consideration of public issues and inputs, and section 219.7(e) to use conclusions about public comments to the extent practicable—were deleted.

The Forest Service has defended the deletion, arguing that the sections were unnecessary, inaccurate, and nonregulatory, and thus inappropriate for NFMA regulations (92). However, several observers have criticized the Forest Service for eliminating those particular provisions which most clearly forced the agency to respond to public comment. These 1982 changes have significantly increased agency discretion of how to use public comments and have contributed to “erosion of the role of the public as *participant in the* planning and decision process . . .” (emphasis in original) (231).

Forest Service Efforts in Public Participation

It is widely held—by Members of Congress, members of the general public, academicians, and many agency personnel—that the Forest Service has

not efficiently or effectively used public input in its planning process (27, 91,231, 277,281, 330). This inefficiency is manifested, in part, by the rising number of appeals and lawsuits over forest plans and proposed activities. It is important to note that the issue surrounding public participation is not solely a question of whether the Forest Service has technically complied with the letter of the law, but also whether the agency has fulfilled the *spirit* and *intent* of the laws.

The Forest Service acknowledges that public participation is an important objective of its planning process, and provides numerous opportunities for the public to participate throughout the planning process. Nevertheless, the Forest Service has not demonstrated much success in achieving effective public participation; few forest plans show the degree to which public concerns have been accommodated or how managers have considered and responded to public issues and concerns. Some national forests have succeeded at involving the public in planning and decisionmaking, but for the most part, forest supervisors apparently lack sufficient training, guidance, and flexibility to respond adequately to public input.

Integrating the public into forest planning, implementation, and monitoring is admittedly difficult. The Forest Service is required to solicit public involvement in at least ten distinct points in the planning process (330). In addition, a large number of specific decisions affect the “public interest,” and this number has grown enormously since the passage of the MUSYA in 1960. Furthermore, agency leaders, observers, and participants differ on the public’s role in planning and decisionmaking. NEPA and NFMA both contemplate that public concerns and issues will be reflected in the planning process, but neither specifies how and to what extent plans and decisions should accommodate these concerns. Because the Forest Service has not clearly defined the role of the public in the planning process, both agency managers and the public have different expectations and perceptions of the extent to which public input should influence final decisions.

Historical Development

Forest Service planning and management have been increasingly attacked since the 1960s. Because of the wide discretion of the Forest Service to make and implement forest policy, several interest groups felt that their views were systematically underrepre-

sented in plans and decisions (330). Though seldom faulting the professionalism of the agency's work force *per se*, some critics have charged that the agency simply has been inclined toward certain interests, while others have asserted that the agency was 'captured' by outside interests (202,250, 330).

The Bitterroot and Monongahela debates demonstrated the controversial and political nature of public land and resource management and highlighted the public's growing expectation for a greater role in Forest Service decisionmaking. The perceived lack of responsiveness to public needs and values led to calls for agency reform. In 1970, the Belle Report concluded in part that "the staff of the Bitterroot National Forest finds itself unable to change its course, to give anything but token recognition to related values, or to involve most of the local public in any way but as antagonists" and recommended agency reorganization so that public involvement would "naturally take place" (264). The 1971 Forest Service policy statement on public participation was not followed in practice (29). In 1972, Cutler recommended five reforms aimed at improving agency responsiveness to public concerns: 1) active recruitment of diverse professionals for a 'multidisciplinary' staff; 2) early involvement of all interests in decisionmaking; 3) use of 'independent hearing officers and semi-independent citizens' committees' to review plans and decisions; 4) more and broader alternatives for public review and comment; and 5) adequate time to review alternatives (330).

Current Conditions and Trends

Criticism of Forest Service decisionmaking has hardly fallen on deaf ears. Since 1970, the agency has adopted scores of procedural reforms aimed at promoting public involvement in its policymaking processes. NEPA documents are widely distributed, public meetings are now commonplace, alternatives are routinely reviewed by interested publics, and the agency has used a growing number of citizen working groups to avoid plan appeals.

Despite Forest Service reforms, public dissatisfaction with final plans and decisions remains high, indicating that many still believe that the agency is unreceptive and unresponsive to their concerns and priorities. A recent survey of forest planning participants shows 43 percent were "somewhat to very dissatisfied" with the planning process in which they had participated, and 55 percent voiced frustra-

tion with the Forest Service planning process as a whole (68). In addition, 72 percent believed that the Forest Service unfairly favored some interests over others when preparing forest plans (68).

The Forest Service undertook its own internal review of the planning process under NFMA. Most of the employees surveyed indicated that the agency had technically complied with public participation requirements contained in the law and the regulations. However, the public was seen as dissatisfied with Forest Service attempts to involve them. Only 3 percent of the employees believed that public participation had affected final forest plans (279).

A 1990 report, which solicited comments and ideas about the forest planning process from a host of persons representing various interests, academia, State and local governments, and the general public, likewise reported a widely held feeling that Forest Service officials 'do not welcome proactive participation . . . but prefer to accept information only on their own terms and in forums organized by the Forest Service' (277). The participants felt that the agency's public hearings, arranged to invite views on issues, forced groups into taking hard, polarized positions at the outset. "The planners then retreated to their offices, emerging sometime later with a draft, followed by another public hearing-and increased polarization" (277). The report attributed part of the problem to the lack of a clear agreement and understanding within the agency on the role of the public in reaching decisions (277).

While acknowledging shortcomings in public involvement, other observers maintain that the Forest Service has been relatively successful in promoting public participation, given the extensive and complex requirements of NEPA and NFMA. As the planning process continues to evolve and mature, public participation efforts will likely improve, assuming that agency leadership acknowledges the importance of public participation and actively encourages and is receptive to public input. In October 1989, Forest Service Chief Dale Robertson (207) stated, "In preparing these forest plans, we have worked with the public. We have come down on what we believe is the best balance after taking all the factors into account." The 1990 internal critique of land management planning echoed the Chief's remarks:

Great strides have been made in Forest Service planning. Citizens were involved to an unprece-

dented extent. . . Many important relationships, with citizens, local officials, other agencies, and Indian tribes, have been formed . . . There was frustration, *but there is a general feeling that individuals inside and outside the agency did the very best they knew how* . . . [P]ublic participation methods changed as the planning process matured and as results indicated the need for changes. Such change will continue as we enter the next phase of forest planning (276) (emphasis in original).

Many questions concerning the legal adequacy of public involvement methods have been resolved through the administrative appeals process (155). According to the Forest Service, appeals have played an important role in “testing the soundness of the agency’s day-to-day decisions, current policy and use of discretion. Thus, appeals can and do help refine and clarify Forest Service policies and procedures” (155). The agency’s critique, which includes a series of recommendations designed to promote greater responsiveness to public input, is further evidence that the agency is learning from its experiences and attempting to improve public participation. This critique also prompted the agency to update its training course on plan development and implementation to ensure that needed changes are communicated to staff in the field.

Public participation probably will continue to improve as the agency becomes more experienced with the NEPA and NFMA processes. Nonetheless, there still appears to be a substantial gap between stated policy and the actual practice. Much of the criticism heard today echoes of that heard more than 20 years ago—that although the agency solicits public input, few participants perceive that their input has a noticeable impact on plans or decisions. The failure of Forest Service efforts to meet public expectations about being included in decisionmaking is common to Federal agencies (4). The promise of citizen participation in policy formulation and decisionmaking is seldom fulfilled, because for the most part, effective techniques of involvement and participation have not been widely adopted (231).

Reasons for Difficulties

Critics who charge that changes in the Forest Service’s public involvement strategy and approach have been minimal, question the extent to which the agency has learned from past experiences (92, 230, 231, 330). The most common explanations for Forest Service difficulties in effectively involving

the public in planning and decisionmaking are the use of incorrect models of public involvement, the lack of information on how to involve the public, professional resistance to public ideas, and inflexible conditions for managers.

incorrect Models--One explanation for why the Forest Service has failed to meet public expectations for participation is that the agency has not developed an appropriate model for encouraging and using public input. Likewise, the Forest Service managers have been unable to provide the public with a clear understanding of the purpose of their involvement or how their input would be used. “People did not know the level of specificity they were expected to make in their comments because they did not understand the decisions that were going to be made” (277).

Typically, the Forest Service convenes a meeting of various individuals and interests to discuss a set of issues determined by the Forest Service (277). This ‘has led to issue-airing and venting, but has not affected decision-making’ (277). By asking for interests and preferences, the agency encourages the public to act individually and separately (231). This approach suggests that the agency views the public narrowly, as a “gaggle of consumers,” i.e. as individuals and groups with predetermined and static values and preferences (231).

This “model” of public participation is premised on the assumption that *due process* is the appropriate means to guarantee public access to agency planning and decisionmaking (231). The publics are given sufficient opportunities to present their views, and all views are considered, but the agency is the sole decisionmaker and final arbiter. The publics are thus placed in the position of having to advocate the “rightness” of their position and the “wrongness” of the positions of others (330).

This divisiveness promotes adversarial behavior and inhibits the ability of affected groups and individuals to find mutually acceptable alternatives (330). Citizens have no collaborative forum in which to learn about one another, to revise their opinions, or to discover common interests and mutually beneficial solutions (231, 330). Rather than promoting a dialogue among the agency and the publics, current models and approaches reduce the purpose of public input to mere information gathering; communication typically flows only one way—from the public to the agency (92, 231, 277, 330). The

process neither convinces nor informs the public, because it “does not provide the opportunity for mutual inquiry to better understand the issues involved and the merit of a variety of different alternatives; . . . affected groups are not given the opportunity to amend, support, or reject their early notions’ (330). Thus, many are not convinced that final decisions are the most acceptable ones that could have been reached.

The adversarial model of public participation also promotes distrust of the agency, because those who disagree with the decisions tend to view agency managers as the agents of the opposing interests (330). Furthermore, the public strongly perceives that forest planning has been used to justify predetermined decisions (277). Decisions disappoint many participants, because they have not been convinced by the decisionmaking process “that the decision reached is right’ (330). Participants ‘wanted a clear and credible rationale for the decision that showed that their comments had been heard, understood and considered, and evidence that the Forest Service had acted on the best information available” (277). All too often this rationale has not been forthcoming in final plans and written decisions.

