The Oregon and California Railroad Grant Lands’ Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict

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This article examines the long, contentious history of the Oregon & California Land Grant that produced federal forest lands now managed by the Bureau of Land Management (“O&C lands”), including an analysis of how these lands re-vested to the federal government following decades of corruption and scandal, and the resulting congressional effort that created a management structure supporting local county governments through overharvesting the lands for a half-century. The article proceeds to trace the fate of O&C lands through the “spotted owl wars” of the 1990s, the ensuing Northwest Forest Plan (NWFP), the timber salvage rider of 1995, and the George W. Bush Administration’s unsuccessful attempts to change the compromise reached in the NWFP. The article then explains how decreases in timber harvesting and declines in federal payments have brought the counties reliant on these lands to the brink of bankruptcy, and analyzes two current legislative proposals aimed at increasing harvests on the O&C lands in order to bolster flagging county economies. The article concludes by identifying significant economic and environmental flaws in these proposals and suggests several alternative revenue-producing options that could provide economic security and diversity to the counties without eviscerating the key environmental protections provided by the NWFP and other federal environmental protection statutes.

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An opinion poll during World War II showed that only half of the population had ever heard of the railroad land grants, and most of them thought the railroads had paid for the land. Since then, another half-century has passed, and the land grants have an even smaller place in our social memory. Without an awareness of the past, and an understanding of how it affects the present, we will continue to suffer the continuing impacts of the land grant legacy.

George Draffan, 1998

Introduction

In the nineteenth century, the United States government granted railroads (and states for railroads) some 179 million acres of public land in return for building various railroads. The government enlisted the recipient railroads in the effort of settling the West by calling upon them to sell the land to settlers to serve as a middle-man conveying government lands to private

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2 Id. at 5-6 (49 million acres to states for railroads, 130.4 million acres directly to railroads); id. at 6 (claiming that “the railroad land grants covered ten percent of the continental U.S., but 179 million acres is roughly 7.7% of the total 2.3 acres of land of the contiguous U.S.). The discrepancy is due to the fact that about 25% of the granted lands were never transferred to the railroads due to violation of grant conditions. Id. at 8.
owners, in effect replacing the federal General Land Office (GLO) with private railroads. Among the largest of the railroad grants was a 2.8 million acre grant to the Oregon & California Railroad (O&C R.R.) to build a line from Portland to San Francisco.

Many of the railroad grant lands were later forfeited to the federal government. The grant conditions generally included a requirement to sell land to bona-fide settlers and established construction schedules, both of which proved problematic. Between 1867 and 1890, the railroads forfeited some 35 million acres. Often these forfeitures were due to clauses contained in post-1866 grants that called for maximum sale prices to “actual settlers” of $2.50 per acre and a maximum sale of 160 acres. In 1890, Congress enacted the Railroad Land Grant Forfeiture Act, which reclaimed another 5.6 million acres, but that was only a fraction of the 50 million acres in granted lands the Populist Party sought to reacquire in 1892.

Land fraud associated with public land grants became the subject of public trials in the early twentieth century, producing over a hundred convictions, including high government officials. Following closely on the heals of the Oregon land fraud scandal was the federal government’s effort to rein in the O&C R.R.’s illegal disposition of its grant land. In 1908, the federal government sought to enforce the terms of the grant against the O&C R.R. (then owned by James J. Hill).

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3 This was Alexander Hamilton’s prescription for settling the Western lands: grant large tracts to those who held the Revolutionary War debt, which Hamilton consolidated in the federal government, so that they could profit from frontier land sales to settlers when the land appreciated in value. See RON CHERNOW, ALEXANDER HAMILTON 299 (2004).
4 George Draffan lists the Oregon and California grant as the eighth largest of the federal railroad grants. DRAFFAN, supra note 1, at 5.
5 See David M. Ellis et al., Comment on “The Railroad Land Grant Legend in American History Texts,” 32 MISS. VALLEY HIST. REV. 557, 558 (1946).
6 See, e.g., Act of April 10, 1869, c. 27, 16 Stat. 47, 47; see also DRAFFAN, supra note 1, at 10.
7 Id. at 21. The Railroad Land Grant Forfeiture Act of 1890, ch. 410, 26 Stat. 496 (1890) (codified at 43 U.S.C §§ 904-907 (2006)), reclaimed lands from 11 railroads, including 2 million acres from the Northern Pacific, over a million acres from the Southern Pacific, and over a half-million acres from the Gulf and Shrimp and Mobil and Girard. Id. The House of Representatives passed Populist-sponsored bill in both 1892 and 1894, but the Senate blocked both, and the forfeiture movement died. Id.
8 See infra Section I.B.
9 See infra Section I.C.
by Southern Pacific Railroad), as only slightly more than fifteen percent of the sales made by the railroad actually complied with applicable acreage and price conditions. This situation led to a revesture of 2.9 million acres of valuable forestland to the federal government, a result confirmed by a Supreme Court decision in 1915. This revested land, managed today by the federal Bureau of Land Management (BLM), is now known as the Oregon and California (O&C) lands and has been the source of continuous controversy for at least the past quarter-century.

Because Congress agreed to share timber sale revenues from the BLM lands with localities at a higher rate than adjacent forestlands managed by the U.S. Forest Service (USFS), county governments quickly became dependent on timber-sale receipts. That led to what now seems as over-harvesting of the lands through the 1980s. Those harvests were halted initially by suits that successfully alleged that BLM’s environmental evaluation of its timber sales failed to satisfy the National Environmental Policy Act (NEPA). Then, as a result of the citizen

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10 See United States v. Oregon & C. R. Co., 186 F. 861, 873 (C.C. Or. 1911); DRAFFAN, supra note 1, at 21 (noting that the railroad sold only 813,000 acres of its 3.7 million acre grant, of which just 127,000 acres were in parcels of 160 acres or fewer and less than $2.50 per acre).
12 See infra Section II (describing legal challenges beginning in the late 1980s, all the way through 2011); infra Sections III-IV (describing the Northwest Forest Plan and the George W. Bush Administration’s failed attempts to kill it).
13 See Relating to the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands Situated in the State of Oregon: Hearings on H.R. 5858 Before the H. Comm. on the Public Lands, 75th Cong. 61-62, 73 (1937) (comments by James W. Mott, Senator from Oregon, Compton I. White, Senator from Idaho, Rufus G. Poole, Assistant Solicitor, Dep’t of Interior) (noting that the laws and regulations governing national forests managed by the USFS allocated a certain percentage of timber sales to counties, but that this amount was insufficient because it did not reimburse the counties for lost taxation revenues); id. at 99-103 (statements of L.F. Kneipp, Assistant Chief, U.S. Forest Service) (discussing the USFS counter-proposal to then unenacted 1937 Oregon & California Lands Act, Act of Aug. 28, 1937, c. 876, 50 Stat. 874, which would have terminated and liquidated the state and county interests in the O&C lands over the course of a nine-year period and placed the land into national forest status, as opposed to disbursing fifty percent of timber revenues to the counties in perpetuity).
15 See infra notes 145-149 and accompanying text.
petition process of the federal Endangered Species Act (ESA), environmentalists forced ESA-protection of the northern spotted owl, a species whose habitat depended on the late-successional (old growth) forests that were quickly being liquidated by federal timber sales. Although the federal government initially denied protection, a court overturned that decision, and the U.S. Fish and Wildlife Service (FWS) listed the northern spotted owl as a threatened species in 1990. A subsequent attempt to exempt the spotted owl from the ESA also failed.

With the listing threatening to shut down timber harvests throughout the Pacific Northwest, in 1993, the newly elected Clinton Administration convened a “Northwest Forest Conference,” which resulted in the 1994 Northwest Forest Plan (NWFP), an innovative ecosystem-management plan that promised to protect listed species as well as allow for continued, but reduced timber harvests. Reflecting the controversial nature of the plan, Congress soon weighed on by enacting the Timber Salvage Rider in 1995, which basically

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18 “Late-successional” forests are areas where the primary goal is to maintain and increase old growth forests. See J.B. Ruhl & Robert L. Fischman, Adaptive Management in the Courts, 95 MINN. L. REV. 424, 450 (2010). “Old-growth” forests are home to pristine, intact forest ecosystems that once harvested cannot be replaced. U.S. FOREST SERV. & BLM, RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL, at fig. 2-3 (1994), available at http://www.blm.gov/or/plans/nwfpnepa/FSEIS-1994/NWFPTitl.htm [hereinafter 1994 ROD]
19 In 1987, the FWS decided not to list the spotted owl. 52 Fed. Reg. 48,552 (Dec. 23, 1987). Environmentalists challenged this decision, and a federal district court found this decision arbitrary and capricious. Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).
21 See infra note 179 and accompanying discussion.
23 See infra Section III.A (describing the NWFP in detail). The NWFP provided salmon as well as owl protection. See STEVEN LEWIS YAFFEE, THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS OF A NEW CENTURY 141-143 (1994). The plan “anticipated” 1.2 billion board feet of timber harvests would be harvested, a decline of nearly 75% from the 1980s. 1994 ROD, supra note 18, at fig. 1.
grandfathered several BLM timber sales from the Northwest Forest Plan.\textsuperscript{24} This appropriations rider had significant on-the-ground effects.\textsuperscript{25}

In 2000, Congress stepped in to provide relief to county governments affected by declining timber sale receipts with the Secure Rural Schools and Community Self-Determination Act of 2000 (SRSA).\textsuperscript{26} Revenue from this program supplemented revenue already provided to the counties under the Payment In Lieu of Taxes Act (PILOT).\textsuperscript{27} Although Congress reauthorized SRSA payments in 2008 for four more years, that extension expired at the end of 2012.\textsuperscript{28} Likewise, PILOT funding expired at the end of 2012.\textsuperscript{29} However, a proposal to extend the SRSA and PILOT for one more year passed the Senate in March 2012.\textsuperscript{30}

Dissatisfied with the stringency of the NWFP, and with the end of congressional subsidies in sight, the George W. Bush Administration sought to increase timber harvests from O&C lands by revising the NWFP through several initiatives, but all proved to be unsuccessful.\textsuperscript{31} The most notable of these efforts was the proposed Western Oregon Plan Revision (WOPR),\textsuperscript{32} which the Bush Administration did not have time to complete before it left office, and which the

\textsuperscript{25} See Patti A. Goldman & Kristen L. Boyles, Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy, 27 ENVTL. L. 1035, 1087-88 (1997) (these hastily-planned, often below-cost sales resulted in increased landslides, threatened city drinking water supplies, degraded fisheries, and ESA species listings).
\textsuperscript{26} Pub. L. 106–393, § 2(a)(8), 114 Stat. 1607.
\textsuperscript{31} See infra Section IV.A (failed attempt to delete the Survey & Management requirement in the NWFP); infra Section IV.B (failed attempt to delete the Aquatic Conservation Strategy in the NWFP); infra Section IV.C (failed attempt to create a new management plan for the O&C lands).
new Obama Administration declined to pursue because it thought that the proposal could not pass judicial muster under the ESA.\(^{33}\)

In 2012, the continued inability of the O&C lands to provide county revenues led to widespread reports that some of the O&C counties would have to declare bankruptcy, notably Curry County along the southern Oregon coast.\(^{34}\) This apparent crisis has produced proposals in Congress to significantly revise federal land management in western Oregon.\(^{35}\) If enacted, the most prominent of these measures—a proposal co-sponsored by Congressmen DeFazio (D-Or.), Schrader (D-Or.), and Walden (R-Or.) that would divide the O&C lands into a private timber trust and a public conservation zone\(^{36}\)—would not only revolutionize federal timber harvests in Western Oregon, but public land law in general.

This article investigates the long history of controversy of what are now the O&C lands. Section I explores the railroad grant itself and its aftermath, including the Oregon land fraud trials of the late nineteenth century, the case that eventually led the U.S. Supreme Court to require the revesture of the O&C lands, and the ensuing congressional reactions. Section II explains the how the harvest practices of the O&C lands led to numerous lawsuits in the late 1980s and early 1990s. Section III examines the Northwest Forest Plan, designed to respond to that litigation, and the congressional response in the 1995 Timber Rider. Section IV turns to the legal assault the Bush Administration mounted on the Northwest Forest Plan in the 2000s, its


\(^{35}\) See infra Sections VI.A-B (detailing the two most prominent proposals).

\(^{36}\) See infra Section VLA.
surprising legal ineffectiveness, and the Obama Administration’s unwillingness to pursue the Bush WOPR. Section V briefly outlines concurrent county payment statutes, explaining how the drying up of those funds has pushed rural Oregon counties to the brink of bankruptcy. Section VI assesses two bipartisan congressional proposals for completely revamping O&C land administration. The article concludes that the long history of contentiousness over what are now the O&C lands suggests that the proposals to revolutionize O&C land management threaten the future of public land law with what amounts to privatization of a resource that the public has controlled, not always well, since the founding of the nation, and which has always reflected of its cultural identity.

I. Background

The O&C lands have a long and checkered past, full of fraud, intrigue, and legal uncertainty. Because of this history, any solution to the issues currently facing the O&C lands necessarily must understand their history. The O&C land controversy began in the 1860s, and has raged on ever since.

A. The O&C Land Grant

As a part of its push to settle the West and connect Portland, Oregon to California by rail, Congress granted established a land grant in 1866, authorizing the Oregon Legislature to determine the company that would build the line.\(^{37}\) Congress anticipated that an Oregon railroad would build a line from Portland to the Oregon-California border, and a California railroad would to build a line from the Central Valley north to the state border.\(^{38}\) Because railroad construction facilitated settlement, Congress granted the railroads the right to earn a patent to every odd-numbered alternate section of non-mineral public land within twenty miles on each

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\(^{38}\) Act of July 25, 1866, ch. 242, § 1, 14 Stat. 239, 239-40.
side of the constructed railway line. \(^{39}\) If the government previously disposed of the railroad’s land selections, the railroad could make “in lieu” land sections within lands ten miles beyond the original railway corridor. \(^{40}\) Once obtaining land patents, the railroad company could sell the lands, but only to “bona fide and actual settlers under the preemption laws of the United States.” \(^{41}\)

In the 1866 Act, Congress envisioned that the railroad selections would occur within a year, and that construction of the line would be complete by 1875. \(^{42}\) Importantly, the grant specified that failure to follow the terms of the grant would result in reversion of the granted lands to the United States. \(^{43}\)

In October 1866, a Portland, Oregon-based company (“West Side Company”) organized the “Oregon and California Railroad Company.” \(^{44}\) Shortly thereafter, the Oregon Legislature designated the West Side Company as the organization entitled to receive the benefits of the 1866 Act. \(^{45}\) The West Side Company then filed for the patent with the U.S. Department of Interior (Interior). \(^{46}\) Although the Company initially won the rights to build the railway, a group of California promoters organized another company (“East Side Company”) in Salem, Oregon in

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\(^{39}\) Id. § 2; id. § 4, 14 Stat. at 240 (once the railroads reported to the federal government, and the government confirmed that twenty consecutive miles of line had been laid, the railroads received patents for the grant lands).

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Id. § 6, 14 Stat. at 241.

\(^{43}\) Id. § 8 (if the companies fail to “comply with the terms and conditions required … this act shall be null and void, and all the lands not conveyed by patent to said company or companies … shall revert to the United States.”).

\(^{44}\) United States v. Oregon & C. R. Co. (O&C R.R. I), 186 F. 861, 868 (C.C. Or. 1911). The “West Side Company” was so named because it proposed to construct a railway from Portland to McMinnville on the west side of the Willamette River. Id.


\(^{46}\) O&C R.R. I, 186 F. at 868. Under the grant, the state-approved railroad company had to file its assent to the Act with Interior within one year of the act’s passage on July 25, 1866. Act of July 25, 1866, ch. 242, §6, 14 Stat. 239, 241.
1867, challenging the validity of the West Side Company’s incorporation.\textsuperscript{47} Due to this dispute between the two companies, Congress extended the deadlines established in the 1866 grant.\textsuperscript{48}

In 1868, as a result of a heated political battle, the Oregon Legislature reversed course and decided to award the rights to build the railway to the East Side Company.\textsuperscript{49} As a result of the legislature’s decision, the West Side Company lost its designation, but the East Side Company—even with the state’s recent approval—could not file for a patent from Interior under the terms of the 1866 grant because the deadline to file expired.\textsuperscript{50} To solve this problem, Congress amended the 1866 grant in 1869 by extending the filing period until April of 1870, thus resolving the East Side Company’s problem.\textsuperscript{51} Importantly, in the 1869 amendment, Congress also reaffirmed that the railroad company could sell its patented land only to actual settlers, in parcels no larger than one-quarter sections (160 acres), for no more than $2.50 an acre.\textsuperscript{52}

In 1870, the East Side Company organized into the Oregon & California Railroad Company (“O&C R.R.”) and finished consolidating the West Side Company’s O&C-related holdings in

\textsuperscript{47} O&C R.R. I, 186 F. at 868; David M. Ellis, The Oregon and California Railroad Land Grant, 1866-1945, 39 PACIFIC NORTHWEST Q. 253, 255 (1948).

\textsuperscript{48} Act of June 25, 1868, c. 80, 15 Stat. 80, 80 (extending deadline to complete first twenty miles until late 1869, and extending the deadline for completion of the entire line until 1880).

\textsuperscript{49} H.J. Res. 16, 5th Leg. Assemb., Reg. Sess., 1868 Or. Laws 109-10 (Or. 1868); see STAFF OF S. COMM. ON INTERIOR AND INSULAR AFFAIRS 38, 86TH CONG., REP. ON THE DISPOSITION OF THE PUBLIC DOMAIN IN OREGON (Comm. Print 1960) (unpublished Ph.D dissertation of Jerry O’Callaghan, Stanford University) [hereinafter O’Callaghan] (describing the political battle to obtain designation from the Oregon Legislature); Ellis, supra note 47, at 255.

\textsuperscript{50} O’Callaghan, supra note 49, at 38. The state-designated railroad company had to file its assent with Interior by July 25, 1867 under the original terms of the 1866 Act. See supra note 46 and accompanying text.

\textsuperscript{51} Act of April 10, 1869, c. 27, 16 Stat. 47, 47. The East Side Company proceeded to make the proper filings in late 1869. O&C R.R. I, 186 F. at 869.

\textsuperscript{52} Act of April 10, 1869, c. 27, 16 Stat. 47, 47. These provisions mirrored the Homestead Act of 1862. Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392 (repealed by Federal Land Policy and Management Act of 1976 § 702, Pub. L. No. 94-579, 90 Stat. 2744, 2787). After the East Side Company filed its assent with Interior, the West Side Company ceased to be involved in the O&C railroad construction, although it did receive a later grant to build a railway from Portland to Astoria. Act May 4, 1870, c. 69, 16 Stat. 94; O’Callaghan, supra note 49, at 39. The act reiterated that the West Side Company could sell its patented lands to actual settlers only, in parcels no greater than 160 acres, for no more than $2.50/acre. Act May 4, 1870, c. 69, § 4. During the 1870s, the West Side Company built 47 miles of railway from Portland to McMinnville. O&C R.R. I, 186 F. at 871.
By 1873, the O&C R.R. had built 197 miles of railway, extending from Portland to Roseburg, Oregon. For the rest of the 1870s and into the early 1880s, the O&C R.R. experienced financial difficulties, frequently halted construction, and was forced to enter receivership after defaulting on bond repayments. Finally, in 1887, Southern Pacific Railroad acquired the O&C R.R. Construction of the line resumed in 1887, which was completed to California border by June of 1888—nearly eight years after its slated completion date.

