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## Smoking Out Forest Fire Management: Lifting the Haze of an Unaccountable Congress and Lighting Up a New Law of Fire

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# SMOKING OUT FOREST FIRE MANAGEMENT: LIFTING THE HAZE OF AN UNACCOUNTABLE CONGRESS AND LIGHTING UP A NEW LAW OF FIRE

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## I. INTRODUCTION

Since its establishment over a century ago, the United States Forest Service (“USFS”) has consistently fought for greater authority and autonomy. This spirit of independence initially served the agency well. Its foundational mission—to manage the national forests “for the greatest good for the greatest number in the longest run”—engendered a pride and loyalty among the agency’s foresters that made it the envy of all other agencies. For many decades, the agency’s focus was on applying forestry methods, mostly borrowed from Germany, to maximize sustainable lumber supplies for the country as a whole while also serving the needs of local communities dependent upon the timber industry. Its success in this regard made the agency popular among the public.

Today though, things have changed. Beginning in the middle of the century, the public’s demands and expectations of national forests shifted from prioritizing timber production and grazing, to recognizing the forests for their environmental and recreation values. In the 1960s and 1970s, Congress passed a series of laws reflecting this change, each aimed at curtailing agency discretion and requiring the USFS to recognize other uses of national forests beyond solely economic ones. While these new laws all contained enforceable provisions, including some substantive standards, they still left the agency with significant discretion. At each step, the USFS has resisted the legislative encroachments, and both the agency and interested stakeholders have tested the limits of the new laws, leading to extensive litigation. All of this takes away from the agency’s main task of managing its forests.

Arguably, the one area where the USFS has most successfully retained its autonomy is in the area of fire management. This is primarily because Congress has exempted certain fire management activities from otherwise-applicable environmental and planning standards. The rationale has typically been that the regulation and control of fire, now often contextualized within a larger context of “forest health” concerns, presents a situation that many consider an emergency. Inasmuch as we do, in fact, confront a forest emergency, it is largely of the agency’s own making and that of others following its lead. USFS policies, for much of the twentieth century, emphasized fire suppression as a way to protect standing timber, as well as human safety. This has altered forest ecologies, leaving forests and their surrounding areas more vulnerable to large, so-called “catastrophic” fires and devastating insect and pest infestations. Ironically, this “emergency,” in large part created by the USFS’ exercise of its near-limitless authority for much of the century, provides the basis for renewed autonomy in that very area of management. Still, in the area of fire management, as elsewhere,

opponents have often succeeded in delaying agency action through administrative and judicial appeals. Litigation has come to be so pervasive that many see public relations as one of the USFS' most important jobs.<sup>1</sup> The predominant recent trend in public land management has been to implement a more collaborative, or "bottom-up," management model in an effort to replace conflict with cooperation.<sup>2</sup>

While the collaborative model has enjoyed a few successes, recent experience in the USFS' management of the Norbeck Wildlife Preserve in the Black Hills of South Dakota, shows that much more is needed than merely a shift in the agency's handling of the public. Despite the efforts of the agency in creating a more cooperative environment, the past three decades in the Norbeck Wildlife Preserve have been dominated by distrust and conflict. The forest has suffered as a result.

Part II of this article examines the Norbeck Wildlife Preserve and the legal and political controversies surrounding its management, particularly as to fire. Part III attempts to explore the root causes of the management quagmire in the preserve by placing them within their wider historical and legal contexts. Whether due to a tradition of favoring exploitative industries or past failures in regards to fire management, the agency is unlikely to gain the level of trust among environmentalists and recreationists to allow it to govern as it once did. The agency is not entirely to blame. Litigation, to the extent we have seen with regard to the Norbeck Wildlife Preserve, is only possible where the applicable laws contain ambiguities or inconsistencies. This creates a problem for Congress. Rather than regularly exempting the agency from legal standards, which only adds to the lack of cooperation, Congress must enact new legislation that provides meaningful standards for fire management.

## II. CONTINUING CONTROVERSY IN THE NORBECK WILDLIFE PRESERVE

Since at least the 1980s, management of the Norbeck Wildlife Preserve (the "Preserve") has provided a perfect example of the extent to which litigation has come to pervade public land management, including the regulation of fire regimes. This Part explores that story. It first outlines the Preserve's establishment in the early part of the twentieth century with an analysis of the Preserve's

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1. See BRUCE SHINDLER, *Public Acceptance of Wildland Fire Conditions and Fuel Reduction Practices: Challenges for Federal Forest Managers*, in PEOPLE, FIRE, AND FORESTS: A SYNTHESIS OF WILDFIRE SOCIAL SCIENCE 37 (Terry C. Daniel et al. eds., 2007).

2. See, e.g., Ronald D. Brunner and Toddi A. Steelman, *Beyond Scientific Management*, in ADAPTIVE GOVERNANCE: INTEGRATING SCIENCE, POLICY, AND DECISION MAKING 1-46 (2005); Christine H. Colburn, *Forest Policy and the Quincy Library Group*, in FINDING COMMON GROUND: GOVERNANCE AND NATURAL RESOURCES IN THE AMERICAN WEST (2002); CHARLES WISE & ANDREW J. YODER, *Policy Institutional Arrangements in Federal Wildland Fire Mitigation*, in PEOPLE, FIRE, AND FORESTS: A SYNTHESIS OF WILDFIRE SOCIAL SCIENCE 189-90 (Terry C. Daniel et al. eds., 2007).

foundational mission, to protect wildlife from extractive industries such as timber and mining. It then examines the basic statutory framework governing management of the forest. Finally, it dissects the legal disputes that have characterized fire management in the Preserve for the last few decades.

#### A. HISTORICAL BACKGROUND AND STATUTORY FRAMEWORK

In 1905, Peter Norbeck, a South Dakota native, visited the Black Hills for the first time. Impressed with what he saw in the Black Hills and fearful for what he thought might be lost if unfettered development continued, Norbeck spent the better part of the following two decades fighting to create the country's largest park. In 1912, four years after being elected to the South Dakota State Senate, he succeeded in designating a portion of South Dakota's land in the southern portion of the Black Hills as the Custer State Forest. The law required the Custer State Forest be managed so as to provide a breeding habitat for wildlife.<sup>3</sup> In 1920, Norbeck, by then a U.S. Senator, was instrumental in getting Congress to pass legislation greatly enlarging the size of the protected wildlife habitat.<sup>4</sup> Specifically, Congress authorized the President to designate up to 46,000 acres of the adjoining federally-owned Harney National Forest (since renamed the Black Hills National Forest) as a sanctuary "for the protection of game animals and birds" and their habitats.<sup>5</sup> The Act generally prohibited "hunting, trapping, killing, or capturing of game animals and birds" within the Preserve.<sup>6</sup> Additionally, Congress required that this "Custer State Park Game Sanctuary" remain virtually free from extractive or depletive uses such as logging, mining, and grazing.<sup>7</sup> Congress recognized Norbeck's contributions in 1949, when it renamed the federal portion of the sanctuary the Norbeck Wildlife Preserve.<sup>8</sup>

Norbeck's views aligned with those of Aldo Leopold, who encapsulated what became known as the "land ethic" with the following passage:

[D]o we not already sing our love for and obligation to the land of the free and the home of the brave? Yes, but just what and whom do we love? . . . A land ethic of course cannot prevent the alteration, management, and use of . . . 'resources,' but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state.<sup>9</sup>

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3. *Friends of the Norbeck v. U.S. Forest Serv.*, 780 F. Supp. 2d 975, 977-78 (D.S.D. 2011) [hereinafter *Friends I*].

4. 16 U.S.C. § 675 (2012).

5. *Id.*

6. 16 U.S.C. § 676 (2012).

7. *Friends I*, 780 F. Supp. 2d at 978.

8. *Id.*

9. ALDO LEOPOLD, A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER 239-40 (THE RANDOM HOUSE PUBL'G GRP. 1986) (1949).

Norbeck shared Leopold's values and it was with those values in mind that Norbeck fought for the establishment of the Preserve.<sup>10</sup> Specifically, Norbeck cared deeply about the potential impacts of economic development in the Black Hills on the continued viability of the many bird and mammal species—including bison, the rare northern goshawk, and the black-backed woodpecker—that lived in the area.<sup>11</sup> USFS wildlife biologists Randall Griebel, Kerry Burns, and Shelly Deisch describe Norbeck as a man harboring “an unwielding [sic] devotion to conservation during his entire political career.”<sup>12</sup>

The Preserve is a special place. Home to up to 139 bird and 62 mammal species,<sup>13</sup> including rare wildlife like the Northern Goshawk and the Black-Backed Woodpecker,<sup>14</sup> wildlife biologists have described the preserve as “one of the few places . . . that has continuous flowing streams and excellent opportunities to increase [certain species'] habitat.”<sup>15</sup> The area is “vegetatively diverse,” with the potential of providing “high quality” habitat consisting of the largest-diameter trees in the Black Hills.<sup>16</sup> These trees provide desirable nesting accommodations to a number of different species.<sup>17</sup> Moreover, the Preserve “contains some of the last stands of uncut trees in the state of South Dakota.”<sup>18</sup>

Management of the sanctuary has rarely been free from controversy. As early as 1927, the USFS attempted to initiate timber harvests within the Preserve.<sup>19</sup> The agency recognized that such harvests must not interfere with game animals and that preservation was the primary purpose for the Preserve.<sup>20</sup> Mining interests enjoyed a great success in 1948, when Congress opened up the preserve to new mining locations.<sup>21</sup> This law not only opened access to minerals, but it also authorized valid mining claimants to use and occupy the surface as necessary for mining operations, including the taking of timber.<sup>22</sup> Under the

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10. See generally Randall Griebel et al., *Focus Species-Norbeck Wildlife Preserve*, 5-6 (May 2007), available at [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5114246.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5114246.pdf) (citations omitted) (claiming that Leopold was “instrumental in sounding a huge wake-up call to alert state and federal governments that our bountiful wildlife species were not infinite in number”).

11. *Id.* at 1-7, 28, 51-53.

12. *Id.* at 6.

13. Answering Brief of the Federal Appellees at 9, *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969 (8th Cir. 2011) (No. 11-1661) [hereinafter USFS' Answering Brief] (citations omitted).

14. Griebel et al., *supra* note 10, at 28-29 (internal citations omitted). Along with the rare goshawk and woodpecker species, “elk, white-tailed deer, mountain goat, and other small mammals and birds” call the Preserve home, where “rugged granite formations and small streams” abound. *Id.* at 1.

15. *Id.* at 27.

16. *Id.* at 29.

17. See generally *id.* See also Appellants' Opening Brief at 5, *Friends of the Norbeck et al., v. U.S. Forest Serv.*, 661 F.3d 969 (8th Cir. 2011) (No. 11-1661) [hereinafter Friends' Opening Brief] (providing that within the parameters of the Preserve, “stands of late seral forest with large old legacy trees persist” and that these features create critical habitat for species associated with old growth forests).

18. Appellants' Reply Brief at 2, *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969 (8th Cir. 2011) (No. 11-1661) [hereinafter Friends' Reply Brief].

19. *Sierra Club-Black Hills Grp. v. U.S. Forest Serv.*, 259 F.3d 1281, 1284 (10th Cir. 2001).

20. *Id.*

21. See 16 U.S.C. § 678(a) (2012).

22. *Id.*

1948 law, takings generally had to comply with the “marking and timber sale practices applicable to the [Black Hills National Forest],” yet the law also explicitly allowed for clear-cutting if deemed necessary to the mining operation.<sup>23</sup> This was not what Norbeck had in mind for the Preserve.<sup>24</sup>

The Forest Service’s management of the Preserve is governed not just by the 1920 law establishing it—now known as the Norbeck Organic Act (“NOA”)<sup>25</sup>—but also by more general land management statutes, including the National Environmental Policy Act (“NEPA”),<sup>26</sup> the National Forest Management Act (“NFMA”),<sup>27</sup> and the Wilderness Act.<sup>28</sup> The relationship among these statutes’ mandates, standards, and prohibitions has led to much confusion.

Passed in 1969, NEPA is often described as the “Magna Carta” of environmental law.<sup>29</sup> It declared national policies for “encourag[ing] productive and enjoyable harmony between man and his environment” and for “promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”<sup>30</sup> However, NEPA’s mechanism for meeting such lofty goals is limited. It requires federal agencies to consider all of the effects of any proposed action that is likely to have a “significant impact” on the environment, to consider any mitigation measures, and to offer alternative actions that may have less detrimental environmental effects.<sup>31</sup> It does not actually require agencies to choose the most environmentally-friendly option.<sup>32</sup> As the Supreme Court has stated, “NEPA itself does not mandate particular results, but simply prescribes the necessary process.”<sup>33</sup> Still, this law has provided an avenue for concerned citizens and environmental organizations to influence the decision-making process and, if unsatisfied, to challenge actions in court.