For want of a clear understanding of the role of the public, managers tend to measure the adequacy of public involvement practices in terms of simple process or interest representation (231)--how many public hearings were held; how many different interest groups were present at these meetings; how many comments were collected; etc. Because agency officials lack explicit formulas for decisionmaking, they seek to compensate by being “systematic and thorough” in their approach to public involvement (330). This ensures that virtually every affected or interested group and individual has an opportunity to present their views, but provides no guidance to managers on how to integrate the public into the process of weighing alternatives, evaluating trade-offs, and making final decisions. This approach fails to distinguish between “‘interest airing’ and “‘interest accommodation ’’-concepts with significantly different implications (330). The current Forest Service approach tends to be based on interest airing alone, and is not designed “to accommodate [the publics’] concerns *in a way that satisfies them that they have indeed been accommodated as well as possible*” (330). “Issue airing,” without involvement in the decisionmaking, encourages participants

to argue positions rather than to discuss the larger interests and issues at stake (83).

Insufficient Data—Some observers attribute the agency’s failure to engage the public in the planning process to the lack of data available on the most effective and efficient public participation techniques and methods. “Little empirical research is available to help forest managers understand public participation . . . [and] empirical data in social science literature that analyze the most appropriate methods to involve the public in resource decision-making are scarce’ (86). A survey of forest planning participants in Idaho and Washington identified five participation methods preferred by the public: 1) citizen representatives on Forest Service policymaking bodies, 2) formal public hearings, 3) surveys of citizen attitudes and opinions, 4) open public meetings, and 5) meetings held for residents of specific communities (325). However, none of these five methods were used by any of the national forests in the survey area (325). Arguably, information on public preferences could assist managers in stimulating better local public participation.

The Forest Service also lacks empirical evidence on the people who tend to participate in forest planning (86). No research has identified or examined demographic, sociological, or other characteristics of the people who participate. It is difficult to design effective involvement programs without understanding the characteristics and interests of the participants. “Empirically derived information can help forest managers understand the public more accurately and can help participation officers design programs for the population in general and for specific groups” (86).

Resistance to Public Involvement—The mandate for more extensive public participation in the forest planning process was imposed upon an agency that had traditionally operated relatively autonomously. While agency leaders were receptive to the charge for greater public involvement, both NEPA and NFMA required major changes in the manner in which the agency operated. Field managers were not experienced or trained in integrating the public into the decisionmaking process, and little guidance was provided on how and why to accommodate the public; consequently, public participation methods have evolved slowly.

Numerous critics assert that the agency leadership does not welcome proactive participation, because it

can be counterproductive-sometimes the public wants decisions that are inappropriate, infeasible, or inconsistent with agency policies (92, 159,229,231, 277). Forest supervisors often believe that ‘proper’ decisions must be internally consistent (“loyalty to the party line’ ‘); responding to local interests is thus irresponsible, unless the decision is unequivocally faithful to agency policies and decisions (229, 231). Consequently, the agency has preferred to accept public input only on its terms and in forums it has organized (277).

Another allegation is that the Forest Service resists meaningful public participation to preserve its decisionmaking autonomy and discretion. Being responsive to the public may restrict certain agency activities or options. Forest Service employees have been described as *reluctant public servants*, who “still seem to regard their work as the strict application of natural science to the management and protection of the environment’ (159). Professional resource managers believe that their training and experience equips them to make decisions and that, by and large, the public is uninformed and too diversely opinionated for useful input and sound decisionmaking (227).

Natural resource personnel surveyed from several agencies felt that the public, even the interest groups, had little knowledge of land and resource management issues (237). Thus, managers work to ‘educate’ the public and change people’s minds about the agency policies and practices rather than explore alternatives to satisfy the public’s goals and objectives. “Information programs are undertaken more from a desire to shape public opinion than to incorporate public opinion into policy decisions’ (159). The Forest Service typically develops and defines public issues internally and then invites the public to review and comment (77). This approach perpetuates the notion that public participation is nothing more than a forum in which to ‘inform and educate’ the public.

This attitude impedes listening to the public. The Forest Service employs many professionals, with diverse backgrounds. However, resource expertise is also employed by State agencies, by other Federal agencies, by universities and consultants, and by many interest groups. Even the uninformed can have intelligent ideas about land and resource management. Sometimes the most innovative suggestions come from those whose thinking has not been

narrowed by professional training. Furthermore, education is most likely to occur, not when the public is told what is feasible, but when it is guided to reach its own conclusions. Finally, professionals often do not realize that their technical decisions may intrude on public values, and only public participation can define which decisions are technical and which are public (3).

The emphasis on retaining autonomy and discretion has prevented the agency from using effective models of participation in forest planning and from resolving basic issues such as the identity of the publics, the roles of the agency and the public in the planning process, and the degree of influence the public should exercise over final decisions (231). The unwillingness to allow the public to play a greater role in planning and decisionmaking has stifled the agency’s capacity to learn-to carefully evaluate and reflect on past programs and policy commitments, to examine a wider range of alternatives to proposed actions, and to respond to changing public values and priorities (203, 231).

Inflexible Conditions—The 1970 Belle Report found that Forest Service managers in the field lacked the flexibility needed to respond effectively to public needs:

In order to maximize local community support those persons in the Forest Service most intimately associated with local community interests [i.e., the district rangers] must be free to act . . . yet his [sic] authority is severely limited and all too frequently his decisions and answers are bureaucratically determined . . . He is therefore denied the flexibility to meet issues and problems on an ad hoc basis. It might also be said that his decisions are always predetermined, at least with respect to major issues and problems (244).

Furthermore, the Forest Service does not reward managers or other employees for accommodating the public:

Unless there is freedom to solve resource related problems on a situational basis, there are no grounds for public participation . . . [but] public participation is the key in determining the particular expression of public interest to particular problems (29).

Evidence suggests that the inflexibility described in the Belle Report 20 years ago remains. Forest supervisors and district rangers are often constrained from responding to public issues by a host of factors beyond their control. For example, allocated na-

tional goals and objectives, set in the RPA Program and through annual budgets, frequently contradict those derived at the local level, effectively preempting forest plans. Control systems—rewards, incentives, and budgets—are not linked to the plans. Local forums designed to encourage deliberation and debate among the most interested publics are for naught, if they are systematically overruled by national policies that are insensitive to local concerns.

Even agency employees note that local planning and response to local publics are being overridden. In an open letter to the Forest Service Chief, forest supervisors from the Rocky Mountain areas stated:

The emphasis of National Forest programs does not reflect the land stewardship values embodied in forest plans, nor does it reflect the values of many Forest Service employees and the public. . . . Program/budget testimony is constrained by Administration objectives. Program shifts contained in forest plans and public opinion are not expressed . . . in annual budgets and agency policies (90).

In their recent recommendations to the Chief, these forest supervisors echoed the conclusions of the Belle Report:

Field line officers should become more effective in working with local, State and National key publics and elected leaders to build support for Forest Service programs generally, and to discourage specific earmarking (90).

Finally, the functional organization of the Forest Service employees and resource-oriented budgets impair a manager's ability to implement integrated resource plans. Many interests and employees believe that functionalism has led to funding for some resources and not for others (276, 277). It is argued that the differences between funding called for in the plans and actual appropriations prevent the agency from meeting the intent of NFMA, because the truly interdisciplinary and integrated plans cannot be implemented as planned (149).

Reducing Conflict Through Cooperation and Collaboration

The preceding discussion of problems in involving the public is not to suggest that agency efforts at public participation have been a total failure on every national forest. Despite the lack of agreed-upon criteria to evaluate the success or effectiveness of public involvement, observers cite a number of

forests that have achieved “viable plans” (330). Typically, these forests brought diverse groups together to identify issues and discuss alternatives; these informal citizen working groups and forums encouraged debate, dialogue, and deliberation among the groups and with the agency. According to several observers, success largely depended on the initiative of particular forest supervisors (or in some cases regional foresters), rather than on guidance from agency leadership (229, 231).

Typically, where a forest plan was deemed a success, there was a forest supervisor who understood the social and political environment, was able to read the forest constituency well, and personally navigated the plan through the reefs of public controversy (277).

Other forests seem to have committed themselves to meaningful participation in their final forest plans. For example, in the Ochoco National Forest:

Incorporation of public involvement into decisions being reached in the final Forest and Grasslands Plans has been an integral step in progressing from the draft documents . . . Significant steps were taken during the last four months of final document preparation to insure that direction in the final plans responded accurately to comments received on the draft. In response to public comment, new information and legislation, significant changes were made in the preferred alternative between Draft and Final. Concurrently, with the alternative modification, the Forest Service worked closely with the public in attempting to validate and/or seek ‘consent’ for the Final Plan (274).

Although this statement alone does not prove that public participation was effective on the Ochoco, it does indicate that the agency recognizes the importance of public participation in the planning process, and acknowledges that public input should be reflected in final plans and decisions.

These successes and commitments are a valuable beginning to effective involvement of the public in forest planning and decisionmaking. However, if public participation in forest planning is to fulfill the purposes of NEPA and NFMA, the Forest Service must provide consistent and organized direction for improving public participation. Effective participation is not solely a function of process and procedures; managers must have a clear idea of why the public is being consulted for particular decisions, and *how they* should consider and respond to public input.

Why Involve the Public in Forest Planning

The decisionmaking responsibilities of Federal administrative agencies, including the Forest Service, contain duties best described as “quasi-legislative” in nature. This is true whenever Congress vests substantial discretion in an agency to execute broad or general legislation, such as MUSYA. Reich (203) noted the ‘practical necessity’ of broad administrative discretion, due to the growth in the administrative state in the last 50 to 60 years. However, broad grants of administrative discretion can also be inconsistent with a ‘pluralist vision of society, because broad discretion creates “the possibility that unelected bureaucrats could impose their own ideas on the public” (203). Concern over the legitimate role of the public administrator led to the creation of the *administrative process*; “Administrators, in theory, became managers of neutral processes designed to discover optimal public policies” (203).

Agency planning activities have been characterized as falling somewhere between rulemaking and adjudication. Planning activities prior to NFMA, however, were generally considered exempt from the requirements to involve the public under the Administrative Procedures Act (APA) (208), and NFMA did not directly alter this situation. The Forest Service’s broad mandate in MUSYA necessarily requires agency managers to allocate scarce public resources, and NFMA preserves broad agency discretion in planning. Thus, the concerns about representation and agency accountability to the public have grown steadily. For example, the Bitterroot and Monongahela controversies erupted, in part, because some members of the public believed that Forest Service policies were unresponsive to and inconsistent with public demands. Increasingly over the past two decades, the public has demanded and expected the right to participate in Forest Service planning and decisionmaking.

Given the nature of Forest Service responsibilities—allocating scarce public resources through long-range, integrated resource planning and management—the call for greater public representation and involvement in agency decisions seems perfectly logical (202). While a strictly democratic approach to agency decisionmaking might be too cumbersome and costly, only public participation can assure that the allocation of forest resources *best* satisfies the ‘public’s interest.’ In 1962, Reich wrote:

... [it] can be argued that in a democracy the ‘public interest’ has no objective meaning except insofar as the people have defined it; the question cannot be what is “best” for the people, but what the people, adequately informed, decide they want.

