OIL AND GAS AND THE PUBLIC LANDS:

CONFLICT AND RESOLUTION

by

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ABSTRACT

Conflict pervades decisionmaking about the use and allocation of public land resources. While conflict has always accompanied these decisions, today its consequences differ markedly from the past. The administrative decisionmaking process is not decisive. Decisions, once made, are frequently undermined through administrative appeals, lawsuits and Congressional intervention.

The current malaise in public land management can only partly be explained by the magnitude of the stakes involved. As seen in the case of oil and gas leasing and permitting in the national forest system, the process is not decisive because it is structured to determine scientifically and technically justified decisions when such decisions do not exist. Right decisions are elusive. As a result, the administrative decisionmaking process is not sufficiently informative or convincing and, moreover, is divisive.

Several factors contribute to this failure of the administrative process. The objectives of public land management have expanded since the scientific paradigm of public land management was developed during the progressive era of conservation. New policies promoting non-commercial uses of public lands have been established by Congress. These new policies reflect the increasing demands being placed upon public land resources. They legitimize recreational ends, endangered species protection, wilderness preservation, wild and scenic rivers protection and other objectives that compete with the commercial timber and mineral development objectives that originally dominated public lands policy. While the objectives have expanded, however, the administrative process has remained intact, one premised in conservation and use and adhering to the scientific paradigm.

Past prescriptions for reforming the land management process have been targeted at either curbing administrative discretion or expanding the agenda of land management agencies. Both sets of prescriptions assume that scientific land management expertise is capable of making the inevitable value judgments inherent in satisfying the complex array of land management objectives. The Forest Service, perhaps more than any other administrative agency, has responded to proposed reforms by improving public participation in its decisionmaking processes. But, these efforts have failed and the problem persists. No administrative structure exists in which disputes might be resolved and the inevitable tradeoffs might be made in a manner that satisfies all affected groups that their concerns have been accommodated as well as possible.

Past experience and research in environmental conflict management indicates that some particularly controversial public land management disputes might be resolved. A mechanism should be institutionalized that is specifically designed to recognize the legitimate claims on public land resources and resolve the disputes that arise in trying to satisfy these claims. The proposed process applies the concept of "principled negotiation" in bargaining between parties to these disputes and in building consensus on proposed decisions and rules for the Forest Service. The outcome, if successful, will be a more decisive decisionmaking process.

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CHAPTER 1

CONFLICT AND THE PUBLIC LANDS

When President Ronald Reagan appointed James Watt as his Secretary of the Interior, public lands issues were immediately thrust into the limelight. Watt's proposals were headline news in the western dailies where public lands issues customarily come first as well as in the **New York Times** and other major eastern newspapers usually little-concerned with this topic. Watt's vision of the proper use and disposal of public lands was in direct contrast to that of his immediate predecessors and, as such, seemed a startling transformation of public land policy. But, Watt's positions were hardly unusual. His western development policies and the demands of the "Sagebrush Rebels" who supported him, when combined with the counter-claims of conservationists and preservationists, mirror much of public lands history. Decisions governing how the public lands should be used have always been controversial. In fact, the conflict generated by these decisions has been so intense that at times the history of public land law development reads like the same action-packed Wild West stories that it inspired.

That public land management decisions generated conflict in the past and continue to do so today should come as no surprise. These decisions allocate the tremendous wealth of resources contained in the public lands. With so much at

stake, it should only be expected that the many groups affected by land management decisions will actively pursue decisions favorable to their interests. One critical difference sets today's conflict far apart from that of the past, however. Today the process by which decisions are made is failing; decisions, once made, are unable to withstand the inevitable attacks of dissatisfied interest groups. Decisions are consistently being undermined through administrative appeals, lawsuits and congressional action. The policies of Secretaries of the Interior and other federal officials, no matter how popular or despised, seem to have little effect on the indeterminate nature of public lands decisions.

This thesis argues that the problem posed by public lands conflict today results from an inadequate decisionmaking process, one that was established to conform to a public land management paradigm that was developed in a different time, responding to different problems and based on assumptions that no longer hold true.

The Public Land Management Paradigm

Public lands conflict today is generated by the question of who gets what: should land be allocated to wilderness or development; timber or recreation; light recreation or heavy recreation; minerals development or wildlife management? These are resource allocation questions that have very large distributional consequences. In contrast, at the turn of the century a very different question confronted policymakers.

At that time, the central question that dominated policy debates was not "who gets what?" but, much more fundamentally, "who should decide who gets what?" and, moreover, "what principles should they use in deciding?". The answer was clear to the conservationists of the progressive era and their response and activism led to the development of the public land management paradigm that persists today. Conservationists argued for rational land management based in scientific expertise:

> Since resource matters [are] basically technical in nature...technicians, rather than legislators, should deal with them. Foresters should determine the desirable annual timber cut; hydraulic engineers should establish the feasible extent of multiple-purpose river development and the specific location of reservoirs; agronomists should decide which forage areas could remain open for grazing without undue damage to water supplies. [1]

The proponents of this paradigm did not ignore the political dimensions of land management. Instead they attacked head-on the consequences of political land management and compared them with the virtues of scientific land management:

> Conflicts between competing resource users, especially, should not be dealt with through the normal processes of politics. Pressure group action, logrolling in Congress, or partisan debate could not guarantee rational and scientific decisions. Amid such jockeying for advantage with the resulting compromise, concern for efficiency would disappear. [2]

Professional land managers succeeded in their effort to supplant political decisionmaking with scientific decisionmaking. Their paradigm continues today to govern public land management.

Why Conflict Persists

This land management paradigm successfully prevailed for more than fifty years. Today, however, it frequently fails when controversial decisions must be made. Analysts have offered several reasons why land management decisions prove so controversial. Common attacks on public land agencies are based upon one of two claims: either that one resource user group or another has amassed enough power over an agency to control that agency and ensure that all decisions advance its best interests (the capture theory); [3] or, that the agency itself has amassed enough power to ignore all resource user groups and make decisions that enhance the organization's power, prestige and managerial discretion. [4]

This thesis rejects these two explanations. Rather than consciously making decisions that defy the "public's interest" because they are either captured by a single group or are serving their own political ends, public land management agencies are generally trying in good faith to make decisions that promote the "public's interest." The problem arises, though, in that recent developments in public land and natural resources law have changed the balance of power in public land management by legitimizing many land uses and, thereby, the claims of their advocates. As a result, decisions that fail to address the interests of any particular resource user group are not viable decisions; they are successfully contested as soon as they are made. The land management paradigm, premised on rational,

scientifically-based resource conservation and use, is not equally able to accommodate the more recent preservation and non-commercial objectives. The decisionmaking processes oriented towards maintaining long-term yields from the public lands are not effective at determining appropriate levels and allocations of non-commercial resources such as wilderness, wildlife, recreation and scenic amenities.

The transition from public land management policies geared toward late 19th and early 20th century conditions to new policies adjusted to late 20th century objectives calls for a revision of this public land management paradigm. Moreover, it demands reform of the administrative decisionmaking process in concert with an updated paradigm. This process must be designed to recognize and take advantage of the current balance of power among competing resource user groups and the legitimate claims of each. Failure to resolve the inevitable differences between the many affected groups only guarantees that the current impasse in decisionmaking will persist.

This thesis analyzes the current land management problem in the context of oil and gas leasing and permitting in the national forests. First, the history that gave rise to the current decisionmaking process is reviewed. Then, the administrative process is studied to determine where and why it differs in practice from the theory of land management. In so doing, the nature of public land management today is better understood and the type of policy process best suited

to this type of policy problem is identified. The analysis concludes by proposing specific administrative reforms designed to better accommodate all affected interests in public land management decisionmaking and, thereby, to reduce the now inevitable opposition to land agency decisions.

The History of Public Land Management

The federal government controls one-third of the nation's land -- 740 million acres. These lands -- the public lands -- contain tremendous and varied resources. Some of these resources are found on the surface: timber, grazing and agricultural lands, wildlife habitat, recreational and scenic amenities, and wilderness. Others lie beneath the surface: coal, potash, phosphate, sulfur, oil shale, helium, copper, and oil and gas. [6]

The resources comprising the public lands are managed by several different federal agencies. The Department of the Interior has jurisdiction over public lands through its Bureau of Land Management (398 million acres), Fish and Wildlife Service (43 million acres) and National Park Service (68 million acres). The Department of Agriculture, through the US Forest Service, controls 187.5 million acres. The remaining acreage is split amongst many different agencies including the Departments of Defense, Transportation and Energy. [7]

The history of the public lands -- their acquisition,

disposal and the gradual development of laws governing their management -- is hardly a dull story. It is a story of the taming of the "Wild West" and the forces of "good" against "evil." It is a story of a relentless struggle for power and wealth. The history leading to today's public land management process is one rift with political battles in Congress, the courts and federal agencies. It is a history of land management agencies fighting to maintain their administrative discretion and therefore their ability to make "professional" decisions.

Public land policy has evolved through three major phases. The first phase (1781-1867) covered the massive acquisition of land by the United States from the original thirteen states, through purchase from European monarchies (ie. the Louisiana Purchase and Alaska Purchase) and through transfers from Mexico. Through these acquisitions, four-fifths of the nation's land was at one time or another under the jurisdiction of the federal government. The second phase (1872-1934) saw the massive disposition of these same lands by the federal government to promote development of the new territories and generate revenues for the General Treasury. Indeed, the Treasury Department was the nation's first public land manager. The third and current phase (1891-present) is characterized by a shift from disposal of public lands to federal government retention and management. [8]

For the purposes of this study, the important time period in federal land management is the late 19th and the

early 20th centuries. During this time the federal government shifted from a policy of disposal in hopes of encouraging development to a policy of retention and conservation. It was a time when the government began to acknowledge the commercial value of these lands; a time when predominant public sentiment, influenced by scientific arguments, embraced the view that federal ownership and management could more directly serve national needs than could disposition.

The Public Lands in the Late Nineteenth Century

As the nineteenth century came to a close, it was readily apparent that the federal government's public domain disposal programs were contributing to wasteful development and lawlessness in the West. Rather than "taming" the wild west, these programs were encouraging its destruction. The government's policies had not been well-conceived and they required reassessment and revision.

Many "settlers" were using the homestead laws to acquire public lands for non-agricultural purposes. [9] With disposal programs run from Washington D.C., there was little field surveillance 2000 or more miles away in the west. Most federal employees in the General Land Office, in fact, had never even seen the lands they were disposing. Often, individuals acquired land intending only to speculate on, not develop, its resources. In 1889 alone, 55 General Land Office agents spent the equivalent of 30 man-years

investigating 3,307 cases of land fraud. Timber trespass accounted for 581 of these cases and $3-6 million in lost revenues to the federal government. [10] Timber fraud was widespread. One GLO land agent estimated that 75% of the timber claims he reviewed were fraudulent. A less pessimistic agent put the figure at 50%. [11] Illegal entry by individuals to cut timber or extract minerals was rampant.

Timber cutting practices by private lumber companies reflected the bountiful supply of forests and lack of management principles. Private companies paid considerably less than market prices for public timber. As a result, only first rate timber was taken. The still marketable second rate timber was left as waste as lumber companies moved on to the next forest. These "cut-and-run" practices created extreme fire danger and disease problems throughout the forests. In 1871, a single forest fire destroyed the town of Pestigo, Wisconsin, killing 1500 people and burning 1 million acres of forest. [12] Additionally, the failure of private companies to reseed and restore cut areas increased erosion and led to flooding in some areas. [13] These visible consequences of mismanagement eventually helped professional foresters gain support for forest retention and management and helped to institutionalize two goals of forestry management: watershed protection and fire prevention.

The western range hardly fared better than the forests. With "free" grazing lands everywhere, cattle and sheep herds rapidly multiplied. The classic "tragedy of the commons" led

to overgrazing in major areas with substandard forage replacing the original vegetation. [14] Some stockmen took the liberty to fence off portions of the range for their own use but rival stockmen would inevitably break down those barriers. [15]

The homestead programs were failing because they had been developed without an understanding of Western agricultural conditions. Instead, the programs were based upon Eastern farming needs. The West, being very arid, required much larger acreages than in the East to make workable farms. Unlike the East, irrigation programs were necessary in the West. [16] The more promising agricultural areas were also the better grazing lands. When settlers did move into an area to farm under the Homestead Laws, violence erupted between settlers and the stockmen already grazing there. [17]

Finally, it was becoming obvious that the best western forests, range and agricultural lands were rapidly being acquired by private interests and that the federal government would soon be left, literally, with "the lands nobody wanted." [18] Indeed, when the dust finally settled, what remained were the more marginal mountainous forests and the uncultivatable, substandard range and desert. To a large extent, this condition still persists; after decades of management, 83% of BLM range lands are still considered substandard for grazing purposes. [19]

Both the federal government and private land users

acknowledged the deteriorating condition of the public domain. Cries for reform came from many fronts but most forcefully from preservationists and conservationists. Preservationists, who viewed any development of some public lands as undesirable, successfully fought to have Yellowstone National Park set aside as the first national park in 1872. One historian wrote of their efforts: "The bill to establish Yellowstone succeeded after one of the most formidable, public-interest lobbying campaigns in history." [20] Preservationists continued their efforts to preserve scenic forest lands and, in 1891, were able to obtain an amendment to the General Land Law Revision Act that gave the President authority to create forest reserves by proclamation. [21] The Act contained no provisions for the management of these forests once reserved, however. The federal government continued to be preoccupied with development, not preservation, of the West. Forest Reserves and National Parks could not remedy public domain problems on a broader scale. The conservationist's alternative of scientific land management seemed to provide the solution to the land problems then plaguing the west.

The Progressive Era of Conservation

The history of the conservation movement has been well-documented by the historian Samuel P. Hays. [22] Hays rejects the traditionally accepted belief that widespread protest and unified support gave birth to the conservation

movement. Rather, he argues that "it is from the vantage point of applied science, rather than of democratic protest, that one must understand the historic role of the conservation movement":

> Conservation, above all, was a scientific movement, and its role in history arises from the implications of science and technology in modern society. Conservation leaders sprang from such fields as hydrology, forestry, agrostology, geology, and anthropology. Vigorously active in professional circles in the national capital, these leaders brought the ideals and practices of their crafts into federal resource policy. Loyalty to these professional ideals, not close association with the grass-roots public, set the tone of the Theodore Roosevelt conservation movement. Its essence was rational planning to promote efficient development and use of all natural resources. [23]

The professional orientation of the conservationists was not universally accepted nor immediately adopted by Congress. To implement the conservation ideals in their purest form would entail wresting power from the commercial interests already entrenched in the west and in turn placing it in the hands of professionals dedicated to conservation in land management. It required tremendous political support to counter the already well-supported Western interests. Congress needed reason to change. At the time, the land disposal programs, combined with tariffs and excise taxes, generated most federal revenues. [24]

Success came slowly but was facilitated by a parallel social reform movement that advocated management principles for municipal and industrial management. The nation was entering the progressive era of political reform; values towards the appropriate role of government, science and

industry in society were being transformed. Society was entering a technological age wherein scientific methods of management and decisionmaking were perceived to be a godsend that would improve living conditions, create efficiency, and overcome political corruption in urban centers as well as in the West. [25] Society was also leaving the frontier period during which rapid growth and development were both desired and rewarded. [26] Now it turned to managing the cities and the public domain and to gaining control over those who had exploited them in the past; The Sherman Anti-Trust Act was passed in 1890. Groups such as the American Civic Association, General Federation of Women's Clubs and Daughters of the American Revolution were actively pursuing similar objectives in the nation's cities, trying to wrest power from politically corrupt influences and install administrative structures based on theories of efficient municipal management, service provision and rational planning. [27] Similarly, the American city planning profession was forming. These groups gave their support to the natural resource conservation movement.

Progress in institutionalizing the conservation ideal was fostered by the respected and influential standing of its advocates. Scientists and economists, they were typically well-bred, well-educated and traveled in the same circles as the Congressmen they sought to influence. [28] The country was in a period during which knowledge and science were valued and respected. This attitude was reflected in

Congressional decisionmaking. As one historian describes it:

> By that time it had also become a practice for Congress and state legislatures to appoint special committees authorized to employ experts and carry on extensive investigations, before undertaking the business of lawmaking relative to such intricate matters as the regulation of railways, conservation of natural resources, and the provision of social security. [29]

And, obviously, those appointed to these commissions were those who had initially raised the issues and potential solutions: the professional, applied science community.

But, while these early conservationists set the scene for change, their scientific arguments alone could not effect that change. What was needed was political savvy. Success would not be achieved until the strong western opposition could be quieted or overcome; that implied compromise. Moreover, Congress needed to be convinced that land management served its already-articulated objectives in Western development and revenue generation. The conservation principles needed to be presented in a manner that conformed to already-defined objectives. New objectives could be proposed only if they did not conflict with those already established.

In the 1890's, the conservation ideal began to take hold through the dynamic personality and relentless efforts of its natural leader and spokesman: Gifford Pinchot. Pinchot was a forester by training. While educated at Yale, he gained his practical experience in Germany and France. He brought back to the United States the forestry skills perfected in

Europe and, after a brief period managing a private forest in North Carolina, was convinced that current silviculture (forest cultivation), watershed management and fire control methods could be applied to the public timberlands to prevent the widespread disease, flood and fire problems there. [30] Pinchot's objective, and one that has been the driving force behind professional land management efforts ever since, was to manage the public lands to achieve, as he put it, "the greatest good of the greatest number in the long run." [31] Conservation of resources, he argued, was the "basic material problem of mankind." [32] Conservation was the efficient, sustained use of public land resources to serve the nation for all time. Bernard Fernow, Pinchot's predecessor as Chief of the Division of Forestry, described it as the efficient use of the interest from public land resources while never having to dip into the capital. [33] Pinchot, Fernow and their colleagues were so convinced of the appropriateness of conservation principles that they referred to it as "a question of right and wrong." [34]

In 1897, Congress passed the Forest Management Act. The Forest Management Act was the first legislative mandate for land **management** rather than disposition or unmanaged reservation. It gave the Secretary of the Interior power to "make such rules and regulations and establish such services as will insure the objects of [the] reservations, namely, to regulate their occupancy and use and to preserve the forests therein from destruction." [35] Future reserves could be

established "to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." [36] The Act was a tremendous victory for Pinchot and his colleagues who argued that "legally there is no obstacle to the introduction of the most practical and approved ways of handling forest lands." [37]

But, the wheels of government turn slowly. Passage of the Forest Management Act in 1897 and Pinchot becoming Chief of the General Land Office's (GLO) Division of Forestry in 1898 did not pave the way for the widespread and unhindered application of professional forestry to the public lands. It took time for Pinchot to overcome the obstacles posed by the already existing GLO and its staff of law clerks "trained in the legal details of land disposal but thoroughly unfamiliar with forestry or the west":

> Trained as lawyers, they had no large views of the possibilities of forest management, but adhered strictly to narrow interpretations of law and emphasized formal procedures rather than results. The custom of political appointments to the General Land Office hampered the selection of technicians. Politicians considered the position of forest supervisor as a patronage plum, for example, and bitterly criticized the General Land Office when it selected trained men for the post. [38]

But, Pinchot persevered. He mobilized professional foresters and forestry associations behind him, including those in the private sector. Pinchot immediately instituted fire control programs and the selective cutting of timber in the forest reserves. His successes encouraged large private timber

corporations that had much to gain by a managed and sustained timber industry and he thereby gained their backing. For the first time, the Division of Forestry was staffed by professional foresters. [39]

Pinchot found a natural ally in Theodore Roosevelt whose efforts had helped preserve Yellowstone National Park. Roosevelt, one historian wrote, joined those political causes in which he found "personal relevance." [40] Because Roosevelt was a conservationist, the conservation ideal made historic strides during his administration. To no insignificant degree, this progress was due to Pinchot's and Roosevelt's close friendship. (This, of course, was neither the first nor the last occasion when a social problem was addressed because of the personal interest or need of a powerful political actor. [41]) Pinchot's diaries recount the many occasions when he and Roosevelt discussed conservation and strategized its implementation. [42] Pinchot's favorite account was when he, Roosevelt and the French Ambassador eluded secret service men and "stripped to the buff" to go swimming in Washington's Rock Creek Park. [43]

Pinchot and Roosevelt were fortunate to be pressing these concerns at a time when social reform was rampant and Congress was receptive to the widespread "gospel of efficiency." Roosevelt saw much to be gained by the new theories of public administration that were developing at the time. He believed that the executive office was the "direct representative of the people at large" and therefore it was

the executive's responsibility "to guide the public and Congress toward that resource policy best for the entire country." [44] Roosevelt sought a more efficient federal administration. But, he realized that "to make it so is a task of complex detail and essentially executive in its nature; probably no legislative body, no matter how wise and able, could undertake it with reasonable prospect of success." [45] He perceived administrative decisionmaking divorced from the political dealings of Congress to be the only way to achieve efficient and rational land planning. One historian has attributed Roosevelt with inverting the traditional relationship between the executive and Congress:

> Now the subdivisions of the executive had assumed the task of studying and resolving the big problems. The President was expected to give priorities, then focus Congressional attention on an issue at a time; in other words, provide and direct a rather precise legislative program. The President initiated, and Congress, if it wished, could veto. [46]

Pinchot was fortunate in Roosevelt's dedication to the conservation movement. Pinchot could suggest policies or legislation and Roosevelt would see to it that it became a reality. During the Roosevelt administration the forest reserves increased by 148 million acres to total 194.5 million acres. [47] In fact, Roosevelt's enthusiasm in establishing forest reserves caused Congress to pass a law requiring Congressional authorization for all future reservations. Roosevelt had no choice but to sign this measure into law because it was attached to a much needed appropriations bill. However, in the few hours before he was

forced to sign it, Roosevelt established sixteen new national forests. [48]

But, the Pinchot-Roosevelt alliance alone could not have imposed the dramatic change then occurring with respect to the public lands. Much of their initial success came from a willingness to accomodate western interests and thereby avoid an undoubtedly insurmountable obstacle to forest management. Some of the proposed regulation, by that time, was actually desired by western range and grazing interests. [49] By taking public timber off the market, except where needed, the forest reserves helped stabilize a severely fluctuating timber market. [50] By systematically allocating grazing permits the forest reserve range was better maintained and stockmen were no longer competing with one another for the same foraging areas at the expense of the quality of the land. [51]

Other factors contributed to western acquiescence. "Primary consideration" in all Forest Service regulations was given to accommodating local interests. [52] Settlers were still allowed to cut timber. The Forest Service "Use Book", the 142 page precursor to today's more than 20 volume Forest Service Manual, stated at the outset the basic tenet of the Forest Service:

> Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forest and range. They are patrolled and protected, at Government expense, for the benefit of the Community

and home builder. [53]

Moreover, the first eight regulations detailed in this "Use Book" regarded "preferential treatment" for local users in obtaining free use permits and generally protecting their economic interests in use of the forest resources. [54] Regulations regarding grazing in the national forests emphasized the dual intent to "contribute to the well-being of the livestock industry" and "protect the interests of the settler against outside competition." [55]

With the national forest essentially reserved until such time that its timber would be needed to meet local and national demands, the Forest Service turned its attention to assisting private companies in the management of their lands. Forest Service staff were available, at private company expense, to develop long term timber management plans for the sustained yield of timber from private forests. Other cooperative programs included tree plantings, fire prevention and fighting and disease and pest control. [56]

One of Pinchot's major efforts during this time, and one immediately adopted by Roosevelt when he became President, was to obtain the transfer of all land management responsibilities from the Department of the Interior to the Department of Agriculture. Pinchot argued that these tasks logically belonged to the Department of Agriculture because they were scientific in nature and based in the biological sciences. Moreover, he argued that "no one could cut through [the] entrenched inefficiencies" of the GLO that was

"hopelessly involved in a maze of political appointments, legalistic routine, and personal favoritism." [57] He believed that a new agency would be the only way to fully overcome the inefficiencies of the past and begin to professionally manage the public lands. He argued that all management responsibilities should be transferred because the resources themselves were interrelated and thus integrated administration would be the rational, efficient approach. Furthermore, it would overcome the problems caused by "interdepartmental conflicts which resulted when competing resource users played one agency against another for their own advantage." [58] Congress approved the transfer of the forest reserves but not the Geological Survey, General Land Office or Office of Indian Affairs to the Department of Agriculture in 1905. That Act marked the birth of the US Forest Service.

Progressive conservation was not pursued universally with the same zeal and enthusiasm exercised by Roosevelt and Pinchot. Roosevelt's successor, President William Taft, only mildly supported and sometimes opposed Pinchot's efforts. After the tremendous strides during the Roosevelt administration, progress in further institutionalizing the professional conservation ideal came slowly. But, it nonetheless did come. By that time conservation was, as one historian put it, "a common element of political rhetoric." [59] President Taft reportedly lamented after his election that, everyone was in favor of conservation, whatever it was. [60]

Preserving the Paradigm

The conservation movement was able to succeed at the turn of the century for three reasons. First, a problem existed. There was widespread fraud and abuse of the resources contained in the public domain and, moreover, no means within established administrative institutions by which the federal government could control this abuse. Second, an organized and influential profession provided a rational solution to the problem. Conservationists had a U.S. President enthusiastically supporting their efforts and they had scientific documentation for their claims. Third, the political and social climate at the time promoted efficiency and management in government, precisely what the forestry profession was advocating.

But, while these factors explain why the ideal succeeded in 1900, they do not explain why it prevails in 1980. Several factors have contributed to the continuing success of the conservation paradigm. To a large extent this success derives from the type of institution that Pinchot and his colleagues were able to set into place at the turn of the century. The Forest Service manages the national forests in a highly flexible and discretionary administrative environment. Pinchot argued for this flexibility in order to maintain "the high standard of fidelity, honesty and ability" needed to manage the forests as well as to better enable Forest Service officials to function under such diverse natural conditions. [61]

Additionally, this institutional strength came from strategic behavior on the part of Forest Service officials throughout this century. While little legislation was actually enacted following the establishment of the national forests in 1905, the agency's powers continued to expand. As one Forest Service law officer later remarked:

> The vitalizing of this power through vigorous use was the chief means whereby the Forest Service achieved results in matters of grazing, water power, the prevention of land frauds, etc. Comparatively little conservation legislation was enacted during these years. Progress came not through getting new powers ...but by using those we had. [62]

Part of these results came through stretching legislative mandates and then receiving favorable rulings when taken to court. Forest historian Harold Steen observed:

> The Forest Service strategists understood well what many refuse to accept, that courts by their decisions do make law. By picking and choosing cases -- and judges who were supporters of conservation -- ...[they] were able to build up an impressive corpus of common law to give substance to hard-won legislative battles. [63]

Moreover, in contrast to today, judges at the time frequently preferred not to rule in matters that they deemed best left to administrative expertise. By not ruling, they validated the Forest Service's action and set precedent for future agency decisions. [64]

The institution alone, however, does not account for the paradigm's strength today. The paradigm is not only a model of action premised in conservation ideals, it also represents the culture of the public forestry profession. As a result, the profession itself has reinforced it through standard-

setting for university level forestry education as well as through the esprit d'corps of the agency. Throughout this century there has been a revolving door between the Forest Service, faculty in forestry schools, and leaders in the professional forestry associations. Hence, the paradigm has become entrenched in the profession's code of ethics and standards of behavior and in Forest Service guidelines.

Additionally, the professional expertise model of decisionmaking persists because it was not really challenged until recently. Overall, the decades following establishment of the Forest Service were a rather sleepy time for the agency. It managed the forests as the early laws allowed and waited for the day when the nation would need timber from the public forests. This does not mean that the Forest Service was without threats during this period. There were several efforts to move the agency from the Department of Agriculture to the Department of the Interior. These proposals were always opposed by foresters and conservationists, fearing that it would bring about the demise of professional, non-political forestry. These efforts failed, however, when Congress or the President's attention was pulled to more pressing issues. [65] To a large extent, these threats reinforced the paradigm as it increased tensions and name-calling between the foresters in USDA and land managers in DOI. [66] It helped sustain the esprit d'corps that Pinchot believed was so critical to good forestry by pulling together Forest Service staff as a team. Without this esprit d'corps

there was no guarantee that loyalty to the agency's ideals would prevail in the field; the temptations to succumb to other pressures would be too great.

The greatest challenge to the paradigm has come recently as Congress enacted several preservationist statutes. [These statutes are discussed in detail in Chapter 4.] Congress implicitly questionned the paradigm by supplementing conservation objectives with preservation and non-commercial objectives. But, while seemingly undermining the paradigm by legitimizing and empowering preservation ideals, Congress at the same time reinforced the paradigm by delegating extensive administrative powers to the scientific experts deemed best able to make these tough decisions.

The Grazing Lands

These dramatic changes in national forest management and the concommitant success of foresters in institutionalizing their professional land management paradigm were not mirrored by land management practices for the rest of the public domain. Land managers in the General Land Office adhered to a different philosophy regarding the proper use and disposal of public lands. Unlike the USFS, they believed that the land users themselves were the best able to dictate appropriate management measures.

The fate of the public domain apart from the national forests had been debated time and again in Congress and the courts since before the turn of the century. It was not until

the Taylor Grazing Act passed in 1934 that the long period of nonmanagement and mismanagement of these lands was brought to a close. [67] The Act established grazing districts and fees for grazing in the open range. Placed in charge of the new Grazing Service in the Department of the Interior was Farrington Carpenter, a Harvard Law School graduate. Unlike Pinchot, Carpenter thought the issues to be addressed by the Grazing Service were best left to the stockmen themselves. He believed that federal officials who knew little about grazing and had never visited the Western range should not make decisions that affected grazing. He established district advisory committees comprised of local stockmen to make recommendations to the Grazing Service. Carpenter regarded "practical range experience" to be the major qualification in hiring the district graziers who would act upon advisory committee recommendations. As a result, Grazing Service field staff were dominated by ranchers and their sons, not by professionals as in the Forest Service. Carpenter's policy became known as "home rule on the range." [68] Because of Carpenter's loose control, the inferred power and independence of these advisory committees strengthened over the years. When a BLM range survey in the early 1950s determined that the allowable AUM (animal unit month) level in one district should be decreased, the advisory committee for that area was outraged:

> The thing which bothers us the most is that the [District Manager] made the cut against the advice of and contrary to the wishes of the Advisory Board.

> These men are all experienced stockmen -- all are operators -- they know the range capabilities -- they are interested, even more than the Manager, in a long time operation. Certainly it was never the intention of Congress that this one bureaucrat should override the considered judgment of the cumulated experience of the members of the Advisory Board. **The Manager and his paid personnel should furnish the information and the board should fix the policy.**
> **If this is not the theory, it should be.**
> (emphasis added) [69]

Carpenter was not the only obstacle to range management by professionally trained land managers. Because the range management profession did not become well-organized until after World War II, the Grazing Service was not able to develop the professional advocates, staff and practices as rapidly as was the Forest Service. As a result, it was not until the 1950s that professional range managers began to infiltrate the organization. [70]

In 1946, dramatic change occurred in the Grazing Service. President Truman's Reorganization Plan Number 2 merged the GLO and Grazing Service to form the Bureau of Land Management (BLM). Marion Clawson was appointed as the BLM's first Director. [71] In the stockmen's eyes, Clawson was "worse than a conservationist; he was an economist who believed the BLM could and should operate as a professional land management agency." [72] He was able to transform the BLM during his seven year tenure (1946-53) to a professional agency staffed with trained grazing managers and irrigation specialists. [73] By the early 1960's, Clawson's influence could be seen in the increasingly professional influence throughout the agency's hierarchy. Still, the influence of

local interests (particularly in setting grazing fees and allocations) as opposed to professional judgment, continues to distinguish Forest Service from BLM land management. [74]

A New Era In Public Land Management

After World War II the role of the US Forest Service also changed dramatically. Ever since the Forest Service was established in 1905 to manage the forest reserves, its role had been primarily "custodial." [75] It managed the national forests essentially as reserves and sold little timber to private companies so as not to depress timber prices. Its activities during this period have frequently been described as "90% fire fighting." [76] But, the demand for public timber supplies increased markedly during the economic expansion following the war. The demand was further increased because private companies had failed to manage their resources for a sustained yield and, as a result, private inventories were decreasing. [77]

With the postwar economy booming, private enterprise viewed the public land management agencies to be obstructing needed growth. Efforts were made during the Eisenhower administration to shift responsibility for the public domain to private interests:

> ...stockmen announced their goal of transferring public rangelands to private ownership, while the forest industry strongly advocated a prohibition against additions to the national forests and even a few schemes to transfer some federal timberlands into private ownership. [78]

But, critically, these efforts were countered by those of

environmental and preservation groups that had broader visions of the uses to which national forest lands should be dedicated:

> The Forest Service had been one of the darlings of the preservation-oriented conservationists because of its criticisms of private timber companies during the decades of private timber regulation conflicts. When the service indicated its plans to open the national forests to increased logging by those same companies, conservationists [sic] turned on the agency, opposing its timber policies and advocating increased recreational programs and preservation of wild and primitive areas. [79]

Congress attempted on many different occasions to address this growing conflict between different users of the same public lands. It passed legislation clarifying its intent regarding what were legitimate land uses and how these lands should be managed. But, as is characteristic of the legislative process, these acts were necessarily broad in scope, giving only general guidance to land management agencies. Moving from broad policy statements to implementation in site specific cases is no simple task. The land management agencies now must not only try to develop programs that satisfy the objectives of one particular act but must, in so doing, accommodate numerous other policy objectives from often conflicting legislative mandates. Consistent with the paradigm, they do so in a manner that provides the greatest, sustainable return, considering the expanded agenda of legitimate uses.

Throughout this time, the land management agencies fought against policies or programs that would diminish administrative discretion (translated to efficient,

professional planning) and allow single uses to dominate. The first major battle during this time was over the Wilderness Act of 1964. [80] This Act was viewed as a threat to the professional standards established by the Forest Service. It was not that the Forest Service did not believe in wilderness. Indeed, it had administratively designated several wilderness and primitive areas over the years. But, the foresters believed in wilderness on their terms, when it would not interfere with the efficient use of commercially valuable timber resources. This was a very different conception than that of the preservationists. The Wilderness Act, though, would take the authority to designate these areas from the Forest Service and give it to Congress. Congress would undoubtedly succumb to political pressures and be unable to make the professionally correct decisions. Thus, the gains made towards efficient and rational planning would be lost. [81]

While fighting the Wilderness Act, the Forest Service also advocated a multiple-use mandate, one that would acknowledge the many uses for which national forest lands should be managed and thus free the agency from the demands of commercial interests:

> The act has frequently been criticized as an abdication of Congressional responsibility over the national forests because it is fairly vague and allows the service to make discretionary judgments among competing uses (for example, "...with consideration being given to the relative values of the various resources..."). It should really be viewed in the context of the 1950s -- as a defense against extreme commodity user demands and as a codification of the

> Service's historic conservation mission to promote, as Pinchot put it, "the greatest good of the greatest number over the long run." [82]

With the Multiple-Use/Sustained-Yield Act [83] comfortably in hand, the Forest Service lightened its opposition to the Wilderness Act, which then passed four years later. The BLM similarly fought for a Multiple-Use mandate that it finally obtained in the Federal Land Policy and Management Act of 1976. [84]

The Wilderness Act was but the first legislative mandate to remove some Forest Service discretion over the uses to which the national forests would be put. The Wild and Scenic Rivers Act, too, gave Congress the final authority to designate rivers within this system. [85] The National Environmental Policy Act [86], Endangered Species Act [87] and National Forest Management Act [88], created additional steps in already established administrative processes and, in so doing, provided access for input into and means for questioning decisions made. More importantly, they each gave standing to appeal and sue to many non-commercial interest groups that before were unable to obtain "affected party" involvement. [This consequence, critical to the public land management problem today, is discussed more thoroughly in Chapter 3.] Gradually, the administrative discretion enjoyed by public land agencies to make decisions based upon professional judgment began to erode. By the late 1970's, power had become fairly well distributed among the many users. And, more importantly, this power was consistently

being exercised to undermine administrative decisions. This "shared power" has become "shared impotence." [89]

Professional land managers are now in a new era of public land management, one in which the conservation ideal and hence the management paradigm are no longer sufficient to maintain their discretion. As new objectives -- objectives contrary to the conservation ideal -- are being legislatively mandated, the paradigm is falling short. It is not directing land managers in how to make decisions when non-commercial uses such as wilderness preservation, wildlife protection, and recreation are given the same status as the traditional commercial forestry and mineral uses. The professional scientific management paradigm fails because it is premised on use. Professional judgment reflects conservation values, not non-commercial and preservation values. And, while land managers continue to apply their long-established decisionmaking processes designed to achieve Pinchot's "greatest good of the greatest number in the long run," their efforts are unsuccessful.

There is seldom agreement on what outcome actually represents this "greatest good." For example, an area strip-mined for coal is no longer available for recreation, timber, scenic amenities or wildlife habitat. Similarly, an area preserved as wilderness or set aside as a national park is no longer available for most commercial development activities. Which use or combination of uses provides the ideal "greatest good" is not obvious and can be argued differently depending

upon one's perspective.

Regardless, the conservation ideal remains today to be the objective sought by the public land agencies. Analyses of the Forest Service in 1960 and again in 1980, made the same observations about the Forest Service dedication to its mission: obtaining "the greatest good for the greatest number in the long run." In 1960, Herbert Kaufman commented that the competing demands confronting the US Forest Service "have given forest officers a sense of engagement in a crusade on behalf of the public interest. Their duties are elevated from routine forest management to safeguarding the economic, and perhaps even the military security of the nation....They are placed squarely in the tradition of Gifford Pinchot." [90] In 1980, Paul Culhane commented on "the amazing consistency with which ranger interviewees mentioned 'multiple-use' and Pinchot's 'the greatest good of the greatest number in the long run' as the guiding principles in their work....and helps explain the Forest Service's tenacious commitment to the principles of progressive conservationism and multiple-use." [91] The same principles now guide the BLM, too. While much power still rests with local advisory committees, the increasingly professional orientation of the agency led to its 15-year battle for multiple-use legislation, finally acquired in 1976. In 1980, Paul Culhane wrote that "the BLM has become almost indistinguishable from the [Forest] Service in one critical respect: as professionally trained resource managers, BLM

officers have a strong commitment to the principles of multiple-use management and progressive conservation." [92]

The Case of Oil and Gas and the National Forests

The phrase "public land management" is all-encompassing. Under its rubric falls watershed and wildlife management, timber sales, mineral leasing, wilderness preservation, recreation provision, and range management, to name but the obvious. To study each issue area in the context of this analysis would be both time-consuming and unnecessary. Instead, a single, representative issue area -- oil and gas leasing and permitting -- is analyzed in order to understand the problem currently posed by public land management, and thereby how the administrative decisionmaking process might be reformed.

The process under which decisions are made governing where and how oil and gas exploration and development may occur on public lands was established in 1920 as a result of the efforts of progressive conservationists. Like other public land policies at that time, the Mineral Leasing Act of 1920 [93] was a response to undesirable mineral development practices and was intended to improve conditions by regaining federal control. The oil and gas leasing and permitting programs developed by this Act were meant to overcome the then pervasive fraud, wasteful production practices, and monopoly control over these resources. The objective of this new policy was to make energy production on public lands more

orderly and efficient by controlling the rate of production. The appropriate decisionmakers were deemed to be the professionals then staffing land management agencies. [94]

When the Mineral Leasing Act was passed in 1920, Congress established a process by which the oil and gas resources contained beneath the public lands were to be leased and extracted. For more than 50 years this process did precisely that with very little problem. But, as with other public land decisions, the political environment within which oil and gas exploration and development decisionmaking occurs has changed since the 1920's. Now these decisions must be considered in concert with many other, often conflicting, natural resource objectives. Decisions that previously would have taken a month or two under the leasing process are now taking years to make. Decisions that previously would have involved only the Bureau of Land Management or the US Forest Service and a single lease applicant, now involve the Secretary of the Interior, Congress, the courts, numerous interest groups, individual citizens and even the President. But, oil and gas decisionmaking continues to be guided by the 1920 Act in the context of the land management paradigm devised during the progressive era of conservation. And, as with other issues, decisions regarding oil and gas are frequently unable to withstand the attacks levelled against them.

While the mineral leasing laws apply equally to BLM and National Forest lands, this study concentrates on US Forest

Service decisionmaking because it is over national forests that the clash between competing resource users is most intense. There was a time when the national forests were used almost exclusively for timber, watershed protection, wildlife management, agriculture, grazing and recreation. In fact, the extensive literature on the US Forest Service seldom mentions oil and gas or other minerals. [95] Suddenly, though, in the late 1970's oil and gas leasing became classified as "one of the most sensitive concerns that the Forest Service deals with." [96] It is a controversy that the **New York Times** describes as "complicated, even nasty...no matter which side wins, the outcome is likely to be irrational." [97] It is a controversy that leads a US Forest Service Supervisor to comment that "a lot of people are watching to see just how bloody we get as a result of this thing. But, whichever way we go, I'm afraid we'll end up in court." [98] It is a controversy that leads the National Audubon Society's vice-president to proclaim that "we prefer to work together in harmony...but, if war is forced upon us we will fight back!" [99] Despite repeated and varied attempts by the USFS to quell the controversy generated by oil and gas decisions, decisionmaking remains at an impasse. Why the change? Why is the process established by the Mineral Leasing Act no longer able to yield decisions that are accepted and implemented intact as they were in the past?

Simple Explanations But No Simple Solutions

There are many explanations offered for why the oil and gas controversy exists and persists. The oil and gas industry places the blame on environmentalists as well as on government regulation. It calls environmentalists "elitists" intent on "locking up" public lands for the select few at the expense of the general and needy public. [100] Government regulation is chastized for placing obstacles in the way of needed energy development.

The oil and gas industry feels "double-crossed" by a leasing process that, on the one hand, encourages the development of domestic energy resources while, with the other hand, places "one hurdle after another" before them and thus limits the exploration and development activities that can occur. The industry believes that "federal leasing means no leasing." [101] Critics refer to a "regulatory swamp" where "permitting and leasing delays...have held up drilling as much as 5 years." [102] They are frustrated with "environmental rules [that] stifled development in many areas, wilderness studies [that] discouraged activity and threatened to lock up millions of acres, and leasing delays [that] discouraged exploration in some of the best onshore areas." [103]

Environmental groups echo industry displeasure with the administrative decisionmaking process. They criticize leasing decisions that threaten established land-uses and non-

commercial resource values. Moreover, they are critical of how these decisions are being made: "Never in recent history have conservationists felt so frozen out of decisionmaking on public lands." [104] Environmentalists, in turn, point their fingers at industry. Industry, they argue, is forcing this confrontation by its efforts to develop pristine wilderness and treasured national forest areas. They believe that industry has contrived an "energy crisis" to rape and ruin America's wild lands. If left untethered, they argue, industry will develop the last remaining wild places. Environmentalists perceive it to be their responsibility to help curb this "blind progress." [105]

Given their dissatisfaction with the formal administrative decisionmaking process, the oil and gas industry and environmental groups are both encouraging the Secretary of the Interior and Congress to take action to end this impasse. The nature of the problem evades such simple solutions, though. During the Carter Administration it was thought that deferring the controversial leasing decisions would stifle the conflict. Carter's Secretary of the Interior Cecil Andrus found himself in court as a result of this inaction. [106] Under the Reagan Administration, industry believes that it has the upper hand. Robert Nanz, vice-president of Shell Oil Company, calls for the opening and development of public lands. He asserts that "Congress and the administration have the power to get all this done quickly." [107] But, Reagan's Secretary of the Interior

James Watt's management objective to "open wilderness areas" [108] has likewise landed him in court. [109] Congress has had no better luck. Its rapid action to prohibit leasing in Montana's Bob Marshall Wilderness Area led it to court. [110] Regardless of who tries to put the issue to rest or who benefits by the decision made, the outcome is predictable. Like the formal administrative process, these avenues for influencing decisionmaking seem unable to resolve the pervasive conflict and thereby make viable decisions.

Administrative Decisionmaking At An Impasse

That oil and gas exploration and development decisions generate conflict has become an undeniable fact. But, even though this conflict is acknowledged and anticipated, even the administrative decisionmaking process is unable to provide direction on how to manage and resolve it. Consequently, federal land managers are unsure about how to fulfill their responsibilities in making oil and gas exploration and development decisions. Decisionmaking has become confused, at best. For example, contrast how decisions were made in three different US Forest Service regions during 1981:

In New Mexico, lease applications were filed for the Capitan Wilderness area. The Regional Forester in the Southwestern Region viewed the leasing decision to be an insignificant one, involving no environmental impact and therefore requiring no public notification or environmental

assessment. [111] The leases were issued. But, when representatives of the Sierra Club discovered that the leases had been issued, they were outraged. The environmental organization immediately went to Congress to protest the decision. Their efforts resulted in a bill being introduced in Congress to withdraw all wilderness lands from oil and gas leasing. The Sierra Club additionally filed suit against the US Forest Service, Bureau of Land Management and Secretary of the Interior to revoke these leases. [112]

In Montana, lease applications and seismic testing permit applications were filed for the Bob Marshall Wilderness Area. The Regional Forester in the Northern Region viewed the decision to be so significant that he denied the leases and permits. [113] When the Mountain States Legal Foundation, an industry interest group, sued the US Forest Service to overturn this decision, Congress immediately invoked an emergency provision of the Federal Land Policy and Management Act of 1976 to withdraw these lands from oil and gas exploration. The Mountain States Legal Foundation then filed suit against the Congressional committee that made this decision. [114]

In Wyoming, the Rocky Mountain Region Regional Forester took what he viewed to be a more balanced approach to decisionmaking. In response to lease applications in the Washakie Wilderness Area, an environmental impact statement was developed and the conclusion reached that 87% of the area should not be leased while 13% could be leased. This balanced

decision, rather than pleasing all sides, has both industry and environmental groups dissatisfied and preparing administrative appeals and lawsuits to overturn the decision once finalized. [115]

In each case, no matter how the decision was perceived (as extremely significant or inconsequential), no matter who would benefit from the decision (environmentalists or the oil and gas industry) and no matter what type of analysis was completed (no assessment to a full environmental impact statement), the outcome was the same: conflict resulted and the debate was carried on to the courts, Congress or the administrative appeals process for further review. None of the decisions was able to accommodate the concerns of each group to their satisfaction. Hence, each decision prompted opposition rather than acceptance and support. Each case involved considerable expense to all parties involved.

Conclusion

Conflict in and of itself is not inherently bad. In fact, sometimes it is good: it keeps federal officials alert, helps define issues, promotes checks and balances in agency decisionmaking, encourages creative solutions to problems, and ensures that the many interests at stake will be heard. [115] It is not conflict, per se, that is of concern in the case of oil and gas or other public land issues. It is the outcome: the inability of administrative decisionmaking processes to resolve the inevitable conflicts and hence make

decisions that are viable. A process that is not decisive is a process ill-suited to the problem it is meant to address.