In 1976, Congress passed NFMA to impose both procedural requirements and substantive standards on the management of national forests.<sup>34</sup> Sixteen years earlier, Congress had passed legislation requiring that “renewable surface resources of the national forests” be developed and administered for “multiple use[s]” and to ensure a “sustained yield” of products and services.<sup>35</sup> That legis-

23. *Id.*

24. See Griebel et al., *supra* note 10, at 3.

25. See 16 U.S.C. § 675 (2012).

26. 42 U.S.C. § 4321 (2012).

27. 16 U.S.C. § 1600 (2012).

28. 16 U.S.C. § 1131 (2012).

29. See, e.g., Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL’Y 293, 293 (2010).

30. 42 U.S.C. § 4321 (2012).

31. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4335 (2012).

32. See 42 U.S.C. § 4332(b) (stating that environmental concerns along with economic and technical considerations will all be given appropriate consideration).

33. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

34. National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (2012).

35. Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”), 16 U.S.C. §§ 528-531 (2012).

lation, however, lacked any real enforcement mechanism. NFMA was an effort to fill that gap. Procedurally, it required the USFS to develop a Land and Resource Management Plan ("LRMP") for each forest and to revise such plan at least every fifteen years. The plans were required to identify the uses and priorities for each particular area of the forest, to project harvesting levels for the forest, and to provide for a timber sale program, including "probable methods of timber harvest . . . ."<sup>36</sup>

NFMA also contained some legally-binding substantive standards. Specifically, it required the Secretary of Agriculture to develop regulations ensuring that plans provide for the "diversity of plant and animal communities . . . ."<sup>37</sup> It also restricted where timber harvests could be authorized, and it contained further restrictions on the use of clear-cutting, or "even-aged management," as the USFS prefers to call it.<sup>38</sup> The Department of Agriculture has interpreted the so-called "diversity standard" as having real substance. In its first regulations, promulgated in 1982, it required that all fish and wildlife habitats be managed so as "to maintain *viable populations* of existing native and desired non-native vertebrate species in the planning area."<sup>39</sup> It defined a "viable population" as "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area."<sup>40</sup> It went on to discuss the importance of maintaining viable populations, emphasizing that "habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area."<sup>41</sup> These regulations, like many others in the land management context, have undergone substantial revisions, primarily coinciding with changes in presidential administrations. The current regulations, enacted in 2012, require plans to define the "desired conditions" and to provide guidelines for attaining them. Rather than requiring viable populations of each and every species be maintained, the new regulations take a more holistic ecosystem approach. The emphasis is placed on the health of the ecosystem as a whole, rather than on specific species aside from those listed or proposed to be listed under the Endangered Species Act or those the USFS otherwise lists as being of "conservation concern."<sup>42</sup>

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36. 16 U.S.C. § 1604(f)(2) (2012).

37. 16 U.S.C. § 1604(g)(3)(B) (2012).

38. Timber harvests are allowed only where it is shown that (1) there will be no irreversible damage to the soil, slope, or watershed; (2) lands can be adequately restocked within five years; (3) protection is provided for streams, stream banks, shorelines, lakes, and wetlands; and (4) the method used is not selected primarily to maximize revenues or timber output. 16 U.S.C. § 1604(g)(3)(E) (2012).

39. 36 C.F.R. § 219.19 (West 1982) (emphasis added).

40. *Id.*

41. *Id.*

42. 36 C.F.R. § 219.1 to -.19 (2012).



In December of 1980, Congress designated 13,000 acres in the center of the Preserve as the Black Elk Wilderness,<sup>43</sup> thereby subjecting that area to the strictest of all management statutes, the Wilderness Act of 1964.<sup>44</sup> The Wilderness Act requires the USFS to manage the designated area “in such manner as will leave [it] unimpaired for future use and enjoyment as wilderness . . . .”<sup>45</sup> This statement is as strict of a preservationist mandate as contained in any law.<sup>46</sup> In preserving the “wilderness character” of the area, the USFS is required to exclude certain activities from the area, including the building of permanent human structures, new mining claims, new grazing, commercial enterprises, and timber harvests.<sup>47</sup> A notable exception to this last prohibition is when necessary for the “control of fire, insects, and disease.”<sup>48</sup> Courts, however, have interpreted this exception narrowly.<sup>49</sup>

The relationship among these management statutes has caused the USFS—as well as interested stakeholders—much consternation. It has also contributed to extensive litigation, as recent experience in the Preserve demonstrates. Such litigation is the subject of the following subpart.

#### B. FOREST PLANNING IN THE NORBECK WILDLIFE PRESERVE

The decades since the passing of NEPA and NFMA have not brought the desired consistency and transparency to the management of the Preserve. Rather, there has been near-constant conflict. In 1973, the USFS proposed a commercial timber sale in the Preserve, but it met strong opposition from a handful of environmentalists, all associated with the Black Hills chapter of the Sierra Club. These environmentalists filed suit in federal court, based on the USFS’ alleged failure to comply with NEPA by failing to prepare an Environmental Impact Statement (“EIS”).<sup>50</sup> The court agreed with the allegations and ordered an injunction against the proposed timber harvests.<sup>51</sup> The USFS went back and developed a new Norbeck Management Plan and prepared an EIS for it, after which the case was dismissed as moot in 1980.<sup>52</sup>

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43. Colorado Wilderness Act of 1980, Pub. L. No. 96-560, 94 Stat. 3265. “An Act to designate certain National Forest System lands in the States of Colorado, South Dakota, Missouri, South Carolina, and Louisiana for inclusion in the National Wilderness Preservation System, and for other purposes.” *Id.*

44. Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (2012).

45. *Id.* § 1131.

46. Courts have treated it as such. See, e.g., Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 119-22 (2010); Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83, 100-01 (2013).

47. 16 U.S.C. § 1133 (2012).

48. *Id.* at (d)(1) (2010).

49. *Sierra Club v. Lyng*, 662 F. Supp. 40 (D.D.C. 1987).

50. Plaintiffs’ Brief in Support of Motion for Partial Summary Judgment at 6, *Sierra Club-Black Hills Grp. v. Forest Serv.*, Civ. No. 94-D-2273 (D. Col. 1997) [hereinafter *Sierra Club Summary Judgment Brief*].

51. *Clauson v. Butz*, Civ. No. 74-5043 (W.D.S.D. 1974).

52. *Id.* at 6.

In 1983, the USFS promulgated its first Black Hills National Forest LRMP.<sup>53</sup> Most notably, this plan provided for a shift in management approaches from one emphasizing the protection of specific fish and game species to one focusing on “overall” habitat sustainability.<sup>54</sup> While it did not directly authorize timber harvests within the Preserve, it did not foreclose them either.<sup>55</sup> Sure enough, it took just three years for the USFS to propose commercial timber sales in the Preserve (specifically in the Needles and Grizzly areas), again prompting the Sierra Club to challenge the sales.<sup>56</sup> This time, the USFS had conducted an EIS, but the Sierra Club alleged that the EIS was inadequate in its consideration of the effects of the proposed harvests on wildlife.<sup>57</sup> It also argued that the harvests, on their face, violated the NOA’s preservationist mandate.<sup>58</sup> The USFS apparently felt the Sierra Club had a good claim, as it withdrew the sales and agreed to conduct a new Draft EIS for management of the Preserve.<sup>59</sup>

The USFS went through the NEPA process once again, ultimately releasing a new Final EIS in the summer of 1989. As with past plans, the new document sanctioned timber harvests (as well as grazing) in certain areas of the Preserve, including the Needles and Grizzly areas. The Sierra Club once again challenged the plan, saying it inadequately addressed the potential impacts on wildlife. On administrative appeal, the Chief of the USFS found in favor of the Sierra Club and required the preparation of a Supplemental EIS especially addressing concerns regarding old-growth dependent wildlife.<sup>60</sup> In response, the USFS again went back to the drawing board and in 1992 approved a Supplemental EIS. This Supplemental EIS maintained the management directives of previous incarnations, but with additional analysis. Most notably, it still allowed for timber harvests and grazing within the limits of the Preserve.<sup>61</sup>

During the next few years, the USFS formally authorized two large-scale timber harvests within the Preserve. In 1994, the USFS approved a timber sale in the Needles Project Area, in the southwest portion of the Preserve. The proposal authorized the harvesting of 6.774 million board feet of timber, along with the associated construction of over eighteen miles of roads.<sup>62</sup> The USFS estimated the sale to bring a \$2.4 million profit for the government.<sup>63</sup> Then in 1995,

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53. See *Sierra Club-Black Hills Grp. v. United States Forest Serv.*, 259 F.3d 1281, 1285 (10th Cir. 2001).

54. *Id.* (suggesting the new management approach was something beyond the strict parameters of the NOA).

55. *Id.*

56. See *id.*

57. *Id.*

58. See *id.*

59. *Sierra Club Summary Judgment Brief*, *supra* note 50, at 6-7.

60. *Id.* at 7.

61. *Id.*

62. *Id.* at 9.

63. Order at 3, *Sierra Club-Black Hills Grp. v. U.S. Forest Serv.*, Civ. Action No 94-D-2273 (D. Col. Aug. 3, 1999) [hereinafter *Sierra Club Order*].

it approved another sale in the Grizzly Project Area, this one providing for over six million board feet of timber along with the construction of nearly fifteen miles of roads.<sup>64</sup> Concurrent with each of these sales, the USFS also amended its Norbeck forest plan to lower the required big game hiding cover from 50% to 34%.<sup>65</sup> The indication was that this was necessary for the sales to be compliant with the plan.<sup>66</sup> The USFS did not conduct a full EIS for the projects, relying instead on a more cursory Environmental Assessment (“EA”), with a “finding of no significant impact.”<sup>67</sup> Unsurprisingly, each of the sale proposals was met with an immediate challenge. The Black Hills chapter of the Sierra Club, Biodiversity Associates, and American Wildlands filed administrative appeals of the sales, all of which were denied. The parties then filed suit in federal court for the District of Colorado, the basis of their claim being that the sales violated the NOA and that the USFS failed to conduct an adequate environmental review under NEPA. In 1999, their claims were dismissed.<sup>68</sup>

The groups appealed the decision to the Tenth Circuit Court of Appeals, setting the stage for a resolution of what the NOA required in light of the USFS’ more general obligations under NFMA. The Sierra Club’s principal argument was simple. The commercial timber harvests were inappropriate within the Norbeck Preserve because they violated the NOA’s specific purpose of “protection.”<sup>69</sup> The Sierra Club argued that the meaning of the NOA was clear on its face and that logging must be measured against the plain meaning of the mandate.<sup>70</sup> The Sierra Club also suggested that the USFS had formerly acknowledged the Preserve as distinguishable from other forest lands precisely because of the special NOA directive, which included unambiguous language such as “protection,” “breeding,” and “preserve.”<sup>71</sup> Although the Sierra Club acquiesced that logging was allowed, in limited circumstances, on the Preserve,<sup>72</sup> it also contended that USFS actions must be severely scrutinized, placing the NOA’s purpose of “protection” above all else.<sup>73</sup> Additionally, the Sierra Club claimed that the sheer lack of game preserves created by Congress further underscored

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64. Sierra Club Summary Judgment Brief, *supra* note 50, at 10.

65. Sierra Club Order, *supra* note 63, at 3.

66. See Sierra Club Summary Judgment Brief, *supra* note 50, at 9-10.

67. Sierra Club Order, *supra* note 63, at 3.

68. *Id.* at 9.

69. Sierra Club-Black Hills Grp. v. United States Forest Serv., 259 F.3d 1281, 1285 (10th Cir. 2001).

70. Appellants’ Opening Brief at 20, Sierra Club-Black Hills Grp. v. U.S. Forest Serv., 259 F.3d 1281 (10th Cir. 2001) (No. 99-1445) [hereinafter Sierra Club’s Opening Brief]. See also *Sierra Club-Black Hills Grp.*, 259 F.3d at 1286-87. The Tenth Circuit reviewed this case as a case of first impression to construe how overlapping congressional acts such as the NFMA affected the NOA’s special mandate governing the Preserve. *Id.*

71. Sierra Club’s Opening Brief, *supra* note 70, at 21.

72. *Id.* at 12.