Failure to involve interested publics in planning can lead those publics to choose other forums—such as Congress and the courts—to press their demands, and may result in final plans that cannot be implemented (49, 203, 231).

Affected and interested individuals and groups can contribute to agency decisionmaking processes in several ways. Public involvement is most commonly viewed as a means to provide agencies with greater insight into values, needs, and priorities than would be available without such input. Perhaps more importantly, however, public participation can serve to define the important decisions and relevant information for decisionmaking (92). Public involvement can lead agency managers to consider a wider range of issues and to articulate concerns more clearly (92, 203, 330).

Public participation can also serve as an “early distant warning system,” alerting agency planners and managers to resource issues that are likely to cause significant controversy in the future. With more direct insight into public values and priorities, the agency can develop plans that address new and emerging concerns and, in theory, avoid making decisions that prompt appeals and litigation and that delay implementation (49, 306). If used effectively, public input can help agency managers detect and address problems early, thereby leading to more efficient and expeditious implementation of the plans on the ground.

Finally, public participation can also improve agency accountability. Several observers argue that public involvement is needed as a representative check on agency activities (92, 203):

Administrative agencies . . . have been making decisions in a temporary political vacuum. Thus, in a sense, the present day participatory emphasis represents a restoration of the political balance in our democracy—a balance that was temporarily lost because the complexity of problems developed faster than the institutional capacity to deal with them through representative procedure (186).

Including the public in the decisionmaking processes helps to ensure that agencies accurately determine the “public interest” in a given situation

and respond appropriately; public participation can help to bridge the gap between actual public values and those perceived by the agency.

The Forest Service has a distinguished history of managing the public forests and rangelands. The agency's professionals have traditionally been educated in a variety of professional and scientific disciplines and have historically maintained virtually exclusive decisionmaking authority over the allocation and management of national forest resources (202, 208, 324). However, as noted in chapter 3, conflicts over resource use have intensified since the 1950s and the agency's statutory mandate has been broadened to include express consideration of more noncommodity values. Consequently, the number of subjective, value-laden questions confronting managers has increased significantly, limiting the ability of professionals to determine and represent the "public interest" (202, 330).

"Goodness" and "badness" in our society are collective value judgments, and land expertise is no better qualification than many others for making them (15).

While education, training, and open-mindedness are important characteristics of land and resource professionals, these characteristics do not give managers any special ability or authority to represent the values of others (15, 202, 330). To the extent interested members of the public are allowed to represent their own concerns and values, public participation can inform and guide final plans and decisions (330).

This is not to suggest that all battles over forest management can be avoided by involving the public in planning and decisionmaking; mutually satisfactory decisions simply cannot be reached on some issues (203, 330). Also, the agency should not be relieved of management authority and responsibility.

[T]he issue is not whether the public or experts are to manage, but whether, and to what degree, the experts should be made aware of, and responsive to, public opinion (202).

Forest Service managers are, ultimately, responsible for making decisions. Nonetheless, public involvement can help managers: 1) determine important public values and priorities, 2) define critical issues and the relevant information to address them, 3)

identify emerging issues and possibly avoid crises, and 4) assess how well they have fulfilled the "public interest."

Models of Effectiveness

Administrative procedures developed to promote public participation are frequently flawed, because public wants are often assumed to be predetermined and static. The primary purpose of public participation, therefore, is presumed to be gathering from the public.

People's preferences are assumed to exist apart from any process designed to discover and respond to them, that is, outside any social or political experience in defining the nature of the problem and attempting to resolve it. . . Individual preferences do not arise outside and apart from their social context, but are influenced by both the process and the substance of public policy making (203).

Public participation in Forest Service decisionmaking is valuable, not just because it offers interested groups and individuals a forum for conveying and advocating certain positions, but because it provides individuals and groups the opportunity to understand the values and preferences of others and a chance to refine their own.

Five distinct concepts of the public, each portraying the public in a different capacity, have been described (239). One concept is the public as market *players-as* individuals and their individual preferences. Another is the public as *clients—as* organized interests that "lobby" decisionmakers. The third concept is the public as *patients—as* persons or groups who are affected by policies and decisions. The public can also be viewed as *consumers-as* persons interested in using goods and services (in contrast to simply expressing their preferences). Finally, the public can be viewed as *functionaries—as* the interests of producers (owners and laborers) in making and selling resource-based goods and services.

Distinguishing among these concepts can be instructive to administrators considering how to involve the public in planning, but there are two limitations to this approach. First, various individuals and groups may fit within different concepts at different times-acting, for example, as a client on one day or in one setting, and as a consumer on another day or in another setting. In addition, all of these concepts divide individuals from one another;

none include the *political identity* of the public as a whole—the public as *citizens* (239). Nonetheless, viewing the public with these distinct concepts, portraying the public in various roles, can help decisionmakers understand the interests and motivation of the individuals and groups who participate in forest planning.

Forest Service administrators commonly use a “market imagery” model of the public (141). The public is typically viewed narrowly, as individual competing and conflicting interests, as “a gaggle of consumers shopping for policies from shelves stocked by government experts” (141). Thus, public participation emphasizes: 1) the need to “inform and educate” the public about agency programs and activities, and 2) the collection of opinions from a wide variety of interests, to be sure all views are represented. Those opinions are then weighed against resource management concepts, costs, and legal constraints, with agency decisionmakers choosing alternatives they believe best meet the expressed interests (49, 203, 330). Such an approach is generally insufficient because it emphasizes ‘representation’ rather than ‘accommodation’ of multiple interests (49, 330). The incomplete or inaccurate picture of the public, which can result from relying principally on the market imagery model, may lead agency planners to miscalculate the political feasibility of final plans and decisions.

A broader view of the public, on the other hand, can encourage mutual understanding. Public involvement in planning and decisionmaking not only offers a forum for conveying concerns and advocating positions, but also provides an opportunity to understand the values and preferences of others and a chance to build on common bonds. Open discussions and joint fact-finding can also improve understanding of the issues and conflicts underlying decisions, and thus produce insights into how and why specific decisions are made (330). Understanding is essential to building trust among the participants (the public and the agency employees). Effective public involvement can, therefore, encourage trust, and thus acceptance of the final plans and decisions (49, 203, 330). An appreciation of the significance of effective public involvement in developing implementable plans can lead agency managers to develop effective procedures to involve the public.

Open Decisionmaking or Decision Building—

An ongoing interchange among diverse interests and the agency is needed to reflect informed public opinion and/or consent in the goals and objectives for land and resource management (306). Planning and decisionmaking is a learning process, and models of participation should, therefore, encourage two-way communication, which allows the agency and the general public to learn from each other (203, 231). The agency and the public should each be viewed as contributors to the process, with different responsibilities.

Problems in public management of natural resources and environmental quality necessarily involve technical, biophysical questions—e.g., what is feasible, what results from specific practices, what various practices cost. They also involve human, socioeconomic questions, as well—e.g., what should be the goals, what values are important, what practices are acceptable (29, 306). The latter are questions of value, and “only *the public* is able to provide adequate insights into the social or human aspects” (29) (emphasis in original). Professionals have no special training for determining what is socially desirable (15). One major objective and challenge of the planning process is to balance “traditional democratic notions of citizen involvement in government with the countervailing need for technical competency and efficiency of the technocratic society” (92, 306). Thus, on those issues involving inherently value-laden questions, more politically acceptable decisions could be made through a more collective, collaborative decision-making process.

Public participation can lead to more collective planning and decisionmaking, if conducted in a manner that encourages dialogue or deliberation among the agency and interested individuals and groups (203, 231, 330). Public deliberation over public issues is the “foundation of democracy” (203).

Such deliberation can lead individuals to revise opinions (about both facts and values), alter premises, and discover common interests. Disagreements and inconsistencies encourage individuals to balance and rank their wants. The discovery that solely personal concerns are shared empowers people to act upon them (203).

Furthermore, socioeconomic considerations enter each stage of the decision process (3, 330). Thus,

public involvement should aim for sustained interaction among the agency and the interested publics throughout planning and implementation (29, 306).

More collective decisionmaking that welcomes public views and considers them seriously is “open decisionmaking” (228, 277). It encompasses many of the concepts described above—sustained interaction among the agency and public interests, honest sharing of information and opinions, and clear description of how decisions were reached. Thus, open decisionmaking effectively leads to the “public dialogue” that is the essence of collaborative decisionmaking.

Shannon (231) suggests that the Forest Service replace the vision of “decisionmaking” with “decision building.” The sole decisionmaker is replaced with a leader who helps the agency and the public jointly build acceptable decisions. Thus, the manager becomes responsible for organizing people (employees and the publics) and information, to develop the knowledge and commitment necessary to choose a course of action (52). This model of decision building recognizes that decisions require considerable effort by all interests, and that the process must be coordinated so that the “pieces fit together” (231).

Clearly, decision building, open decisionmaking, or collaborative planning would require a change in Forest Service planning and decisionmaking.³ Greater public involvement in planning and decisionmaking likely will impose greater duties and responsibilities on the managers, many of whom are already stretched to their capacity to perform their required duties. However, if people are involved—if they help build the decisions and understand why decisions are made—they will not only be more likely to accept the decision, they will also contribute to its implementation. If the agency is to get out of the courts, public participation must effectively *involve the public*.

Manager Responsibilities—A change *from* decisionmaker to decision builder does not eliminate managers’ responsibility for their decisions. However, the focus of efforts is altered. Rather than functioning as an arbiter, managers would function more like brokers. They would solicit, organize, and facilitate public participation and debate and seeking

mutually beneficial tradeoffs and compromises through discussions with and negotiated settlements among the various interests (49). Discussions of interests, as opposed to declarations of positions, lend a less adversarial and more collaborative atmosphere to the planning process (83, 330). Thus, an administrator would “function less like . . . [a] ‘neutral’ manager . . . [and more like a] teacher and guide” (203).

The professional has the responsibility to provide the public with the basic information required to understand problems and to recognize what is involved in the decisions that are made. Once the public has set *its goals*, the professional can help by applying technical skills in the attainment of those goals (29).

Agency managers can also advise on the physical, technical, and practical feasibility of whether the expectations and goals can be achieved. Managers thus lead in the debate, as well as provide technical expertise (49).

Managers reevaluating the public’s role in decisionmaking must ask three initial questions (216): 1) who should be involved in the decision process, 2) what role should they play, and 3) what degree of influence should they possess. By addressing these questions, the agency can provide its managers with direction on the purposes and objectives of public involvement, and the public with a clearer indication of how its input will be used in making final decisions. This, in turn, would provide the public with a greater incentive to become involved.