By the time the line was operational in 1888, the O&C R.R. had earned nearly 3,728,000 acres of land, even though it was technically entitled to 4,220,000 acres. Despite “owning” these vast tracts of land, the railroad had incentives not to patent their lands, and was otherwise unsuccessful in selling land to settlers in the 1870s and 1880s. As a result, by 1890, the O&C R.R., and its successor, Southern Pacific, had patented only 323,184 acres, leaving over three million acres of unpatented land. Of the patented acreage, just 300,000 of those acres had been

53 Id. at 869; O’Callaghan, supra note 49, at 44.
54 O&C R.R. I, 186 F. at 869.
55 Scott & Brown, supra note 37, at 263-64. The O&C R.R. Co. issued $5 million in bonds in both 1881 and 1883, which allowed the railroad to resume construction of the line. O&C R.R. I, 186 F. at 871. The O&C R.R. used this money to extend the line to Ashland, Oregon by 1884. Id. However, in the railroad defaulted on the payment of the 1881 and 1883 mortgage bonds, and thus entered receivership in 1885. Id.
56 Id. at 872. In 1887, Southern Pacific negotiated a buy-out with the O&C R.R. and its bondholders. Id. The result of this contract was to merge the O&C R.R. into Southern Pacific. Id.
57 Id. at 873; Act of June 25, 1868, c. 80, 15 Stat. 80, 80 (setting a completion date of July 1, 1880).
58 United States v. Oregon & C. R. Co. (O&C R.R. III), 8 F.2d 645, 660 (D. Or. 1925); see Scott & Brown, supra note 37, at 264. The disparity was a result of settlement pressures along the railway route. In the alluvial lands of Oregon’s Willamette Valley, homesteaders had already preempted much of the available land. Ellis, supra note 47, at 254. Moreover, once the line route was announced, speculators rushed in to buy land. Id. This practice forced the O&C R.R. to select grant lands in the more distant indemnity zone. O’Callaghan, supra note 49, at 41. As a result, the railroad was not allotted its full entitlement. Id.
59 The O&C R.R. was slow to patent its grant lands because until patent passed from the federal government to railway, the O&C R.R. could avoid taxes and fees on the land. Ellis, supra note 47, at 260.
60 From 1874 to 1881, the O&C R.R. Co. was unsuccessful in its efforts to market and sell its lands to settlers. O’Callaghan, supra note 49, at 40. This included failed marketing efforts in the Eastern United States and Europe, where the land was offered at $1.25/acre. Id. At that time, the prevailing view was that these lands were of low value because they were located in rugged, mountainous, timber-covered terrain. Id. at 41. Especially since the original intention was to facilitate agricultural settlement, this understanding as to the character of the land in the grant did not help the O&C R.R. dispose of lands. Ellis, supra note 47, at 260.
61 O’Callaghan, supra note 49, at 41; Scott & Brown, supra note 37, at 264.
sold to settlers, as required by the terms of the grant, meaning that some 23,000 acres had been sold to non-settlers.

By the mid-1890s, the perceived value of the O&C timberlands shifted dramatically. Around this time, the Great Lakes timber industry began to exhaust its supply of timber. As a result, much of the nation’s timber industry moved from the Midwest to the Northwest. From 1893 to 1906, the O&C R.R. patented 2,450,000 acres of its grant. By 1900, the 1866 grant lands had an estimated worth of $30–50 million. Because its grant land contained valuable timber, the railroad began selling off large swaths, often in blatant disregard of the grant’s “actual settler,” acreage, and price provisions. By 1903, the O&C R.R. and Southern Pacific had sold 5306 tracts, totaling approximately 820,000 acres. These sales ranged from $5 to $40 per acre, and the railroad sold some 524,000 acres of the patented land in parcels greater than 160 acres, including several huge sales.

In 1903, Southern Pacific withdrew all the O&C lands from sale in an effort to hold reserves until stumpage prices rose even higher. Oregon was a hotbed for the anti-monopolistic Progressive movement in the early 1900s, and this decision gave Oregonians a negative perception of railroads and railroad grants. The withdrawal would prove fateful for Southern

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62 O’Callaghan, supra note 49, at 41. These small parcels conformed with the acreage and “actual settler” provisions of the grant, although some parcels were sold for more than allowed. Ellis, supra note 47, at 260 (noting sales during this period at $1.25 to $7/acre).

63 Scott & Brown, supra note 37, at 265.

64 See Ellis, supra note 47, at 261.

65 O&C R.R. I, 186 F. 861, 873 (C.C. Or. 1911).

66 O’Callaghan, supra note 49, at 41.

67 Under the federal grant, the O&C R.R. could sell its patented land only to actual settlers, in parcels no larger than one-quarter sections (160 acres), for no more than $2.50 per acre. Act of April 10, 1869, c. 27, 16 Stat. 47, 47.

68 O&C R.R. I, 186 F. at 873.

69 Id. The O&C R.R. made a number of sales in excess of 1000 acres, including one of 45,000 acres. Id.

70 Ellis, supra note 47, at 261 (the chief executive of Southern Pacific stated the company’s motives for the withdrawal: “The agricultural land we will sell, but the timber-land we will retain, because we must have ties and timbers, and we must retain our timber for future supply . . . .”).

71 Scott & Brown, supra note 37, at 265 (noting that Oregonians already distrusted railroads for their tax avoidance techniques); Dodds, supra note 14, at 749.
Pacific and the O&C lands, especially as the Oregon Land Fraud scandal brought Oregon timberland disposition into the national spotlight.

B. The Oregon Land Fraud Scandal and Changing Public Opinion

The booming, “illegal” sales of O&C lands were just a microcosm of the pervasive land fraud dynamics plaguing early twentieth-century Oregon. Beginning in 1902, the Theodore Roosevelt Administration began investigating widespread land fraud in Oregon and California, principally under the Timber and Stone Act of 1878 and the Forest Reservation Act of 1897. These investigations eventually led to the indictment of over a thousand people, including both of Oregon’s U.S. Senators, a U.S. Congressman from Oregon, a U.S. District Attorney from Oregon, a GLO Commissioner, several Oregon State Senators and Assistant Attorneys, and countless other businessmen and officials in the state. This scandal catalyzed a sea change in timberland disposition policies that would ultimately seal the fate of the O&C lands.

According to a U.S. Senate Report, the federal government observed an “unusual increase in the number of entries” under the Timber and Stone Act around the turn of the century. Under the statute, an applicant applied to a local land office for a patent, alleging that the land was chiefly valuable for timber or stone. Assuming no one protested the claim, the claimant was eventually issued a patent, even though he/she was not required to reside on or cultivate the land. Consequently, a speculator could enlist locals to apply for a patent and agree

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73 Timber and Stone Act of 1878, c. 151, 20 Stat. 89.

74 Forest Reservation Act of 1897, c. 2, § 1, 30 Stat. 36.

75 DRAFFAN, *supra* note 1, at 22.

76 S. REP. 58-189, at vi (1905).

77 Timber and Stone Act of 1878, c. 151, §§ 1-2, 20 Stat. 89, 89; *see also* S. REP. 58-189, at vi (1905) (describing how speculators manipulated the Act).

78 S. REP. 58-189, at vi (1905).
to buy the land for more than $2.50/acre. Moreover, a well-placed bribe by a powerful politician could quickly expedite the process.

Many speculators also capitalized on the creation of new forest reserves. Under the “in lieu” provision of Timber Reserve Act, people who had previously settled or owned lands within these reserves obtained the option to keep their land (as an inholding) or to select an equal amount of land outside the reserve. Speculators would then invest in lands near potential reserves and bribe officials to include those lands in the boundaries of the reserves. This use of the “in lieu” provision was quite prevalent in Oregon, where President Roosevelt enlarged Oregon’s forest reserves to 13 million acres in the early 1900s.

The land fraud scandal began to materialize in 1902 when a progressive advocate employed by the GLO received letters from a disgruntled former employee of a California-based land fraud ring. Despite GLO Commissioner Binger Hermann’s attempts to sabotage the investigation, the GLO sent special agents to both California and Oregon to investigate the allegations. In Oregon, the agents discovered the so-called “11-7” and “24-1” land fraud schemes, headed by Steven Puter. When the claims did not receive patents, Puter traveled to

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79 *Id.* Even the Supreme Court was familiar with the scheme, even if it could not prove it. See United States v. Budd, 144 U.S. 154, 155-57, 161 (1892).
81 Forest Reservation Act of 1897, c. 2, § 1, 30 Stat. 36.
82 See Messing, *supra* note 72, at 37.
84 See id. at 41.
85 See *id.* at 43. Puter and his cohorts convinced non-settlers to enter homestead claims, and then paid $3800 for these 12 claims. See Jerry O’Callaghan, *Senator Mitchell and the Oregon Land Frauds, 1905*, 21 PACIFIC HIST. REV. 255, 256 (1952) [hereinafter O’Callaghan, Land Fraud]. Puter then paid C.E. Loomis, an investigator in the Oregon City district land office, $1000 to favorably investigate the claims. *Id.* at 257. Despite Loomis’ positive report, the GLO commissioned another investigator. Puter again paid this investigator $500. See *id.* The “24-1” scheme essentially repeated the same process, although the ring used actual settlers this time. See Messing, *supra* note 72, at 43. Puter and his ring then paid $100 to the GLO Commissioner for the Eugene Land Office to expedite the claim. See *id.*
Washington, D.C. and bribed Oregon Senator John H. Mitchell to have Commissioner Hermann expedite the claims. Although Puter was indicted for fraud in both schemes in October of 1903, Senator Mitchell and many other politicians might have avoided prosecution if not for the appointment of special prosecutor Francis J. Heney. When Heney arrived in Portland in 1903, he discovered that the U.S. Attorney for Oregon, John H. Hall—who was up for reappointment—intended to prosecute Puter for the weaker “24-1” claim, but not for the “11-7” claim. After Heney changed course, Puter was convicted of fraud for the “11-7” count. After Senator Mitchell convinced Hall to drop charges against Puter’s co-conspirators, and publicly castigated Puter, Puter turned on the Senator. Implicated by a paper trail, the Senator was eventually convicted in July of 1905 and sentenced to six months in jail and a fine. At the request of Heney, U.S. Attorney Hall was also dismissed right before the Mitchell indictment.

On the other hand, Commissioner Hermann, as a result of a well-timed earthquake in 1906, avoided conviction in this and other land fraud cases, and was in fact later elected to Congress.

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87 See O’Callaghan, Land Fraud, supra note 86, at 257. Recognizing Senator Mitchell’s interest in women, Puter also brought along Emma Watson, the person to whom the “11-7” deed had been issued. See id.; see also Perdue, supra note 80, at 489 (describing Mitchell’s publicly-exposed affair with his second wife’s younger sister). Watson signed an affidavit claiming that she was a widow and that she would lose her investment if the claims were not expedited. See id. Although Mitchell initially rejected the offer, he finally relented, and spoke with GLO Commissioner Hermann, who then promptly approved the patents. See id. at 257-58. With the patents, approved, Puter returned to Oregon and sold the patents to Frederick Kribs for $10,090. See id. at 258. Although Senator Mitchell denied the bribery allegations, records eventually surfaced that Kribs had paid the Senator’s private law firm the amount alleged. See id. at 259.

88 See O’Callaghan, Land Fraud, supra note 86, at 258. Heney was appointed because he was not sympathetic to the local interests in the case. See id. Heney was staunchly supported by President Roosevelt and Gifford Pinchot, the head of the United States Forest Service at the time. See DRAFFAN, supra note 1, at 22.

89 See Messing, supra note 72, at 45. Hall likely felt pressure to acquiesce the Oregon Congressional delegation, as he needed their support in order to gain reappointment. Id.

90 See id. at 49-50. Although plans were made to prosecute the “24-1” count, the case was stayed. Id. at 50.

91 See id.; O’Callaghan, Land Fraud, supra note 86, at 259.

92 See id. at 260; Messing, supra note 72, at 56.

93 See O’Callaghan, Land Fraud, supra note 86, at 259.

94 In connection with the land fraud investigations, Hermann destroyed a number of key files before he was forced to resign as Land Commissioner. See Messing, supra note 72, at 40. Immediately thereafter, Hermann was elected as a U.S. Representative from Oregon. See O’Callaghan, Land Fraud, supra note 86, at 261. Heney intended to prosecute Hermann for record destruction. The trial was originally set for April 25, 1906. However, when the San Francisco earthquake struck on April 18, 1906, Heney traveled to San Francisco in an effort to locate his three
Although the Mitchell trial was the most notable, a number of other Oregon land fraud scandals infiltrated all levels of Oregon government and business. The second major land fraud trial involved U.S. Congressman John Williamson, his partner in a sheep grazing business, and a U.S. Lands Commissioner in the Prineville, Oregon district.\(^95\) In order to maintain prime summer sheep grazing areas, Williamson and his partner bribed the Prineville commissioner to hire settlers, who would then enter fake claims under the Timber and Stone Act in the desired areas, and then ensure that the claims were patented.\(^96\) The group was indicted in February of 1905, and after two hung juries, a third jury finally convicted Williamson and the land commissioner in October of 1905, sentencing them to jail and imposing fines.\(^97\) In the third major scheme, which led to indictments in February of 1905, a number of state senators purchased lands in the hope that they would be included in proposed forest reserves, thus making the senators eligible to receive “in lieu” selections under the Forest Reserves Act.\(^98\) A fourth trial involved a similar scheme involving a major Oregon livestock company.\(^99\) In addition to permeating all levels of Oregon society, the Oregon Land Fraud scandals led to the repeal of the “in lieu” provision in the Forest Reserves Act and may have influenced the outcome of the 1912 Presidential election.\(^100\)

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\(^95\) See Messing, supra note 72, at 53.
\(^96\) See id.
\(^97\) Williamson and the Land Commissioner received jail sentences of 10 months each, and ordered to pay $500 each. See id. at 58. Williamson’s sheep herding partner was sentenced to 5 months in jail, and ordered to pay a $1000 fine. Id.
\(^98\) See id. at 53. State senators George Sorenson, Willard Jones, H.A. Smith and F.P. Mays were all indicted for their roles in this scheme. Id.
\(^99\) See id. at 54 (describing case against Butte Creek Land, Livestock & Lumber Company). Heney did not prosecute any of the cases after the Williamson verdict, as he was called to Washington D.C. to prosecute the California land fraud cases, and a case against GLO Commissioner Hermann for his role in destroying files. Id. at 58.
\(^100\) The “in lieu” provision in the Forest Reserves Act of 1897 was repealed in 1905. Act of Cong., Mar. 3, 1905, c. 1495, 33 Stat. 1264 (repealing the “Forest Lieu Act,” Act Cong. June 4, 1897, c. 28 1, 30 Stat. 34). Shortly before leaving office, President William Howard Taft pardoned Oregon state senator Willard Jones for his role in the Oregon Land Fraud scandal, and condemned Heney’s (and by implication, former President Roosevelt’s) methods.
C. Litigation over the Reversion of the O&C Lands to the Federal Government

The timber-related intrigue and attention created by the Oregon Land Fraud scandal, combined with Southern Pacific’s decision to remove the O&C lands from sale, and public concern regarding railroad monopolies sparked interest in the O&C land grant. In 1904, during the heart of the land fraud trials, *The Oregonian* newspaper, a primary instigator in the anti-corporate, progressive movement in Oregon, published notice of a “homestead” clause in the 1869 Coos Bay Wagon Company. Already angry about Southern Pacific’s withdrawal of land from sale, land-hungry, anti-monopoly Oregonians began to attack the railroad. Noticing that the O&C grant was nearly identical to the Coos Bay Wagon grant in these respects, a competing timber company—the Booth-Kelley Lumber Company, which was in need of new timber supplies—pounced. Instead of paying market prices for Northwest timber, Booth-Kelley believed it could acquire timber for no more than $2.50/acre from the O&C lands. The anti-railroad, progressive public sentiment of the time, together with the competitive advantage sought by Southern Pacific competitors, catalyzed the forfeiture movement. Once the issue


101 See Ellis, *supra* note 47, at 262; DRAFFAN, *supra* note 1, at 22.

102 See Ellis, *supra* note 47, at 262-63; RICHARDSON, *supra* note 83, at 10. The Act of Mar. 3, 1869, c. 150, § 1, 15 Stat. 340, 340 granted lands to Oregon for the construction of the Coos Bay wagon road, from Coos Bay, Oregon to Roseburg, Oregon. *Id.* Oregon granted the Coos Bay Wagon Road Company all of the associated with the grant in exchange for the construction of the road. See Southern Or. Co. v. United States, 241 F. 16, 17 (9th Cir. 1917). In 1917, 96,000 acres of this land revested to the federal government as a result of the Wagon Company having violated the homestead, price, size, and timber-cutting restriction terms of the grant. *Id.* at 17, 19-20, 24.

103 See Dodds, *supra* note 14, at 749.

104 Like the O&C grant, the Coos Bay Wagon grant required the company to sell land at up to $2.50/acre, in parcels less than 160 acres. Act of Mar. 3, 1869, c. 150, § 1, 15 Stat. 340, 340, although it required only that lands “shall be sold to any one person,” as opposed to “actual settlers only.” *Id.*

105 See Ellis, *supra* note 47, at 263.

106 See *id*.

107 See *id*.
gained momentum, Oregonians mobilized to “rescue” the public interest from railroad monopoly. The issue became a hot-ticket item for Governor (later U.S. Senator) George Chamberlain, the Oregon legislature, and the media. In 1908, Congress got involved, directing the U.S. Attorney General (AG) to enforce the terms of the O&C grant. Shortly thereafter, the AG filed suit, seeking forfeiture of all unsold O&C grants lands to the federal government. In the alternative, the AG sought 1) appointment of a receiver to carry into effect the 1869 Act’s sale price, size and actual settler conditions; or 2) sale of the remaining O&C grant lands in compliance with the Act.

In 1911, the Circuit Court for the District of Oregon held that the whole 1866 grant to O&C R.R. was subject to forfeiture because it had not followed the “conditions subsequent” established in the 1869 Act when it sold tracts greater than 160 acres in size to non-settlers and for more than $2.50 per acre. Southern Pacific appealed and stopped paying taxes to the counties. These tax amounts were significant. In 1912, Congress responded to public

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108. See RICHARDSON, supra note 83, at 10. The Oregonian’s well-timed publication in 1904, combined with Booth-Kelley’s economic motives thus catalyzed a movement in Oregon to reclaim the O&C lands from the “tyranny of the railroad monopoly.” See id.

109. Recognizing that public sentiment was against the railroads, Governor Charles E. Chamberlain quickly took up the forfeiture cause, and argued that the lands should be sold to settlers under the homestead clause. See Ellis, supra note 47, at 263. In early 1907, the Oregon Senate passed a joint resolution to the President and Congress, urging the federal government to make Southern Pacific Railroad forfeit the O&C lands. S.J. Memorial 3, 24th Leg. Assemb., Reg. Sess., 1907 Or. Laws 516-17 (Or. 1907). In 1907, the Oregonian summed up public opinion regarding the O&C lands: “[t]he reign of broken pledges and greedy grab of nonresident landlords should end. Oregon aspires to a nobler destiny than striving for the pleasure and profit of these barons.” See O’Callaghan, supra note 49, at 43 (citing THE OREGONIAN, May 24, 1907).