73. *Id.*

the clear statutory directive of the NOA.<sup>74</sup> The Sierra Club reminded the court that even the USFS, in past documentation, had recognized that “the Preserve’s mandate ha[d] teeth—it was not a vague, discretionary pronouncement.”<sup>75</sup> NFMA, the Sierra Club affirmed, could not be interpreted to replace or to repeal the NOA; rather, the protective language of the NOA had remained the law for the last eighty years.<sup>76</sup>

The USFS had a different interpretation of the NOA, one less focused on protecting individual wildlife species. While admitting the proposed harvests would cause “wildlife disturbances,” the USFS justified the plans by pointing to their “mitigation measures oriented toward overall habitat diversity.”<sup>77</sup> The agency also relied on its promotion of “overall diversity” to justify compromising certain species at the expense of those already jeopardized.<sup>78</sup> Likewise, it argued that under a reasonable interpretation of the NOA, a “balancing of interests” would create favorable habitat for wildlife generally, and that the NOA was only supplemental to NFMA.<sup>79</sup>

The Tenth Circuit found in favor of the Sierra Club. The majority acknowledged that “[h]abitat management is a delicate venture,” and that often a balancing act was necessary in properly managing overlapping habitats.<sup>80</sup> However, the court rejected the USFS’ subordinate interpretation of the NOA, holding instead that “[i]t is a ‘fundamental tenet of statutory construction that a court should not construe a general statute to eviscerate a statute of specific effect.’”<sup>81</sup> In other words, the NOA was the governing statute for management scheduled on the Preserve, and plans were required to comply with its specific mandate.<sup>82</sup> Construing the NOA narrowly, the court then stated that the USFS’ reliance on “overall habitat diversity” was not what the Act intended, but rather that the plain meaning specified the protection of game animals and birds, some of which might be sacrificed under the USFS’ plan.<sup>83</sup> The court accordingly reversed and remanded to the USFS until the agency could prove its project would specifically fulfill the NOA’s mandate.<sup>84</sup>

Concurrent with the litigation over the Needles and Grizzly sales, the USFS developed and promulgated a new LRMP for the Black Hills National Forest

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74. *Id.* at 22. See also 16 U.S.C. §§ 671-698 (2012) (listing several nationally appointed game refuges and reserves).

75. Sierra Club’s Opening Brief, *supra* note 70, at 24.

76. *Id.* at 32 (citing *W. Va. Div. of Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 953 (4th Cir. 1975)).

77. *Sierra Club-Black Hills Grp. v. United States Forest Serv.*, 259 F.3d 1281, 1285 (10th Cir. 2001).

78. *Id.* at 1285-86.

79. *Id.* at 1286.

80. *Id.*

81. *Id.* at 1287 (quoting *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1078 (10th Cir.1996)).

82. *Id.*

83. *Id.* at 1287-89.

84. *Id.* at 1289.

(“Forest”). The revised plan, finalized in 1997, contained many changes from the 1983 plan, including allowing timber harvests in areas where logging had previously been prohibited, like the Beaver Park Roadless Area.<sup>85</sup> Several groups appealed the plan. In October of 1999, the Chief of the USFS, Mike Dombeck, upheld the revised plan while also directing a review to ensure the plan adequately protected species viability. The following month, the Sierra Club and others challenged in court the timber sales authorized pursuant to the 1997 revised forest plan, including a sale in the Veteran/Boulder Project Area in Beaver Park.<sup>86</sup> The purpose of such sales was to combat an infestation of pine beetles. The challengers claimed that the Final EIS for the sale was inadequate in its conclusion that the sale would not affect the viability of the northern goshawk. This conclusion was tied to findings in the 1997 forest plan—findings that Dombeck had declared inadequate.<sup>87</sup> In September of 2000, the USFS settled with the litigants. Pursuant to the settlement, the agency agreed not to allow any tree harvests in Beaver Park until it adopted a new plan that would solve the defects in the 1997 plan.<sup>88</sup>

In the meantime, the situation in the Forest worsened. In 2002 alone, pine beetles killed an estimated 114,000 trees, compared to the 5,200 killed in 1997 and 15,000 killed in 1999.<sup>89</sup> This not only made further spread of the pine beetles more likely, but also potentially increased the risk of large forest fires.<sup>90</sup> The Forest had indeed experienced several wildfires prior to 2002 “that were fueled by dead and dying [pine beetle] infested trees.”<sup>91</sup> According to the USFS, fires were “out pacing pending lawsuits and settlement negotiations” in the Forest.<sup>92</sup> Land managers and interested stakeholders thus turned to their friends in Congress. The Under Secretary for Natural Resources and the Environment, Mark E. Rey, testified in 2002 that the Preserve, as well as the Beaver Park Roadless Area, had “unique legal challenges that have eluded our ability for resolution through judicial or administrative means.”<sup>93</sup> “Simply put,” Rey concluded, “court proceedings have prevented implementation of our proposals for treatment—timber sales, thinning, and fuel treatments for example—in these two areas.”<sup>94</sup> U.S. Senator Tom Daschle, from South Dakota, sponsored a bill entitled “The Black Hills Fire Prevention Agreement” to address this purported

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85. *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1157 (10th Cir. 2004).

86. *Id.*

87. *Id.* at 1158.

88. *Id.*

89. *Id.* at 1159.

90. *Id.*

91. Appellee-Intervenor’s Brief at 15, *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969 (8th Cir. 2011) (No. 11-1661) (citation omitted).

92. *Id.* (citing *Biodiversity*, 357 F.3d at 1157-60).

93. Press Release, House Comm. on Agric., Black Hills National Forest Fire Risk and Management Plan Reviewed (June 6, 2002), <http://democrats.agriculture.house.gov/press/107/pr020606.html>.

94. *Id.*

emergency.<sup>95</sup> The bill was attached to—or, more accurately, hidden within—the unrelated Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States.<sup>96</sup> That bill passed Congress easily later in the summer of 2002.

Daschle's bill regarding the Black Hills, commonly called the "706 Rider," specifically authorized both the Needles and Grizzly timber sales.<sup>97</sup> Based on a finding that conditions inside and outside the Preserve were deteriorating and immediate action was in the public's interest,<sup>98</sup> Congress directed the USFS to use "the full spectrum of management tools including prescribed fire and silvicultural treatments to benefit game animal and bird habitat . . .," thereby allowing the USFS to meet its management obligations in the Preserve.<sup>99</sup> It in effect overrode the Tenth Circuit's opinion invalidating the 1994 and 1995 proposed timber sales within the Preserve.<sup>100</sup> It also overrode the settlement agreement in authorizing timber treatments within Beaver Park. This led to yet another round of litigation in the courts.

Biodiversity Associates filed a motion in the United States District Court for the District of Colorado to enforce the original settlement agreement. The court denied the motion, but Biodiversity Associates appealed claiming that the 706 Rider was unconstitutional because it "trenched on both the executive and judicial branches."<sup>101</sup> Biodiversity Associates' main argument was that the 706 Rider extended beyond mere congressional legislation to become an interpretation of the law, normally the province of either the administrative or judicial branches.<sup>102</sup> Biodiversity Associates argued the 706 Rider was unconstitutional because it attempted to "mandate specific results *without* changing the underlying environmental laws."<sup>103</sup>

Nonetheless, the court found it obvious that "South Dakota interests [would] turn[] to Congress for a legislative solution."<sup>104</sup> The court rejected the constitutional separation of powers challenge, holding the 706 Rider did not in-

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95. § 706(f)-(g), 116 Stat. at 868.

96. *Friends of the Norbeck v. U.S. Forest Serv.*, No. 10-cv-2164-AP, 2010 WL 4137500, at \*1 (D. Colo. Oct. 18, 2010) [hereinafter *Friends - CO*]. See also 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820 (2002) (authorizing timber sales, adding Wilderness, mandating management actions, and proposing a Memorandum of Understanding and settlement agreement between the South Dakota Department of Game, Fish and Parks and the USFS in implementing management of the Preserve).

97. § 706(f)-(g), 116 Stat. at 868.

98. § 706(a)(1), 116 Stat. at 864.

99. § 706(h), 116 Stat. at 868.

100. Appellee-Intervenor's Brief, *supra* note 91, at 3-4; § 706(a)(2)-(3), 116 Stat. at 864.

101. *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1159-60 (10th Cir. 2004).

102. *Id.* at 1160-61.

103. *Id.* at 1163.

104. *Id.* at 1159. The court noted that Congress had been seeking a streamlined process for years through the enactment of national legislation to obtain environmental approval of USFS projects in threatened national forests, "but [] efforts were caught up in the debate over the role of commercial logging in forest restoration." *Id.*

trude on the authority of either of the other branches.<sup>105</sup> The court discussed the implications of overturning the 706 Rider and ultimately held that executive actions and congressional judgments supersede a private group's own preferences concerning forest policies.<sup>106</sup> It further held that a private settlement agreement, which was reached without much interference from the judiciary, cannot "strip both Congress and the Executive of their discretionary powers," because "[t]he Constitution neither compels nor permits such a result."<sup>107</sup> This holding, purportedly supported by Article IV of the Constitution, established the 706 Rider as the governing rule for the Forest.<sup>108</sup>

In its 706 Rider, Congress also required the USFS and the South Dakota Department of Game, Fish, and Parks to enter into a memorandum of understanding on procedures for monitoring the effects of management activities, consulting on habitat management, and reviewing and recommending any changes to the direction of the preserve.<sup>109</sup> Through the agencies' joint review of the Preserve, they found that "the unique habitat needs of the Preserve's game animal and bird species sometimes conflict with one another," such that it was "not possible to design management activities around every species . . . ."<sup>110</sup> Accordingly, with stakeholder input, they selected twelve species—termed "Focus Species"—"that use key habitat elements with the objective that habitat management for those species '[would] provide for all game animals and birds' in the Preserve."<sup>111</sup> Included in the list were "the mountain goat, bighorn sheep, elk, white-tailed deer, turkey, bluebird, golden-crowned kinglet, brown creeper, ruffed grouse, song sparrow, northern goshawk, and black-backed woodpecker."<sup>112</sup>

The development of the "Focus Species" list set the stage for new proposals regarding their management. In July of 2007, the USFS proposed the "Norbeck Wildlife Preserve Project" (the "Wildlife Project"), which included "vegetative treatments"—i.e., logging—on over six-thousand acres within the Preserve and prescribed burning on over seven-thousand acres of the Black Elk Wilderness.<sup>113</sup> The stated purpose of the Wildlife Project was "to benefit 'game animals and birds' by improving habitat conditions" within the Preserve and specifically "to protect these habitats for game animals and birds in [the Preserve] from a wild-

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105. *Id.* at 1172.

106. *Id.*

107. *Id.*

108. *Id.* at 1173.

109. Norbeck Memorandum of Understanding, Pub. L. No. 107-206, § 706(i), 116 Stat. 868 (2002).

110. *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973 (8th Cir. 2011) [hereinafter *Friends II*].

111. *Id.*

112. Black Hills National Forest, Hell Canon Ranger District, Custer, South Dakota—Norbeck Wildlife Project, Notice of intent to prepare an environmental impact statement 72 Fed. Reg. 41703 (proposed July 31, 2007).

113. *Id.*

fire escaping from the Black Elk Wilderness.”<sup>114</sup> The agency modified the proposal in 2008 in response to a forest health evaluation reporting an alarming pine beetle infestation highlighted by a three-fold increase in pine beetles from 2004 to 2006.<sup>115</sup> Specifically, it proposed two additional alternatives to account for the heavy mortality of ponderosa pine occurring on the preserve resulting from the beetle infestation.<sup>116</sup> After completing its NEPA analysis, the district ranger issued a Record of Decision in March of 2010 selecting the “environmentally preferred alternative” providing for the optimum amount of old growth habitat in all areas of the preserve.<sup>117</sup>

Despite being the “environmentally preferred alternative,” the Wildlife Project still authorized logging on up to 5,190 acres within the Preserve and prescribed burning of approximately 7,502 acres.<sup>118</sup> As in the past, this newest logging proposal was met with strong opposition. Two groups, Friends of the Norbeck and the Native Ecosystems Council (collectively referred to as “Friends”), jointly sought declaratory and injunctive relief against the USFS in the United States District Court for the District of Colorado on September 3, 2010.<sup>119</sup> After a Motion to Transfer Venue was granted on October 18, 2010,<sup>120</sup> the United States District Court for the District of South Dakota denied the motion to enjoin the USFS from implementing the Wildlife Project.<sup>121</sup> The court gave the USFS deference in determining the effect on game animals and birds on the Preserve and held the agency’s decision was not contrary to the NOA.<sup>122</sup>

114. *Id.*

115. Appellee-Intervenor’s Brief, *supra* note 91, at 65. Within three years, dense ponderosa pine stands suffered a decrease of over 30% in the Wilderness. USFS’ Answering Brief, *supra* note 13, at 13-14. The agency predicted pine beetle activity “would spread to the entire project area by 2013,” and would “kill nearly all late-successional and dense ponderosa pine stands by the year 2020.” *Id.* See also *Friends II*, 661 F.3d 969, 976 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3507 (U.S. Apr. 23, 2012) (No. 11-1040) (mentioning that after considering these effects, the Forest Service should edit its original proposal).

116. *Friends I*, 780 F. Supp. 2d 975, 979 (D.S.D. 2011).

117. Dep’t of Agric., *Norbeck Wildlife Preserve Project: Record of Decision*, USDA at 8 (Mar. 2010), [http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/26669\\_FSPLT1\\_027490.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/26669_FSPLT1_027490.pdf) (referencing alternative 4 within Dep’t of Agric., *Norbeck Wildlife Preserve Project: Final Environmental Impact Statement Volume I*, USDA at S-2 (Mar. 2010), [http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/26669\\_FSPLT1\\_027533.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/26669_FSPLT1_027533.pdf)). To find other related documents see Dep’t of Agric., *Norbeck Wildlife Preserve Project: Wildlife habitat improvement project*, USDA (last visited Dec. 14, 2014), available at <http://www.fs.fed.us/nepa/fs-usda-pop.php/?project=16392>.