A modified organizational structure may be required to involve the public effectively. The resource-oriented structure may inhibit the open, wide-ranging discussions inherent in open decisionmaking. Furthermore, periodic reevaluation to determine whether the current structure supports successful planning and implementation is fundamental to effective strategic planning (70, 101). Thus, reexamining the roles of agency managers and the public in the decisionmaking process might prompt the agency to revise its internal structure and adopt new techniques that better promote public involvement.

Once administrators determine when and why to involve the public, they should focus on effectively promoting public participation. This requires more

Throughout the remainder of this chapter, the term **decisionmaking** is used generically to refer to making decisions, whether by **open**, collaborative, decision building or by more traditional processes.

than providing ample notice of decisions to potentially interested individuals and groups. Incentives to participate in a particular forum are also needed (231). Forest policy is made in a variety of forums—in Congress, in the Forest Service planning and appeals processes, and in the court—each open to various degrees of public involvement. Understandably, persons and groups will be more inclined to participate in the forums where they believe that their participation will have the greatest impact (80, 230).

Finding the right formula for facilitating public participation is admittedly difficult. The suitability of methods and procedures varies with the nature of the decisions, the geographical setting, and the preferences of the local publics. For example, a town meeting might work well for public involvement in parts of New England, where town meetings have a rich history, but might not work at all in other parts of the country; similarly, some individuals are uncomfortable participating in public hearings, preferring letters or personal interaction. Whatever procedures are chosen, managers should encourage the public to participate by responding clearly to their concerns, and stimulate deliberation and debate. Without incentives to participate in agency planning and decisionmaking processes, citizens and interest groups often seek out other forums, such as Congress or the courts, to influence forest policy and decisionmaking (203, 231, 330).

Forest Service Efforts To Improve Public Participation--The Forest Service has recognized the importance of public participation in national forest planning and management. The agency recently reviewed its public participation practices (among other things), and the review team made a series of recommendations to improve the effectiveness of public participation (277). They emphasized the importance of achieving consensus among interested publics and the need to train agency personnel in communication, mediation, and facilitation skills. They also noted that the traditional resource-oriented approach to funding is inhibiting integrated planning and management (276).

Pursuant to this review, the Forest Service has begun the process of revising its regulations to guide the implementation and revision of forest plans (287), and has revised its forest plan implementation training course. In the proposed revisions of the regulations, the agency has embraced the findings

and recommendations of the review and has announced its commitment to strengthen the role of public participation in agency planning and decisionmaking. Public participation processes are recognized as attempting to achieve “informed consent” among the interested publics, and the proposal thus casts the public in a more specific, direct, and active role in planning and decisionmaking. In addition, the proposed regulations encourage the practice of “conflict resolution” as a tool for public involvement. (See box 5-A.) This suggests that more collaborative public participation activities may become more commonplace.

Furthermore, observers have cited several national forests where public participation efforts are considered relatively successful, and suggest that their experiences can serve as models for other forests (149, 330). Wondolleck (330) cites seven national forests where managers have successfully established collaborative public participation processes to develop final forest plans or to avoid administrative appeals of those plans. Shands (228) described open decisionmaking as applied in North Carolina. Thus, the Forest Service has success stories to show that public involvement in national forest planning and decisionmaking can work.

Measuring the Effectiveness of Public Involvement in Forest Planning

Developing criteria by which to measure the effectiveness of public involvement is important for at least two reasons. First, measures of effectiveness can provide clearer direction to managers in the field on the goals and objectives of public involvement and on the role of the public in planning and decisions. With a clearer picture of the goals and objectives of public participation, managers could have a better idea of how to respond to public input. Second, public participants would have clearer **and** more realistic expectations of how their input would be used, providing an incentive to participate in planning and in building decisions.

Because of the intensely political nature of forest planning, measuring the effectiveness of public participation activities in forest planning and decisionmaking can be elusive (203). Neither NEPA nor NFMA contain measures by which to gauge the effectiveness of public participation efforts. There are no substantive guidelines for how the agency should consider and respond to public input. In addition, courts are generally deferential to agency

Box 5-A--Opportunities and Limitations With Alternative Dispute Resolution

Involving the public in a collaborative manner can lead to plans and decisions that are accepted by the public, but not all conflicts can be resolved, even through the best collaboration or open decisionmaking. Often, the individuals or groups who are dissatisfied with the plans or decisions will turn to administrative appeals or litigation to modify those plans or decisions. Sometimes, such disputes can be resolved through a number of techniques, collectively known as alternative dispute resolution (ADR).¹

ADR is a voluntary process involving some form of consensus building, joint problemsolving, and/or negotiation aimed at producing mutually acceptable solutions to disputes or controversies (21, 171). ADR encompasses several different types of problemsolving practices, the most common of which are negotiation, mediation, and arbitration (21, 171). Negotiation brings the parties together to bargain, compromise, or otherwise solve problems and settle disputes. Mediation involves a neutral third-party mediator or facilitator to assist the parties in resolving their differences, but the mediator has no authority to impose a settlement. Arbitration is similar to mediation, but the third-party arbitrator does have the authority to impose a settlement. A fourth type of ADR, similar in many respects to mediation, is termed joint problemsolving. This technique brings interested parties together (possibly with a neutral facilitator) to collaboratively solve problems, typically related to proposed rules, plans, or actions, and thus is especially useful in administrative rulemaking and in planning (37, 231).

The Use and Benefits of ADR

The use of ADR by State and Federal agencies is becoming more common. ADR has been used successfully to resolve disputes involving a wide variety of environmental and natural resource issues, such as land use, water resources, air quality, energy, forest land and resource planning and management, and toxics (21). Negotiated rulemaking and Superfund mediation by the U.S. Environmental Protection Agency (EPA) are perhaps the best known examples of the use of ADR by a Federal agency (21, 203, 204), and legal challenges to EPA rules have declined considerably since they began negotiated rulemaking (300). In addition, the Administrative Conference of the United States has encouraged the use of ADR in Federal rulemaking to reduce subsequent litigation (21).

The Forest Service is encouraging the use of ADR, especially mediation, for developing final forest plans and for resolving administrative appeals of plan and projects. The 1989 revision of the administrative appeal regulations encourages the use of ADR to settle appeals (36 CFR 217.12(a)), and the proposed revision of the forest planning regulations encourage conflict resolution at all stages in the forest planning process (287). Furthermore, Chief Robertson has publicly endorsed and encouraged the use of ADR by the national forests (1 16).

The Forest Service has responded to such encouragement. Bingham and DeLong (22) identified 21 national forests that had relied on ADR techniques to develop final plans or to resolve administrative appeals. Wondolleck (330) cites seven national forests where agency managers established collaborative public participation processes to develop final forest plans or to avoid administrative appeals of those plans. For example, the draft forest plan for the Monongahela National Forest in West Virginia received widespread public criticism. In anticipation of administrative and legal challenges, agency planners invited interested groups and individuals to work closely with them to redevelop plan alternatives; the result was a final plan that was substantially different than the draft plan (330). On the other six national forests--the Jefferson, the Cibola, the Chugach, the Rio Grande, the Chattahoochee/Oconee, and the Nebraska--agency managers also used ADR techniques to resolve contentious administrative appeals.

Negotiation at the planning and appeals stages can be a valuable tool for bringing diverse interests together to resolve complex disputes (21, 22, 243, 330). Bingham and DeLong (22) noted that the use of ADR techniques in forest planning can:

1. promote better communication;
2. promote more creative solutions;
3. promote more lasting decisions;
4. reduce the time to complete a plan; and
5. be used in combination with other processes.

¹Some of these techniques are also useful in decision building. This discussion, however, focuses on techniques used to resolve administrative appeals and litigation after plans have been completed or decisions made.

The **promise of ADR** in forest plan development is that voluntary negotiated agreements can reduce the likelihood of administrative or legal challenges and increase the ability of the agency to implement the plans (22, 330). Past approaches to public participation have involved the public reactively--agency managers are unable to accommodate all interests, and then must defend their plans and decisions from administrative and legal challenges by dissatisfied interests (330). A more cooperative and interactive process for plan development and implementation can engage the publics proactively--managers invite forest users and other interested groups and individuals to jointly develop a plan that is acceptable to all (330). A mediator or facilitator can coordinate the process and help parties to develop final decisions that are more defensible (and less likely to need defense) than those made without direct public consultation and collaboration (330). The **neutral third party is particularly useful when trust among the participants is low. The principle underlying ADR can serve as a foundation for building these proactive and collaborative processes (21, 22, 330).**

ADR is an additional problemsolving tool, not a substitute for more traditional processes such as litigation (5, 21, 330). ADR may not always be appropriate for the dispute or acceptable to all the parties involved. But when traditional methods are unsatisfactory, ADR is an effective alternative means by which to avoid stalemate, polarization, or protracted litigation (21, 204). In some instances, ADR is less expensive and time-consuming than more traditional mechanisms, although research has not fully documented the savings (21). Nonetheless, ADR has provided parties with a greater feeling of control over the decisions being made and a greater sense of satisfaction, and has led to consideration of a wider range of alternatives and more creative options (84). Participants generally believe that ADR increases their input to planning and decisionmaking, and believe that it is fair and efficient (21).

Using ADR in Forest Planning

To date, the choice of whether to use ADR in forest planning has generally been made regionally or locally, on a case-by-case basis (21). The use of ADR techniques is clearly authorized, but not mandated. Because ADR can resolve many disputes over national forest planning and management, Congress and the Forest Service have considered how to institutionalize ADR in forest planning, but no specific requirements have been enacted.

Clearer direction and better-defined procedures for Forest Service use of ADR could create incentives to use ADR by providing greater predictability on how public participation might affect final decisions, and might encourage the participants to initiate negotiations themselves (22). Clearer direction on the use of ADR could also benefit managers by providing clearer standards and guidelines on when and how to use ADR, whether to engage a mediator, and how to convene all the necessary parties. By building a certain measure of consistency in ADR procedures, such standards and guidelines might reduce the likelihood that the process will be misused. Clearer direction might also make enforcement of negotiated agreements easier (21).