Before new policies or programs are generated or new charges levelled, the problem currently encountered in making public land management decisions must be explored and understood. In the context of oil and gas, what is the nature of the problem posed by public land management? What are the consequences of the current decisionmaking process? What can be done to improve the decisionmaking process and overcome the now inevitable and costly conflict? Only by understanding the problem currently posed by decisionmaking can the public land management paradigm be updated and administrative decisionmaking processes revised accordingly.

The next four chapters analyze the policy problem posed by public land management in the 1980's. They place one issue area -- oil and gas exploration -- under the microscope to determine why the conflict cannot be resolved by current administrative processes and what the consequences are of this failure. Chapter 2 first describes the physical oil and gas exploration and development process. What does this process involve and thus what is at stake in these decisions? What mitigation measures can be used to minimize environmental impacts? It then describes the decisionmaking process established by the Mineral Leasing Act of 1920 that is followed by public land managers in making these decisions today.

Chapter 3 analyzes the land management paradigm in

practice in the context of oil and gas leasing and permitting. It explores the political dimensions of what is undeniably a very political process. It identifies three critical pathologies that contribute to the paradigm's demise: the process is not sufficiently informative or convincing, it is divisive and it is not decisive.

Chapter 4 determines why the paradigm now fails when, for so long, it was very successful. It discusses the changing public sentiment regarding the appropriate use and management of public lands in the context of a changing social and political climate. It describes several natural resource statutes that have expanded the objectives to be satisfied in land management and why the paradigm is not able to accommodate them.

Chapter 5 asks why this mismatch between policy problem and process persists. It reviews the findings and arguments of other students of public land management who have identified this problem and proposed solutions. Moreover, it highlights USFS efforts to remedy the situation. It pinpoints where these proposed and attempted reforms have failed.

Finally, Chapter 6 takes the lessons of Chapters 3-5 and describes the elements of a process that might address these failings. It presents eight steps that the Forest Service and Secretary of Agriculture might follow to accommodate the public land management problem of the 1980's.

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[87] The Endangered Species Act of 1973, 87 Stat 884-903, 16 U.S.C. 1361.

[88] The National Forest Management Act of 1976, 90 Stat 2249, 16 U.S.C.A. (Supp. 1979).

[89] This consequence of a broadened environmental agenda is not unique to the public lands. See, for example, Alan A. Altshuler and Robert W. Curry, "The Changing Environment of Urban Development Policy -- Shared Power or Shared Impotence?", **Urban Law Annual**, 1975, pages 3-41, for an analysis of a similar problem with respect to urban transportation development.

[90] Herbert Kaufman, **The Forest Ranger: A Study in**

Administrative Behavior, Resources for the Future/Johns Hopkins University Press, Baltimore, Maryland, 1960; pages 223-224.

[91] Culhane, op. cit., page 69.

[92] Ibid., page 105; see also Clawson, op. cit., pages 52-53.

[93] The Mineral Leasing Act of 1920, 41 Stat 437, 30 U.S.C. 181.

[94] John Ise, **The United States Oil Policy**, Yale University Press, New Haven, Connecticut, 1926; Heather Noble, "Oil and Gas Leasing on Public Lands: NEPA Gets Lost in the Shuffle," **Harvard Environmental Law Review**, Vol. 6:117, 1982; and, Peffer, op. cit., pages 125-133.

[95] See, for example, Samuel Dana and Sally Fairfax, **Forest And Range Policy**, McGraw Hill, New York, second edition, 1980; Michael Frome, **The Forest Service**, Praeger, New York, 1974; Glen O. Robinson, **The Forest Service: A Study in Public Land Management**, Resources for the Future/Johns Hopkins University Press, Baltimore, 1975; and, Harold K. Steen, **The Forest Service: A History**, op. cit. Most reference in these -- the most widely referenced books on the Forest Service -- deal with hardrock mining. If the Mineral Leasing Act of 1920 is mentioned it is just in passing. The most attention given to oil and gas issues affecting the National Forests is 2 pages in the most recent review of public lands issues: Paul Culhane, **Public Lands Politics: Interest Group Influence and the Forest Service and Bureau of Land Management**, Resources for the Future/Johns Hopkins University Press, 1981.

[96] John Crowell, Assistant Secretary of the U.S. Department of Agriculture, address given to Symposium on "Public Lands and the Reagan Administration: Access to America's Natural Resources;" Denver, Colorado, November 19-20, 1981.

[97] **The New York Times**, editorial, August 25, 1981.

[98] **The New York Times**, "U.S. Faces Key Decision on Leasing Wilderness for Mineral Exploration," Sunday, August 30, 1981; quote from Randall R. Hall, Shoshone National Forest Supervisor.

[99] Brock Evans, executive vice-president, National Audubon Society, address given to Symposium on "Public Lands Under the Reagan Administration..." op. cit.

[100] Al Overton, American Mining Congress, address given to

Symposium on "Public Lands Under the Reagan Administration..." op. cit.

[101] H. Edwards, Attorney for ANACONDA, address given to Symposium on "Public Lands Under the Reagan Administration..." op. cit.

[102] **The Oil and Gas Journal**, "Outlook Cloudy for More Public Land Energy Work," November 10, 1980, page 140.

[103] Ibid.

[104] William K. Reilly, Executive Director, The Conservation Foundation, address given to Symposium on "Public Lands Under the Reagan Administration..." op. cit.

[105] "Not Blind Opposition to Progress But Opposition to Blind Progress;" Motto of The Sierra Club.

[106] Rocky Mountain Oil and Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980); and, Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980).

[107] **The Oil and Gas Journal**, "More Access to U.S. Federal Land Urged," September 29, 1980, page 58.

[108] U.S. Department of the Interior, memo dated May 7, 1981, from transcript of December 9, 1981 Public Broadcasting Service program: "James Watt's Environment."

[109] Sierra Club v. Peterson, Civil Action No. C81-1230, US District Court for the District of Columbia.

[110] Pacific Legal Foundation v. James Watt, 529 F. Supp. 982, (D. Mont. 1981).

[111] Personal interview with R. Max Peterson, Chief, U.S. Forest Service, October 13, 1982.

[112] **New England Sierran**, "Watt Should Have Looked Before He Leased," May 1982, page 5.

[113] **High Country News**, "Move to Guard Bob Marshall Puts Real Values Before Rhetoric," May 29, 1981, vol. 13, no. 11, page 14.

[114] **High Country News**, May 29, 1981, page 2, and, June 12, 1981, page 2.

[115] **Oil and Gas Exploration and Leasing Within the Washakie Wilderness**, Draft Environmental Impact Statement, US Forest Service, Rocky Mountain Region, Shoshone

National Forest, November 1981; and, personal interview with R. Max Peterson, Chief, US Forest Service, October 13, 1982.

[116] In The Functions of Social Conflict, (The Free Press of Glencoe, 1956) Lewis A. Coser describes the benefits derived from conflict to intra- and inter-group relations.

CHAPTER 2

THE OIL AND GAS LEASING AND PERMITTING PROCESS

That oil and gas exploration and development on public lands is controversial is partly a function of the physical process by which it occurs and partly a function of the administrative process by which decisions are made governing where and how this exploration and development may occur. The purpose of this chapter is to provide a context for the analysis that follows it. It describes what is involved in oil and gas exploration and development and hence what is at stake in these decisions. It provides a background understanding of the oil and gas leasing and permitting decisionmaking process and the detailed analysis that it requires. This chapter presents the decisionmaking process on paper; the following chapters illustrate it in practice with an eye towards where and why the two differ and how reform might be achieved.

The Mineral Leasing Act: A Brief History

The same conservation sentiment that led to national forest management policies at the turn of the century gave rise to the Mineral Leasing Act of 1920. [1] Consequently, the Act dealt with matters of efficiency in production and was little concerned with the implications of energy exploration and development on other valued surface resources.

Originally under the Placer Law, [2] the unique characteristics of oil and gas and other nonmetalliferous minerals (coal, potash, phosphate, potassium, sodium) were not acknowledged. By applying the same disposal and development policies to oil and gas as were applied to hardrock minerals, extensive overproduction and waste of petroleum resources resulted. In his lengthy review of federal oil policy through 1925, John Ise described this mismatch:

> The Placer Law provided that any individual might file a location on 20 acres of mineral land, or an association of eight or more persons might file on eight claims aggregating 160 acres, and by expending a certain amount each year in "assessment work" and by finally making a discovery, might secure title to the land on payment of $2.50 per acre. The law was not adapted to the exploitation of oil and gas for several reasons: in the first place, it gave prospectors no definite rights until discovery; in the second place, it required the performance of assessment work regardless of the need for oil; in the third place, it provided for the disposition of tracts too small for efficient operations, and so made it necessary for the oil operators to use dummy entrymen to get large enough tracts." [3]

Entry under the placer laws gave no legal right to the entryman until after a discovery was made. But, because of the extensive and very obvious development activity involved in oil and gas exploration, prospectors were not able to conduct operations in the clandestine manner necessary to ensure that, if a strike were made, they would be the first to file the discovery. Rumors of a potential strike would spread like wildfire with many "professional" entrymen then converging on the same area to hopefully become the lucky

first prospector to strike petroleum and thereby gain rights to the area's resources. [4]

Because of the waste, overproduction and fraud that plagued this system, President Taft announced, in September 1909, the emergency withdrawal of federal petroleum lands from all forms of entry and disposition until legislation could be enacted to promote efficient disposal practices. [5] Taft's proclamation commenced a ten year debate about the proper ownership and disposal of these lands. Two issues divided congress during this period: First, should the federal petroleum lands be transfered to the states or should they be retained in federal ownership? Second, should exploration be regulated by a leasing system that kept surface resources under federal management or by a disposal program? [6] This ten year delay in obtaining legislation, during which the withdrawn lands remained inaccessible, would likely not have been permitted had overproduction on private lands not diminished any need or desire at the time to open the public lands to production. [7]

As with the earlier land management statutes, enacting the mineral leasing laws could not have been achieved without first accommodating the powerful western interests. The act provided 37.5% of lease royalties to the states. [8] Additionally, as with the timber management practices advocated twenty years earlier by Gifford Pinchot, efficient oil and gas exploration and development practices were desired by the oil and gas industry. The inefficient and

uncertain practices promoted by the Placer Law only made private production from public lands all the more difficult. It was to the private industry's advantage to have uniform exploration and production practices and they encouraged this regulation. [9]

The Mineral Leasing Act passed in 1920. It was enacted with a single, overriding intent: to prevent waste in producing petroleum resources on the public lands. The House Committee overseeing hearings on the Act in October 1919 reported: "It is conceded that there has been waste, and this bill is predicated upon that, and its object is to avoid waste...". [10] Furthermore, the House Report on the bill presents the Act's intent as "to provide an enlightened method for the disposition of such mineral rights...reserving to it [the federal government] the right to prescribe rules and regulations against wasteful practices." [11] The Act and its amendments govern how private firms can acquire leases and permits to public land resources and then conduct exploration and development on them. Initially, regulations governed well-spacing and drilling practices to control the rate of production. Later amendments permitted regulations to limit production and to unitize pools. By requiring the unitization of single pools, the secretary of the interior gained authority to prevent the inefficient pumping of oil or gas by several lessees with leaseholds sitting atop the same pool. By requiring them to unitize -- to combine their leases to form a single production operation -- drilling

would occur at a more efficient rate, thereby promoting greater resource recovery. [12]

In enacting the mineral leasing laws, Congress gave little thought to the environmental concerns that several decades later would dominate debate. As one analyst of the mineral leasing laws commented:

> ...concern was focused on then popular matters such as the monopolistic and unfair competitive practices of the oil giants, Federal versus private ownership and development of natural resources, and conservation in the economical sense of prevention of waste. Accordingly, the legislative history depicts a law under which protection of the public interest is primarily intended to apply to economic and not environmental considerations. [13]

It was not until 1947 that one of its provisions was construed more generally to protect other natural resources besides oil or gas. At that time Interior Secretary Julius Krug used his authority to require unitization limiting the number of wells drilled in order to protect wildlife and scenic resources in Jackson Hole. This "Krug Memorandum," and Jackson Hole Stipulation enforcing it, have since been a standard attachment to all leases in the area designated by Krug. [14] In other areas, the Bureau of Land Management or US Forest Service generally condition leases in order to mitigate impacts to surface resources.

Decisionmaking Under the Mineral Leasing Act of 1920

Decisionmaking over where and how oil and gas exploration and development may occur on public lands is guided by the complex process established under the Mineral

Leasing Act. This process is complex because of the complexity of the exploration and development process itself. At the outset of exploration it is impossible to know what oil and gas resources will be found and thus what further activity, if any, may follow. Consequently, the process by which decisions are made is incremental, with more extensive federal review and involvement occurring as more extensive development is proposed.

Oil and gas exploration and development occur in a succession of four interdependent stages: **Preliminary Investigation, Exploratory Drilling, Development and Production** and, finally, **Abandonment.** Whether one stage even occurs is dependent upon the findings of that stage preceding it. Each subsequent phase is more involved and costly than the one preceding it. Each is more threatening to the environment than that preceding it. And, each requires more extensive federal involvement than that preceding it.

No single decision determines where and how oil and gas exploration and development may occur. No single federal agency controls the decisionmaking process. [See Figure 1] Before an oil and gas company or individual can conduct preliminary surveys of surface and subsurface indicators of an area's oil and gas potential, a **special use prospecting permit** must be obtained from the surface land management agency (US Forest Service or Bureau of Land Management). Before any exploratory drilling may occur, an oil and gas company or individual must obtain the lease from the Bureau

FIGURE 1

The Four Stages of Oil and Gas Exploration and Development in the National Forest System and Required Federal Approvals at Each Stage

Stage	Federal Requirements
Preliminary Investigation:	
Geophysical Analysis	no approvals needed if no surface impact involved
Seismic Testing	Special Use Prospecting Permit required from USFS District Ranger
Exploratory Drilling	Lease to the area must first be acquired from the BLM subject to USFS Regional Forester's review and recommendation Permit to Drill must be acquired from the Minerals Management Service (MMS) subject to USFS Regional Forester's review and recommendation
Development and Production	License from MMS subject to USFS Regional Forester review and recommendation
Abandonment	Bond released if USFS and MMS conditions satisfied upon agency review

of Land Management to the tract being explored. If the tract to be explored is on acquired lands rather than public domain lands, the lease must be obtained from the US Forest Service (or other federal agency with full responsibility for the lands). A lease confers the right to develop the oil and gas resources beneath a tract of land but does not permit exploratory drilling. Before any exploratory drilling may occur, the lessee must obtain a permit to drill from the Minerals Management Service. Should exploratory drilling lead to a discovery, the lessee may not develop the field until a license for development and production is obtained from the Minerals Management Service.

While all leases, drilling permits and development and production licenses must be acquired from agencies within the Department of the Interior (DOI) (Bureau of Land Management, or Minerals Management Service), DOI decisions are generally based on recommendations from the Forest Service when national forest lands are involved. The Regional Forester (in charge of one of the nine Forest Service regions) has responsibility for making all lease, permit and license recommendations. However, his decision is always subject to initial review by the District Ranger and the Forest Supervisor for the national forest under application in his region. The only exception to this progression is for wilderness areas, primitive areas, recreation areas and irrigation districts, all of which require the Forest Service Chief's review and final recommendation to the appropriate

DOI agency. [15]

The remainder of this chapter describes the four oil and gas exploration and development stages, the associated environmental impacts, and the federal role during each stage.

STAGE I: PRELIMINARY INVESTIGATION

Oil and gas resources are elusive. They are hidden beneath the earth's surface and there is no way of telling precisely where they are hidden and in what quantities but by drilling. There are ways to determine where oil and gas might exist, however, in order to give some idea of where exploratory drilling should occur. This preliminary investigation -- "defining a prospect" -- can involve two steps: surface geophysical analysis and seismic testing.

Surface Geophysical Analysis

Surface geophysical analysis is the first step in defining a prospect. Using on-site surveys and aerial photographs of various exposed geological formations combined with information about exploration in nearby or similar areas, an initial prospect is defined and the probability that oil and gas might be found is narrowed. [16] Surface geophysical analysis is conducted by an oil and gas company interested in obtaining a lease or already holding a lease and interested in developing its potential. As long as surface geophysical analysis involves no disruption of

surface resources, it requires no permits or government review. [17]

Seismic Testing

Seismic testing often follows surface geophysical analysis to give an oil and gas company more detailed information about the potential oil and gas resources of an area and consequently whether or not expensive exploratory drilling should even be undertaken. In seismic testing a straight line is mapped through an area with promising oil and gas potential. Shockwaves are then generated along this line. The shockwaves are used to map deep strata formations to indicate where potential oil and gas "traps" (oil or gas-bearing formations) may lie. The shockwaves echo back from the different geologic layers and are recorded by a series of sensitive geophones. These readings along a line are then combined to produce a profile of the subsurface geology. [18]

Seismic testing can be conducted in one of three ways. One involves heavy trucks carrying "thumping" or vibrating devices that pound the ground to generate shockwaves. The "thumping" method involves dropping a three ton steel slab several times along the predetermined test line. This steel slab is attached by chains to a crane on a special truck. [19] The vibrator method employs four large trucks equipped with a vibrator pad that is about four feet square and is mounted between the front and rear wheels. These pads are lowered to the ground and then electronically triggered by

the recorder truck. Like thumpers, the vibrators are then moved a short distance forward to continue testing along the line. [20]

Using trucks, though, obviously requires roads or relatively flat and easily passable terrain. In roadless areas, shockwaves are generated by either surface or subsurface blasting with dynamite. Crews conducting this type of seismic testing in roadless areas use helicopters or, infrequently, horseback, for access. [21] Seismic crews are "leapfrogged" from one site to the next; while one crew is setting up a "shot" along a line, another is cleaning up from the last blasting. A "shot" consists of ten 5-pound sticks of dynamite suspended, on average, every 20 feet. Seismic crews average between 50 and 100 shots per day. For subsurface blasting, "shot holes" are drilled to between 50 and 200 feet deep. [22]

Before an oil or gas company will undertake a seismic survey costing between $18,000 per mile for surface blasting and $50,000 per mile for subsurface blasting, [23] it is only logical that it would possess the leases to the area tested. On some occasions, a private seismic testing firm will conduct the testing and then sell their results to individual firms or industry associations. For example, the well-publicized conflict over oil and gas exploration in Montana's Bob Marshall Wilderness centered on a proposal by Consolidated Georex Geophysics (CGG) to conduct seismic testing there. CGG did not possess any leases to the area

but was doing the exploratory work because several oil and gas companies were interested in obtaining leases there. [See Chapter 4 for more information about the Bob Marshall Wilderness dispute.] Since testing results are proprietary, crews may blast the same or slightly altered lines several different times but for different oil and gas companies. [24] Usually, though, a firm will not make this expense without some assurance that it has control of the mineral rights should a promising prospect be defined. Therefore, leases are usually acquired before seismic testing is begun and long before any decision about eventual drilling can be made.

Unlike surface geophysical analysis, seismic testing does disturb surface resources and wildlife. Seismic blasting can start forest fires. [25] Since most seismic testing must occur during the summer or fall seasons when weather permits, there is conflict with other backcountry users. [26] Frequent helicopter trips generate noise that disturbs wildlife and diminishes the backcountry experience for recreationists. [27] Additionally, there is a risk that backcountry users or cattle ranchers will unknowingly cross shot lines when blasting is about to occur. [28] Sometimes blasting contaminates groundwater supplies. [29] These impacts, however, are all short term; little evidence of seismic testing remains one year later. [30] A special use prospecting permit must be acquired from the surface land management agency before seismic testing may be conducted.

Federal Requirements: Special Use Prospecting Permits

A special use prospecting permit must be acquired from the surface land management agency before surface disturbing preliminary investigation activities may be conducted. The USFS and BLM control prospecting on lands within their respective jurisdictions.

For national forest lands, this permit application must be filed with the USFS District Ranger responsible for the area to be surveyed. This application explains the planned survey methods, location, timing and whatever project information is needed by the District Ranger to evaluate the proposal. [31] The District Ranger completes a brief environmental analysis to determine what conflicts with other land uses, if any, may arise. This environmental analysis also determines what stipulations should be placed on the permit to protect surface resources, wildlife and other established or planned land uses. Informal consultation between the applicant and the District Ranger may occur to clarify or amend the proposed prospecting activity. [32]

Various conditions may be placed on the prospecting permit to prevent or mitigate potential impacts to surface resources. These conditions vary depending upon the particular area and project plans. Should a proposed shot line run through a wildlife calving area or migration route, the surface land management agency may hold back a permit until calving or migration seasons are over. [33] Other measures often include avoiding all live streams by at least

100 feet; [34] no activity during the Memorial Day, Independence Day and Labor Day high recreation periods; [35] no seismic activity during the grizzly bear denning period (October 15 - April 30) or bald eagle nesting season (March 1 - July 31); [36] specific locations of helicopter landing sites and flight corridors; [37] and, preventing blasting when extreme fire danger exists. [38]

A prospecting permit does not confer any rights to the minerals discovered nor does it give preference rights to the permittee in obtaining leases for the lands surveyed. The terms of the permit specify precautions to be taken by the permittee in protecting surface resources, preventing forest fires and restoring the lands to their original state. [39] The permittee must post a performance bond to ensure that all stipulations will be met and reclamation undertaken once the testing is completed. A US Forest Service representative will periodically inspect the project to approve bond release and terminate the permit. [40] The District Ranger is directed to approve the proposed project if it "does not create unacceptable impacts on the surface resources or unreasonably conflict with other uses." [41] These permits are seldom denied but no prospecting permits are issued for lands expressly withdrawn from the operation of the mineral leasing laws. [42]

The Federal Leasing Process

As mentioned, an individual or oil and gas company is not required to possess leases before conducting preliminary

geophysical exploration in an area. But, should this analysis indicate a structure worth exploring further, leases must be acquired before an exploratory drilling permit will be issued. Oil and gas leases are issued through three different systems, depending upon where the leasable tract of public land is located. When a tract of land has never before been leased and does not contain known oil or gas resources, it is leased non-competitively over-the-counter to the first qualified applicant. When leases have been issued before but have since expired, been canceled, terminated or relinquished, they are issued non-competitively through a bi-monthly lottery called the Simultaneous Oil and Gas Leasing System. Finally, when leases are for tracts of land within a Known Geologic Structure (KGS) containing oil or gas, they are issued through a competitive bidding process. Each of these three processes is described below.

Over-the-Counter Leases

Leases issued for the first time in an area with unproven geologic reserves are known informally as "wildcat" leases. These leases are issued over-the-counter to the first qualified applicant. Any U.S. citizen can file an application for an oil and gas lease as long as he or she is not a minor and does not already hold leases for more than 246,080 acres in the state in which the applied for lease is located. [43] The filing process is simple. All a prospective lessee must do is review the land plats for the

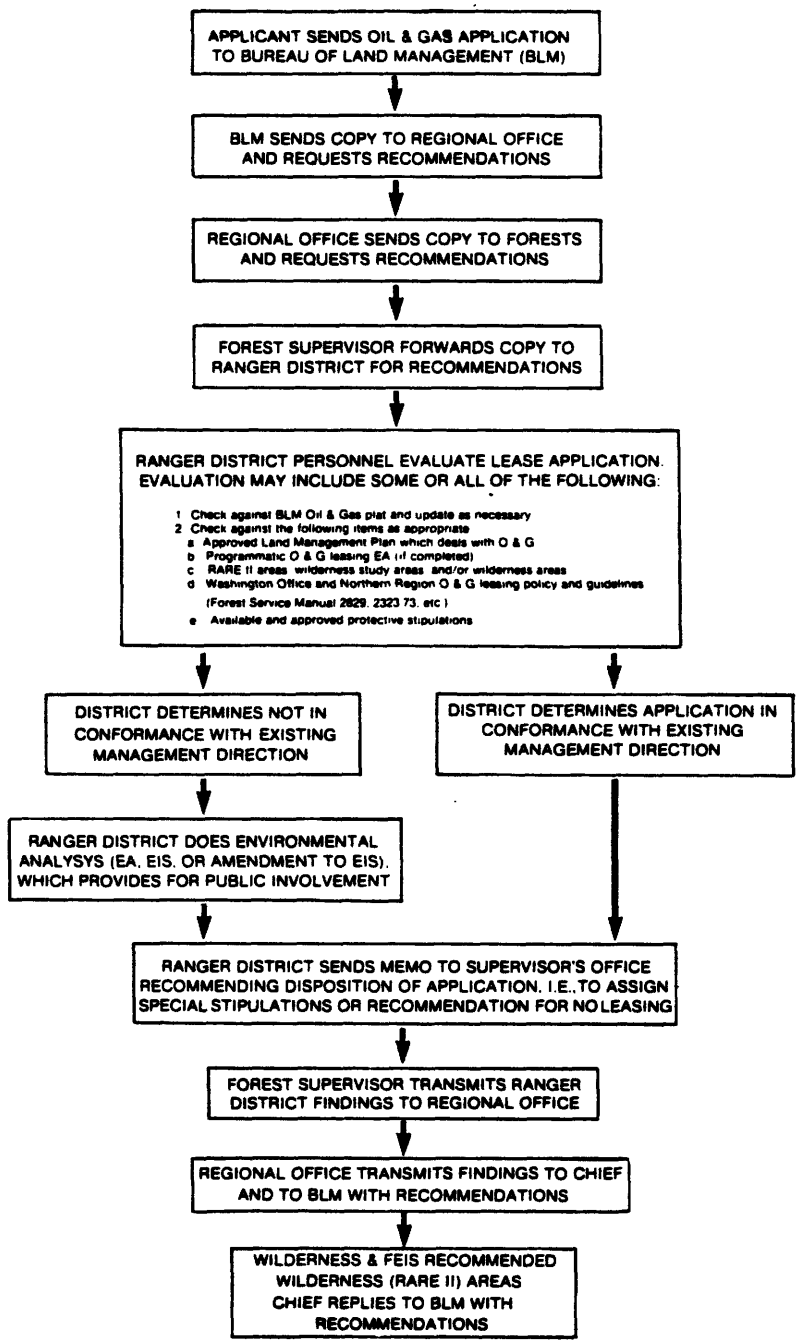
BLM District or National Forest of interest in order to determine which tracts have not yet been leased. The lessee then chooses the tract(s) that interest him and files a one-page application for each. [44] A lease tract must, at minimum, comprise 640 acres; it cannot exceed 2560. [45] A $75 filing fee must accompany each application and, should the lease be granted, a $1 per acre annual rental fee must be paid. (The Department of the Interior has proposed raising the rental fee to $3 per acre for the last five years of the lease term.) [46] The lease term is ten years. It is non-renewable.

Lease applications are always filed at the Bureau of Land Management (BLM) District Office for the state in which the lease tract is located. The BLM has full responsibility for leasing public domain lands for oil and gas resources under the Mineral Leasing Act, as amended. It is charged with evaluating each lease application and attaching any conditions to a lease that are deemed necessary to protect the "national interest" in oil and gas exploration and development. If the lease is for BLM lands, the application is reviewed in the same office as filed. In its review, the BLM ensures that the land has not already been leased or been withdrawn from the provisions of the mineral leasing laws. The BLM also confers with the Minerals Management Service to ensure that the tract is not within a known geological structure. If the lease is available, the BLM must then fulfill the requirements of the National Environmental Policy

Act before it may be issued. Usually a "Finding of No Significant Impact" (FONSI) is made and no environmental impact statement undertaken. (Only one environmental impact statement has ever been done for an oil and gas leasing decision.) [47] The lease is then issued with the appropriate stipulations and attachments.

When a lease application is filed for land under US Forest Service jurisdiction, the BLM forwards the application on to the Regional Forester for his recommendation. [See Figure 2] The Regional Forester is responsible for making the final recommendation to the BLM but it is usually made after review and evaluation by both the District Ranger and Forest Supervisor. The USFS ensures that the lease has not been issued or withdrawn. It usually satisfies NEPA's requirements by developing an environmental assessment and concluding with a FONSI. The USFS generally, but not always, posts a public notice of its intention to lease. Some national forest headquarters also send notices to groups and individuals on their mailing list as well as to the local newspapers. There is seldom any consultation with the lease applicant. Public comment resulting from the posted notice may be considered in assigning stipulations to the lease. [48] Upon completing its review, the Regional Forester submits his recommendation to the BLM. The BLM has final authority for issuing or denying a lease. In fact, though, few lease denials are ever recommended to the BLM and the BLM has traditionally adopted the USFS recommendation. [49] Only

FIGURE 2



Source: Oil and Gas Lease Applications of the Los Padres National Forest, Draft Environmental Analysis, USDA/USFS, Pacific Southwest Region, Los Padres National Forest, July 1981.

when the BLM decision is contrary to the USFS recommendation must the BLM complete an additional environmental assessment before rendering its decision. [50]

All lands under the control of the federal government are public lands. Within this large category, though, are two types of land that are treated somewhat differently by the mineral leasing laws. Public domain lands are those that have always been under the federal government's jurisdiction. Acquired lands are those lands that have been given to or purchased by a federal agency. With regards to mineral leasing, acquired lands are governed by the Acquired Lands Leasing Act of 1947. [51] Essentially, this act extends the provisions of the Mineral Leasing Act of 1920 to acquired lands but gives the surface resource management agency full control over leasing and exploration and development decisions. Thus, when the BLM receives a lease application for National Forest acquired lands, this application is forwarded to the Regional Forester for his consent (or rejection) rather than for his recommendation. [52]

Stipulations govern what activities the lessee may undertake and vary depending upon where the tract is located. Some stipulations are standard and are attached to all leases issued. BLM Form 3109-3 -- "Stipulation for Lands Under Jurisdiction of Department of Agriculture" -- is attached to all leases for national forest lands. This stipulation governs surface use and restoration by the lessee in conducting exploration and development activities. [53]

Other stipulations are specific to a particular BLM or USFS region or leasable tract. For example, "No Surface Occupancy" (NSO) stipulations are attached to leases in wilderness areas or areas with fragile surface resources. (Less than one percent of all leases have this NSO stipulation.) [54] Specific wildlife protection stipulations are attached to leases when important calving, denning, nesting or migration areas might be affected by exploration or development activity. Some stipulations govern the time periods during which exploration or development may occur. [55] Others govern specific areas within a leased tract that may or may not be developed because of especially sensitive surface resources. [56] Some stipulations are conditioned on potential future events (ie. a proposed wilderness designation). NTL-6 -- "Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases" -- is the US Geological Survey's Conservation Division (now the Minerals Management Service) attachment to all leases issued. NTL-6 specifies the requirements that must be fulfilled by the lessee before exploratory drilling or field development and production may be undertaken. Its 15 pages describe how a preliminary environmental review and final environmental analysis should be conducted. It outlines the steps to be taken in applying for a permit to drill and provides guidelines for preparing surface use and operating plans to accompany an application for a permit to drill. It also specifies how wells should be abandoned and the surface area

reclaimed. [57]

The Simultaneous Oil and Gas Leasing System

Originally, when leases expired, were canceled, terminated or relinquished, they would have been restored to the surface land management agency (US Forest Service or Bureau of Land Management) and become available for leasing, once again, over-the-counter. But, in 1959 the **Simultaneous Oil and Gas Leasing System** was established to facilitate leasing of previously issued tracts of land. The BLM had encountered considerable interest in previously issued leases and had difficulty determining who, in fact, was the "first qualified applicant" when these leases were returned to its hands. Unable to control the "altercations" that often arose between those claiming to be first in line, the BLM developed a new system for issuing these leases. This system is commonly referred to as "the lottery" since all applicant's filing cards are placed in a bin and then drawn for each available tract. [58]

As with over-the-counter leases, the BLM informs the USFS when it is going to post previously leased tracts on national forest lands for the next lottery. The US Forest Service can then supplement the listed leases with any additional stipulations deemed necessary to protect surface resources. The USFS again makes a public notice of its intent and conducts an environmental analysis. [59]

The lottery is held bi-monthly (January, March, May,

July, September, November) on the first day of the month. The list of available tracts are posted in the Bureau of Land Management State Offices one month before the drawing. Applications can then be filed for any tracts (but no more than one application can be filed per tract) until the 15th of the month. [60] Filing is a simple process. The BLM provides the necessary filing card and the only information necessary is the applicant's name, address and signature. A $75 filing fee must accompany each application. [61] A drawing is held for those tracts receiving more than one application. For tracts of land in the energy rich west, it is not uncommon to have several hundred applications per tract. [62] Approximately 7,500 leases are issued annually through the lottery, with the BLM receiving almost 4 million applications for these leases. [63] (These figures are for 1980 and will undoubtedly change now that the filing fee is $75, increased from $10 in 1981.)

Known Geologic Structures

Leases for tracts of land within a known geologic structure (KGS) are issued competitively at the discretion of the BLM. The process followed is very similar to that used in offshore oil and gas leasing. The tracts to be leased are selected and then placed on the auction block. Tracts are not more than 640 acres in size. Leases are issued to the highest "responsible qualified bidder." [64] This analysis is centered on conflict over non-competitive leases. Land

management decisionmaking is proving most difficult and controversial for non-KGS leases; uncertainty is greater and, unlike KGS areas, exploratory drilling has frequently not occurred there previously. Hence, proposed exploration in non-KGS areas is more likely to threaten other land uses or relatively pristine areas.

STAGE II: EXPLORATORY DRILLING

Should seismic testing indicate that a promising geologic formation does exist, exploratory drilling plans begin. Exploratory wells are commonly referred to as "wildcat" wells because of their unknown potential. Nationwide, about one in sixteen wildcat wells produce significant amounts of oil or gas. However, only one in one hundred forty wells produce enough to succeed financially. [65]

Each wildcat well requires a cleared and levelled 3 to 5 acre site. The site accomodates a drill pad, a 100 foot derrick, a 100' by 100' reserve pit for drilling muds, and the more general operating facilities such as generators, fuel and water storage tanks, trailers, pipe racks, toilets and either a water well or surface water pump. [66] Wildcat wells are drilled to an average of 10,000 feet. [67]

Exploratory drilling requires that access roads into the wellsite be constructed or upgraded should they already exist. These are generally 14 to 20 feet wide graded roads. [68] There is growing interest in using helicopter rather

than road access in cases where the terrain is difficult to pass or when special surface resources would be harmed (especially in wilderness areas). Helicopters have never yet been used in the continental US, however. [69] Helicopter access is more than three times as expensive as road access; costs average $160,000 per airlift mile for each well versus $50,000 per mile for roads. [70]

Exploratory drilling activities last from one to two years. Commonly, 2 or 3 wells will be drilled during this exploratory stage. Costs average $9.8 million for a dry well and $11 million if a discovery is made. [71] Should helicopter access be used, these figures increase to $15 million for a dry hole and $18 million for a discovery. [72]

Given the extensive surface resource effects, a permit to drill must be acquired from the Minerals Management Service before a lessee can begin constructing an exploratory well.

Federal Requirements: Applications for a Permit to Drill

A permit must be acquired before a lessee can conduct exploratory drilling. An Application for a Permit to Drill (APD) details the lessee's plans and is submitted to the Minerals Management Service (MMS), a new Department of the Interior agency. Established in February 1982, the MMS has the same staff, offices and responsibilities as the former US Geological Survey's Conservation Division. [73] This APD indicates where the exploratory drilling will occur, how

access roads will be located and developed, where and how mudpits and other drillsite facilities will be constructed and where additional wellsites may be located. Site reclamation plans once exploratory drilling is completed must be included in this APD. [74]

Environmental impacts associated with exploratory drilling are obviously dependent upon precisely where the exploratory well is to be located; a wellsite on flat desert terrain will pose different problems than one located in a high mountain meadow. Consequently, although it has full responsibility for decisionmaking, the MMS forwards the APD on to the surface land management agency (US Forest Service or Bureau of Land Management) for its review and recommendation.

The USGS and USFS developed a detailed "Cooperative Agreement" in 1977 that lists the responsibilities of each agency in responding to an APD. In this agreement it is made clear that the USGS (now the MMS) is solely responsible for issuing permits and is "the sole representative with respect to direct contact with the lessees and operators in matters related to oil and gas." [75] Nonetheless, considerable consultation does occur between the lessee and operator and the USFS while project plans are being developed and exploratory drilling activity being conducted. [76] A preliminary environmental review occurs even before an operator's plans are finalized and the APD submitted. [See Figure 3] This review identifies potential conflicts with

FIGURE 3

Procedural Guidelines for Acquiring an Exploratory Drilling Permit in the National Forest System

	Operator Action	Dept. of Interior Action	Field Activities	Normal Time Period
I	1. Develops preliminary map and submits to GS and Bureau of Land Management or Forest Service. 2. Identifies necessary off lease rights-of-way. 3. Attends joint field examination if requested by Interior.	1. Performs preliminary environmental review. 2. Reviews for other authorizations necessary. 3. Notifies operator if site conflicts with other resource values. Notifies operator if no archaeological survey is required. 4. Requests joint field examination if necessary.	1. Operator reviews on-the-ground site. 2. Joint field inspection, if necessary.	1. 15 days after receipt.
II	1. Operator surveys well location and centerline of access roads. 2. Identifies necessary off lease rights-of-way. 3. Arranges for archaeological clearance work. 4. Develops Multi-point Surface Use & Operations Plan. Prepares Application for Permit to Drill. 5. Acquires private surface owner agreement if appropriate.		1. Survey and stake well site and other facilities, includes centerline staking of roads. 2. Archaeological survey performed.	1. Variable; contingent upon operator schedules.
III	1. Operator files APD, Multi-point Surface Use & Operations Plan, private Surface Owner Agreement, and archaeological clearance. 2. Applies for necessary rights-of-way to Bureau of Land Management, or Forest Service. 3. Attends joint field examination if requested by GS.	1. Reviews APD and Surface Use & Operations Plan. 2. Reviews archaeological survey. 3. Requests joint field examination, if appropriate. 4. Requests revision of plan if unacceptable. 5. Prepares necessary environmental analysis for APD and other federal actions required. 6. Prepares conditions of approval to APD and Multi-point Surface Use & Operations Plan. 7. APD approved or rejected. 8. Appropriate rights-of-way issued.	1. Joint field examination performed.	1. 30 days.
IV	1. Performs in accordance with approval plan. 2. Files necessary reports to Geological Survey.	1. Compliance inspections.	1. Operator stakes well site exterior dimensions. 2. Operator begins construction and/or drilling activities. 3. Interior conducts compliance inspections.	1. Variable.
V	1. Operator files Notice of Completion if well is a producer, plus modification to the Multi-point Surface Use & Operations Plan. Operator may need to arrange for additional archaeological survey on areas affected by plan modifications. 2. Operator files Notice of Intent to Abandon if well is dry hole. This can also be for a producer that has gone dry.	1. Reviews on-the-ground conditions for compliance and rehabilitation needs. 2. Reviews modifications to the Multi-point Surface Use & Operations Plan. 3. Requests joint field examination, if appropriate. 4. Requests revision of plan if unacceptable. 5. Prepares necessary environmental analysis for the plan and reviews archaeological survey. 6. Prepares conditions of approval to modified plan. 7. Plan approved or rejected. 8. Additional requirements for rehabilitation of disturbed areas developed for conditions of Intent to Abandon.	1. Joint field examination if necessary. 2. Field work performed to develop well and necessary 3. Field work performed to abandon well if this is the action. 4. Rehabilitation work begins on disturbed areas.	1. Review of plan, 30 days. 2. Rehabilitation work, one year.
VI	1. Operator files Sundry Reports on a Well. Subsequent Report of Abandonment states all work is completed and ready for inspection.	1. Performs compliance checks to see that all conditions are met. 2. Approved final abandonment.	1. All work completed and ready for inspection.	1. Variable; one-two years for vegetation establishment.
VII	1. Applies for release of the period of bond liability.	1. Performs final check, if necessary. 2. Approves release of the bond liability.	1. Possible field inspection by Bureau of Land Management, or Forest Service.	1. 30 days.

SOURCE: Surface Operating Standards for Oil and Gas Exploration and Development, Second Edition 1978.

other land uses or resources and impact mitigation steps that might avoid these conflicts. The purpose of this review is to assist the lessee and operator in developing project plans and directing initial surveying and staking activities before they occur.

Once the lessee and operator's project plans are completed, they are filed with the MMS and USFS in the formal APD. A field inspection with MMS and USFS officials and the lessee's operator and contractor(s) occurs in approximately seven working days. The proposed wellsite, access roads and other surface use areas are reviewed at that time. [77] Specific environmental impact mitigation measures may be discussed during this trip and the operator's plan amended accordingly. [78]

Within 10 days of the field inspection, the USFS must submit its recommendation to the MMS. MMS officials then complete an environmental assessment on the proposed drilling. Seldom is an EIS deemed necessary for exploratory drilling projects. (The first EIS on an APD was completed in early 1982.) [79] Unless USFS and MMS officials disagree about the need for an EIS, the permit will be issued at this time. No more than 30 days should have transpired between APD receipt and permit issuance. [80]

When the US Forest Service receives the forwarded APD from the MMS, it usually posts a public notice of its review of the proposal. Public comment resulting from this notice may raise considerations in its review and proposed

conditions on the eventual permit. [81]

Additionally, the Environmental Protection Agency requires all oil and gas lessees and operators to prepare Spill Prevention Control and Countermeasure (SPCC) plans. While the lessee or operator is not required to file this plan with the EPA, EPA officials may request it and, should it not be provided immediately, fine the operator. Should a hazardous material spill occur, the EPA will then review the SPCC plan. [82]

In addition to fulfilling this EPA requirement, operators must also comply with Department of Transportation and Interstate Commerce Commission requirements. [83]

State and Local Involvement

State and local requirements of lessees and operators vary depending upon the state and locality. Most states require notification and a monthly report should a well prove productive. Some states have environmental protection requirements that must be fulfilled. Local and county governments become involved when access, zoning or rights-of-way issues arise. [84]

STAGE III: FIELD DEVELOPMENT AND PRODUCTION

The impacts associated with exploratory drilling are extended and compounded should a discovery be made and development and production be warranted. An average oil and gas field is 640 acres with well spacing of 40 acres for oil and 160 acres for gas. Generally, this implies that four gas

wells or sixteen oil wells, maximum, can be located in one field. [85] Each wellsite again requires a 3 to 5 acre cleared and levelled drill pad with a 100' derrick, 100' by 100' fenced reserve pit, and the general operating facilities. [86] Once the wells have been drilled, the derrick will be replaced with a system of 20' high "horsehead" or "grasshopper" lifts to pump the oil and gas. [87] Field development requires "in-field" access roads, pipelines, and utility lines from wellsite to wellsite and temporary housing and associated structures for field workers. Additionally, pipelines and transmission lines into the field must be constructed. Onsite oil and gas storage tanks are required. [88] Eventually, injection wells will be constructed to promote secondary or tertiary recovery of oil and gas resources. [89] If helicopter access is required, a staging area must be constructed outside the field as well as landing sites within the area. [90] Roads must be maintained and snow removed during the winter season. [91] In some cases, a "sweetening" plant must be constructed when "sour gas" (Hydrogen Sulfide) is mixed with the natural gas. [92] The average life of a producing field is 30 years -- the range is 15 to 50 years. [93] The life of a specific field depends upon the size of the discovery.

Production is an expensive undertaking. On average, the cost of developing a field is $2.5 million per well. Once developed, production costs include $3 million to drill each additional production well, $10,400 per mile annually to

maintain access roads, $96,000 per well annually to operate the producing field, $15 million per mile for powerlines and $750,000 per mile for pipeline construction. [94]

Before a lessee can develop the field, a license must be acquired from the Minerals Management Service.

Federal Requirements: Licenses for Development and Production

Should exploratory drilling lead to discovery of oil and gas resources in commercial quantities warranting production, the operator cannot simply proceed to develop the field. First, a license must be obtained from the MMS. The review and evaluation process for this license is similar to that for an APD. The operator submits an operating plan that details how field development will proceed, what construction activities will occur and where and how reclamation will be completed. [95] This plan is forwarded to the USFS for review and recommendation. Consultation between the MMS, USFS and the operator will likely amend the operating plan to mitigate environmental impacts and avoid surface resource conflicts if possible. [96] The MMS then completes an environmental assessment and, frequently, an environmental impact statement with associated public hearings and involvement before rendering its final decision. As with exploratory drilling activities, the operator must post a performance bond before undertaking development and production. Both USFS and MMS officials will periodically inspect the operations to ensure that all conditions are

being fulfilled and all stipulations adhered to. [97]

STAGE IV: ABANDONMENT

Abandonment begins immediately once production is completed. The well is plugged and capped. Generally, an above surface pipe "monument" is required that lists location and name of well. This requirement can be waived by the MMS, particularly when surface resource concerns warrant it. [98] All equipment, utility lines, pipelines, powerlines, and field facilities are removed. The disturbed surface area is re-contoured and revegetated as closely as possible to its original condition. [99]

The Appeals Process

Decisions by federal agencies, even if the decision is merely a recommendation by the USFS to the BLM or MMS, may be appealed by any group or individual affected by the decision. There is a 30-day appeals period following each leasing, permitting and licensing decision. [100] The appeal must state how the particular individual or group is affected by the decision and the specific complaint with how the decision was reached. [101] An appeal is always filed with the next superior official in an agency's hierarchy. For example, a leasing recommendation is made by a Regional Forester. An appeal of this recommendation would therefore be filed with the USFS Chief in Washington, D.C. If the recommendation is upheld by the Chief, it can be further appealed to the

Secretary of Agriculture. Should the Secretary of Agriculture again uphold the decision, the USFS recommendation is forwarded to the BLM District Office. A group or individual can protest this recommendation to the BLM District Officer. If the recommendation is accepted and a decision made accordingly, this decision can then be appealed to the BLM Director in Washington, D.C., and then to the Department of the Interior Board of Land Appeals [102] and, finally, to the Secretary of the Interior. [103] If the individual or group is still not satisfied, a lawsuit can often be filed and the federal agencies taken to court. At least two years would be consumed in this process. [104]

Conclusions

The development and decisionmaking processes described above appear, on paper, detailed and extensive but, essentially straightforward. At each stage, the different land managers review an application to determine what response is appropriate. Consistent with the conservation ideal, the objective of this process is efficiency in production. Although the mineral leasing laws do not acknowledge other surface resource values, these concerns are addressed in land agency reviews. The administrative decisionmaking process is consistent with the land management paradigm; it assumes that the decisions to be made are amenable to scientific review and analysis. But, as the next three chapters illustrate, the process is very different in

practice. It is extremely political and, moreover, ineffective. Even though analysis is exacting and all apparent bases are covered, decisions reached are frequently disputed. As the next three chapters indicate, the problem posed by oil and gas exploration on public lands has changed markedly since the mineral leasing laws were enacted and the decisionmaking process established. But, because the process has not changed in concert, oil and gas leasing and permitting decisionmaking is at an impasse in many national forests.