118. *Friends I*, 780 F. Supp. 2d at 980.

119. *Id.*

120. *Friends - CO*, No. 10-cv-2164-AP, 2010 WL 4137500, \*5 (D. Colo. Oct. 18, 2010).

121. *Friends I*, 780 F. Supp. 2d at 981 (citation omitted).

122. *Id.* at 982 (stating that the NOA allows timber sales pursuant to 16 U.S.C. § 678(a), and a “full spectrum of management tools . . . to benefit game animal and bird habitat in meeting the purposes of the Norbeck Organic Act,” pursuant to the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United State, Pub. L. No. 107-206, § 706(h), 116 Stat. 820). The district court held that “the plaintiffs’ claims [were] unavailing.” *Id.* This inhibited any further analysis concerning the NOA mandate. *Id.* See also 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§



On appeal, Friends again argued that the Wildlife Project violated the NOAA's strict conservationist mandate. It would, the groups claimed, *destroy* nests, *kill* hens and chicks, and create a *potential mortality* of birds and *loss of habitat* for nesting and their young.<sup>123</sup> Friends also argued that the Wildlife Project would remove trees through mechanical treatments and utilize burning to clear shrubs, grassland, and meadows,<sup>124</sup> which would destroy crucial habitat and logs that act as cover.<sup>125</sup> Friends cited to the USFS' track record for support. The USFS, according to Friends, had "systematically [been reducing species] protection over the past twenty years."<sup>126</sup> The group also challenged the USFS' scientific findings, due to many of their predictions having proven false in the past.<sup>127</sup> Friends contended bluntly that "wild predictions regarding the impacts of pine beetles" were not supported.<sup>128</sup> Countering the notion of the Wildlife Project being the most environmental way of dealing with the pine beetle threat, the group argued that the pine beetle, rather than being a threat, could actually have significant positive effects and improve habitat on the Preserve. Friends thus argued for a "no action" alternative as truly the "best" alternative.<sup>129</sup>

In defense, the USFS insisted the Wildlife Project protected species living in the Preserve by "improving their habitat."<sup>130</sup> The USFS maintained the Act was broadly-worded and lacked detail about how the agency should manage the Preserve to achieve such an ambiguous end, and further the court should not improperly "entangle[] itself in the abstract policy disagreement of how best to pro-

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706(f)(1), (g), 116 Stat. 820. The court indicated these two prior permissions for timber sales to support its rationale. *Id.*

123. Friends' Opening Brief, *supra* note 17, at 26-27 (emphasis added) (regarding information that was gleaned from the Wildlife Project itself). See also Friends' Reply Brief, *supra* note 18, at 12. Friends advocated that the court had rejected projects when it found that timber harvests and road construction would create "wildlife disturbances" and have "deleterious effects" on species. *Id.*

124. USFS' Answering Brief, *supra* note 13, at 32.

125. Friends' Opening Brief, *supra* note 17, at 37, 40.

126. *Id.* at 22.

127. *Id.* at 47-48. The historical outbreak in the Beaver Park area of the Preserve, which triggered the passing of the 706 Rider, only proved to be devastating to nearly 30 % of the vegetation and did not succeed in destroying the entire mature forest habitat. *Id.* at 54-55.

128. *Id.* at 48.

129. Appellee-Intervenor's Brief, *supra* note 91, at 58. See also *Sierra Club v. U.S. Forest Serv.*, 878 F. Supp. 1295, 1313 (D.S.D. 1993) (defining snags as "standing dead trees [that are] significant because many species depend on snags for habitat."). Pine beetles could actually provide more habitats for those species that thrive on dead "snags". See Friends' Opening Brief, *supra* note 17, at 49. Pine beetles could provide a food source for the wood foraging birds and smaller mammals. *Id.* at 48-50. The Forest had historically supported trees up to 300 years old, which buttressed an inference that "survival from multiple [pine beetle] epidemics was apparently not only possible, but was relatively common." *Id.* at 54. Friends also argued that justifying actions affecting nature was not reasonable when we could not predict how nature itself might react on its own, thus favoring a "no action" alternative. *Id.* at 48.

130. USFS' Answering Brief, *supra* note 13, at 1. Friends rested its predilections, stating that the "Black Hills Beetle," as they were previously named, has been around since the turn of the twentieth century, with outbreaks in the 1930s, 1940s, 1960s, 1970s, and 1990s, and with some incidents larger than the current one, the forests were always able to manage themselves. *Id.* at 30.

tect game animals and birds” as the Tenth Circuit had previously done.<sup>131</sup> According to the USFS, the question of whether the pine beetle improved or degraded the Preserve was a judgment call properly within its expertise.<sup>132</sup> The agency claimed to have made an informed decision, albeit among competing scientific and other management views, so that its “analysis [was] entitled to deference.”<sup>133</sup> Specifically, the USFS rationalized the decision by suggesting that active management including logging activities, was necessary to prevent the area from becoming a “monoculture[] of dense trees . . . contrary to the need for various habitats and a mix of conditions over time for *all* game animals and *all* birds.”<sup>134</sup>

The USFS also considered Friends’ doubts surrounding the dire predictions on past pine beetle epidemics, but it ultimately dismissed them. Friends claimed that the infestation in an area outside the Preserve was “by any standard, very serious” and that the area was facing imminent danger.<sup>135</sup> It urged that an act of Congress was the only solution available to the agency during the emergency.<sup>136</sup> The USFS concluded it was impossible to know what the future held, but the historical infestation was not overestimated, and even if it was overestimated, the USFS was not necessarily wrong about the current epidemic.<sup>137</sup>

On appeal, the Eighth Circuit Court of Appeals clarified that the NOA’s mandate, contrary to the USFS’ contentions, provided standards by which to measure the USFS’ management decisions.<sup>138</sup> It held that the NOA’s mandate may have been broad, but the Act distinctly favored “game animals and birds” and allowed for judicial interpretation regarding the agency’s decisions concerning this specificity.<sup>139</sup> Nonetheless, the court acknowledged that in a case such as the one surrounding the Preserve, analysis “require[d] a high level of technical expertise,” and deference to the “informed discretion of the responsible federal [agency]” was obligatory.<sup>140</sup>

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131. *Id.* at 30. See generally *Sierra Club-Black Hills Grp. v. U.S. Forest Serv.*, 259 F.3d 1281 (10th Cir. 2001) (discussing the policies surrounding NOA interpretation).

132. Appellee-Intervenor’s Brief, *supra* note 91, at 57.

133. *Id.*

134. *Id.* at 27-28. See also USFS’ Answering Brief, *supra* note 13, at 3. Additionally, the USFS suggested it approved the Wildlife Project to “remedy the unintended adverse consequences of wildfire suppression” such as pine beetle infestations and catastrophic fires. *Id.* The USFS eluded Friends’ “no action” argument by demonstrating that Alternative Four was implemented for the primary reason of protecting the forest and the species within it, and the pine beetle mitigation was merely a secondary benefit. *Id.* See also Appellee-Intervenor’s Brief, *supra* note 91, at 27-28. The USFS strongly opposed the no action alternative, claiming that it most of all, was “contrary to the NOA.” *Id.*

135. *Id.* at 64.

136. *Id.*

137. *Id.*

138. *Friends I*, 780 F. Supp. 2d 975, 982 (D.S.D. 2011).

139. *Id.*

140. *Id.* at 976 (citing *Cent. S.D. Coop. Grazing Dist. v. Sec’y of U.S. Dept. of Agric.*, 266 F.3d 889, 894 (8th Cir. 2001)). In its analysis, the court decided that the Forest Service “did consider the direct and indirect effects of the Wildlife Project on the Preserve’s . . . species of local concern.” *Id.* It also ruled that the district ranger, through deferment of action in the Black Elk Wilderness; and modifi-

Thus, the court ultimately concluded that the USFS faced two impending threats—habitat degeneration and fire hazard caused by the pine beetle epidemic—that would “dramatically degrade . . . the Preserve if left unchecked.”<sup>141</sup> The court recognized that the USFS held a dual responsibility of balancing the needs of separate species including indicator species of the Forest and vegetative species within the Forest.<sup>142</sup> In light of these technical tradeoffs, the court held the following: (1) that agency deference was essential to battling the two major issues; (2) that the agency’s decision to forego the “no action” alternative was not arbitrary or capricious; and (3) that a party is not granted relief considering “mere dissatisfaction with an agency’s decision.”<sup>143</sup> As a last note, the court also added that Congress, with the 706 Rider, had already previously authorized the use of such management tools, even if otherwise in contravention of the NOA.<sup>144</sup> Subsequent to this holding, Friends petitioned for certiorari to the United States Supreme Court and was denied review on April 23, 2012.<sup>145</sup>

The result of all of this litigation is a forest in poor health. Decades of wild-fire suppression in the Preserve have led to the predominance of ponderosa pine in overly dense stands, decreasing “the prevalence of other types of habitat and creating a substantial risk of catastrophic fire. Additionally, in 2006, the mountain pine beetle began killing ponderosa pine stands within the Black Elk Wilderness at the center of the preserve.”<sup>146</sup> The outbreak is expected to kill nearly all of the late successional pines in the preserve by 2020.<sup>147</sup> Nobody should be content with the management of the Forest over the last three decades. Unfortunately, this story is far from unique.

### III. A HISTORY OF FOREST FIRE MANAGEMENT

Experiences in the Preserve—and their causes—cannot be understood without consideration of the wider context of forest management in the United States. At the heart of the story is the USFS’ spirit of independence rooted in notions of scientific management free from political constraints. Even as the USFS continues to fight for autonomy, Congress, since at least 1916, has taken steps to limit the agency’s discretion, especially in regards to the preservation of natural and recreation values, of which the establishment of the Preserve can be seen as an early example. Even with these laws, however, the USFS has retained

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cation to action placement, action timing, and treatments within the Preserve, provided adequate mitigation to possible adverse effects. *Id.* The court placed weight on the fact that the Wildlife Project not only met its goal of retaining optimum habitat but also limited the spread of the destructive beetle. *Id.*

141. *Id.* at 977.

142. *Id.*

143. *Id.*

144. *Id.* (referencing the 706 Rider from past legislation in the 2002 Appropriations Act).

145. *Friends II*, 661 F.3d 969, 976 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3507 (U.S. Apr. 23, 2012) (No. 11-1040).

146. *Friends II*, 661 F.3d at 972.

147. *Id.*

much discretion in decision-making authority, particularly in the area of fire management. In exercising its autonomy in regards to fire, the USFS has made many mistakes, contributing to an emergency in forest health that ironically is the primary rationale for the relative lack of procedural and substantive constraints on its response to fire threats. An important part of the reason the USFS—like other agencies—has been able to retain much autonomy in making ultimate decisions is that Congress has typically relied on a model of “scientific management” to direct and to constrain agency decisions. Experts are increasingly realizing, however, that even the decisions that incorporate and necessitate a great deal of scientific information and understanding still ultimately require a policy choice. All the while, Congress seems content to largely stay on the sidelines, except when it intervenes through specific (and theoretically temporary) substantive riders tacked onto appropriations bills, typically with little or no oversight or accountability. The 706 Rider, which authorized logging projects in the Preserve even after a federal court had struck them down, exemplifies this approach to governance. It is not a good one. These interventions, rather than solving management stalemates as we have seen in the Preserve, merely perpetuate the distrust of parties on all sides of every land management debate.

#### A. THE UNITED STATES FOREST SERVICE’S AUTONOMY

Since the transfer of jurisdiction over federal forest reserves to the USFS in 1905, the agency has continuously fought for administrative autonomy and broad discretion in managing federal forests.<sup>148</sup> Gifford Pinchot, the first head of the USFS, had a profound influence on the agency’s culture and policies for the better part of the twentieth century. His brand of conservation—more broadly referred to as “utilitarian conservation”—was not about constraining economic exploitation, including grazing and timber harvesting, within the national forests, but rather about wisely managing such activities in the present so as to ensure an equitable allocation of benefits in the present and a stable supply into the future. Importantly, Pinchot insisted that his mode of conservation would not require the sacrificing of any yield in the present. In 1905, just prior to the transfer, President Roosevelt, himself an ally of Pinchot, assured pro-development westerners that the government’s policy was “consistent to give to every portion of the public domain its highest possible amount of use.”<sup>149</sup> Pinchot added that “[t]he administration of the forest reserves is based upon the general principle . . . that the reserves are for use. They must be useful first of all to the people of the neighborhood in which they lie.”<sup>150</sup>

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148. See generally Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223 (2004).

149. AMERICAN FORESTRY ASSOCIATION, PROCEEDINGS OF THE AMERICAN FOREST CONGRESS HELD AT WASHINGTON, D.C., JANUARY 2 TO 6, 1905 11 (Ulan Press 2012) (1923).

150. *Id.* at 392.