Proponents of institutionalizing ADR stress that the objectives should be to: 1) achieve some consistency in procedures, and 2) preserve the flexibility of the agency and the parties to shape the process to meet the needs of the particular circumstances (21, 22, 330). Achieving both objectives is admittedly a difficult task. Several suggestions for institutionalizing ADR have been proposed (22):

1. The negotiation process should be voluntary. The strength of ADR lies in the parties' willingness to work cooperatively to find mutually acceptable solutions to common problems (21, 22, 330). Mandating the use of ADR would inhibit the necessary cooperation.
2. ADR is particularly useful for resolving specific disputes. The process has worked well on administrative appeals, because the interested parties are easily identifiable and the issues tend to be narrow and well-defined (22, 330). And, parties have an incentive to negotiate when a lawsuit is filed, because litigation is the final forum in which to affect the decision (22). Nonetheless, by negotiating early in the planning process, the Forest Service can discourage polarization and avoid subsequent challenges and delays to implementation (22).
3. The process should be initiated only when the disagreement is amenable to negotiation. The agency or a mediator can assess the appropriateness of convening negotiations, and identify potential issues and procedural concerns (22, 330). ADR is most useful if the parties have the flexibility to determine which issues are ripe for resolution and which should be deferred (21, 22, 330).
4. The process should include all relevant parties, who can be identified by the agency or a *mediator*. Excluding critical interests will lead to controversy later, and could result in appeals or litigation. Thus, negotiations must accommodate a balanced and fully representative body of interests (22, 330). Furthermore, under NEPA and NFMA, all interested individuals and groups have an equal right to participate in the forest planning process.

(continued on next page)

Box S-A-Opportunities and Limitations With Alternative Dispute Resolution-Continued

5. A neutral mediator is often useful. Because the agency is not neutral-it represents statutory and regulatory mandates, promotes certain organizational interests, and may have an interest in Particular outcomes (22, 50)-a mediator can be particularly useful and lend some perceived fairness to the process. A mediator may not be necessary, however, in cases where there are only a few parties, the issues are well-defined, and all the parties believe that they can reach an agreement without the aid of a mediator (22).
6. Time should be allowed for the process to work In many instances, ADR has been less costly and less time-consuming than appeals and litigation, but observers caution that ADR is not necessarily more expeditious than litigation or other decisionmaking processes. Furthermore, some stress that deadlines are important and should be established at the outset, considering the number of parties involved, the type and number of issues in question, the stage of the decisionmaking process, and any other relevant circumstances (22). To preserve flexibility, deadline extensions could be allowed (22). However, other interests may be affected by delays in decisions, and these impacts should also be considered
7. Agreements should be implemented. A potential benefit of ADR is that plans and decisions are less likely to be challenged and thus are more likely to be implemented. But since such processes are time-consuming and potentially costly, some assurance that the agreement will be implemented may be a necessary incentive to obtain cooperation (22). However, providing sufficient assurance maybe difficult, because the agency must still comply with the requirements of NEPA, NFMA, and the other laws that apply to forest planning and management.

Limitations of ADR

Not all decisions are amenable to successful resolution through negotiation and mediation. For example, if the parties' fundamental values or interests are at odds, ADR may only result in further delay (25, 330). ADR is unlikely to be successful unless the issues in dispute are well-defined. ADR can be useful for specific, narrowly defined issues, but often the most contentious issues must be resolved through other means (22, 330).

The success of ADR also depends on the participation. It maybe difficult to gather a balanced group of participants, but excluding some critical interests could lead to litigation (25, 198). Furthermore, the parties may have significant differences in expertise and/or power, leaving some at a dative disadvantage (5, 25). Those perceiving their relative disadvantage might compensate for it by abandoning the ADR process and turning to Congress or the courts where they may have relatively greater power (201). Because of these potential disadvantages, the question of whether ADR is appropriate for resolving of a particular dispute or conflict is best determined by the parties themselves.

Finally, the use of ADR does not always lead to solutions. First, ADR is not free, and only saves time and money if the dispute could not have been resolved earlier and if ADR avoids more costly and time-consuming administrative appeals and litigation. Second, while voluntary negotiated agreements are more likely to be implemented (22), they confront the same technical, financial, and administrative difficulties faced by other plans and decisions (21). Thus, ADR is not a panacea, but simply one more useful tool in the planning and management of the national forests.

decisionmakers. Discretionary decisions, such as how to balance competing public interests, are typically upheld by the courts unless the decisions are clearly "arbitrary and capricious" or the result of an "abuse of discretion." In such cases, the plans may withstand administrative appeals and legal challenges, but not satisfy the participants, who may in turn seek legislative redress for the concerns.

The 1990 internal critique identified three criteria for measuring the effectiveness of public participation: 1) whether public participation had affected the decision, 2) whether the public and the Forest Service were committed to the plan, and 3) whether appeals could be avoided through negotiation and continued intensive public participation or conflict

resolution (279). The critique also identified several reasons for improving the effectiveness of public participation in the planning process (276):

1. involving more people leads to better, more acceptable decisions;
2. challenges to the decisions can be avoided through informed consent;
3. challenges (appeals or litigation) can be withdrawn by resolving the dispute;
4. decisions are more defensible if the public has been involved; and
5. trust and credibility lead to general commitment to the decision, and eliminate "fatal" challenges to implementation.

Two assumptions are implicit in these statements. First, public participation is assumed to be more effective if all or most of the interested and affected groups and individuals are involved. This traditional Forest Service view is a useful but incomplete view of the public's role in planning and decisionmaking. The second assumption is that public participation is primarily intended to achieve the "informed consent" of the participants to the forest plans. While the latter assumption casts the public in a more collaborative role, the former still emphasizes representation over accommodation.

Wondolleck (330) identified five factors leading to successful public participation: 1) building trust among participants; 2) promoting understanding of the issues and conflicts and of the reasons for underlying decisions; 3) incorporating conflicting values; 4) providing opportunities for joint fact-finding; and 5) encouraging cooperation and collaboration. These factors could provide a tangible framework with which to measure the success of public participation activities for particular decisions. Another observer suggests that plan and decision effectiveness should be measured by political feasibility, social acceptability, economic justifiability, environmental efficacy, and the technical competency to implement the decisions made (231).

Even the best and most effective public involvement cannot resolve all conflicts. Individuals and groups will continue to differ over the important values to be produced through national forest management. Effective involvement can build trust and promote understanding, but some participants will be unwilling to compromise or accommodate other values.

Such disputes necessarily lead to alternative means—traditionally, administrative appeals and litigation—for solutions. The Forest Service has increasingly used a variety of techniques, collectively known as alternative dispute resolution (ADR), to settle disputes outside these traditional avenues. (See box 5-A.) ADR is not a substitute for decision building or collaborative planning, but can be an effective tool for some challenges, because the issues and participants tend to be more narrowly defined in administrative appeals and litigation.

ADMINISTRATIVE APPEALS AND LITIGATION

In recent years, Members of Congress have expressed concern that the number of administrative and legal challenges to forest plans and activities indicate that forest planning has "broken down" (262, 263). Congress has been especially concerned over the effects on forest plan implementation—particularly on timber sales-of delays caused by appeals and litigation. These concerns have prompted calls to modify or streamline the systems for administrative and judicial review. In an effort to expedite the administrative appeals process, the Forest Service revised its appeals regulations in 1989. Others contend that delays because of appeals and lawsuits do not result from flaws in the systems, but rather are symptoms of interest in and concerns over national forest planning and management. Proponents of this argument believe that problems should be corrected: 1) through improved agency compliance with NEPA and NFMA, 2) through improved public involvement during plan development and implementation, and 3) through an end to congressional management direction (output targets and resource-specific funding) in annual appropriations.

This discussion examines the role of administrative appeals and litigation in forest planning and implementation, assesses the nature of problems attributed to appeals and litigation, and considers options for reform. Administrative appeals will be discussed separately from litigation, as the problems associated with each are different in nature.

Administrative Appeals

The Forest Service is not required by law to offer an administrative appeals process. Nonetheless, the agency has maintained various systems for administrative appeals of agency decisions since 1906(16). The systems have varied in formality and complexity; some processes have had standing requirements and have confined the right to appeal to those in a contractual relationship with the agency, while others have permitted any person having a grievance with particular agency decisions to request additional administrative review (155).

The Current Administrative Appeals System

The Forest Service currently has three sets of procedures for administrative reviews of agency plans and decisions. One set, 36CFR251.82, is used only for reviews of occupancy and use decisions, and is available only for the affected party. A second set, 36 CFR 211.16, provides an expedited system for requesting review of rehabilitation decisions following natural catastrophes, such as salvage sales following forest fires. However, most appeals, and concerns over the appeals process, are under the regulations, 36 CFR 217, governing the appeal of NEPA-related decisions (including forest plans and activities under those plans). The following discussion focuses solely on this appeals process.

The current system of administrative appeals within the Forest Service is relatively informal in nature. In contrast to the appeals systems in some Federal agencies, the Forest Service appeals process is not adjudicatory in nature—no administrative law judges or independent hearing officers review administrative decisions. The Forest Service's process is better characterized as an extension of public participation under NEPA and NFMA than as an adjudicatory process, because any interested party can file an administrative appeal on a forest plan or a NEPA-based decision on a specific project or activity that flows from a plan.

Appeals are made to reviewing officers, the direct supervisors of the decisionmakers. A second level of review can be requested, but the second review is discretionary, not a right of the appellant. For example, since forest plans must be approved by regional foresters, appeals challenging those plans are reviewed by the Chief of the Forest Service, with discretionary review by the Secretary of Agriculture. Likewise, decisions made by the forest supervisors are appealable to the regional forester, with discretionary review by the Chief. The reviewing officers can fully or partially affirm or reverse the original decisions, or may, under certain circumstances, dismiss appeals without review. The reviewing officers may also request that the deciding officer attempt to resolve or settle the issues in dispute with the appellants. (See box 5-A.)

Not all decisions are subject to review under 36 CFR 217. Only decisions recorded in a NEPA document (i.e., a Record of Decision, a Decision Notice, or a Decision Memo, and the related environmental disclosures) are subject to appeal

under these regulations. Consequently, appealable decisions include timber sales, road and facility construction, forest pest management activities, measures to improve wildlife and fisheries habitat, and so forth. However, policy directives, agency handbooks, and other guidance for forest planning and management that do not require NEPA documents are not appealable. The regulations also set time limits on filing and processing appeals. However, the review period can be extended, to allow for the disagreement to be resolved through other means and for other reasons. Following a final decision on an appeal, an appellant can seek judicial review of that decision in Federal district court under the Administrative Procedures Act.

The Current Appeals Situation

Many members of the public and of Congress are concerned over the number of administrative appeals, and the time and expense involved in processing them. In 1989, the General Accounting Office (GAO) reported that the total number of administrative appeals filed annually had more than doubled between 1983 and 1988, from 584 to 1,298 (252). Much of the increase can be attributed to the completion of forest plans; in 1983, forest plan appeals accounted for less than 1 percent of the appeals, but in 1988 they accounted for more than a quarter of the total appeals of NEPA-related decisions (252). However, appeals of timber sales also increased during this period (252). The total number of new appeals fell in 1989, but rose again in 1990 and increased substantially in 1991 (although 60 percent of the increase was attributed to one decision) (111,285).