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CHAPTER 3

THE POLITICS OF OIL AND GAS LEASING AND PERMITTING

On paper, the decisionmaking process described in the last chapter appears detailed but straightforward. In theory, it is a rational process involving professional land managers reviewing proposals, assessing impacts associated with these proposals, evaluating several alternatives and, only then, rendering a decision. The mineral leasing laws direct land management officials to consult with each other as well as with lessees, operators and contractors proposing exploration and development. Such consultation is consistent with the professional, scientific land management paradigm. It assumes that, with sufficient information about a proposal, a land manager will be able to make a "wise" decision; one that efficiently utilizes public land resources and, in so doing, satisfies the public's interest in land management.

In practice, the process plays out a much different story with an expanded cast of characters. Lessees, operators and land managers are not the only voices heard when leasing and exploration decisions must be made. Frequently, other groups become involved in Forest Service decisionmaking. These groups raise additional, often conflicting concerns, and thereby considerably complicate the Forest Service decisionmaking process.

Each Forest Service lease or permit decision allocates national forest resources. Thus, some decisions benefit some

user groups at the expense of others. Because there is a lot at stake in each decision, all affected interests inevitably try to influence decisionmaking. The result, as will be seen in this chapter, is a very different and considerably more politicized process than that envisioned when the mineral leasing laws were enacted.

The Many Publics Involved in Oil and Gas Decisionmaking

Whether or not a group organizes and how actively it tries to influence oil and gas decisionmaking, depends upon what it has at stake in the particular decision. Because of the ongoing wilderness reviews and forest management planning processes, [1] industry and environmental groups are especially well-organized and knowledgeable about the US Forest Service and how it makes decisions. Furthermore, these wilderness review and forest planning processes have generated considerable interest in and knowledge about the particular areas proposed for oil and gas exploration.

Often, oil and gas exploration and development threatens established public land uses and wildlife and wilderness attributes. As a result, national and regional environmental organizations take a great interest in oil and gas issues. These groups actively follow and participate in the administrative decisionmaking process and, when all else fails, pursue other avenues for achieving more favorable outcomes. In November 1981, The Wilderness Society was monitoring oil and gas lease proposals in 28 Wilderness Areas, 25 proposed Wildernesses, 12 BLM Wilderness Study

Areas and 16 USFS Further Planning Areas in the six Rocky Mountain States (Idaho, Montana, Wyoming, Utah, Colorado and New Mexico). [2] When proposals to either lease or permit exploratory drilling are being considered by the USFS, environmental organizations voice their concerns and make recommendations to the USFS. They participate in whatever formal public hearings are held and monitor decisionmaking informally through communication with Forest Service staff involved in the analysis and decisionmaking. The involvement of environmental organizations is persistent, especially when decisions have national or regional significance because they will be precedent-setting, or will affect an area of particular scenic, ecological or recreational importance. Environmental group involvement seldom ends when a decision, is made should that decision run counter to what they perceive to be the appropriate outcome.

Different groups and individuals value the resources at stake in oil and gas exploration and development differently. Each group assesses the risks and the benefits associated with a decision differently. As a result, rarely do these groups agree on what decision the Forest Service should make.

Environmentalists are concerned about protecting the scenic and ecological resources contained in the public lands. They fear that energy development will destroy these resources forever. William Turnage, Director of The Wilderness Society, offers one explanation of the environmental view:

> In Europe there was a long cultural tradition; societies that have been in place for tens of centuries have their great monuments, their great cathedrals, the symbols of their civilization. America is a much newer nation, a nation of people who are deeply attached to nature. It's formed our character. And to us, our cathedrals, the monuments of our civilization, are the National Parks, the great Wilderness Areas, the wild rivers, the eagles of Alaska. Those are the things that make Americans different and special. And we've learned more than any other people in the world to take care of those things, and preserve those things. [3]

Brock Evans, vice-president of the National Audubon Society, concurs: "Of course we need resources, of course we need minerals and energy and all those sorts of things...But, more important, more apropos, is the question of do we need it from these precise spots, these last little places remaining?" [4] Regardless of the resource potential of some lands, environmentalists argue that exploration and development simply should not occur. To them, the benefits to existing and future generations of preserving these lands intact outweighs the opportunity costs of the fuel resources foregone, regardless of how extensive they might be.

Like national environmental groups, oil and gas industry associations closely monitor precedent setting and policy level decisions. They routinely participate in site-specific cases having a broad impact as well as in federal policy development and legislative activity. While industry associations do not themselves apply for oil and gas leases and drilling permits, they do have a stake in these decisions through their memberships. The Rocky Mountain Oil and Gas Association (RMOGA), for example, has 650 member oil and gas

corporations in the Rocky Mountain region. Since its members file lease and permit applications and otherwise actively pursue oil and gas exploration and development on public as well as private lands, RMOGA files administrative appeals or lawsuits in those cases that will affect its membership generally. [5] Similarly, industry interest groups such as the Mountain States Legal Foundation (MSLF) and the Pacific Legal Foundation (PLF), advocate development interests in important cases, just as environmental interest groups support preservation objectives. [6]

Predictably, industry groups approach oil and gas exploration and development differently from the environmentalists. Nonetheless, Kea Bardeen, attorney for the Mountain States Legal Foundation, does not believe MSLF's concerns to be in opposition to those of preservationists:

> The fact that we don't go around advocating wilderness protection all the time doesn't mean that we don't believe in Wilderness, that we would like to see it all levelled....it's extremely important. But... wilderness values and mineral values are not necessarily incompatible. And that's because...[we] don't see wilderness as having to be totally pristine for all time. [7]

To preservationists, energy development is not compatible with The Wilderness Act ideal of an area "untrammeled by man, where man is a visitor who does not remain." [8] They believe that wilderness, once raped, can never be restored to its virgin state. [9] To industry interest groups, though, energy development is short-term and reversible. Perceiving the quality of wilderness differently, industry groups assess

the costs and benefits of exploration and development differently. In contrast to preservationists, they conclude that the costs to society are much greater if oil and gas exploration is prohibited. Thus, these groups argue that development, not preservation, best promotes the public interest.

Not all groups frame their arguments in terms of the "public interest." Some groups have more parochial interests at stake in these decisions. For example, outfitters protested exploratory drilling in Wyoming's Gros Ventre range because they feared it would scare away wildlife and, thereby, the hunters they guide through these mountains for a living. [10] Similarly, ranchers who graze their cattle in the national forests argue against the seismic testing with dynamite that criss-crosses many Western forests. This testing threatens both the cattle and the stockmen who unknowingly cross over shot lines when blasting is about to occur. [11] These differences in values are therefore not limited to exploration and development in Wilderness Areas. Controversy is generated by proposals in heavily used backcountry areas, recreation areas, or areas deemed to be exceptionally scenic or wild. Oil and gas exploration and development proposals are apt to incite protest in almost any area that has already established land-uses and users. Now that industry interest in the resources contained in public lands is intensifying, proposals more frequently conflict with established users. As will be seen, these users include

big game outfitters, ranchers using public lands for grazing, local communities and others concerned with maintaining the status quo or promoting a use different from that proposed for a particular area. Unlike the environmental and industry associations discussed above, these groups do not ordinarily keep their eye on USFS oil and gas exploration and development decisions. In general, these decisions are of little consequence to them. But, when a proposal is made that will potentially affect their concerns they then organize around that specific issue to protect their interests. These groups perceive an immediate stake in the decisions made; one that will affect their daily lives.

When the National Cooperative Refinery Association (NCRA) first proposed an exploratory well in Cache Creek Canyon outside Jackson, Wyoming, it would have likely appeared a reasonable proposal to an outsider. A dirt road already went up the Canyon and other development activities had occurred there in the past. [12] An exploratory oil well did not seem out of place. But, Jackson Hole residents were outraged. They questionned the proposal on the grounds that it would diminish the quality of life in Jackson Hole, tax the town's streets and public services and detract from the area's exceptional tourism and recreation opportunities. [13] Teton County Commission Chairman Bill Ashley protested:

> To us it doesn't make any sense to screw up prime recreational areas with roads and other impacts of oil and gas exploration unless it's as a last resort. In this area, oil and gas and even mining and timbering are somewhat incompatible with the high priority given to recreation and wildlife. [14]

The Jackson Hole Chamber of Commerce echoed a similar sentiment, justifying its opposition to the well: "people visit Jackson Hole first to see the area and second to enjoy it...the Chamber's purpose is to cater to these desires, not detract from them." [15] Jackson Hole residents valued Cache Creek Canyon as their "backyard;" it was a critical part of their character. [16] To them, the costs of losing this amenity were far greater than any oil and gas that might be discovered there. NCRA, on the other hand, believed that the potential oil and gas resources there did warrant exploration and possible development and that, once completed, the area could be restored to Jackson Hole's standards.

The Process in Practice

Because of the many competing values at stake in oil and gas leasing and permitting, the seemingly technical and straightforward process outlined in the last chapter is, in reality, highly politicized. This marked contrast between theory and practice can only partly be explained by the stakes involved and because these many groups are organized in supporting different decision outcomes. In practice, three pathologies afflict the process. And, these three pathologies politicize the process by giving a substantive basis for the claims of conflicting interests without providing a means for accommodating their concerns:

First, the process is **not sufficiently informative or convincing.** Forest Service analyses, no matter how thorough

and seemingly objective, do not indicate what decision should be made; a "right" choice is elusive. Moreover, because no decision can be proven to be the correct one, the process is not convincing to those groups who perceive a different outcome to be more appropriate than that reached by the Forest Service.

Second, the process is **divisive.** It separates different interest groups into adversarial camps and encourages strategic behavior among them. It provides no means for bridging the obvious chasm between them and hence only exacerbates the political conflict over the decision that must be made.

Finally, the process is **not decisive.** Even when the Forest Service ultimately makes a "decision," the "decision" rarely ends the controversy. On the contrary, the decision merely begins the next phase of the real decisionmaking process.

The remainder of this chapter illustrates these three pathologies and their consequences. Drawing from several controversial cases, this analysis pinpoints where the actual process diverges from theory and to what end. The cases highlighted involve national forests along the Rocky Mountain Range in northern Wyoming, Idaho and Montana. These cases are not unusual; onshore oil and gas leasing and permitting decisions are proving controversial from California's Sierra Nevada Mountain Range to the Green Mountains of Vermont. Leasing and permitting decisions that in the past took one to

two months to make, now take up to ten years. Particularly hard hit are those national forests sitting atop what is known as the Western Overthrust Belt along the Rocky Mountain Range. The Overthrust Belt extends 2,200 miles from Alaska to South America. As described in the oil and gas industry's newsweekly, it is "a geologic masterpiece with thrusts and structural complexities that have boggled the minds of explorationists for years." [17] With exploration and development technology becoming more sophisticated, the mysteries of the Overthrust Belt are slowly being solved. Since discovery of Utah's Pineview Field just seven years ago, oil and gas industry efforts have concentrated on the U.S. Intermountain Region of Montana, Wyoming, Idaho, Utah and Colorado. Interest in obtaining leases and permits in this area is intense. The USFS estimates that it manages 9,000,000 acres within this area. Of this 9 million, 5.5 million acres have already been leased and the remaining 3.5 million are under lease application. [18]

Numerous leases are involved in the cases highlighted or mentioned in this analysis. Seven hundred leases are at stake in Montana's Bob Marshall Wilderness. [19] Two hundred leases were involved in Wyoming's Palisades area. [20] Decisions on one-hundred thirty-five lease applications have yet to be made for the Washakie Wilderness in Wyoming's Shoshone National Forest. [21] Two-hundred fifty-seven leases, covering 180,000 acres are still outstanding in California's Los Padres National Forest, some having been

filed as long as ten years ago. [22] 130 lease applications are under consideration in Vermont, covering the entire Green Mountain National Forest. [23] In national forests along the east coast, 4800 leases were outstanding in February 1982. [24]

Final decisions on these lease applications have been delayed for up to ten years. These decisions have either been appealed by dissatisfied user groups or the Forest Service has deferred decisionmaking on them out of concern for other surface resource values that might be harmed by oil and gas operations. Given that the Bureau of Land Management issues approximately 12,000 leases total for all public domain lands each year, these outstanding leases for the national forest system are not an insignificant concern for federal officials. In 1980, Senator Henry Jackson, chairman of the Senate Committee on Energy and Natural Resources, wrote then Secretary of the Interior Cecil Andrus to find out what was causing the delays and how extensive they actually were. Andrus responded:

> Appeals of BLM State Office oil and gas decisions cause immense delays in lease issuance. There is at present a 6-9 month backlog of protests on appeal before the Interior Board of Land Appeals. In addition, all action toward lease issuance is suspended for 120 days following an IBLA decision in anticipation of an appeal to Federal Court. While some delay is unquestionably necessary in the event that a legitimate protest or appeal is filed, the present adjudicatory process is being abused. [25]

Andrus went on to describe the extent of the delay, using just one of the nine BLM state offices as an example:

> 72 percent of the 7400 oil and gas lease applications

> backlogged for more than one year [in the Wyoming State Office] are tied up in other agencies, mostly in the Forest Service, and most of these as a result of the RARE II wilderness review process. [26]

Andrus expressed concern for these delays and suggested to Senator Jackson that more manpower and resources be allocated to the BLM leasing program.

1980 was an election year and Cecil Andrus was succeeded by current Secretary of the Interior James Watt. Watt, a Colorado attorney, had been president of the Mountain States Legal Foundation, an industry interest group advocating greater energy exploration on public lands. He immediately set out to rectify problems he attributed to the environmental sympathies of his predecessor. But, Watt encountered formidable obstacles to speeding up the leasing and permitting process. His efforts further politicized the issue and made it front page news across the country. Notwithstanding his efforts, leasing and permitting decisions remain ensnarled in administrative appeals and Forest Service reviews. The problem cannot be remedied by the efforts of a Secretary of the Interior, even though the Secretary, on paper, has final authority.

As seen in the remainder of this chapter, the administrative decisionmaking process is at the root of the current impasse over oil and gas leasing and permitting. The three pathologies that afflict the process -- it is not sufficiently informative or convincing, it is divisive and it is not decisive -- make the decisionmaking task interminable. Neither the actions of powerful political actors or the

expertise of professional land managers can produce decisions that are accepted and supported by all the key groups involved. Power over these decisions has become well-balanced.

I. The Process is Not Sufficiently Informative or Convincing

When the BLM or USGS forwards a lease or permit application to the Forest Service, Forest Service officials respond by preparing an environmental analysis of the proposal. This analysis covers the specific aspects of the proposal, potential impacts on surface resources and, finally, ways in which these impacts might be mitigated. One point of an environmental assessment (EA) is to determine whether or not a full environmental impact statement (EIS) should be prepared as required by the National Environmental Policy Act. [27] In theory, this process appears straightforward. It mirrors the type of analysis the Forest Service conducts in almost all of its decisions. In practice, this analysis does not sufficiently inform decisionmaking; it is not obvious upon completing an environmental assessment what the agency should do.

The Limits of Technical Expertise

Leasing and permitting evaluations are not made in an ad hoc manner. The extensive Forest Service Manual spells out in great detail the procedures to be followed by District Rangers, Forest Supervisors and Regional Foresters in

analyzing a proposal and making final recommendations and decisions. Unfortunately, however, these guidelines call for considerable judgment on the part of Forest Service officials. The guidelines are necessarily broad and flexible because each decision involves different types of areas and resources.

In response to a lease or permit proposal, the federal government must either reject the application, accept it as submitted, or accept it subject to certain conditions. Forest Service officials reviewing a lease or permit application must decide whether or not to accept it and, if so, what conditions, if any, should accompany the lease or permit. In making these decisions, the Forest Service Manual lists ten factors that must be considered:

1. Statutory authorities.
2. Existing and planned uses.
3. Dedications.
4. Impact on surface resources.
5. Damage to watershed.
6. Degree of surface disturbance and difficulty in restoration.
7. Special values, such as wilderness character, archaeological sites, cultural resources, and endangered wildlife habitat.
8. Term of the lease and probable nature of operations.
9. Economic considerations, such as relative values of minerals and surface resources and scarcity of and demand for minerals.
10. Range of alternatives available for operations and

land uses and for environmental protection. [28]

But, how much damage to the watershed is permissible, or what degree of surface disturbance should be allowed is entirely up to the discretion of the field officer. Furthermore, this same subjective judgment must be exercised in determining "the relative values" of oil and gas resources and surface resources; judgment must be exercised because the oil and gas resources at stake are of unknown quantity and type. Moreover, how a Forest Service field geologist is to determine "the scarcity of and demand for minerals" and then consider these data in decisionmaking is not prescribed. This question has been debated without resolution for decades by experts throughout the world. As a result, should a Forest Service official decide that an area's fuel resources are critically important and that the loss of surface resources is negligible, relative to the value of these fuel resources, another individual can easily argue to the contrary. For example, when the Forest Service and USGS decided that exploratory drilling for oil and gas should occur in a Wyoming area recommended for wilderness designation, Bill Cunningham of The Wilderness Society argued:

> Most of Wyoming is already available for oil and gas exploration without objection from conservationists. There is simply no need to risk the loss of irreplaceable wild places, such as the Gros Ventre, for a costly, uncertain quest for nonrenewable resources. [29]

Even a consideration as innocuous as "statutory

authorities" requires judgment on the part of Forest Service officials and hence allows for criticism and opposition by those disagreeing or who are adversely affected by the decision. To a large extent, debate over leasing in the Palisades area of Wyoming and Idaho centered on the Forest Service's authority to enforce stipulations that it attached to the leases. Similarly, debate still rages over the authority of the US Forest Service and US Geological Survey to deny a drilling permit for environmental reasons in the proposed Gros Ventre wilderness area. Department of the Interior Solicitor Lowell Madsen ruled that the APD could not be denied, [30] and his ruling was quickly challenged by environmentalists and local residents. Phil Hocker of the Sierra Club argued that all the Interior Department needed to do to deny an APD was to find that approval is not in the public interest. [31] He also noted that in a separate case involving the Palisades Further Planning Area, federal attorneys were arguing that approval of APDs is not mandatory, and that disapproval is valid where justified. [32] An editorial in the Casper Star Tribune queried:

> What awesome force could so suddenly make helpless yesmen out of our resource stewards, so suddenly and utterly strip them of their traditional values and will to balance conflicting interests?
>
> Why, it was no less a power than a non-binding legal **opinion** of an inhouse lawyer...That opinion hasn't ever seen the inside of a courtroom and they've given up. [33]

The task force adopted Madsen's opinion and completed the environmental analysis accordingly. Now the agencies are in

court.

The Forest Service Manual guidelines describe those instances where a prospecting permit or lease may be denied:

> A [prospecting] permit may be refused if the degree of disturbance will be excessive and result in unavoidable serious impacts on other resources. [34]

Oil and gas leases may be denied when the Forest Service Environmental Assessment indicates that oil and gas activity in a particular area would:

> (1) seriously interfere with other resource values, (2) be incompatible with the purpose for which the area is being used or administered, or (3) permanently destroy or render useless the land for the purposes for which used or dedicated....(or) when the value of the land, and its resources, for the purpose for which it is being used outweighs the foreseeable benefits that would be derived from extraction of the mineral resources, and the existing use cannot be adequately protected by stipulation. [35]

Oil and gas leases may also be denied when an area has been withdrawn from the mineral leasing laws. But, specifically withdrawing a particular area in order to preclude leasing is discouraged:

> There should be relatively few requests for withdrawals from operation of the mineral leasing laws, because the land and surface resources ordinarily can be protected by proper stipulations, or because detrimental leasing can be prevented by recommendations or refusal to consent to applications. [36]

The guidelines explicitly state what conditions warrant a withdrawal:

> Withdrawal may be requested if mineral leasing would (1) be incompatible with the purpose for which the land is dedicated, used, or reserved from use; (2) destroy or damage the values sought to be preserved; (3) hamper, restrict, or render useless the plans, programs, or functions for which the land has been utilized; (4) nullify major accomplishments and

> investments; or (5) create intolerable hazards or unjustified risk on lands having or planned for special purposes or programs, such as city watersheds, experimental forests, developed recreation areas, and archaeological sites. [37]

Again, as with land withdrawals, the guidelines make it clear that "wilderness designation shall not be sole justification for decisions against leasing, permitting or licensing." [38]

Forest Service field staff have broad discretion in decisionmaking under these guidelines. They must make a judgment about when a proposal "seriously interferes" with other land uses and surface resource "values." They must determine when existing uses "outweigh" the benefits of mineral extraction, or when disturbance might be classified "excessive" and its impacts "serious." Under these guidelines, any of a number of different decisions are possible on a single proposal; none is more correct than another. One District Ranger might deem a proposal to be disastrous; another might view it to be inconsequential. A Ranger living in a community adamantly opposed to a proposal might reflect these pressures in his decision; a Ranger in a district far from the beaten path may be more easily influenced by the applicant's concerns. [39]

The Forest Service acknowledges that judgment must be exercised in decisionmaking. In fact, the process provides for review by various agency officials of decisions and recommendations made by their subordinates. Each official is authorized to amend the decision or completely overrule it when his judgment indicates otherwise:

> After completion of the EA, or EIS if required, the Forest Service officer responsible for its completion will forward it, through channels, to the official responsible for the Forest Service decision. Each preparing and reviewing line officer will recommend an alternative, concur with or change previous recommendations, and provide an explanation for that position. Proper stipulations will be provided for each reasonable alternative, even though it is not recommended, in case the responsible Forest Service officer or the BLM does not concur with previous recommendations. [40]

In other words, the decisions to be made are admittedly judgmental. None can be analytically proven correct.

Just as these Forest Service line officers can exercise judgment in reviewing and adjusting a subordinate's decision, so too can those groups and individuals potentially affected by a decision. A lessee applying for an exploratory drilling permit may perceive his operations to be totally compatible with existing surface resources and pose little threat to an elk calving area or nearby stream. An environmental group, on the other hand, may perceive the same proposal to potentially devastate a previously pristine area. Both sets of values are legitimate. But, depending upon the specific decision rendered, one or the other perceives its concerns to be unaccommodated. The issue is not that their concerns have not been aired or that the Forest Service has not acknowledged them. Rather, the final decision neither directly reflects their input nor convinces them the the contrary outcome is more appropriate. For example, when a USFS/USGS interagency task force determined that drilling could occur in the proposed Gros Ventre wilderness, Bill Cunningham of The Wilderness Society immediately questionned

their analysis:

> The EIS statement that the drilling in Little Granite would "affect very few people" is patently false. The Gros Ventre is one of our nation's most important unprotected wilderness areas in terms of vastness in size and natural beauty and diversity. This and future generations of Americans have a stake in the preservation regardless of whether they actually set foot in the area. [41]

Because of the range of different values involved, the Forest Service is unable to objectively represent each one in decisionmaking. Hence, those who perceive their concerns to be unaccommodated oppose the decisions made.

Assessing the "Relative Values" of Resources

Although Forest Service officials must exercise judgment in making oil and gas leasing and permitting decisions, they do not take this responsibility lightly nor minimize the importance of each decision. Precisely because judgment is involved, they are thorough in their analyses, acquiring data, developing alternatives, assessing impacts and potential mitigation measures and, only then, making a decision. Several different approaches have been used by Forest Service officials to assess the "relative values of minerals and surface resources." Some have used numerical ranking schemes while others have used less exacting relative rankings of alternatives. Consider, for example, the Palisades leasing decision.

Before making their leasing recommendation for the Palisades area of Wyoming and Idaho, the USFS Supervisors in

the Targhee and Bridger-Teton National Forests completed their environmental assessment on the proposed leasing. From their own analyses as well as from comments received in three public meetings, the Forest Service study team selected five alternatives and five decision criteria with which to evaluate these alternatives. The alternatives were:

1. deny all leases
2. defer a decision until a later time
3. lease all of the Palisades area
4. lease a portion of the area that was not environmentally sensitive (11%) and defer a decision on the remaining 49% [40% of the Palisades area had previously been leased]
5. lease the less sensitive 11% and lease the remaining 49% with no-surface-occupancy allowed [42]

The five "evaluation criteria" used were:

1. protection of wilderness values
2. identification of energy resources
3. compatibility with all natural resources
4. consideration of potential changes in the socio-economic environment
5. compliance with Forest Service direction and authority [43]

To determine their preferred alternative, the Forest Service team rated each of the five alternatives against each of the five criteria using a numerical scoring system. Alternative 5 (49% NSO) received the highest score with 10 and Alternative 1 (deny all leases) was second highest with a score of 9. [44]

Assigning a particular numerical value to an alternative

depended upon the particular evaluator's perspective. A Forest Service official obviously applies his professional knowledge and experience in his ratings. But, members of the Sierra Club, The Wilderness Society and other environmental organizations assigned different values and thereby reached different conclusions. What the Forest Service argued "protected...wilderness values" the Sierra Club argued threatened these same values. In recommending leasing in the Palisades area, the Forest Service contended that oil and gas exploration was "compatible with all natural resources." [45] The Sierra Club argued that a road and drilling rig in a roadless area were hardly compatible with the existing wilderness and wildlife resources of the Palisades. [46]

In selecting Alternative 5 as its "preferred alternative," the USFS found that it:

> is responsive to the key issues raised by the public since it balances the intense opposing concerns of environmental groups and the energy industry; is an action alternative. Refusing to lease or deferment of leasing would be unresponsive to National energy needs and would fail to comply with Forest Service policy and direction; and, allows the land surface management agency (FS) more time to properly assess the adverse impacts on resource values and to formulate realistic mitigation measures to more effectively offset these impacts.... (and) to prepare for the administrative impact that may result should a significant resource be identified. [47]

But, this finding assumed that "opposing concerns" would also view the decision as "responsive." Additionally, it assumed that the Forest Service retains the authority and the power to control future actions under the leases issued. Environmental organizations disagreed with both assumptions.

They voiced their concerns at public meetings, in writing to the USFS EA team and in person to USFS staff in the Targhee and Bridger-Teton National Forests. [48] When their concerns had not been addressed to their satisfaction, they took the agency to court.

Much of the controversy over leasing in the Palisades area was created by uncertainty; uncertainty about whether or not development on the leaseholds would ever occur and, if it did, whether or not the stipulations would be enforceable. This would lead one to believe that uncertainty would be diminished and analysis greatly facilitated when a specific drilling proposal is submitted to the Forest Service. As seen in the Cache Creek/Little Granite Creek cases, though, the disputes remain and are perhaps heightened. Again, there often is no agreement on what the boundaries of analysis should be at the outset nor on what the conclusions of this analysis indicate should be decided.

The Forest Service and Geological Survey jointly prepared an EIS on two exploratory wells in Cache Creek and Little Granite Creek outside Jackson, Wyoming. The draft document, released in August 1981, painted a bleak picture of the development impacts in either area:

For Cache Creek it concluded:

> Should field development occur in the Cache Creek watershed it would likely produce high impacts on recreation, wildlife (particularly elk), and local culture for many years (20 years or more)....The potential for contamination of surface water would be increased....A major elk calving area would be eliminated....Visual qualities would be severely

> compromised....Noise from development drilling and vehicles, the road system, and landscape disruption would make the area unattractive to many forms of recreation. [49]

For Little Granite Creek it concluded:

> The Little Granite Creek road alternative...would create moderate to high impacts on riparian vegetation, fisheries, wildlife, visual esthetics, and wilderness attributes of the Little Granite drainage ....Reclamation of the road would be particularly difficult because of the steep terrain and unstable slopes traversed...scars would persist for many years along the mile of road directly below the wellsite...
>
> Field development...would produce high impacts on the present wilderness character of the area for 20 to 30 years. [50]

To determine what action should be taken given these impacts, the USFS/GS interagency task force analyzed two alternatives for each proposal: two different access road routes for Cache Creek and one access road and the use of helicopters rather than roads to reach the wellsite in Little Granite Creek. The draft EIS also discussed the implications of full field development, should it someday occur, for each proposal. These alternatives were evaluated in the draft EIS using nine criteria:

1. Determine the area's potential to contribute to the Nation's energy needs.
2. Recognize the lease rights of NCRA, Getty, and other members of the Bear Thrust Unit.
3. Provide for visual quality objectives of the area as defined in the Cache Creek-Bear Thrust mapping evaluation.
4. Protect water quality, aquatic habitat, and riparian zones, both onsite and in access corridors.
5. Minimize adverse effects on wildlife, basically by recognizing diverse habitat needs and protecting

big-game populations.

6. Maintain traditional recreational use of Cache Creek drainage.

7. Minimize man's intrusion into the recommended Gros Ventre Wilderness in the exercise of mineral exploration and development activities.

8. Feasibility of reclaiming disturbed areas to natural conditions at the cessation of activities.

9. Minimize impacts on the community of Jackson (overload of community facilities, noise, hydrogen sulfide, and other safety factors). [51]

The task force supplemented this list of evaluation criteria with an additional objective that "alternatives must be practical, economically feasible, and provide a balance with respect to environmental protection and exploration." [52]

The task force then studied the impacts associated with each proposal on 19 "elements:" soils, air quality, noise, surface water, ground water, vegetation, wildlife, fisheries, recreation, wilderness, cultural resources, visual resources, population, local culture, economics, employment, housing, community services and contribution to nation's energy needs. [53] These impacts were rated either "high," "moderate" or "low," using a dot system to visually compare alternatives. With this data in hand, each alternative was evaluated against the nine criteria using a rating scheme:

> Each Government scientist (FS and USGS) working on the EIS was asked to rate the magnitude of the impacts of alternatives for his specialty, according to these three levels. "Low" impact assumes very little change from status quo conditions; "moderate" implies some change to the extent that these changes would alter or destroy critical/key habitat or highly valued activities, produce intense community conflict, be obvious to anyone, or offensive to anyone, as the case may be...the impact ratings were thoroughly reviewed by

> experienced USGS or FS personnel to assure a sense of reasonableness and consistency. [54]

As might have been predicted, the Forest Service analysis was immediately called into question. Phil Hocker of the Sierra Club criticized the task force's evaluation method:

> The dot-system used for evaluation of alternatives is too simplistic to be credible. Subjective judgements are hidden in the assignment of dots, which are not supported by the text of the dEIS, the supplemental studies, or fact. The bias of the authors of the dEIS has affected the construction of the naive charts shown. [55]

Because he had no faith in the process used to analyze alternatives, Hocker immediately questioned its conclusions. He criticized the cursory attention given to eventual full field development should oil or gas be found in significant quantities. He listed several alternatives that he thought were plausible but that were not discussed in the draft EIS. He also questioned whether or not the action satisfied the intent of The Wilderness Act as the authors contended. He concluded:

> The draft EIS under review is "so inadequate as to preclude meaningful analysis," and a retraction and issuance of a new draft or multiple drafts is required (40 CFR Part 1502.9(a)). The scope of the draft is imprecise and appears to shift within the document. The draft omits important alternatives, and includes others which are inconsistent with policy positions taken in the study. The draft adopts a new Federal policy on lease administration and uses this new policy to justify other positions within the study; however, the sweeping impacts of adopting such a policy are not studied, as is required (40 CFR Part 1508.18(a)). Specific impacts are inaccurately portrayed or omitted. The conclusions of the dEIS are incorrect and insupportable. [56]

Hocker was joined by several other environmental organizations in criticizing the EIS. Again, some suggested

that there were other alternatives that should have been analyzed but were not. Others reached different conclusions using the same data acquired by the Forest Service-Geological Survey task force. The task force had recommended "limited approval" of the Cache Creek APD. They concluded for Cache Creek that "approval could be limited to the initial APD only, with the understanding that the government might pursue a disapproval option subsequent to the drilling of the first test well." [57] Earlier in the dEIS, however, they had emphasized that "[u]nder the present legal structure, the Federal oil and gas leasing program is geared toward production only. A discovery automatically leads to development rights under the system. There is no proviso for one well only without special Congressional action." [58] This discrepancy prompted anger from local residents and national environmental groups who argued that the Forest Service analysis was internally inconsistent. They argued that the conclusion reached was not supported by the facts and analysis preceding it. [59]

Similarly, for Getty Oil's Little Granite Creek proposal, the task force concluded, even though helicopter mobilization satisfied all of their criteria, to recommend road access via Little Granite Creek:

> The helicopter mobilization alternative fully satisfies practically all of the evaluation criteria. On the other hand, while the road alternative may not fully satisfy as many criteria, it does fully or partially meet all of the USFS/GS objectives. It appears that with proper reclamation using techniques currently available there would be no long-term

> effects from the Little Granite road other than **persistent** road scars in the last mile below the wellsite. (emphasis added) [60]

Sharon Nelson of the National Wildlife Federation questioned the USFS/GS selection of the road access alternative. She commented that the Jackson Hole Area Oil and Gas Lease Stipulation that was attached to each of the leases involved requires that the lessee "keep to an **absolute** minimum the number of access, tote roads and other travelways" and to "conduct operations in a manner that will offer the **least** possible disturbance to wildlife on or adjacent to the leased land." (NWF emphasis) [61] Given these provisions, Nelson concluded:

> The DEIS acknowledges that, with added expense, the Bear Thrust exploratory well can probably be drilled using only helicopter access. The language of the stipulation does not provide for "practicable" or "economical" or "reasonable" access. It stipulates **absolutely minimal** road building.
>
> If Getty cannot demonstrate ability to obliterate that last mile...they cannot proceed with their operation under this term of their lease, except via helicopter. [62]

That judgment must be exercised in making these decisions is hardly an earth-shattering observation. Economists have long warned against the impossibility of trying to maximize a decision along several dimensions simultaneously. The policy analysis and planning evaluation literature similarly discusses the difficulty of making social choices when many objectives are desired. [63] Forest Service officials acknowledge these shortcomings. But, they argue that Congress has mandated that they make decisions by

considering and weighing numerous factors. [64] While there may be no precise formula to indicate a correct decision at the end of analysis, Forest Service officials feel confident that their professional judgment leads to decisions that closely approximate "the public interest." [65] Furthermore, they argue that, while their decisions might have shortcomings, who else could possibly make these decisions any better? They are still the agency with forest management expertise. [66] Seeing no other way to make these judgmental decisions, agency officials systematically and thoroughly study each proposal and, considering the information gathered in this effort, use their judgment to make a decision. But, because these analytical methods are flawed and, moreover, subject to dispute, they are almost always called into question by those who believe different factors should have been considered or weighed differently.

Even Experts Disagree

Not only is there disagreement between the Forest Service and environmental organizations about the type of information needed for decisionmaking and the appropriate conclusions to draw from each analysis, there is also disagreement among federal and state agencies with land management responsibilities and expertise. While the Forest Service concluded that some development could occur without impact in the Washakie Wilderness in Wyoming, [67] the National Park Service concluded that this same activity "would destroy the wilderness values of this wild, remote and

indescribably scenic area...[and] will be detrimental to Yellowstone National Park." [68] When the USFS and USGS recommended that exploratory drilling occur in Cache Creek Canyon and Little Granite Creek outside Jackson, Wyoming, Roger Williams, EPA Region VIII Administrator, protested:

> Exploration is only the first step in what could become a major developmental process. While this action is significant in itself, the policy implications extend beyond just the proposed action. Important precedents will be set for future oil and gas EIS's.
>
> The 5-7 miles of road construction needed would drastically and irretrievably alter the area's wilderness characteristics. The Gros Ventre is the largest single de facto wilderness area in the lower 48 states. The Gros Ventre as wilderness provides important watershed protection. It provides important habitat for not only grizzly bears, but also eagles. Due to its generally steep slopes and unstable soils, the Gros Ventre will not fair well from a resource development standpoint. [69]

Similarly, Idaho and Wyoming State Game and Fish Department officials expressed concern to the US Forest Service about leasing in the Palisades area: "The remoteness of the Palisades Further Planning Area has made it a haven for wildlife. Elk, and especially mountain goats, need protection from human disturbance....The best solution to protect wildlife is no further leasing...our recommendation is no further leasing." [70] Nonetheless, the Forest Service's environmental assessment concluded that "there will be no significant adverse effects...due to oil and gas lease issuance." [71] The agency recommended to the BLM that the leases be issued.

Not only do "experts" disagree about the appropriate

conclusions to draw from environmental analyses and hence what decisions should be reached but, additionally, they disagree about how much and what type of information is needed before a wise decision can be made. One such disagreement arose between the US Forest Service and US Geological Survey over exploration permits in Wyoming's Cache Creek Canyon. As described in the last chapter, the USFS responds to an APD by preparing a preliminary environmental assessment of the proposal. With this information, a recommendation is developed and sent back to the USGS. The USFS recommendation lists the agency's concerns with the proposal and how permit approval might be conditionned to offset potential impacts. Theoretically, the process takes about ten days. The USGS then revises the applicant's development plan to conform to USFS recommendations. But, the Cache Creek APD took a different course.

Once the preliminary findings from the USFS environmental assessment were available, Bridger-Teton National Forest Supervisor Reid Jackson announced his "precedent setting recommendation" [72] to the USGS -- that an environmental impact statement be prepared before a decision was made on the proposal. Reid Jackson commented that the Forest Service's preliminary EA found that the proposed well and access road "cannot be conducted in Cache Creek, regardless of alternative methods, without impacts to soil, water, aesthetics, potential wilderness, wildlife, recreation and aspects of the socio-economic structure of

Teton County." [73] Jackson called for an EIS on these grounds as well as because the well was proving "highly controversial" and that Council on Environmental Quality guidelines call for an EIS under such circumstances. He noted that of 200 letters received by then at the Bridger-Teton National Forest headquarters, 170 opposed the well. [74]

Jackson forwarded his conclusions and recommendations to the USGS District Office in Rock Springs, Wyoming, in January, 1978. Once back in the USGS' hands, the fate of the proposal was uncertain. The USGS has full responsibility for making drilling decisions and is not required to abide by the USFS recommendation. [75] Traditionally, though, the agency has respected the Forest Service's professional judgment. The USGS had never denied a drilling permit for environmental reasons and had previously prepared only one EIS on an APD. [76] As a result, agency officials began what they termed an "unusual" environmental assessment report (EAR); "unusual" in the sense that the issues to be addressed in it, especially whether or not to do an EIS on the proposed drilling, were precedent-setting. [77] The proposal then faded from view as the USGS conducted its EAR inhouse, without input from USFS personnel or the Jackson Hole community.

Almost a year later, in December 1978, a letter from W.A. Radlinski, acting director of the USGS, to USFS Chief John McGuire was made public. In this letter, Radlinski stressed that the USFS environmental assessment on the Cache

Creek APD of a year earlier was "excellent," and expressed his view that an EIS was unnecessary. He argued that an EIS at the APD stage would be premature since it would not provide any information that could help federal decisionmakers make their decision. He indicated his belief that an EIS would be more appropriate after exploration had occurred and before development took place. Only then would information regarding the oil and gas resource potential be available with which to make an informed decision. [78]

On April 2, 1979, 15 months after Reid Jackson had first recommended an EIS, USFS and USGS officials met together for the first time to discuss the "unusual" EAR. Immediately afterward, Jackson drafted a letter to the USGS participants at the meeting. He pinpointed the Forest Service concerns with the analysis and questioned key assumptions, the estimates of those impacts discussed as well as environmental impacts overlooked. The letter concluded that the EAR:

> ...does not state the environmental impacts as clearly and directly as it might. We continue to remain of the opinion that the impacts from this rank wildcat well and attendant road developments would be unusually severe. The statements in your EAR regarding mitigation are overly optimistic and tend to play down the impacts.
>
> The EAR does not deal with the primary issues of the Cache Creek well which were much broader than just the impacts resulting from this single test well. Those issues which are still very much alive have to do with the question of the rate and order of oil and gas prospecting and exploration in the Jackson Hole area, e.g., is it necessary to drill the most environmentally sensitive areas first to determine what the oil and gas potential of the area is. [79]

In early July, 1979, the USGS released its "unusual" EAR

in draft form for public comment. Public hearings were held in late July and early August. The EAR discussed potential impacts on water quality, recreation, and wildlife, in the Cache Creek watershed as well as erosion and road construction-related impacts. It also referred to the obvious public opposition to the well, commenting that the Town Council was most concerned about impacts upon the local water supply and traffic through residential areas and that the County Commission feared impacts upon the tourist economy. The USGS still held to its contention that an EIS at this stage of development would be "premature" and that the test well should be drilled. The USGS concluded that "one well in and of itself does not constitute a major federal action." [80] While the well would cause some environmental problems, most could be mitigated and the site reclaimed if drilling were unsuccessful. They did conclude, however, that Cache Creek would lose its status as a benchmark station for water quality. [81]

The issue once again faded from view after the public hearings. But, on January 17, 1980, more than two years after NCRA's permit application had been filed, the Director of the US Geological Survey agreed to prepare an EIS before making any decisions about the proposed Cache Creek well. By that time another APD had been filed for Little Granite Creek, an area adjacent to Cache Creek. The public outcry intensified. The agency had little choice; the Jackson Hole community and several national environmental organizations

had joined the Forest Service in demanding an EIS.

USFS officials were and are caught in the middle of an unquestionably difficult situation. They have responsibility for making leasing and permitting recommendations and decisions almost daily, but there is no agreement between public land users, the USFS and other federal and state resource managers. These groups disagree about the boundaries of analysis in decisionmaking, the specific alternatives to be analyzed, the meaning of Forest Service Manual directives and the conclusions that ought to be drawn from the findings of analysis. Forest Service field officials wish they had more explicit formulas to follow in decisionmaking. [82] Since they do not, they compensate by being as systematic and thorough as possible so that all affected user groups can see that their interests have been considered. As has been shown above, not all the groups involved are convinced.

The analysis conducted by the Forest Service in making oil and gas leasing and permitting decisions is critical to making an informed decision, but this analysis cannot alone provide sufficient information with which to make a decision. Assumptions must be made in selecting alternatives and bounding the analysis, and judgment must be exercised in reaching conclusions from the analysis. These judgmental aspects of decisionmaking cannot be subsumed within technical analysis. While the process may satisfy Forest Service officials that all pertinent information has been considered and convince them that the decision reached is the most

appropriate, it does not similarly satisfy or convince other affected groups or individuals. If the objective of this process is solely to reach a decision, then it is successful. But, if the objective is to be decisive, that is to make decisions that are accepted and supported rather than immediately contested and undermined, then the process fails.

Inevitably, many groups have preconceived notions about what an appropriate decision should be long before the analysis is completed. The decisionmaking process does not convince these groups either that their preconceived notions are "wrong" or that the decision reached is "right." Hence it encourages criticism and, moreover, provides a substantive basis for this criticism. The process 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 an opportunity to amend, support or reject their early notions. The process does not convince these groups that the critical assumptions and value judgments that in the end dictate which decision will be reached, are the most acceptable. It is unlikely that additional analysis would have convinced the Jackson Hole community that permitting a well up Cache Creek Canyon is the right thing to do. The values at stake simply do not lend themselves to the type of technical analysis conducted on this exploratory drilling proposal. But, should there be a mutually acceptable alternative -- in the Cache Creek case or in the dozens of other cases in which the Forest Service

similarly finds itself -- the process is not structured to determine what that alternative might be. In this sense, the process is not as informative as it otherwise could be.

II. The Process is Divisive

When the National Cooperative Refinery Association filed an APD for its leasehold in Cache Creek Canyon outside Jackson, Wyoming, the initial reaction from the local community was cautious and concerned but not immediately negative. However, by the time NCRA withdrew its application four years later, the community was, literally, up-in-arms against drilling in Cache Creek. As one local resident exclaimed during the revelry following NCRA's announcement withdrawing its APD:

> We told them we were gonna harass the hell out of them. They were warned that there would be vandalism and all kinds of trouble. People carry guns up here, you know. [83]

The specifics of NCRA's proposal were only part of the reason the community's opposition grew to be so adamant; the administrative decisionmaking process provided no option but to respond as they did.

As structured, the oil and gas leasing and permitting process is divisive. It promotes distrust between parties, it encourages adversarial behavior, it leads to extreme position-taking and, ultimately, it ensures opposition to whatever decision is rendered. While conflict over many oil and gas proposals is inevitable, the process provides no

mechanisms for anticipating this conflict and trying to resolve the differences among affected parties. As a result, the process exacerbates conflict and inhibits accommodation of the interests at stake.

The Process Promotes Distrust

The "decisionmaker" in oil and gas leasing or permitting cases is, obviously, the federal land manager. As a result, the process is designed to generate information to inform his decision. The relevant information from a lease or permit applicant is contained in the official application. The federal official obtains additional information by requesting it directly from the applicant and by undertaking on-site inspections.

The public, on the other hand, obtains its information, second-hand, from the federal land manager. In many respects, the federal land manager becomes the applicant's spokesman, describing the proposal and its consequences in public announcements and at public meetings. The process provides no forum for direct communication between the applicant and the public. As a result, any hostility or opposition over a specific proposal, by design, is centered on the federal agencies. When opposition to NCRA's well heightened, the Jackson Hole Chamber of Commerce framed the battle as one of the community against the government: "people here think they can fight the federal government and they do and they win." [84] Given this context, distrust of administrative decisions is frequently built into the

process; it is difficult for public groups and individuals to divorce the proposal from the federal officials presenting it.

When it first became public that NCRA had filed an APD for Cache Creek Canyon, the Jackson Hole Community (residents, town council, county commission, Chamber of Commerce) questioned the proposal on the grounds that it would diminish the quality of life in Jackson Hole, tax the town's streets and services and potentially detract from the area's exceptional tourism and recreation opportunities. [85] At the outset, though, the governing bodies and Chamber of Commerce adopted a "wait-and-see" stance despite the immediate and vocal opposition of some residents. [86]

The Chamber of Commerce and town officials invited NCRA to Jackson Hole to explain their drilling plans to the community. But, NCRA refused. [87] They adopted a very low profile throughout the process, apparently preferring to leave all dealings with the community to the Forest Service. And, since the process included no forum for bringing these parties together, NCRA was able to keep its distance. This posture was interpreted as arrogance by Jackson Hole residents and prompted distrust of NCRA and, hence, opposition to the proposed well. Moreover, it encouraged opposition by the Chamber of Commerce, the one organization in town most likely to support the company's proposal. The Chamber's executive director attributed the group's eventual strong opposition to the Cache Creek proposal to NCRA's

attitude: "Refusing to communicate with the Chamber...really made us mad." [88]

The Process Promotes Adversarial Behavior

In addition to promoting distrust, the process also encourages adversarial behavior. The Forest Service is charged with representing "the public interest" in decisionmaking. As a result, the only rational response of affected groups and individuals is to argue that their interests coincide with "the public interest." And, that is precisely how most arguments are framed in these disputes, both at the policy level and in site-specific cases. For example, over time, opposition to the Cache Creek well became much more organized than when NCRA first filed its APD. The Jackson Hole Alliance for Responsible Planning was established in March 1979 and it served as an organizing force against the well. The Alliance formed a "Blue Ribbon" committee of influential community members to build community opposition to the well. They also encouraged a coalition with the Sierra Club, Chamber of Commerce, town council and county commission. The Alliance's philosophy from the start was that land use planning in Jackson Hole should complement rather than detract from its scenic and natural system attributes. Their argument throughout the process was that Jackson Hole and Northwestern Wyoming was a "national interest area" and, for that reason, should be protected from incompatible development activities. [89]

When Getty Oil Company proposed drilling an exploratory well in Wyoming's Little Granite Creek area, the Sierra Club opposed the oil company's plans. The environmental organization argued that Little Granite Creek was within a recommended wilderness area and that permitting a well there violated the protective provisions of The Wilderness Act and thus was not in the public interest. [90] But, the Forest Service approved the well, arguing that it had no authority to deny a drilling permit to a leaseholder. [91] Sierra Club representative Phil Hocker protested the agency's decision, arguing that one of the stipulations attached to the leases gave the agency authority to deny drilling: "a finding that approval is not in the public interest is adequate to justify disapproval....The Jackson Hole Stipulation and Krug Memorandum requirements supplement the fundamental authority reserved to the Secretary of Interior to control prospecting and development of oil leases 'in the public interest'." [92] Hocker argued that the Forest Service decision had failed to represent "the public interest." As a result, the Sierra Club took the Forest Service to court.