111. In September of 1908, the AG filed suit against the O&C R.R. (owned by Southern Pacific), and 45 individual purchasers. See O’Callaghan, supra note 49, at 43. The AG these three orders in the alternative. O&C R.R. I, 186 F. 861, 874-75 (C.C.D. Or. 1911).

112. Id.

113. Id. at 921-22, 924, 933 (C.C.D. Or. 1911) (concluding that under the terms of the 1866 grant, as amended in 1869, the O&C R.R. was only allowed to sell the land to actual settlers, in parcels up to 160 acres, for up to $2.50/acre). “Conditions subsequent” are conditions, which if not followed, “entail a forfeiture of the lands granted for nonobservance of the condition.” Id. at 890.

114. See Scott & Brown, supra note 37, at 266.

115. Prior to 1916, the railroad companies paid the O&C counties around $500,000 annually in land taxes. Hearings on H.R. 5858, supra note 13, at 141 (statement of Guy Cordon, representative for the O&C Counties).
concerns about the effects of the lower court decision on O&C land purchasers by providing buyers an opportunity to obtain clear title to the lands they had purchased from the O&C R.R. and its successor, Southern Pacific, prior to 1908.\textsuperscript{116} Then, in 1915, the Supreme Court decided the fate of the remaining unsold O&C grant lands. First, the court enjoined the railroad from further disposing of O&C lands or cutting any timber from them.\textsuperscript{117} But, the court did not agree that violations of the 1869 Act conditions led to forfeiture; instead, it believed the grants contained enforceable covenants that when breached, led to an injunctive remedy, not forfeiture.\textsuperscript{118} Thus, instead of forcing Southern Pacific to forfeit the grant land, the Supreme Court in effect remanded the land disposition and compensation issues to Congress.\textsuperscript{119}

D. Congressional Response to Management of the O&C Lands

While Congress deliberated on a solution, timberland speculators, including Steven Puter, again ran wild.\textsuperscript{120} The Oregon public hoped that the land would be sold at the original grant price of $2.50/acre, while county governments championed a solution that would afford them much-

\textsuperscript{116} In 1912, Congress passed the Forgiveness Act of 1912, c. 311, 37 Stat. 320. Under the Act, buyers who had been sued by the government could agree to forfeit their purchased land to government, with the stipulation that if the buyers then paid the federal government $2.50/acre for the previously forfeited lands, those buyers would then be issued patents for the lands. \textit{Id.} § 4, 37 Stat. 320, 321; \textit{see also} DRAFFAN, \textit{supra} note 1, at 22.

\textsuperscript{117} Oregon & Cal. R.R. Co. v. United States (\textit{O&C R.R. II}), 238 U.S. 393, 438-39 (1915); \textit{see} Ellis, \textit{supra} note 47, at 267.

\textsuperscript{118} \textit{O&C R.R. II}, 238 U.S. at 419, 431, 438; \textit{see} Scott & Brown, \textit{supra} note 37, at 266; RICHARD D. POWELL & PATRICK J. ROHAN, \textit{POWELL ON REAL PROPERTY} § 676 at 60-112 (1996).

\textsuperscript{119} \textit{O&C R.R. II}, 238 U.S. at 419, 438-39 (“[T]he lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should [be enjoined from any further disposition] . . . until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.”). In support of this conclusion, the court noted that forfeiture would have led to a liquidation of the remaining unsold lands at $2.50/acre, thus benefiting speculators, not settlers. \textit{See id.} at 438-39; Ellis, \textit{supra} note 47, at 267.

\textsuperscript{120} In 1916, speculators filed between 14,000 and 15,000 applications to buy land with the railroad company. \textit{See} Ellis, \textit{supra} note 47, at 268. Among these speculators was Steven Puter, who reportedly earned $1 million in fees while representing those trying to locate new claims. \textit{See id.} at 269; O’Callaghan, \textit{supra} note 49, at 45 (citing 53 CONG. REC. 8584 (1916)). In addition, squatters rushed to stake out claims, believing that this would somehow provide them priority. \textit{See} O’Callaghan, \textit{supra} note 49, at 45.
needed tax relief. The Chamberlain-Ferris Act of 1916 was the first attempt at a resolution. Under the 1916 Act, all unsold O&C lands as of July 1, 1913—2,891,000 acres—revested back to the United States. Southern Pacific did receive compensation under the Act.

Congress instructed the Interior Department to categorize these lands as either “timberlands,” power sites, or agricultural lands. If classified as timberlands, the GLO had the discretion to sell the timber, although Congress instructed the agency to do so “as rapidly as reasonable prices [could] be secured” through a public bidding process. Congress apportioned income generated from these sales in the following order: 1) Southern Pacific was to receive $4.1 million for land the O&C R.R. earned from construction of the line, and 2) the U.S. Treasury to pay off the counties’ accumulated back taxes on the revested O&C lands. The Act required distribution of the remainder to the Oregon public school fund, to the counties (in lieu of taxes), to the Federal Reclamation Fund, and to the U.S. Treasury general fund. The Chamberlain-Ferris Act, however, did not work as Congress intended, however.

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121 See O’Callaghan, supra note 49, at 45; Ellis, supra note 47, at 271. Prior to the 1911 district court’s decision ruling that the O&C R.R. forfeited its lands—which prompted the railroads to stop paying taxes—the counties assessed the O&C R.R. property taxes at rates higher than $2.50/acre. Id. After the railroads stopped paying taxes, the counties accumulated over $1.3 million in tax arrears from 1913-1916. See id. (citing 53 Cong. Rec. 8593 (1916)).


123 Id. § 1; see Ellis, supra note 47, at 267; O’Callaghan, supra note 49, at 46.

124 See infra note 127 (describing the amount received by Southern Pacific). Although Congress paid compensation, the Act was in effect a condemnation because it gave the railroad no other options.

125 Id. § 2. The statute defined “Timberlands” as lands with 300,000 or more board feet of timber per 40 acres. Id.

126 Id. § 4. The GLO did have the right to reject bids it deemed insufficient, but the Act set no minimum price. Id.

127 The O&C R.R. earned 3,728,000 acres of land from construction. See supra note 58 and accompanying text. Multiplied by $2.50/acre, this amounted to $9.32 million. At the time of the reversion, the O&C R.R. and Southern Pacific had earned $5.24 million from land sales, timber, and interest. O&C R.R. II., 8 F.2d 645, 660 (D. Or. 1925) (providing a full accounting). The $4.1 million received by Southern Pacific reflected this balance.

128 Chamberlain-Ferris Act of 1916, c. 137, §§ 9, 10, 39 Stat. 218, 221-22. From 1913-1915, the U.S. Treasury lent over $1.5 million to the counties to pay off taxes they owed on the revested land. Ellis, supra note 47, at 272.

129 25% was earmarked for the Oregon public school fund, 25% was earmarked for the counties (for schools, roads, and transportation infrastructure), 40% was earmarked for the Federal Reclamation Fund, and the last 10% was earmarked to the U.S. Treasury. Chamberlain-Ferris Act of 1916, § 10.
The woefully under-funded and undermanned GLO, responsible for administering the Act, had few resources to facilitate and administrate timber sales. In addition, much of the O&C timber was not cheaply or easily accessible, especially when compared to other sources of Northwest timber. As a result, few sales occurred, and most O&C counties received no payments in lieu of taxes between 1916 and 1926, when Congress again intervened, enacting the Stanfield Act. Under this statute, Interior was to pay the counties $7.135 million from future timber sales—an amount equal to what they would have earned from railroad taxes between 1916 and 1926, if the O & C lands had not revested to the United States. Like the Chamberlain-Ferris Act, the Stanfield Act was unsuccessful in solving the counties’ financial problems. Between 1926 and 1937, the counties received $3.86 million in lieu of taxes, and the government owed them another $2 million. By 1937, the O&C Fund disbursed $18 million from the O&C Fund to Southern Pacific, the U.S. Treasury, and to the counties in lieu of taxes, but timber sales from the O&C lands had raised only $8.3 million in revenue for the fund.

In an effort to provide a permanent fix, Congress enacted the Oregon & California Lands Act of 1937 (OCLA). The OCLA declared that all O&C timberlands shall be managed [by the GLO] … for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic

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130 See id. § 10; Brown & Scott, supra note 37, at 267 (describing the resources available to the GLO as it attempted to facilitate sales under the Act).
132 Stanfield Act of 1926, c. 897, § 1, 44 Stat. 915.
133 Id. §§ 1, 4; see Ellis, supra note 47, at 275.
134 See Ellis, supra note 47, at 275.
135 See id. at 275; Scott & Brown, supra note 37, at 268.
137 In 1937, the O&C lands contained 46 billion board feet of timber, or 3% of the nation’s total timber supply. S. REP. NO. 75-1231, at 2 (1937).
stability of local communities and industries, and providing recreational facilities.\textsuperscript{139}

The Act stated that until the GLO set the annual sustained yield capacity for the O&C lands, no more than 500 million board feet of timber was to be cut.\textsuperscript{140} However, once the GLO set the annual sustained yield, Congress directed the agency to make annual timber sales of “not less than one-half billion feet board … or not less than the annual sustained yield capacity [once set] . . . or so much thereof as can be sold at reasonable prices on a normal market.”\textsuperscript{141} The OCLA also authorized the GLO to subdivide the land into “sustained-yield forest units.”\textsuperscript{142} Congress directed the agency to distribute revenue produced from the O&C land sales according to the following formula: fifty percent to the counties; twenty-five percent to the federal treasury to pay off money in lieu of taxes that was advanced to the counties (until the debt was extinguished), and then to the counties once paid back; and twenty-five percent for administrative expenses.\textsuperscript{143} Congress amended the formula twice later; by 1981, the O&C counties and the U.S. Treasury were each entitled to fifty percent of timber receipts.\textsuperscript{144}

Beginning with the contentious battle as to who would build the line, through the railroad’s sale of lands in violation of the original grant, the O&C lands engendered and attracted controversy. The O&C lands became enveloped in a nationwide movement to

\textsuperscript{139} 43 U.S.C § 1181(a) (2006). Despite protests from the Forest Service that it was better suited to manage the land, Congress kept Interior (and its subdivision, the GLO) as the land manager. See Scott & Brown, supra note 37, at 266–67.

\textsuperscript{140} 43 U.S.C § 1181a (2006). The provision did not specifically state that the GLO (through Interior) was the agency responsible for setting the annual sustained yield, but that is easily implied from the provision.

\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} Id. § 1181f(a)–(c).

eliminate fraudulent land disposition practices, and may have influenced the outcome of
the 1912 Presidential election. And in the mid 1910s, at the behest of the U.S. Supreme
Court, the lands revested in the government. Thereafter, Congress and the courts
attempted to shape a management regime that would repay the federal government for its
tax relief, support the timber-reliant local communities, and produce a sufficient supply
of timber. As a result of these efforts, culminating in the OCLA of 1937, O&C land
management was non-contentious for nearly 40 years. That would all change, however,
in the late 1980s.

II. BLM Management of the O&C Lands and Increasing Management Controversy

From 1937 until the late 1980s, the GLO (now the BLM) managed the O&C lands with
a great deal of unchallenged administrative discretion. Although the OCLA echoed familiar
“multi-use” and sustained yield themes, the BLM consistently contended that the Act in fact
established a “dominant use” regime that elevated timber production above all other values. In
line with this policy, BLM managed the O&C lands for nearly forty years so to maximize timber
harvests. This policy was popular with many Oregonians because timber harvesting produced
considerable revenue for the eighteen “O&C Counties” in Western Oregon. In fact, some
commentators have suggested that the significance of OCLA revenues has played a large role in

145 In 1946, the BLM was created, and it inherited the responsibilities of the GLO including land management
authority over the O&C lands. See JAMES MUHN & HANSON R. STUART, OPPORTUNITY AND CHALLENGE: THE
146 See Michael C. Blumm & Jonathan Lovvorn, The Proposed Transfer of BLM Timber Lands to the State of
Oregon: Environmental and Economic Questions, 32 LAND & WATER L. REV. 353, 363 (1997);
Dodds, supra note 14, at 756-61.
147 See Dodds, supra note 14, at 755 (claiming that the OCLA was the first federal law to require multiple-use
management of federal public lands).
148 See Michael C. Blumm, Public Choice Theory and the Public Lands: Why “Multiple Use” Failed, 18 HARV.
ENVTL. L. REV. 405, 424 (1994) (noting that the O & C Act produced “a de facto ratification of dominant use
principles.”). As viewed by the House of Representatives, the OCLA “establish[ed] a vast, self-sustaining timber
149 See Dodds, supra note 14, at 756-61.
150 See id. at 740-41. In 1984, for example, the O&C Counties received almost $66 million in revenues under the
OCLA. BLM, 1984 LAND STATISTICS, supra note 14, at 193.
preventing Oregon from enacting a sales tax. However, beginning in the late 1980s, a number of citizens began to question whether the BLM was complying with environmental directives in the Federal Land Policy and Management Act (FLPMA), NEPA, and the ESA.

Under FLPMA—which governs the management of all public lands managed by the BLM—BLM must manage all public domain lands “on the basis of multiple-use and sustained-yield unless otherwise specified by law.” A savings clause in FLPMA, however, may exempt the O&C lands from its coverage:

[N]otwithstanding any provision of this act, in the event of a conflict with or inconsistency between this act and the acts of August 28, 1937 . . ., and May 24, 1939, insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter act shall prevail.

From 1977 to 1981, the Solicitor of Interior issued several opinions concluding that the OCLA was a “dominant use” statute, and that FLPMA’s “multiple use” mandate conflicted with the OCLA, and thus did not apply on the O&C lands. Two Ninth Circuit cases in the 1970s and 1980s also assumed (in dicta) that the OCLA established a timber-dominant scheme for the O&C lands. Nonetheless, environmental groups in the

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151 See Dodds, supra note 14, at 741.
155 43 U.S.C § 1701(a)(7).
158 See Skoko v. Andrus, 638 F.2d 1154, 1156 (9th Cir. 1979) (in a dispute concerning Interior’s obligation to disburse disputed O&C funds, the court noted in passing that the OCLA “provides that most of the O & C lands would henceforth be managed for sustained yield timber production.”); O'Neal v. United States, 814 F.2d 1285, 1287 (9th Cir. 1987) (in a personal injury action the BLM caused by the collapse of one of its roads, the court noted that the OCLA “make[s] it clear that the primary use of the revested lands is for timber production.”).
late 1980s and early 1990s continued to challenge the applicability of FLPMA to the O&C lands, as well as the interaction of the OCLA with NEPA and the ESA.

A. **Headwaters v. BLM – An Early Victory for Dominant Use Management**

In 1989, Headwaters, Inc. brought the first of these challenges to a BLM timber sale on O&C lands. The group asserted that the BLM had not fulfilled its NEPA obligation on the sale, and claimed that FLPMA’s multi-use mandate applied to the O&C lands. The U.S. District Court for the District of Oregon rejected both of these claims. Although the BLM had prepared an environmental impact statement (EIS) under NEPA for the Jackson and Klamath Sustained Yield Unit in 1979, and an environmental assessment (EA/FONSI) for the specific sale in 1986, it did not write a site-specific EIS on the sale. Although Headwaters raised various environmental concerns, including new evidence establishing the presence of ESA-listed (as of June of 1990) spotted owls in the sale area, the Ninth Circuit rejected all six of Headwaters’ NEPA claims.

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159 Headwaters, Inc. v. BLM, 19 Envtl. L. Rep. 21, 159 (D. Or. 1989), aff’d 914 F.2d 1174 (9th Cir. 1990), reh’g denied, 940 F.2d 435 (1991) (challenging the Wilcox Peak sale area in Southern Oregon).

160 Id. at 21,162 (rejecting NEPA claim); id. at 21,164 (rejecting FLPMA claim).

161 Id. Under NEPA, an agency must file an EIS for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006); see also 40 C.F.R. § 1508.11 (2012). If the agency finds that the action will not create a significant impact to the environment, it need not perform an EIS, and need only perform a less rigorous EA. See id. § 1508.13; see also id. § 1508.9 (describing EAs).

162 First, the court determined that new information on spotted owl habitat at the site did not trigger the need for an EIS. 914 F.2d at 1177-78. Next, the court concluded that timber harvest-caused river sedimentation, pollution and degradation at the site did not trigger the need for a site-specific EIS. Id. at 1178. Third, the court ruled that timber harvesting’s effects on fire hazards did not trigger the need to perform a site-specific EIS. Id. at 1179. Fourth, the court held that new information regarding the site did not make the EA outdated. Id. Fifth, the court found that BLM had considered a sufficient range of alternatives to the proposed action. Id. at 1180-81. NEPA requires a federal agency to provide a “detailed statement . . . on . . . alternatives to the proposed action . . . and to study, develop and describe appropriate alternatives . . . . “ 42 U.S.C. § 4332(2)(C), (E) (2006). Finally, the court held that the site-specific EA adequately considered cumulative impacts from the construction of logging roads. Id. at 1181. “Cumulative impacts” are the collective impacts of all “past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (2011). The northern spotted owl was added to the Endangered Species List on June 26, 1990. 55 Fed. Reg. 26,189 (June 26, 1990).
The second main issue in the case was whether the multi-use management mandate in FLMPA applied to the O&C lands. Relying solely on the dicta in prior cases, the district court ruled that the O&C lands were dominant use lands, and therefore FLPMA’s mandate did not apply. Headwaters argued on appeal that the OCLA’s directive to manage the O&C lands for “permanent forest production” included both timber production and non-timber values like wildlife conservation. The Ninth Circuit rejected this argument on the assumption that if “forest production” included non-timber habitat values, the sustained timber yield command in the OCLA would not be fulfilled. Consequently, the court equated “forest production” with “timber production,” and held that other non-timber values were not on par with timber production. Further, in analyzing the OCLA’s legislative history, the court found “no indication that Congress intended ‘forest’ to mean anything beyond the aggregation of timber resources.” But the court could provide no evidence that “forest” meant “timber.” Moreover, this interpretation conflicted with the plain text of the OCLA, which lists five co-equal values to be managed for sustained yield. Finally, the court did

163 19 Envtl. L. Rep. at 21,164 (citing O’Neal v. United States, 814 F.2d 1285, 1287 (9th Cir. 1987)) (“[T]he weight of authority on the issue suggests that [O&C] lands are to be managed with timber production as the dominant use.”).
164 914 F.2d at 1181 (relying on language in 43 U.S.C. 1181(a) (2006)).
165 Id. at 1183; 43 U.S.C. S 1181a (requiring that “timber . .. shall be sold, cut, and removed in conformity with the principal (sic) of sustained yield.”).
166 914 F.2d at 1184 (“Congress intended to use ‘forest production’ and ‘timber production’ synonymously. Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forests is a goal on par with timber production, or indeed that it is a goal of the O&C Act at all. The BLM did not err in construing the O&C Act as establishing timber production as the dominant use.”).
167 Id. at 1183 (concluding that the purpose of the OCLA was to provide a stable funding source for the counties, and to prevent timber clearcut harvesting without replanting).
168 See Blumm & Lovvorn, supra note 146, at 370.
not address the important historical context in which the OCLA arose. Although the
BLM prevailed in *Headwaters*, subsequent cases would soon greatly curtail the agency’s
power to manage the O&C lands so one-dimensionally.