The time needed to process appeals also rose significantly during the 1980s. The average processing time increased from 201 days in 1986 to 363 days by 1988, an increase of more than 75 percent, and more than 250 percent longer than is provided in the regulations (252). Appeals of forest plans generally require more processing time than other appeals (252), and thus some of the increase in time is the result of the increase in appeals of plans. In addition, the backlog of unresolved appeals has increased from 64 at the end of 1983 to 830 at the end of 1988, with forest plan appeals accounting for 44 percent of the backlogs in 1988, and to more than 1440 at the end of 1990 (111).

The cost of handling and processing appeals has also generally risen. The Forest Service reports that

servicewide costs for appeals (excluding costs incurred by the U.S. Department of Agriculture's Office of General Counsel) increased from approximately \$2.8 million in 1983 to \$10.1 million in 1988 (285, 300). Cost data for fiscal years 1989 and 1990 indicate that annual costs have decreased to approximately \$7.8 million (285).

The increases in appeals appear to be due both to concerns over the emerging forest plans and to increasing concerns over timber sales in some areas. Although many appeals are described as harassment, especially when many timber sales on a forest are appealed, most appeals appear to be justified, because 90 percent have been reversed or remanded (300), with additional appeals reversed or remanded at the second-level, discretionary review (285). The majority of the reversals was because of NEPA-related problems (1 16).

The increase in processing times appears to be due to problems in complying with the appeals system, rather than with the system itself. GAO (252) found that, nationwide, the Forest Service was responsible for 94 percent of the total time overruns beyond the basic time provided for appeals in the regulations.

These problems have resulted primarily from the difficulties in responding to the growing number of sophisticated challenges to the environmental analyses by the Forest Service (252). Because NEPA has largely been interpreted through litigation, the Forest Service often must incorporate new standards and requirements into its pending appeal decisions, causing added delays. Nevertheless, the Congressional Research Service (CRS) echoed GAO's finding that the appeals system is not necessarily a problem in and of itself (300).

The administrative appeals process has been a valuable tool for the Forest Service. It has provided an internal mechanism for clarifying the legal requirements and for testing the soundness of decisions and the appropriateness of current policies and procedures (155). In addition, the appeals process can lead to better and more consistent decisions by encouraging more responsibility and accountability on the part of deciding officers (1 16). Through appeals decisions, the agency has clarified: 1) what decisions are to be made in forest plans, 2) the relationship between decisions made in the plans and those made during implementation, and 3) the standards for the environmental analyses required by NEPA (155). Appeals have also helped the agency

establish uniform policies to address various issues, such as the nontimber benefits of below-cost sales; the adequacy of a plan's timber demand analysis; and the appropriateness of the plan's allowable sale quantity (155). Other issues addressed in administrative appeals have included guidance on management indicator species and biological diversity, and adequacy of resource monitoring plans (155). Because the appeals process has forced the agency to address and resolve novel and complex questions under NEPA and NFMA in this first round of plan development, revising forest plans may be easier than preparing the initial plans (155).

The Forest Service revised its appeals regulations in 1989 in response to concerns over the growing number of appeals filed against final forest plans and to the significant increase in the amount of time needed to resolve those appeals. In addition, the Forest Service has recently initiated new efforts to rectify deficiencies. In January 1991, the agency began using its revised forest plan implementation training course. The course is designed to address various shortcomings, especially compliance with the analysis and documentation requirements of NFMA and NEPA. It is too early to tell whether these changes will ameliorate the conflicts surrounding forest management, and thus reduce the number of appeals and/or their impacts.

Implications and Consequences of Appeals

The implications of the growing number of appeals, and of the delays and costs they cause, are not precisely known. Some speculate that the delays in processing significantly reduce the amount of timber available for sale, causing serious economic impacts for local communities (252). Consequences for other resource uses and values are far less well-known, and are rarely debated, but should not be ignored. Nevertheless, the following discussion focuses on the impact of appeals on timber available for sale.

The available evidence does not support the assertion that administrative appeals have significantly decreased the volume of timber available for sale. GAO (252) concluded that, although impacts on timber availability vary by region, appeals of forest plans and activities have not significantly affected or delayed timber sale volume nationwide. In fiscal years 1986 and 1987, appeals were filed on only 6 percent of the total volume of timber offered for sale, and less than 1 percent of the total offered

volume was **delayed by those appeals (252)**. Furthermore, **less than 6 percent of timber volume sold in each region, and less than 2 percent nationally, was delayed in fiscal year 1988 (295)**. However, **these data exclude appeals resolved relatively quickly (in the same year they were filed) and meritorious appeals, where the agency's decision was determined to be inadequate**. Finally, **an analysis of the Forest Service timber program from 1969 through 1988 showed no significant decline in timber availability that could be attributed to administrative appeals (301)**.

Nonetheless, administrative appeals can affect the timber sale program. The agency attempts to maintain an inventory or "pipeline" of approved timber sales that are available as substitutes for appealed sales, thus preventing serious gaps in timber flow. But, for a number of reasons, the inventory of planned timber sales with approved environmental analyses has declined in recent years (252, 300). According to the Forest Service, this "pipeline" problem has been more acute in some regions—such as the Northern Region (Montana and northern Idaho)—than in others (252). Appeals, in conjunction with inadequate environmental analyses and a reduction in the number of timber sales for which the requisite environmental analyses have been prepared, can reduce the flow of timber from the national forests (301). Furthermore, shortcomings in the agency timber program data may disguise the real impacts of appeals on timber availability.

Alternatives to Appealing Plans and Activities

Some have attributed the growth in the number of appeals and in the processing time to the current system of administrative appeals. It is argued that, because any activity can be appealed, the appeals system is used to force a reevaluation of forest plan decisions, and to harass authorized uses of the national forests. However, only NEPA-related decisions can be appealed, and thus policy directives and guidelines that can affect forest planning and management are not subject to appeals.

Some have suggested replacing the current Forest Service appeals process. One proposal is to establish a more formal, quasi-judicial appeals process, similar to that of the Interior Board of Land Appeals in the Department of the Interior. This system relies on an administrative law judge (or an independent hearing officer) to review the record on appeal, and arbitrate the solution (300). Another suggestion is to

create a "super board" to hear appeals of decisions made by the Forest Service, the Bureau of Land Management, and possibly other land managing agencies, such as the National Park Service and U.S. Fish and Wildlife Service (300).

More typical proposals would change the current system of administrative appeals practiced by the Forest Service, rather than revise it wholesale (262). One suggestion is to require appellants to have participated in the planning process or to demonstrate that they would be directly harmed by the decision. Another proposal, to assure that the appellant is serious about the challenge, is to require a filing fee for appeals. A third approach is to shorten the time allowed for filing and processing, thereby reducing the delays caused by appeals. Another suggestion is to restrict appeals of activities to consistency with the plans, although how this fits with tiering of site-specific activity documentation and programmatic forest plans is unclear. (See ch. 4.) A fifth recommendation is to require negotiations before the reviewing officer examines the appeal. This might eliminate some appeals, particularly those resulting from misunderstandings, but is inconsistent with successful use of alternative dispute resolution. (See box 5-A.) In general, these proposals restrict access and/or expedite the process, and therefore attempt to eliminate "unnecessary" appeals and accelerate implementation of forest plans and activities.

Changing the current administrative appeals system might not yield the desired results, however. The GAO findings suggest that the problems are not principally due to the system; the delays and time overruns were mostly attributable to the agency's inability to meet the deadlines (252). Furthermore, the agency reversed or modified its decisions in 40 percent of the timber sale appeals resolved in Washington, Oregon, Montana, and northern Idaho between 1985 and 1988 (252). Thus, appeals have apparently played a significant role in exposing inadequate environmental analyses and documentation. If the current system is modified to reduce access or expedite processing, it may simply lead to more litigation by dissatisfied parties.

The Forest Service revised the appeals regulations in 1989 to expedite appeals processing. The impact of the changes is not yet fully known, but the second-level "discretionary review procedure does not appear to be working" (285). To the extent the

changes do not reduce the number or processing time of appeals, additional changes may be warranted. The Forest Service is also encouraging the use of alternative dispute resolution to avoid and/or settle appeals (116). Such a technique can be effective for settling disputes, and thus is a valuable alternative to administrative and legal challenges. More effective public participation and more widespread use of alternative dispute resolution in planning and implementation may result in fewer appeals of plans and projects.

Ultimately, forest planning and implementation involve a host of complex political and technical questions. Administrative appeals constitute a valuable check on Forest Service decisionmaking by providing additional administrative review of sometimes highly controversial plans and projects. Appeals provide the public with a final administrative opportunity to question the appropriateness of decisions on land use, resource allocation, and standards and guidelines. As NEPA has been interpreted by the courts, administrative appeals have helped the agency to assure that decisions are modified when necessary to comply with NEPA requirements. Appeals have also encouraged consistency and accountability throughout the National Forest System. Thus, many of the features of the current system should be retained. Modifications could expedite the process while preserving the general purposes and structure of the system. Solutions that focus on correcting management problems responsible for some of the appeals can improve plan implementation.

Litigation of Plans and Activities

Many in Congress are also concerned that litigation of forest plans and activities has led to intolerable delays in implementing those plans and activities (263). Some even suggest that appeals and litigation are often used “offensively” to **delay implementation of the plans for as long as possible (28). This section briefly examines the role of the courts in the Federal forest planning process, describes the impacts of litigation on forest plan implementation, and discusses some options for reform.**

Judicial Review

Neither NEPA nor NFMA expressly provide for judicial review of forest plans and activities. Nonetheless, since the passage of these two laws, the courts have played an increasingly significant role in forest planning and implementation.⁴ Federal courts exercise jurisdiction over forest planning under the Administrative Procedures Act.⁵ APA authorizes Federal courts to review Federal agency actions, except when a statute precludes judicial review of a particular action or commits the decision to agency discretion. Standing requirements are fairly broad: any person “suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof” (5 U.S.C. 702). The law once required persons to demonstrate pecuniary damage to obtain judicial review of agency actions, but such direct financial interests are no longer necessary.

The 1897 Organic Act and MUSYA vested significant management authority in the Forest Service, with relatively few constraints on the agency’s discretion to allocate resources or to regulate the occupancy and use of the national forests. Consequently, prior to NEPA and NFMA, most agency actions were essentially immune from close judicial review (324). However, NEPA and NFMA contain a number of procedural and substantive requirements for forest planning and management, and thus subject agency decisions to closer scrutiny by the courts. In addition, several environmental laws, including the Endangered Species Act, contain provisions authorizing private citizens to challenge agency actions in court.