Pinchot orchestrated “one of the greatest and most daring achievements in conservation history” in setting aside almost three-quarters of the current National Forest system, all over the opposition of the timber industry.<sup>151</sup> This is why public lands law scholar Charles Wilkinson finds irony in the fact that it is environmentalists who now “decry Pinchot as the source of the centralized timber targets that drive inflated harvests throughout the national forests,” and it is the timber industry which views Pinchot as “the philosophical parent of high-yield forestry in the national forests.”<sup>152</sup> The reason, of course, is that Pinchot saw timber production as the dominant use of forests, and he sought its curtailment as desirable only to the extent it was necessary to protect future harvests, not habitat for plants or wildlife or other environmental values.

According to environmental historian Samuel P. Hays, Pinchot’s approach was not the only one possible. Rather, Pinchot in fact “considerably narrowed” the agency’s forest management objectives.<sup>153</sup> In the first decade after 1891, when Congress first authorized presidents to establish federal forest reserves,<sup>154</sup> various management objectives were expressed. Some saw forests as primarily habitats for wildlife, habitats that must be protected even outside the boundaries of the few federally-designated wildlife refuges. Others saw them as protective cover for their sources of water for irrigation and urban and industrial uses.<sup>155</sup> But Pinchot, the “architect” of the national forest system,<sup>156</sup> saw their purpose as being first and foremost a response to an impending “timber famine.”<sup>157</sup> Pinchot, Hays has argued, “deliberately rejected the notion of forests as wildlife refuges or as public amenities,” and he “also gave little attention to watershed objectives and subordinated them to the more important grazing and wood production programs.”<sup>158</sup> Economic development was the ultimate goal in managing the forests, as can be seen in the agenda of the Governors’ Conservation Congress in 1908, which Pinchot drafted. This agenda gave scant attention to aesthetics or wildlife and prioritized water resource development over watershed management.<sup>159</sup>

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151. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 120 (1992).

152. *Id.*

153. SAMUEL P. HAYS, *THE AMERICAN PEOPLE AND THE NATIONAL FORESTS* 13 (2009) [hereinafter HAYS - AMERICAN PEOPLE].

154. Forest Reserve Act of 1891, 26 Stat. 1095, 1103 (repealed 1976).

155. See generally HAYS - AMERICAN PEOPLE, *supra* note 153, at 12.

156. See *id.* at 13. See also SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* 29-30 (1959) [hereinafter HAYS - CONSERVATION]; WILLIAM K. WYANT, *WESTWARD IN EDEN: THE PUBLIC LANDS AND THE CONSERVATION MOVEMENT* 299 (1982). While scholars and land managers continue to debate the substance and wisdom of Pinchot’s approach, none doubt his importance. Indeed, as environmentalists, foresters, and the timber industry debated both the legality and the efficacy of clear-cutting during the 1970s, each side attempted to invoke Pinchot’s legacy. See CHAR MILLER, *PIONEERS OF CONSERVATION: GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM* 357-61 (2001).

157. See, e.g., HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 95 (2004).

158. HAYS - AMERICAN PEOPLE, *supra* note 153, at 13.

159. *Id.*

Even with Congress giving Pinchot and his agency almost free reign in managing national forests, he and his agency continuously exceeded their explicit statutory powers. The most important example of this was in allowing livestock grazing within national forests despite there being no statutory authorization for doing so under the Forest Management Act of 1897.<sup>160</sup> Pinchot thus effectively added a third purpose (grazing) to the two (timber and watershed protection) contained in the statute. Even more alarming is the fact that this third purpose contradicted the purpose of watershed protection. Despite the fact that watershed management was the rationale without which the federal government likely would not have committed itself to the creation of national forests, this purpose received little attention. The grazing that the agency allowed in fact did great damage to the sources of water. Hays cites this as strong evidence that “the early history of the agency was shaped not so much by legal mandates as by the economic and social circumstances within which the agency made its choices.”<sup>161</sup>

Part of the USFS’ near-constant fight for wide, if not unfettered, discretion lies in its technocratic outlook that was a central component not just of Pinchot’s conservationism, but of progressivism more generally.<sup>162</sup> Pinchot and others had come to believe that politicians and industrialists, in seeking their own “power and profit,” were no longer able to serve the public good. They believed that affairs, particularly when involving technical questions, should be decided by educated elites, including foresters, engineers, sanitarians, social workers, and others, who were presumed to have been guided by reason and science rather than by selfish interests.<sup>163</sup> This is why Hays famously characterized conservation as primarily a “scientific movement” rather than one of “democratic protest.”<sup>164</sup> Decisions, according to Pinchot and other progressives, were best made by scientific experts, ideally insulated from the corrupt political processes.<sup>165</sup>

The USFS’ independent spirit is part of what made that agency a model of bureaucratic efficiency and expertise. It has, however, also placed the USFS in the crosshairs of environmentalists and recreationists who resent what they see as the agency’s continued close relationship with the timber industry. These opponents have had some victories in Congress, even if they have proven somewhat illusory. These congressional actions are the subject of the following subpart.

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160. Forest Reserve Management Act, 30 Stat. 11, 35 (1897).

161. HAYS - AMERICAN PEOPLE, *supra* note 153, at 30-32.

162. See generally HAYS - CONSERVATION, *supra* note 156 (arguing that conservation was above all a scientific movement which arose “from the implications of science and technology in modern society” and which argued that “technicians, not legislators, should deal” with conflicts among resource users); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967) (contending that the Progressive Movement was primarily a middle-class movement made up of bureaucrats, technicians, and academics who sought to impose order on an increasingly chaotic society).

163. See DAVID A. CLARY, *TIMBER AND THE FOREST SERVICE* 16 (1986).

164. HAYS - CONSERVATION, *supra* note 156, at 2-3.

165. See *id.*

## B. CONGRESSIONAL ATTEMPTS TO LIMIT FOREST SERVICE AUTONOMY

Congress has taken steps to reign in USFS discretion, particularly as applied to the protection of natural features beyond those involved in timber production, including wilderness values and other important habitat areas for wildlife such as the Preserve. Indeed, at the same time that Pinchot and his brand of utilitarian, pro-development conservation came to dominate management of the national forest system, a movement to preserve areas and their communities of life from the negative impacts of economic development also gained prominence. Although some “preservationists”—including John Muir and Aldo Leopold—cited to the inherent value of nature as a rationale for protection, most (even including Muir and Leopold) justified preservation of certain areas of “wilderness” based on their potential experiential value. Wilderness areas provided unique recreational opportunities, whether in allowing American men to develop, test, and showcase what they saw as “masculine” or “manly” characteristics, or merely in providing an escape hatch of sorts from the burdens of modern life.<sup>166</sup> Many pointed to the supposed frontier as serving these same functions, such that the apparent closing of the frontier late in the nineteenth century brought a sense of urgency to the call to preserve areas of wilderness as a remnant of the frontier experience.<sup>167</sup> As Leopold himself saw it, the creation of protected wilderness areas was necessary “for allowing the more virile and primitive forms of outdoor recreation to survive the receding economic fact of pioneering.”<sup>168</sup>

The ideological divide between adherents to Pinchot’s brand of “utilitarian conservation,” as it came to be known, and a more nature-centric, pro-wilderness, or anti-development preservationist ethos, perhaps best represented by Muir and his Sierra Club, came to a head over the question of whether a dam should be constructed in the Hetch Hetchy valley of Yosemite National Park. In the first years of the twentieth century, the City of San Francisco proposed erecting a dam in the valley, both to store water to supply the city through a system of aqueducts and other waterworks and to serve as a hydroelectric facility to meet the city’s growing power needs. Once Muir caught wind of the proposal, he and his Sierra Club challenged the proposal, sparking a national debate. In one

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166. Kammer, *supra* note 46, at 103. See also, e.g., JOHN MUIR, OUR NATIONAL PARKS 1-2 (1901); Aldo Leopold, *Wilderness as a Form of Land Use*, in THE GREAT NEW WILDERNESS DEBATE 75 (J. Baird Callicott and Michael P. Nelson eds., 1998).

167. Kammer, *supra* note 46, at 103. As Kammer wrote, “Just as the frontier was thought to have instilled in Americans the virtues of self-reliance, moral fortitude, and resolute determination, . . . protected [parks or refuges] would now have to suffice as a symbolic substitute.” *Id.* at 103-104.

168. Leopold, *supra* note 166, at 79. See also Letter from Wallace Stegner (Dec. 3, 1960), as quoted in Plaintiffs-Appellants Opening Brief at 1, *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024 (9th Cir. 2010) (No. 08-17406) (discussing wilderness advocate Wallace Stegner encapsulated this view when he emphatically insisted that wilderness must be preserved because “[I]t was the challenge against which our character as a people was formed.” In the same passage, Stegner also cited to the other experiential values of wilderness, namely its importance for “our spiritual health” due to the “incomparable sanity it can bring briefly, as vacation and rest, into our insane lives”).

work, Muir went so far as to compare the damming of Hetch Hetchy to the destruction of a temple. He sarcastically called for the building of dams not to stop there, but rather to continue with the damming of “the people’s cathedrals and churches, for no holier temple has ever been consecrated by the heart of man.”<sup>169</sup> Pinchot, for his part, favored the proposal. The lines were drawn. As one prominent environmental historian summarized the debate’s importance, “[f]or the first time in the American experience the competing claims of wilderness and civilization to a specific area received a thorough hearing before a national audience.”<sup>170</sup> Ultimately, the dam was built. The preservationists lost, but the battle set the stage for future preservationist victories.

To preservationists like Muir, the Hetch Hetchy controversy only confirmed the USFS’ hostility to the wilderness idea. As early as 1897, when the National Academy of Sciences recommended the creation of new national parks, which generally prohibited extractive industries, in the Rainier Forest Reserve and the Grand Canyon Forest Reserve, Pinchot demonstrated his opposition to national parks and their “no timber harvest” policies.<sup>171</sup> Later, in 1905, he advocated that the parks be placed under the jurisdiction of the Forestry Bureau so that timber could be cut.<sup>172</sup> Pinchot got his wish. At the same time that the Bureau was renamed the USFS and it acquired jurisdiction over federal forest reserves (renamed “national forests”), it also gained jurisdiction over national parks. Then, at the Governors’ Conservation Conference of 1908, Pinchot gave only scant support to parks and to aesthetic or wildlife issues, and he refused to allow Muir or the head of the General Federation of Women’s Clubs to speak.<sup>173</sup> After this conference, preservationists and park advocates devoted their energies to the formation of a separate agency to administer the national parks that would emphasize aesthetics and wildlife protection. The Hetch Hetchy controversy—and the national attention it garnered—emboldened this effort, ultimately culminating in the creation in 1916 of the National Park Service, an entity completely independent from the USFS, to govern the growing national park system.<sup>174</sup>

The USFS seemed to change its stance towards the protection of natural, recreation, or aesthetic values in the 1920s, primarily through the efforts of Leopold, then an assistant forester in the Carson National Forest in New Mexico. Preservationists gained a great victory in 1924, when the USFS, under Leopold’s direction, carved out of that forest the world’s first protected wilderness area (at

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169. JOHN MUIR, *THE YOSEMITE* 261-62 (1912).

170. RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 162 (New Haven, CT: Yale University Press 1968). See, e.g., Elmo R. Richardson, *The Struggle for the Valley: California’s Hetch Hetchy Controversy, 1905-1913*, 38 CAL. HIST. SOC’Y Q. 249 (1959); HOLWAY R. JONES, JOHN MUIR AND THE SIERRA CLUB: THE BATTLE FOR YOSEMITE (Sierra Club, 1965). Recently, Nash’s thesis has been under attack. See generally, ROBERT W. RIGHTER, *THE BATTLE OVER HETCH HETCHY* (2005).

171. HAYS - AMERICAN PEOPLE, *supra* note 153, at 44.

172. *Id.*

173. *Id.* at 44-45.

174. *Id.* 45.



least by name), the Gila Wilderness.<sup>175</sup> Later in the decade, the USFS authorized the administrative designation of protected “primitive” areas. However, the USFS proved unreliable in managing such areas, prompting a movement in the 1950s for the statutory protection of “natural conditions,” including wildlife, in congressionally-designated wilderness areas. In 1951, for instance, Howard Zahniser, who drafted the bill which would become the Wilderness Act, argued that statutory protection of wilderness was necessary in order “to stabilize the system and prevent successive administrative decisions to decrease the size of the [administrative wilderness] system.”<sup>176</sup>

The notion of congressionally-designated wilderness areas with a strict preservationist mandate gained support in Congress, and in 1964, Congress passed the Wilderness Act.<sup>177</sup> This piece of legislation differed from other land management statutes. Whereas all other federal acts direct management agencies to balance some diverse set of values—through use of their scientific and bureaucratic expertise—the Wilderness Act requires management for one use to predominate: wilderness preservation. This reflects the fact that the legislation was not a delegation of authority to an agency, but rather the stripping away of authority; it was an exclusion of certain lands from the normal operation of the USFS and, later, other land management agencies.<sup>178</sup>

The environmental movement of the late 1960s and 1970s brought new constraints on federal land management, including the USFS’ operations. Both NEPA, passed in 1969, and NFMA, passed in 1976, increased public involvement in national forest decision making and heightened the degree of administrative and judicial oversight. However, while both laws have provided environmentalists a wide avenue for challenging agency actions, as recent experiences in the Preserve demonstrate, neither provides much of a substantive constraint on

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175. Leopold, whose name stands beside Muir’s in wilderness movement lore, was the chief proponent of the Gila Wilderness Area’s creation. Interestingly, though he is often cited for his writings on environmental (or biocentric) ethics, Leopold’s arguments for the preservation of the Gila wilderness centered on the recreational opportunities it would afford to visitors. He wrote that “the argument for . . . wilderness areas is premised wholly on highest recreational use.” Aldo Leopold, *The Wilderness and its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921).

176. Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 297 (1966). According to McCloskey, Zahniser and others also feared that the USFS would be influenced by “pressure from commodity interests . . .” *Id.* Similarly, one scholar, in 1953, argued that Congress needed to protect wilderness itself, observing that:

Forest Service wilderness reservation policy in western states may have been sincerely inaugurated to meet preservation sentiment which began developing over one hundred years ago. . . . However, the application of the policy in many cases developed into political maneuvers to thwart the Department of the Interior and the National Park Service. . . . The policy was not the result of a “grass roots” movement. . . . It was never intended to reserve specified areas permanently from development.”

David Gerard, *The Origins of the Federal Wilderness System*, in POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN 211 (Terry L. Anderson ed., 2000) (quoting James P. Gilligan, *The Development of Policy and Administration of Forest Service Primitive and Wilderness Areas in the Western United States* 221-22 (1953) (unpublished Ph.D. dissertation, University of Michigan)).

177. See *supra* Section II.A.

178. See Kammer, *supra* note 46, at 100-01.

agency decision making. For its part, NEPA does not regulate the substance of agency decisions, including the content of forest plans, at all. Rather, NEPA's mandate, though important, "is essentially procedural."<sup>179</sup> In short, as long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."<sup>180</sup> Although NFMA contains some substantive limits on the USFS' decision-making, it still delegates substantial autonomy to the USFS in many of its important responsibilities, including the allocation of resources to the many uses of national forests. As the Ninth Circuit once artfully observed, the multiple-use mandate indeed "breathes discretion at every pore."<sup>181</sup>

More than any other activity, the USFS enjoys almost unlimited discretion in regards to controlling fire. Even the greatest victory for both preservationists and low-impact recreationists in limiting the agency's discretion—the Wilderness Act—contains an exception for fire management activities. The manner in which it has exercised that discretion is the subject of the next subpart.

### C. THE EVOLUTION OF FIRE MANAGEMENT

The experiences over the past decades in the Preserve show the extent to which the USFS has maintained its autonomy in regards to fire management. Over recent decades, its policy has evolved from one emphasizing all-out fire suppression to one recognizing the ecological imperative of allowing at least some to burn.

#### 1. *Tradition of Fire Suppression*

Pinchot and other foresters emphasized the importance of reducing waste as a means to conserve resources for future generations.<sup>182</sup> Indeed, natural re-

179. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

180. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted).

181. *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (alteration in original) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

182. At least one scholar has argued that Pinchot was not all that concerned with future generations but rather with using public ownership as a "means of strengthening the social system of his own time," with only a secondary emphasis on future generations. RICHARD M. ALSTON, *THE INDIVIDUAL VS. THE PUBLIC INTEREST: POLITICAL IDEOLOGY AND NATIONAL FOREST POLICY* 17 (1983). This would explain Pinchot's focus on efforts to regulate or eliminate resource monopolies, and more generally, his promotion of the democratization of resource use and the sharing of their benefits; both goals centered on changing society to help people in the present. In his memoir, for instance, Pinchot wrote of monopoly as the "source of many of the economic, political, and social evils which afflict the sons of men," and he argued the regulation or abolition of monopoly was "an inseparable part of the Conservation policy." GIFFORD PINCHOT, *BREAKING NEW GROUND* 507 (Island Press 1987) [hereinafter *PINCHOT – BREAKING NEW GROUND*]. Pinchot's emphasis on promoting democracy in regard to resources and their benefits can perhaps best be seen in his famous quote that "[w]here conflicting interests must be reconciled, the question will always be decided from the standpoint of the greatest good of the greatest number in the long run." CLARY, *supra* note 163, at 22 (citation omitted).

source legal scholars Lawrence MacDonnell and Sarah Bates recently argued that prevention of waste was really the central component of Pinchot's forestry paradigm.<sup>183</sup> A key source of waste, as Pinchot, other foresters, and much of the public saw it, until very recently, was fire. The response was simple: to suppress all forest fires. In an 1899 article in the popular magazine *National Geographic*, Pinchot attempted to explain the relationship between forest fires and forest composition.<sup>184</sup> He assumed that "fires do vast harm" and that it was a matter of "first interest and importance" that they "be prevented or extinguished."<sup>185</sup> Indeed, upon transfer of jurisdiction over federal forests to the USFS in 1905, Pinchot directed agency foresters that "[p]robably the greatest single benefit derived by the community and the nation from forest reserves is insurance against the destruction of property, timber resources, and water supply by fire."<sup>186</sup> Pinchot saw fires not just as harmful to forests—and the timber industry that was dependent upon them—but as actual destroyers of forests themselves. Specifically, he contended that fires were "probably" to blame for a "very large part" of certain regions of the country being dominated by treeless prairies rather than forests.<sup>187</sup> This is why Congress, in 1897, designated fire prevention as one of the primary rationales for the establishment of forest reserves.<sup>188</sup>

A particularly devastating year of fires in 1910 only sparked greater concerns for controlling, and even eliminating, fires from American forests. In that year alone, over a hundred separate fires burnt over three million acres in the northern Rockies, killing eighty-five people and destroying several towns.<sup>189</sup> Congress responded by passing the Weeks Act of 1911, which authorized the USFS to purchase private forest lands, thereby bringing them under federal protection, and to support state and private protection programs.<sup>190</sup> Though the 1910 fires were caused in part by the USFS' overzealous logging, the mission of the agency (the protection of timber resources) remained unscathed,<sup>191</sup> unlike much of the forest itself. In 1924, The Clarke-McNary Act extended protection "to privately owned forest lands lying outside watersheds of navigable rivers," and by 1944, fire prevention authorization had tripled under those efforts.<sup>192</sup> Most saw fire as a massively destructive force. Since fire also did not respect

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183. Federico Cheever, *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 375 (Lawrence J. MacDonnell and Sarah F. Bates eds., 2010).

184. Gifford Pinchot, *The Relation of Forests and Forest Fires*, *FOREST HISTORY TODAY*, Spring 1999, at 29-30 [hereinafter *FOREST HISTORY TODAY*] available at <http://foresthstory.org/Publications/FHT/FHTSpring1999/pinchot.pdf> (appearing as a reprint from *National Geographic*, Vol. X, 1899).

185. *Id.*

186. PINCHOT - BREAKING NEW GROUND, *supra* note 182, at 276 (citation omitted).

187. *FOREST HISTORY TODAY*, *supra* note 184, at 30.

188. 30 Stat. 35.

189. Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 306 (2006).

190. STEEN, *supra* note 157, at 175.

191. *Id.* at 175.

192. *Id.* at 281-82.

property lines, the USFS deemed it necessary to protect privately owned lands, in addition to public lands, in order to protect the whole forest.<sup>193</sup>

Fire suppression continued to preoccupy forest management into the middle of the twentieth century. Beginning as early as the 1960s, however, federal agencies began to re-assess their fire policies, based on new scientific understandings of fire as an integral part of forest ecologies. Foresters could apparently keep their heads in the sand for only so long. Their reassessment of federal fire policies is the subject of the next subpart.

## 2. *A Paradigm Shift*

Ecologists and land managers now recognize that fire, rather than being harmful to forests, is in fact an integral part of their natural processes. Fire reshapes landscapes, provides essential habitat to many species of flora and fauna, and even reduces wildfire intensity.<sup>194</sup> As Judy L. Meyer summarized in her influential 1994 article, *The Dance of Nature: New Concepts in Ecology*, early ecologists saw the ideal ecosystem as completely stable, with nature continually “striving to achieve that ideal.”<sup>195</sup> Under that paradigm, fire was seen as an unnatural disturbance that impeded an ecosystem’s achievement of its ideal state, its “climax state.”<sup>196</sup> Science thus went hand-in-hand with socio-economic rationales to justify fire suppression for the greater part of the twentieth century.

The irony is that today it is widely understood, both in the scientific and forestry circles, that fire suppression, rather than fire itself, is what has disturbed the natural workings of forest ecologies. In short, when fire is “removed from its historic role” it creates a disturbance in the ecological workings of a forest.<sup>197</sup> Fire suppression, particularly when coupled with an emphasis on sustaining commercial species of timber at the expense of other plant species, has disturbed the ecological workings of forests, has made forests more susceptible to devastation from fire, has made forests more vulnerable to insect infestations and the spreading of other exotic species, and has even led to confusion about what the

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193. *Id.* at 282.

194. ROBERT H. NELSON, A BURNING ISSUE: A CASE FOR ABOLISHING THE U.S. FOREST SERVICE 15-19 (2000).

195. Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT. L. REV. 875, 876 (1994).

196. As David J. Parsons pointed out, “even during the height of fire suppression, informed individuals warned of the dire consequences of continuing such practices.” David J. Parsons, *The Challenge of Restoring Natural Fire to Wilderness*, USDA FOREST SERV. PROCEEDINGS RMRS-P-15-VOL-5 276, 276 (2000) [http://www.fs.fed.us/rm/pubs/rmrs\\_p015\\_5/rmrs\\_p015\\_5\\_276\\_282.pdf](http://www.fs.fed.us/rm/pubs/rmrs_p015_5/rmrs_p015_5_276_282.pdf). These informed individuals included Aldo Leopold. *Id.*

197. NELSON, *supra* note 194, at 16. See also *Sierra Club-Black Hills Grp. v. U.S. Forest Serv.*, 259 F.3d 1281, 1290 (10th Cir. 2001) (Ebel, J., dissenting); *Biodiversity Assocs. v. Cables*, 357 F.3d 1156, 1157 (10th Cir. 2004). Smaller, less intense fires help clear debris from the forest floor and leave larger trees unscathed. *Id.* Denser forests are a result of fire suppression regimes, which causes more fuel accumulation and produces combustible material that is susceptible to insect infestations and more intense fires that devastate the forests. *Id.*

“natural conditions” are and whether and how we might restore our forests to them.<sup>198</sup> What forest managers for the better part of the twentieth century failed to understand was that fire suppression would lead to ecological conditions under which low-frequency, high-intensity fires—rare in “natural” forests—have become the norm in many forests.<sup>199</sup> Suppression has allowed for fuel build-up, which in turn also provides a ladder from the underbrush to the forest canopy, thereby creating the conditions for high-heat crown fires that leave little of the forests in their wake.<sup>200</sup> As Bruce Babbitt, a Secretary of Interior under President Bill Clinton, explained this phenomenon, forests have become “choked with fuel,” such that any fire has the potential to “set off an uncontrollable inferno.”<sup>201</sup>

Severe mountain pine beetle infestations have also become a major concern in forests across the Rocky Mountain region. In 2007 alone, an estimated 3.9 million trees were killed by beetles.<sup>202</sup> This is to a large degree due to the USFS’ emphasis on producing commercial timber at the expense of non-commercial tree species, in that the older, more valuable trees for timber production tend to be weaker than their younger counterparts and thus more vulnerable to beetles. Further, the overcrowded forests that have resulted from the USFS’ fire suppression policies provide a sustainable range for a beetle that can only fly up to three hundred feet.<sup>203</sup> Biological controls, such as birds and parasitic insects, both predators to the beetle, have proven unable to keep beetle populations at manageable levels. There simply are not enough birds and insects to do the job. Not only have policies of fire suppression contributed to increased risks from insect pests such as the pine beetle, but such infestations in turn may increase the risk of catastrophic fires due to the increase in dead trees as fuel.<sup>204</sup>

It is not just the ecological components of the forests themselves that suffer from devastating fires, but also nearby human communities. Forest managers call the relationship between residential areas and forest the “wildland-urban interface” (“WUI”) or, as one forestry expert called it, “where combustible homes

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198. SHINDLER, *supra* note 1, at 48; see Keiter, *supra* note 189, at 314 (“The absence of fire has changed the composition and distribution of tree and plant species, promoted the build up of woody debris (fuel loading), facilitated the spread of exotic species, and displaced some native species.”); *Biodiversity*, 357 F.3d at 1157.

199. PETER A. THOMAS & ROBERT S. MCALPINE, *FIRE IN THE FORESTS* 25 (2010). See also *Sierra Club-Black Hills Grp.*, 259 F.3d at 1289 (Ebel, J., dissenting); NELSON, *supra* note 194, at 17.

200. NELSON, *supra* note 194, at 21.

201. *Id.* at 52.