### B. Portland Audubon Society and Seattle Audubon Society – The End of
Unfettered BLM Management Discretion on the O&C Lands

In 1987, Portland Audubon Society and various other groups challenged the
BLM’s timber management scheme on the O&C lands, alleging that the agency was in
violation of NEPA, the OCLA, FLPMA and the Migratory Bird Treaty Act (MBTA).
The litigation was delayed by a series of congressional appropriations riders that
temporarily exempted timber harvests in the Northwest from judicial review. Although
the district court agreed that the BLM violated NEPA in 1989 by refusing to supplement
the previous EISs in light of the newly discovered information on spotted owls, it held
that the 1987 and 1988 appropriation riders precluded any corrective action.

However, in 1991, a federal court in Washington enjoined logging in all suitable
spotted owl habitat on USFS lands. Once the congressional riders expired in 1992, the
Oregon district court held that the BLM had not complied with NEPA by not preparing a

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170 See Scott & Brown, *supra* note 37, at 301 (noting that the 1937 OCLA was enacted while the nation was still
reeeling from the Dust Bowl, and fearful of a timber drought).
1774, 1825 (1988); Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, §
management of [the O&C lands] . . . is adequate . . . .”). Although the Ninth Circuit initially held that these riders
were unconstitutional, the Supreme Court reversed and upheld the riders. *Seattle Audubon Soc’y v. Robertson*, 914
F.2d 1311 (1990), *rev’d*, Robertson v. *Seattle Audubon Society*, 503 U.S. 429 (1992); see Michael C. Blumm,
*Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 WASH. U. J. URB.
174 Seattle Audubon Soc’y v. Evans, 771 F.Supp. 1081 (W.D. Wash. 1991), *aff’d*, 952 F.2d 297 (9th Cir.) (entering
an injunction under violations of the National Forest Management Act, 16 U.S.C. §§ 472a, 521b, 1600, 1611-1614
476 (1974))).
supplemental EIS in light of new information regarding spotted owl habitat. In so ruling, the court rejected the BLM’s argument that it could not comply with NEPA because doing so would produce a violation of the OCLA’s provision requiring the agency to annually sell at least 500 million board feet (MMBF) of timber. The district court also held that nothing in the OCLA authorized the BLM to exempt the O&C lands from NEPA. The court therefore enjoined the BLM from timber sales in “suitable” spotted owl habitat, or that “may affect” the spotted owl.

Although BLM initially obtained a limited “God Squad” exemption from section 7 of the ESA for thirteen of forty-five timber sales in Oregon a month before the district court issued its holding, the Clinton administration ultimately withdrew the exemption request after environmentalists successfully convinced a court that the George H.W. Bush Administration might have exerted undue influence on the God Squad. Shortly after the Clinton Administration withdrew the God Squad exemption request, the Ninth Circuit

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176 Id. at 1505 (citing 43 U.S.C. § 1181a (2006)). (“There is not an irreconcilable conflict in the attempt of the BLM to comply with both NEPA and the [OCLA].”).
177 Id. at 1506. The court concluded that “[In setting annual timber harvest levels under section 1181(a) of the O&C Act] . . . the BLM must comply with all applicable laws, including NEPA.”).
178 Id. at 1510. The injunction was to remain in effect until the BLM submitted a supplemental EIS examining how logging would affect the spotted owls. Id. at 1510-11.
179 Right before the district court issued its decision, the BLM formed a committee to address alternative solutions to the spotted owl issue. See John Lowe Weston, The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?, 7 ADMIN. L.J. 779, 805-06 (1994). This committee proposed a draft alternative plan that would have allowed the agency to offer timber sales on forty-four tracts of BLM forestland in Oregon protected by the judicial injunctions. See U.S. DEP’T OF THE INTERIOR, PRESERVATION PLAN FOR THE NORTHERN SPOTTED OWL—DRAFT (1992). BLM was apparently aware that this new plan would not satisfy the ESA, and so it petitioned for an exemption from section 7 of the ESA. Weston, supra note 179, at 806-08. The “God Squad”—a highly exclusive executive-level committee authorized to grant exemptions for federal agency actions that would otherwise violate the ESA—ultimately exempted thirteen sales from the ESA in 1992. 57 Fed. Reg. 23,405 (1992); 16 U.S.C. § 1536(e)-(n) (2006) (describing God Squad). Shortly thereafter, however, a district court judge held that the George H.W. Bush Administration may have improperly influenced the God Squad through ex parte communications, and remanded the original exemption decision to the God Squad committee. Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1534 (9th Cir. 1993). The newly elected Clinton Administration then decided to withdraw the exemption request altogether. See John W. Steiger, The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs, 21 ECOLOGY L.Q. 243, 259 n. 83 (1994).
then affirmed the district court decision in *Portland Audubon Soc‘y*, rejecting the BLM’s argument that *Headwaters* meant that the agency had no obligation to supplement EISs. The Ninth Circuit distinguished *Headwaters*—in which the court held that a timber sale did not need a site-specific EIS because the site had already been examined in a programmatic EIS—from the current situation—in which the BLM had failed to supplement the programmatic EIS governing the region’s timber management plans. Thus, the BLM could no longer claim that the OCLA exempted it from complying with NEPA or other environmental statutes like the ESA.

A year later, in *Seattle Audubon Society v. Lyons*, a federal judge in Washington upheld the 1993 Northwest Forest Plan, discussed *infra* in Section III, expanding on *Portland Audubon Society* and other pertinent cases. The district court held that the ESA requires all agencies, including the BLM, to ensure that all of their activities are not likely to “jeopardize” ESA-listed species or cause the destruction or modification of their critical habitat. The court also explicitly recognized that the BLM must “fulfill conservation duties imposed by other statutes[,]” such as NEPA and the ESA, in managing the O&C lands.

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180 *Portland Audubon Society v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993).
181 *Id.* (“Here, however, plaintiffs are challenging the Secretary’s decision not to supplement the EISs underlying the TMPs that control myriad land use decisions with new information relating to the possible extinction of a species through the systematic implementation of the BLM’s timber-sale program throughout its lands.”).
182 See Blumm & Lovvorn, *supra* note 146, at 373-74.
185 *Id.* at 1314 (citing 16 U.S.C. § 1536(a)(2) (2006)).
Headwaters, the court also concluded that the OCLA required the BLM to manage the O&C lands for all of the values listed in the statute, not just timber production.\textsuperscript{187}

Although the 1995 Timber Salvage Rider temporarily authorized a number of federal timber sales in contravention of these holdings,\textsuperscript{188} once the rider expired in late 1996, however, these important holdings took full effect.\textsuperscript{189} Recent case law has affirmed the notion that the BLM’s NEPA and ESA obligations are not subservient to the OCLA, even if greater timber sales would yield economic benefits in conformance with the OCLA.\textsuperscript{190} As a result of these cases, the Northwest Forest Plan has essentially superseded the OCLA as the primary management directive for the O&C lands.\textsuperscript{191}

III. The Northwest Forest Plan and Backlash Against the Plan

In 1993, in response to the timber harvesting injunctions issued in Portland Audubon Soc’y and Seattle Audubon Soc’y, high-level members of the newly elected Clinton administration—including President Clinton, Vice President Al Gore, and three cabinet-level federal secretaries—convened a nationally-televised Northwest Forest Conference to resolve the spotted owl controversy.\textsuperscript{192} Noticeably absent from the conference were the chief of the Forest Service, the director of the BLM, and Oregon’s congressional delegation.\textsuperscript{193} As the conference

\textsuperscript{187} Id. (“Management under [the OCLA] must look not only to annual timber production but also to protecting watersheds, contributing to economic stability, and providing recreational facilities.”).


\textsuperscript{190} See Klamath Siskiyou Wildlands Center v. Boody, No. 03-3124-CO, 2004 WL 1146538, at *8 (D. Or. May 18, 2004) (finding that the “public’s interest in ensuring that resources are not irretrievably committed without observance of required [NEPA] procedures” outweighs the economic benefits from the sale of O&C land timber).

\textsuperscript{191} See Blumm & Lovvorn, supra note 146, at 377.


wore on, its scope broadened beyond resolution of the spotted owl controversy to also include salmon protection issues and Northwest forest management reform. At the close of the conference, President Clinton stated that any management changes necessary to address the economic needs of timber communities and protect long-term forest health would be based on sound science, provide sustainable and predictable timber harvests, and end government gridlock. The president also created three inter-agency working groups and tasked them with crafting an “ecosystem management” solution for the Northwest forests.

The most notable of these groups was Forest Ecosystem Management Assessment Team (FEMAT). Although originally meant to include just fifteen people, FEMAT quickly ballooned to a coalition of over one-hundred scientists. FEMAT’s goal was to develop a set of management options that would comply with federal environmental laws, promote biological diversity, and produce a sufficient amount of timber. Specifically, FEMAT aimed to maintain and restore habitat conditions for the Northern spotted owl, the Marbled murrelet, and salmon stocks by establishing a “connected, interactive old-growth forest ecosystem.” In short, FEMAT’s mission was to view the Northwest forest system through a landscape ecosystem management lens as a complex, fragile, interrelated, dynamic system that would be managed in its entirety to protect the forests and its species. After months of dedicated work, FEMAT

194 YAFFEE, supra note 23, at 141-143.
199 FEMAT ASSESSMENT, supra note 195, at 4-5.
200 See Thomas et al., supra note 193, at 280-81.
produced ten options for managing federal forestland in Western Washington, Western Oregon and Northern California. In developing these options, FEMAT studied their effects on over one-thousand species of plants and animals. At the high end, Option 7 predicted 1.8 billion board feet of annual timber harvest, while at the low end, Option 1 anticipated an annual harvest of only 0.1 billion board feet. Ultimately, FEMAT recommended Option 9, which allowed for thinning of young monocultural stands in old growth areas when those activities would enhance old-growth conditions, and adaptive management. Option 9 also enlarged buffers for intermittent streams and created reserves around existing owl habitat in so-called “matrix” areas allowing timber harvests.

Option 9 predicted that up to 1.1 billion board feet of timber could be harvested; nearly 75% less than the annual harvest between 1980-1989. In April 1994, after Interior and the U.S. Department of Agriculture (USDA) completed a supplemental EIS, the USFS and BLM formally endorsed Option 9 as the best alternative for meeting President Clinton’s goals, thus forming a regional forest management plan, and amending the forest planning documents for two USFS regions, nineteen national forests, and seven BLM districts within the range of the Northern spotted owl. Covering 24.5 million acres of federal forestland in the Northwest, the Northwest Forest Plan was “the first systematic, broad-scale attempt by any administration to

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203 See Thomas et al., supra note 193, at 281.
204 1994 ROD, supra note 18, at fig. ROD-1.
205 Id. at 28.
206 See Thomas et al., supra note 193, at 281. “Matrix” areas will be defined infra in Section III.A.
207 1994 ROD, supra note 18, at fig. 1.
208 Seattle Audubon Soc’y v. Lyons, 871 F.Supp. 1291, 1303–05 (W.D.Wash.1994), aff’d sub nom., Seattle Audubon Society v. Moseley, 874 F. Supp. 2d 1401 (9th Cir.1996); Conservation Nw. v. Rey, 674 F. Supp. 2d 1232, 1237 (W.D. Wash. 2009); Nw. Ecosystem Alliance v. Rey, 380 F. Supp. 2d 1175, 1182 (W.D. Wash. 2005); see 1994 ROD, supra note 18, at 26 (“[W]e adopt the alternative that will both maintain the late-successional and old-growth forest ecosystem and provide a predictable and sustainable supply of timber, recreational opportunities, and other resources at the highest level possible. Alternative 9, as slightly modified herein, best meets these criteria.”).
209 1994 ROD, supra note 18, at 2; Nw. Ecosystem Alliance, 380 F. Supp. 2d at 1182.
apply an ecosystem approach to resolve a natural resource management issue. Importantly, under the NWFP, the primary management goal for federal forests in the Northwest shifted from production of a sustained yield of timber to conserving biodiversity and species.

A. The Northwest Forest Plan – Land Classifications and Protective Measures

The 1994 ROD creating the NWFP consisted of extensive standards, guidelines and land allocations meant to solve achieve President Clinton’s multi-faceted management goals. The NWFP created three primary categories of land: reserves, “matrix” lands, and adaptive management areas (AMAs). As a threshold matter, the NWFP recognized nearly 8.8 million acres within the management area that Congress and the agencies had already reserved from timber harvests. The NWFP then proceeded to set aside an additional 7.4 million acres of the area as “late successional reserves” (LSRs) to protect and enhance old growth forest conditions. Within LSRs, forests more than 80-years old cannot be clear cut unless doing so will create beneficial old-growth conditions. The NWFP also established 2.63 million acres of “riparian reserve” (RRs). The main purposes of RRs are to protect aquatic systems and the species dependent on them, to enhance habitat for species transitioning between riparian and

210 JAMES PIPKIN, THE NORTHWEST FOREST PLAN REVISITED 11 (1998), available at http://www.reo.gov/library/reports/NFP_revisited.htm; see also 1994 ROD, supra note 18, at 1 (“[The NWFP] represents the first time that two of the largest federal land management agencies, the Bureau of Land Management and the Forest Service, have developed and adopted a common management approach to the lands they administer throughout an entire ecological region.”).

211 See Thomas et al., supra note 193, at 278.


213 See 1994 ROD, supra note 18, at 2; Zellmer, supra note 212, at 470-71. For an instructive visual map demarcating these land classifications within the NWFP boundaries, see Thomas et al., supra note 193, at 282.

214 The NWFP recognized 7.3 million acres of national parks and monuments, wilderness areas, wild and scenic rivers, national wildlife refuges, Department of Defense lands, and other lands with congressional designations with no timber harvests within the area of the plan. 1994 ROD, supra note 18, at 6. In addition, the NWFP incorporated 1.48 million acres of existing administratively-designated recreational and visual areas, back country, and other areas not scheduled for timber harvest. Id. at 7.

215 Id. at 6, 8.

216 Id. at 7.

217 Id. at 8.
upslope areas, to improve travel corridors, and to enhance the overall connectivity of late-
successional forest habitat. Next, the NWFP created 4 million acres of “matrix” lands where
most timber harvest activities would take place. Finally, the NWFP created 1.5 million acres
of AMAs where land managers may explore alternative management techniques. Of the total
plan area, approximately seventy-seven percent of the land is in reserves, sixteen percent is in
matrix lands, and six percent is in AMAs.

In addition to zoning the land into these categories, the NWFP also added important
mitigation measures to “increase protection of habitat for species whose habitat assessments
were relatively low under [Option 9 of the FEMAT report].” The first of these measures is
known as “Survey & Manage” (S&M). Under S&M, the primary mitigation measures are: (1)
manage known sites of rare organisms; (2) survey sites on the ground for the presence of rare
organisms prior to conducting ground-disturbing activities; (3) conduct surveys to identify
locations and habitats of rare species; and (4) conduct landscape-level regional surveys for rare
species. As originally promulgated, the S&M guideline applied to over 400 species of rare
amphibians, bryophytes, lichens, mollusks, vascular plants, fungi, and arthropods that can only
be studied on-the-ground. Although the agencies updated and streamlined the S&M

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218 1994 ROD, supra note 18, at 7.
219 Id. Timber activities may also take place in “managed late successional areas” (MLSAs). Id. at 6. MLSAs only
comprise 102,200 acres of the NWFP coverage area. Id.
220 Id. at 6. Only modest amounts of experimentation have occurred on AMAs, and so this category of land will not
be discussed in detail. See Thomas et al., supra note 193, at 282.
221 1994 ROD, supra note 18, at 2.
222 U.S. FOREST SERV. & BLM, VOL. II, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON
MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE
RANGE OF THE NORTHERN SPOTTED OWL, at B-143 (1994), available at
223 1994 ROD, supra note 18, at 11; see also 1994 FSEIS, supra note 222, at App. B-11 (describing standards in
detail).
224 See 1994 ROD, supra note 18, at 11; 1994 FSEIS, supra note 222, at B-150 to B-162 (listing species).
requirements in 2001, the requirements retained these key components. The requirements to survey and manage indicator species go well beyond protections under the ESA. Largely due to the S&M requirements, the amount of timber available for commercial harvest has plummeted from 4.5 billion board in the late 1980s, to approximately 0.96 billion board feet in the 2000s.

The second major mitigation measure in the NWFP is the “Aquatic Conservation Strategy” (ACS). ACS calls for the restoration of “ecological health of watersheds and aquatic ecosystem contained within them on public lands,” and provides nine objectives for maintaining and/or restoring functioning aquatic habitats. The ACS has four main components: riparian reserves, designated key watersheds, a watershed analysis, and a watershed restoration program. First, in designated as riparian reserves, most timber harvesting, road building, grazing, mining, and off-road vehicle usage is restricted within 100-300 feet of a riparian area, including the waterbody itself, as well as the adjacent vegetation, the 100-year floodplain and landslide prone areas.

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228 1994 FSEIS, supra note 222, at B-81. In managing land within the NWFP boundaries, decision-makers are to maintain and restore (1) watershed features on which aquatic species depend; (2) habitat “connectivity within and between watersheds”; (3) “physical integrity of the aquatic system”; (4) water quality necessary for healthy riparian, aquatic, and wetland ecosystems; (5) historical sediment regimes under which species evolved; (6) “in-stream flows” necessary for “riparian, aquatic, and wetland habitats”; (7) “timing, variability, and duration of floodplain inundation and water table elevation in meadows and wetlands”; (8) “species composition and structural diversity of plant communities in riparian areas and wetlands”; and (9) “habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.” 1994 FSEIS, supra note 222, at B-82 to B-83.
229 1994 ROD, supra note 18, at 9-10; see Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1032 (9th Cir. 2001).
230 1994 ROD, supra note 18, at 9; 1994 FSEIS, supra note 222, at B-16 to B-17, B-85 tbl. B6-1.
Second, under the ACS, designated “key watersheds” aim to provide high quality refuge habitat for at-risk aquatic species. Key watersheds are either “Tier 1” (if they directly provide habitat for at-risk species) or “Tier 2” (if they do not provide habitat but do enhance water quality to the benefit of those species). In key watersheds, no new roads may be built in inventoried “roadless areas,” and no net increase of roads may occur in “roaded areas.”