Courts can prohibit the Forest Service from implementing a plan or pursuing a particular action if the agency fails to comply with procedural or substantive requirements of NEPA and NFMA. However, except for clear violations of statutory procedure or substance, courts remain relatively deferential to agency expertise and discretion, and will generally uphold agency actions unless they are shown to be arbitrary and capricious or an abuse of discretion. This broad deference is tempered some-

⁴NFMA was passed in an attempt to “get the Forest Service out of the courts and back in the woods,” but it **seems** not to **have** been **effective** in fulfilling this purpose.

⁵District court jurisdiction is established under the “Federal Question” statute (Act of June 25, 1948, ch. 646 (62 Stat. 930), as amended; 28 U.S.C. 1331).

what by the ‘hard look’ standard of judicial review. (See ch. 4.)

Implications and Consequences of Litigation

In contrast to the substantial and growing number of administrative appeals, relatively few Forest Service plans and activities are litigated. Of the roughly 500 forest plan appeals finalized in fiscal year 1989, only 11 ended up in Federal court (300). Furthermore, only 32 timber sales were litigated in fiscal year 1989 (300), out of about 500 timber sale appeals and 525,000 timber sales. As of March 1, 1991, 6 cases were litigating regional guides (regional direction for forest planning), 15 cases were litigating forest plans, and 7 other cases were based on NFMA (289). A total of 66 lawsuits challenging timber sales were pending as of April 17, 1991, including 21 challenges in California and 35 in Washington and Oregon (11). Thus, despite claims that the growing number of legal challenges to forest plans and activities threatens efficient and effective forest management, the existing evidence suggests that the Forest Service is rarely sued over its plans and activities.

This is not to suggest that the few lawsuits do not have substantial economic impacts, particularly in certain regions, such as the Pacific Northwest. Litigation can often be complex and lengthy, and the subsequent delays may have a significant impact on the planning and management of the national forests at any given time. For example, several lawsuits are challenging the Regional Guide Amendments on Spotted Owls, but at least two⁶ have been stayed pending resolution of the principal challenge--*Seattle Audubon Society v. Robertson, No. C89-160* (W.D. Wash.). While the exact impact of the spotted owl litigation is highly debatable, most estimates suggest that tens of thousands of timber industry jobs could be affected by the decision. On the other hand, the plaintiffs obviously believe that the litigation is needed to protect existing values associated with the old-growth forests. What is clear from this example is that, while few agency plans and decisions are litigated, such litigation can have immense consequences on agency activities over an extended period.

Possible Reforms for Judicial Review of Forest Service Plans and Decisions

In an effort to curb some of the impacts of litigation of Forest Service (and Bureau of Land Management) timber sales, Congress has enacted a number of riders to appropriations laws that preclude judicial review of certain decisions. Between 1985 and 1989, these riders have exempted a broad range of management decisions from judicial scrutiny. Riders have been used: 1) to exempt decisions to resell timber returned under the Federal Timber Contract Payment Modification Act of 1984 from judicial review; 2) to proclaim that environmental impact statements for certain timber sales, roads, and other activities “shall be treated as satisfying” the requirements of NEPA and NFMA and consequently not subject to administrative appeal or judicial review⁷; and 3) to preclude judicial review of challenges to existing plans solely because the plans are outdated or fail to incorporate new information (28). Opponents of such provisions contend that appropriations bill riders circumvent the legal direction for forest planning in NEPA and NFMA, and that solutions to forest planning and management controversies should be made only after careful review by the authorizing committees (143).

Other, more comprehensive reforms have also been suggested (300). One proposal is to legislatively encourage, or even to require, the use of alternative dispute resolution techniques to avoid or resolve administrative appeals and litigation. (See box 5-A.) A second option is to eliminate one level of judicial review; cases that have completed the administrative review process would be heard directly in Federal appeals courts, possibly with appeal directly to the U.S. Supreme Court. Another suggestion is to develop a bifurcated system, whereby certain issues (e.g., those involving activities under the plans) go to the district courts, and others (e.g., those involving forest plans) go directly to the courts of appeals. A fourth option is to establish a new Federal Lands Court to hear legal challenges to land and resource management plans and activities for both the Forest Service and other Federal land

⁶*Northwest Forest Resource Council v. Robertson, NO. 89-136FR* (D. Oregon), consolidated with *Western Washington Commercial Forest Action Committee v. U.S.F.S., No. 89-139* (D. Oregon).

⁷The Ninth Circuit Court of Appeals held that part of this rider was unconstitutional. The court recognized Congress’s general constitutional authority to exempt certain decisions from NEPA and NFMA, but held that the language of the rider was unconstitutional, because it violated the separation of powers doctrine by dictating judicial findings as to the sufficiency of the environmental impact statements.

managing agencies. The opportunities and limitations of such measures were the subjects of a 2-day workshop sponsored by the Congressional Research Service in 1989, and a more detailed analysis can be found in the CRS Report, *Appeals of Federal Land Management Plans and Activities: A Report on a CRS Research Workshop (300)*.

To the extent that plaintiffs are successful on the merits of their legal claims, and to the extent that other lawsuits filed have not generally been frivolous or otherwise unwarranted, the current system of judicial review seems to be serving its intended purpose. Citizens are allowed an opportunity to challenge the legal basis for agency plans and decisions. Thus, judicial review provides a valuable independent check on the agency's compliance with its legal requirements. At least some Members of Congress seem committed to preserving citizens' rights to judicial review of forest planning and management decisions:

The rights of our citizens to use the courts to protect our forests should not be abridged. We must find a way to protect our citizens' rights and our forests (143).

The available information suggests that the lawsuits filed against the Forest Service generally can be attributed to the agency's inadequate compliance with NEPA, NFMA, and other laws, such as the Endangered Species Act and the Clean Water Act. Improved compliance with applicable law is likely to reduce the successful legal challenges to Forest Service plans and decisions. Thus, the immediate challenge is to make the planning process work more effectively and efficiently, while preserving the basic function of the courts.

Much of the current controversy over administrative appeals and litigation has arisen because of one issue—the protection of spotted owls and old-growth forests in the Pacific Northwest. It seems premature to revise the nationwide judicial review process for forest planning and management because of one admittedly calamitous clash of values. Changing the judicial review process appears to be an attempt to resolve the substantive debate about the fate of old-growth forests, without forcing Congress to choose between forest protection and timber production. Further study and analysis of ways to expedite forest management-related litigation may be warranted. In the meantime, however, it may be more pressing to address management-

related problems that have led to agency failures to comply with planning and environmental laws.

STATE, TRIBAL, AND LOCAL GOVERNMENT PARTICIPATION

Other Federal agencies and non-Federal government organizations have additional requirements and opportunities to participate in Forest Service planning. The requirements generally revolve around State jurisdiction over water and wildlife. In addition, MUSYA and NFMA provide for Forest Service coordination with State, tribal, and local governments and other Federal agencies in the planning and management of the national forests. Finally, States and local governments have interests in national forest management, which may go beyond the traditional consideration of direct employment and income generated by national forest outputs.

State Legal Responsibilities

The legal framework governing national forest planning and management generally recognizes State responsibility for water rights and for fish and wildlife. The 1897 Organic Act specifies that:

All waters within the boundaries of forest reserves may be used . . . under the laws of the State wherein such reserves are situated . . .

State jurisdiction over national forest waters is implicit in MUSYA, since MUSYA is to be “supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897.” Furthermore, State authority over fish and wildlife is expressly provided in section 1 of MUSYA:

Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests.

Since NFMA directs that land and resource management planning for the national forests is to be consistent with MUSYA, NFMA also implicitly endorses State authority over the waters and the wildlife of the national forests.

In addition to these directions in the 1897 Organic Act and in MUSYA, the Wilderness Act and the Wild and Scenic Rivers Act of 1968 expressly provide for State jurisdiction over water rights and wild animals. Section 4(d) of the Wilderness Act specifies that:

(7) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(8) Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

The Wild and Scenic Rivers Act of 1968 provides similar language for State authority over fish and wildlife, and then provides much more explicit guidance on the relationships between State water rights and efforts to preserve the wild and scenic qualities of the designated rivers.

In addition to the traditional State authority over water rights and wild animals, the States set and enforce water and air quality standards, under the Clean Water Act and Clean Air Act, respectively. As noted in chapter 4, States are authorized to establish standards more stringent than those imposed by the Federal laws, and Federal agencies must comply with State standards. Thus, Forest Service practices must meet the State standards for water and air quality.

Most States also regulate forest practices--silvicultural techniques, the percentage of a watershed that can be clearcut within a specified period, and so forth (114). Since many of these regulations are imposed to achieve water and air quality standards, they may be applicable to national forests as well. Even if the Forest Service is not subject to State requirements, however, the Forest Service must, at a minimum, be aware of State forest practice regulations and their implication for management of national forests and adjoining lands.

Cooperation With Other Agencies

Direction for Forest Service cooperation with other government agencies was first expressed in section 3 of MUSYA:

... the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

RPA reinforced this direction in its requirement to prepare land and resource management plans for units of the National Forest System; such plans are to be:

... coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

Section 12 of NFMA adds that "information and data available from other Federal, State, and private organizations" shall be used in forest planning. And, State, tribal, and local governments can also participate in national forest planning through the public participation provisions of section 6(d),

As with public participation, agency participation and coordination is not guaranteed to influence national forest decisionmaking:

The opportunity to comment on a proposed federal action does not necessarily give state and local government any meaningful leverage over federal land use decisions (55).

Furthermore, the 1982 revision of the NFMA regulations reduced the emphasis on Forest Service cooperation with State and local governments (20).

A complicating factor in intergovernmental coordination in forest planning is the variety of State agencies with an interest in national forest management. At a minimum, States typically have one agency administering water rights and possibly enforcing water quality standards, another agency responsible for fish and wildlife, and a third agency to manage State forest lands and to regulate forest practices. These separate agencies often have different, potentially conflicting interests in national forest planning and management, and it can be quite difficult for the Forest Service to coordinate with the State when the State presents conflicting views.

The State of Oregon recognized this difficulty, and believed that a unified State response would have greater influence on the plans for the national forests in the State (20). The State was fortunate to be able to assemble a small team of experienced experts, with ready access to the Governor's office, to achieve a unified response. In addition, the State Forestry Department and Oregon State University had already begun a cooperative assessment of the timber resources on all timberlands in the State. Subsequently, the Governor and the Oregon congressional delegation were able to forge a short-term legislative compromise between timber interests and environmentalists for continuing timber sales despite the ongoing litigation over spotted owl protection. Finally, the ongoing concern about spotted owl protection had led to a study of timber management

options for all landowners. The State's wealth of new data on timber resources and timber management, and its ability to reach a compromise among interests, greatly contributed to its success in influencing the forest plans for the national forests in Oregon (20).