202. Grant Foster, *Pine Beetle Infestation and Fire Risk in the Black Hills*, TEMPO ANALYTICS, Feb. 10, 2012, at 1, available at <http://www.defendblackhills.org/document/firerisk2.pdf>.

203. See generally Kurt Allen, *Biological Evaluation of Mountain Pine Beetle Activity on the Black Hills National Forest*, USDA FOREST SERV. (Dec. 2001), [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_038756.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_038756.pdf).

204. See Keiter, *supra* note 189, at 314. This point is debated. See generally, Foster, *supra* note 202.

meet combustible vegetation.”<sup>205</sup> This is made even worse by the acceleration of the pace of urban, suburban, and even exurban sprawl into close proximity with forests. In 2005, a group of forest ecologists estimated that almost one-third of homes in the United States were within the WUI.<sup>206</sup> That percentage has certainly only increased in the decade since and will continue to do so unless something is done.

### 3. Policy Dilemma

Forestry experts continue to disagree as to the proper response to current conditions within America’s forests. As the Tenth Circuit described, “[s]ome [experts] advocate a hands-off approach, allowing fire . . . to reconstitute the forests in their natural state; some advocate controlled burns; and some advocate thinning and fuel removal,” an approach that commercial loggers predictably have favored.<sup>207</sup> The public is divided as well. Private landowners near to forests typically desire controlled burns so as to minimize the risk to their property and their livelihoods, while the general public continues to see fire as inherently “unnatural” and “challenge loudly whether fire is needed at all.”<sup>208</sup> Disagreements over the proper response to fire, when combined with the lack of specific legal standards for dealing with fire, has led to much litigation, as the Preserve experience suggests.<sup>209</sup>

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205. ROSS W. GORTE, FOREST FIRE PROTECTION, IN NATIONAL FORESTS: CURRENT ISSUES AND PERSPECTIVES 133 (Susan Boriotti & Donna Dennis eds., Nova Science Publishers, Inc. 2003).

206. Susan M. Stein et al., *Wildfire, Wildlands, and People: Understanding and Preparing for Wildfire in the Wildland-Urban Interface*, USDA FOREST SERV. 1 (Jan. 2013), <http://www.fs.fed.us/openspace/fote/reports/GTR-299.pdf>.

207. Biodiversity Assoc. v. Cables, 357 F.3d 1152, 1157 (10th Cir. 2004). See, e.g., Michael Axline, *Salvage Logging: Point & Counterpoint, Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613, 626 (1996) (arguing for a hands-off approach); James K. Agee, *Alternatives for Implementing Fire Policy*, in PROCEEDINGS: SYMPOSIUM ON FIRE IN WILDERNESS AND PARK MANAGEMENT 107-111 (James K. Brown et al. eds., 1995) (arguing for prescribed burns); W. Wallace Covington et al., *Restoring Ecosystem Health in Ponderosa Pine Forests of the Southwest*, 95 J. FORESTRY 24-25 (Jan. 1, 1997), <http://www.fs.fed.us/psw/publications/4403/Restoring.pdf> (arguing for tree thinning as at least a supplement to allowing some natural fires).

208. THOMAS & MCALPINE, *supra* note 199, at 24.

209. See, e.g., Minn. Public Interest Research Grp. v. Butz, 541 F.2d 1292, 1303 (8th Cir. 1976) (suggesting it may be disadvantageous to assert a policy of no logging because current knowledge of fire management suggests it would lead to “attendant insect outbreaks and greater fire danger”). See also Ventling v. Berglund, 479 F. Supp. 174, 182 (D.S.D. 1979) (holding that there may be reason to believe that “following the course of action urged by the plaintiffs might result in greater environmental harm than the road system proposed by the Forest Service.”); Sierra Club v. Block, 614 F. Supp. 134, 137-39 (E.D. Tex. 1985). The court acted under the presumption that “the loss of a significant number of trees constitutes an irreparable harm, at least to the extent that decades are required to replace the lost trees and their accompanying undergrowth.” *Block*, 614 F. Supp. at 137-39. It balanced the results of no action, which would result in the loss of thousands of pine trees because of the pine beetle infestation, to the results of continued cutting, which would also lead to a loss of pine trees but would otherwise lead to the proliferation of the beetle, and held that “[e]ither way, irreparable harm results.” *Id.* The court further identified that cutting is “not without a purpose” and Plaintiffs contentions that there is no support for the predictions of beetle harm and that historical infestations indicate that the beetle will naturally run its course are without merit. *Id.*

There are problems with both of the “extreme” options of either an all-out fire suppression policy or a completely hands-off approach. As history has demonstrated, fire suppression leads to unhealthy forests that are denser and more at-risk to large, dangerous fires. It also requires new roads cut into an already fragmented forest habitat, places fire fighters at risk, and requires large amounts of money.<sup>210</sup> While a hands-off approach might be appealing as a way to return forests to their “natural” fire regimes, it ignores the fact that because of past fire suppression, uncontrolled fires will not replicate historic conditions. Rather, it will likely lead to more catastrophic fires and increased danger to the forests themselves as well as to human life and property.<sup>211</sup> Thus, as Robert Keiter noted, the real policy debate seems to be over “how and where to use prescribed fire and selective cutting to reduce fuel loads, ensure human safety, and restore forest ecosystems.”<sup>212</sup> It is unlikely that any one single approach will return forests to their natural fire regimes while also protecting life and property in the interim.

Still, some contend that there is no forest health emergency at all—that so-called “catastrophic” fires and insect infestations are “natural” components of forest ecology. Chad Hanson, for instance, has argued that so-called “catastrophic” fires can be part of the natural processes of a forest and that they have ecological benefits as well. Far from destroying natural ecologies, so-called “catastrophic” fires are in fact crucial for “advancing ecological restoration,” according to Hanson.<sup>213</sup> They produce “snag forest habitat,” which Hanson characterized as “natural ecological treasures”; they are rare, endangered, and ecologically important, and they contain higher levels of biodiversity than any other forest type in the United States.<sup>214</sup> Hanson argues against what he considers the ruse of “thinning” to protect forests and homes from “catastrophic” fires. He sees it as yet another attempt to practice fire suppression but under another name.

Others have taken Hanson’s argument a step further, contending that mechanical treatments (i.e., logging) are ineffective in preventing large fires, and that they are really just commercial harvests by another name. Timothy Ingalsbee, of the Western Fire Ecology Center, for instance, has objected to the use of salvage logging as a means of promoting “forest health.” He went so far as to call it a “Forest Health Hoax,” one which has “metamorphosed into what can be called the fire hazard hysteria.”<sup>215</sup> He continued:

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210. Keiter, *supra* note 189, at 316.

211. *Id.* at 379.

212. *Id.* at 316.

213. Chad Hanson, *Technical Report, John Muir Project, The Myth of “Catastrophic” Wildfire: A New Ecological Paradigm of Forest Health*, THE JOHN MUIR PROJECT OF EARTH ISLAND INST. 2-3 (Winter 2010), [available at](http://www.blm.gov/or/districts/medford/forestry/pilot/files/JMP_attachment.pdf) [http://www.blm.gov/or/districts/medford/forestry/pilot/files/JMP\\_attachment.pdf](http://www.blm.gov/or/districts/medford/forestry/pilot/files/JMP_attachment.pdf).

214. *Id.*

215. Kettle Range Conservation Group, “Background Information on Salvage Sales”, (Dec. 2001), <http://www.kettlerange.org/salvagelogging> (last visited Oct. 29, 2014).

Now, its [*sic.*] not just those so-called dead and dying stands of trees that need to be commercially extracted, but also those live and growing ones! Mature, multi-storied, closed-canopy forests—the very stands many of our nation’s most endangered forest species depend on for their survival—are now being portrayed as ‘tinderboxes’ ready to fuel ‘catastrophic wild-fires.’ Logging proposals are no longer presented truthfully as commercial timber sales, but instead, are being portrayed dishonestly as ‘fuels reduction for fire protection’ projects.<sup>216</sup>

A similar distrust of USFS policies underlies the litigation involving the Preserve as well.

Despite its importance, the United States for the most part lacks a comprehensive wildfire policy. The one major piece of legislation dealing specifically with wildfires, the Healthy Forest Restoration Act of 2003 (“HFRA”), is aimed principally at the WUI. Its main mechanism is to streamline projects aimed at reducing the risk of catastrophic fires by eliminating the requirement for some environmental analyses under NEPA, by reducing the opportunities for administrative review, and by expediting the judicial review process.<sup>217</sup> In essence, it removed accountability for fuel reduction projects by exempting them from the ordinary operation of land management rules. Beyond the WUI, though, Congress has largely left it up to state and federal agencies, including the USFS, to attack the problem, all within a legal structure built according to old ecological assumptions.

As much as anything, the debate regarding forest policy shows the complexities involved in implementing a fire management regime and the amount of distrust and confusion that persists. Fire management involves difficult scientific judgments, while also implicating wildly divergent policy preferences. This is why it is especially unfortunate that Congress has largely stayed on the sidelines. As the next two subparts demonstrate, the limited manner in which Congress has intervened has only made things worse—both for the USFS in doing its job and for the health of the forests it manages.

#### D. THE LIMITS OF SCIENTIFIC MANAGEMENT

The typical view of Pinchot and his Progressive allies is that they favored scientific management as a way to insulate important decision making from the irrational whims of the public. As one group of natural resources law scholars recently summarized their perspective, “[s]cientific management aspired to rise above politics, relying on science as a foundation for efficient policies made through a single, central authority, a bureaucratic structure with the appropriate mandate jurisdiction, and expert personnel.”<sup>218</sup> Environmental historian Samuel

216. *Id.*

217. 16 U.S.C. § 6501-6591(c) (2012).

218. Brunner et al., *supra* note 2, at vi-xiii.



P. Hays famously analogized Progressives to preachers of a new religion. Their scripture was the “gospel of efficiency.”<sup>219</sup> Their purpose, according to Hays, was to “supplant conflict with a ‘scientific’ approach to social and economic questions.”<sup>220</sup> Perhaps more than anything else, the Preserve case study confirms that Progressives failed in their mission to insulate decision making from conflict by making it scientific. This subpart examines the reasons for that.

The primary reason scientific management failed to shield land management from political pressure and conflict is that Progressives (as well as subsequent policy makers) quite simply promised too much. As environmental historian Stephen Pyne has observed, “[t]he fact is, technology can enable but not inform, and science can inform but not choose.”<sup>221</sup> Science can provide information to decision makers, but the decisions themselves ultimately come down to value preferences. Because people often hold different values, negotiation is necessary and some degree of conflict is possible. Land managers have come to understand this reality all too well over the last century.

As an example, the Endangered Species Act (“ESA”), which perhaps best reflects the government’s faith in scientific management, requires that decisions as to whether a species is listed as endangered or threatened be made “solely on the basis of the best scientific and commercial data available to him.”<sup>222</sup> An “endangered species” is further defined as one “in danger of extinction throughout all or a significant portion of its range,” a “threatened species” as one “likely to become an endangered species within the foreseeable future.”<sup>223</sup> While scientists can produce findings—always with *some* degree of uncertainty—regarding the risk of extinction within a particular time frame, they cannot objectively determine when that risk rises to the level of that species being “in danger” or “likely to become endangered.”<sup>224</sup> Rather, that determination requires a judgment call regarding how much risk is too much and how much certainty should be required before potentially curtailing economic activity. In short, it requires a subjective policy choice. This choice likely involves the value placed on the species in question, the value of the activities that would potentially be stopped or curtailed if the species were listed, and the value placed on the ESA’s mission itself. It is far from objective, far from scientific.

Science cannot answer the difficult questions for us, as much as we might want it to. Under the guise of “scientific,” expert management, Congress has passed the most difficult questions to agencies such as the USFS to answer, all the while giving stakeholders the power to tie agency decision making up in ad-

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219. HAYS - CONSERVATION, *supra* note 156, at 124.

220. *Id.* at 267.

221. Stephen Pyne, *Green Fire Meets Red Fire: Environmental History Meets the No-Analogue Anthropocene*, PINOCHOT INST. FOR CONSERVATION, <http://www.pinchot.org/doc/490> (last visited Oct. 29, 2014).

222. Endangered Species Act, 16 U.S.C. 1533(b)(1)(A) (2003).

223. Endangered Species Act, 16 U.S.C. 1532(6)(20) (2003).

224. *See id.*

ministrative and judicial appeals and other bureaucratic red tape. Congress may have thought the use of science would insulate agencies from political opposition, but that has not been the case.