In addition to arguing that their position best represented "the public interest," each group also alleged that its adversaries are making nothing but self-interested demands. For example, when lobbying against wilderness designation legislation, industry associations argue that such actions support "extreme" special interest groups: "The U.S. may lock up vast areas of land without knowing how much

energy supply it gave up in order to keep the acreage in pristine condition. That's a valid basis for decision making only to extremists who insist on their objectives regardless of cost in terms of energy supply." [93] Similarly, Neal Williams of the Rocky Mountain Oil and Gas Association argues that:

> We cannot continue to study and analyze our public lands for restrictive **single-interest** uses [ie. wilderness] when there are so many worthwhile competing uses. We cannot postpone responsible and environmentally sound mineral exploration...we should not impede development of our natural resources while we import timber, fuel and strategic minerals, to the detriment of our economy and balance of trade. [94]

Such arguments are not unique to industry representatives. Michael Scott of The Wilderness Society responds similarly to industry's allegations: "When we talk about wilderness, we are talking about barely one percent of the total land mass of the lower 48 states. How much oil and gas can be found in so little land? I think we are simply dealing with people...who are personally offended as a matter of philosophy that there are areas they can't go into and develop." [95]

The Process Encourages Strategic Behavior

Not only does the process deepen the chasm between the traditional adversaries, it also encourages these groups to behave strategically. Because the process puts potentially affected groups other than the applicant on the defensive and prompts distrust, it encourages all groups to seek other means of protecting their interests (ie. it encourages them to seek other avenues through which their power to influence the final outcome might be greater).

When the USFS and USGS decided that a no-drill decision for Cache Creek was beyond their statutory authority, the Jackson Hole community concluded that their concerns could not be adequately addressed in the administrative process. The Jackson Hole Alliance came to the conclusion that the EIS would be "little more than a justification for the project...There is no administrative remedy now that we have reached this stage of development." The Alliance was "appalled that leasing had occurred without public input" and now that an APD is filed "the decisions have already been made and there is nothing in the administrative process that the community can do about it." In their mind, involvement in the administrative process had become "meaningless." [96]

When the administrative process failed them, the community moved into a forum where they felt they had more influence: Congress. Their approach was to encourage Congressional action to exchange or buy back NCRA's leases. They were convinced that they would be successful. Ralph

McMullen, the Chamber's executive director, explained why:

> We have people who know what to do and whom to call...The people who move here often are powerful, wealthy and influential. The locals know where to go and our tentacles reach far. [97]

McMullen was convinced that the Congressional delegation would be much more responsive to the Chamber's concerns than was the USFS or USGS:

> The Forest Service and Geological Survey are bureaucracies and so they are not responsive to the electorate...but the Congressional delegation is republican and so are most of the Chamber's members... they listen to us. [98]

The Chamber and the Alliance both felt they had a better chance to influence decisionmaking through Congressional channels than through administrative channels.

This strategy was encouraged by a seemingly favorable response from their Congressional delegation. Given the Jackson Hole community's united and forceful opposition to the Cache Creek well, Wyoming's three-member Congressional delegation [99] gave its support to the community. Senator Alan Simpson reported that "all of us have grave reservations about drilling in that area. I haven't found anyone in the county who favors this, so we will pursue everything we can." [100] Senator Malcolm Wallop declared that "we can generally agree that it ought not happen. The delegation will try to find any means available to it to prohibit the drilling in Cache Creek." [101] The delegation assured Jackson Hole residents that they "don't believe oil and gas drilling will ever be a reality in Cache Creek Canyon." [102] With such an encouraging response, there seemed little reason for the

community to pursue the administrative process.

When opposition to drilling in Cache Creek Canyon flowed over to Getty Oil's proposed Little Granite Creek well, Getty officials tried to offset this community reaction. It immediately presented itself to the community to help residents and environmental groups understand and trust Getty's proposal. Getty's attitude could not have differed more from NCRA's. They were open, accessible and acknowledged the environmental concerns at stake. They had proven themselves to be trustworthy and responsible in other interactions with the Bridger-Teton National Forest and environmental groups in another drilling project in nearby Fall Creek. Moreover, Getty had an "excellent" prospect, much different from NCRA's questionable one. They were willing to compromise in order to drill. [103]

Getty assured the town that its Little Granite proposal would not be environmentally disastrous as the Sierra Club contended and would be a financial bonus for the area. It reported that seismic data and geophysical analyses indicated a 44,900 acre anticline that could potentially hold $1 billion worth of oil and gas: 50 million barrels of oil or 300 billion cubic feet of natural gas. The State would receive $375 million if Getty's projections proved accurate. Teton County would receive one-third of whatever revenues were generated. [104] Getty assured the town that it would take whatever steps necessary to protect the large elk herds as well as the other wildlife that Little Granite Canyon

supports as calving and grazing grounds and migration routes. They minimized the probability of encountering hydrogen sulfide ("sour gas") and promised minimal impact on the county's or town's cultural, social or educational services. They assured that no drill rigs would ever be visible from Jackson or the highways into town and that operations would be quieter than usual because Getty would use muffled generators and diesel-electric engines. [105] Getty's representative emphasized the company's record: "Getty has demonstrated, in Teton County and elsewhere, that drilling in sensitive environments can be accomplished successfully." [106]

Getty hoped that its strong public relations effort would encourage a constructive dialogue with the environmentalists, the Jackson Hole community and the USFS/GS team. They hoped that they would be able to address most concerns and still be able to explore and perhaps develop their prospect. [107] This dialogue never evolved. There seemed to be little incentive for the Sierra Club or Jackson Hole community to negotiate; a Congressional solution to the whole problem seemed imminent.

The Sierra Club was not willing to concede to drilling in a proposed wilderness area because the drilling would be precedent setting and make it difficult to prevent further oil and gas exploration in other wilderness areas. There seemed little reason for them to negotiate with Getty to mitigate impacts if, in fact, a no-development option still

existed. [108] While congressional action was not guaranteed, it seemed likely. In November 1981, Jackson Hole Alliance Director, Story Clark felt confident that "the gears for a solution are already in the works." [109]

In late February 1982, this optimism was shattered when the Wyoming Congressional delegation introduced its wilderness legislation to Congress. The Wyoming Wilderness Bill explicitly removed all designated wilderness areas in Wyoming from any oil and gas or other mining activites. It firmly set the boundaries of each wilderness area. To the shock of the Sierra Club, the Wilderness Society, the Wyoming Wilderness Association, Jackson Hole Alliance and many Jackson residents, the bill removed Little Granite Creek from the Gros Ventre Wilderness, theoretically paving the way for Getty's well. [110]

The Congressional delegation's bill hardly put the issue to rest, though. By that time the dispute had been allowed to build to the point that positions had become entrenched. Hence, the Jackson Hole Alliance, Sierra Club and other environmental organization, rather than responding favorably to Getty's advances, began looking for other means by which to oppose the well. And, as they found, the process is vulnerable; there are many avenues by which individuals and groups can influence decisions in the making and oppose decisions that do not accommodate their concerns.

III. The Process is Not Decisive

In 1962, the Outdoor Recreation Resources Review Commission commented on the Forest Service's ability to prevail in the midst of inevitable conflict over its decisions:

> The Forest Service does not stand alone in the face of pressures from one direction. One Chief of the Forest Service is alleged to have said, "I am supported by the pressures which surround me." With skillful manipulation, the various clientele groups tend to cancel out each others' efforts. To the extent that this occurs, the administrator is given greater discretion to make decisions which he considers to be in the public interest. [111]

But, by 1982 this perspective no longer applied. The Forest Service might have discretion to **make** decisions deemed to be in "the public interest," but these decisions are no longer supported by the conflicting pressures acting upon it. In 1982, decisions not deemed appropriate can be opposed effectively; they are not decisive.

Theoretically, a "decision" should be the final word on a matter; as Webster defines it, a decision is a "conclusion" or "a report of a conclusion." But, while Forest Service officials would certainly prefer that their decisions fit this definition, frequently they do not. Because the stakes are so great, groups whose concerns have not been accommodated by a decision inevitably oppose that decision. And, because the decisionmaking process is unable to conclusively determine which outcome is the appropriate one, these groups have grounds on which to make strong arguments against a decision. If an oil and gas leasing or permitting

decision is not influenced in the making, there remain many different ways to potentially undo that decision once made.

Consider, for example, a case involving Montana's Bob Marshall Wilderness Area. After four years and four decisions the fate of the permit and lease applications filed for the Bob Marshall are still up in the air. The first decision was made when the Region I Regional Forester decided to deny a prospecting permit for the area. But, this decision was appealed by the permit applicant to the Forest Service Chief. The Chief disagreed with the Regional Forester's assessment and sent the application back to him to be reconsidered. [112] A second decision was then made when the Regional Forester reconsidered his original decision and again ruled against the applicant. [113] But, the applicant again appealed. In the meantime, environmentalists concerned about the Bob Marshall's wilderness characteristics turned to Congress. A third decision was made when the House Committee on Interior and Insular Affairs evoked an emergency provision of the Federal Land Policy and Management Act of 1976 to withdraw the wilderness area from the mineral leasing laws. [114] But, once again, the dispute was not resolved. The Mountain States Legal Foundation and the Pacific Legal Foundation sued the Congressional committee, alleging that the committee's action was unconstitutional. [115] The fourth decision was made when the federal judge in this case ruled that the committee's action was constitutional, but only so long as the secretary of the interior set the time

limit of the withdrawal. [116] The judge thereby forwarded responsibility for the "final" permit decision to the secretary.

After four decisions and three decisionmakers, the fate of oil and gas exploration in the Bob Marshall Wilderness has yet to be "decided." The ball is now in Secretary of the Interior James Watt's court. His decision has been forestalled by an agreement with Congress affecting leasing in all Wilderness Areas until September, 1983. [117] At that time, if Congress has not legislatively protected the Bob Marshall, Watt will become the fourth decisionmaker, making the fifth decision. His decision will inevitably be judicially opposed by either the applicant or environmental groups. The final decision and the final decisionmaker have yet to be identified.

No decision is immune from opposition. Informal as well as formal policies are opposed. If unsuccessful at influencing policies in the making, the policies will be opposed when implemented. Opposition traditionally follows existing administrative and judicial channels. But, opponents are hardly limited to these avenues; there is much room for an individual or group's creative instincts. If success is not achieved in the administrative process then opponents may turn to the courts, Congress, the state or other governing bodies; guerrilla tactics cannot be ruled out when conflict is permitted to develop to extremes. If differences are not resolved when prospecting decisions are

being made then the conflict flows over to leasing decisions and then on to permitting decisions and eventually to licensing decisions. In the end, however, just as in the Bob Marshall case, no mechanism is available to resolve disputes; no process exists to accommodate the interests at stake. Consistent with the long-held land management paradigm, all the steps in the process are designed to inform the professional land manager's decision. Disputes fester and escalate as the parties jockey for position in subsequent rounds of appeal.

The Conservation of Conflict

Reviewing the Palisades leasing case is a tedious task. Each stage is redundant; the issues argued are the same. But, because the differences between several environmental organizations and the Forest Service were not addressed -- because the environmental interests were not accommodated to their satisfaction -- the disputes persisted. The case proceeded through a succession of decisions that in the end merely served as transfer points, as the dispute moved from one forum to another. The process proceeds as if governed by a natural law of "conservation of conflict:" the level of conflict either remains stable or increases as decisions move from one phase to the next. Seldom are attempts made to resolve conflicts and hence defy this "natural" law.

Policymaking:
The FPA Stipulation and Guidelines Dispute

Because of the intensifying interest in the oil and gas potential of the Western Overthrust Belt, the Forest Service concluded in RARE II that, even though the Palisades area had high wilderness value, no decision could be made about its final status until more information was obtained about its oil and gas resources. Thus, the Palisades area was classified as neither wilderness nor nonwilderness but instead placed into a third "further planning" category. In the Final Environmental Statement on its RARE II wilderness evaluation process the US Forest Service acknowledged its dilemma:

> Unless there is additional exploration for oil and gas resources permitted in many areas allocated to further planning, subsequent wilderness-nonwilderness decisions will have to rely on data not much better than currently exists.
>
> Exploration by drilling to determine oil and gas potential is essential in reaching conclusions in land management or project plans that allocate roadless areas.
>
> For the above reasons, oil and gas exploration (including drilling where adequate exploration requires it) will be considered an integral part of the further planning process. [118]

In justifying its allocation decision in this way, the USFS was assuming that stipulations would protect surface resources against environmental impacts should exploration or development be proposed. Additionally, they assumed that the Forest Service retains authority at later decision points (ie. permitting and licensing) to control whatever activities may be proposed. But, environmental groups questioned both

assumptions and, therefore, the decisions reached.

The first task the Forest Service Washington Office officials undertook was developing a special stipulation to be attached to all leases issued in Further Planning Areas. The national environmental organizations closely followed the development of the FPA lease stipulation and FPA leasing and management guidelines. They wanted to ensure that the stipulation and guidelines were sufficient to protect the area's wilderness character should oil and gas exploration and development ever be proposed. [119] While the Washington Office distributed drafts of the agency's proposed stipulation and guidelines for comment before finalizing them, these groups felt that their involvement was merely "pro forma." They did not believe that the US Forest Service Washington Office ever took their criticisms and recommendations seriously. [120]

Sierra Club representatives criticized the proposed FPA stipulation on several grounds, going as far as drafting their own version that they felt would better assure maintenance of wilderness values while final allocation decisions were being made. They complained about the lack of public comment or discussion of the stipulation before it was promulgated and expressed frustration at their inability to follow and participate in the process. They cited several unanswered letters to the USFS Washington Office on the matter. They urged the Forest Service "to either adopt the Sierra Club proposed revision, or at least to initiate a

consultation procedure leading to major changes in the oil/gas administration of Further Planning Areas." [121] More specifically, Bruce Hamilton criticized the requirement of only an environmental assessment (EA) and not an EIS, stating that it was a contradiction of explicit RARE II FES intention and "would completely void the integrity of the Further Planning Process." [122] But, the US Forest Service made no changes in the FPA Stipulation in response to these criticisms. Agency officials were confident that the FPA stipulation was adequate and enforceable as originally designed. [123] But, by failing to respond to the environmental groups' contentions, the agency ensured that the dispute would reappear when it came time to implement the stipulations.

The FPA Stipulation was supplemented with new Forest Service Manual (FSM) guidelines for managing the oil and gas resources in FPAs. These guidelines were also developed in the USFS Washington Office in consultation with those Forest Service Regions facing oil and gas pressures. One meeting was held in Washington in April 1980 to obtain input from environmentalists and energy industry representatives. [124] With respect to specific management of further planning areas, the guidelines emphasized that "a primary reason for allocating an area to further planning was the need to gather additional data on which to base a wilderness, non-wilderness decision. Therefore, mineral exploration is considered an integral part of the further planning process but it must be

conducted in such a way that a wilderness option is retained or can be restored by reclamation." [125] The Forest Service's confidence in the ability of protective stipulations to guard against surface resource impacts was clear:

> Controls available in regulations and lease terms are generally sufficient to avoid environmental problems and protect wilderness values. [126]

In addition, the Forest Service felt assured that there remained other decision points where they could control lease activities and perhaps rectify leasing errors:

> While the prelease environmental analysis treats general issues and concerns (such as preservation of the wilderness option) that would seriously and necessarily be affected by lease operations, the operations stage is the time to address most concerns. [127]

But, the national environmental organizations monitoring the development of these guidelines questionned the US Forest Service's assumptions that lease stipulations would adequately protect surface resource values and that the USFS possessed sufficient authority at later decision points to control activities that proved threatening to wilderness characteristics. [128] In early September, 1980, USFS Chief R. Max Peterson distributed a draft of the FPA guidelines for comment from those participating in the April meeting. [129] Bruce Hamilton, Sierra Club Northern Great Plains Regional Representative, immediately responded to the draft guidelines, expressing concern that the issues raised earlier by the Sierra Club and other environmental groups had not

been "adequately addressed." He stressed that:

> We remain convinced (1) that the FPA stipulation is not adequate to preserve the wilderness option; (2) that highly environmentally sensitive zones in FPAs that can't be directionally drilled should not be leased; (3) that leasing prejudices the land allocation decision; and (4) that the Forest Service does not have a workable plan for making a timely unbiased land allocation decision in FPAs that are leased. [130]

Hamilton questionned the logic behind further leasing of national forest lands to determine their energy resource potential, especially when a considerable amount of land was already leased. [131]

On December 31, 1980, a policy "decision" was made when USFS Chief R. Max Peterson finalized the Further Planning Area guidelines. But, the debate about the proper management of FPAs, especially with respect to oil and gas activities, was not put to rest. The environmental groups continued to question both the protection contained in the stipulations and the ability of the Forest Service to legally enforce these stipulations. They saw no reason to accept the guidelines as a "fait accompli." They pursued their concerns in the Palisades leasing decision, again raising the same issues.

Policy Implementation: The Palisades Leasing Decision

When lease applications were filed for the Palisades Further Planning Area, the Region II Forester decided to defer any decision until after the area's wilderness evaluations were completed and its status decided. [132]

But, deferring the leasing decisions in this manner was not a costless option. With The Wilderness Act's December 31, 1983, leasing deadline rapidly approaching, inaction on the outstanding leases could have potentially severe repercussions for the oil and gas industry. The Mountain States Legal Foundation (MSLF), a non-profit industry interest group, sued the Forest Service to force it to make a decision. [133]

MSLF filed suit in Wyoming District Court arguing that the USFS inaction on the lease applications constituted:

> (1) a withdrawal of the lands from the operation of the Mineral Leasing Act of 1920, without submitting such withdrawal to Congress for approval as required by the Federal Land Policy and Management Act; and,
>
> (2) a rule or regulation of either or both of the Departments of Interior and Agriculture which was not promulgated as required by the Administrative Procedure Act. [134]

MSLF claimed that its members as well as the general public would be "irreparably injured by the delay or prevention of development of energy resources" in the Palisades FPA. MSLF charged that the USFS' inaction would have "serious secondary impacts, such as increased unemployment, possible energy shortages and an increasing balance of trade deficit, which...affects the public's individual rights including the right of economic choice." [135]

USFS and Department of the Interior (DOI) attorneys defended themselves in court by claiming that, although they had "proceeded slowly" on these leases, they had not

specifically withdrawn the lands in question. Rather, they stressed that the Forest Service had been following other statutory mandates, specifically that of The Wilderness Act of 1964. The agency representatives expressed confidence that by deferring leasing decisions they would be better able to make the appropriate decision at a later time when more information about the area's resources was available. They argued that there were simply too many unknowns at that time to confidently make a decision. [136]

But, on October 10, 1980, Wyoming District Court Judge Clarence Brimmer ruled:

> We cannot allow the Defendants to accomplish by inaction what they could not do by formal administrative order. By our decision herein, we do not purport to require the Secretary of the Interior to accept, reject, or even take action on the outstanding oil and gas leases. We merely hold that the action taken by the Secretary of Agriculture, in failing to act on the outstanding lease applications falls within the definition of withdrawal under 43 U.S.C. Section 1702(j) and the Secretary of Interior is required to notify Congress of such withdrawal or institute action on the applications. [137]

With this ruling, the Forest Service was forced to make the leasing decisions, regardless of the potential impact on the area's wilderness characteristics.

The MSLF case fueled the dispute over the proper management of potential wilderness areas but did not resolve it. It moved the Forest Service "out of the frying pan and into the fire." It provided the agency with no guidance on how to decide, given the competing claims of the Sierra Club and the Mountain States Legal Foundation. But, it forced them to make a decision.

Because the Palisades area was one of the first FPAs with impending leasing decisions following Judge Brimmer's ruling, any decision reached in the case would be precedent setting. Now both national environmental organizations and the oil and gas industry associations were watching the USFS response closely. The Sierra Club, The Wilderness Society, the Wyoming Wilderness Association and the Idaho Environmental Council closely monitored all USFS activities affecting the Palisades FPA. They had participated in the agency's wilderness evaluations from the beginning and had long advocated wilderness designation for the Palisades. They had been pleased when RARE I concluded in a wilderness recommendation for the Palisades; they were outraged when RARE II resulted in a further planning status because of the area's oil and gas potential. Their feeling was that the area's exceptional wilderness qualities stood for themselves; the area should be designated wilderness **regardless of what energy resources, if any,** were located beneath it. [138]

In June, 1981, the Regional Forester recommended to the BLM that the Palisades leases be issued. On July 7, 1981, the Sierra Club filed an appeal of the Regional Forester's decision to recommend oil and gas leasing in the Palisades. The appeal immediately went before the USFS Chief. In their 50-page "Statement of Reasons in Support of Appeal" the Sierra Club outlined and defended their (by this time all-too-familiar) contention that:

Leasing in the Palisades, as permitted by the Regional

> Forester's decision, will not preserve the wilderness option for the area. The decision commits the lands to non-wilderness uses, and will result in damage to the wilderness qualities of the Further Planning Area. The decision does not meet the criteria for environmental protection established by the RARE program. Nor does the decision assure that the Forest Service will obtain data on oil and gas resources which RARE II indicates is necessary to carry out land management planning. [139]

The Sierra Club argued that the Forest Service decision did not satisfy the agency's own objectives in decisionmaking; it neither contributed to the agency's oil and gas resource information base with which to make a wilderness-nonwilderness decision nor preserved the wilderness option. Consequently, the environmental organization sought to prove that not only was the decisionmaking process flawed in that it did not comply with NEPA's provisions, but also that the decision itself clearly did not satisfy the USFS' own objectives of resource mapping in FPAs while maintaining wilderness values. The Sierra Club feared that the Regional Forester's decision was a "heads they win, tails we lose" proposition: Regardless of the actual oil and gas potential of the Palisades, the wilderness option would likely be lost. [140]

The Regional Forester responded to the Sierra Club's Statement-of-Reasons point-by-point in supporting his decision. He viewed the Forest Service decision to be clearly justified by the Forest Service Manual guidelines. Further, he emphasized that his decision did not commit the Palisades to non-wilderness uses, but rather that it allowed the Forest Service, while protecting wilderness values with

clear stipulations, to obtain information about oil and gas resources in the Palisades. The Regional Forester acknowledged that there were many uncertainties involved in making these decisions but expressed confidence that later decision points involving specific development proposals would provide better information and involve less uncertainty. [141]

The Sierra Club, in turn, responded point-by-point to the Regional Forester's response to their original statement, again disagreeing with the USFS' assertions. They continued to question whether or not the Forest Service actually possessed authority at later decision points to control oil and gas exploration and development activities as the Regional Forester was asserting. It was an administrative capability the Forest Service believed it possessed but one that they had never exercised. The Sierra Club questioned the Regional Forester's assertion that the leasing decision was not a major federal action requiring an EIS. They argued that waiting for an Application for a Permit to Drill (APD) before doing an EIS was an "incremental" approach to understanding and dealing with the issues and that "one of the primary purposes of NEPA was the elimination of just such bits and pieces decisionmaking. NEPA [required] a review of a proposal as a whole, before commitments of resources [were] made to it." [142]

After considering the arguments made by the Sierra Club and other affected parties in appeals documents as well as at

an oral presentation held in Washington, D.C., USFS Chief Peterson reaffirmed the Regional Forester's decision on December 31, 1980, and forwarded the Forest Service recommendation on to the BLM. [143]

The Sierra Club continued to appeal, making the same arguments, through the BLM decisionmaking hierarchy. Once again, though, their efforts were in vain. Secretary of the Interior James Watt personally intercepted the appeal before it went before the Interior Board of Land Appeals. [144] On May 28, 1981, after considering the Sierra Club's complaint and the Forest Service response, Watt decided that the Forest Service's recommendation was appropriate and issued the leases.

The debate was not put to rest. While final authority to make decisions under the mineral leasing laws does rest with the Secretary of the Interior, his decisions are just as susceptible to appeal as those of his subordinates. Two days after Secretary Watt made his decision to issue the Palisades leases, the Sierra Club filed suit in Washington D.C. U.S. District Court against R. Max Peterson (USFS Chief), John R. Block (Secretary of Agriculture), Robert Burford (BLM Director) and James Watt. Not satisfied that their concerns had been addressed by the Forest Service and BLM/DOI appeals processes, and still convinced that their questions deserved attention, the Sierra Club alleged the failure of the various USFS, BLM and DOI officials to fulfill their obligations under the National Environmental Policy Act. [145]

In the conclusion to their "Motion for a Preliminary Injunction" Sierra Club attorneys highlighted their long-expressed and well-known concerns. Once again, the Sierra Club questionned the assumptions supporting the Forest Service's decision. Once again, it doubted that the Forest Service had the administrative capability to significantly control oil and gas activities once leases were issued. They saw no link between the RARE II FES objective of obtaining further information about an area's oil and gas potential and this Forest Service decision. Finally, they once again called for a full EIS, hoping that more extensive analysis would make the consequences of the leasing decision more apparent to the Forest Service. [146]

With the Sierra Club's lawsuit, the issues were moved to a new arena, once again to be debated and judged. Now the decisionmaker, instead of being the USFS Regional Forester or Chief or the Secretary of the Interior, was a federal district court judge. The arguments presented by each group were the same; only the person listening was different.

On March 31, 1982, Washington D.C. U.S. District Court Judge Aubrey E. Robinson ruled that the USFS did possess the authority to enforce lease stipulations, even when these stipulations may make exploration or development impossible:

> The lessees may legally obligate themselves to lease conditions that may result in the inability to explore or develop; that is knowing risk the lessees wish to take. [147]

More than six years after having been filed, the

Palisades leases were issued. The final "decision" in the case was made by a federal district court judge. Judge Robinson's ruling gave a little to each party. The Forest Service was not required to do an EIS because its lease stipulations could effectively negate any development on the leaseholds. Should one of the Palisades lessees now file an APD, the judge's ruling left the door open for environmental groups to question the actual enforcement of the stipulations. While the leasing dispute seems resolved, the underlying issues about exploration in national forest roadless areas remain.

Where There's A Will There's A Way

The oil and gas decisionmaking process is extremely vulnerable to delay and attack. The Palisades case followed the customary administrative appeals process, ending with judicial review. Not all cases are so neat and predictable, though. While administrative avenues are seldom ignored, groups pursue other paths of least resistance where their influence is greatest. Consider the Little Granite Creek case:

On Friday, April 2, 1982, the US Minerals Management Service (MMS) announced its approval of Getty Oil Company's Little Granite Creek APD. Within days, environmental organizations announced their intention to appeal the decision. Phil Hocker of the Sierra Club labeled the decision "amazing and arrogant" given the strong public opposition and testimony against the well. [148] A Wyoming

Wilderness Association spokesman called the decision "a real mockery of the democratic process." [149] Should the administrative appeals fail, Earth First!, a radical environmental organization with nationwide support, promised civil disobedience in order to prevent Getty from drilling in Little Granite Creek. Earth First! spokesman Dave Foreman announced that "we're prepared to put our life on the line...we aren't going to rule out anything." [150]

The local Jackson Hole groups appealed to Wyoming governor Ed Herschler for help. The State of Wyoming had not yet become involved in the dispute. In a surprise move in early May, Governor Herschler voiced his opposition to the well and appealed to Secretary of the Interior James Watt to "either deny the drilling application or temporarily suspend the approval action." [151] He cited "valid concerns" expressed to him by Jackson Hole residents, sportsmen, outfitters, interest groups, local representatives and elected officials about "potential negative impacts on wildlife resources and the area's recreation, hunting and fishing and tourism industries." [152] He felt that other, "less sensitive," lands should be explored before areas like Little Granite Creek. He argued that the federal reviews had not exhausted all possible alternatives. [153]

In mid-May, the US MMS regional director in Rock Springs, Wyoming, signed Getty's drilling permit into effect. A 30-day appeal period followed the signing before Getty could proceed with its plans. [154] The Sierra Club promised

to use "all legal means...to protect the Gros Ventre from Getty's bulldozers." [155] Getty announced that it would begin constructing the access road in late June, although they still expected continuing opposition to their plans. [156]

Less than a month later, four administrative appeals of the MMS action had been filed. The Sierra Club filed an appeal with the DOI Interior Board of Land Appeals (IBLA) in Washington. [157] The Wyoming Wilderness Association filed two appeals: one with the US MMS in Rock Springs and one with the USFS Regional Forester in Ogden, Utah. [158] And, the Jackson Hole Alliance, in concert with the Jackson Hole Outfitters Association, Jackson Hole League of Women Voters and 62 prominent Jackson Hole citizens, filed a class-action appeal with the US MMS Rock Springs office. [159] The appeals questioned several different aspects of the decision but all focused on the irreversible environmental consequences of Getty's proposed 6.5 mile access road into the wellsite. Other issues in the appeals included the area's wilderness values, public opinion against the well, the helicopter access alternative, and various administrative procedures used in reaching the decision. [160]

Governor Herschler continued his opposition to the well. He filed an additional administrative appeal, and asked the Wyoming State Oil and Gas Conservation Commission (OGCC) -- of which he is chairman -- to review the proposal in order to determine whether state jurisdiction was possible. [161] The

Commission immediately began holding hearings under "Commission Rule 236." This rule gives the OGCC responsiblity for protecting the state's lands and waters from pollution and environmental degradation due to oil and gas exploration and development. [162] The purpose of the hearings was to determine whether the state should prohibit any drilling, place specific restrictions on development or allow Getty to proceed unrestricted. Again, the proposed access road provided cause for concern. The Commission members feared that erosion from the road would pollute Little Granite Creek which flows into the Hoback River and, finally, enters the Snake River, a proposed wild and scenic river. [163] The Wyoming State Game and Fish Department requested that the Commission order Getty to use helicopter rather than road access to prevent this possibility. [164] While state jurisdiction under Rule 236 came under immediate fire from Getty's attorneys and federal officials, OGCC Supervisor Don Basko concluded that the Commission "probably does" have authority to deny Getty a permit and thus he continued the hearings. [165]

Opposition to Getty's well was not limited to the administrative appeals and State OGCC hearings. Getty and a seismic testing firm in the area incurred more than $56,000 in damage at its construction site where surveying stakes were uprooted and expensive surveying equipment thrown into the creek. [166] On July 4, Earth First! held a rally at the Little Granite Creek trailhead, protesting Getty's proposed

well. 400 people attended the rally and 100 of those pledged to blockade Getty's access road should the oil company begin road construction. Author Edward Abbey (whose book **The Monkey Wrench Gang** inspired the founding of Earth First!) implored the gathering to "oppose, resist and, if necessary, subvert....Earth first, grizzly bears second, people third and J. Paul Getty last!" In concluding, Abbey joked with the audience to "please stop sending me those damned, dirty survey stakes!" [167]

In late July, Secretary of the Interior James Watt circumvented the MMS, USFS and IBLA to personally deny all administrative appeals filed against Getty's permit decision. [168] The move outraged the appellants. Attention turned to the ongoing State OGCC hearings and the courts. Additionally, the Sierra Club and the Wyoming Wilderness Association began preparing lawsuits. The Jackson Hole Alliance received, at no cost, the aid of the nationally prominent Jackson Hole law firm of Spence, Moriarity and Schuster in developing its lawsuit. [169]

The State OGCC vigorously pursued its hearings. It arranged with Getty Oil to tour the proposed wellsite and an additional site that had previously been drilled and reclaimed to its original condition by Getty. It obtained testimony from Getty and opponents to the well. It issued subpoenas to ten federal officials to appear before the Commission on August 10 to provide depositions. [170] The federal officials refused to attend. They argued that the

permitting decision was a federal issue that had already been ruled upon by Secretary Watt. [171] When the federal officials did not appear, the OGCC canceled the hearing and denied Getty's permit. [172]

The outcome of the Little Granite Creek case is uncertain. As of this writing, opponents of the well are waging the battle on two fronts. Three lawsuits have been filed against Secretary of the Interior James Watt and several other DOI officials responsible for issuing Getty's drilling permit. Getty Oil Company is also a defendent in these suits. The suits have been filed by Governor Ed Herschler on behalf of the State of Wyoming, the Sierra Club Legal Defense Fund for the Sierra Club and The Wilderness Society and the Jackson Hole Alliance in conjunction with eight Jackson Hole residents. The contentions in all three suits are similar and hence the suits have been consolidated. The causes of action include Forest Service violation of the Endangered Species Act, the National Environmental Policy Act, the Administrative Procedures Act, federal and state constitutional rights, violation of the public trust and conflicting DOI rulings on lessees' rights to drill. The Alliance is asking $5 million in punitive damage from each defendent. [173] A September 6, 1983 jury trial date has been set by Wyoming U.S. District Court Judge Clarence Brimmer to hear the three, consolidated lawsuits. [174]

Opposition has also shifted to another front. Before Getty can begin preparing its wellsite it must first build

the 6.5 mile road into Little Granite Creek. But, before it can begin constructing the road, Getty must obtain a road building permit from the Forest Service. Bridger-Teton National Forest Supervisor Reid Jackson approved the permit in late 1982. [175] His decision was appealed, though, to the Regional Forester in Ogden, Utah, who upheld Jackson's decision. The appeal is now in Deputy USFS Chief Ray Housley's hands in Washington, D.C. [176] Housley's decision is imminent, after having been delayed several months by a Congressionally-imposed moratorium on all oil and gas activity. [177] Getty officials are confident that the road-building permit will be approved. At that time they plan to return to the State of Wyoming for final approvals there. [178]

Conclusions

The cases discussed in this chapter by no means stand alone. Numerous others are now beginning or are in process. An appeal has been filed over recommended leasing within Vermont's Green Mountain National Forest. [179] Lawsuits are being drawn up by both industry and environmental groups over proposed leasing in Wyoming's Washakie Wilderness. The fate of Montana's Deep Creek Further Planning Area is in the hands of a federal district court judge. The California congressional delegation has appealed to President Reagan to withdraw two California Wilderness Areas from oil and gas

leasing; the California State Coastal Commission has promised that it will prevent leasing if President Reagan fails to do so. [180] In late August, 1982, Secretary of the Interior James Watt announced that several leases had been issued without his knowledge in a South Carolina Wilderness Area, thereby violating his agreement with Congress to withhold all leasing until November, 1982. [181] Environmental groups have taken the Department of the Interior and US Forest Service to court for issuing leases in New Mexico's Capitan Wilderness Area.

Disputes over oil and gas leasing and permitting decisions are not generated by capricious Forest Service officials. The problem is **not** that the Forest Service selects the **wrong** alternatives to study, evaluates them using the **wrong** criteria or assigns the **wrong** values to different outcomes. The problem is that there are no **right** answers. Because these decisions are inherently judgmental, numerous outcomes are legitimate. Likewise, any decision can be subject to question and opposition. Because the process is structured to develop technically defensible decisions when such decisions do not exist, it ensures that decisions will be opposed. The stakes are just too great to expect otherwise.

The next chapter explores some of the factors that contribute to public land management problems as they exist today. Chapter 4 describes how the procedural and substantive requirements of the Forest Service have changed

since the mineral leasing laws were enacted. Additionally, it addresses how the political environment of the 1960s and 1970s has changed the nature of public land management and how the Forest Service has responded to this change.

CHAPTER 3 -- REFERENCES

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[3] "James Watt's Environment: Promised Land," Transcript from Public Television (PBS) Broadcast, December 9, 1981.

[4] Ibid.

[5] For example, Rocky Mountain Oil and Gas Association v. Andrus, 500 F. Supp 1338 (D. Wyo. 1980).

[6] For example, Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980); and, Pacific Legal Foundation v. James Watt, 529 F. Supp. 982 (D. Mont. 1981).

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[8] 16 U.S.C. 1131 (1976).

[9] This criteria has been amended, however, to encourage designation of previously logged or developed eastern national forests. See Michael Frome, **Battle for the Wilderness**, Praeger Publishers, New York, 1974, Chapter 11: "Any Wilderness in the East?"; see also, William E. Shands and Robert G. Healy, **The Lands Nobody Wanted**, The Conservation Foundation, Washington, D.C. 1977.

[10] **Jackson Hole Guide**, "Proposed Oil Well Needs Your Attention," volume 26, number 18, November 17, 1977, page A1, A10.

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[12] **Draft Cache Creek-Bear Thrust Environmental Impact Statement: Proposed Oil and Gas Drilling Near Jackson, Teton County, Wyoming**, US Department of the Interior, Geological Survey, Conservation Division, US Department

of Agriculture, Forest Service, Bridger-Teton National Forest, 1981, (hereinafter: **Cache Creek dEIS**) page II-23.

[13] **Jackson Hole Guide,** "USGS Report Minimizes Oil Well Problems," July 5, 1979, page A3.

[14] **Jackson Hole Guide,** "Public Input on Oil Well Brings Results," volume 26, number 21, December 8, 1977, page A11.

[15] Interview with Ralph McMullen, Executive Director, Jackson Hole Chamber of Commerce, Jackson, Wyoming, November 1981.

[16] Interview with Story Clark, Jackson Hole Alliance, op. cit.

[17] **Oil and Gas Journal,** "New Discovery, Development Buoy Hopes in Montana's Overthrust Belt," November 16, 1981, pages 121-122.

[18] **Congressional Record,** May 20, 1980, S5650.

[19] **National Geographic,** "Our National Forests: Problems in Paradise," September 1982, volume 162, number 3, page 311.

[20] **Environmental Assessment for Oil and Gas Exploration in the Palisades Further Planning Area,** US Department of Agriculture, Forest Service, Targhee and Bridger-Teton National Forests, (hereinafter: **Palisades EA**).

[21] **Oil and Gas Exploration and Leasing within the Washakie Wilderness: Draft Environmental Impact Statement,** US Department of Agriculture, Forest Service, Rocky Mountain Region, Shoshone National Forest, 1981, (hereinafter: **Washakie dEIS**).

[22] **Oil and Gas Journal,** "Search in California National Forests at Issue," November 23, 1981, pages 52-53.

[23] **Boston Globe,** "Oil Prospectors See Green in Mountains of Vermont," April 22, 1982, page 1, 34.

[24] Ibid.

[25] **Congressional Record,** op. cit., page S5651.

[26] Ibid., page S5648.

[27] 42 U.S.C. 4321-4347. Section 102(c) of the National Environmental Policy Act requires that all federal agencies "include in every recommendation or report on

proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -- (i) The environmental impact of the proposed action, (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) Alternatives to the proposed action, (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

[28] **Forest Service Manual** Section 2822.42.

[29] Letter from Bill Cunningham, Northern Rockies Regional Representative for The Wilderness Society, to John R. Matis, USGS, October 16, 1981.

[30] U.S. Department of the Interior, Office of the Solicitor, Denver Region, Memorandum to John Matis, Cache-Creek EIS Task Force Leader, USGS, from Lowell Madsen, Acting Regional Solicitor, Rocky Mountain Region, October 10, 1980, (commonly referred to as the Madsen Memo).

[31] Letter from Philip M. Hocker, then Secretary, Gros Ventre Wilderness Committee, Representative, Wyoming Chapter of the Sierra Club, to Bridger-Teton National Forest Supervisor Reid Jackson, "re: Comments on Proposed Cache Creek Oil/Gas Well," November 28, 1977, page 3.

[32] Hocker letter, supra., note 55.

[33] **Casper Star-Tribune**, "Jackson Drilling Study Shows Feds as Yesmen," Sunday, August 30, 1981.

[34] **Forest Service Manual** Section 2821.03(3).

[35] **Forest Service Manual** Section 2822.46.

[36] **Forest Service Manual** Section 2822.21.

[37] Ibid.

[38] **Forest Service Manual** Section 2822.46.

[39] Interview with Philip Hocker, Member, Sierra Club Board of Directors and Sierra Club Wyoming Chapter Conservation Chairman, and with Pete Jorgenson, Teton County Engineer and private consultant to oil and gas companies on engineering concerns, November 1981. Both

emphasized the pressures on District Rangers when the stipulations applied at lease issuance must then be implemented in practice. Jorgenson recounted experiences when he, as an operator's engineer, observed lease stipulations "amended" in order to facilitate road building or site development. In a letter to USFS Chief R. Max Peterson about the FPA Stipulations, Phil Hocker argued that: "The long time period, with many changes of personnel, which will be involved makes it doubly necessary that the Further Planning Stipulation be written in unambiguous form, to direct future managers. Experience with other stipulations, in actual field use in various National Forests, gives ample evidence that where a stipulation can be misinterpretted or ignored, it will be."

[40] **Forest Service Manual** Section 2822.42.

[41] Bill Cunningham, The Wilderness Society, op. cit., note 29.

[42] **Palisades EA**, op. cit., pages 27-28.

[43] Ibid., page 27.

[44] Ibid., page 46.

[45] Ibid., evaluation criterion number 3.

[46] Interview with Philip M. Hocker, Member, Sierra Club Board of Directors, and Sierra Club Wyoming Chapter Conservation Chairman, Jackson, Wyoming, November 1981.

[47] **Palisades EA**, op. cit., pages 46-47.

[48] Phone interview with Bruce Hamilton, Northern Great Plains Regional Representative, Sierra Club, October 1981; also, interview with Philip Hocker, Sierra Club, op. cit.

[49] **Cache Creek dEIS**, op. cit., page 3.

[50] Ibid., pages 3-4.

[51] Ibid., page III-1.

[52] Ibid.

[53] Ibid., Chapter V.

[54] Ibid., page V-1.

[55] Letter from Philip Hocker, Wyoming Chapter Conservation Chairman, to John Matis, USGS, Cache Creek EIS Task

Force Leader, "re: Comments on Cache Creek-Bear Thrust dEIS," October 19, 1981, page 15.

[56] Ibid., page 1.

[57] **Cache Creek dEIS**, op. cit., page 5.

[58] Ibid., page IV-15.

[59] Interview with Story Clark, Jackson Hole Alliance, op. cit.; Interview with Philip Hocker, Sierra Club, op. cit.; see also, letters in notes 55 and 61.

[60] **Cache Creek dEIS**, op. cit., page 7.

[61] Letter from Bob Golten, Counsel to the National Wildlife Federation, and Sharon D. Nelson, Legal Intern for the National Wildlife Federation, to John Matis, "Re: Cache Creek-Bear Thrust DEIS," October 19, 1981, pages 7-8.

[62] Ibid.

[63] See for example: Edith Stokey and Richard Zeckhauser, **A Primer for Policy Analysis**, W.W. Norton and Co., New York, 1978; and, Nathaniel Lichfield, Peter Kettle and Michael Whitbread, **Evaluation in the Planning Process**, Pergamon Press, Oxford, 1975.

[64] Interview with Al Reuter, USFS Minerals Specialist, Bridger-Teton National Forest, November 1981. He argues that the Forest Service is implementing Congressional policy in the way in which it now makes decisions: "The USFS is not a policy making body, it's an administrative body. If different groups want policy changes they have to go to Congress. The Forest Service simply implements Congressional policy."

[65] Interview with R. Max Peterson, USFS Chief, October 1982; also, interview with Al Reuter and Gary Marple, USFS Minerals Specialists, Bridger-Teton National Forest, November 1981.

[66] Interview with USFS Chief R. Max Peterson, ibid.

[67] **Washakie dEIS**, op. cit.

[68] **The Washington Post**, "Jammed Yellowstone Awaits Watt and Its Grizzlies' Fate," September 7, 1981, pages 1, 2.

[69] Letter from Roger L. Williams, EPA Region 8 Administrator, to John Matis, USGS, August 26, 1980.

[70] Letter from Joseph C. Greenley, Director, Idaho Fish and Game Department, to David Jay, Forest Supervisor, Targhee National Forest, December 10, 1979, containing joint comments for the Wyoming Game and Fish Department and Idaho Fish and Game Department.

[71] **Palisades EA**, op. cit., "Finding of No Significant Impact" attachment.

[72] **Jackson Hole Guide**, "Forest Service Calls for Impact Statement on Cache Creek Oil Exploration," volume 26, number 27, January 19, 1978, page 1.

[73] Ibid.

[74] Ibid.

[75] Interview with Al Reuter and Gary Marple, USFS Minerals Specialists, Bridger-Teton National Forest, Jackson, Wyoming, November, 1981.

[76] The previous EIS was on proposed drilling in the Florida Everglades.

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[79] Letter from Bridger-Teton National Forest Supervisor Reid Jackson to John Fraher, USGS District Engineer in Rock Springs, Wyoming, April 2, 1979, letter number 1950(2820), pages 3-4.

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[87] Interview with Ralph McMullen, Jackson Hole Chamber of Commerce, op. cit.

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[89] Interview with Story Clark, Jackson Hole Alliance, op. cit.

[90] Interview with Philip Hocker, Sierra Club, op. cit.

[91] **Cache Creek dEIS**, op. cit., page 1.

[92] Philip Hocker letter, op. cit. note 55, pages 5-6.

[93] **Oil and Gas Journal**, Editorial: "Government Breaches of Wilderness Law Threaten to Forfeit Petroleum Resources," September 21, 1981, page 69.

[94] **Oil and Gas Journal**, "Oil Praises, Environmentalists Rap RARE II Bill," May 4, 1981, page 386.

[95] **New York Times**, "U.S. Considers Drilling Leases in a Wilderness," August 30, 1981, pages 1, 50.

[96] Interview with Story Clark, Jackson Hole Alliance, op. cit.

[97] **The Baltimore Sun**, October 1981, op. cit.

[98] Interview with Ralph McMullen, Jackson Hole Chamber of Commerce, op. cit.

[99] Wyoming's all-Republican Congressional delegation has three members: Senator Malcolm Wallop, Senator Alan Simpson and Representative Richard Cheney

[100] **Jackson Hole News**, "Simpson to Oppose Cache Creek Well," August 26, 1981, page 1.