While the State of Oregon benefited from unique circumstances, its experience illustrates that a unified response among State agencies provides clearer input, and thus makes a direct Forest Service response more feasible. If other States wish to influence national forest planning, coordinating the positions of the various agencies and providing a harmonious stance may be necessary.

Local Concerns

State and local governments also have direct interests in the management of the national forests. First, the Forest Service returns 25 percent of its gross revenues to the States for use on schools and roads in the counties where the national forests are located. Thus, State and especially local governments have a financial interest in national forest management that generates revenues. (For a more thorough discussion of this concern, see ch. 8.)

In addition, elected State and local officials are representatives of the people, and thus are surrogates for the public acting collectively. The public as citizens is an important role (231, 239), but the Forest Service typically views the public as individual interests. State and local government participation in forest planning provides one means for including this important aspect of the public's interests. (See ch. 5.)

Finally, State and local governments have a stake in maintaining the employment and income of their citizens. Activities in the national forests support local jobs, and debate over community stability reflects this interest. (Again, see ch. 8.)

The Federal Government may also have an interest in maintaining the economic stability of localities. Under the "fabric-of-government" theory, the multiple levels of government work cooperatively to support the interests at all levels (312). This position is based on the vision that local and regional economic health and vigor is in the national interest, and the Federal Government is, therefore, a partner in influencing State and local economies. If

one accepts the fabric-of-government theory, then the Forest Service has a direct interest in cooperating with State and local governments to maintain their economies. (The alternative view, the "assignment-of-powers" theory, asserts that each level of government has separate and distinct responsibilities. State and local economies are viewed as State and local responsibilities; national interests pertain only to benefits for all Americans or at least multi-State regions.)

The joint management of forest ecosystems also generates State and local interest in national forest management. National forests are part of these ecosystems, and their management should be coordinated with the management of other forested lands to protect ecosystem health and productivity. Some ecosystem requirements, such as wildlife migration corridors, particularly need some form of coordination among landowners.

States not only have an interest in coordinated forest management, they also have some responsibility for, and some expertise in, such management (20). As discussed above, many States regulate forest practices on at least State and private lands. Many States also have statewide forest resource planning programs, funded in part through the Forest Service's Cooperative Forestry Assistance Program (in the State and Private Forestry Branch of the agency) (102, 103). These State forestry activities—forestry regulation and statewide resource planning—implicitly recognize that forests are ecosystems. Therefore, States have some particular expertise and interest in coordinating forest management, and such expertise should be given a full hearing in national forest planning and management.

SUMMARY AND CONCLUSIONS

Public participation is essential to developing forest plans that the public will accept as appropriate management direction for the national forests. Public participation operates at several stages of planning and implementation: during the development and revision of forest plans; in implementing those plans; and when requesting administrative and/or judicial review of agency plans and decisions. Finally, the public participates through the coordination of Forest Service planning and decisionmaking with State, tribal, and local governments.

Public Participation

Public participation in Forest Service planning and decisionmaking is required bylaw. The Multiple-Use Sustained-Yield Act of 1960 (MUSYA) requires that management ‘best meet the needs of the American people,’ which can only be determined by identifying the public’s values and desires. The National Environmental Policy Act of 1969 (NEPA) requires agencies to inform the public about the possible environmental impacts of their decisions, including the public as a participant in decisionmaking rather than as a mere recipient of information.

Congress reinforced the public’s right to participate in Forest Service planning and decisionmaking in the National Forest Management Act of 1976 (NFMA). Senator Humphrey, the chief sponsor, described the public as advisors to agency planners and decisionmakers. NFMA also authorized the use of advisory boards in planning and managing the national forests, but the Forest Service has not used this authority.

Although the Forest Service has long included the public in its planning and decisionmaking, the public remains critical of agency efforts. Recent studies have shown that the public does not understand why the agency makes the decisions it does, and believes it has little influence on the agency. Thus, the public perceives that the Forest Service has failed in its public participation responsibilities.

One explanation for the perceived failure is that the Forest Service model of participation is based on due *process*, on receiving full and equal representation of various views and values. Thus, each interest is forced to argue the ‘rightness’ of their position and the ‘wrongness’ of other positions. This process is divisive and promotes conflict and distrust among the interests and with the agency. It also means that ‘success’ is measured in numbers of views, participants, and opportunities. Forest Service failures are also blamed on insufficient data on who the participants are and how they prefer to participate. Others suggest that the agency resists meaningful participation because its traditional autonomy and professionalism inhibit listening to ‘nonexperts. Finally, some observers have noted that public participation is limited by the focus on resource outputs and budgeting and the lack of managerial incentives for effective participation.

The Forest Service has had numerous successes in involving the public in national forest planning. Typically, successful managers have a clear idea of why the public is to be involved—to determine what is truly in the public’s interests. Furthermore, they often understand the goals of public participation—to gain insights into the public’s values, to provide an early warning of potential problems, and to be accountable to the public. However, the Forest Service also needs a model of public involvement that recognizes the various roles of the public: as individuals, as organizations, as producers, as consumers, and as citizens. This broader view of the public can lead to open discussions and joint understanding of situations, limitations, and possibilities.

Such a model of public participation leads to a quite different approach to planning and decisionmaking. Under this approach, sometimes referred to as open decisionmaking or as decision building, the agency and the public are both contributors to decisions. Decisions are reached through dialogue and mutual deliberation, with sustained interaction to find the common ground and to build acceptable decisions. This model also suggests that, instead of balancing interests and adjudicating conflicts, Forest Service managers become leaders in organizing and facilitating debate and public analysis. This approach not only involves the public in decisionmaking, it helps the participants to understand why certain decisions are reached. There is no simple formula or technique for open decisionmaking or decision building. The best means of involving the diverse publics will vary regionally and among interests.

The Forest Service has recognized the need for criteria of successful participation, and has suggested that success includes decisions affected by the public, public and agency commitment to implementing the plan, and fewer administrative appeals. Others have suggested that key elements of success are mutual trust and understanding.

It will not always be possible to develop plans and decisions that are acceptable to all parties. Alternative dispute resolution techniques can help to resolve some differences. Such techniques, used in conjunction with open decisionmaking/decision building, could reduce the conflicts over national forest management. Nonetheless, the traditional techniques of administrative appeals and litigation will still be

used occasionally, when differences cannot be resolved satisfactorily.

Appeals and [litigation]

Many members of the public and of Congress believe that administrative appeals and litigation are preventing the implementation of national forest plans, and that this indicates the failure of the planning system. The number of administrative appeals—internal, relatively informal reviews at the request of a member of the public—more than doubled between 1983 and 1988, and the average processing time also increased substantially. Much of the increase can be directly attributed to the completion of forest plans, although the number of timber sales being appealed has also risen, and the Forest Service has not been meeting the regulatory deadlines for processing appeals. However, the appeals system has been useful for helping the agency to cope with evolving standards for meeting the requirements of NEPA and NFMA.

The increasing number and processing time of appeals has been described as a problem, particularly by delaying the sale and harvest of timber. Although evidence of significant delays is lacking, the aggregate data available could be masking serious local problems.

Various proposals have been offered to address the apparent problems of Forest Service administrative appeals. Some would overhaul the system completely, replacing the current, informal system with a more structured, formal system akin to that of the Department of the Interior's Board of Land Appeals. Most suggestions would alter the current system less radically, typically either by restricting access to appeals through standing requirements or a filing fee, or by expediting processing through shorter deadlines or required negotiations. However, such options could be counterproductive, if the result is fewer appeals but more litigation.

Litigation—judicial review of agency decisions—can lead courts to prevent the agency from implementing plans or pursuing actions, if the decision-making did not comply with the procedural and substantive requirements of NEPA and NFMA. Relatively few administrative appeals of Forest Service plans or decisions actually lead to litigation. Currently, only 28 cases are pending over NFMA

decisions, and only 66 cases are pending over timber sales. Nonetheless, few lawsuits can have immense consequences. The largest and best known example is the case over the spotted owl supplement to the Pacific Northwest Regional Guide, for NFMA planning in Washington and Oregon. This case could affect tens of thousands of jobs in the Pacific Northwest, but the plaintiffs assert that the guide could allow the extinction of the owl and the elimination of other values associated with the old-growth forests the owls inhabit.

Some problems resulting from litigation of Forest Service planning and decisionmaking have been addressed with riders on the annual Forest Service appropriations to preclude judicial review of specific decisions or on certain bases. Such riders have become increasingly controversial, as the authorizing committees recognize the increasing use of appropriations to establish management direction for the national forests. Other reforms have been suggested, such as requiring the use of alternative dispute resolution techniques, eliminating one level of judicial review, developing a bifurcated system (with some decisions reviewed by district courts and others reviewed initially by appellate courts), or establishing a new Federal Lands Court.

However, one must be careful in revising the current system of judicial review for Forest Service planning and decisionmaking. Successful litigation suggests that the Forest Service is not complying with its legal requirements. If the requirements cannot be met, Congress should consider changing the laws, not simply preventing the laws from being enforced. Furthermore, much of the current controversy is over the spotted owl. Some have suggested that Congress is attempting to avoid the appearance of choosing sides in the debate, and is attempting to resolve the substantive issue by altering the system of judicial review. It may be inappropriate to change the system because of one, albeit monumental, lawsuit.

State and Local Government Participation

State, tribal, and local governments have particular interests in national forest planning and management. States have jurisdiction over and responsibility for certain resources, such as water rights and fish and wildlife management, and the laws governing

Forest Service planning and decisionmaking preserve these State rights. Furthermore, many States regulate forest management practices, at least on State and private lands. Thus, cooperation between the Forest Service and the relevant State agencies is an important part of national forest planning.

MUSYA and NFMA require the Forest Service to cooperate with State and other government agencies. However, cooperation does not provide the States or other governments with any meaningful leverage to influence plans or decisions. The State of Oregon, through a fortunate combination of people and circumstances, was relatively successful at influencing national forest plans. The State coordinated its various agencies for water quality, forest practices, fish and wildlife management, etc., and thus provided harmonized responses to the forest plans. The success of their efforts strongly suggests that con-

sistent, coordinated State responses to Forest Service plans and decisions are more likely to be influential than independent agency responses.

Finally, **State** and local governments have additional interests in maintaining their economies and in sustaining ecosystems. The fabric-of-government theory suggests that the Forest Service is a partner in supporting regional and local economies. Furthermore, State and local governments represent the public acting as citizens, and thus represent particular interests that are relevant to land and resource management planning. Finally, coordination among the various landowners is necessary to sustain ecosystems. States, through their forest practice regulations and their State forest resource planning, have expertise and knowledge to offer in coordinating management of multiple landowners.