Third, under the ACS, a watershed analysis must precede all non-categorically excluded management activities within key watersheds, non-key watersheds (in inventoried roadless areas), and riparian reserves. A watershed analysis is a “systematic procedure” meant to “characterize the aquatic, riparian, and terrestrial features within a watershed.” The information gained from this analysis forms the basis of an assessment current watershed conditions; it can also refine appropriate riparian reserve boundaries, plan for likely future conditions and restoration needs, and develop monitoring evaluation programs for the watershed. Importantly, a watershed analysis is not a decision document, but instead scientifically based guidance meant to bridge site-specific plans and broad regional NEPA

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231 1994 FSEIS, supra note 222, at B-91.
232 Id. The NWFP designated 8.9 million acres as Tier 1 watersheds, 1 million acres as Tier 2 watersheds, and 15.3 million acres as non-key watersheds. 1994 ROD, supra note 18, at 10.
233 1994 FSEIS, supra note 222, at B-92; see Blumm, The Amphibious Salmon, supra note 192, at 669-70 (“Inventoried roadless areas” are areas determined by the USFS to not have roads, but that have not received congressional wilderness area designation); see Christopher Cumings, Judicial Iron Triangles: The Roadless Rule to Nowhere-and What Can Be Done to Free the Forest Service’s Rulemaking Process, 61 OKLA. L. REV. 801, 805-06 (2008) (describing how these “roadless” areas came to be inventoried). These areas are also protected by the “roadless rule.” See California v. U.S. Dep’t of Agric., 575 F.3d 999, 1020 (9th Cir. 2009) (reinstating the original rule, which had been repealed and replaced by the Bush Administration); Wyoming v. U.S. Dept. of Agric., 661 F.3d 1209, 1272 (10th Cir. 2011) (determining that Wyoming district court’s nationwide injunction of the roadless rule was an abuse of discretion).
235 1994 ROD, supra note 18, at 10.
236 1994 FSEIS, supra note 222, at B-94 to B-95.
Consequently, watershed analysis is a critical part of implementing the ACS and the NWFP in general. \(^{238}\)

**B. Backlash Against the NWFP: Challenges in the Courts and a Congressional Circumvention of the Plan**

Almost immediately after the NWFP became effective, it came under attack. First, the implementing agencies, unaccustomed to having their discretion curtailed, pushed back against the plan. \(^{239}\) Moreover, a timber industry group challenged the FEMAT work group for allegedly violating the Federal Advisory Committee Act (FACA). \(^{240}\) Although a district court agreed that FEMAT violated FACA, it refused to enjoin the government from using and relying on the FEMAT report. \(^{241}\) The plan itself was challenged by both environmentalists—who argued that the plan did not adequately protect old-growth dependant species—and the timber industry—which argued that it was too restrictive on timber harvesting. \(^{242}\) These challenges were consolidated into a case before Judge William Dwyer in the western district of Washington. \(^{243}\)

In 1994, Judge Dwyer upheld the NWFP, \(^{244}\) noting that the late-successional reserves and riparian reserves were critical aspects of the NWFP and determining that “any more logging

\(^{237}\) Id. at B-93; see Blumm, *The Amphibious Salmon*, supra note 192, at 670.

\(^{238}\) See 1994 FSEIS, supra note 222, at B-93.

\(^{239}\) See Lauren M. Rule, *Enforcing Ecosystem Management Under the Northwest Forest Plan: The Judicial Role*, 12 *FORDHAM ENVTL. L.J.* 211, 215-16 (2000) (noting that the implementing agencies resisted strict adherence to the NWFP in its early years, instead trying to change the plan’s standards at their discretion).


\(^{241}\) Id. at 1015; see William Funk, *News from the Circuits*, ADMIN. & REG. L. NEWS, Fall 1994, at 6.


\(^{243}\) Nw. Forest Res. Council v. Dombeck, 107 F.3d 897, 899 (D.C. Cir. 1997). *Northwest Forest Resources Council v. Thomas*, was, however, transferred to the Western District of Washington, and was shortly thereafter dismissed by the plaintiffs without prejudice. *Id.*

\(^{244}\) *Seattle Audubon Soc’y*, 871 F.Supp. 1291 (W.D. Wash. 1994), aff’d sub nom. Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401 (9th Cir. 1996).
sales than the plan contemplates would probably violate the laws.\textsuperscript{245} Whether the plan and its implementation will remain legal will depend on future events and conditions.\textsuperscript{246} In recognizing a “massive” effort of the USFS and BLM to “meet the legal and scientific needs of forest management,” Judge Dwyer concluded that the NWFP provided just enough environmental protection to comply with federal statutes such as the ESA and NEPA.\textsuperscript{247} This holding ultimately proved dispositive in eliminating the remaining legal challenges to the NWFP.\textsuperscript{248}

Congress, however, quickly went on the offensive, attaching the Timber Salvage Rider\textsuperscript{249} to a necessary emergency appropriations act that also provided relief for the victims of the 1995 Oklahoma City bombing.\textsuperscript{250} The salvage rider included three procedural provisions aimed to increase salvage logging in the Northwest: 1) allowing the federal land managers to rely on pre-existing environmental review documents; 2) restricting the scope and timing of judicial review; and 3) giving timber contracts priority.\textsuperscript{251} In addition to allowing for salvage harvest, the rider directed the USFS and BLM to expedite “Option 9” sales under the NWFP “notwithstanding any other law,” and did not require any documentation or review requirements.\textsuperscript{252} The timber

\textsuperscript{245} Id. at 1300, 1314.
\textsuperscript{246} Id. at 1299.
\textsuperscript{247} Id. at 1303.
\textsuperscript{248} Judge Dwyer’s validation of the NWFP in Seattle Audubon Soc’y ultimately resulted in the dismissal of the remaining case challenging the NWFP—Northwest Forest Resources Council v. Dombeck. In Seattle Audubon Soc’y, Judge Dwyer issued a declaratory judgment against the Northwest Forest Resource Council (NFRC) on nine of the original eleven claims, declaring the NWFP valid as against those claims. See Seattle Audubon Soc’y v. Lyons, 871 F.Supp. at 1325. The U.S. District Court for the District of Columbia held that NFRC’s remaining claims in Dombeck were barred by stare decisis. See Nw. Forest Res. Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997) (explaining the district court’s decision). Although the D.C. Circuit concluded that the remaining claims in Dombeck were not actually barred by stare decisis, on remand, the district court determined that NFRC’s remaining claims were barred by res judicata and the “doctrine of virtual representations.” Am. Forest Council v. Shea, 172 F. Supp. 2d 24, 27 (D.D.C. 2001).

\textsuperscript{251} Id. § 2001(d). “Option 9” sales were those sales originating in the adoption of the NWFP (which was the ninth harvest mix option proposed by FEMAT). See Goldman & Boyles, supra note 25, at 1075-76; see also supra notes
industry successfully argued that the rider precluded all judicial review of Option 9 sales.253 The rider also permitted completion of all timber harvest contracts originally offered (but not completed) or unawarded under section 318 of the 1989 Interior appropriations rider.254 In addition, the timber industry sought to compel the completion of all timber sales offered prior to the rider's enactment on all public lands within the geographic scope of section 318.255 The district court of Oregon and the Ninth Circuit agreed with the timber industry's interpretation of the rider's effect on section 318, ordering the USFS and BLM to complete all pending timber sales in Western Oregon and Washington.256 Thus, the Ninth Circuit concluded that the Timber Salvage Rider resurrected all uncompleted section 318 sales offered between October 1, 1989 (the date section 318 went into effect) and July 27, 1995 (the date of the rider).257

199-208 and accompanying text. Congress eliminated administrative appeals of these sales and insulated them from court challenges. Pub. L. No. 104-19, §§ 2001(e), (i).

253 Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796 (9th Cir. 1996) (because the rider eliminated all possible federal environmental claims, there was no freestanding “arbitrary and capricious” cause of action).

254 Pub. L. No. 104-19, § 2001(k) (“The Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101–121 (103 Stat. 745).”). Section 318 of the 1989 Interior appropriations rider exempted timber sales in thirteen Oregon and Washington national forests from judicial review and stringent environmental compliance standards and required the USFS and BLM to meet timber sales quotas in FY 1989 and FY 1990. See Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, § 318(a)(1)-(2), Pub. L. No. 101–121, 103 Stat. 701, 745–50 (1989) (setting harvest quotas); id. § 318(b)(6)(A) (“Congress hereby determines and directs that management of areas . . . on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting . . . statutory requirements . . . . The guidelines [in this rider] shall not be subject to judicial review . . . .”); see also Nw. Forest Res. Council v. Glickman, No. 95-6244 (D. Or. Sept. 13, 1995), aff’d 82 F.3d 825, 829 (9th Cir. 1996) (describing interaction of the two laws). Many of these authorized sales, however, were never offered, awarded or executed due to concerns about their impacts on listed species. See, e.g., Lone Rock Timber Co. v. U.S. Dep’t of Interior, 842 F.Supp. 433 (D. Or. 1994); see also Zellmer, supra note 212, at 469; Goldman & Boyles, supra note 25, at 1075-76.

255 See Zellmer, supra note 212, at 472; Goldman & Boyles, supra note 25, at 1070.

256 Nw. Forest Res. Council, 82 F.3d at 829, 835-36 (9th Cir. 1996); see also Nw. Forest Res. Council v. Pilchuck Audubon Soc’y, 97 F.3d 1161, 1165 (9th Cir. 1996) (noting that the rider effectively resurrected previously cancelled timber sales).

257 Nw. Forest Res. Council, 82 F.3d at 831, 839.
rider directed the agencies to log old-growth forest, even if doing so conflicted with environmental laws—unless listed species were “known to be nesting” in the area.\footnote{258} As a result of these rulings, the USFS and BLM completed a number of hastily planned sales.\footnote{259} Although it is unclear how much timber the agencies actually sold under the rider, the Ninth Circuit’s decision in \textit{Nw. Forest Resource Council v. Glickman} authorized the USFS and the BLM to complete sixty-two additional section 318 sales, totaling 230 million board feet of timber.\footnote{260} Moreover, the Ninth Circuit’s unwillingness to review the legality of Option 9 sales, and the old growth timber sale authorization in section 2001(k) also led to more sales.\footnote{261} Although the Clinton Administration tried to stall some section 2001(k) sales with a creative interpretation of the “known to be nesting” language,\footnote{262} the rider ultimately enabled a number of section 318, Option 9 and section 2001(k) sales, including a number that harvested healthy trees under the “salvage” provision.\footnote{263} Many of these sales were also below-cost and made in defiance of existing forest plans.\footnote{264} Ultimately, these sales resulted in significant on-the-ground effects, including increased landslides, threatened city drinking water supplies, degraded fisheries, and ESA species listings.\footnote{265}

\footnote{258}Pub. L. No. 104-19, § 2001(k). This provision included one exception: no sales could go forward “if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.” \textit{Id.} § 2001(k)(2).
\footnote{259} \textit{See} Goldman & Boyles, supra note 25, at 1056-59.
\footnote{260} Zellmer, supra note 212, at 472-73.
\footnote{261} \textit{See} Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796 (9th Cir. 1996).
\footnote{262} Pub. L. No. 104-19, § 2001(k)(2). Although the Clinton Administration ultimately did not prevail on the issue, it argued that if a listed bird had flown through a forest unit, that was sufficient proof that it was occupying the stand. Northwest Forest Resource Council v. Glickman, No. 95-6244-HO, at *3-7, *21 (D. Or. Jan. 19, 1996); see also Slade Gordon & Julie Kays, \textit{Legislative History of the Timber and Salvage Amendments Enacted in the 104th Congress: A Small Victory for Timber Communities in the Pacific Northwest}, 26 ENVTL. L. 641, 645 (1996).
\footnote{263} \textit{See} Goldman & Boyles, supra note 25, at 1056. Under the timber salvage rider, “salvage” was broadly defined to include trees “imminently susceptible” to fire and insect attack—thus providing the agencies with a great deal of discretion. \textit{Id.}; Pub. L. No. 104-19, § 2001(a)(3).
\footnote{264} \textit{See} Goldman & Boyles, supra note 25, at 1058-59.
\footnote{265} \textit{See id.} at 1068, 1087-88.
However, once the salvage rider expired, environmentalists began to use the NWFP to challenge timber sales in the late 1990s. For example, in *Oregon Natural Resource Council Action v. U.S. Forest Service*, Judge Dwyer enjoined 100 million board feet of timber sales because the agencies’ failed to meet their S&M requirements prior to undertaking ground-disturbing actions. In so ruling, Judge Dwyer emphasized the importance of adhering to the S&M requirements. Thus, by the end of the 1990s and the close of the Clinton Administration, the force and effect of the NWFP was becoming clear. The plan had passed muster in the courts, and survived the Timber Salvage Rider. The courts even recognized the substantive teeth contained in the plan’s provisions. This success, however, quickly drew the attention of the incoming Bush Administration.

**IV. The Bush Administration’s Failed Attempts to Amend the NWFP**

For the next eight years, the Bush Administration repeatedly tried to weaken the NWFP. The administration attempted to eliminate the S&M requirements and to delete and amend key aspects of the ACS. Ultimately, however, these efforts failed to survive judicial review under NEPA, the Administrative Procedure Act (APA), and/or the ESA. Consequently, after a decade of court challenges, the protections offered by the NWFP remain intact, largely because of the

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266 59 F. Supp. 2d 1085 (W.D. Wash. 1999)
267 *Id.* at 1093; Alston, *supra* note 197, at 728.
268 59 F. Supp. 2d at 1093 (“Far from being minor or technical violations, widespread exemptions from the survey requirements would undermine the management strategy on which the ROD depends. The surveys are designed to identify and locate species; if they are not done before logging starts, plants and animals listed in the ROD will face a potentially fatal loss of protection.”).
269 *See id.* at 1093 (enjoining federal timber sales that failed to perform adequate pre-sale surveys).
270 *See infra* Section IV.A.
271 *See infra* Section IV.B.
strong, persuasive, scientifically justified positions articulated by the Clinton Administration in the original NWFP documents.273

A. Failed Attempts to Eliminate the Survey & Management Requirement

After a few years of implementing the NWFP, the USFS and BLM claimed that the S&M requirements were presenting “unanticipated difficulties in land management” because the requirements “were not clear, efficient, or practicable.”274 Thus, in 2000, the agencies undertook a full study of the S&M requirement and determined that these difficulties left them “unable to fully meet the original purpose and need” of the NWFP.275 In 2001, the agencies responded by streamlining the S&M standards, while at the same time maintaining the key tenets of S&M from the original 1994 ROD.276 Immediately thereafter, both timber groups and environmental groups challenged the revised S&M ROD.277 The new Bush Administration settled the case with the timber companies, agreeing to consider completely eliminating the S&M requirement in a new supplemental EIS.278

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275 BLM & U.S. FOREST SERV., I FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR AMENDMENT TO THE SURVEY & MANAGE, PROTECTION BUFFER, AND OTHER MITIGATION MEASURES STANDARDS AND GUIDELINES 9 (2000), available at http://www.blm.gov/or/plans/nwfpnepa/FSEIS-2000/FSEIS-Vol-1.pdf. The dual needs of the NWFP, as originally stated in 1994, are the need for forest habitat and the need for forest products. Id.


In 2002, the Bush Administration proposed to remove the S&M requirements from the NWFP. Then, in January 2004, BLM and the USFS released a final supplemental EIS that recommended eliminating the S&M standard. In March 2004, BLM and the USFS formally eliminated the S&M standard, which was promptly challenged as a violation of NEPA and the APA. Ultimately, the environmentalists prevailed on three of their six NEPA challenges to the 2004 ROD in *Nw. Ecosystem Alliance v. Rey.*

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279 National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl; Western Oregon and Washington, and Northwestern California; Removal of Survey and Manage Mitigation Measure Standards and Guidelines, 67 Fed. Reg. 64,601 (Oct. 21, 2002).

280 2004 FSEIS, *supra* note 274, at 15; 69 Fed. Reg. 3316 (Jan. 23, 2004). The EIS analyzed three alternatives: 1) retain the S&M standard (the no-action alternative); 2) eliminate the S&M standard; or 3) retain the S&M standard but with less protective modifications. 2004 FSEIS, *supra* note 274, at 15. The third option proposed removal of the uncommon species category, elimination of the pre-disturbance survey requirement for young forest stands, and changes to the review process for excepting known sites from management. *Id.* at 11. Elimination of the S&M requirement was the preferred alternative.


282 *Nw. Ecosystem Alliance v. Rey,* 380 F. Supp. 2d 1175, 1184 (W.D. Wash. 2005) (citing Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir.2002)). In determining whether an agency acted “arbitrarily and capriciously” under the APA, courts consider whether “the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989) (internal quotation omitted, citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

283 *Nw. Ecosystem Alliance,* 380 F. Supp. 2d at 1181. The plaintiffs asserted that the agencies violated NEPA because “1) the purpose and need statement in the 2004 SEIS is unreasonably narrow because it failed to analyze whether the existing Survey and Manage standard is effective, 2) the 2004 SEIS failed to consider in detail a reasonable alternative that Plaintiffs had proposed, 3) the environmental effects analysis is illegally predicated on uncertain possible events, namely that the 152 eligible species will be included in the Agencies’ SSS Programs, 4) the Agencies’ assumption that the Survey and Manage species will be adequately protected by the Reserve system is false and misleading, 5) the disclosures in the 2004 SEIS related to fire are false and misleading, and 6) the cost rationale in the 2004 SEIS is subterfuge and the figures inflated.” *Id.* at 1185. First, the court determined that the agencies failed to consider in the 2004 EIS what would happen if the USFS and BLM exercised their discretion so that the species previously covered by S&M standards were not included in or later removed from the agencies’ alternative administration protection programs. *Id.* at 1190. Second, the court concluded that the agencies failed to evaluate how many species protected by late-successional reserves would be otherwise protected if the agencies eliminated the S&M requirement. *Id.* at 1190. After noting that the analysis underlying the 1994 NWFP was “thorough” and that the S&M standard was necessary to satisfy the plan’s “foundational objectives,” the court observed that the 2000 EIS concluded that “new information . . . would warrant a more fundamental shift.” *Id.* at 1192. The court concluded that the USFS and BLM had not provided sufficiently explained or shown that the conclusions regarding the need for the S&M requirement in 1994 were no longer true. *Id.* at 1192-93. Before the agencies could eliminate the S&M, they had a NEPA obligation to “disclose and explain on what basis they deemed the standard necessary before but assume it is not now.” *Id.* at 1193; see also Atchinson T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). Because they did not provide this reasoned explanation, the 2004 EIS did not provide enough analysis to make a reasonably informed decision. *Nw. Ecosystem Alliance,* 380 F. Supp. 2d at
In response to *Nw. Ecosystem Alliance*, the agencies prepared a draft supplemental EIS in July 2006.\(^{284}\) Also in 2006, the BLM lost another S&M case in which the Ninth Circuit ruled that the agency’s decision to downgrade the red tree vole’s designation under S&M violated both NEPA and FLPMA.\(^{285}\) In 2007, the agencies issued a final supplemental EIS to the 2004 EIS,\(^{286}\) once again attempting to remove the S&M requirements from the NWFP.\(^{287}\) The agencies claimed that this decision reduced the cost, time, and effort required to conserve rare species, and provided “new information” and “additional background material” as compared to the 2004 FSEIS.\(^{288}\) Environmental groups promptly challenged the 2007 decision.

The district court proceeded to review the 2007 EIS and accompanying ROD to ensure that the agencies took a “hard look” at the pertinent factors and thoroughly evaluated the environmental consequences of the proposal.\(^{289}\) The court reiterated that in order to eliminate the S&M requirements in compliance with NEPA, the agencies had to discuss in detail the basis on which they no longer deemed the standard necessary.\(^{290}\) Although the agencies claimed that five categories of new information demonstrated “fundamentally different” forest conditions compared to those existing in 1994 when they first approved the NWFP, the court disagreed, and in fact concluded that “all of [this information] is to say that [S&M] is working.”\(^{291}\)

\(^{1193}\) The court therefore concluded that the agencies had not complied with their NEPA obligations in issuing the 2004 EIS. *Id.* at 1181.


\(^{285}\) *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

\(^{286}\) *Conservation Nw.*, 674 F. Supp. 2d at 1240.


\(^{288}\) *Id.* at 5-8. The agencies also claimed that the new EIS addressed all of the salient points raised in *Douglas Timber Operators, Nw. Forest Alliance and Boody. Id.*

\(^{289}\) *Conservation Nw.*, 674 F. Supp. 2d at 1241 (citing Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir.1998)).

\(^{290}\) *Id.* at 1247 (citing *Nw. Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175, 1192 (W.D. Wash. 2005)).