[101] **Jackson Hole Guide**, "No Drilling in Cache Creek, Senator Wallop Promises," September 3, 1981, page A7.

[102] Ibid.

[103] Interview with Dick Hamilton, District Manager, Getty Oil Company, Denver, Colorado, November 1981.

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[105] **Jackson Hole Guide**, "Getty Oil Co. Lobbies for Drilling the Little Granite Creek Area," October 15, 1981, pages A3, A8.

[106] **Jackson Hole News**, October 15, 1981, op. cit.

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[133] 499 F. Supp. 383 (D. Wyo. 1980).

[134] Judge Clarence Brimmer, "Memorandum Opinion and Order..." op. cit., page 12.

[135] Ibid., page 1.

[136] Ibid., page 2.

[137] Ibid., page 27.

[138] Interview with Bruce Hamilton, Sierra Club, op. cit., and, interview with Philip Hocker, Sierra Club, op. cit.

[139] Karin P. Sheldon, Attorney, Sierra Club Legal Defense Fund, "Statement of Reasons in Support of Appeal," (In the Matter of Forest Service Recommendations and Consent on Oil and Gas Leases Issuance Involving National Forest System Lands in the Palisades Further Planning Area, Idaho and Wyoming), pages 1-2.

[140] Ibid.; also, Interview with Philip Hocker, Sierra Club, op. cit.

[141] Jeff M. Sirmon, Regional Forester, Ogden Utah, "Responsive Statement -- Palisades Further Planning

Area Environmental Assessment," September 3, 1980.

[142] Karin P. Sheldon, Attorney, Sierra Club Legal Defense Fund, "Reply to the Regional Forester's Responsive Statement," September 24, 1980, page 3.

[143] William L. Johnson, Counsel for the USFS, "Statement of Facts," Civil Action No. 81-1230, Sierra Club v. Peterson, US District Court for the District of Columbia.

[144] Ibid.

[145] Sierra Club v. R. Max Peterson, Civil Action No. 81-1230, US District Court for the District of Columbia.

[146] Ibid.

[147] **Jackson Hole Guide**, "Ruling May Affect Little Granite Lease," April 15, 1982, volume 30, number 40, page 1.

[148] **Jackson Hole Guide**, "Despite Opposition, Little Granite Well Approved," April 8, 1982, page A12.

[149] Ibid.

[150] **Jackson Hole Guide**, "Environmentalists Plan Protest," April 15, 1982, page A19.

[151] **Jackson Hole Guide**, "Little Granite Drilling Permit Delayed," May 13, 1982, page A1.

[152] Ibid.

[153] Ibid.

[154] **Jackson Hole Guide**, "Feds Approve Little Granite Well," May 20, 1982, page A3.

[155] Ibid.

[156] **Jackson Hole Guide**, April 8, 1982, op. cit.

[157] **Jackson Hole Guide**, "Little Granite Battle Continues on All Fronts," June 10, 1982, page A8.

[158] Ibid.

[159] **Jackson Hole Guide**, "The Controversy Continues: The Fears," July 1, 1982, page A3, 14.

[160] Ibid.

[161] **High Country News**, "Jurisdiction Struggle over Wyoming

Drilling," June 11, 1982, volume 14, number 12, page 4; see also, **Jackson Hole Guide**, "Governor Joins Little Granite Appeals," June 17, 1982, page A14; **Jackson Hole Guide**, "Herschler Tours Little Granite Site," July 22, 1982, page A1, 2; **Alliance Newsletter**, Jackson Hole Alliance for Responsible Planning, volume IV, number 4, July 1982.

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] **Jackson Hole Guide**, "Granite Creek Hearing Set June 29," June 24, 1982, page A13.

[166] **Jackson Hole Guide**, "Vandals Hit CGG," July 15, 1982, page A8; most of the damage was incurred by CGG, a seismic exploration firm conducting seismic operations in the area.

[167] **Jackson Hole Guide**, "Abbey Lends Encouragement to Protest Rally Cause," July 8, 1982, page A19.

[168] **Jackson Hole Guide**, "Watt Denies Granite Creek Appeals," July 29, 1982, page A3.

[169] Ibid.

[170] **Jackson Hole Guide**, "State Rejects Little Granite Drilling Plans," August 12, 1982, page 1.

[171] Ibid.

[172] Ibid.

[173] **Alliance Newsletter**, Jackson Hole Alliance for Responsible Planning, volume IV, number 7, November 1982, page 6.

[174] **Jackson Hole Guide**, "Court Date Scheduled for Little Granite," February 17, 1983, page A11.

[175] **Jackson Hole Guide**, "Forest Service Alters Getty Road Plans," September 23, 1982, page A3.

[176] **Jackson Hole Guide**, "Little Granite Legal Showdown Closer," February 10, 1983, volume 31, number 30, page 1.

[177] In its October 2, 1982 "Continuing Resolution of the Budget," Congress temporarily denied any federal funding for mineral activity in national forests under

consideration for wilderness designation; see, **Jackson Hole Guide**, "Congress Sets Moratorium on Little Granite Exploration," October 14, 1982, page A13.

[178] **Jackson Hole Guide**, "Reid Jackson Will Decide Plans for Getty's Little Granite Roads," September 30, 1982, page A14.

[179] **New England Sierran**, "Green Mt. Forest for Lease?", September 1982, volume 13, number 7, page 1.

[180] **Oil and Gas Journal**, "Search in California National Forests at Issue," November 23, 1981, pages 52-53.

[181] **Boston Globe**, October 1982.

CHAPTER 4

WHY THE PARADIGM FAILS

As seen, oil and gas leasing and permitting in practice differ considerably from their statutory counterparts. In practice, the process is very political. It is not sufficiently informative or convincing; it is divisive; and, moreover, it is not decisive. In short, the process fails in precisely those areas where, theoretically, it should excell. Why does the land management paradigm within which decisionmaking occurs now fail when it succeeded for so long?

Land management decisions are not purely technical. They cannot be solely subject to scientific review and analysis. They are inherently judgmental. But, on paper the process hides the judgmental aspects under a cloak of technical expertise. It assumes that scientifically trained land managers will be able to acquire the appropriate information with which to analyze specific proposals and then reach outcomes that advance the public's interest. The inherent value judgments are hidden in technical analysis. But, like the emperor's new clothes, this technical cloak now hides little and, in this instance at least, the masses are not quiet about what they see.

National forest management has always been inherently judgmental. Regardless, the Forest Service paradigm prevailed for the first half of this century; these decisions were long accepted to be scientific in nature and thus best

left to professionals trained in scientific methods of management and decisionmaking. The paradigm remained intact because the Forest Service's professional judgment was widely accepted and, moreover, trusted. Compared with the alternative of unbridled industrial exploitation, the public welcomed professional forestry as a godsend.

Today the judgment exercised by professional foresters in managing public lands is no longer accepted; their management processes are no longer trusted. Several factors contribute to the changing environment of public land management. First, the Forest Service task is now more overtly judgmental than it ever has been in the past. Congress has mandated numerous and competing objectives that demand choices between legitimate yet conflicting outcomes. Furthermore, these mandates are not all consistent with the conservation ideal. Several are based in preservationist notions about appropriate natural resource management. But, because the paradigm is premised on use, it is not capable of accommodating preservation values. Additionally, the uncertainty involved in oil and gas leasing and exploration has become more critical to decisionmaking. Second, the public has lost faith in the Forest Service responsiveness to its concerns. Increasingly, groups and individuals are turning to Congress and the courts to obtain decisions that are deemed more appropriate and more just; decisions that accommodate their concerns. Finally, the numerous natural resource statutes enacted in the 1960s and 1970s have not

only legitimized their arguments but also distributed power amongst many user groups with which to oppose decisions deemed inappropriate. And, because the stakes have heightened in the last two decades, this power is used to oppose decisions that fail to accommodate a group's concerns.

Public Land Management in Transition

Today's US Forest Service task differs markedly from that encountered when the agency was established at the turn of the century. The agency's paradigm of scientific management has always been subject to attack by some groups. After World War II, though, support began eroding at a much more rapid pace as other visions of appropriate public land uses took hold and gained influence and power in decisionmaking. As the cases discussed in Chapter 3 illustrate, the Forest Service now confronts a political resource allocation task in addition to the traditional scientific land management task to which it has long adhered. But, while the problem framed by the public and Congress has changed, the decisionmaking process applied by the Forest Service has remained grounded in the same paradigm; one where professionals are responsible for acquiring and assimilating information and pronouncing efficient outcomes; and, one where conservation, not preservation, of resources is the end. The same paradigm is unable to accommodate both ends.

The scenario described in the last chapter did not exist prior to World War II. Before that time, the US Forest

Service served largely as custodian of the national forests, using professional silvicultural and pest, flood and fire control practices to maintain the forests. At the time there was little demand for national forest resources with the exception of timber and that was still marginal. The agency concentrated on assisting private forest management and in fire, pest and disease control in public and private forests. Part of its responsibility was road-building to promote firefighting, overseeing the forests and logging when it did occur. What disputes did arise were the old ones between preservationists advocating wilderness preservation and the forestry conservationists advocating resource use. [1] But, preservationists during this time had little influence in Forest Service decisionmaking or recourse against decisions they deemed inappropriate.

The Heart of the Paradigm -- Conservation -- Challenged

While preservationists had supported the early efforts of Pinchot and the forestry profession to establish and manage the public forests, they never adopted the conservation philosophy themselves. At the time, the conservationist's proposal was simply a more desireable alternative to the non-management and disposal problems then plaguing the forests. Moreover, it had more political and popular support than did the preservationists' proposals. But, a major difference in values continued to separate the two groups and create tensions between them. Their

disagreements were highlighted by the battle over damming the Hetch Hetchy valley in California's Sierra Nevada Range. This dispute destroyed the long friendship between John Muir and Gifford Pinchot. Preservationists continued to try to influence Pinchot and his successors to consider preserving some national forests intact for the benefit of future generations. But, the two philosophies were incompatible and the preservationists efforts met with little success.

For much of United States history, wilderness was something to be conquered and subdued. As one historian described this early view:

> The pioneers' situation and attitude prompted them to use military metaphors to discuss the coming of civilization. Countless diaries, addresses, and memorials of the frontier period represented wilderness as an "enemy" which had to be "conquered," "subdued," and "vanquished" by a "pioneer army." The same phraseology persisted into the present century; an old Michigan pioneer recalled how as a youth he had engaged in a "struggle with nature" for the purpose of "converting a wilderness into a rich and prosperous civilization." Historians of westward expansion chose the same figure: "they conquered the wilderness, they subdued the forests, they reduced the land to fruitful subjection." [2]

But, once the Forest Service was well-established, a minority of federal land managers and private individuals and groups again began advocating the preservation for non-commercial purposes of several particularly scenic or ecologically important areas. Arthur Carhart, the Forest Service's first landscape architect, was assigned the task of planning for recreation and summer home development in particularly scenic national forest areas. But, he reported back to his superiors that:

> the first logical step in any work of this type is to plan for preservation and protection of all of those things that are of values great enough to sacrifice a certain amount of economic return for esthetic qualities. [3]

This comment, coming in 1919, was one of the first intra-agency indications that preservation might have definable values that should not universally be disregarded in favor of the quantifiable commercial land uses. It also conformed to Forest Service policies regarding economic efficiency in land management. But, it was not readily accepted.

Several years later, US Forest Ranger Aldo Leopold pursued the issues Carhart had raised. Leopold's efforts led to administrative classification of the first national forest wilderness area, the Gila Wilderness in the Southwest. [4] Forest Service Chief William B. Greeley not only approved the Gila Wilderness designation but also encouraged further designations in other national forests. He commented that "the frontier has long ceased to be a barrier to civilization. The question is rather how much of it should be kept to preserve our civilization." [5] In 1929 Greeley established Regulation L-20 under which national forest "primitive areas" could be designated by the Chief. These primitive areas were intended to maintain "primitive conditions of environment, transportation, habitation, and subsistence, with a view to conserving the value of such areas for purposes of public education, inspiration and recreation." However, exceptions to these purposes could be authorized by either the Chief or the Secretary of

Agriculture. [6]

But, preservationists were not appeased by this new Forest Service policy. The Forest Service values in preservation did not coincide with their own. In his review and analysis of these early regulations, historian Michael Frome questionned the true Forest Service intent:

> The Forest Service, however, did not anticipate reserving the primitive areas indefinitely from commercial use. Many of the remote portions with outstanding scenic and recreational qualities were being kept from haphazard road-building and commercial development until a time when more intensive study was needed. It is also conceivable that the Forest Service was trying to keep one step ahead of its "sister agency," the National Park Service; by demonstrating active concern for wilderness, it was better able to block establishment of new parks out of old forests. [7]

Perceiving a wolf in sheep's clothing, The Wilderness Society was established in 1934 "to secure the preservation of wilderness, conduct educational programs concerning the value of wilderness, encourage scientific studies, and mobilize cooperation in resisting the invasion of wilderness." [8] Organization and pressure external to the Forest Service was needed because national forest wilderness areas were being threatened more than at any time in the past. One of the organization's founders was Bob Marshall, then Director of Forestry for the Department of the Interior's Office of Indian Affairs. In that capacity he initiated a series of memos between himself and then Secretary of the Interior Harold Ickes about the potential consequences of New Deal public works programs on undeveloped

wilderness areas. Marshall's greatest worry was that roads would soon traverse most undeveloped territory and he recommended to Ickes that wilderness areas be set aside with specific standards prohibiting development within their boundaries. [9]

In 1937, Marshall continued his battles for wilderness preservation as Forest Service Chief of Recreation and Lands. His efforts, combined with continuing pressure from constituencies such as The Wilderness Society, led to Forest Service "U" regulations in September 1939. These regulations were stronger than the old L-20 regulations and "established a procedure for expansion of wilderness and for excluding developments previously permissible in primitive areas." [10]

But, Forest Service administrative classifications under these "U" regulations remained few and far between. Many proposals encountered opposition from USFS officials who perceived their responsibility to be one of managing the public lands for multiple-uses, not preservation of a single use. As a result, the remaining national forest wilderness areas were gradually being consumed by other uses. In 1926, Forest Service figures showed the national forest system containing 74 roadless areas, each having at least 230,400 acres. The largest roadless area at that time was 7 million acres in size. In total, the 74 areas covered 55 million acres. But, by 1961, similar reviews indicated that only 19 roadless areas of 230,400 acres or more remained. The largest at that time had dwindled to 2 million acres. All 19

areas now totalled only 17 million acres. [11] Wilderness areas are distinguished by their roadless feature. But, roads are critical to timber and other commercial development as well as to fire prevention and control. As these pressures intensified, wilderness was destroyed as the national forest road system exploded. Consequently, those lands set aside as wilderness were most often those having little or no value for other uses. As one historian of the long fought battle over wilderness recounted:

> The protected wilderness existed more by accident than design. Most of its commercial resources, composed of lands by-passed in the rush of settlement and exploitation from east to west, were too poor to utilize or too costly to develop. About one-fourth of all acreage in reserved wilderness was composed of mountain peaks, desert, sand dunes, lava flows, and rock slides; about one-third was covered with brush or with scrubby and other nonproductive forests; another third was productive timberland, while a small percentage was meadow, grassland, or water surface. The timberlands contained 8 million acres of productive wood sources -- only about 2 per cent of the nation's total, or a sufficient volume to supply national needs for two years. [12]

As demands for national forest resources exploded following World War II, the Forest Service "U" regulations proved insufficient to protect wilderness areas to the satisfaction of preservationists. They perceived in the Forest Service an emerging emphasis on timber production at the expense of wilderness and other resource values. As a result, what wilderness had been protected began succumbing to commercial development pressures. Administratively designated areas were split by roads and some areas were logged. Critically, the Forest Service was also raising the

ire of the general public as well as preservationists as its clear-cutting practices increased. This increasing clamor helped bolster the preservationists arguments and open Congress' door. Michael Frome reviewed the events that led to diminished confidence in administrative management of wilderness areas and in the Forest Service in general:

> Although citizen groups had long supported the Forest Service as an agency concerned with scenic resources and wilderness, they lost their place as a key part of its constituency. The timber-first policy came to the fore in response to several factors, one being the political pressure of the timber industry, which, having intensively cut its own private lands without adequate concern for sustained yield, became reliant on public lands, including the remaining virgin forests, to keep its mills going. [13]

After World War II, the problem currently posed by public land management emerged. The resource allocation dimension of the Forest Service task came to the forefront of decisions as conflicting demands for the varied national forest resources increased. Timber demands were increased by an industry that had both poorly managed the private forests and needed expanded sources of timber to meet the burgeoning demands of a post war housing boom. The amount of timber cut from the national forests increased from approximately 500 million board feet (1-2% of total domestic production) in 1910 to about 2 billion board feet just before World War II and more than 10 billion board feet by 1965. [14] Recreation demands exploded from a population with increased leisure time. There were approximately 5 million recreational visits to the national forest in 1925 compared to 150 million by 1965. [15] An increasingly urbanized society demanded more

opportunities for solitude and wilderness retreat. The nation's economic productivity was increasing and hence so was the demand for the mineral resources contained in the public lands. The environmental awakening of the 1960's led to demands for increased wilderness preservation, wildlife protection and watershed management. It led to an increased concern about mankind's responsibility towards and dependence upon the natural environment. And, in the 1970's, demands for domestic energy production increased and attention turned to the previously neglected national forests.

Groups and individuals concerned with the non-commercial scenic and wilderness resources were not satisfied with the Forest Service's response to their demands. They believed that too much emphasis was being placed on timber sales and road-building to accommodate logging, all at the expense of particularly scenic and wild areas. With their concerns unaccommodated by the administrative process, these groups shifted their attention to Congress.

The Congressional Response to Changing Demands

Initially, Congress responded cautiously. The first problem raised was the age-old question of wilderness preservation. Brought before Congress in the mid-1950's, The Wilderness Act was not enacted until 1964. By then, the clamor had intensified and, as might have been predicted, Congress became more responsive. In fact, the environmental awakening and, moreover, the social activism of the late

1960's and early 1970's provided Congress with little choice. As one analyst of the environmental decade commented:

> Although Nixon was by no means an enthusiastic supporter of the environmental movement, his signature on NEPA was considered indicative of the fact that no politician could afford to ignore the demands being made by the movement. [16]

Similarly, Senator Edmund Muskie's adoption of the clean air cause has been attributed by some political analysts as an attempt to respond to a no-lose growing public concern, thus gaining support for his presidential campaign. [17] The environment was a cause to advance; the decade saw the passage of several monumental environmental statutes that have destroyed the original premise upon which the traditional land management paradigm is based: conservation.

But, the issues placed before Congress were hardly simple ones to resolve. They were not, as often portrayed, obvious questions of good (the public interest) against evil (industry and an unresponsive bureaucracy). Arguments for more wilderness preservation meant less timber and minerals development, both critical to a thriving economy. As is the nature of the legislative process, compromise was necessary. Because each constituency had its advocates in Congress, legislation could seldom be enacted before it contained something for each. The result is a collection of natural resource statutes that contain obviously conflicting mandates to public land managers. And, as seen in the cases in Chapter 3, because objectives compete, there is no technically correct decision; almost any decision reached can be opposed

on the grounds that it fails to address the objectives of a particular statute.

Several natural resource and public land management statutes affect the operation of the mineral leasing laws. These are outlined below, highlighting those provisions and requirements that make the Forest Service decision unclear and give power to land user groups to question administrative decisions deemed inappropriate. Particular emphasis is placed on The Wilderness Act of 1964 because, at this time, Forest Service implementation of this Act's provisions fuel many disputes involving oil and gas exploration in the national forests.

The Wilderness Act of 1964

Because the early USFS wilderness classifications were administrative decisions, they could easily be undone. As a result, preservationists feared that future administrators might re-classify land in response to commercial development pressures. In the eyes of preservationists, the administrative classification system also suffered from one other important defect; because it was haphazard, it did not ensure that important wilderness areas would **ever** be preserved. Consequently, preservationists moved their efforts to the Congressional arena in the 1950's. They hoped to encourage legislation that would both institutionalize and systematize the preservation process as well as preserve designated wilderness areas in perpetuity.

The Forest Service opposed the Act, arguing that:

> This bill would give a degree of Congressional protection to wilderness use of the national forests which is not enjoyed by any other use. It would tend to hamper free and effective application of administrative judgment which now determines, and should continue to determine, the use or combination of uses to which a particular national forest is put. [18]

The Forest Service was joined by the National Park Service, the two professional forestry associations -- the Society of American Foresters and the American Forestry Association -- the forest products industry, the oil and mining industries and grazing interests in opposing the act. Eighteen hearings were held on the Wilderness Bill between 1957 when it was first introduced and 1964 when it finally passed. The bill was rewritten time and again before it was accepted by all affected groups. [19] In September 1964, President Johnson signed The Wilderness Act into law.

The Wilderness Act of 1964 [20] largely accomplished the preservationists' objectives. In the Act, Congress declared that:

> In order to assure that an increasing population...does not occupy and modify all areas within the United States...leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of Congress to secure for the American people...an enduring resource of wilderness. For this purpose it is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness area." [21]

The Act automatically placed all administratively classified national forest "wilderness," "wild" and "canoe" areas in the new wilderness system. It instructed the Secretary of

Agriculture or Chief of the US Forest Service to review all administratively designated "primitive" areas for possible inclusion in the system. A ten year deadline was imposed for reporting their findings to the President. The President was charged with making recommendations to Congress regarding which "primitive" lands should become "Wilderness." Congress is the final decisionmaker on all Wilderness designations. Similar instructions were spelled out for the secretary of the interior with respect to roadless areas in the national park system and national wildlife refuges. (In 1976, the Federal Land Policy and Management Act -- commonly referred to as the BLM "Organic" Act -- extended wilderness evaluation and designation mandates to BLM lands.) [22]

Congress provided a very lengthy definition of the term wilderness in order to guide the two Secretaries, the President and eventually itself in making wilderness designation recommendations and decisions:

> A wilderness in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain...wilderness is further defined to mean...an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and, (4) may also contain ecological geological, or other features of scientific, educational, scenic, or historical value. [23]

The Secretaries of the Interior and Agriculture were instructed by Congress to manage Wilderness "to preserve its wilderness character...wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation and historical use." [24] And the Act clearly prohibited certain uses: "...there shall be no commercial enterprise and no permanent road within any wilderness area...no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area." [25] These prohibitions were not absolute; exceptions were permitted where necessary to administer the Act's provisions and manage the wilderness area, as well as in the case of emergencies which threatened the the health or safety of individuals.

But, while The Wilderness Act created a Wilderness Preservation System that is much more extensive than its proponents ever imagined, [26] it also permitted activities within this system that run counter to the wilderness ideal. The Wilderness Act was the product of nine years of Congressional debate, negotiation and compromise. The major concession made by preservationists -- and the concession that finally led to the Act's passage -- was section 4(d)3. This section permits mineral leasing in national forest wilderness areas until December 31, 1983. This provision is responsible for considerable conflict today about how and where oil and gas exploration and development may occur on

public lands. Section 4(d)3 specifically permits:

> use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. [27]

The provision permits the Secretary of Agriculture to attach "reasonable stipulations" to mineral leases, permits and licenses in Wilderness areas "for the protection of the wilderness character of the land." [28]

Initially, this provision posed little threat to Wilderness; today it is creating havoc. Since the Wilderness Act was passed in 1964, the Forest Service has followed an unwritten policy of not issuing leases in Wilderness Areas. Until recently this policy has gone unchallenged. [29] Today it is under attack because of at least four changes in the oil and gas exploration and development environment.

First, several major oil and gas discoveries have attracted industry interest into new territories. Notably, the discovery of Utah's Pineview Field in 1977 led to major interest and further discoveries in what is now known as the Western Overthrust Belt. Similar activity is occurring in the Eastern United States along the Eastern Overthrust Belt and in Michigan's Northern Lower Peninsula. As a result, previously ignored USFS lands now look more promising to

industry. [30]

Second, oil and gas exploration and development technology has improved markedly. Industry is now able to drill deeper to explore previously inaccessible yet promising formations. Additionally, industry can now drill wells at more acute angles. Where difficult terrain might have impeded drilling in the past, the same formation can now be explored directionally from a more manageable drill site. Thus, the mountainous terrain above the Overthrust Belt poses less of an engineering problem than in the past. [31]

Third, because of skyrocketing energy prices, areas previously thought to be economically marginal or inaccessible now warrant exploration. As a result, industry is less likely to be discouraged by the more costly road construction, more difficult terrain for wellsite development, increased environmental safeguards and winter weather obstacles in backcountry wilderness areas. [32]

Finally, political pressures to increase domestic energy production are heightening. Federal land management agencies are being discouraged by Congress from holding back lands from leasing and exploration. [33]

Regardless of Section 4(d)3's legislative legitimacy, preservationists still oppose energy or mineral development in Wilderness Areas except if justified by national emergency. They argue that the protective phrases of the Act are too weak. [34] (Some wilderness areas contain leases issued before their designation as Wilderness. Consequently,

these leases have no protective stipulations attached to them. The government lacks power to attach stipulations after the fact without agreement of the lessee. Otherwise, such an act would constitute a breach of contract on the part of the government. Lessees, though, lack incentives to agree to such conditions.) Preservationists also question the rationale behind the phrase "restoration as near as practicable" of mined or drilled lands. They argue that if the land cannot be restored to its wilderness state then it should not be intruded upon at all. [35] Finally, preservationists note that the December 31, 1983 deadline still permits exploration and production after that date. Leases issued on December 31, 1983 are valid for ten years. During that period, the lessee has a legal right to develop the oil and gas resources, even though the leasehold is located in a Wilderness. Hypothetically, lessees could hold their leases for 9 1/2 years before submitting an application for a permit to drill. If the permit is granted, the clock is stopped until exploration and production, if warranted, are completed. Consequently, oil and gas production in Wilderness areas could easily extend well beyond the year 2000, long after the Act's December 31, 1983 deadline for issuing new leases. [36] December 31, 1983 will hardly mark the end to this debate.

Once wilderness preservation became law, the Forest Service was forced to deal with these lands on Congress' terms. But, Congress' message was still vague and left much

to the Forest Service's discretion. The Wilderness Act, couched in laudable but broad terms, left much undefined. The two decades following its passage have been filled with debate over whether or not specific areas fall under the broad provisions of the act. Debate has raged over when an area "generally appears" to be in its natural state with the work of man "substantially unnoticeable." These determinations are highly subjective; what is "substantially unnoticeable" to one evaluator can be a glaring defect to another. Debate has also centered on when an area contains "features of scientific, educational, scenic or historical value." [37] Again, making this determination requires judgment about the relative values of an area; when do commercial values outweigh scenic values? The Forest Service view has differed from that of preservationists:

> ...the agency committed itself to impeccable compliance with the letter of the law and fulfilled it thoroughly insofar as the primitive areas and wilderness areas are concerned. Its attitude toward potential additional areas, or even to consideration of any, is quite another story, one of consistent resistance to proposals of new wilderness, endless confrontations with citizen groups in virtually all parts of the country, often ending with officially sanctioned intrusion and commercial exploitation of the contested regions so as to render the wilderness "invalid." [38]

Disagreement over the Act's intent led to two massive Roadless Area Review and Evaluation (RARE I and RARE II) programs by the USFS in which **all** national forest roadless areas, not just the administratively classified "primitive areas," were evaluated for possible inclusion in the Wilderness system. [39] Because of a recent California

District Court ruling that the Forest Service RARE II EIS is inadequate, the Forest Service announced in February 1983 its plans to scrap RARE II and commence a new, RARE III process. [40]

While questions of wilderness designation and management have dominated many oil and gas leasing disputes, other statutes have an important role in Forest Service decisionmaking. Combined, these acts increase Forest Service discretion at the same time as increasing the influence over decisionmaking of different public land user groups.

The Wild and Scenic Rivers Act

> The great rivers of this country represent vestiges of a frontier America where waterways were the highways to exploration and development. Today, these wondrous resources have fallen victim to excessive industrialization, abusive land use, and an overall move to commercialize the recreational value of free-flowing rivers....[they] are now in danger of extinction. [41]

There are few remaining river systems in the United States that are unencumbered from their headwaters to their mouth. Responding to the unbridled development, particularly for power generation, of the nation's few remaining free-flowing rivers, Congress enacted the Wild and Scenic Rivers Act in October 1968. [42] The battles leading to its enactment were not as lengthy as those for the Wilderness Act but they were fought by the same groups over the same ideological issues. Like The Wilderness Act, the Wild and Scenic Rivers Act established a "Wild and Scenic Rivers

System." Unlike the National Wilderness Preservation System, though, there were three different components of the Wild and Scenic Rivers System -- wild, scenic and recreational rivers -- each receiving different levels of protection. Once again, Congress expressed its laudable yet broad policy objectives to be implemented by federal public land management agencies:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. [43]

In enacting this legislation, Congress was especially concerned about rivers where "there is the greatest likelihood of developments which, if undertaken, would render the rivers unsuitable for inclusion in the national wild and scenic rivers system." [44] Thus, the Act required the designated federal agencies to make decisions in areas where conflict between different resource demands was most intense.

In administering the Act, Congress mandated that all federal agencies give "primary emphasis" to protecting the "esthetic, scenic, historic, archaeologic, and scientific features" of these rivers. [45] A protected river is to be administered "in such manner as to protect and enhance the values that caused it to be included in said system." [46]

Congress defined Wild Rivers as:

> Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by

> trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent the vestiges of primitive America. [47]

Scenic Rivers were defined as:

> Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads. [48]

Finally, Recreational Rivers were defined as:

> Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past. [49]

The Wild and Scenic Rivers Act withdraws one-quarter of a mile of land on either side of a wild river from the mineral leasing laws. [50] Scenic and recreational rivers remain under the provisions of the mineral leasing laws but subject to conditions imposed by the Secretaries of Interior and Agriculture to safeguard the areas. Potential Wild Rivers can still be leased but only with sufficient safeguards to protect them should they eventually become part of the System. [51] Because those areas where non-commercial resource values conflict with oil and gas activities are the few remaining wild areas on national forest lands, it follows that these same lands, having not yet been exposed to commercial development activities, will have relatively pure rivers running through them. (The Snake River is a proposed Wild River that caused environmental concern over leasing in Wyoming's Palisades area and drilling in Little Granite Creek.) Consequently, proposals to explore for oil and gas in these areas inevitably are opposed by groups and

individuals advocating a wild river's designation and protection. Once again, the federal public land managers are caught in the middle, forced to make decisions when the objectives they are to satisfy clearly conflict. Once again, broad standards such as "outstandingly remarkable" values are subject to debate between those favoring and those opposing a river's designation.

The Endangered Species Act

In 1973, Congress enacted the Endangered Species Act. [52] The provisions of this act have a role that surpasses that of The Wilderness Act or the Wild and Scenic Rivers Act in oil and gas decisionmaking for public lands. The Act provides for two categories of species: endangered and threatened. Section 7 of the Act requires federal agencies to take actions necessary to protect endangered or threatened species habitat. Thus, the US Forest Service must evaluate the effects of its oil and gas leasing or exploration decisions on endangered or threatened species in what is called a "biological review." Should their assessment conclude that critical habitat may be modified or destroyed, the agencies are required to consult with the US Fish and Wildlife Service (FWS). When consultation is required, the US Fish and Wildlife Service's regional director completes a "threshold examination" to determine what effect, if any, the proposed activity will have on a listed species or its critical habitat. No further consultation between the USFS

and FWS is required if this examination indicates little or no threat to the species. Should the proposed activity jeopardize a species, however, the FWS renders a "biological opinion" developed from information provided by the US Forest Service. This opinion includes recommended modifications to the proposed activity to protect the species. While the USFS is not bound to comply with the findings and recommendations in this opinion, failure to do so can lead to court action by either the Fish and Wildlife Service or a private group or individual. [53] Section 11(g) provides for citizen lawsuits when an agency is not perceived to be fulfilling its responsibilities.

Current case law has interpretted Section 7 of the Act to imply "an explicit Congressional decision to afford first priority to the declared national policy of saving endangered species." [54] Hence, endangered species protection is to be paramount in land management decisionmaking, even with regards to the mineral leasing laws. Moreover, in one recent case the judge ruled that "any contract which [the Secretary] enters into (e.g., a lease) which requires a future action on his part (e.g., approval of plans) will contain as an **implied term** a condition that the Secretary will behave lawfully (e.g., not violate the Endangered Species Act)." (emphasis added) [55] In other words, under the Endangered Species Act an Application for a Permit to Drill can conceivably be denied even though a lessee holds the rights to an area's oil and gas resources.

As oil and gas industry interest has spread to the more primitive and wild public lands, the role of the Endangered Species Act in leasing and exploration decisions has become more frequent. Exploration proposals in Montana's Bob Marshall Wilderness have been opposed because they threaten one of few remaining habitats of the endangered Grizzly Bear, [56] Leasing proposals in a Wyoming wilderness study area potentially threaten the endangered or threatened Grizzly Bear, Bald Eagle and Peregrine Falcon. [57] Leasing proposals in a California national forest threaten the only remaining California Condor nesting area. [58]

The Federal Clean Air and Water Acts

Additionally, certain provisions of the Clean Air Act [59] and the Federal Water Pollution Control Act (as amended by the Clean Water Act) [60] affect Forest Service oil and gas leasing and exploration decisions. Many proposed areas subject to mineral leasing disputes are in those undeveloped, pristine backcountry areas that have been assigned "Class I" status under both acts. This status means that existing air and water quality levels cannot be "significantly" deteriorated or degraded. [61]

Multiple-Use Mandates and Procedural Requirements

In addition to considering the preservation mandates of each of the previously described statutes, the Forest Service must also fulfill the broader mandates of the Multiple-Use

Sustained-Yield Act of 1960. [62] And, to ensure that environmental concerns are considered in decisionmaking, Congress passed the National Environmental Policy Act in 1969 [63] and National Forest Management Act in 1976. [64] Both acts impose procedural requirements as a way of encouraging an understanding of and planning for the long-term consequences of particular decisions.

In the 1960 Multiple-Use Sustained-Yield Act, Congress established its policy that the national forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." [65] The Act was passed in the midst of debate over the Wilderness Act, still four years shy of enactment. Regardless, Congress specified that wilderness was consistent with its intent in the Multiple-Use Act. Congress instructed the Forest Service to manage "all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people." [66] It further required that this management be "harmonious and coordinated...without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." [67] Similarly, in the Federal Land Policy and Management Act of 1976, Congress declared it to be the policy of the United States that:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical,

> ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals, and that will provide for outdoor recreation and human occupancy and use; and,
>
> the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber and fiber from the public lands. [68]

Additionally, in the Federal Land Policy and Management Act Congress again required harmonious decisionmaking:

> in administering public land statutes and exercising discretionary authority granted by them, the Secretary [is] required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking. [69]

Rather than bounding the decisions to be made, these mandates only increased the number of objectives to be satisfied by land managers with no direction given as to how the inevitable conflict between objectives should be resolved; how can these decisions be made "harmonious" when what is at stake is so great and when decisions clearly benefit some at the expense of others? How would the conflict generated between different groups competing for use of the same lands be resolved so that decisions will be harmonious? Congress apparently thought that the answers to these questions would come from involving the public in decisions and from rationalizing the decisionmaking process.

To ensure that land managers consider the consequences of their decisions on all facets of natural resource use, the

Forest Service must comply with the National Environmental Policy Act (NEPA). NEPA requires that federal agencies complete environmental impact statements for any decisions that "significantly affect the quality of the human environment." [70] These statements must include descriptions of the unavoidable adverse impacts of the decision, alternatives to the decision, the short-term versus long-term consequences for productivity, and "any irreversible and irretrievable commitments of resources" resulting from the decision. [71] But, like the substantive objectives of the natural resource management statutes, completing these statements is also a subjective process. Who defines what a "reasonable alternative" is? When is an impact adverse and when is it actually a benefit? Lawrence Bacow has discussed the inherent difficulties in fulfilling NEPA's requirements: Which alternatives should be selected from the potentially endless list? How should public officials assess impacts when subjective judgments about risk and acceptability must be made? How and when should public input be obtained when problems are frequently too complex for public understanding? Finally, how might environmental and other interests be "balanced" when all are legitimate? Bacow argues that the premise NEPA is based on -- "that the 'right' information is out there waiting to be gathered and, once collected, it will help us find the 'right' solution" -- is invalid. He concludes that: "The fallacy in this argument is that the source of conflict is over facts when it is

usually a difference in beliefs or values." [72] Most of these decisions require value judgments about what is at stake and what is to be gained. Once again, technical expertise provides limited direction in making such decisions.

In addition, in the Forest and Range Renewable Resource Planning Act of 1974 (as amended by the National Forest Management Act of 1976) [73] Congress required that comprehensive land-use plans be developed and periodically revised for the National Forest System. Moreover, these plans must be "considered with the land and resource management planning processes of state and local and other federal agencies." [74] In fulfilling this mandate, Congress called for a "systematic interdisciplinary approach to achieve the integrated consideration of physical, biological, economic and other sciences." [75] Consequently, the USFS must now coordinate oil and gas exploration and development decisions with National Forest plans to help guide decisionmaking even though plans themselves involve value judgments about appropriate uses.

When Senator Hubert H. Humphrey introduced the National Forest Management Act to the Senate floor he emphasized that "this bill is designed to get the practice of forestry out of the courts and back to the forests." [76] But, this comprehensive planning effort and coordination with routine administrative decisions has not made the land managers task any easier; choices still must be made between different

objectives. Furthermore, it only increased the number of occasions when Forest Service officials must make value judgments and, thereby, the number of occasions these judgments can be called into question.

Mineral Leasing Reconfirmed

Just as the environmental activism of the 1960's and early 1970's produced many environmental protection laws, an energy crisis and a faltering economy in the late 1970's and early 1980's created statutes and a political climate favoring precisely the reverse. As might be predicted, Congress responded to these new problems in like manner. Confronting an industry backlash at its earlier environmental excesses, Congress passed new legislation reinforcing the importance of mineral and fuels production from public lands. Two acts were passed in 1980, both hedging previous environmental mandates without actually rescinding them.

In the National Materials and Minerals Policy Research and Development Act of 1980, [77] Congress reinforced the policies established in the mineral leasing laws. It instructed the president to "encourage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs." [78] But, like past mandates, this development was not to be encouraged at the expense of all other resource values. Congress made it clear that "appropriate attention" was to be given "to a long-term balance between resource production, energy use, a healthy

environment, natural resource conservation, and social needs." [79] Congress was more direct in the Energy Security Act of 1980. [80] It specifically instructed the Forest Service to promptly process all oil and gas lease and permit applications forwarded to it by the BLM or USGS. The agency could no longer defer these decisions pending completion of its long-term planning processes mandated by the National Forest Management Act of 1976:

> It is the intent of Congress that the Secretary of Agriculture shall process applications for leases on National Forest System lands and for permits to explore, drill and develop resources on lands leased for the Forest Service, notwithstanding the current status of any plan being prepared... [81]

In these Acts Congress once again reinforced the extent to which natural resource objectives compete and once again shifted the tough decisions to the land management agencies.

As seen in the cases discussed in Chapter 3, the land management paradigm that directed decisionmaking in earlier times, fails when these more recent objectives must be accommodated. The clash of the conservation and preservation philosophies and the inability of the paradigm to reconcile them is well-illustrated by the Bob Marshall dispute discussed below.

Making Decisions When Objectives Conflict: The Bob Marshall Case

The Bob Marshall ecosystem straddles 150 miles of the continental divide in Montana. At its heart is the 1-million acre Bob Marshall Wilderness Area, officially designated

Wilderness in 1964 when the Wilderness Act was enacted. To its north lies the 286,700 acre Great Bear Wilderness (designated in 1978) and to its south is the 240,000 acre Lincoln-Scapegoat Wilderness (designated in 1972). [82] The Bob Marshall Wilderness has been described by preservationists as "the quintessence of wilderness." [83] Environmental groups following the wilderness designation process believe it to be the crown jewel of the National Wilderness Preservation System. [84]

In early 1979, Consolidated Georex Geophysics (CGG), a Denver, Colorado, geophysical exploration firm, applied to the USFS Northern Region for a prospecting permit to conduct seismic testing in the Bob Marshall, Great Bear and Lincoln-Scapegoat Wilderness Areas and on national forest lands adjacent to these wilderness areas. CGG's plans included detonation of 270,000 pounds of explosives along a 207 mile seismic line. All access along the line would be by helicopter and the testing was planned to last approximately 100 days. [85] At the same time as CGG's application was filed, oil and gas lease applications for the three wilderness areas began pouring into the district forester's office, eventually numbering 700 by 1982. [86]

Announcement of the proposed seismic testing generated immediate outrage from both local and national environmental organizations. The Bob Marshall Alliance, a coalition of local individuals and regional and national environmental organizations, was established to oppose any oil and gas

exploration or development intrusion into the wilderness areas. [87] They referred to the proposed seismic testing as "bombing the Bob" and exclaimed that it would be "like slashing the face of the Mona Lisa." [88]

The proposed seismic study area sat atop the Western Overthrust Belt and thus could prove to be a major source of oil and gas. But, it was also a pristine wilderness area, harboring one of the last remaining endangered Grizzly Bear habitats. Facing this dilemma, Regional Forester Charles Coston chose to make a decision based on a technicality. In so doing, he did not have to decide which objective (resource preservation or domestic energy production) should prevail in the area. While CGG did not possess any leases in the Wilderness areas, it intended to sell the information obtained from seismic testing to several oil and gas companies interested in obtaining leases there. [89] Because CGG did not possess the leases, Coston ruled in April 1980:

> It is my policy not to consider any proposal for mineral activities within a national forest wilderness unless the proposal is being specifically applied for under the United States mining laws or law pertaining to mineral leasing. [90]

Coston cited conflicts among "competing interests of multiple resources" in making his decision. [91] He justified the decision, commenting that "it seems only prudent when discretion rests with the agency, that the conflict should be avoided." [92]

But, Coston's decision hardly "avoided" conflict. While environmentalists were jubilant, praising Coston's action,

[93] CGG appealed the Regional Forester's decision to USFS Chief Max Peterson. CGG was supported in its appeal by the Mountain States Legal Foundation (MSLF), an industry interest group, and the Rocky Mountain Oil and Gas Association (RMOGA). [94] The Sierra Club, The Wilderness Society and the Bob Marshall Alliance immediately submitted their own briefs to USFS Chief Peterson supporting Coston's decision.

One year later, in April 1981, USFS Chief Peterson sent CGG's application back to Regional Forester Coston for reconsideration. He cited the USFS responsibility under the Energy and Minerals Security Act, as well as the Wilderness Act, to not interfere with the operation of the mineral leasing laws. He ruled that Coston's decision to deny CGG's application because it lacked leases to the area was inappropriate. Peterson told Coston that "the citizens of the United States have an interest in assessing all values lying in those wildernesses." [95]

Now Coston was forced to make a decision on the merits of CGG's proposal. In late May, 1981, the regional forester again denied CGG's permit, this time ruling that "seismic operations conflict with significant wildlife, geologic, scenic and recreation values." [96] Again, environmentalists were jubilant. Again, CGG, MSLF and RMOGA began preparing administrative appeals of the Regional Forester's decision as well as lawsuits against the agency. [97] And, once again, the Regional Forester's decision hardly put the issue to rest. While CGG, MSLF and RMOGA prepared new administrative

appeals and laid plans for a lawsuit against the USFS, environmentalists pressured Congress to take action to protect the Bob Marshall Wilderness. [98]

CGG's proposal placed Regional Forester Coston in a corner. His position gave him responsibility for preserving wilderness values as well as fulfilling the provisions of the mineral leasing laws. In this case, however, it appeared impossible to accomplish both. Regardless, Coston had to make a decision. Whichever objective he fulfilled, he was doomed to encounter opposition. No decision was obviously correct; any decision could be supported as well as opposed on the basis of federal natural resource and land management laws. Coston's training as a professional forester did not help him find a path out of this corner. He had to exercise his judgment as to which resource values should prevail. CGG, MSLF and RMOGA assessed this situation differently and took Coston to court.

Why the Congressional Inconsistencies?

As seen, Congress has delegated broad responsibilities and considerable decisionmaking discretion to professional land managers. This legislation implicitly assumes that the technical expertise of the land managers gives them the ability to establish the "relative values of the various resources" and thus equips them to reach decisions that "best meet the needs of the American people." In so doing, Congress reconfirmed the paradigm established consistent with

the conservation ideal while in the same voice undermining the ideal itself.

"Relative values" differ for different groups and individuals. Technical expertise does not lead to a decision; value judgments do. As a result, in making oil and gas leasing and permitting decisions, the USFS must choose which objective to satisfy. A Forest Service decision supporting mineral exploration or development, for example, might completely undermine an endangered species protection or wilderness preservation objective. In like manner, a decision to prohibit oil and gas activity in a specific area runs contrary to expressed legislative and executive objectives to promote domestic energy production. The professional judgment exercised by the Forest Service in making such choices can easily be questionned by groups who value the resources at stake differently and who thereby legitimately reach different conclusions.

While many blame Congress for the current stalemate in land management, Congress in reality had little choice but to act as it did. As a representative body, it is attuned to the demands of many different constituent groups. The difficult social choice problems placed on its lap in the 1960s and 1970s could only be resolved through compromises that tried to accommodate all concerns. In so doing, Congress was able to garner support, rather than opposition, for its decisions. Congressmen last but short terms if they ignore their constituencies and support unfavorable legislation.

But, as seen, Congress' responsiveness only compounded the difficulty of the land managers task. By legitimizing almost every conceivable public land use without clear guidelines for then choosing which use takes priority in a particular case, the tough land use allocation decisions were tossed back to the Forest Service like a hot potato.

The symbolic dimension of these Congressional mandates cannot be ignored. [99] There is little cost to most legislators in supporting wilderness designation, pollution control, endangered species preservation, and watershed protection. And, in fact, when much of society has become disillusioned with the results of a technological era and its ecological travesties, there is much to be gained by such statements. Furthermore, there are few political costs to making broad, seemingly reasonable demands for comprehensive planning of forest resources. And, when the economy begins faltering and the nation seems to be suffering at the hands of OPEC, it would be more costly to ignore the situation than to establish policies promoting domestic energy production and thereby independence from foreign forces.

But, symbolic gestures by Congress are not the only reason these natural resource objectives are vague and often conflicting. There are real constraints on Congressional action on specific issues, especially as complex as those involving the public lands. [100] It would be infeasible to expect Congress to specifically decide which wilderness or river is preserved, which timber sale is offered or which

endangered species is protected. The time, resources and information needed to make these decisions would only burden an already-overloaded Congressional agenda. Hence, our system of government is structured with Congress setting policy and the bureaucracy then implementing that policy.