### E. OUR BROKEN CONGRESS

The question of whether timber harvests would be allowed in the Preserve ultimately turned on the 706 Rider that Congress passed in 2002. The 706 Rider explicitly exempted certain projects from the normal operation of the NOA. This was far from the first time Congress has thwarted environmental protections through the appropriations process. Sandi Zellmer, a leading natural resources law scholar, observed in 1997 that “[t]he technique of appending substantive provisions to appropriations bills [had] already become a favorite tool of the legislative trade . . . ,” and that they had already proven “particularly destructive” in “circumvent[ing] long-standing environmental policies . . . .”<sup>225</sup>

One of the most famous (and infamous) examples was a rider in 1979 exempting the Tennessee Valley Authority (“TVA”)’s construction and operation of a dam on the Little Tennessee River from the Endangered Species Act. Congress had authorized the dam at issue, the Tellico Dam, in 1967, over the opposition of farmers whose lands would be condemned to make room for the reservoir. Opponents succeeded in halting the project in 1975 when the Department of Interior listed the snail darter as endangered and designated the Little Tennessee as a critical habitat. Having already spent tens of millions of dollars in completing over ninety percent of the project, the TVA filed suit challenging the department’s action. The case made its way to the Supreme Court, which upheld, in a six-to-three decision, the lower appellate court’s decision that the dam was a *prima facie* violation of the ESA.<sup>226</sup> In response, Congress amended the ESA to allow what has come to be known as the “God Committee” to consider economic factors in granting exemptions. When that committee denied the exemption,<sup>227</sup> the TVA again went to Congress, this time getting a rider into an appropriations bill, the Energy and Water Development Appropriation Act of 1980, specifically exempting the dam from the ESA.<sup>228</sup> The project could proceed.

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225. Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997).

226. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

227. Interestingly, the committee, in weighing the costs and benefits of the project, considered only the costs of completing the last 5% of the project, and the costs *still* outweighed the benefits. As the chairman, Charles Shulze, explained, “if one *takes just the cost of finishing*, it against the benefits and does it properly, it doesn’t pay! Which says something about the original design.” ZYGMUNT JAN BROEL PLATER, *THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER* 287 (2013).

228. Pub. L. No. 96-69, 93 Stat. 437, 449 (1979).

Another much-discussed example occurred in 1995.<sup>229</sup> In July of that year, President Bill Clinton signed into law the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act.<sup>230</sup> The bill contained a substantive rider authorizing the “emergency salvage timber sale program.”<sup>231</sup> That program authorized the harvesting and selling of “salvaged timber” (defined broadly to include, paradoxically, some live, green timber)<sup>232</sup> with an expedited administrative process and without any administrative appeals. It also effectively limited any judicial review by declaring such sales to be legal “notwithstanding any other law,” including statutes, regulations, and judicial orders.<sup>233</sup> Given its overturning of both a quarter-century of environmental protections and its abrogation of constitutional separation of powers, critics called the law anything from “a recipe for environmental devastation,”<sup>234</sup> to a “sacrifice [of] legislative integrity.”<sup>235</sup>

The above examples are just two of tens of thousands of substantive riders overturning previously enacted laws. The use of riders in this way is “not a minor infraction of Congress’s procedural rules,” in the understated words of one scholar.<sup>236</sup> It is in fact a perversion of one of Congress’ most important constitutional powers. Its role in appropriating funds from the federal treasury for the execution of federal laws—one half of its so-called “power of the purse”<sup>237</sup>—is critical to the separation and balance of powers among the federal government’s three branches. The lodging of this power in the legislative branch as a check on executive power has roots in England, where the House of Commons has been recognized, since the mid-seventeenth century, as having the exclusive power to

229. For scholarly discussion of this 1995 Rider and its implications, see, e.g., Axline, *supra* note 207; Julie A. Coldicott, *Oregon Natural Resources Council v. Thomas; Another “Meritorious” Timber Lawsuit Fails: Do Substantive Riders Warrant an Exception to the Plain Language Rule?*, 27 GOLDEN GATE U. L. REV. 1 (1997); Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 27 ENVTL. L. 1035 (1997); William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who’s Who*, 39 WASHBURN L.J. 1 (1999); Curt Wilson, *The 1995 Salvage Timber Sale Rider: A Recipe for Environmental Devastation*, 5 DICK. J. ENVTL. L. & POL’Y 419 (1996). See also Zellmer, *supra* note 225.

230. Pub. L. No. 104-19, 109 Stat. 194, 240-47 (1995).

231. *Id.* at 240.

232. It defined a “salvage timber sale” as “a timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence.” *Id.* at 241.

233. *Id.*

234. Wilson, *supra* note 229, at 419.

235. Zellmer, *supra* note 225, at 457.

236. Kathleen M. Vanderziel, *The Hatfield Riders & Environmental Preservation: What Process Is Due?*, 19 B.C. ENVTL. AFF. L. REV. 431, 471 (1991). See also Axline, *supra* note 207, at 638-39.

237. U.S. CONST. art. I, § 9, cl. 7. The other part of the *power of the purse* is the authority to raise revenues through taxation. U.S. CONST. art. I, § 8, cl. 1.

create and to spend revenue.<sup>238</sup> Its centrality to Anglo-American governance was demonstrated in the American patriots' rallying of "no taxation without representation," the British parliament's alleged breach of which sparked the American movement for independence. Indeed, during the Constitutional debates, the question of whether the House of Representatives should have the primary authority over spending received little debate. By the late 1850s, the process had emerged by which Congress would annually appropriate funds to governmental agencies in several separate bills through a process completely separate from the legislative setting of priorities and authorizing of programs to attain them. In short, various substantive committees wrote authorization acts within their area of expertise while appropriation committees, in both the House and the Senate, decided on how—and how much—to fund the authorized programs.<sup>239</sup> Because appropriation bills are supposed to be non-permanent (typically providing funding for a year at the most) and non-substantive, they have typically been omitted from the United States Code.<sup>240</sup> This basic process continues to today. There are even internal congressional rules to prevent "any new or general legislation in appropriations bills."<sup>241</sup>

Despite Congress' own internal rules and the historic separation of appropriations and substantive legislation, appropriation bills often contain dozens if not hundreds of substantive riders. Members of Congress insert these riders into large appropriations bills usually with little or no debate or discussion, such that members often vote on appropriation bills without even knowing of the new, general, substantive provisions they contain.<sup>242</sup> Members can get away with such maneuvers in part because the general public is even less likely to be aware of the content of substantive riders than their representatives who voted for them. This is why one legal scholar characterized them as Congress acting in a manner "least responsive to the popular will,"<sup>243</sup> while another criticized them for violating not just the internal rules of Congress, but "the very democratic spirit that is the essence of representative government."<sup>244</sup> That is especially the case when

238. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. OF ECON. HIST. 803, 811-12 (1989).

239. See, e.g., D. RODERICK KIEWIET AND MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (Univ. of Chicago Press, 1991); CHARLES H. STEWART III, *BUDGET REFORM POLITICS: THE DESIGN OF THE APPROPRIATIONS PROCESS IN THE HOUSE OF REPRESENTATIVES, 1865-1921* (1989).

240. Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 139 (2010) (stating that many types of legislation do not meet the "general and permanent" criteria necessary for proscription into the United States Code).

241. Vanderziel, *supra* note 236, at 437.

242. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190-93 (1978) (discussing the "limited and specific" purpose of appropriations measures).

243. Zellmer, *supra* note 225, at 457.

244. Vanderziel, *supra* note 236, at 472. See also Goldman & Boyles, *supra* note 229, at 1036-37. Riders have taken environmental laws and the public out of forest management by "truncat[ing] the required environmental analysis, eliminat[ing] administrative appeals, and render[ing] federal environmental . . . laws unenforceable." *Id.* at 1048. This resulted in great deference to the agency with little public

riders are attached to appropriations for an unrelated program that enjoys broad support, such as emergency relief bills, or for bills appropriating funds for several departments at once. This is not just because of their size and scope, but also because they are often passed at the last minute to keep the government running.<sup>245</sup> Even in its best light, it is a high-stakes game of chicken. Unfortunately, there does not seem to be a legal mechanism, short of amending the Constitution, to stop it.<sup>246</sup>

The pervasive abuse of the appropriations process has exacerbated the distrust among land managers, stakeholders, and environmentalists. One can certainly see how it would be difficult to negotiate towards any sort of compromise, when any gains reached through such a deal might be subsequently negated through the appropriations process. It is not surprising that, having essentially lost in the political and legal arenas, many environmentalists feel they “have nothing left but the court of public opinion and acts of civil disobedience.”<sup>247</sup> Like any other agency, the USFS needs the trust of its constituents to manage its forests effectively, and it simply does not have it.

We must start demanding as much from Congress as we have from the USFS and, more generally, from science. Congress needs to provide for a comprehensive law of fire management that is firmly situated within the larger land management structures. This law should, at a minimum: (1) provide for multiple substantive standards for the management of fire regimes on public lands, depending upon their designated uses and local interests; (2) contextualize fire management within broader land management laws and policies, rather than treating it as a separate concern justifying exceptions from such management dictates; (3) treat the WUI as not just a problem of “wildlands” management, but also as a problem of urban, suburban, and exurban sprawl; and (4) recognize the limits of scientific management by providing clear standards for how science is

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input, if any. *Id.* Some have defended Congress’s use of riders as embodying the concept of balance of powers. They contend that such provisions are yet another tool in Congress’s arsenal for checking abuses of power in the executive branch. *See, e.g.,* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84-85 (2006) (“Congress has used what are known as appropriations riders to supervise the execution of the laws in a very direct and particularized way. Appropriations riders are used by Congress across a broad spectrum of substantive areas to supervise the activities of federal agencies.”). This argument is certainly plausible where Congress limits funds for particular programs where its members legitimately feel the executive branch is not executing the law as Congress intended. The temporary appropriations process provides time for Congress to amend the law to clarify its intent, all the while preventing the executive branch from doing the law a disservice. These “riders,” commonly known as “limitation riders,” are a different breed than what is discussed in this article. Substantive riders that subvert environmental laws normally do not impose limits on the authority of agencies but rather convey them powers to act notwithstanding laws passed through the normal legislative process—in the light of day. This is not Congress holding agencies accountable but rather letting them off the hook.

245. These appropriation bills are known as “omnibus,” meaning “for everything.”

246. *See generally* Zellmer, *supra* note 225 (arguing the current legislative structure has created a constitutional crisis and is thus requiring a constitutional change).

247. Wilson, *supra* note 229, at 419 (quoting Peter Seeth & Eric Gorski, U.S. Forest Service Goes on the Defensive, *Oregonian*, Sept. 9, 1995, at A1).

to be integrated into decision making. Only with such a clear statutory mandate can the USFS and other land management agencies get back to work.

#### IV. CONCLUSION

Despite the prevailing view of Pinchot and Progressive conservationists as being technocratic, there is another, often overlooked, side to Pinchot's political philosophy. While Pinchot thought decisions should be made by experts free from the corrupt political process that Congress represented, he still sought to give the people most affected by management decisions a voice. Indeed, Pinchot characterized the management of each reserve as involving primarily "local questions" that should therefore "be decided upon local grounds."<sup>248</sup> The USFS' first handbook of regulations further provided that decisions would be decentralized, with much of the daily decision making being made by local rangers and forest supervisors rather than in Washington D.C.<sup>249</sup> Pinchot sought to insulate decision making from politics but not from the people.

Pinchot's approach was a key reason why the USFS was able to win over an initially skeptical public. Most came to have a favorable view of the agency once they realized that they had a say in decisions and that Pinchot's "conservation" meant protecting timber from destruction and maximizing timber production in the long run rather than curtailing it. As long as there remained a consensus regarding the *ends* of forest management, and as long as those *ends* aligned with the expertise of the agency bureaucracy, the agency effectively managed the *means*. But as that consensus has broken down—principally with increased demands for environmental protections and opportunities for different forms of recreation—the USFS' tradition of excellence in producing timber harvests has ironically become a detriment to the agency. It was so effective in administering the forests for their timber that many now legitimately doubt whether it is capable of *not* doing so. Congress has not helped. In the 1960s and 1970s, Congress passed laws making the USFS and other federal agencies more accountable to the public. Most predominantly it did so by allowing for participation in the decision-making processes and by providing for administrative and judicial appeals of decisions. Congress, in short, provided an avenue to translate distrust into litigation, which in turn only leads to more distrust. Proper, efficient management is immensely difficult, if not impossible, in such an environment, regardless of what management model is employed.

The USFS should certainly devote increased energies towards convincing the public of the efficacy of its decisions before they are made. But given the

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248. Secretary of Agriculture James Wilson to Chief Forester Gifford Pinchot (Feb. 1, 1905), [http://www.foresthistory.org/ASPNET/policy/Agency\\_Organization/Wilson\\_Letter.aspx](http://www.foresthistory.org/ASPNET/policy/Agency_Organization/Wilson_Letter.aspx) (though the letter was ostensibly written by Wilson, it is widely believed that Pinchot in fact wrote it, in a sense, to himself).

249. PINCHOT – BREAKING NEW GROUND, *supra* note 182, at 267.

current climate, such efforts will not be enough. Rather, Congress (and, by proxy, *we*) must answer some of the difficult questions that have for too long been delegated to “science” without agreement as to what the proper “scientific” decision is. We need to recognize these are political questions, and they require political answers. While the USFS is capable of answering some of these questions, it still requires a proper framework to do its job, which is to administer public land policies. For too long, the USFS and other land management agencies have been prevented from effectively doing their jobs.