\(^{291}\) *Id.* at 1248. Independent reviews of the NWFP reached similar conclusions. In fact, after ten years of implementation, the NWFP achieved more old-growth forest conditions than projected, improved watershed conditions, and smaller-than-projected timber harvests. See Thomas et al., *supra* note 193, at 283-84.
Although employing a “cabined standard of review,” the court nonetheless proceeded to determine that the agencies’ methods leading to the elimination of the S&M requirement “is flawed enough to be a violation of NEPA.”\textsuperscript{292} The court emphasized that the agencies’ decision would adversely affect S&M-dependent species without a sufficient basis.\textsuperscript{293} In July 2011, the parties reached a settlement concerning the S&M requirements\textsuperscript{294} in which the Obama Administration set aside the 2007 attempt to remove the S&M requirement, and reinstated the S&M requirements from the 2001 ROD.\textsuperscript{295} Thus, after a decade of attempts to undercut the S&M requirement, the NWFP stood on the same ground as it had when the Bush Administration took office.

\textbf{B. Failed Attempts to Undermine the ACS Requirements}

In addition to failing in their efforts to eliminate the S&M requirements from the NWFP due to non-compliance with NEPA and the APA, both the Clinton and the Bush Administrations also did not amend the plan’s ACS requirements. In 1997, the National Marine Fisheries Service (NMFS) issued a programmatic biological opinion (BiOp) under the ESA, concluding that USFS and BLM logging operations in watersheds within the NWFP were not likely to jeopardize species listed under the ESA if logging operations were consistent with ACS objectives.\textsuperscript{296} Commercial fishermen challenged this BiOp in 1998, and the district court for the Western District of Washington concluded that “[b]efore a project can proceed, USFS and BLM must

\textsuperscript{292} \textit{Conservation Nw.}, 674 F. Supp. at 1249.
\textsuperscript{293} \textit{Id.} (“[T]he agencies cannot abandon fifty or more species whose viability may still be dependent on the continued implementation of Survey and Manage . . . [especially since there is not enough new information disclosed that would ensure the public that elimination of Survey and Manage is warranted.”).
\textsuperscript{295} \textit{Id.} at 1. The settlement also acknowledged existing exemptions, updated the 2001 S&M species list, established a transition period for application of the species list, and established new exemption categories. \textit{Id.}
find that their actions either meet, or do not prevent attainment of, the ACS objectives.” In response, NMFS assessed ACS consistency at the watershed level, over a long time period.

The next year, in 1999, a group of commercial fishermen and environmental organizations challenged four NMFS BiOps for the Umpqua River watershed in Oregon, asserting that twenty-four sales in the basin would harm ESA-listed fish species inconsistent with the ACS. Although the court upheld that the programmatic BiOp, it concluded that the agency had failed to ensure the timber sales complied with the ACS on a site-specific or project level. The court emphasized that NMFS acted arbitrarily and capriciously by assessing ACS by assessing compliance only at a watershed level and failing to consider the short-term degradation that timber harvesting could have on these aquatic areas.

On appeal, the Ninth Circuit emphasized the relative difference in scale between watersheds and project areas. The court upheld the district court, commenting that “it does not follow that NMFS is free to ignore site degradations because they are too small to affect the accomplishment of that goal at the watershed scale,” and that NMFS had not provided sufficient

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298 Pacific Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv. (PCFFA II), 71 F. Supp. 2d 1063 (W.D. Wash. 1999), aff'd in part, vacated in part, 253 F.3d 1137 (9th Cir. 2001), amended and superseded on denial of reh'g, 265 F.3d 1028, 1035-38 (9th Cir. 2001).
299 See id. at 1035-37.
300 Id. at 1066. Around the same time, a similar situation unfolded in Oregon. In 2000, FWS issued a BiOp, concluding that USPS and BLM logging operations would not likely cause jeopardy to listed bull trout. Environmentalists challenged this BiOp. The District Court of Oregon issued a preliminary injunction on the BiOp, concluding that there were “serious questions” as to whether FWS' determinations were arbitrary and capricious. Cascadia Wildlands Project v. United States Fish & Wildlife Serv., 219 F.Supp.2d 1142, 1149-50 (D. Or. 2002). In response, FWS subsequently withdrew the questionable BiOps. See PCFFA III, 482 F. Supp. 2d at 1259.
301 PCFFA II, 265 F.3d at 1031.
302 Id. at 1035. The largest watershed at issue in the sales was 350 square miles, whereas most sales encompass only a few acres.
support for limiting the review to the watershed scale alone.\textsuperscript{303} Thus, the proper measure of compliance with the ACS occurs at both the watershed and project levels.\textsuperscript{304}

The Ninth Circuit also addressed whether it was appropriate for NMFS to consider consistency with the ACS over a ten- to twenty-year timeframe. The court emphasized that such a long time-frame ignores the short and sensitive life cycle of salmon.\textsuperscript{305} In addition, the court rejected NMFS’ claim that tree re-growth would offset these effects.\textsuperscript{306} Consequently, the court upheld the district court, concluding that NMFS’ decision to analyze effects over a longer time period was unsupportable.\textsuperscript{307}

Despite the clarity of these judicial decisions, the USFS and BLM began amending the ACS requirements in 2002 in response to the demands of the timber industry.\textsuperscript{308} Then, in 2003, the USFS and BLM proposed to amend and delete key language from the ACS objectives.\textsuperscript{309} In 2004, the agencies adopted this proposal,\textsuperscript{310} which fishermen and environmentalists promptly challenged.\textsuperscript{311} Echoing the judicial sentiment expressed in the S&M context,\textsuperscript{312} the district court again emphasized that where an agency decided to adopt a standard, and now seeks to choose a different standard, it has a NEPA obligation to explain why the previously necessary standard is no longer needed.\textsuperscript{313} The court also noted that the 2003 EIS performed by the agencies “wholly

\textsuperscript{303} Id. at 1035-36.
\textsuperscript{304} Id. at 1036.
\textsuperscript{305} Id. at 1037 (“[This timeframe] ignores the life cycle and migration cycle of anadromous fish. In ten years, a badly degraded habitat will likely result in the total extinction of the [species in that stream].”).
\textsuperscript{306} Id. at 1037-38.
\textsuperscript{307} Id.
\textsuperscript{308} \textit{PCFFA III}, 482 F. Supp. 2d 1248, 1259-60 (W.D. Wash. 2007).
\textsuperscript{310} \textit{PCFFA III}, 482 F. Supp. 2d at 1260-61.
\textsuperscript{311} See id.
\textsuperscript{312} See supra notes 281-293 and accompanying text.
\textsuperscript{313} \textit{PCFFA III}, 482 F. Supp. 2d at 1252 (citing Northwest Ecosystem Alliance v. Rey, 380 F.Supp.2d 1175, 1192 (W.D.Wash.2005)).
fail[ed] to meet the standards for adequate disclosure and discussion of dissenting scientific opinions," and proceeded to set aside the ACS Amendments. In response, the USFS and BLM recognized that compliance with the ACS required adherence to the nine values outlined in the original ACS standard.

C. The WOPR: Its Birth, Death and Living-Dead Status

In late 2008, after years of frustration in its efforts to revise the NWFP, the Bush Administration’s Interior Department adopted six revised resource management plans (RMPs)—known collectively as the Western Oregon Plan Revisions (WOPR)—for 2.5 million acres of BLM forestland in western Oregon. These plans mostly covered the O&C lands. The RODs approving the WOPR would increase timber harvest in these six districts to a combined 502 million board feet—up from around 200 million board feet allowed under previous RMPs. At the time the agencies introduced the WOPR, the O&C lands produced only an average of 140 million board feet of timber per year. Thus, the WOPR would have essentially authorized a quadrupling of timber harvesting on the O&C lands.

\[314\] Id. at 1254.
\[318\] WOPR WITHDRAWAL, supra note 33, at 1.
BLM justified the WOPR on the ground that it failed to achieve harvest levels under existing resource management plans.\(^{321}\) Citing *Headwaters*, BLM claimed that increasing harvest levels on the O&C lands would be consistent with the OCLA’s dominant use timber-centric management mandate.\(^{322}\) Under the WOPR, BLM excluded thinning and treatment only within sixty feet of perennial and fish-bearing streams, and within thirty-five feet of intermittent streams, thus undercutting the extensive riparian buffers provided for in the NWFP.\(^{323}\) Moreover, the WOPR redefined the boundaries of several late-successional reserves and allowed salvage logging in late-successional management areas where logging was previously limited.\(^{324}\)

After the environmental review process, BLM concluded that the revisions to the RMPs contained in the WOPR would “have no effect to listed species or critical habitat.”\(^{325}\) The EIS also explained that the WOPR revisions were not self-executing and “[d]id not authorize any on-the-ground action . . . As such, further Federal decision-making [wa]s required before the BLM . . . c[ould] conduct ground-disturbing activities.”\(^{326}\) Thus, because the agencies determined there

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\(^{322}\) *Id.* at Summary: 2 n. 1, Summary: 3 (citing *Headwaters v. BLM*, 914 F.2d 1174 (9th Cir. 1990)).

\(^{323}\) *Id.* at 2:24. Under the NWFP, buffers for these streams range from 100-300 feet. *See* 1994 ROD, *supra* note 18, at 9-10.

\(^{324}\) 2008 WOPR FEIS, *supra* note 319, at 2:24. Although the 1994 EIS underlying the NWFP did not preclude salvage logging in late-successional forests, it did not list salvage logging as an appropriate response, and instead described how dead trees benefit ecosystem recovery following a disturbance. 1994 FSEIS, *supra* note 222, at B-49 to B-50 (“The surviving trees are important elements of the new stand. They provide structural diversity and a potential source of additional large snags during the development of new stands. Furthermore, trees injured by disturbance may develop cavities, deformed crowns, and limbs that are habitat components for a variety of wildlife species.”).


\(^{326}\) 2008 COOS BAY ROD, *supra* note 325, at 9; *see also* 2008 WOPR FEIS, *supra* note 319, at 1:19 (“[N]o specific on-the-ground activity would actually be proposed in the revised RMPs.”).
would be “no impact” on ESA-listed species, BLM did not initiate an ESA section 7 consultation with the USFWS to identify how the WOPR could affect listed species under the ESA.

In October 2008, timber operators challenged BLM’s failure to initiate ESA section 7 consultation for the WOPR as a violation of a 2003 settlement agreement between the parties. Although the district court in Washington D.C. did not require BLM to complete ESA consultation, in July 2009, the Acting Assistant Secretary of Interior issued a two-page memorandum to the Acting Director of BLM withdrawing the WOPR RODs because “BLM’s ‘no effect’ determination was legal error.” This withdrawal was effective immediately. The decision to withdraw the WOPR was heralded by environmentalists, who believed that the Bush Administration had been “trying to cut corners scientifically and legally” in avoiding ESA section 7 consultation, but it was decried by timber industry advocates, who claimed that it was “outrageous” for BLM to withdraw “five years of the best planning and science,” and thus leave BLM without “clear direction going forward.”

Douglas Timber Operators, Inc. v. Salazar challenged Secretary Salazar’s 2009 administrative withdrawal of the WOPR, claiming that the agency’s failure to follow FLPMA’s

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327 Douglas Timber Operators, Inc., 774 F. Supp. 2d at 249. When a federal agency, such as BLM, “authorize[s], fund[s], or carrie[s] out” any agency action, it will consult with the USFWS to insure that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . .” 16 U.S.C. § 1536(a)(2) (2006).


329 WOPR WITHDRAWAL, supra note 33, at 2.

330 Id. Interior did not, however, provide a formal notice and comment period prior to withdrawal of the WOPR.

331 See Mortensen, Logging Reversal Deepens State’s Rift, supra note 320, at C-1, C-4.
public notice provision violated the APA.\textsuperscript{332} In March 2011, the district court in Washington D.C. court struck down the Obama Administration’s administrative withdrawal, determining that the Interior Department has no inherent authority to withdraw RMPs under FLPMA without complying with the Act’s formal notice and comment requirements.\textsuperscript{333} The district court noted that even if BLM had the inherent authority to withdraw RMPs, the agency’s failure to provide a public participation period prior to withdrawing the plan was not harmless error.\textsuperscript{334} Thus, the court concluded that the Secretary’s failure to comply with FLPMA’s procedures was arbitrary and capricious under the APA.\textsuperscript{335} Although the court found the 2009 withdrawal arbitrary and capricious, it remanded the decision to Interior to “shed additional light” on the agency’s rationale for withdrawing the WOPR.\textsuperscript{336} Far from reinstating the WOPR, this order merely required that BLM provide for public participation prior to withdrawing the plan.\textsuperscript{337} After the court remanded the withdrawal decision to Interior, environmental groups renewed their original challenge concerning BLM’s failure to consult.\textsuperscript{338} Since the BLM apparently intends to conform to both the 2008 RODs and RMPs (the WOPR), and the 1995 RMP,\textsuperscript{339} the WOPR is not yet dead, but it is not exactly alive.\textsuperscript{340} Environmental challenges to the WOPR remain ongoing.\textsuperscript{341}

\textsuperscript{332} \textit{Douglas Timber Operators, Inc.}, 774 F. Supp. 2d at 251; 43 U.S.C § 1712(f) (2006).
\textsuperscript{333} \textit{Douglas Timber Operators, Inc.}, 774 F. Supp. 2d at 257-58. Under FLPMA, the BLM “shall, with public involvement and consistent with the terms and conditions of the Act, develop, maintain, and when appropriate, revise [RMPs].” 43 U.S.C. § 1712(a) (2006). The statute is silent as to “withdrawal.”
\textsuperscript{334} \textit{Douglas Timber Operators, Inc.}, 774 F. Supp. 2d at 260.
\textsuperscript{335} \textit{Id.} (citing 5 U.S.C. § 706(2) (2006)).
\textsuperscript{336} \textit{Id.} at 261.
\textsuperscript{341} \textit{See Memorandum Opinion at 11, Douglas Timber Operators, Civ. No. 09-1704-JDB} (denying Pacific River Council’ motion to require Interior to withdraw its filings in the case).
V. The Secure Rural School Act (SRSA) & Payments In Lieu of Taxes (PILOT): Propping Up County Governments with Federal Cash

Since the late 1980s and 1990s, Congress has authorized a variety of payment programs to help the O&C counties cope with the financial uncertainty caused by the spotted owl dispute, and the resulting decrease in harvest revenues.\(^{342}\) Congress provided these funds to the affected counties in addition to federal payments under the Payment In Lieu of Taxes Act (PILOT).\(^{343}\) Under PILOT, the O&C counties receive payments per acre of land managed by BLM or the USFS to reimburse them for revenues lost because of the tax-exempt status of federal lands, although this payment is reduced for counties that receive money through timber revenue sharing programs.\(^{344}\) In FY 2011, Oregon counties received over $13 million in PILOT funding.\(^{345}\) Funding for the PILOT program expires at the end of the 2012 fiscal year.\(^{346}\) Recently, the Senate overwhelmingly passed a one year extension of PILOT.\(^{347}\)

Recognizing that timber sales (and thus county revenues) had been greatly curtailed since implementation of the NWFP, Congress passed the Secure Rural Schools and Community Self-Determination Act of 2000 (SRSA).\(^{348}\) The SRSA provided rural counties—mostly in areas covered by the NWFP—with payments, and established “resource advisory councils” (RACs)

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\(^{344}\) Id. § 6901(1)-(2); id. § 6902(1)(a); id. § 6903; id. § 6904; see also GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND MANAGEMENT AND RESOURCES LAW 159 (6th ed., 2007). The revenue counties receive under other revenue sharing programs such as the SRSA reduces PILOT payments. 31 U.S.C. § 6903(b); 43 C.F.R. § 44.23(a) (2011); see 31 U.S.C. § 6903(a)(1)(C) (the SRSA is a “payment law” that reduces PILOT disbursements).


that organized projects at the local level. Rural counties viewed the SRSA as imperative, since they cannot “generate this type of revenue at the local level [with their] small population and limited tax base.” In 2008, Congress passed an emergency, short-term reauthorization of the SRSA. Although Congress averted a funding disaster for rural counties in 2008, the reauthorization appropriated money only for fiscal years 2008–2011. Further, the reauthorization provided the counties with a declining amount of funding during each year of the appropriation. Congress chose not to reauthorize the SRSA in 2011, although there are proposals in both houses of Congress to authorize SRSA payment extensions. In approving a one-year extension of PILOT funding, the Senate also approved a one-year extension of SRSA.

VI. Congressional Responses to the O&C County Funding Deficiencies

Because the O&C counties no longer derive significant revenues from the OCLA due to the environmental restrictions of the NWFP, and due to the unlikely prospects of the WOPR, Congress’ decision to not re-appropriate funds for PILOT and the SRSA has created desperation among several of the O&C counties. The O&C Counties estimate that they need $110 million...
annually to sustain county services. Recently, the sense of urgency has intensified as several counties—most notably Curry County—have faced the prospect of bankruptcy. Responding to the dire economic situation of the O&C counties, Congress has offered two separate solutions.

Under the first proposal (sponsored by Oregon representatives DeFazio, Schrader and Walden), the O&C lands would be split into a timber zone managed by a private trust, and a conservation zone managed by the USFS. Under the second, a group of bipartisan legislators has proposed a new county payments program and extension of PILOT for five more years. Both solutions are inadequate. The former would not adequately protect the environment, would undermine the integrity of the NWFP, and would base economic recovery on outdated industrial forestry assumptions. Similarly, the latter proposal fails to grasp the changed nature of the Northwest forestry economy, and punts on a viable long-term solution to the O&C counties’ funding issues that also respects environmental values.

Any viable long-term solution to county funding must fall outside the timber-centric worldview that has pervaded for the last century-and-a-half. We suggest a solution based on a combination of payments for ecosystem services like watershed protection and recreation; local sales tax initiatives similar to those in existence in two other Oregon towns; higher state taxation of log exports; increased county property tax rates; and possible federal

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357 See infra Section VI.A.
358 See infra Section VI.B.
359 See infra Section VI.D.1.
360 See infra Section VI.D.2.
361 See infra Section VI.D.3.
362 See infra Section VI.D.4.
363 See infra Section VI.D.5.
364 See infra Section VI.D.6.
management consolidation of the O&C lands.\textsuperscript{365} This type of broad-based revenue solution may finally secure budget security for the O&C counties, while at the same time preserving the incredible, unique natural resources values found in the O&C lands.

\textbf{A. The Trust Proposal: Divide and Privatize}

In December 2011, Oregon Congressmen DeFazio, Walden and Schrader introduced their self-proclaimed bipartisan solution for breaking management gridlock on the O&C lands, creating jobs, and fixing the county budget issues.\textsuperscript{366} In February of 2012, the congressmen formally introduced their proposal, the O&C Trust, Conservation, and Jobs Act (OCTA).\textsuperscript{367}

In order to avoid further mill closures, job outsourcing, and county budgetary collapse, the delegation has proposed dividing the O&C lands into timber and conservation trusts, with the timber tracts managed in trust for the O&C counties, and the conservation tracts protected from harvesting.\textsuperscript{368} The “timber trust”—1.479 million acres of land, with an average stand age less 125 years—would be managed for timber harvesting.\textsuperscript{369} Although the federal government would still technically hold title to the lands, the timber trust land would be managed and, for all intents and purposes, owned by a private board of trustees.\textsuperscript{370} This board of trustees would be governed by a fiduciary duty to produce “maximum sustained revenues in perpetuity for [the O&C Counties]. . . .”\textsuperscript{371} In order to fulfill its fiduciary duty to maximize revenues, this board of

\textsuperscript{365} See infra Section VI.D.5.
\textsuperscript{369} H.R. __, 112th Cong., 2d Sess., §§ 211(c)(1), 211(d)(1), 214 (2012) (discussion draft).
\textsuperscript{370} Id. § 212(a)(1)-(3). The trust would assume authority over the road system covering the trust land. Id. § 212(d). The United States would, however, retain title to subsurface minerals under the trust lands. Id. § 212(b).
\textsuperscript{371} Id. § 211(b).
trustees would need to clearcut a substantial amount of timber-trust lands. Commentators project that the OCTA would triple the amount of timber logged from O&C lands. In addition to creating the timber trust, the OCTA would transfer jurisdiction over all O&C lands not placed in the timber trust—approximately 824,000 acres—to the USFS. The lands in this “conservation trust” would still be subject to the NWFP, with a focus on protecting old growth forests. The OCTA bill would also designate approximately 89,000 acres of new wilderness areas and 128 miles of new wild and scenic river corridors.