Additionally, there are real political costs to making these decisions Congressionally, even should Congress have the time and resources. Because implementation occurs at the administrative, not legislative, level, Congress does not have to make site-specific decisions in which the bottom-line costs and benefits of achieving its broad policy objectives are exposed for all to see. Instead, this latter side of the equation is passed on to the administrative agencies and it is there that the tough decisions must be made. But, the consequence is that Congress' broad policies have not resolved the disputes between competing groups; they merely shifted them back to the administrative arena where they originated.

Because of these Congressional mandates, the Forest Service finds itself confronting many competing policy objectives. And, in each site-specific case, it must make the political resource allocation decisions that Congress was either unable or unwilling to make. Administrative implementation of Congressional mandates is inherently problematic. [101] Bureaucratic inaction or purposeful misinterpretation of Congressional mandates frequently undermines policies. Such inaction is seldom a problem in

natural resource decisionmaking, though, for those groups that fought for the legislation in the first place now fight to ensure that it is implemented as they intended. These groups behave like Eugene Bardach's "fixer." [102] But, unlike Bardach's "fixer" -- the legislator responsible for guiding a particular policy through the legislature -- these public land policy "fixers" are external to the process. Their voices and frequent lawsuits do not allow an administrative agency to overlook or ignore those statutory provisions that advance their concerns. As Steven Yaffee discovered in his analysis of the implementation of the federal Endangered Species Act:

> Constituent support is one of the most effective initiators of external pressures to force the bureaucracy into action.
>
> These groups...petition; they provide data; they educate; they lobby; they threaten legal action. Their actions account for many of the [endangered species] listings that were finally made. [103]

Because the broad national resource mandates have legitimized their claims, it has given public land "fixers" power with which to question administrative decisions in the courts. This distribution of power, combined with the willingness of the courts to hear these cases, has dramatically changed the environment within which current land management decisions are made. But, just as in the administrative arena, the courts have had difficulty responding to the competing claims of equally legitimate parties.

The Limits and Consequences of Judicial Review

In 1977, the Forest Service mistakenly issued leases for a wilderness area within the White River National Forest. As a result, no protective stipulations were attached to the leases. When the error was discovered, Forest Service officials had several options, none of which were attractive. The Regional Forester decided not to do anything to rectify the error, reasoning that the agency would be sued regardless of what it did:

> The possibilities as we saw them: we may be sued for the error of agreeing to lease without special wilderness character protection stipulations; we may be sued for permitting operations on the lease without a full EIS; we may be sued for agreeing to lease even with protective stipulations; or we may be sued for not honoring a contractual obligation of the United States. I chose to honor the contract. [104]

Increasingly, the Forest Service is finding itself defending its decisions in court. During and before the 1960's, the Forest Service never had more than one, possibly two, court cases questionning administrative decisions pending at a single time. Today a forestry attorney in the Department of Agriculture's Office of the General Counsel puts that figure between one and two dozen. [105] This outcome of decisionmaking occurs so frequently that agency officials are resigned to its inevitablity. Because of the broad legislative mandates under which the agency operates, almost every decision made is susceptible to judicial review by an adversely affected individual or group.

On the one hand, while there has been a decreasing

confidence in the Forest Service and, indeed, administrative agencies in general, on the other hand there has been an increased reliance on the courts to review contested administrative decisions. As U.S. Circuit Court Judge Harold Leventhal commented, the courts have come to share "the public sense of urgency reflected in the new [environmental] laws." [106] More generally, in his review of the growing role and consequences of courts in social policymaking, Donald Horowitz observed:

> ...American courts have been more open to new challenges, more willing to take on new tasks. This has encouraged others to push problems their way -- so much so that no courts anywhere have greater responsibility for making public policy than the courts of the United States. [107]

Hence it is not surprising to see the success with which public land users have taken their cases to the courts in hopes of redressing administrative wrongs. What better place to take one's problems that to a "judge" who, by definition, will address the fairness issues allegedly ignored by the administrative branch. As Horowitz observed:

> There is an undeniable attractiveness to the judicial method. In its pristine form, the adversary process puts all the arguments before the decisionmaker in a setting in which he must act. The judge must decide the case and justify his decision by reference to evidence and reasoning. In the other branches, it is relatively easy to stop a decision from being made -- they often effectively say no by saying nothing. In the judicial process, questions get answers. It is difficult to prevent a judicial decision. No other public or private institution is bound to be so responsive. [108]

But, while such reasoning places the judiciary on a pedestal of responsiveness, it presents but a fraction of a much

larger picture. Horowitz goes on to note that:

> The fact that there are fewer participants in the adjudicative process than in the legislative process makes it easier for judges than for legislators to cut through the problem to a resolution. But it is precisely this ability to simplify the issues and to exclude interested participants that may put the judges in danger of fostering reductionist solutions. [109]

Because judges are generalists and because issues are necessarily simplified, the courts are not always the most appropriate forum for resolving some social policy disputes.

In analyzing several court cases involving social policy, Horowitz found that judicial review was inadequate along several dimensions. First, adjudication is focussed. It is centered on the rights or duties of different parties and hence ignores discussion of alternative actions wherein resolution of the underlying disputes might be achieved. Second, it is piecemeal. It deals only with the case before it. Third, it only takes action when cases are brought before it. In this sense, it is a passive body; it does not initiate action when needed. Fourth, adjudication focuses on historical fact or "events that have transpired between the parties to a lawsuit," not social fact. But, social facts are those most often relevant to policymaking. Finally, adjudication provides no room for planning. By nature, "judges base their decisions on antecedent facts, on behavior that antedates the litigation." But, in social policy, it is critical to plan for the future given the knowledge garnered from past experience. As a result, the courts address the procedural, adjudicative issues but the larger substantive,

policy issues are frequently sidestepped.

In the case of public land management, the courts are encountering much the same problem as Congress -- how to choose between legitimate yet competing claims to public land resources. Just as there is no obviously correct decision to the land manager, so too there is no obviously "fair" decision to the judge. It is a question of "right vs. right." Judges, like administrators, are also faced with Congress' obviously conflicting mandates when ruling on a case. Because legislated objectives clearly conflict, some analysts argue that no Congressional intent actually exists:

> ...the new areas of [judicial] activity respond to... new legislation so broad, so vague, so indeterminate, as to pass the problem to the courts. They then have to deal with the inevitable litigation to determine the "intent of Congress," which, in such statutes, is of course nonexistent. [110]

With such flexibility in determining Congressional intent, it is only to be expected that many different perspectives have been offered.

When the Izaak Walton League sued the Forest Service to prevent mining in northern Minnesota's Boundary Waters Canoe Area (BWCA), Minnesota's U.S. District Court Judge Philip Neville decided to issue a permanent injunction against future mining and mineral exploration there. The BWCA, a part of the Superior National Forest, was designated as Wilderness when the Wilderness Act was passed in 1964. Judge Neville interpretted Congress' intent in this manner:

> To create wilderness and in the same breath to allow for its destruction could not have been the real

> Congressional intent, and a court should not construe or presume an act of Congress to be meaningless if an alternative analysis is possible. [111]

He concluded that:

> It is clear that wilderness and mining are incompatible...If the premise is accepted that mining activities and wilderness are opposing values and are anathema each to the other, then it would seem that in enacting the Wilderness Act, Congress engaged in an exercise of futility if the court is to adopt the view that mineral rights prevail over wilderness objectives. Mineral development by its very definition cannot take place in a wilderness area.... [112]

But, encountering a similar question of whether or not the Forest Service should defer leasing decisions until wilderness designation decisions were made, Wyoming District Court Judge Clarence Brimmer issued a ruling directly conflicting with Judge Neville's. In Mountain States Legal Foundation v. Andrus Brimmer ruled that decisions on the leases could not be deferred:

> It would surely be inconsistent with the intent to keep lands designated as wilderness areas open until December 31, 1983, that lands merely under administrative study for a proposed wilderness area may be effectively withdrawn from the leasing without the consent of Congress. [113]

Brimmer commented that it is the Secretary of the Interior's obligation "to provide some incentive for, and to promote the development of oil and gas deposits in all publicly-owned lands of the United States through private enterprise." [114] In so doing, he interpretted Congressional intent in The Wilderness Act's Section 4(d)2 in precisely the opposite manner as Judge Neville.

In contrast, in a case involving a timber sale on

national forest lands adjacent to a proposed wilderness area but itself possessing wilderness characteristics, a Colorado district court judge ruled that no commercial development that might harm the area's wilderness attributes could be allowed until after final wilderness decisions had been made by Congress. He ruled that the Forest Service must "refrain from acts...which will irrevocably change [the area's] character until the President and Congress have...rendered a decision." [115] The result of cases such as these has been the development of a case law that is internally inconsistent and that only shifts the dispute back to the administrative agencies. The inherent conflict over the specific allocation and management of national forest lands is seldom resolved.

As anyone, judges prefer to have some substantive basis for ruling in a case. But, the extent to which Congressional objectives conflict forces the courts to focus on procedural issues and not question the professional judgment exercised by the administrative agencies. For example, the US District Court Judge ruling in Sierra Club v. Hardin expressed the court's hesitation to question the substance of a decision made by professional foresters:

> Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service....
>
> Having investigated the framework in which the decision was made, the court is forbidden to go further and substitute its decision in a discretionary matter for that of the Secretary. [116]

But, once again, ruling in this manner merely shifts the

dispute back to the administrative arena. But, how else is a judge with no land management expertise to rule?

Because most court rulings are made on a single procedural issue, contradictory rulings now complicate administrative implementation of natural resource statutes and, moreover, leave the door open for further judicial review of the decisions made. In oil and gas cases the procedural issues raised generally fall into two categories. The first involves administrative responsibility under the National Environmental Policy Act and, more specifically, the timing of environmental impact statements. The second category questions the authority of the Secretary to impose different conditions on leases issued.

In Sierra Club v. Hathaway the Sierra Club argued that the land managers must complete an EIS before issuing leases for geothermal resources. But, the judge upheld the government's position. He ruled that no development could occur under the leases without future decisions by the administrative agency and hence that an EIS should be prepared at that later time:

> the lessee could not proceed beyond casual use until a notice of intent or plan of operation had been approved...the leasing decision therefore did not represent a commitment of resources. [117]

This policy of deferring extensive environmental review until specific operating plans are submitted has been adopted by both the Forest Service and BLM. In a review of onshore oil and gas leasing and exploration, the Government Accounting

Office (GAO) reported:

> With respect to oil and gas, both the Forest Service and the Bureau of Land Management have adopted practices which allow them to continue processing leases without committing themselves to approval of future development operations. They incorporate stipulations...into some leases which give the agency control over whether development will eventually be allowed under the lease. [118]

But, USFS Chief R. Max Peterson qualified the GAO's interpretation:

> The discussion seems to overstate the control which the agency maintains by stipulations. The intent of the (Forest Service) in developing stipulations is to retain a degree of control over operations to assure compliance with law...such stipulations do not reserve **full** control to prevent future development. We believe the process of denying operations on the basis of post lease environmental assessments is more complex than implied. The issuance of a lease carries the right to reasonable use and the post lease assessment normally only considers the "how to." [119]

But, Peterson's qualification contradicts the Forest Service argument in the Palisades case. The leasing dispute in the Palisades FPA centered on the significance of the decision and thus the need for an EIS. The Sierra Club argued that the leasing decision was significant because it made an irretrievable commitment of resources. But, the Forest Service expressed confidence that its lease terms would prevent environmental impacts if and when specific exploration was proposed. Hence they argued that resources were **not** committed by the leasing decision but would be when an APD was filed:

> While the prelease environmental analysis treats general issues and concerns (such as preservation of the wilderness option) that would seriously and necessarily be affected by lease operations, the operations stage is the time to address most concerns.

[120]

The Regional Forester justified his decision to issue leases without an EIS:

> Mineral deposits are unique and completely unknown prior to exploration and discovery. To assume that a NEPA document will or can explicitly define all the unknowns and uncertainties of an undiscovered mineral deposit is unrealistic. The Palisades FPA-EA fulfills the spirit and intent of NEPA and the selected alternative allows for at least two additional NEPA actions should use and occupancy be required within the FPA. [121]

But, in Environmental Defense Fund v. Andrus, the judge ruled that such uncertainty was precisely the reason EIS's are required of federal agencies:

> Section 102(c)'s requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. And one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA.... [122]

While contradicting Forest Service arguments in the Palisades case, Chief Peterson's qualification is supported by a case involving BLM stipulations on oil and gas leases. In 1978, Department of the Interior Solicitor Leo Krulitz issued an opinion stating that the "wilderness characteristics" of BLM wilderness study areas must be preserved until final wilderness decisions were made. [123] The BLM developed its Wilderness Inventory Handbook and

interim management policies accordingly. Krulitz's opinion and DOI's adoption of it led the Rocky Mountain Oil and Gas Association (RMOGA) to sue DOI and Krulitz to open these areas to mineral development. RMOGA cited "irreparable financial harm" to its 650 member corporations. [124] Wyoming District Court Judge Kerr interpretted Solicitor Krulitz's opinion and the resulting BLM guidelines and Wilderness Protection Stipulation (WPS) to mean that "actions which have even a remote possibility of impairing an area's suitability for wilderness designation are not allowable because the agency cannot permit the possible wilderness characteristics to be destroyed before those characteristics have been determined to exist." [125] Kerr referred to leases issued under such procedures as "shell" leases because companies holding them would be prohibited from conducting any exploration under them:

> The government argues that the inclusion of the WPS with the lease informs the lessee that development may or may not be allowed. Such an argument is a poor excuse for the end result. Once again a lessee could continue to pay rentals and not be allowed to develop oil and gas.... Such a system of issuing "shell leases" with no development rights is clearly an unconstitutional taking and is blatantly unfair to lessees.
>
> A lease without development rights is a mockery of the term lease. [126]

Judge Kerr concluded, ruling that the BLM must lease wilderness study areas:

> Energy and resource development are critical to this country at this point in time, and the erroneous interpretation of the law as given by the Solicitor is not only clearly contrary to the law as enacted by

> Congress, it is also counterproductive to public interest. [127]

But, other judges have ruled in precisely the opposite manner. In the Palisades FPA case, Sierra Club v. Peterson, Washington D.C. District Court Judge Aubrey Robinson upheld the Forest Service contention when he ruled that an EIS was not required because the stipulations attached to these leases would sufficiently protect surface resources:

> the lessees may legally obligate themselves to lease conditions that may result in the inability to explore or develop; that is knowing risk the lessees wish to take. [128]

Judge Robinson termed Judge Kerr's earlier ruling in RMOGA v. Andrus to be of "questionable validity." [129]

In Alaska v. Andrus, plaintiffs challenged an EIS covering oil and gas drilling in the Gulf of Alaska. They argued that the alternative of attaching a termination clause to the leases had not been considered. The court agreed with the plaintiffs contention, arguing that such a termination clause might provide "that the Secretary could terminate a lease if environmental hazards, unknown or unforeseen at the time of leasing, subsequently arose or were discovered." [130] In so doing, the judge supported the argument that lease stipulations are enforceable even if they prevent development. The Interior Board of Land Appeals has ruled similarly in at least two cases. [131]

But, in the Cache Creek and Little Granite Creek cases, Interior Solicitor Lowell Madsen rendered an opinion directly counter to those that support the enforceability of

stipulations, no matter how stringent. Madsen ruled that a lessee has "the exclusive right and privelege to drill" and that if "the pending applications for drilling permits are denied, the Secretary will have exceeded the scope of his authority and will have rendered nugatory an inviolable right...". [132] Madsen's opinion critically altered the course of events in the Cache Creek and Little Granite Creek permitting cases discussed in Chapter 3. Following Madsen's ruling, the USGS/FS EIS did not contain a no drill alternative.

These contradictory court rulings and legal opinions have only served to exacerbate, not resolve, the conflict over oil and gas exploration on public lands. Because of the range of different opinions, they provide little guidance to administrative agencies. Moreover, they encourage groups to strategically select those courts where they believe they will get a favorable ruling. Judicial review of these administrative decisions involves considerable time and resources on the part of all parties just to rehash old issues rather than focus on the substantive issues of concern. Moreover, to gain access to the courts these groups must usually raise a procedural question. Frequently, these procedural issues are not the same as the substantive issues that directly concern the plaintiffs. And, since the underlying disputes are not resolved, they merely flow into the next forum where they can again be debated. An unresolved leasing dispute inevitably arises again when an

APD is filed. For example, should an APD now be filed under the Palisades leases, disputes over whether or how exploration may occur is guaranteed to occur; the judge's ruling in this case has left the door open for this outcome.

A Problem Compounded by Uncertainty

Making decisions about how and where oil and gas exploration may occur on national forest lands is made difficult by the many competing objectives under which these decisions must be made. But, these varied objectives are not the only difficulty with which the Forest Service must contend in decisionmaking. To make matters worse, these decisions are shrouded in uncertainty. Not only is the Forest Service unable to make a "measurably correct" decision because objectives conflict, it is also not able to fully understand the consequences of alternative decisions until after they are implemented. Consequently, no decision can be proven "measurably correct" at the time that it is made. Likewise, any decision reached can be legitimately questionned.

A lease confers the right to the oil and gas resources located beneath a particular tract of land. A decision to lease legitimizes oil and gas development as an appropriate use of the leased lands even though it does not grant permission to conduct exploratory drilling or resource production. By conferring rights to lessees, it allows oil and gas to become the predominant use should development be

proposed. It follows, therefore, that leases should not be issued for areas where oil and gas development is not deemed an appropriate land-use. But, making this allocation decision is not a simple task. Ideally, benefits derived from the oil and gas produced must be compared with the opportunity costs of the other resources and land-uses foregone once development occurs. Determining what surface resources are at stake in these decisions is relatively easy since they are visible and easily mapped and inventoried. Determining what oil and gas resources are there, if any, is another matter. Making a leasing decision is like choosing between the trip to Hawaii, the stereo and $10,000 in cash or what is behind Door #3 in the television show "Let's Make A Deal." The decisionmaker simply does not know what might be gained for what is being given up. With oil and gas and the public lands, though, the stakes are considerably greater.

The Many Dimensions of Uncertainty

Oil and gas resources are elusive. They are well-hidden beneath the earth's surface and there is no way of telling precisely where they are and in what quantities but by drilling. Chapter 2 described the incremental steps taken in exploring for oil and gas. Only as each step divulges additional information about an area's resources can an oil and gas company decide whether or not to continue exploratory or development activity. But, like the oil and gas company, the USFS does not know the implications of its decisions

until **after** they have been implemented.

Even though oil and gas are located beneath public lands, the federal government is not in the exploration and development business. Instead, the government has put its faith in the private market to determine when and where exploration and development should occur. In order to avoid a haphazard rush to develop these resources, a leasing system was developed so that only an individual or single firm has access to a particular tract of public land.

Because of the low lease application fee ($75) and the low annual rental fee ($3/acre), the leasing process encourages speculation by individuals hoping to make a large return on a small investment. Leases are issued to the first qualified applicant. This applicant is not always an oil and gas firm. Most applicants have no intention of ever conducting exploratory drilling. [133] Their hope is that an oil and gas company will want to purchase their lease at a high price conditionned with royalty payments should oil or gas someday be discovered. Predictably, when an area such as the Western Overthrust Belt is discovered there is a mad rush by individual speculators to acquire leases there. [134]

When confronting a lease application, USFS field staff have little information about what exploration or development, if any, will ever occur on the leasehold. Consulting with the lease applicant is seldom helpful as that individual is frequently just speculating that someday more information may indicate that exploration is warranted or

that someone else (notably an oil and gas company) may want to acquire his or her lease(s) and then undertake exploration and development. Because the process is structured in a way that encourages speculation, only 1 in 10 leases ever result in exploratory drilling. Consequently, 90% of the USFS' leasing decisions are inconsequential beyond generating rental revenues for the public coffers. [135] Because a decision to lease can have many different outcomes from no exploration at all, to unsuccessful exploration, to full field development, the Forest Service issues leases with various stipulations attached and defer extensive environmental review until later stages when more specific proposals are made.

Even exploratory drilling does not reveal complete information about the oil and gas resources beneath a particular leasehold, though. The area now comprising the Western Overthrust Belt was explored unsuccessfully several times in the past. But, those exploratory wells were not drilled deep enough to discover the oil and gas located there. [136] Similarly, exploratory wells may sidestep and just miss an oil or gas "trap." For this reason, exploratory drilling often involves two or three wells and different wellsites. [137] One hundred twenty-eight wells were drilled in Alaska's Prudhoe Bay before a strike was made in what is now North America's largest oil field. [138] Should a strike be made, several wells must then be drilled just to estimate the size of the discovery and thus whether or not field

development is warranted. [139]

To make matters worse, because oil and gas are so well hidden beneath the earth's surface, there is little agreement on the resource potential of public lands. The oil and gas industry estimates that federal public lands contain 70% of domestic oil and gas resources while accounting for only 17% of its production. [140] Environmentalists, on the other hand, estimate that 78.5 percent of the producible oil and 83.5 percent of the natural gas are contained in non-federal lands. They estimate that only 15.8 percent of the oil and 12.4 percent of the gas will be found beneath federal lands. Moreover, environmentalists claim that wilderness and potential wilderness in the 17 western states contain only 2.1 percent of the oil and 1.7 percent of the gas. [141] Because of these conflicting claims about likely outcomes, there is no agreement about what is at stake in these decisions. The Forest Service does not know what oil and gas resources are to be gained or lost by their decisions to lease or not lease an area. There is no obviously correct decision; any decision reached can be legitimately questioned.

Decisionmaking is further clouded by debate over national energy "needs." Is the oil and gas located beneath national forest lands, regardless of how plentiful or scarce, even "needed?" What are the consequences of not permitting exploration and development? The vice-president of Shell Oil Company calls for increasing development of the public lands

"in order to alleviate the continuing declines of oil and gas production in the U.S." [142] The managing director of British Petroleum declares that "a declining supply of oil appears inevitable because oil is simply not being discovered fast enough." [143] The industry's newsweekly magazine editorialized that "the Carter Administration is culpable in several major areas of energy policy, but in our view the most damning indictment is its failure to stimulate exploration for oil and gas on high-potential federal lands." [144] Another industry representative comments that "at a time of energy and strategic minerals insecurity, it is of questionable judgment to postpone developing needed resources while awaiting the development of a forest management plan." [145] Environmentalists, on the other hand, argue that there are many renewable energy sources to satisfy America's energy needs and that it is senseless to destroy other scarce natural resources to obtain the last drop of oil. [146]

In addition to the disagreement about the need for and potential of oil and gas exploration on public lands, decisionmaking is complicated further by uncertainty about the environmental implications of drilling. Environmentalists contend that even exploration activities that lead to no further development have undesired environmental consequences. As a result, they argue that no leases should be issued in areas having high surface resource values. [147] Industry replies, though, that it is capable of environmentally sound exploration and development. It

believes that environmentalists are basing their fears on past development but that times have changed:

> The industry in recent years has made an enviable record in environmental protection. Gone is the hangover from earlier less sensitive days, before oilmen and others learned to be more conscious of the consequences of their activities on the world around them. Industry has generally cleaned up its act...Oilmen have done a particularly good job in the fragile frontiers. Oil operations coexist in harmony with wildlife on land and offshore. [148]

Environmentalists, though, paint a different picture based on their backcountry encounters with current exploration activities:

> The site looked more like a construction zone than a wilderness area, with drill rigs, water tanks, pipelines and work crews dotting the landscape. Instead of the scent of mountain wildflowers, all they could smell was diesel fuel. Quiet and solitude were elusive; helicopters darted over the ridge with such regularity they said they felt they were in a Vietnam war movie. The only wildlife they saw was a few chipmunks, and they may have been packing their bags. [149]

Disagreement about potential impacts is not limited to these traditional adversaries either. As discussed in the last chapter, even government "experts" disagree about the impacts of oil and gas exploration and development.

Regardless of this pervasive uncertainty, the Forest Service must make oil and gas leasing decisions almost daily. But, the mineral leasing laws give little guidance about how to make decisions when the outcomes are unknown. When these laws were enacted uncertainty was deemed to be the problem of private industry; the market system would adjust prices to account for the risks associated with doing business in an uncertain world. But today this same uncertainty has

considerable import for federal land managers. Because of increasing and competing demands for the varied resources of the public lands, the stakes in these decisions are much greater now. But, the Forest Service is not able to determine which demands should be satisfied and which objectives upheld because it does not know what is gained or lost by different decisions. The conservation paradigm helps little in situations such as these.

Uncertainty about the consequences of decisionmaking has always existed. But, now that industry interest in exploration in national forest lands has intensified and begun penetrating areas valued for other uses, uncertainty has become a critical factor in decisionmaking. Uncertainty is particularly problematic when proposed or potential wilderness areas are involved.

Conclusions

The public land management paradigm was developed to pursue conservation objectives. And, it succeeded in serving those ends for the first half of this century. Now, though, the traditional conservation objectives have been supplemented with preservation and non-commercial objectives. Inherent value differences separate these different objectives; scientific expertise and technical analysis cannot choose which objective should prevail in a particular case. But, because the long-held paradigm remains intact, that is precisely how these decisions are made today. The

consequences, as has been seen, is persistent conflict. Professionals schooled and experienced in the conservation tradition are no longer trusted to make these choices by those adhering to preservation ideals. Moreover, these professionals are not capable of making these choices in a manner that accommodates all interests because of the differences in values involved. Because power has become well-distributed by Congressional mandates and favorable court rulings, land management is at an impasse in many cases.

Trying to fit a square peg into a round hole has never been an easy task; neither has making judgmental decisions through technical analysis. Society has a penchant for leaning on scientists and experts for making the tough social choices that inevitably must be made precisely because they are difficult, controversial and many outcomes are possible. When power becomes distributed, as it has over public lands issues, viable decisions are decisions that accommodate the concerns of all interests at stake to their satisfaction. Technical analysis fails at this task. Likewise, Congressional intervention and judicial rulings have similarly failed. Other means must be found.

The current debate over how public land decisions should be made is not new. For the past two decades, academics, practitioners, professional foresters and political scientists have studied and criticized the current process. Reform has been proposed and attempted. As discussed in the

next chapter, however, past analysts have blamed the agency and not the paradigm. As a result, efforts at reform have been misdirected and, thus, unsuccessful.

CHAPTER 4 -- REFERENCES

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> [We] can perceive no reasoning why the permit may not be granted **subject to the express stipulation** and understanding that the issuance of any lease pursuant thereto will be conditioned upon the prior rendition of an environmental impact statement, **the findings of which shall determine whether and under what terms the lease may issue.**

In Quantex Corp (78 Interior Dec. 317 (1971)), the IBLA ruled similarly:

> ...the importance of oil and gas development would have to be weighed against the importance of the environmental protective factors in order to determine whether a lease should be issued at all. While adherence to these stipulations...may impede the lessee's proposed exploratory operation, the overriding importance to the

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[140] **Oil and Gas Journal**, "Outlook Cloudy for More Public Land Energy Work," November 10, 1980, page 140.

[141] Kevin C. Gottlieb, "Rigging the Wilderness," **The Living Wilderness**, Part I/Spring 1982, Part II/Summer 1982; also, Joseph L. Fisher, "Economic Aspects of Wilderness Conservation," Presentation to the National Symposium: "Public Lands and the Reagan Administration," Denver, Colorado, November 20, 1981.

[142] **Oil and Gas Journal**, November 10, 1980, op. cit.

[143] **Oil and Gas Journal**, "More Access to U.S. Federal Land Urged," September 29, 1980, pages 58-60.

[144] **Oil and Gas Journal**, "Federal Lands: Carter's Calamitous Energy Failure," Editorial, November 3, 1980.

[145] **Oil and Gas Journal**, "Oil Praises, Environmentalists Rap RARE II Bill," May 4, 1981, page 386.

[146] Phone interview with Bruce Hamilton, Great Plains Region Representative for the Sierra Club, October

1981.

[147] **The Living Wilderness**, Winter 1981, page 24, quoting Bill Cunningham of The Wilderness Society: "The question is whether this area is to be managed as a surface resource. If it is to be managed as an enduring resource then an inventory, as innocuous as it sounds, is unnecessary. What's there is irrelevant."

[148] **Oil and Gas Journal**, Editorial, "Environmental Self-Policing Serves Industry's Best Interests," December 21, 1981, page 19.

[149] Hank Fischer, "The Plight of the Cabinet Mountains Grizzlies," **Sierra**, January/February 1982, page 111.

CHAPTER 5

WHY THE PROBLEM PERSISTS

The US Forest Service task differs markedly from that encountered when the agency was established at the turn of the century and the mineral leasing laws were enacted in 1920. Professionally trained foresters now have resource allocation responsibilities that defy their technical expertise and that are more overt than at any time in the past. These foresters are charged with meeting many contradictory objectives. Their decisions must be made in the face of uncertainty about potential outcomes. They are required to make decisions in "the public interest" yet no single "public interest" exists. While the decisionmaking process is designed to make scientifically defensible decisions, the decisions to be made are inherently judgmental; objectively correct answers simply do not exist.

The Forest Service now confronts a political resource allocation task in addition to the traditional scientific land management task to which it is accustomed. But, the decisionmaking process remains one based in technical expertise. It provides no means for resolving the disputes that inevitably arise. It cloaks political problems in technical analysis. The past three chapters have described a process that is obviously mismatched to the problem it is meant to address. In fact, too obvious. Why does the mismatch exist and persist? Moreover, how might it be remedied?

The answer to the first question is complex. First, many past analysts have misread the nature of the problem posed by public land management. [1] Rather than addressing the scientific management paradigm within which the Forest Service makes decisions, these analysts have attacked the conservation ideal. But, by attacking the long-held conservation notion of good public land management and by demanding that the agency consider other, non-commercial values in decisionmaking, these critics have recommended procedural changes aimed at the wrong target. It is the paradigm that needs adjustment; it is how these many conflicting values are considered that is critical to reform. As seen, interest "airing" is not the same as interest "accommodation." But, within the scientific management paradigm wherein experts acquire information and then make decisions, interest airing is all that occurs.

Second, as discussed in Chapter 4, Congress responded to the expanding demands over public land resources following World War II by demanding precisely what land management agencies are now doing: considering other values in decisionmaking. But, by shifting these tough social choice questions to the land management agencies, Congress implied (and at times explicitly stated) that these decisions were best left to scientific expertise. It implied that these decisions had right answers that could be determined through the rational, dispassionate analysis of scientific experts. In so doing, Congress reinforced this paradigm. Hence, the

Forest Service has not been given a message to change from that body with the direct authority to do so: Congress.

Finally, there are organizational limits to change in the manner this author argues is needed. While Forest Service officials acknowledge that a problem exists, they logically frame their solution in the context of the traditional paradigm. Partly this response is due to the Congressional legitimization mentioned above. But, more critically, it is due to the culture of the public forestry profession that is imbedded in this paradigm. This chapter discusses both the prescriptive sources of failure and the organizational factors that limit change in order to determine how the mismatch might be remedied. As is seen, the root of both is in continued adherence to the long-established land management paradigm, one relying on scientific expertise to resolve political questions.

Past Perceptions of the Problem and Prescriptions for Reform

This study is hardly the first to critically analyze the Forest Service and to recommend reform. Over the past two decades the problem has been studied extensively by students of administrative law and behavior, foresters, academics and groups and individuals with a stake in public land management. They have criticized the Forest Service's failure to recognize the limits of its expertise and to change its behavior and procedures accordingly. While almost

all have come to study land management because of the dissatisfaction of different user groups, none have discussed how the underlying conflict between these groups might be resolved. While proposed reforms have become more exacting, they still are not well-suited to the problem at hand. Although the problem is often recognized as political, reform proposals are almost always directed at changing agency behavior within the context of the traditional professional expertise land management paradigm.

As the demands placed on national forests broadened following World War II, Congress responded by expanding the list of objectives to be met in national forest management. National policy no longer centers on conservation ideals but now embodies preservation and non-commercial ends as well. Given the changed policy, the "problem" warranting the attention of past analysts became the inadequate representation of these newly-legitimized values in national forest management.

Forest Service officials responded to these new demands in a professional manner. When making decisions, they "consider" the many resource values at stake in a particular proposal and then make decisions reflecting what they believe to be "the public interest." As might be expected, this determination reflects both their training in commercial forestry practices and the norms of the public forestry profession. Forest Service staff seem to have confidence in their ability to master this increasingly complex management

task and still make decisions in "the public interest." This confidence has several roots. It is partly born of the Forest Service's long tradition of decisionmaking in "the public interest." It is also due to their systematic approach to decisionmaking in which all issues are theoretically uncovered and considered before a decision is made. And, partly it derives from their belief that, even though current problems are much more complex than in the past, professional land managers are better able than other, potentially more political bodies to make these decisions; professional land managers understand what resources are at stake and have an eye for long-term efficiency. But, the apparent confidence of the Forest Service on this account has not been universally shared. Some have argued that it is unethical for the agency to take "the public interest" into its own hands.

A Question of Professional Ethics

In the mid-1960's, University of Montana Forestry Professor R.W. Behan was one of the first members of the profession to express uneasiness about the changing nature of the forest management task and the inability of professional foresters to respond to it. In an editorial in The Journal of Forestry he criticized the ethic adhered to by the forestry profession, one articulated to Behan's freshman forestry class by "a forester of considerable professional status":

> We must have enough guts to stand up and tell the public how their [sic] land should be managed. As professional foresters, we know what's best for the land. [2]

Behan referred to this ethic as "the myth of the omnipotent forester." In this editorial, he hoped to plant the seeds for reform. He emphasized the extent to which value judgments pervade forest decisionmaking and the need for professional foresters to acknowledge different values and consider them. He recognized the limits of professional land management training to make the inevitable value choices:

> "Goodness" and "badness" in our society are collective value judgments, and land expertise is no better a qualification than many others for making them. [3]

Additionally, he pleaded for a shift in forester loyalty from the profession and to society:

> For the "various ends of society" in our unique society, are and will be set only by that society, and not by a professional class of foresters. It is when we as professional foresters either can't or won't understand this that we get the most rapidly into the hottest water. (And our forestry school training helps us very little in sensibly avoiding getting there or capably getting out.) It is when we attempt to determine ends that "pressure groups" become the most hostile, challenging our leadership in resource conservation, and they do so quickly and properly. [4]

He concluded that freshman forestry classes should not be indoctrinated with the myth of the omnipotent forester but rather should be told:

> We must have enough sense to stand up and listen to the public, and to work with it in setting forest land objectives. Then as professional foresters we can supply the technological means to these sociological ends, and not confuse the one with the other. [5]

In the end, though, Behan offered no plan either for accomplishing the shift in attitude or determining what

"society" wants. He defined the problem as one of an ethical bias on the part of the Forest Service and thus believed that appealing to their sense of "right," combined with a more appropriate forestry education, would sufficiently amend the system.

Behan's prescription for expanding the realm of forestry education was echoed by others during the 1960's and 1970's. When Daniel Henning studied the wilderness designation process in 1972 he found, not surprisingly:

> Wilderness preservation, in many cases, is dependent on the recognition of intangible and qualitative values as opposed to tangible or quantitative values as dollars or numbers of people. Yet federal agencies and many aspects of society are committed to values of the first order (progress, materialism, tangibles) as contrasted to values of the second order (quality, intangibles, ecological considerations)... [6]

He, too, blamed professional forestry education for this bias:

> Forestry schools, professional and agency indoctrinations **are oriented to producing a timber-management orientation** in many governmental foresters. Although the claim of professionalism and agency objectivity is made by many resource managers and administrators in the wilderness classification process, value considerations pertaining to economics and mass recreation are obvious. [7]

Henning called for opening the "closed ring" of forestry education which now only involves "technically trained forestry professors who are training students for government positions where the requirements are made by professional foresters." [8] He believed that a curriculum including courses dealing with values, ethics and humanities would offset the apparent commerical orientation of professional foresters. He also believed that the use of committees and

consultants with expertise in various issue areas could supplement the agency's expertise and help foresters "determine the social ends or value base of the public interest." [9] He denounced the current process in which "the same administrators who initiate and argue in support of a particular proposal" are the judges that then evaluate public input in reaching a decision. [10]

With time, university level forestry programs have begun to offer or require courses on ethics and the value aspects inherent in a professional forestry career. [11] In addition, the USFS has held its own workshops in interpersonal skills and different strategies for involving the public in decisionmaking. [12] More recently, the Forest Service has begun sponsoring professionally-run training sessions in conflict management and dispute resolution techniques for its field personnel. [13] But, while education in non-technical forest management considerations and professional training in conflict management and interpersonal skills are a critical first step in meeting the needs of today's land management task, they cannot stand alone. At bottom, education and open-mindedness do not give a professional forester the ability to actually represent the values of others in decisionmaking.

A Question of Unbounded Administrative Discretion

While many have criticized professional forestry training as the source of inadequate interest representation

in Forest Service decisionmaking, most have pinpointed the problem as one of unreined administrative discretion and an agency bias in favor of some interests over others. There have been two levels of attack on this account and hence two levels of reform prescribed. Some perceived an internal bias that could be offset through education, combined with public involvement, broadened hiring practices and more formalized procedures. Others perceived a bias that was imposed externally by agency "capture." All blamed Congress for the predicament.

Agency Bias

As early as 1962, Charles Reich asked many of the same questions that have been posed in this analysis:

> Management must decide between the competing demands on the forests. When different uses clash, which shall be favored? How are local needs to be balanced against broader interests? Who is to have the benefit of the economic resources, and on what terms? How are the conflicting recreational demands of fishermen, skiers, hunters, motorboat enthusiasts, and automobile sightseers to be satisfied? Should the requirements of the future outweigh the demands of today? [14]

He criticized the power bestowed on "small professional groups....[to] make bitterly controversial decisions, choices between basic values, with little or no outside check." [15] He blamed Congress for delegating such extensive administrative discretion to the Forest Service with little attempt to bound the agency's authority:

> The standards Congress has used to delegate authority over the forests are so general, so sweeping, and so vague as to represent a turnover of virtually all responsibility. "Multiple-use" does establish that

> the forests cannot be used exclusively for one purpose, but beyond this it is little more than a phrase expressing the hope that all competing interests can somehow be satisfied and leaving the real decisions to others. The "relative values" of various resources are to be given "due consideration," but Congress has not indicated what those values are or what action shall be deemed "due consideration." Congress has directed "harmonious and coordinated management of the various resources," but it has left the Forest Service to deal with the problem that different uses of resources often clash rather than harmonize. Most significantly, Congress has told the Forest Service to "best meet the needs of the American people" but has left it entirely up to the Service to determine what those needs are. [16]

Reich criticized Congress' "multiple-use" mandate in that it justified all land uses. In so doing, he charged that any Forest Service choice could be justified and few could be questionned legally.

Reich then turned his attention to how the Forest Service exercised its broad discretion. He lambasted the Forest Service presumption that it could determine what constituted the "public interest" before making a decision:

> ...the Service recognizes, in the matter-of-fact pages of its manual, that its ultimate job is nothing less than the definition of "the public good," a task once reserved for philosopher-kings. [17]

Finally, he stressed that the Forest Service manner of decisionmaking inevitably led to bias in representing the many land use values at stake:

> It is too much to expect that foresters who initiate and argue in support of a particular proposal can then adequately evaluate public criticism or counter-proposals that often represent thinking they have earlier rejected. [18]

Reich recommended three reforms. First, he called for public hearings on controversial proposals to ensure that the

Forest Service was made aware of all concerns before making a decision. Second, he proposed that the many different resource values be institutionalized within the Forest Service by hiring staff other than foresters. In so doing, these other values would be automatically incorporated into day-to-day agency decisionmaking. Finally, Reich called for formal justifications when decisions are made so that all concerned groups know how and why the decision was reached. Reich believed that such justifications would make the Forest Service more accountable for their decisions and, ideally, force them to represent all interests in decisionmaking. [19]

To some extent, all of Reich's reforms have since been institutionalized. As a result of National Environmental Policy Act procedures as well as new agency policies described earlier, public hearings are held on most controversial decisions. Environmental assessments and environmental impact statements now contain the formal justifications he suggested. The agency also has expanded the profile of its staff in a special "public information office" as well as within its field staff. [20] But, as seen in the oil and gas case, "all competing interests" have not been "satisfied" by these measures. While most interest groups actively participate in formal agency hearings on various proposals and comment on draft analyses, they still do not feel that their concerns have been accommodated by the Forest Service decisionmaking process. Hence, opposition persists.

In the year following Reich's article, University of Virginia Economics Professor George Hall similarly blamed Congress for delegating broad discretionary authority to the Forest Service:

> It appears that in voting for multiple use Congress believed it was voting for virtue and against sin without having a definite idea about just what actions constituted virtue or sin. [21]

He criticized what he viewed to be the fundamental flaw of the multiple-use doctrine, that being that:

> it fails to provide a criterion for resolving the conflicts among demands except for the general and unspecified standard of "the best interest of the public." [22]

Hall also criticized the apparent Forest Service bias in exercising its discretion in decisionmaking. He labelled a "myth," the Forest Service belief that its "professional competence...savvey [sic]...and good judgment" [23] could successfully balance competing interests in multiple-use management:

> The myth is that such practices are capable of resolving all conflicting demands and allowing us to have our cake and eat it too. Resolution, of course, occurs in the sense that **some** land use plan is selected. [24]

Hall's recommended solution to the multiple-use dilemma differed from Reich's. He proposed that procedures be instituted for assessing the costs and benefits of different land allocations. He believed that, in so doing, conflicting demands would be appropriately "resolved," thereby ensuring that that "socially best administrative decisions for the national forests were made." [25] But, Hall also admitted

the difficulty in devising such a scheme when so many intangible values were involved. [26] Economists have often debated different means for quantifying environmental amenities and hence remedying that failure of cost-benefit analysis. But, no specific measures have ever been generally accepted by these economists. [27] And, when the Forest Service has tried to quantify the values at stake in its decisions it has always been soundly criticized. [28] The groups involved seldom trust the agency's evaluation of their concerns and thus they oppose the outcomes of such analyses.

Reich's and Hall's prescriptions came before many natural resource protection statutes had passed, particularly the National Environmental Policy Act. As discussed in Chapter 4, these statutes eventually gave considerable power to user groups to oppose land use plans and decisions deemed inappropriate. Hence, today's conflicting demands are **not** resolved when, as Hall implied, "**some** land use plan is selected" or decision is made. It was not until the early 1970's that the persistent and powerful opposition of dissatisfied user groups became a cause for concern. At that time analysts turned their attention to this consequence of the agency's broadened mission.

In 1972, M. Rupert Cutler analyzed, in his doctoral dissertation, the growing dissatisfaction with and litigation over Forest Service decisions. [29] He attributed this trend to two factors. First, numerous court decisions in the late 1960's and early 1970's had liberalized judicial rules of

standing in environmental disputes and thereby provided previously unavailable opportunitites for court review of Forest Service decisions. Second, he determined that these newly-opened doors to the judicial system were well-used because Forest Service decisionmaking procedures failed to provide adequate opportunities for public involvement.

Cutler recommended five specific reforms to overcome this problem of constant litigation, all designed to improve public involvement and Forest Service receptivity to non-traditional concerns. First, he called for an improved multidisciplinary profile within the agency. This could be accomplished by "personnel recruitment and in-service training" and "two-way communication with clientele groups." Second, he encouraged early involvement of all "clientele groups" in agency decisionmaking. Third, he suggested "the use of independent hearing officers and semi-independent citizens' committees." Fourth, he called for the Forest Service to generate several alternatives for public review and comment and, finally, to provide enough time for different groups to conduct "adversary analyses" of agency actions. [30]

Many of Cutler's recommendations have been adopted to some extent by the Forest Service. "In-service" training efforts have been mentioned earlier. The multi-disciplinary profile has improved, mostly through expanded-hiring of land management professionals other than foresters. In 1959, foresters comprised 90% of the Forest Service staff compared

to 50% in 1975. [31] Extensive public workshops involving thousands of individuals were held during the Forest Service wilderness reviews (RARE I and RARE II). [32] At times, "independent hearing officers" have been used to run public meetings. But, these meetings were always to obtain public input, not resolve disputes. As a result, the independent hearing officers often only complicated the meetings by impeding the flow of information between Forest Service staff and those attending the meetings. Their efforts seldom facilitated discussion between the different groups. [33] "Semi-independent citizens committees" are seldom used by the Forest Service in decisionmaking. Red-tape associated with the Federal Advisory Committee Act is often given as a reason for not more formally involving such committees. [34]

This Forest Service response is partly due to Council on Environmental Quality regulations under the National Environmental Policy Act. [35] Environmental impact statements must now contain analyses of several alternatives and public comment on a draft version of the report. But, to a large extent, today's public involvement efforts by the Forest Service are a result of Cutler's own efforts as Assistant Secretary for Conservation, Research, and Education in the Department of Agriculture during the Carter Administration.

Cutler was placed in the enviable position of implementing the recommendations made in his dissertation research. As Assistant Secretary, he immediately commented

that the "one imprint" he wanted to make on the Forest Service was "development of policies that ensure extensive, high quality, public involvement in policy determination." [36] His reasoning was that:

> The amount of citizen litigation to block unacceptable decisions relates directly to the opportunities, or lack of opportunities, for public participation. The U.S. Department of Agriculture's aim is to make such litigation unnecessary, to tear down any remaining shrouds of administrative procedure that tend to shelter our decisionmaking, and to get everyone affected by the results of our decisions into the decisionmaking process." [37]

Cutler established "five stages" to be followed in decisionmaking in order to ensure successful public involvement. Success, in this scheme, was reducing the extensive litigation plaguing the agency. These five stages were:

(1) defining the issue

(2) collecting public input

(3) systematic analysis

(4) evaluating public comments

(5) decision implementation
[38]

It was Cutler's belief, given his research findings, that more open and accessible decisionmaking would be representative decisionmaking. In theory, this representativeness would offset the widespread opposition to Forest Service decisions. The final test of this theory would be in the decision implementation stage; to use Cutler's words, this stage would reveal "whether the public has been adequately involved in the decision." [39]

Cutler's proposals and the Forest Service response are to be commended. Dramatic change has occurred in the way the agency involves the public in decisionmaking. [40] But, if the "final test" is in decision implementation, these reforms have not been enough. The problem persists. Cutler's prescriptions have failed to end the litigation at which they were targeted because, like those before him, he prescribed reform that reinforced the scientific management paradigm and further entrenched the technical analysis approach to decisionmaking. While the Forest Service has employed more and more sophisticated analysis techniques to systematically evaluate public input, the public is not satisfied and continues to try to redress the perceived wrongs of the administrative process by appealing to the courts. Consider, for example, the showpiece of this participatory process: The RARE II wilderness reviews. Fifty-thousand people were involved in providing input to the scope of the wilderness review EIS. Seventeen-thousand more were involved in workshops to structure the review process. When the dEIS was released, 264,000 more comments were received. [41] But, in "the final test," the process and its conclusions has been attacked on all fronts. Mining and timber industry groups, environmental organizations, ORV and other backcountry users have all opposed its conclusions as either too much or not enough wilderness protection. [42] And, moreover, because of a recent court ruling that the EIS was inadequate, the Forest Service has just announced plans to convene a new, "RARE III"

process. [43]

While the problem addressed in this analysis closely parallels that studied by Cutler, the root of the problem as defined here is much different. This study argues that the paradigm in which technical analysis is used to determine outcomes is the root of the problem. But Cutler's reforms reinforced this paradigm. Cutler admitted that "there is no formula in the decision process that tells USDA what weight public participation should receive relative to other factors." [44] But, he still called for agency officials to "weigh public input against other decision factors" in the evaluation stage. [45] He believed that the public would have faith in the administrator's decision as long as public comments could be related to alternatives in a "consistent, visible and traceable way." [46] But, this fishbowl decisionmaking effort has not addressed what this analysis indicates is the heart of the problem: the many affected interests do not feel represented unless their concerns have been accommodated to their satisfaction. And, critically, they no longer trust the systematic, technical analysis of the public administrators to accomplish this end. Some other means for accommodating these many interests must be found if viable decisions are to be made. Systematic, technical analyses that do not conclusively pinpoint solutions should no longer be used to hide the judgments that invariably must be made.

Agency Capture

There was also a minority during this time that framed the problem somewhat differently than simply agency bias in decisionmaking. They argued that the Forest Service was "captured" by a single clientele group, and that other interests could never be represented under the existing system. Some claimed that the Forest Service was captured by environmental concerns [47] while others believed that development interests were the culprit. [48] These analyses diverged from those discussed above and called for Congress to avert single-interest domination by setting the specific priorities to be adhered to by administrative agencies.

A Yale Law Review article analyzing the federal multiple-use management system found that land management decisions benefit local and development interests at the expense of needed environmental protection. [49] In a scathing attack of the multiple-use system, the unnamed author criticized the "vacuous platitudes" of the Multiple-Use and Sustained-Yield Act and called for a complete Congressional overhaul of the entire natural resource administrative system. In order to better represent environmental and other national interests, the author proposed three new agencies, each with a specific management task: grazing, timber and recreation (including wilderness). In this scheme, Congress would reshuffle all public lands and then allocate them to one of the three categories. The specific resource value would then prevail, with other uses

only allowed when compatible with the primary use. Congress would make these broad land allocation decisions with the help of special commissions consisting of "industry representatives, conservationists, and some agency specialists." [50] The Commission's proposals would solely be advisory and Congress would have power to change allocations whenever national needs dictated. Current agency officials were to be kept out of this allocation process, however, because they "have a penchant for empire building, and are more likely to fight for expanded domains than to fairly articulate and choose among the interests involved." [51] The author seems confident that this type of system would be better able than the existing system to end the persistent opposition to land management decisions:

> Resort to adjudication would be much less frequent... The inefficiencies of using the cumbersome, case-by-case adjudicative process for policymaking would disappear once policy was established by Congress. Adjudication would become a process of testing an administrator's actions against Congressional directives, as it ought to be. Since there would be manageable directives from Congress greatly narrowing the range of discretion, appeals within the agency and to the courts could provide meaningful control. [52]

But, it is not clear that the basis for this article's criticisms -- that the Forest Service is captured by local and development interests -- is well-founded. Paul Culhane recently questionned the periodic attacks levelled against the Forest Service by those adhering to the capture theory. In a comprehensive analysis of Forest Service decisions, he found that, far from being captured, Forest Service decisions

appear, overall, to be quite well-balanced among the many different interests involved. [53]

Regardless, such an extreme response, if not unnecessary, is politically infeasible. As discussed in Chapter 4, Congress mandated its long list of legitimate public land uses for many reasons. It is seldom costly politically to support legislation that promotes many varied uses for the national forests as opposed to special, single-purpose uses. In fact, sometimes it is beneficial to do so as such legislation is often symbolic and enhances a legislator's reputation. [54] Furthermore, the "vacuous platitudes" of many Congressional acts are a result of real constraints -- both political and technical -- on greater specificity. [55] Congress would be overwhelmed if it tried to dictate precise measures for implementing its mandates. Making site-specific choices between, for example, energy development or endangered species protection or wilderness preservation would only further crowd Congress' already-burdened agenda. It would also be politically costly for many legislators to do so because it is at this site-specific implementation of Congressional mandates that the "winners" and "losers" become clearly defined. When possible, legislators prefer to avoid resolving such controversial choices. [56] Therefore, it is highly unlikely that Congress would ever voluntarily take on the hot potato suggested in the Yale Law Review article. And, in fact, they have refused to do so on several occasions in the past. [57]

The Problem of Administrative Discretion: A Larger View

The common theme underlying these past critiques is the extent to which Congress has delegated broad administrative discretion to the Forest Service. Critics argue that the problem persists because the Forest Service exercises its discretion in an inappropriate manner. Hence, many measures are proposed to redirect or curb agency discretion as a way of allowing full representation of all interests.

Framed as a problem of excessive administrative discretion and thus agency bias in decisionmaking makes the Forest Service situation appear little different from that of many administrative agencies. Students of administrative law and administrative behavior have long criticized Congressional delegation of broad authority to non-representative agencies. Their proposed reforms echo those recommended for the Forest Service.

But, as Richard Stewart argues in "The Reformation of American Administrative Law," these reforms are seldom appropriate. [58] He describes the role of administrative agencies to be a political one of "balancing" competing interests, not solely a technical one:

> ...the application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests. The required balancing of policies is an inherently discretionary, ultimately political procedure. [59]

But, Stewart notes that most reforms that are proposed rely

on Congress setting strict standards and procedures for agency compliance. Such prescriptions assume that today's complex problems can be solved using explicit procedural formulas applied in a professional manner. In so doing, all interests theoretically are fairly represented because administrators are no longer able to exercise discretion in favor of particular client groups. Stewart argues, though, that most administrative tasks are not adaptable to these formalized procedures:

> ...the relatively steady economic growth since World War II...has allowed attention to be focused on the perplexing distributional questions of how the fruits of affluence are to be shared. Such choices clearly do not turn on technical issues that can safely be left to the experts. [60]

As a result, he labels the traditional model of administration as "an essentially negative instrument for checking governmental power." [61] Because the decisions are inherently political, no technical formula can ensure that all interests are represented in decisionmaking. But, by trying to do precisely that, the traditional model relies predominately on the judicial system to review administrative decisions after they are made. Stewart argues that a more appropriate approach would be an "affirmative" system of "government 'which has to do with the representation of individuals and interests' and the development of governmental policies on their behalf." [62]

Unfortunately Stewart does not recommend any means for developing this "affirmative" system, one recognizing the political dimensions of today's complex social choice

problems. His conclusion is that general reform is impossible but instead that energies should be devoted "to treating various instances of administrative 'failure' through case-by-case examination." [63]

One Case Examined: Public Land Management

Unlike many administrative agencies, the Forest Service was not established to either serve or regulate a particular clientele. Instead, it was charged from the outset with no less a task than managing the national forests in "the public interest," and to serve "the greatest good of the greatest number in the long run." For much of Forest Service history, achieving this end was a relatively easy task. "The public interest" was perceived to be the outcome of professional, scientific land management. Hence, if the agency responded to its task professionally and managed the lands using scientific silvicultural, fire, flood and pest control practices, the outcomes would, by definition, coincide with the public interest.

But, the conception of what constitutes "the public interest" has changed. No longer is the Forest Service merely able to exercise its technical expertise in land management. Now it is expected to also consider many non-technical, judgmental values in decisionmaking that are counter to the conservation values that dominated for so long. Now it is expected to weigh values that yield no measurable commercial return from the national forests. No

longer do Forest Service scientific management practices and technical analyses automatically result in outcomes satisfying "the public interest." The agency is charged with making some difficult social choices that are political, not scientific, in nature. Like most administrative agencies, the Forest Service is unequipped to do so.

Public Administration and the Public Interest

The Forest Service is not alone in its charge to represent the public interest in decisionmaking while having many publics advocating just as many different public interests. That is the responsibility of most administrative agencies. The federal government generally adopts responsibility for tasks for which a broader public interest exists that otherwise would not be met. In fact, many administrative agencies arose out of the same scientific management ideal that gave birth to the Forest Service. [64] How do these other agencies define and then satisfy "the public interest?" As one student of public administration theory has phrased it: "If the bureaucrat is exposed to the babel of many voices, speaking different tongues to convey various messages, how can he know which among competing alternatives he **ought** to choose?" [65]

Unfortunately, there is no single answer to this question. Public administration theorists have long debated but never resolved how administrators are to determine and then serve "the public interest." Three different theories have been offered regarding the role of public

administrators: Administrative Rationalism, Administrative Platonism and Administrative Realism. The Administrative Rationalists assume that efficient management coincides with the public interest. In Herbert Simon's words:

> The criterion which the administrator applies to factual problems is one of efficiency....Once the system of values which is to govern an administrative choice has been specified, there is one and only one "best" decision... [66]

While this view prevailed during the progressive conservation era when scientific management principles were devised, it is seldom professed today. Today the specified value system is internally inconsistent. For example, the problem frequently faced by the Forest Service is how to choose between commercial and non-commercial values that have legislatively been given equal weight even though they are often incompatible. The Rationalists' theory is unenlightening when, within the boundaries of "efficiency," several legitimate outcomes are possible.

The Administrative Platonists, while not in total agreement on how to operationalize their theories, view public administrators as taking a more active approach in defining the public interest and then using technical expertise to achieve it. For example, Paul Appleby notes that:

> Neither the simple reconciliation of private interests nor their reconciliation modified by considerations of public interest is in the end a technical performance, no matter how many technical factors may figure in it. It is a political function, involving essentially the weighing of forces and the subjective identification of the narrow area within which these forces may be

> balanced and the exercising of discretion concerning the point within that area at which acceptability and public interest may be effectively and properly maximized. [67]

To a large extent the Forest Service adheres to this latter view of appropriate behavior. The agency acknowledges the many publics affected by its decisions and thus the necessity to move beyond just technical analysis in decisionmaking. Forest Service officials perceive it to be their responsibility to seek out and then weigh the public interest when making decisions. Unfortunately, though, this approach does not satisfy the many publics; the "babel of voices" only grows louder with their efforts. As one student of these theories concludes, the problem with the Administrative Platonists is that "they have described the public interest as a thing of substance, independent of the decisional process and absolute in its terms." [68]

The Administrative Realists, in contrast, argue that there is no such thing as "the public interest" and thus the key to administrative decisionmaking is in the process by which the "babel of voices" is quieted, not gelled into a single will. David B. Truman describes this view that "the public interest" is a non-existant entity:

> Many...assume explicitly or implicitly that there is an interest of the nation as a whole, universally and invariably held and standing apart from and superior to those of the various groups included within it... such an assertion flies in the face of all that we know of the behavior of men in a complex society. Were it in fact true, not only the interest group but even the political party should properly be viewed as an abnormality....Assertion of an inclusive "national" or "public interest" is an effective device in many... situations....In themselves, these claims are part of

> the data of politics. However, they do not describe any actual or possible political situation within a complex modern nation. In developing a group interpretation of politics, therefore, we do not need to account for a totally inclusive interest, because one does not exist. [69]

The Realists' observation coincides with the current Forest Service dilemma over oil and gas exploration decisions. There are many publics affected by these decisions and each is advocating decisions satisfying its particular concerns, arguing that they coincide with "the public interest." The Forest Service decisionmakers have been unable to define a particular "public interest" to which the many publics will agree. It appears, then, that the Realists might provide some direction for the Forest Service out of its current dilemma. One of the major criticisms levelled against the Realists, though, is that they have been unable to articulate an operational definition for converting their theory to practice. [70] Perhaps the closest guide to implementation is Appleby's statement that public administration:

> is the eighth political process. It is a popular process in which vast numbers of citizens participate, in which assemblages of citizens comprise power units contending with each other, in which various governmental organizations are themselves functional representatives of special interests of many citizens, and in which these organizations themselves contend mightily with each other in the course of working out a consensus that translates many special interests into some workable approximation of public interest. This process is as essential to the evolvement of governmental action as public debate, and closely akin to it. [71]

The Forest Service rejects the Administrative Realists' theory, though. Agency officials argue that it is their responsibility to make these decisions, not to turn their

authority over to the vocal, but not-necessarily representative, public. [72] Instead, the agency seems to adhere to the Administrative Platonists point of view. Agency officials seem confident that by determining and then analyzing the many different interests at stake, an outcome can be determined that will coincide with the public interest. But, the "babel of voices" that arises when these decisions are to be made is not quieted by administrative decisions stamped with the Forest Service label: "Made In The Public Interest." The Forest Service adherence to a Platonist-type ideology does not direct it out of its predicament.

The USFS Decisionmaking Process

USFS officials are fully aware of the many perceptions of the public interest in their decisions. They, perhaps more than anyone, acknowledge the inherent difficulty of the decisions to be made in the face of these competing demands. But, in many ways, they feel vindicated by these contrary opinions. If left to its own devices, "the public" would be constantly embattled, never able to decide who gets what. By having an agency of trained public land managers, these decisions can be made in a systematic and scientific manner in which all the different competing interests can be heard and their interests balanced. Theoretically, this approach should lead to decisions that best approximate the "public interest."

The Forest Service Manual clearly states that it is the Forest Service's administrative responsibility to "weigh the public's interest" in decisionmaking:

> The Forest Service...encourages identification of the values to be protected, definition of resource protection and mitigation needs -- based on relative values of minerals and impacted resources -- and a weighing of the public interest where there is a conflict. If, after such weighing of public interest, the potential adverse impact of mineral development on surface values of an area is judged to be unjustified, considering the value of the minerals, the Forest Service shall recommend (or require, where appropriate) no leasing. [73]

But, assessing the "relative values of minerals and impacted resources" and "weighing the public interest" are much easier said than done, especially when there are so many publics, each advocating different outcomes, each allegedly in "the public interest." How do Forest Service field staff implement this mandate?

The Cache Creek/Little Granite Creek drilling permit review process illustrates the thorough information gathering and public participation efforts of the Forest Service in decisionmaking. In June 1980, a three-day public scoping meeting was held in Jackson, Wyoming, to help the US Forest Service/US Geological Survey task force in charge of developing this EIS determine what issues and topics should be addressed in it. Before the public scoping meeting, the interagency task force drafted a preliminary scoping document to provide a base for discussion at the meeting. This document was distributed to over 300 groups, individuals and public agencies. Responses as well as additional ideas could

be presented at the formal scoping meeting, in writing to the USGS or by calling the USGS collect. In addition, public hikes to both proposed wellsites augmented the scoping meeting. [74]

Public input and fact-finding were hardly limited to this three day scoping session, though. The USGS/FS task force prided itself in its extensive "consultation with others." In Chapter VIII of the draft EIS, entitled "Consultation with Others," the interagency task force discussed the tremendous amount of input and analysis supporting the EIS conclusions. The discussion noted that the original USFS Environmental Assessment on the proposal was completed in December 1977 and that more than 200 written comments were received on it. A formal public meeting was then held in January 1978. Next, an additional USGS "unusual" environmental assessment prompted more input both in writing and public hearings held in late July and early August 1979. The chapter went on to list the task force's information gathering efforts:

> Over 160 people attended the public (scoping) meeting, and some 35 individuals participated in the "show-me" trips to the proposed wellsites.
>
> . . .
>
> Well over 1,000 private individuals were personally contacted or consulted for information on technical aspects by project scientists during the course of the EIS investigation.
>
> . . .
>
> A series of [eighteen] reports was prepared by Government personnel and private consultants to analyze and document various aspects of the Cache

> Creek-Bear Thrust EIS. The reports cover environmental, engineering and legal issues.
>
> .
> .
> .
>
> Personal contacts with concerned individuals were made by the task force leaders and other members of the USGS and FS throughout the analysis period. These personal contacts, and other informal meetings, were extremely important in developing an understanding of the various publics' positions....All such information has been used to assess the issues and concerns, public needs, demands and alternative formulation. [75]

It is not clear that this extensive public involvement made the Forest Service's decision any easier. In fact, the manner in which the public was involved in the Cache Creek/Little Granite Creek process may actually have complicated the agency's task. As they acquired more and more information either about technical or ecological aspects of the proposal or about public attitudes towards it, the agencies in many ways isolated themselves from the various interest groups. Perceiving themselves to be "the decisionmaker," the two agencies set themselves apart from interests directly affected by the decision. As a result, each interest group saw its task to be one of convincing the federal agencies of the "rightness" of their position and the "wrongness" of their adversaries' positions. This approach shadowed the legitimacy of all affected groups; it provided no means for resolving the conflict that existed between them. Eventually, this approach led these groups to distrust the decisionmaking process and hence reject those decisions made by it. In the end, the Forest Service decided to permit exploratory drilling at both wellsites. As has been

discussed, this decision outraged several local, state and national groups and led to several administrative appeals, state hearings and lawsuits. [76]

The Cache Creek/Little Granite Creek case illustrates the Forest Service emphasis on public involvement in decisionmaking. Furthermore, the outcome of this case is representative of public dissatisfaction with this process. While the Forest Service's approach to decisionmaking might give the public land managers confidence that the final assessment is in the "public's interest," it leaves the many different publics feeling unrepresented. In selecting its "preferred alternative," in the Palisades environmental assessment, the agency found, after obtaining and then analyzing public input, that this alternative:

> is responsive to the key issues raised by the public **since it balances the intense opposing concerns of environmental groups and the energy industry.** (emphasis added) [77]

But, the Sierra Club disagreed with this assessment and appealed the Forest Service's decision, eventually taking the agency to court.

The many publics do not perceive the USFS to be responsive to their concerns when the decisions reached run counter to their individual best interest. While the current administrative decisionmaking process provides for **participation** by these many publics in order that the concerns of each are aired, it is not designed to accomodate their concerns **in a way that satisfies them that they have**

indeed been accomodated as well as possible. Interest airing is not interest accomodation.

The Forest Service predicament persists not because it has not been acknowledged or analyzed but rather because proposed reforms have not been viable. Analyzed in the context of the long held public land management paradigm, past prescriptions are based on the assumption that scientifically trained land managers are capable of making these decisions and the only question is how to bound their discretion to ensure that all interests at stake are fairly represented. As a result, most reform prescriptions as well as Forest Service procedural changes, have been inadequate. Despite extensive public involvement efforts, despite extensive public input to and review of decisions, and despite Congressional mandates that all values be represented, frequently one user group or another is **not** satisfied that their concerns have been accomodated. These groups distrust a process that yields decisions contrary to their best interests and hence they oppose those decisions and appeal to other avenues for obtaining representation. To use Professor Stewart's terms, the process is a "negative" one with energies devoted to checking administrative behavior in the judicial arena rather than an "affirmative" one ensuring representation in the administrative arena. It is a political problem lacking a political process in which the competing demands can be made and resolved through bargaining and compromise.

The Forest Service Capacity for Change

Conflict is the foundation of most social problems. [78] Bargaining and compromise to resolve disputes are the rule rather than the exception in solving such problems. If some aspects of land management have become more politicized and if power has become fairly well-balanced as suggested here and elsewhere, why do bargaining and compromise not naturally occur in the management of public lands? As the land management task developed political aspects, why did a political system not evolve to accomodate it?

While the Forest Service has employed several public involvement methods in order to represent all concerns in decisionmaking, its efforts have clearly not been enough. Some might argue that the mismatch between policy problem and policy process persists because the Forest Service is resisting the type of change that must occur. Even when an agency acknowledges a problem and desires change, it is not always a simple task to effect that change. There is an extensive literature on organizational behavior in which barriers to change are analyzed and means explored for effecting change when desired. [79] In The Limits of Organizational Change, Herbert Kaufman identifies a long list of factors that inhibit change within an organization. [80] Change is not effected when the benefits of maintaining an organization's stability outweigh the benefits of change. Sometimes members actually oppose change because of

individual advantage in maintaining the status quo, in order to protect the quality of the good or service produced by the organization or because of the psychic costs associated with change regardless of its overall benefits. Often there is an aversion to the unpredictability inevitably brought about by change. There are also "systemic" barriers posed by limited resources with which to effect change, sunk costs precluding change, official constraints on behavior imposed by laws, regulations, rules, and previous decisions as well as unofficial constraints posed by traditional rules or norms.

The Forest Service exhibits many of Kaufman's "systemic" barriers to change. Change in the agency must overcome professional norms and traditional procedures where the resistance is greatest. Ashley Schiff's Fire and Water [81] describes the twenty year battle within the agency to replace the traditional fire prevention policies with improved controlled-burning practices. Fire prevention had become as much a philosophy as a professional practice within the agency. Even raw data proving its inadequacies could do little to change the historic zeal with which foresters denounced forest fires as one of the worst threats to the national forests. In-house research indicated, as early as 1927, that controlled burning often improved timber health and productivity. But, change in Forest Service policies did not come about until the late 1940's. Even then it was not without considerable resistance. The informal network within the forestry profession ridiculed the idea and hence had

developed a professional bias against it that was difficult to overcome.

The US Forest Service has a level of professionalism and political independence that distinguishes it from most administrative agencies. It was established at the turn of the century and is staffed by professionally trained land managers. Its chief officer is not a political appointee but is instead a forester who has always worked his way up the ranks of the Service. The Forest Service is highly decentralized with most management tasks occurring in the field, far from the agency's Washington headquarters. But, as Herbert Kaufman discovered in The Forest Ranger, [82] it is structured to be directly controlled by and responsive to executive orders. Conformance with organizational procedures is tightly enforced by a highly-detailed Forest Service Manual, by ongoing intra-agency review procedures and through long-established professional norms that are reinforced in university-level forestry education as well as in on the job experience. The organization rewards conformance to its norms by promotion and advancement. There are few incentives for innovation or change. Hence, as Ashley Schiff discovered, the stability of the organization resists change.

While the agency's stability and traditional norms may inhibit change the Forest Service's tightly-reined hierarchical structure facilitates change when it is deemed appropriate by agency executive officials. And, as has been seen, there has been some dramatic change in the agency in

response to the demands of different interest groups for representation. Public participation programs were rapidly instituted during the early 1970's where they had previously been nonexistant. In 1970, public participation became an official Forest Service policy. [83] In 1972, the agency established its "Inform & Involve" program. This program illustrated a dramatically changed perspective on the part of the Forest Service about the value of public input. It directed field staff to:

> Broaden contacts with groups, associations, and organizations to better inform and involve a wide range of the public on current programs, projects and issues.
>
> The key...is "awareness," and the key to awareness is "listening."...It means seeking out and listening to individuals and groups which may have traditionally opposed certain aspects of Forest Service management.
>
> Recognize that public involvement is an essential part of decision making since it can enable the decision maker to render a better decision.
>
> Discard any notion that actions which will affect environmental quality or the public interest can be judged only by professionals.
>
> Keep in mind that all interest groups are champions of some aspects of good resource management. Disregarding the concern of specific groups on one issue because of extreme controversy may well weaken their desire to get involved on other issues in which they could make valuable contributions.
>
> Recognize that public involvement requires that it must be sought out **before** a decision has been reached. [84]

The Forest Service now uses what it terms "Information and Education" efforts to help groups understand different public lands issues and proposals. Public meetings and tours are held much more frequently now than in the past. One-to-one

meetings with different groups are also used more often to obtain input as well as inform the public. [85] The Forest Service is hardly ignoring the problem; nor does it appear to be resisting change. But, that change that does occur is clearly defined by professional norms and clearly within the context of scientific decisionmaking consistent with the land management paradigm.

Retargeting Reform: The Public Land Management Paradigm

The paradigm remains intact for two reasons. First, past reform proposals as well as Congressional mandates have reinforced it. Society continues to turn to scientific experts when tough problems must be solved; in this respect, the Forest Service cannot be blamed for its current dilemma. Second, the paradigm prevails because it represents the norms of the public forestry profession. While Forest Service officials acknowledge public dissatisfaction with their decisions, they respond, as seen, by providing more opportunities for public input to decisionmaking. But, the decisionmaking itself still occurs through technical analyses consistent with this paradigm. This approach should come as no surprise considering who established the paradigm at the outset.

Past efforts to change the behavior of the public forestry profession, have, not surprisingly, failed. The culture of a profession is, by nature, self-reinforcing and stabilizing. By design, it resists external pressures for

change. The profession defines its role and establishes it in society; it would be counter to the concept of professions if outsiders were able to fill this role. [86] Political scientist Frederick C. Mosher explains why this is true:

> Professionalism rests upon specialized knowledge, science and rationality. There are correct ways of solving problems and doing things. Politics is seen as constituting negotiation, elections, votes, compromises -- all carried on by subject-matter amateurs. Politics is to the professions as ambiguity is to truth, expediency to rightness, heresy to true belief. [87]

Mosher has identified several common characteristics of professions. First, their purpose is to elevate or maintain its "stature and strength in the public image." Second, their objective is to expand the boundaries of work in which they have "exclusive prerogatives to operate." Third, they establish and maintain professional standards and norms through education and entrance requirements to the profession. Finally, they identify their niche by concentrating on "work substance" and expertise that sets them apart from other groups or individuals. [88] The forestry profession is no different than other professions in this respect. That they accept the responsibility for the expanded public land management task is not surprising; nor is the way they have responded.

As seen, the Forest Service's public involvement efforts have not proven sufficient to end interest group opposition to many Forest Service decisions. The agency's efforts to obtain input from "the public" do not always satisfy groups

that their best interests have indeed received a fair hearing. While official Forest Service directives now require that field staff listen to the public and keep it informed, these directives do not explain what the field staff should do with this input once they have acquired it. Is simply "considering" it all that is required? One Sierra Club Director praised the Forest Service public involvement efforts but lamented that, once decisions are made, "it is like they never listened." [89] While a problem of interest group opposition was noted by Forest Service officials and a solution seen in public involvement, the involvement that occurred, even though rapidly instituted and thorough, has not been sufficient to avert continuing and successful opposition to decisions made.

In the oil and gas case analyzed in the last two chapters, it became clear that the institutional means have not been provided to accommodate the concerns of affected groups. The power bestowed on these many groups is a political power that can now only be used to question decisions after they are made but not to ensure that concerns will be accommodated in decisionmaking itself. The authority to make these decisions still rests appropriately with the Forest Service. But, the agency's power to implement decisions once made has dwindled as that of different interest groups has grown.

Congress has not necessarily shirked its duties by passing these tough resource allocation decisions to

administrative agencies. Because of the level of information needed and number and complexity of decisions to be made, it would be infeasible to expect Congress to make these decisions. But, by framing its task to administrative agencies as it has, Congress has couched a political problem in technical terms. In both the language and intent of the numerous natural resource statutes, Congress has implicitly labelled the decisions to be made as technical, best left to the professionals trained to make them. It has instructed the Forest Service to consider and weigh all values in decisionmaking. In so doing, Congress has reconfirmed the progressive ideal that professionally managed national forests, by definition, serve "the public interest." In this sense, any need for change has been overshadowed by an apparent Congressional validation of established Forest Service decisionmaking procedures. In so doing, it has failed to provide the political means for making these decisions. It has given power to the many different interests with which to advocate and protect their concerns and has thereby indirectly curbed administrative discretion. But it has not provided a forum within which this power can be exercised. As a result, the power must be used in a negative manner to question agency procedures judicially rather than to directly represent their interests in Stewart's "affirmative" manner.

Both Congressional mandates and past reform proposals have cast professional land managers into a comprehensive

planning role in addition to their traditional scientific land management role. But there is little reason to expect that foresters trained to address conservation ends in land management will be able to suddenly adopt this comprehensive view. It is counter to their professional background and norms. In fact, considering these inherent professional biases, we should probably be more surprised that they have responded as dramatically as they have in providing means for obtaining public input than critical that these efforts have not been enough. Public land managers are not like comprehensive city planners who obtain information and develop alternatives that are then subjected to a political decisionmaking process by elected officials. [90] The task that has been given to Forest Service officials is to both develop these alternatives and then make the highly political decisions. That the outcome is opposition and litigation is hardly surprising. Means for making these political, as opposed to scientific, decisions have never been prescribed. Hence, the response conforms to professional norms.

The technical expert model of decisionmaking that has long been the hallmark of the progressive conservation ideal is not adequate when viewed in the context of today's public land management task. The political, resource allocation dimensions of the decisions to be made must be recognized rather than hidden within technical analyses. In order to avoid the now pervasive and costly opposition, each interest group must be **satisfied** that its concerns have been

represented. The established process is clearly unsuccessful at this task; procedural change is needed. Experts alone are not able to represent the many interests at stake, no matter how systematic, how thorough nor how objective they may try to be. These disputes must be resolved through the direct involvement of affected interests. The indirect representation approach has proven itself incapable of making viable decisions; the process is no longer trusted by the many affected groups and individuals. A reformed paradigm must not only acknowledge the limits of scientific expertise and technical analysis in decisionmaking but include other means for making the value judgments that invariably must be made. It must recognize the legitimacy and forcefulness of the now well-distributed power and direct it towards facilitating acceptable decisions, in contrast to opposing unacceptable decisions.

The next chapter discusses how institutional reform might be accomplished in oil and gas leasing and permitting. It draws from a growing theory and practice of environmental conflict management to illustrate how other, similar disputes have been resolved. It indicates that, in many ways, this public land issue is ripe for reform. Finally, Chapter 6 proposes specific steps that might be taken by both the Forest Service and Secretary of Agriculture to facilitate consensus among the interests involved in oil and gas exploration disputes and thereby reduce the costly but now-inevitable opposition to decisions reached.

CHAPTER 5 -- REFERENCES

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[6] Daniel H. Henning, "The Ecology of the Political/Administrative Process For Wilderness Classification," **Natural Resources Journal**, Volume 11, January 1971, pages 70-71.

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[8] Daniel H. Henning, "Natural Resources Administration And the Public Interest," **Public Administration Review**, Volume 30, March/April 1970, page 137.

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[87] Mosher, ibid., page 109.

[88] Ibid., pages 107-131.

[89] Interview with Phil Hocker, member of the Sierra Club's Board of Directors and Wyoming Chapter Conservation Chairman, November 1981. Another environmental attorney conjectured that perhaps "they just put all the information gathered into a box somewhere."

Interview with Karin Sheldon, attorney for the Sierra Club Legal Defense Fund, January 1983.

[90] See Alan A. Altshuler, **The City Planning Process: A Political Analysis,** Cornell University Press, Ithaca, 1965, especially Chapter VII, "Political Restraints and Strategies."

CHAPTER 6

EIGHT STEPS TOWARDS RESOLVING OIL AND GAS LEASING AND PERMITTING DISPUTES

Confronting 150 lease applications for the Washakie Wilderness in Wyoming, Shoshone National Forest Supervisor Randall Hall expressed his dilemma, one facing most forest supervisors today:

> I don't see where there is any middle ground between the oil people and the environmentalists when it comes to questions of wilderness....whichever way we go, I'm afraid we'll end up in court. [1]

Hall has responsibility for making these leasing decisions. As described in the Forest Service Manual, he must balance the competing interests of the environmentalists, industry and the public in general. In other words, he is responsible for identifying that elusive middle ground. But, how he might successfully do so has never been adequately defined. M. Rupert Cutler, when Assistant Secretary for Natural Resources and Environment in the Department of Agriculture, acknowledged that no "formula" exists to guide land managers to a "right" choice. [2] Similarly, USFS Chief Max Peterson bemoans the fact that few of these decisions can be proven "measurably correct." [3]

To try to avert the non-conclusive nature of their analyses, Forest Service officials apply even more systematic methods, computer tabulations, cost/benefit and other extensive analytical tools to the decisionmaking problem. But, as seen, their efforts have been to no avail. Technical analysis, no matter how thorough and seemingly

objective, does not assure user groups that their concerns have been accommodated as well as possible. Consequently, opposition persists.

Consciously or not, Congress has significantly redistributed power over public land management. And, because the institutional means have not been provided to direct this power towards developing acceptable outcomes, it is instead used to oppose unacceptable decisions. The result is paralysis of the decisionmaking process. Efforts to avert this outcome have centered on public participation and more visible decisionmaking in hopes of assuring public land users that their concerns have been considered. But, as seen, these efforts have not succeeded.

In many cases there is no middle ground; the clash between values is too extreme. In just as many other cases, a middle ground may exist. But, the decisionmaking process is not structured to determine what that point is. Shoshone National Forest Supervisor Randall Hall, like all Forest Supervisors and Regional Foresters, is responsible for making a decision. He follows all the steps outlined in the Forest Service Manual. But, these guidelines cannot tell him which decision to make. And, he is under pressure from several different groups to make very different decisions. Each time he tries to balance these competing interests, each time he tries to pinpoint and then achieve that middle ground, his decisions are contested. The process encourages this opposition by providing no other means for

accommodation.

The reform recommended in this chapter institutionalizes an alternative forum in which affected groups can influence decisions in the making rather than oppose decisions once made. It provides an alternative to the defensive posture now adopted universally and without choice by public land user groups. The process proposed is one in which professional foresters do not **alone** make the critical value judgments that must be made before a decision can be rendered. It substitutes a consensual approach to decisionmaking for that dictated by the long-held land management paradigm. It encourages those groups affected by a particular decision to work together in developing a **proposed** action for the Forest Service. By participating directly, the process focuses efforts on real issues of concern rather than, strategically, on issues that "win." It encourages cooperation, not adversarial behavior. It seeks to accommodate concerns directly in decisionmaking and allow those affected groups to ensure that their concerns have been accommodated as well as is possible. It focuses the broadly distributed power over public land management decisions in an affirmative rather than negative manner. [4] The objective of this process is to promote accepted and hence decisive decisionmaking.

Politicizing vs. Depoliticizing the Process

The argument made here is **not** that authority over national forest management in general, or oil and gas leasing and permitting recommendations in particular, should be given to some organization other than the Forest Service. Despite the difficulty of the task, the Forest Service remains the one body with the most experience and expertise about the national forests and forest management. The question is not **who** would make these decisions better but rather **how** might the Forest Service reduce the now inevitable and costly opposition to its decisions in order to better fulfill its complex mandate.

From a political science perspective, many would argue that the problem exists today because **too much** opportunity for public participation has been provided. They argue for a return to "responsible governance" and the cultivation rather than the ridicule and demise of the public service professions. [5] But, the process proposed here is not meant to question the public forestry profession and to replace it with a purely political decisionmaking body. Instead, it is designed to assign the profession those tasks for which it has expertise and should prevail. And, in those cases where Congress has mandated tasks that require judgments beyond this scientific expertise, the agency receives assistance by those directly affected by the decision.

Public administrators in foreign countries are frequently bemused by the widespread distrust of American

administrative agencies and the political realm in which their decisions must be made. [6] In their countries, public administration is based upon trust in professionals to do their jobs and, in so doing, to serve national interests. These foreign public administrators would undoubtedly be appalled at the proposal made here, one that seemingly further politicizes an already highly-politicized situation.

On the other hand, it is quite clear that the American public is **not** going to suddenly shift a growing distrust into the trust and respect that non-American administrators advocate. Similarly, it is not clear that, in our democracy, we would ever want to "depoliticize" the process by removing those avenues for review and revision of administrative decisions that preserves our "government for the people and by the people." Such "depoliticization" is, in itself, a highly political undertaking. Nor does it seem, in this case at least, that it would accomplish the public policy objectives that Congress has so enthusiastically embraced.

Whether this forum is further politicizing the process or actually depoliticizing it is not obvious. As seen in Chapter 3, the process is already both extremely political and extremely ineffective. By bringing groups together in a cooperative setting (as opposed to the adversarial and divisive setting established by the current process) to use their power to directly influence the outcomes of decisionmaking, this process appears to be further fueling an already excessively political process. However, by looking

at the outcome, if successful, there is support rather than opposition for decisions made. And, at that level of evaluation, it appears to be depoliticized. Regardless, if the point is to facilitate oil and gas leasing and permitting decisionmaking rather than have it delayed indefinitely in appeals and lawsuits, whether the process is more or less politicized is perhaps irrelevant.

Environmental Conflict Management

The idea that some environmental disputes might be managed and resolved is not a new one. For the past decade, academics and practitioners have explored ways in which these conflicts might be resolved through cooperative, consensus-building processes rather than in the traditional, adversarial manner that current processes often encourage. [7] Disillusionment with the results of court decisions as well as the limits of administrative appeals have led some traditional adversaries to the bargaining table in hopes of achieving a more desirable outcome. [8] Moreover, the costs involved in current appeals procedures and judicial reviews are encouraging environmental and community groups, development and business interests, as well as public agencies to seek other means for resolving their differences. These alternative processes have led to more creative, problem-solving sessions and outcomes often not possible in the traditional, administrative or judicial proceedings. And, in turn, past successes are attracting other groups in

additional cases to try resolving their differences rather than automatically proceeding to the courts.

The actual bargaining that occurs in settling environmental disputes may take on many different forms. Gerald Cormick of the Institute for Environmental Mediation in Seattle, Washington, makes the distinction between conflicts and disputes. His distinction is helpful to this discussion. He defines conflicts as occurring "when there is a disagreement over values or scarce resources" while a dispute "is an encounter involving a specific issue over which the conflict in values is joined." [9] It follows then that "resolution of a conflict is achieved when the basic value differences that separate the parties are removed," and "settlement of a dispute is achieved when the parties find a mutually acceptable basis for disposing of the issues in which they are in disagreement, despite their continuing differences over basic values." [10] Using Cormick's terms, the process proposed here is not designed to resolve the fundamental value differences separating groups like the Sierra Club or The Wilderness Society and the Mountain States Legal Foundation or Rocky Mountain Oil and Gas Association. It will not create universal agreement on the proper allocation of public land resources. These value differences will always exist. The process proposed here is designed to settle the national forest management disputes that arise because of these underlying value differences.

Many national forest management decisions involve

questions of "right" against "right." All concerns, even when conflicting, are legitimate. Yet, the decisions to be made inevitably affect some groups beneficially at the expense of others. As such, legitimate claims seem to go unanswered. Tradeoffs inevitably occur in decisionmaking but not all groups believe they were fairly treated when these tradeoffs were made. To be viable, decisionmaking must acknowledge the legitimacy of each set of concerns. It must assure each group that their best interests are represented in the decision made. That is the intent of the proposed process.

Environmental conflict resolution is not merely the subject of academic thought and discussion. The examples of successful attempts at all levels of government to resolve environmental disputes are numerous. Such a list, while too long to detail here, would include cases involving wilderness and proposed wilderness areas and endangered species; cases in which, at first glance, all involved would confidently proclaim that "there is no middle ground!" The list would even include an oil and gas exploration proposal in a national forest under consideration for wilderness designation. The reason that such disputes over "non-negotiables" can be settled is not that one side "sells out" or "caves in" to another. Rather, by substituting a cooperative, consensus-building process for the more traditional, adversarial process, groups can focus on issues of direct concern to them rather than on positions with which

they might "win." For example, when the endangered Whooping Crane was threatened by construction of the proposed Grayrocks Dam in Wyoming [11] or when the endangered Sandhill Crane was threatened by construction of Interstate 10 in Mississippi, [12] predictable battle lines were drawn. Environmental interests fought to stop both proposals in order to protect the endangered species. Development interests sought to obtain approval for the proposals by arguing for the benefits to be achieved. While the predictable, costly and time-consuming court battles were forecasted for both disputes, the eventual outcome differed markedly. Dispute resolution processes were used to change this position-orientation of the disputants (disapprove the dam/approve the dam) to an issue-orientation (how can the endangered species be protected and the energy or transportation needs be satisfied?). By changing their orientation, the disputants were able to then focus attention on ways in which all concerns could be addressed. This approach broadened the agenda of alternative solutions and eventually led to settlements that would not have been achieved in the courts. Similar processes have been used successfully to resolve disputes over the allocation of resources in Idaho's Gospel-Hump Wilderness Area, [13] to develop a consensus on Colorado's wilderness designation recommendations, [14] to protect an endangered bear in Alaska's Kodiak Wildlife Refuge, [15] and to permit oil and gas exploration in a Wyoming Further Planning Area while

still preserving the area's wilderness characteristics. [16]

The growing literature on environmental conflict management contains criteria on disputes that can likely be resolved. [17] The raging dispute about how and where oil and gas exploration should occur on national forest lands fits the description of a dispute amenable to dispute resolution. The different parties to the dispute -- those having a stake in the decisions to be made -- are well-identified and organized. The issues of dispute are well-defined. Power between these parties has become well-developed and balanced through lawsuits, administrative rulings and Congressional mandates. These leasing and permitting decisions inevitably must be made. The different parties to the dispute have exhausted other avenues by which to obtain representation to their satisfaction. It is costly to them all to continue in an adversarial process, never focusing on and resolving the real issues of concern.

Eight Steps Towards Resolving Oil and Gas Disputes

The eight procedural steps proposed below are designed with four purposes in mind. First, they are designed to supplement the current process, not to supplant it. They are developed recognizing the authority and the responsibility of the Forest Service in national forest management. Hence the intent is to help Forest Service officials make viable decisions, not to remove this responsibility from them. Second, this amended process acknowledges both the judgmental

and scientific aspects of the decisions to be made. It does not ignore the critical need for Forest Service expertise and experience in making these decisions. Nor does it overlook the value judgments that must be made. It acknowledges that professional expertise only goes so far in actually determining what decision should be made once understanding the implications of various alternatives. Third, this process is designed to avoid the shortcomings of the current process when highly controversial decisions are involved. It is designed to encourage cooperation, not adversarial behavior between the potentially affected user groups. It should promote positive rather than negative involvement in the process and, moreover, result in accepted, not contested, decisions. Finally, this process is designed to provide a forum within which groups can more directly ensure that their concerns are addressed in decisionmaking. While it in no way precludes administrative appeal or judicial review of decisions made, it should encourage participation since it provides a more direct and manageable outcome as opposed to the uncertainties and costly delays associated with the current process. In this sense, the process has built in incentives for participation; each group's power should be greatest in the process, not by following other avenues for intervention.

These eight steps are not dissimilar to those recommended by M. Rupert Cutler when he was Assistant Secretary in the Department of Agriculture. [see chapter 5]

The intent behind both Cutler's reforms and those recommended here is to more directly involve affected groups in decisionmaking and, in so doing, assure them that their concerns have been accommodated. The difference between these two reforms, however, is in how the steps are actually executed and what is done with the information acquired in each step and by whom. The reforms proposed here are not consistent with the traditional land management paradigm.

These eight procedural steps have been developed understanding both the nature of the oil and gas problem and the lessons of past efforts to structure effective conflict management procedures. Several criteria were mentioned above that make the oil and gas dispute amenable to resolution. But, merely satisfying these criteria does not alone guarantee that a dispute will be resolved successfully. If these elements are present in a dispute the next step is structuring a process that facilitates negotiation and has the trust of its participants and identifying and involving the critical parties at the bargaining table. MIT Professor Lawrence Susskind has highlighted the critical components of successful negotiations and put them into a series of "nine steps" to consider and follow as negotiations proceed:

1. Identify the parties with a stake in the outcome
2. Make sure all parties are appropriately represented at the bargaining table
3. Narrow the agenda of items to be discussed and debated; confront the fundamental value differences and assumptions separating the parties so all sides acknowledge and accept these differences

4. Generate sufficient numbers of alternatives and options for consideratoin

5. Agree on boundaries and time horizons for analysis

6. Amalgamate impacts

7. Determine fair compensation

8. Implement the agreement

9. Bind parties to the agreement [18]

Susskind's nine steps have been amended here to specifically address the oil and gas leasing and permitting problem and to acknowledge the Forest Service authority to make these decisions. The specifics of this case make the binding and implementation tasks somewhat different than those addressed more generally by Professor Susskind. Because the Forest Service implements the final decision, legal means are not needed to bind all parties to the agreement. Instead, incentives built into the process should ensure that agreements, once reached, are then supported. In theory these same incentives bind the Forest Service to the spirit of the **proposed** decision.

The eight steps proposed for the oil and gas leasing and permitting process are:

1. trigger this supplementary process into effect when it might facilitate decisionmaking.

2. convene the different groups affected by the decision

3. joint fact-finding

4. identify issues of concern

5. develop alternatives

6. agree on a proposed decision

7. public review of proposed decision

8. decision implementation

Each of the eight steps is described below.

Forest Service decisionmaking is generally of two types, occurring at two levels in the agency's hierarchy. The first type of decision is that involving policy affecting agency-wide administration. The Washington, D.C. Office establishes policy. It structures how the agency will implement Congressional mandates by developing guidelines, procedures and regulations that are then placed in the lengthy Forest Service Manual. An example would be the Further Planning Area (FPA) Stipulation and Guidelines that played a critical role in the Palisades leasing dispute discussed in Chapter 3. The second type of decision occurs when officials in the Regions, Forests and Districts apply these internal mandates to site-specific proposals or general management tasks. Implementing the FPA Stipulations and Guidelines in the Palisades case, or permitting procedures in the Cache Creek and Little Granite Creek cases are examples of site-specific decisionmaking. Since disputes arise in both policymaking and policy implementation, attempts to resolve them should also occur at both levels.

Step 1
Triggering The Process

Not all oil and gas leasing and permitting decisions are controversial; not all processes yield decisions that are not

viable. Because this process is merely supplementing existing procedures, it needs to be triggered when those decisions arise that will potentially benefit by it; decisions that exhibit those characteristics highlighted in the cases described in Chapter 3.

The Assistant Secretary for Natural Resources and Environment in the Department of Agriculture triggers this process for policy level disputes. This assistant secretary has jurisdiction over the Forest Service. The Forest Service Chief triggers it for site specific disputes. These two individuals are chosen because they do not have initial responsibility for making the particular decision (although that responsibility could be appealed to them by dissatisfied groups). Hence they will not be party to the dialogue that ensues. They are in a position of authority over those in charge of making the final decision. As such, their action legitimizes the process. Moreover, by institutionalizing this process, the Assistant Secretary or USFS Chief empower the different groups participating in it.

The Assistant Secretary or USFS Chief triggers this process upon petition of the Forest Service Chief (for policy-level decisions) or the responsible Regional Forester (for site-specific cases). A particular public land user potentially affected by the decision or the lease or permit applicant can also petition to have this process triggered. The process is designed to provide a means for facilitating, not delaying decisions. It does not represent more work for

the agency or other participants; just redirected efforts that already occur. Hence, the incentives built into the process should be such that only those cases that can potentially be resolved will trigger it.

The process is triggered when the Forest Service Chief or Assistant Secretary files a notice of intent in the Federal Register to commence this process and convene the different participants. Consistent with current lease and permit review procedures, this notice should be supplemented by announcements sent to those on the agency's already-established mailing list of interested parties and to the media. [19]

To a large extent, the cases that might benefit from this process are self-defining. When the Washington Office must develop rules governing decisionmaking, officials there generally have a good idea at the outset what different groups are going to think about these rules and the concerns they will express. At this point there are few surprises. Similarly, when a lease or permit application is forwarded to a Forest Supervisor he has a good idea who is going to be concerned and likely responses to it.