In promoting the bill, the Oregon delegation has claimed that without a new program for supporting rural Oregon counties, the O&C counties—already facing “depression-like unemployment”—would lose between 3,000 and 4,000 jobs, and Oregon business sales will drop by around $350 million (which would also result in the loss of another $230 million in indirect economic activity within the state). The delegation claims that this plan would provide Western Oregon with a “predictable level of revenues in perpetuity” and would create 12,000

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373 Spivak, supra note 372, at 1 (510 million board feet would be logged each year—up from 186 million/year currently. This is the equivalent of thirty-three square miles of new clearcuts).

374 See H.R. __, 112th Cong., 2d Sess., § 232(b) (2012) (discussion draft) (specifying that conservation trust lands would be subject to the NWFP after making no similar mention in Subtitle A of the bill).

375 Id. § 231; see Spivak, supra note 372, at 1.


new jobs. Moreover, the delegation has argued that the OCTA proposal is the best that conservation interests can hope for, claiming that they will never be able to defend old growth protections against the current Congress and U.S. Supreme Court. Rep. DeFazio recently predicted that if Congress does not act, county governments around the state would topple like dominoes all the way up to Multnomah County (home to Portland). Rep. Schrader also pitched the proposal as a way to break through the old “timber war” paradigm.

In response, some commentators have criticized this proposal as catering to short-term political expediency over finding a sustainable, long-term solution. The Oregonian editorial staff has endorsed the plan, arguing that the proposal would “fulfill the historical economic commitment to Oregon” by providing more logs, more jobs and more revenues to the counties, characterizing the DeFazio proposal as moderate and balanced and emphasizing that sustainable harvests can co-exist with environmental protections strong enough to appease environmental concerns. At the close of the most recent legislative session, the Oregon Assembly passed a joint memorial urging the President and Congress to allow the O&C Counties to exercise full management authority over federal O&C lands within their county borders by passing the DeFazio proposal.

B. The County Payments Proposal: A Return to a Foregone Era

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380 Id.
382 Id.
383 See Hubbard, supra note 372.
384 See e.g., Steve Pedery, Conservation Director for Oregon Wild, Editorial, Put Public Lands Ahead of Politics, THE OREGONIAN, Jan. 29, 2012, at B9; See Hubbard, supra note 372 (quoting Sean Stevens, spokesperson for Oregon Wild: “We’re seeing how people in positions of power are between a rock and hard place . . . They know how unpopular (raising taxes) is, so they’ll throw a proposal out there . . . and when it fails, they can pin it on environmentalists.”).
Although the Obama Administration’s February 2012 budget proposed to fund the SRSA timber payment program with $270 million in nationwide funding for FY 2013, this amount is far from the $260 million Oregon alone received at the height of the program in the early 2000s. After the president released the 2013 budget, Rep. Doc Hastings (R-Wash.) introduced the Federal Forests County Revenue, Schools, and Jobs Act of 2012 (Hastings bill), meant to replace the county payments program. The sponsors claimed this bill would create jobs and stimulate the economy by setting new minimum harvest levels and revenue targets for the BLM and USFS. In particular, the Hastings bill would require that federal lands generate at least sixty percent of the income generated from the National Forest System between 1980 and 2000. This money would be deposited into a trust account to provide O&C counties with

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funding for schools, roads and services. The bill would require minimum timber harvest levels equivalent to half the average amount harvested from federal forests between 1980 and 2000 and extend PILOT payments until 2017.

The Hastings bill moved quickly through the legislative process in the U.S. House of Representatives, but the Oregon delegation has not endorsed the Hastings proposal, instead focusing attention on integrating the two proposals. A primary concern is that replacing SRSA funding under the Hastings bill would require an increase in logging by at least four hundred percent over current levels, an increase in timber prices would by four hundred percent, and augmented federal land management budgets by three hundred percent. Moreover, all harvest projects proposed under Hastings bill would be presumed compliant with federal environmental laws such as NEPA, the ESA, and NFMA, and not subject to judicial review.

C. The Inadequacy of the Trust and County Payment Bills

Although the Hastings bill is not as extreme as the Timber Salvage Rider, it includes similar provisions—such as precluding judicial review and declaring all sales compliant with existing federal environmental laws—and promises to raise timber harvests in the region to a level not seen since the 1980s. The OCTA “trust” proposal, on the other hand, attempts to offer

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391 H.R. 4019, § 102.
392 Id. § 101(8).
393 Id. § 201.
397 See supra notes 249-265 and accompanying text.
398 See supra note 251 and accompanying text.
some environmental protections, and at least begins to consider alternatives outside the traditional harvest-centric thinking. Both proposals, however, suffer from critical environmental and economic flaws.

First, the OCTA bill’s assumption that the Oregon Forest Practices Act (FPA) will provide sufficient protection to the O&C lands is flawed. Second, both proposals fail to consider water quality impacts. Third, given the changed Northwest timber landscape, the claimed economic benefits are likely greatly over-stated. Fourth, the forests may not have the timber volume necessary to support the counties. These flaws are significant, and should give politicians pause before pushing through a short-term fix.

1. The Inadequate Protection Provided by the Oregon Forest Practices Act

If Congress enacted the OCTA, the O&C lands would no longer be subject to most federal environmental protections, including those afforded by NEPA and the ESA.\(^{400}\) Thus, under the OCTA trust proposal, the Oregon FPA would offer the only protection for land included in the “timber trusts.”\(^{401}\) (The Hastings bill appears to not even consider this dynamic). In promoting the OCTA, the Oregon delegation assumed that the Oregon FPA would be sufficient to protect the spotted owl and salmon.\(^{402}\) Since roughly 1.7 million acres of O&C lands currently support strong salmon populations, and are already home to sixty species of concern as

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\(^{401}\) See id.

\(^{402}\) See id. §§ 212(j), 214(a) (noting that so long as the board of trustees manages the timber trust in compliance with the Oregon FPA, its actions shall be considered compliant with the ESA).
well as thirty percent of the listed Marbled murrelet’s critical habitat, this assumption is a critical one.

Unfortunately, the assumption is incorrect. For example, Oregon law permits 120-acre clearcuts and allows operators to harvest forests in a way that create habitat fragmentation. In state forests, the Oregon FPA protects only thirty percent of land from clearcuts. Moreover, in most situations under the state statute, operators must provide riparian buffers only up to twenty feet wide. By contrast, the NWFP prevents harvesting within 100-300 feet of riparian areas, as well as within the 100-year floodplain, and in landslide prone areas. Further, the federal plan requires on-the-ground surveys of plants and animals prior to harvesting a parcel. Finally, the NWFP requires watershed analysis to assess current watershed conditions. The Oregon FPA provides none of these protections. In fact, numerous studies have detailed the

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403 WILD SALMON CENTER & THE NATURE CONSERVANCY, BUREAU OF LAND MANAGEMENT WESTERN OREGON LANDS: A NATURAL RESOURCE ATLAS (2012) (draft study) (on file with authors) [hereinafter WSC & TNC]. The O&C lands currently contain over 1400 miles of salmon-bearing river miles. Id.

404 OR. REV. STAT. § 527.740(1)–(2); OR. ADMIN. R. 629-630-0100(1) (operators are given the discretion to choose the method by which to harvest forests); see Edward J. Heisel, Biodiversity and Federal Land Ownership: Mapping A Strategy for the Future, 25 ECOLOGY L.Q. 229, 244 (1998) (“Clearcutting of [Northwest old growth] forests has severely compromised their biological integrity, resulting in the direct loss of biodiversity through habitat fragmentation.”).

405 Only 15% of ORS 530 forests must achieve “layered” forest stand structure, and only 15% must achieve “old growth” forest stand structure—the rest need only reach “regeneration” (15%), “closed single canopy” (5%), and/or “understory” (30%) stand structures. See OR. DEPT OF FORESTRY (ODF), NORTHWEST OREGON STATE FOREST MANAGEMENT PLAN REVISED, at S-17 (2010), available at http://www.oregon.gov/ODF/STATE_FORESTS/docs/management/nwfp/NWFMP_Revised_April_2010.pdf. Although 70% of ORS 530 land is theoretically open to clearcutting, the actual percent of land open to clearcutting varies by timber district due to terrain (i.e. steep slopes, rocks, stream buffers, wetlands), a lack of road access, and/or varied growing conditions.

406 OR. ADMIN R. 629-635-0310(1)(a) (small domestic use/non-fish streams are only afforded 20 foot riparian management areas, whereas small fish streams receive 50 foot management areas. All other small streams that do not have domestic or fish use classifications only receive water quality protection, and receive no riparian management area); id. 629-640-0100(2)(a)–(c), 629-0200(2)(a)–(c) (for fish streams, domestic streams, and large and medium unclassified streams, operators only have to retain understory vegetation within 10 feet of a stream, trees within 20 feet of a stream, and all trees leaning over a channel).

407 See 1994 ROD, supra note 18, at 9; 1994 FSEIS, supra note 222, at B-16 to B-17, B-85 tbl. B6-1.


409 See 1994 ROD, supra note 18, at 10; 1994 FSEIS, supra note 222, at B-94 to B-95.
The insufficiency of the Oregon FPA to protect salmon. Moreover, in terms of protecting habitat for ESA-listed species, the Oregon Board of Forestry has admitted “compliance with the Oregon Forest Practices Act requirements does not ensure compliance with the federal ESA.”

Paradoxically, although the Oregonian endorsed the DeFazio proposal and its reliance on the Oregon FPA as a sufficient environmental protection on the O&C lands, the newspaper has at the same time decried the management of state forests under the Oregon FPA as grossly inadequate from an environmental perspective. This internal conflict among the Oregonian editorial staff is indicative of the need to dig deeper to find a solution that adequately balances the counties’ economic interests and forthrightly addresses the environmental realities that would result from executing the OCTA proposal. Simply relying on the Oregon FPA as an environmental backstop seems wholly inadequate.

2. Neglecting the Effect of Increased Timber Harvesting on Oregon’s Already Violated Water Quality Standards

High river temperatures currently cause the most violations of Oregon’s water quality standards and are Oregon’s most widespread pollution problem. Recently, the Oregon federal district court concluded that the EPA failed to adequately review implementation of Oregon’s

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412 Compare Craig Patterson, The Mismanagement of State Forests, THE OREGONIAN, Jan. 14, 2012 (“[T]he State lands [are] exempt from the reality and [s]cience that affects public lands”), with Editorial Staff, A Promising Forest Plan, THE OREGONIAN, Feb. 21, 2012, at B4 (“If the [state Forest Practices Act standards] are solid enough to govern the private working forests of Western Oregon, shouldn’t they be sufficient for what the DeFazio bill envisions as public working forests?”).

water quality standards for stream temperatures concerning the effects of logging, farming and cattle grazing.\textsuperscript{414} The court noted that under state law, pollution sources from logging, agriculture, and grazing are automatically deemed to be in compliance with water quality standards if certain mandatory management practices are fulfilled.\textsuperscript{415} A central flaw in this assumption, according to the court, is the fact that logging, grazing, and agriculture can raise water temperatures because these activities reduce streamside vegetation (thus reducing shade) and add sediment to the water (making streams shallower and less reflective of sunlight).\textsuperscript{416}

The district court ruled that EPA’s approval of Oregon’s automatic upward adjustment of stream temperature requirements was unsupportable in terms of protecting salmon and steelhead\textsuperscript{417} and required NMFS and FWS to revise their BiOp concerning how Oregon’s water quality standards affect ESA-listed fish.\textsuperscript{418} Thus, even without significant increases in timber harvesting, the state is not adequately protecting water quality and providing sufficient stream protection for salmon and steelhead. Considering that 2.5 million live within ten miles of O&C lands, and that seventy-five of O&C lands are within designated Oregon DEQ designated

\begin{itemize}
\item 414 Opinion and Order at 13, 15, Northwest Environmental Advocates v. U.S. Envtl. Prot. Agency, No. 3:05-cv-01876-AC (D. Or. Feb. 28, 2012) (“Given that many temperature impaired waters in Oregon are impaired in whole or in part by nonpoint sources of pollution, the challenged provisions could present a considerable obstacle to the attainment of water quality standards[,] . . . The EPA cannot choose to review and approve water quality standards while ignoring separate provisions which have the potential to cripple the application of those standards.”) (emphasis added); see Learn, supra note 413, at A1, A4.
\item 415 Opinion and Order at 12-13, Northwest Environmental Advocates, No. 3:05-cv-01876-AC. This is the situation under the Oregon FPA. OR. ADMIN. R. 340-041-0028(12)(e) (forest operations that comply with best management practices already required under the FPA are “deemed in compliance” with temperature standards). Similar standards exist in the agricultural and grazing context. See, e.g., OR. ADMIN. R. 340-041-0004(4)(a), (b); OR. ADMIN. R. 340-041-0028(12)(g).
\item 416 See Learn, supra note 413, at A4 (describing the motive underlying the suit).
\item 417 Opinion and Order at 24, 26-27, Northwest Environmental Advocates, No. 3:05-cv-01876-AC (granting summary judgment to the plaintiff). The regulation provides that where the Oregon Department of Environmental Quality (DEQ) determines that “the natural thermal potential of all or a portion of a water body exceeds the biologically-based [numeric] criteria, the natural thermal potential temperatures supersede the biologically-based [numeric] criteria, and are deemed to be the applicable temperature criteria for that water body.” OR. ADMIN. R. 340-041-0028(8). Although sixty-four degrees fahrenheit is a high-but-accepted temperature reading for the protection of salmon and steelhead, DEQ regularly allowed temperatures up to ninety degrees fahrenheit to pass muster under this provision. See Bell, supra note 413, at B7.
\item 418 Opinion and Order at 36-42, Northwest Environmental Advocates, No. 3:05-cv-01876-AC.
\end{itemize}
drinking water protection areas,\textsuperscript{419} the quality of water flowing from the O&C lands matters for a lot of Oregonians. And with large increases in timber harvesting, as proposed in the Hastings and OCTA bills, these water quality concerns would only become more pronounced.

3. **The Mythical Link Between Increased Harvesting and Economic and Employment Increases**

Another critical flaw in both the OCTA and Hastings proposals is the assumption that increased harvesting can solve the counties’ funding problems. Based on estimates from Headwaters Economics, logging would need to increase by ten-fold to raise the money necessary to support O&C County governments.\textsuperscript{420} Although both proposals claim that increased harvesting will add jobs and improve local economic conditions, changed market dynamics raise questions about whether there is market demand for an increased supply of Oregon logs and whether logging would provide sufficient economic benefits for the O&C Counties.

The once robust demand for Oregon Douglas fir timber is likely no longer the case.\textsuperscript{421} In fact, since the inception of the NWFP, many sub-equatorial nations have developed highly productive, short-rotation, low-cost timber.\textsuperscript{422} Soon, timber imports will fulfill a significant portion of American demand.\textsuperscript{423} Further, since timber stumpage prices are linked to housing starts,\textsuperscript{424} as housing starts decline, so does the demand for timber.\textsuperscript{425} Because the recent

\begin{footnotesize}
\textsuperscript{419} See WSC & TNC, supra note \textsuperscript{403}.


\textsuperscript{422} \textit{Id}.

\textsuperscript{423} \textit{Id}.

\textsuperscript{424} See OREGON DEP’T OF FORESTRY, AN EVALUATION OF THE ACHIEVEMENT OF ALL NINE PERFORMANCE MEASURES FOR TWO MANAGEMENT APPROACHES ON THE TILLAMOOK AND CLATSOP STATE FORESTS 3 fig. 1 (2009), http://www.oregon.gov/ODF/BOARD/docs/June_3_2009/3_Att_1.pdf.

\textsuperscript{425} For example, in the early 1980s, the housing market plummeted, and housing starts sank from over 2.0 million per year to 1.07 million per year. Daniel Jack Chasan, \textit{A Trust for All the People: Rethinking the Management of}
economic recession produced a sharp decline in housing starts.\textsuperscript{426} Oregon timber prices have been depressed.\textsuperscript{427} As a result of these new market dynamics, Oregon timber is less competitive in the global marketplace.\textsuperscript{428}

Moreover, in the past, the Oregon timber industry was at a competitive advantage because a cluster of nearby businesses arose to support the forest products industry.\textsuperscript{429} At the heart of this economic web were the milling and forest product companies, with equipment manufacturers, distributors and business services providing support.\textsuperscript{430} Prior to the promulgation of the NWFP, most of this support infrastructure was located in Oregon, in communities close to the forests, thus providing a number of localized “timber” jobs beyond just harvesting the timber.\textsuperscript{431} Now, many of these formerly clustered customers and suppliers are no longer in Oregon.\textsuperscript{432} In connection with the lessened demand for Oregon timber, this altered market structure makes it even more difficult for Oregon timber and forest products to compete.\textsuperscript{433}

As a result of these changed dynamics, Congress should consider whether a solution to county funding problems that is based on increased timber harvesting is even economically

\textsuperscript{426} See Franklin & Johnson, \textit{supra} note 421, at 41 (2004).

\textsuperscript{427} Average stumpage price for timber in Oregon was $348/MBF in FY 2007. \textit{COUNCIL OF FOREST TRUST LAND COUNTIES (CFTLC), STATE FORESTER’S ANNUAL REPORT FOR THE ASSOCIATION OF OREGON COUNTIES} 9 t.5 (2009). In 2009, average stumpage prices had dropped to $211/MBF. \textit{Id.} Prices did climb moderately in FY 2010 as ORS 530 land timber sold for an average of $257/MBF. \textit{CFTLC, STATE FORESTER’S ANNUAL REPORT FOR THE ASSOCIATION OF OREGON COUNTIES} 12 t. 5 (2010).

\textsuperscript{428} \textit{Id.} at 6–7.

\textsuperscript{429} \textit{E.D. HOVEE & COMPANY, OREGON FOREST CLUSTER ANALYSIS} i (2005), \textit{available at www.oregonforests.org/assets/pdfs/ForestCluster_FINAL.pdf} (prepared for OFRI).

\textsuperscript{430} \textit{Id.} at 1.

\textsuperscript{431} \textit{Id.} at 7.

\textsuperscript{432} \textit{Id.} at 7.

\textsuperscript{433} \textit{See} Franklin & Johnson, \textit{supra} note 421, at 41 (2004); \textit{id.} at 43 ("The United States will likely become a minor player in the global production of common wood-based products, including lumber, pulp, and paper.").
possible in this very different global timber marketplace. Otherwise, the proposals may provide only false hope to the struggling counties, while also gutting the valuable forest resources.  