Decisions that should trigger this process are those in which different interests clash and in which much is at stake; decisions that potentially affect some user groups beneficially and others adversely and hence will likely be opposed however made. For example, should exploratory drilling be proposed in an area with valued scenic resources,

important wildlife habitat or wilderness characteristics, this process should be commenced. In so doing, the critical issues of concern can be identified early in the process. Moreover, if there is a mutually acceptable outcome, it can be determined before the predictable battle lines are drawn. Policy decisions broadly affecting the management of specific areas -- wildernesses, further planning areas, wild and scenic rivers -- should trigger this process. More generally, decisions should be triggered that will likely be contested at later, implementation stages if disputes are not resolved. Similarly, cases warrant triggering where initial announcement of intent to develop a rule or regulation or evaluate a lease or permit application generates conflicting input. And, precedent-setting decisions broadly affecting a range of different users in numerous decisions over time should be subject to consensus-building in order to avert the domino effect wherein they are contested when applied in case-after-case.

Step 2
Convening Representative Groups

Three different groups participate in this process: a **government** group, an **applicant** group and a **land user** group:

The government group represents those federal, (ie. Forest Service, BLM, USGS, Fish and Wildlife Service, etc.) state and local agencies or ruling bodies that have some authority over the proposal. This is not a one-step permitting process after which all permits are granted,

however. Instead, it is an opportunity at the outset to identify all requirements that must be satisfied and what must be accomplished in order to satisfy them. In Getty Oil Company's Little Granite Creek case, the Wyoming State Oil and Gas Conservation Commission and the Wyoming State Game and Fish Department would have been involved at the outset rather than having to react after federal decisions had been made.

The applicant group includes representatives of the lease or permit applicant(s) as well as industry associations or interest groups perceiving a larger stake affecting their memberships because of a potentially precedent-setting decision.

The public land user groups category represents those individuals or groups currently using or proposing particular uses for the public lands in question. This category includes environmental organizations at the national, regional and local level, grazing interests, outfitters, ORV users, and any other groups or individuals with an interest at stake in the decision.

In Step 2, these three different groups are individually convened and representatives selected to participate in the process. The Assistant Secretary or USFS Chief's Federal Register announcement in Step 1 indicated their intent to commence this process by convening the different groups. It invited concerned groups to participate in **selecting** the participants. (If every individual were to participate the

process would be unwieldly and unlikely to succeed.) These groups are convened and representatives self-selected by the efforts of an independent convenor, at the request of the Assistant Secretary or Forest Service Chief. A likely candidate to serve as convener would be the Federal Mediation and Conciliation Service, should it be willing to take on disputes of this nature. [20] Another possible convenor would be the American Arbitration Association. [21] Representatives of these organizations do not select the participants. Instead, they assist the groups in selecting their own representatives: people who are trusted, whose decisions will be supported and accepted and who will be able to speak for the groups they are representing. Throughout the process these participants will maintain contact with their constituencies. By this time, the national and regional environmental and industry groups are well-organized and identified. This should facilitate convening these groups. The Assistant Secretary and Forest Service Chief may assist the convener in bringing together the representatives for the government group. The convener not only brings the groups together but also assists them in understanding the process, identifying concerns and coordinating efforts between participants within a group.

The convenor's task of coordinating efforts within the different groups is critical in order to avoid disjointed or inconsistent negotiations. For example, when the Sierra Club sued the Forest Service over leasing in the Palisades Area of

Wyoming and Idaho, U.S. District Court (Washington, D.C.) Judge Aubrey Robinson suggested that the groups try to settle their differences out of court. He gave them one month to reach a settlement before he would commence judicial proceedings. While negotiations initially were encouraging, disagreements and uncertainty on the part of the government representatives (attorneys for the BLM, DOI and USFS) helped to preclude any final agreement. The government representatives did not have power to make the decisions necessary to an agreement and hence had to continually go back to their respective agencies before making any commitments. They did not have expertise in the areas under consideration and hence had to continually go back to agency officials for information. Additionally, they had not developed any consensus on a consistent negotiating strategy at the outset so they actually represented two bargaining teams, not one. While the lease applicants and the Sierra Club seemed able to reach agreement on an outcome that would accommodate their concerns to their satisfaction, the problems within the government team precluded this outcome. [22]

Three factors are critical in convening these groups. First, participants must represent all interests at stake. If they do not, then an overlooked group will not necessarily support any agreement reached. For example, when leases were originally filed in the Palisades area in 1977, the Forest Service was in the midst of its wilderness reviews. It initially decided to grant the leases but the Sierra Club

appealed the decision. Upon appeal the Regional Foresters in Regions I and II reached agreement with Sierra Club representatives not to issue any leases in wilderness study areas until the wilderness review was completed. [23] But, since oil and gas industry representatives were not party to these negotiations, they did not feel bound to the agreement reached. As a result, as discussed in Chapter 3, the Mountain States Legal Foundation took the Forest Service to court to force them to make the leasing decisions. [24]

The second critical factor in convening these groups is to ensure that participants have decisionmaking authority. This requirement is critical to avoid the problem mentioned in the Palisades case where government representatives had to keep going back to the agencies for information and direction. Third, participants must have the trust and respect of the constituent groups they are representing in order to make decisions that the group will support. If they are not, there is nothing preventing a splinter group from forming to oppose any agreement reached.

Step 3
Fact-Finding

The intent behind Steps 3 (Fact-finding), 4 (Issue Identification), 5 (Developing Alternatives) and 6 (Agreement on a Proposed Decision) is to more directly incorporate the concerns of all potentially affected public land users in the environmental assessment process. Rather than a "black box"

approach to decisionmaking wherein Forest Service officials both acquire and then assess information themselves, the events that usually transpire in this "black box" are brought out into the open with those affected directly participating in it. In this way, critical facts are raised at the outset rather than in criticizing analysis after-the-fact. Issues of concern are raised initially and then alternatives devised that specifically address these issues. In so doing, the process avoids what current Secretary of the Interior James Watt refers to as the "paralysis by analysis" that now afflicts the process. [25] In the end, the process should not have failed to gather or consider critical facts or have overlooked viable alternatives.

Once the participants are convened, this process essentially becomes an amended version of the current environmental impact assessment process. As designed, this process satisfies NEPA requirements for assessing the impacts of several different alternatives before making a decision. The Forest Service may want to consult with the Council on Environmental Quality to determine whether or not scoping requirements will be satisfied in this process or if an additional public meeting should be held to accomplish the required scoping objectives. This meeting, if required, might help the participants ensure that their initial agenda has not overlooked any critical issues. However, should these participants have successfully been selected at the outset to represent all affected groups, scoping is built

into the fact-finding and issue identification stages and an additional scoping meeting will likely raise few, if any, new issues.

The first stage the Forest Service conducts in the current process is acquiring information with which to make their decision. In this amended process facts are similarly compiled but in a more participatory manner. Meetings are held during which agreement is reached between the three groups on the scope and boundaries of the assessment. Once these factors are defined, attention turns to acquiring the information needed before a decision can be made. There is a variety of different facts relevant to oil and gas leasing and permitting decisionmaking: For example, what surface resources exist in the area? What are likely impacts on these resources and how might they be mitigated or avoided? What is the probability of finding oil or gas in the area? What different means are available to conduct drilling operations? Who will likely be affected both beneficially and adversely by the proposal and how, specifically, will they be affected?

At this point, the three groups might want to select an independent facilitator or mediator to assist them in the next four steps. As defined by the American Arbitration Association, a facilitator:

> assists the parties to define the key issues and rank them for orderly discussion, encourages the parties to communicate clearly and makes sure that all parties' opinions are heard, offers suggestions on the process for problem solving, but does not offer opinions on substantive issues, and remains available to assist

> the parties openly in a group, but does not ordinarily meet with them privately. [26]

In contrast, a mediator:

> educates the parties about the negotiation process and helps them develop negotiating positions, assists parties to understand each other's perceptions and positions, helps the parties clarify the issues and identify areas of conflict, cooperation and compromise, serves as a "go-between" by meeting privately with the parties, and occasionally offers creative suggestions for possible solutions, and is therefore concerned with the issues as well as with the process. [27]

The original convenor from the Federal Mediation and Conciliation Service or the American Arbitration Association could assist the groups in jointly selecting a facilitator or mediator if desired. There are numerous organizations and individuals nationwide offering environmental conflict management services. [28]

Much information, given the agreed upon agenda, will likely be provided by the applicant (particularly in the case of an APD) or by Forest Service staff. Should the groups believe that independent analysis is needed, private consultants can be hired to address a specific question. The process is iterative; should fact-finding reveal unforeseen concerns, additional data may be desired and added to the agenda. But, these determinations are made together by the participants, not by an individual group. This process puts the Forest Service in the position of representing and protecting surface resources and other national forest management objectives rather than appearing to represent the applicant as in the current process.

The joint fact-finding, issue identification and alternative generation proposed here has been accomplished successfully in at least one oil and gas permitting case. Typically, after a lease application or APD is filed, the applicant fades into the background while the Forest Service, BLM and/or USGS evaluate the proposal. In controversial cases where competing demands are placed on the same lands, these federal agencies are then inevitably confronted with counter claims. The process provides no forum for the competing user groups to get together, focus discussion on the issues that actually concern them and reach an outcome satisfying them all while still within the Forest Service's land management responsibilities. The situation is a win-lose one. A case that illustrates the development of a different forum for decisionmaking, with a cooperative rather than adversarial dialogue, is the Fall Creek drilling proposal.

In early 1978, Getty Oil filed an APD with the USGS Office in Rock Springs, Wyoming, for leases it held in the Fall Creek section of the Palisades Further Planning Area. Getty officials were not aware of the ongoing leasing battle in another section of the Palisades FPA. [See Chapter 3] Getty's leases had been issued in May, 1970, well before the area became part of the Palisades FPA during the Forest Service's RARE II program. When Getty's APD was forwarded to the USFS Bridger-Teton National Forest headquarters in Jackson, Wyoming, public notice was routinely made of the

impending Forest Service review and recommendation. Sierra Club representatives immediately responded. They had just filed their first appeal of the Regional Forester's decision to recommend leasing in the Palisades area and they merely supplemented this appeal with a new paragraph noting their opposition to Getty's Fall Creek plans and why the Forest Service should be prohibited from taking action on this APD until after a final wilderness decision was made. [29]

Getty officials foresaw all too well the events that would likely follow. They were prepared to drill then and did not want to spend years in court before learning whether or not they would ever be able to do so. As seen in the Little Granite Creek case, this uncertainty and delay can be very costly. Getty has spent almost $1.5 million and, four years after filing its APD, does not know whether or not it will ever be able to drill in Little Granite Creek. Hence, in the Fall Creek case, rather than wait for the Sierra Club appeals to be concluded with no guarantee that the courts would not then become involved, Getty officials decided to play a more active role than traditionally adopted by APD applicants. [30]

At Getty's encouragement, Phil Hocker of the Sierra Club, USFS Bridger-Teton National Forest minerals specialists and the Forest Supervisor and Getty Oil representatives met together at the Bridger-Teton National Forest headquarters in Jackson to discuss Getty's proposal, the Sierra Club's concerns and what could be done to merge the two. Phil

Hocker expressed the Sierra Club concern that the proposed drilling would be an intrusion into an area that was under consideration for inclusion in the National Wilderness Preservation System. The Sierra Club was concerned that such an intrusion would ultimately affect the Palisades FPA wilderness decision and that, on those grounds, it should be deferred or denied. [31]

Getty representatives countered with assurances that the access road to the Fall Creek wellsite could be maintained, reclaimed and the entire site reseeded to mitigate any impacts. They assured Hocker that Getty would work under close Forest Service and Sierra Club supervision in developing and reclaiming the site. Discussion then proceeded about the specifics of road location, construction and reclamation and how drilling activities would be conducted. Visits to the Fall Creek site were made. Agreement was reached setting forth the conditions under which Getty could drill its exploratory well at Fall Creek, how and where the access road and wellsite should be developed, and how road and wellsite reclamation should occur.

The dialogue established between Getty Oil, the Forest Service and the Sierra Club over the Fall Creek well allowed all three groups to determine whether or not a common ground existed between them. Because Getty was willing to accommodate Sierra Club concerns and because Sierra Club representatives were willing to be upfront about their

concerns with the proposal, the dialogue uncovered a mutually acceptable operating plan. Forest Service officials viewed the agreement as a godsend. They were relieved of the frustrating and time-consuming burden of themselves trying to resolve the differences between these two adversaries. Moreover, the negotiations between the Sierra Club and Getty are often extolled by Forest Service officials desiring similar, harmonious outcomes in other difficult cases but unsure how to achieve them. Getty has since drilled its well and fully reclaimed its wellsite and access road to both the Sierra Club and Forest Service's satisfaction. In fact, both Phil Hocker and Bridger-Teton National Forest minerals specialist Al Reuter describe the reclamation as "excellent" and "a model for other reclamation activities." [32] These negotiations do not occur more frequently, however, because the institutional structure is not in place to encourage and support them.

The process proposed in this chapter puts this institutional structure into place. In so doing it promotes a dialogue between affected groups such as that which occurred between Getty and the Sierra Club. Obviously, not all cases are amenable to resolution. But, when a mutually acceptable alternative does exists as in the Fall Creek case, this process will encourage the groups to determine what it might be.

Step 4
Identifying Issues Of Concern

In Step 4, each group identifies issues of concern given their understanding of the proposal and its implications derived from Step 3. Unlike the current process, this approach encourages each group to focus attention on those issues of direct concern rather than those issues that strategically might "win." In the Cache Creek case, attention shifted immediately from the community's specific concerns (ie. impact of the well on town character, public services and tourism) to positions (an EIS must be prepared and no well should be permitted). The point of the proposed process is to identify and then focus attention on the specific issues of concern before they are transformed into positions that then overshadow the actual concerns. In Step 4 these issues are broken down into their component parts. For example, in the Cache Creek case what public services would have been affected and in what manner? What aspects of the tourist economy would likely have been affected and how? In what way would town character be affected by the proposal? By breaking down the issues in this manner, the participants should be better able to identify and create alternatives that specifically address these issues in the next step of the process. Because the current process provides no opportunity for the various groups to focus their attention on specific issues, it forces the less flexible position-taking response. As a result, opposition to whatever decision is reached is guaranteed whether or not a mutually

acceptable outcome exists.

Each group has an incentive to be upfront and thorough about their concerns. The next step -- alternative generation -- is designed to determine ways of addressing those specific issues raised in Step 4. If all concerns are not on the table, it is going to be difficult in the end for a group to decline support for a scheme that seemingly accommodates all issues raised. The point of this process is to provide all affected parties with an opportunity to directly contribute to a final decision that accommodates their concerns; it does not preclude the other options. By not participating forthrightly, honestly and reasonably in working towards a mutually agreed upon solution, they merely throw themselves back on the mercy of an uncertain appeals, judicial and legislative system. Furthermore, the costs of doing so are not minor; why bother participating in the process if not sincerely? Moreover, it is not clear that judicial and legislative avenues will be as responsive if a means for settling the difficult dispute were not given a fair chance. Because it is likely that groups will participate together more than once in this process, failure to negotiate in good faith will only make future negotiations more difficult, with other parties less likely to be reasonable and compromising.

Step 5
Developing Alternatives

In the current process, Forest Service officials select several alternative decisions that are analyzed in depth. This selection is made after obtaining initial public input and from the agency's own preliminary evaluations. Frequently, these alternatives do not fully encompass the concerns of one group or another. More frequently, the "preferred alternative" is not the one that most closely accommodates a particular group's concerns. And, as seen, when a final decision is rendered it is contested on the grounds that an equally legitimate alternative has not been considered. The analysis is therefore labeled inadequate and reassessment demanded. And, undoubtedly these claims are valid since there is an infinite number of potential alternatives depending upon how one bounds the analysis. [33]

The task before the participants in Step 5 is to develop a list of mutually acceptable alternatives to be analyzed and discussed. Each alternative is to be designed addressing the issues raised in Step 4 and understanding the facts gathered in Step 3. As alternatives are developed, each group makes sure that its constraints, legal requirements and other concerns are understood and addressed.

Developing these alternatives can best be described as side-by-side problem solving. Rather than selecting a standard range of alternatives, the alternatives generated in this process specifically address the issues raised and are developed cooperatively and creatively as in the Fall Creek

case. The Forest Service frequently requires different mitigation measures for exploratory drilling operations and different stipulations on leases. These measures either completely avoid or minimize potential impacts to surface resources. In the proposed process, these mitigation measures are evaluated and applied in a manner that is visible for all to see and in a manner that ensures each group of its intent. In so doing, it should avoid any distrust or misunderstanding of the conclusions reached. For example, in the Palisades case, the Sierra Club was not convinced that Forest Service lease stipulations for protecting wildlife habitat and wilderness resources were sufficient. Sierra Club representatives had not been involved in the analysis that developed these alternatives and therefore did not have confidence in the intent behind the stipulations. They did not trust the Forest Service's assurances because of contradictory administrative actions in other areas. As a result, they took the Forest Service to court, demanding an EIS before a final decision was rendered. The Washington, D.C. district court judge in this case ruled that an EIS was not required because the stipulations were enforceable to the extent of precluding exploratory drilling. [See Chapter 5] While the Sierra Club lost the case in that their argument that an EIS was needed was rejected, representatives of the organization believed that they had "won the war this time." They had achieved assurances from the district court judge that their interpretation of the

lease stipulations was valid. This outcome, however, might have been achieved more directly and with more far-reaching consequences if the process proposed here were in place. This judge's ruling is contradicted by rulings in several other cases. [See Chapter 5] Thus, it is not clear whether or not the Sierra Club's perspective will apply beyond the Palisades case. Furthermore, it is not clear that it will even apply in the Palisades case should an APD be filed and the case reenter the courts before a less sympathetic judge. Additionally, if the proposed process were in place and agreement had been reached on lease stipulation intent and enforceability at the policy level, then the outcome would be more far-reaching than just the Palisades case. In so doing, the need for other cases questionning precisely the same issues (ie. The Wilderness Society and Sierra Club suit over leasing in Montana's Deep Creek Further Planning Area) would be precluded.

Another example of the distrust and misunderstanding of administratively-generated alternatives is the Washakie case. The Forest Service analysis of oil and gas lease applications for Wyoming's Washakie Wilderness indicated that 13% of the area could be leased but the remaining 87% should not be leased. [34] Predictably, environmental groups responded that even the 13% portion should not be leased and industry responded that the 87% figure was much too high. Neither group was party to the analysis and inevitable value judgments that produced this alternative. Hence, each

questionned its validity; none were convinced that their best interests were addressed in this proposed decision. None fully understood and accepted how the critical 87% and 13% figures had been derived. The consensual decisionmaking process proposed here would have the groups such as those involved in the Palisades and Washakie cases directly participate in developing alternatives that address the various issues raised. In so doing, these groups help make the value judgments that must be made in generating alternatives and eventually selecting a preferred alternative.

Because of the uncertainty involved in oil and gas decisionmaking, contingency agreements should be considered when alternatives are developed. These agreements -- "if this happens then that must be done" -- help offset the uncertainty that now makes decisionmaking so difficult. Additionally, it ensures an ongoing review process. Several court decisions and Interior Board of Land Appeals rulings indicate that it is a valid approach to decisionmaking. [35]

In creatively and cooperatively developing these alternatives, other options that are usually not now considered can be raised. If impacts to a town's streets or public services are a concern, then compensation to offset these costs might be considered. If a national forest recreation area or campsite is affected, compensation for relocating or mitigating the impacts might be considered. Compensation and other "rewards" have been considered in

resolving many environmental disputes. [36] For example, in agreeing to an alternative that would both allow construction of the Grayrocks Dam in Wyoming and protect the endangered Whooping Crane's habitat downstream, the energy consortium involved agreed to establish a $7.5 million "trust fund" for maintaining and protecting the habitat. [37] While such solutions can more directly address the issues of concern, the current process and judicial reviews seldom raise or consider them. Moreover, these traditional forums frequently preclude these solutions.

Another problem with how alternatives are currently developed and analyzed is that alternatives that are not viable or are much more complex than implied are frequently advocated. In the Little Granite Creek case, when the Forest Service recommended that Getty Oil Company's exploratory drilling permit be granted, Jackson Hole community groups and national environmental organizations immediately began demanding that Getty's leases be exchanged for leases in a less scenic and wild area. They charged that this alternative had not been adequately considered in the EIS and that it should have been. It provided a rallying point for future debate. But, Getty responded that such an apparently simple solution was actually very complex. One Getty official asked:

> How would you determine what was an equitable trade or swap? We frequently expend large sums of money looking for traps [oil-bearing formations] and never find one. Here we have defined a potential trap. The leases are worth more to us now than before we did the

seismic survey. [38]

After completing $852,000 in seismic testing a year earlier, Getty concluded that its chances of finding oil or gas were best described as "excellent." [39] A USGS geologist concurred, stating that Getty's prospect is atop a structure with the greatest likelihood of success in that area of the overthrust belt. [40] To Getty, a lease trade was out of the question; to opponents of the well it was a logical way to preserve the area's wilderness and wildlife attributes.

The raising and then rallying around of questionable alternatives is not limited to site-specific cases. It happens just as frequently at the policy-level since there is also no common forum there for combining fact-finding, issue generation and, only then, generating viable alternatives. For example, a common argument in the current debate over energy exploration in Wilderness is that exploration should be allowed in these areas simply to inventory the oil and gas resources there. On its face, the proposal seems reasonable. This exploration would give land managers more information with which to make a land allocation decision. Seemingly, it keeps Wilderness Areas in their pristine condition until that day when the energy resources laying beneath them are critically needed. This apparently perfect solution to the current stalemate has considerable support in Washington. But, this alternative has major flaws that are seldom raised in a forum where it can be revised and a truly viable alternative developed. [41]

Step 6
Agreement On A Proposed Decision Or Rule

Step 6 is perhaps the most difficult step in this process. Now that specific issues of concern have been identified, tradeoffs must be made in order to achieve consensus. As discussed earlier, a mediator or facilitator might be involved at the request of the participants to help them focus their discussions and develop agreements when possible.

To successfully reach an agreement may require expanding the list of negotiable items. Since many disputes are interrelated, tradeoffs can encompass factors in other disputes. Many participants undoubtedly will be negotiating together on several occasions. If participating in a similar process involving a different area, a final agreement may involve aspects of a proposal beyond that being considered. As is already widely practiced, lease applications can be combined on an area-wide basis, perhaps through the forest management planning process. By expanding the context for decisionmaking, potential tradeoffs are increased and negotiations facilitated. Moreover, by consolidating leasing decisions in this manner, disputes involving a specific area can be resolved comprehensively rather than incrementally, on a lease-by-lease basis. Any agreement reached would cover where leases may or may not be issued and subject to what stipulations.

This process will not always result in an agreement. In

some cases, participants may, after reaching partial agreement, leave the final decision to a jointly-selected arbitrator or to the Forest Service. If agreement cannot be reached, it may indicate that the particular dispute is not suited to administrative resolution. In these cases, if good faith efforts have been made to resolve the dispute, Congress or the courts may be more willing to adopt the issue and try resolving it in their forums. Moreover, the results of the assessment thus far should provide a more coherent and concise set of facts and issues with which a substantive decision might be made in these alternative forums.

Step 7
Public Review Of The Proposed Decision Or Rule

Because the authority for making these leasing and permitting recommendations and decisions rests with the Forest Service, Forest Service officials cannot merely adopt the agreement reached in this process. They must first provide an opportunity for those not directly participating in these negotiations to comment on the proposed decision or rule.

In this step, the Forest Service completes its procedural obligations and ensures that all concerns have been raised. As is customary now, the Forest Service should place this **proposed** rule or decision recommendation in the Federal Register for comment and, when required, hold a public hearing to obtain further feedback. The agency then

accomodates these additional concerns in its final decision or recommendation. If considerable additional comments are received that are contrary to the proposed decision or rule, agency officials may want to reconvene the original participants to discuss how to acommodate these new concerns. The decision may be contested if the three groups do not understand and agree to the changes that were made. A fine-tuning review may avoid this consequence. But, if the process were successfully designed at the outset to be representative and have constituent support, this outcome should be the exception, not the rule; the proposed decision should represent the collective interests of the three participant groups and, thereby, public land interests in general.

This final adjustment to the proposed rule should not merely reinstitute the problems that currently plague decisionmaking. While the Forest Service was a party to the negotiations that originally developed this proposal, they have no incentive to drastically revise the proposal to reflect their concerns although they have authority to do so. Such action would void the integrity of the process, ensure opposition to it and taint the inevitable future interactions with the same groups.

Step 8
Forest Service Implementation

The Forest Service implements its decision as outlined in current procedures. The agency's authority is retained by

this process. It is fulfilling its Congressional mandates, perhaps to an even greater degree if the outcome is "harmonious" as Congress has required in several land management statutes. [see chapter 4] The professional expertise that is critical to proper national forest management has not been sacrificed to a purely political solution. Instead, the scientific expertise has been applied to facilitate and inform the inevitable value judgments that must be made. Of course, many Forest Service leasing and permitting decisions at the site-specific level actually constitute recommendations to the BLM or USGS. In these cases, the BLM or USGS, having participated in the process in the government group, would have little reason to undermine the agreement and not abide by the Forest Service recommendation. Forest Service recommendations to the USGS or BLM are generally accepted as issued in the current process, even when the BLM or USGS had no role in their development.

Prospects and Potential Problems

There are several advantages for the US Department of Agriculture, the Forest Service and the US Department of the Interior in adopting a system such as that proposed here. It should reduce litigation over administrative decisions and thereby reduce the cost and time now associated with decisionmaking. It should generate allies for the Forest

Service and support for the agency's decisions rather than the immediate adversaries produced by the current process. It is designed to facilitate decisionmaking by providing specific phases of analysis that directly build upon each other. In so doing, it should generate confidence in the conclusions reached and agreement on the value judgments and tradeoffs that must be made. Moreover, it should reduce the now inevitable delay that is creating tensions between Congress and the executive. Furthermore, this process is responsive to the current Congressional and administrative calls for regulatory reform. It should increase public confidence in the Forest Service by reducing conflict and hostility over its decisions and by providing means for different groups to substantively ensure that their concerns have been addressed. It insulates the administrative agencies from the extensive and frequently heavy-handed lobbying efforts that now make decisionmaking so difficult.

Should the Forest Service adopt this process and make decisions consistent with any agreement reached, its decisions should be immune from later charges of being arbitrary and capricious. Inevitably, these ad hoc decisions will not always be consistent across cases. The peculiarities of particular proposals and disputes will require creative solutions that will distinguish them from previous agreements. Moreover, because many of the same groups will be frequent participants in this process, some disputes may be resolved in a broader context, applying to

more than just the issues at hand. Hence, agreements that provide for considerable development in one area and little, if any, in another or agreements that require different conditions in different areas are not necessarily inconsistent. Instead, they are making the delicate tradeoffs that must be made in these decisions and doing so in a manner that accommodates the concerns of the participating groups.

The Forest Service's authority and responsibility for decisionmaking remains intact in this process. Moreover, if the process proves successful, the agency's position is strengthened. After two decades of controversy over its decisions, the Forest Service's image is badly tarnished. It now has few constituent supporters. It has often been said that a strong conservation-oriented Secretary in the Department of the Interior is all that is needed to effect a transfer of the agency from USDA to DOI where the other land management agencies reside. [42] It is a move that some interests advocate. [43] But, should the Forest Service be able to rebuild its image and regain constituent support, then its position as a relatively independent administrative agency would be strengthened, not weakened by the process. The proposed process acknowledges the critical need for the expertise and experience of Forest Service officials and staff in making these controversial decisions. It should lend more credibility to and support for their analyses. In so doing, the process is structured to ensure that final

decisions are based upon scientific land management needs rather than questions of administrative procedure or law as in the current process. As a result, the Forest Service can put greater effort into other land management tasks that are now shelved while controversial decisions drag on.

This process is not solely advantageous for federal agencies responsible for public land management decisions. There are also incentives for environmental and industry groups to both advocate and participate in a consensual decisionmaking process. The uncertainty and delay now plaguing decisionmaking makes the current process very costly for industry. Four years and $1.5 million after filing its APD for Little Granite Creek, Getty Oil Company does not know whether or not it will ever be able to explore its leasehold. Getty officials would certainly have preferred knowing before making this expense whether or not it would ever receive a drilling permit. [44] Environmental groups such as the Sierra Club and The Wilderness Society similarly find the established process costly. [45] Moreover, the influence of environmental groups in final decision outcomes turns more on questions of how leases and permits are issued, not whether they should even be issued at all. At present, no exploratory drilling permits have ever been denied for environmental reasons. Similarly, very few (1-2%) lease applications are ever rejected. In the negotiations that would occur in the proposed process, areas of particular concern may have a greater chance of being preserved than

currently. Should environmental organizations believe that some specific areas should **never** be developed, the current process provides little hope for achieving this end. The proposed process however would encourage tradeoffs among areas. For example, by agreeing to facilitate exploration in one area, environmental organizations may be able to preclude exploration in another area. Furthermore, as described in the Palisades case, they can have a more direct hand in establishing critical precedents in this process rather than leaving it to the uncertainties of the judicial system. For both industry and environmental groups, this process provides an opportunity for bettering their situation without precluding administrative and judicial recourse should negotiations fail.

For this process to be viable, two important factors must be satisfied. First, representatives from both environmental and industry groups must participate with the Forest Service in fine-tuning the requirements and objectives of each step. All groups must be involved at the outset in order to understand this process and to establish the ground rules that will govern how the process proceeds. If all groups are not involved initially and at this level of discussion the possibility exists that one or another interest group will not trust the agency's motives in proposing it and will therefore not participate. Second, a conflict management capability must be institutionalized within the agency. When a dispute arises that triggers this

process, a Forest Service administrative office housing a trained mediator or facilitator should exist in order to usher the dispute through the process. Leaving this responsibility to existing Forest Service staff not trained in conflict management would neither ensure that appropriate action is taken nor provide the independence necessary to create a credible and trusted process.

Institutionalizing the process proposed here is not without some administrative problems in addition to those already mentioned. How, for example, will this process be financed? How will the Federal Advisory Committee Act provisions be fulfilled in convening these groups and encouraging an effective dialogue between them?

An additional problem is overcoming the immediate and inevitable distrust of a bargaining process to resolve environmental disputes. [46] The mere suggestion that these public land management disputes might be managed and resolved inevitably provokes several, predictable counter-arguments: How can there possibly be a middle ground between such diverse groups, especially with respect to wilderness? If it is such a great idea, with so many advantages for everyone, why is it not happening now? Aren't environmental and community groups just coopted by such a process? What's to stop the different groups from going on to the courts in the end if they do not like the settlement reached?

Financing

Financing can be arranged in a number of different ways.

A special line item appropriation could be requested or special Congressional funding on an experimental basis might be acquired for the program. Probably the most easily accomplished and perhaps the most appropriate manner of financing, however, would be to earmark a certain portion of the oil and gas lease rent and production royalty revenues to a special fund supporting this process. If the process is successful in its objective of reducing the now costly opposition by producing viable decisions at the outset, this funding should not actually constitute an addition to the agency's budget. If application review and analysis time and administrative appeal and judicial review costs are reduced by this process, this funding should represent an overall reduction in agency expenditures.

The Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA) requires that federal officials establishing advisory committees file a "charter, meeting announcements and minutes in the Federal Register; justification statements for the Office of Management and Budget; public announcements of meetings and meeting agendas; invitations to the public to attend meetings and filing of annual reports." [47] Groups that are subject to this Act's provisions are those "having fixed membership selected by a federal official, created for the purposes of providing advice, having an organizational structure and holding periodic meetings." [48] Currently, Forest Service

officials avoid using advisory committees because they find the Act's requirements to be too "cumbersome." [49] Furthermore, Forest Service officials avoid these committees because, as they explain, "selection of committee members can introduce a bias which does not represent the entire range of public interests," and, moreover, not assure the "general public" that it is being represented in decisionmaking. [50] Another problem noted by the Forest Service is that "membership tends to become permanent because of reluctance to tell members their services are no longer desired. There is danger that deadwood will build up and render the committee ineffective." [51]

As described above, the proposed process goes beyond the purpose of advisory committees as traditionally conceived. Its recommendations are developed more interactively than in the one-way comments of the current advisory committee system. Moreover, its recommendations are then placed before the "general public" for comment and potential revision. The three proposed participant groups are self-selected with the critical requirement that they be representative of the interests at stake and, furthermore, trusted by their respective constituencies. Fulfilling some aspects of the FACA regulations would hinder proposal development. If meetings were open, the critical dialogue between traditional adversaries -- the give-and-take that occurs in reaching an agreeable solution to the problem -- might be precluded. But, if public involvement is provided later, this open

meeting format may not be necessary to fulfill FACA's requirements. Regardless, at the outset the Forest Service and Department of the Interior may want to try to ease fulfillment of FACA's charter requirements by making special arrangements with the Office of Management and Budget for approving participants in selected cases in order to experiment with this process. For example, the Environmental Protection Agency has recently obtained a special charter approval for participants in an experimental rule-making process that is very similar to that proposed here. [52]

The Question of Wilderness

When The Wilderness Act passed in 1964, Section 4(d)3 permitting mineral leasing until December 31, 1983, was included as a compromise to the mining industry. At the time, oil and gas was not an issue, other hardrock minerals were. [53] Today, however, the table has turned in a way that was not foreseen in 1964. As a result, Congress is reconsidering its intent with Section 4(d)3, potentially rescinding the section entirely. Hence, there is no incentive for preservationists to participate in the process proposed here when Wilderness Areas are involved; there is no incentive for them to concede to any oil and gas leasing or exploration in Wilderness areas until Congress has rendered its decision later this year. Whichever way Congress decides -- to prohibit leasing entirely, to allow it until December 31, 1983 or to permit it until an even later date -- final implementation will be shifted back to the Forest Service.

If Congress permits exploration, the Forest Service is still going to have to determine where and how that exploration should occur. If Congress prohibits leasing in Wilderness Areas, the Forest Service is still going to have to complete its final wilderness designation recommendations and determine how to manage its further planning areas in the meantime. And, unless they develop some means for accommodating the conflicting values at stake, their decisions will continue to be contested. The process proposed here could help them to do so. If a dialogue were established at the policy-level, a consensus could be developed between affected groups -- which then, of course, would be subject to public review -- regarding these complex wilderness management policies and oil and gas leasing and permitting conditions. Because all groups' claims are legitimate, tradeoffs are unavoidable. But, by making these tradeoffs overt, those areas of critical concern might be protected while exploration subject to agreed upon conditions could be facilitated in others. Schemes could be cooperatively developed by all participants such that some areas like, for example, the Bob Marshall Wilderness -- the "crown jewel" of the wilderness system -- could be left untouched while the oil and gas industry was able to explore for and produce the Overthrust Belt's energy resources from other locations. But, only by having these groups place their issues of concern on the table and begin making the unavoidable tradeoffs together will these difficult choices

be made in a less combative and costly manner.

Why Do These Negotiations Not Occur Now?

Another hesitation expressed about a dispute settlement approach to decisionmaking is that, if the advantages are so great, why is it not happening now? As indicated above, negotiations occasionally do occur but clearly not as frequently as advocated here. To a large extent, such disputes are not settled more frequently because the established administrative decisionmaking process does not accommodate it. The process, as structured, encourages adversarial not cooperative consensus-building behavior. The institutional structure is not there that would accommodate bargaining and encourage dispute settlement; the needed dialogue is never initiated. The process is structured to convince the Forest Service because the Forest Service is "the decisionmaker." Thus, it encourages the many different groups to argue aggressively before the agency in support of their positions. There is no incentive to cooperate in this type of process because being more reasonable and less extreme in presenting one's argument only means that you might get less in the end. The point is to bolster your own position and undermine your adversary's, not to be reasonable or compromising.

Perhaps a more critical reason negotiations do not occur now is that each group appears to have more power and influence over the final decision outcome through means other

than the administrative process. In fact, their power seems least within the established process. And, as seen, because other forums are not designed to acknowledge the legitimacy of all groups and the need for tradeoffs in decisionmaking, groups have little incentive to help effect the needed tradeoffs. Furthermore, there is little incentive to negotiate in the manner proposed here because there is no assurance that it will make a difference; this approach to decisionmaking has never been legitimized.

What Is The Role of the Forest Service?

A common Forest Service response to suggested conflict management is that it is the agency's mandate, indeed its raison d'etre, to make these decisions. [54] If professional foresters were to let interest group negotiations decide the fate of the national forests, why have a Forest Service at all? Wouldn't agency officials be abdicating their responsibilities?

A counter-argument could be that it is also the Forest Service's responsibility to represent all values in decisionmaking and to make decisions in a "harmonious" manner. [55] There is clearly a need for a scientific, professional Forest Service. Professional expertise and judgment are critical for much of the day-to-day forest management tasks. But, when disputes like those seen in the oil and gas cases arise, it is also their responsibility to represent each set of values in their decision. The Forest Service has a critical role in the conflict management

process proposed here. The eight steps do not occur outside its jurisdiction but rather within it as a supplement to existing administrative procedures. Agency officials need to actively participate in this process both to represent the non-vocal public that is not present as well as to provide the technical and scientific facts and administrative constraints that only they can provide.

Is Conflict Management A Coopting Strategy?

The argument has been made that environmental conflict management strategies are designed to coopt environmental and community groups in order to facilitate development. [56] But, the process proposed here neither forces participation nor forecloses other avenues should a group believe that the process is not going to serve its best interests. This process provides a choice of how to participate; a choice that is lacking in the current process. At the policy level, it allows both industry and environmental organizations to assist in developing broad policies, rather than incrementally questionning policy implementation in numerous site-specific cases. At the site-specific level, it does not preclude the critical precedent-setting nature of many cases. In fact, the agreements reached in site specific cases, precisely because they will be supported by many different groups, will perhaps have greater precedent-setting value than the cases that now end up receiving conflicting rulings in the courts.

Conflict management processes will not resolve every conflict. There will inevitably be cases where precedent setting issues are of concern that might be better resolved in the courts. There might be cases where agreement between the parties simply cannot be reached and the courts are pursued. There might be cases where procedural or constitutional concerns will need to be reviewed judicially. But, there are many cases that are resolvable if the institutional structure was there to accommodate them. Such processes would make this difficult task somewhat "easier" and much less adversarial. By cooperating and building consensus over these decisions it will be much more likely to accommodate more values than in the win-lose adversarial processes now followed. Solving part of the problem is certainly better than none.

CHAPTER 6 -- REFERENCES

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[2] M. Rupert Cutler, "Public Involvement in USDA Decisionmaking," **Journal of Soil and Water Conservation**, 33(6):264-266, 1978.

[3] Personal interview with USFS Chief R. Max Peterson, October 1982.

[4] The process proposed in this chapter builds directly upon the "principled negotiation" method advocated by Roger Fisher and William Ury in **Getting to Yes: Negotiating Agreement Without Giving In**, (Houghton Mifflin Company, Boston, 1981). In this book, Fisher and Ury discuss the problems created when groups bargain over positions rather than issues. They propose a bargaining method in which first, the **people** are separated from the **problem** (chapter 2), discussion is centered on **interests**, not **positions** (chapter 3), opportunities for **mutual gain** are created through joint problem-solving (chapter 4) and, objective criteria based on fair standards or procedures are applied when possible to facilitate agreement (chapter 5).

[5] I am grateful to MIT Political Science Professor Alan Altshuler for raising this question and sharing his experience with public administrators in other countries.

[6] ibid.

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[13] **Congressional Record**, Thursday, October 20, 1977, Volume 123, Number 170, S 17375-17400.

[14] Interview with David Stead, administrative assistant to Colorado Congressman Tim Wirth, October 1982.

[15] **National Wildlife**, "Kodiak Refuge Case Settled," December/January 1982, page 32-G.

[16] These negotiations occurred over Getty Oil Company's Fall Creek exploratory well in the Bridger-Teton National Forest. Interviews with Al Reuter and Gary Marple, minerals specialists for the Bridger-Teton National Forest, Jackson, Wyoming, November 1981; Philip Hocker, Sierra Club Board of Directors, Jackson, Wyoming, November 1981; and, Dick Hamilton, Getty Oil Company District Manager, Denver, Colorado, November 1981.

[17] See Susskind and Weinstein, op. cit.; Susskind, Richardson and Hildebrand, op. cit.; and, Philip J. Harter, "Negotiating Regulations: A Cure for the Malaise?", A Report to the Administrative Conference of the United States, 1982.

[18] Susskind, Richardson and Hildebrand, op. cit.

[19] For example, see the process used by the Bridger-Teton National Forest to publicly announce their intent to

consider an oil and gas lease or permit application.

[20] The Federal Mediation and Conciliation Service has historically limited their involvement to labor-management disputes but is recently branching out to community and environmental disputes. **U.S. Government Manual**, 1981-82, pages 520-521.

[21] The Community Dispute Service of the American Arbitration Association employs a variety of consensus-building strategies in disputes ranging from those between labor and management, prison inmates and guards, police and citizens and environmentalists and developers.

[22] Phone interview with Karin Sheldon, Attorney for the Sierra Club Legal Defense Fund, January 1983; and, interview with Mr. C. M. Peterson, attorney for the Palisades area lease applicants, Denver, Colorado, November 1981.

[23] Robert A. Nelson, "Oil and Gas Leasing on Forest Service Lands: A Question of NEPA Compliance," **The Public Land Law Review**, Volume 3, Spring 1982, p. 45.

[24] Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyoming, 1980).

[25] Robert A. Nelson, op. cit.

[26] Peter B. Clark and Wendy M. Emrich, "New Tools for Resolving Environmental Disputes: Introducing Federal Agencies to Environmental Mediation and Related Techniques," American Arbitration Association, 1980, page 5.

[27] Ibid., page 4.

[28] Ibid.; see also, **Resolve**, a quarterly publication of The Conservation Foundation, Washington, D.C., updating current activities in the field of conflict management research and practice.

[29] Interview with Philip Hocker, Member of the Sierra Club Board of Directors and Wyoming Chapter Conservation Chairman, November 1981, Jackson, Wyoming; also, see Chapter 3, note 139.

[30] Interview with Dick Hamilton, District Manager, Getty Oil Company, Denver, Colorado, November 1981.

[31] Interview with Philip Hocker, Sierra Club, op. cit.

[32] Interview with Al Reuter and Gary Marple, USFS Minerals

Specialists, Bridger-Teton National Forest, Jackson, Wyoming, November 1981; also, interview with Philip Hocker, Sierra Club, op. cit.

[33] See Lawrence Bacow, "The Technical and Judgmental Dimensions of Impact Assessment," **EIA Review**, Volume 1, Number 2, June 1980.

[34] **Oil and Gas Exploration and Leasing Within the Washakie Wilderness: Draft Environmental Impact Statement**, US Department of Agriculture, Forest Service, Rocky Mountain Region, Shoshone National Forest, 1981, page C-1.

[35] See chapter 5.

[36] Compensation is used in resolving community disputes and has been legislatively mandated in siting hazardous waste management facility siting disputes; see, Michael O'Hare, "Not on My Block, You Don't -- Facility Siting and the Strategic Importance of Compensation" **Public Policy**, Volume 25, Number 4, 1977; see also, Michael O'Hare, Lawrence Bacow and Debra Sanderson, **Facility Siting and Public Opposition**, Van Nostrand, New York, 1983, forthcoming.

[37] See Julia Wondolleck, op. cit.

[38] **Casper Star-Tribune**, "Getty Oil Promises Granite Creek Drilling Will Be Kept to a Minimum," October 8, 1981, page A3.

[39] **Casper Star-Tribune**, "Getty Woos Jackson," October 12, 1981, page A1, 12.

[40] **Jackson Hole Guide**, "USGS Report Says Oil Potential Good in Gros Ventre Wilderness," March 18, 1982, page A20.

[41] The major flaws with this resource inventory argument are:

First, a single exploratory well does not reveal the resources of an entire area. The well may miss a large (or small) geologic formation. It may strike an oil or gas deposit but, without several additional wells, the extent of the formation cannot be known. An entire field of wells would be required to accurately estimate the resources beneath it. For example, before Alaska's Prudhoe Bay oilfield was discovered, 128 exploratory wells had been drilled. Thus, this alternative seems to protect wilderness areas from development by developing them.

Second, this argument assumes that industry is willing to spend millions of dollars to undertake exploration without a guarantee (and, in fact, with an explicit prohibition) that development of the resources discovered may occur. Industry has made known the fact that they do not intend to undertake exploration in Wilderness Areas under these terms.

Third, the lead time on energy development is about ten years. During this time, the prospect is defined, exploratory wells are drilled, and, if a strike is made, production begun. Along with production on the field, pipelines, roads and, frequently, a "sweetening" plant for hydrogen sulfide gas must be constructed. The argument that Wilderness Areas should be drilled only in the face of a national emergency stands only if a "national emergency" can wait several years before it is addressed. Even still, there is no guarantee that the oil or gas resources will be there to be found. Furthermore, even should the national emergency argument be accepted, how would a "national emergency" be defined in order to know when development in the Wilderness Areas should be permitted? Industry is arguing that, in fact, a state of national emergency exists now and that development of domestic energy resources should be advanced.

[42] See, Harold K. Steen, **The U.S. Forest Service: A History**, The University of Washington Press, Seattle, 1976.

[43] See Chapter 5, note 57.

[44] Interview with Dick Hamilton, Getty Oil Company, op. cit.

[45] Interview with Philip Hocker, Sierra Club, op. cit.; phone interview with Bruce Hamilton, Sierra Club Northern Great Plains Regional Representative, Casper, Wyoming, October 1981; phone interview with Doug Scott, Sierra Club Federal Issues Representative, San Francisco, August 1981; and, interview with Terry Sopher, The Wilderness Society Public Lands Specialist, Washington, D.C., September 1981.

[46] Julia Wondolleck, op. cit.

[47] "Public Involvement and the Forest Service: Experience, Effectiveness and Suggested Direction," A Report from the United States Forest Service Administrative Study of Public Involvement, May 1973, pages 58-62.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] This effort is the result of analysis of EPA rule making procedures by MIT Professors Lawrence Bacow and Lawrence Susskind. The experimental program is being conducted by Lawrence Susskind and the Harvard Negotiation Project.

[53] Interview with USFS Chief R. Max Peterson, October 1982.

[54] Ibid.; also, interviews with Gary Marple and Al Reuter, minerals specialists for the Briger-Teton National Forest, Jackson, Wyoming, November 1981.

[55] See chapter 4.

[56] Douglas J. Amy, "Environmental Mediation: A New Approach with Some Old Problems," **Citizen Participation**, November/December 1982.