4. Enough O&C Timber To Sustain Increased Logging?

Finally, there is a case to be made that logging the O&C lands simply cannot provide enough timber volume to sustain the counties, now that much of the old growth has been logged. According to the estimates of an experienced BLM timber surveyor, when logging ground to a halt as a result of the spotted owl injunctions in the early 1990s, only five percent of the O&C lands still contained old growth. A recent study found that nearly half of the timber stands on O&C lands are less than 75 years old. Knowing the timber volume available on the O&C lands is critical because while an old-growth tree may contain thousands of board feet of lumber, a forty or fifty year-old tree may only have a few hundred. Further, the checkerboard layout of the land makes large-scale harvesting difficult—especially since over half of the O&C land parcels are less than 640 acres—and increased harvesting on the O&C lands could result in decreased harvests from adjacent USFS lands due to species and watershed impacts throughout the ecosystem. As a result of these dynamics, the economic benefits supposedly linked to increased O&C harvests could ultimately be offset significantly. This reality is compounded by the fact that one-third of the O&C lands are classified as fragile or unsuitable for timber

436 Id.
437 WSC & TNC, supra note 403.
438 Id.
439 See WSC & TNC, supra note 403. Because the O&C lands are adjacent to USFS lands in this checkerboard, and timber sales from USFS lands would still be subject to NEPA’s “cumulative impacts” and “indirect effects” analysis and NFMA’s species diversity requirements, it is possible that increased logging of the O&C lands could impact species and watersheds throughout the contiguous ecosystem so that USFS sales might not meet environmental standards. See 16 U.S.C. § 1604(g)(3)(B) (2006) (NFMA authority for diversity) 36 C.F.R. § 219.9 (2012) (not yet codified USFS forest planning rules but published in 77 Fed. Reg. 21,260, 21,265 (Apr. 9, 2012)); 40 C.F.R. §§ 1508.7, 1508.8 (2012) (NEPA regulations).
Thus, before making an “all-in” bet on timber under the OCTA and Hastings proposals, knowing the actual physical state of the O&C forests, would seem imperative.

D. Mixed Sources of County Funding, Including New Ecosystem Service Markets

The potential environmental consequences associated with the OCTA and Hastings proposals seem ominous. Further, the economic assumptions underlying the proposals may be wildly inaccurate. Although ecologically sensitive logging increases and short-term reauthorization of county funding programs like the SRSA and PILOT can be a part of the solution, full-out liquidation and/or privatization of the forests is not the long-term answer. The current congressional proposals simply ignore many environmental and economic issues.

In response to the congressional proposals, a coalition of Oregon environmental groups offered a counter-proposal aimed at “sharing responsibility” in solving the O&C Counties’ budget crisis. This counter-proposal suggested a combination of increased local property taxes, increased state export taxes on logs, and federal management consolidation to eliminate funding redundancy. These groups claimed that each of these actions could raise one-third of the estimated $110 county funding shortfall (or $37 million each). Although the Oregon congressional delegation quickly dismissed the environmental counter-proposal as infeasible in

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440 Id.
441 See Hall & Sorenson, supra note 434, at B5 (“The loss of these federal funds leaves [the O&C Counties] in a bind. But proposals to link county funding to expanded logging on federal public lands have significant problems.”). The authors of this opinion piece—two O&C County commissioners—suggest that forest thinning modeled on the Siuslaw National Forest, could be one way to achieve higher harvest levels without compromising environmental values too much. Id.
443 See GEOS INSTIT., supra note 442, at 2.
444 Id.; see Mortensen & Pope, Forest Plan Would Share Costs, supra note 357, at C1.
light of the counties’ and state’s current economic situation, the environmentalists’ notion of shared responsibility, as well as several of their funding sources, should form the basis of a more comprehensive proposal.

We believe that a long-term answer lies in a diversified funding solution that helps the O&C Counties develop more sustainable revenue sources without sacrificing the NWFP, other federal protections, or Oregon’s already-compromised water quality. Such a solution would continue county payments, but tie those payments to a requirement to establish ecosystem service programs. Examples of potentially feasible ecosystem service programs include watershed protection, recreation, and aesthetics. Increased county-wide sales taxes would be an important revenue supplement as would an increased state log export tax. Moreover, the O&C Counties are currently property tax havens, and so we suggest raising county property tax rates to a value closer to the statewide average. Finally, we suggest that the USFS and BLM investigate potential cost savings associated with consolidated management authority over the O&C lands and adjacent national forest lands.

1. Generating Revenue from Forest Ecosystem Service Values

The O&C lands provide a host of values not currently monetized and sold in the marketplace. Ecosystem service schemes monetize the otherwise “free” service values that healthy, functioning ecosystems provide to humans. By monetizing the non-economic values provided by the O&C lands, and then selling these service values, the O&C Counties might be able to generate significant new revenues without having to increase timber harvests.

Forest ecosystems typically provide four types of benefits: commodities, environmental condition improvement, cultural services, and supporting services that make these other values

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445 Id. at C1.
446 See Janet C. Neuman, Thinking Inside the Box: Looking for Ecosystem Services Within a Forested Watershed, 22 J. LAND USE & ENVTL. LAW 173, 188–89 (2007)
possible. Commodities include fisheries, wood, and fresh water. Forests also provide flood control, water purification, and carbon sequestration benefits for humans. Cultural services include recreation, education, and aesthetics. Finally, forests provide supportive services such as nutrient cycling and soil formation, thus enabling the other services. Some of these services are more easily monetized than are others.

Although forest ecosystems provide recreational, aesthetic and carbon sequestration values, watershed-based markets are likely the most easily measured and implementable ecosystem service from the O&C lands, especially since the federally-owned O&C lands would be ineligible for carbon sequestration credits under the new California cap-and-trade regulations. Healthy forest watersheds are essential to water users. Increased timber harvesting leads to increased sediment runoff and decreased water quality, which can in turn increase water filtration plant operational costs, cause plant shutdowns, generally interfere with

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448 See id.; Neuman, supra note 446, at 189.
450 See Ruhl, supra note 447, at 1382.
451 See id.; Wayburn & Chiono, supra note 449, at 388 (discussing need for “investment in the natural infrastructure that provides the basic ‘factory’” for producing ecosystem services).
452 See Tim Wigington, Wading Out of the Tilla-muck: Reducing Timber Harvests in the Tillamook and Clatsop State Forests, and Protecting Rural Timber Economies Through Ecosystem Service Programs 59 (Mar. 19, 2012) (unpublished J.D. thesis, Lewis & Clark Law School) (on file with authors) (describing need for implementation of watershed protection ecosystem services on state forestland in Oregon); id. at 62-67 (describing carbon sequestration potential, but noting difficulty of applying to federal lands); id. at 67-71 (describing recreational and aesthetic values—such as salmon fishing license surcharges, forest recreation and permit fees, and highway tolls—that could provide additional revenue sources).
454 Travis Greenwalt & Deborah McGrath, Protecting the City's Water: Designing A Payment for Ecosystem Services Program, 24 NAT. RESOURCES & ENV'T 9, 9 (2009) (“[F]low regulation; filtration; flood control; and protection against runoff, erosion, and sedimentation are critically important[.]”).
the operation of such systems, and cause ecological problems. Avoiding the sedimentation and water supply issues associated with a degraded watershed thus can be of great value to municipalities. Among many success stories, the city of Portland has benefited economically from enhanced watershed protection, and the federal government has recently partnered with the city of Denver to protect key forested headwaters, distributing these costs among municipal water users. In addition, since healthy watersheds foster stream temperatures compliant with Clean Water Act standards, the O&C Counties could potentially sell temperature credits to larger government units whose water discharges exceed CWA limits.

Successfully implementing a system of ecosystem service payments will require a shift in thinking and forceful leadership by the state and federal government. To encourage this

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456 See Keith H. Hirokawa, Sustaining Ecosystem Services Through Local Environmental Law, 28 PACE ENVTLL. L. REV. 760, 790–91 (2011) (“In many cases, such as the protection of the Bull Run watershed by Portland, Oregon, evidence of the substantial economic value of local ecosystem services compels local governments to engage in ecosystem investments.”). The city of Portland spends nearly $1 million/year to protect the Bull Run watershed (home to Portland’s water supply). DOUGLAS KRIEGER, ECONOMIC VALUE OF FOREST ECOSYSTEM SERVICES: A REVIEW 10 (2001). The alternative is often much more expensive. For example, each year Salem, Oregon spends $3.2 million to operate water treatment facilities. Id. at 12.

457 Concerned about possible catastrophic effects on water supply from fire, Denver Water—the supplier of water to 1.3 million people in the metro area—recently signed a $33 million cost-sharing agreement with the USFS for watershed restoration. Neil LaRubbio, Communities Help Pay for Ecosystem Services Provided by Forests, HIGH COUNTRY NEWS, Feb. 20, 2012, at 6, available at http://www.hcn.org/issues/44.3/communities-help-pay-for-ecosystem-services-provided-by-forests. To pay for this restoration work, residential water users in Denver will pay an extra $27 over the course of the next five years. Id. A number of other communities around the world have successfully implemented a distributed watershed protection surcharge. See Wigington, supra note 452, at 60-61.


459 See id. (describing scheme whereby the city of Medford agreed to pay the Freshwater Trust to restore river-side shade in exchange for “temperature reduction credits” it can use to offset its continued water discharges in excess of its temperature TMDL).

460 See Wayburn & Chiono, supra note 449, at 385–86 (2010) (“[W]hile voluntary markets for ecosystem services currently exist in the United States, these are unlikely to produce an efficient level of the ecosystem service due to
leadership, Congress should condition county payment appropriations on the development of these types of programs. The PILOT program reduces payments by the amount a local government receives from other revenue programs, such as the SRSA.\(^{461}\) Congress should specifically exempt funding received from ecosystem-service programs from the payment reduction provision in PILOT. Congress should also provide an incentive to the counties to develop ecosystem service programs by increasing PILOT disbursements to reward counties implementing these types of programs on a specified percentage of PILOT-eligible acreage within their jurisdictions.

2. **Countywide Sales Tax Measures and Capturing Out-of-Town Revenue**

Because the O&C counties house such large swaths of federal land, they are at a revenue disadvantage due to the fact that local government units cannot impose property taxes on federal land.\(^{462}\) To make up for this disadvantage, Congress has provided revenues to the counties under programs such as the OCLA, the SRSA, and PILOT. These county payments provided a large portion of the O&C Counties’ revenues each year.\(^{463}\) As these funds have dried up, the O&C Counties must rethink their long-held position on sales taxes.\(^{464}\)

Among Oregon counties, Curry County on the southern Oregon coast is the most affected by the O&C funding crisis. Although the county has considered declaring bankruptcy,
disappearing, or merging with other counties, the first two proposals have been deemed legally impossible, and the third too difficult. As recently, the county has proposed placing a general sales tax on its November 2012 ballot. As proposed, the county would levy a three percent tax on the sale of all non-exempted goods in the county. The tax was designed to capture non-local, tourist revenue. This county-wide sales tax would be the first in the state, although the Oregon cities of Ashland and Yachats impose a sales tax on prepared food and beverages. The tax could raise an estimated $7.9 million annually. Imposition of similar taxes by each of the O&C Counties would solve significant portion of their revenue problems.

3. Increasing the State Log Export Tax Rate

Oregon imposes only a minimal tax on forestry exports. As a result of this low tax and flagging demand in the United States, west coast log exporters now send $900 million in raw logs overseas—twenty-two times more than just four years ago. The OCTA proposal would address this problem by forbidding the exportation of logs from the private timber trust. The
environmentalist counter-proposal suggested increasing the forest products harvest tax assessed to private forest owners from $3.24 per 1,000 board feet to around $9.21 per 1,000 board feet.\textsuperscript{474} Ultimately, any solution must recognize that when logs are exported (even domestically to different regions of the country), the jobs associated with milling and forests products—and the supporting cluster businesses—are exported from Oregon communities as well.\textsuperscript{475} Any solution to the O&C Counties’ economic situation must attempt to prevent the Northwest from becoming a timber colony for Asia.\textsuperscript{476} Therefore, we suggest that the state should raise the state export tax on private lands—as suggested in the environmentalist counter-proposal—and should also impose a severance tax on lumber harvested from both the O&C and national forest lands in Oregon.\textsuperscript{477}

4. Increasing County Property Taxes

The fact that Curry County has the state’s second lowest property tax—at sixty cents per $1000 of assessed value (as compared to the statewide average of $2.25 per $1,000 of assessed value, and $4.34 per $1,000 of assessed value in Multnomah County—home to Portland)—has exacerbated the disappearance of federal funds.\textsuperscript{478} Homeowners in Portland pay over seven times more in property tax, even though the median home value in the two counties is very close, and

\textsuperscript{474} \textit{GEOS INSTIT., supra} note 442, at 5. From 2004-2012, the average Forest Products Harvest Tax was $3.24 per thousand board feet. \textit{See Or. Dep’t of Revenue, Forest Products Harvest Tax, http://www.oregon.gov/DOR/TIMBER/2003_fpht.shtml} (last visited Mar. 19, 2012). The average amount of timber harvested during that period in Oregon was 3.77 billion board feet. \textit{GEOS INSTIT., supra} note 442, at 5. To raise $37 million annually (as proposed), the FPHT would need to be raised to $9.21 per thousand board feet. \textit{Id.}

\textsuperscript{475} \textit{See Governor John Kitzhaber, Governor Kitzhaber Testimony Before the Oregon Board of Forestry (Nov. 3, 2011) available at, http://governor.oregon.gov/Gov/media_room/speeches/s2011/testimony_boardofforestry_110311.shtml. Roughly, for each million board feet of timber milled domestically, there are five jobs. \textit{GEOS INSTIT., supra} note 442, at 8. In contrast, for each million board of timber harvested, there is only one export job. \textit{Id.}}

\textsuperscript{476} \textit{See id. (“This amounts to nothing more than exporting our natural capital and our jobs. We are at risk of becoming a timber colony for Asia.”).}

\textsuperscript{477} \textit{See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 624 (1981) (upholding the application of Montana’s thirty percent severance tax on lessees of federal coal in the state, noting that “there can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity.”)).}

\textsuperscript{478} \textit{KULONGOSKI, supra} note 34, at 44 tbl. 5.
both are well above the national average. The environmentalist counter-proposal suggested increasing property taxes in each of the affected counties to a level near the current statewide average. This seems reasonable. Although Curry County voters soundly defeated a 2010 measure to increase property taxes, the current budgetary crisis could yield a different result.

5. Consolidating the O&C Lands into the National Forest System

To achieve further savings, BLM could transfer ownership of the O&C lands to the USFS to avoid management duplicity. This proposal has been contemplated since the enactment of the OCLA in 1937. The OCTA proposal promoted by the Oregon delegation suggests consolidation of the non-timber trust land into the USFS as well. Although opponents challenged the assumptions underlying their conclusion, the environmentalist counter-proposal argued that the federal government could save up to $113 million per year as a result of consolidation. Although management streamlining could save money, consolidation could also result in lost jobs among BLM staffers, thus undercutting any potential employment increases gained elsewhere. Consequently, more study is needed before relying on consolidation.

VII. Conclusion

479 The median home value in Curry County is nearly $267,000, whereas the median home value in Multnomah County is $281,000. U.S. Census Bureau, State & County Quick Facts, http://quickfacts.census.gov/qfd/states/41000.html (last visited Mar. 20, 2012) (select a county in the pull down box at the top of the screen for county-specific data). The national median home value is only $188,000. Id.
480 See GEOS INSTIT., supra note 442, at 6-7.
481 See Mortensen & Pope, Forest Plan Would Share Costs, supra note 357, at C1.
482 Id.
483 See Hearings on H.R. 5858, supra note 13, at 14-15 (exchange between Mr. White and Mr. Poole regarding consolidated management of the O&C lands).
485 GEOS INSTIT., supra note 442, at 4. The proponents of the environmental counter-proposal based this estimate on statistics showing that the BLM spends over four times as much to manage an acre of land than does the USFS. Id. Opponents to the environmentalist proposal challenged their assertion, claiming that the difference is more likely two-to-one. Mortensen & Pope, Forest Plan Would Share Costs, supra note 357, at C1 (quoting Douglas County Commissioner Doug Robertson).
486 See Holmes, supra note 435.
From their inception to the present, the O&C lands have been enmeshed in controversy.\footnote{Beginning with the railroad grant in 1866, through the Oregon land fraud scandal of the early 1900s, and the revestment of the remaining unsold lands to the federal government in 1916, through the spotted owl controversy of the late 1980s and early 1990s, the subsequent NWFP and the ensuing 1995 timber salvage rider, and the George W. Bush Administration’s unsuccessful attempts to weaken the plan in the 2000s, the O&C lands have been fraught with controversy and unrest.} Today, history has once again repeated itself, as the O&C lands are at the center of a major county funding crisis that threatens to unravel twenty-five years of environmental progress. The O&C Counties—long reliant on timber harvest revenue from the O&C lands—now face serious fiscal crises as a result of diminished timber harvests and sharply curtailed federal funding. In response to this crisis, federal legislators have proposed to privatize the O&C lands into large-scale timber plantations (the OCTA “trust” proposal), and to increase harvesting to unsustainable levels so as to increase county revenues (the Hastings proposal).

Both proposals suffer from serious environmental and economic flaws. First, both proposals rely on the grossly inadequate Oregon Forest Practices Act to protect these forested ecosystems should they be exempted from federal environmental protections. Second, both proposals fail to assess water quality impacts connected to increased harvesting, despite Oregon’s already compromised water quality status. Third, given the changed Northwest timber landscape, the purported employment and economic benefits of both proposals are quite overblown. Finally, the O&C lands may simply not have enough timber to sustain the proposed harvest levels. These deficiencies suggest that Congress should pursue neither proposal.

We instead suggest an approach that both upholds the integrity of the hard-fought, time-tested Northwest Forest Plan and provides the O&C Counties with long-term fiscal and economic security. We recognize that the O&C Counties need additional revenue to support their local governments and economies, but this funding increase should not be achieved by sacrificing environmental protections or ignoring the irreplaceable natural values provided by the
O&C lands. Moreover, it is hardly clear that privatization and/or liquidation of the forests will even provide the counties the long-term economic security that they desire.

Any viable solution must provide long-term economic growth and security for the O&C Counties, protect environmental values, and fairly distribute the burdens of achieving these twin goals among the various stakeholders. The current congressional proposals assume that these principles cannot coexist, but we suggest that with the right combination of policies, environmental integrity and economic growth can coexist and thrive.

The first step toward achieving this outcome is to monetize the robust ecosystem services provided by the O&C lands. Among other things, healthy forested watersheds provide cleaner, cooler, and less-sedimented drinking water, and improved salmon and aquatic habitat. Capturing and monetizing these values could provide the O&C counties with a consistent source of revenue without liquidating the forest. In addition, the counties could capture out-of-town and tourist revenues through properly structured sales taxes. Further, the O&C Counties could generate more revenue could be generated if they raised property taxes to a level in-line with the state median. The state could supplement these revenues with an increased log export tax to provide an incentive for logging companies to mill timber in rural Oregon. Finally, the federal government should consider the cost savings associated with consolidating the O&C lands into the USFS. Although there is no silver bullet, these suggestion would spread burdens more broadly among stakeholders, and support the O&C Counties over the long-term while protecting the O&C lands’ unique environmental and cultural legacy.

In contrast to their contentious past and present, the pursuit of such an environmentally-sensitive, economically-sound strategy may provide the O&C lands, and those dependent on them, something entirely new: long-term, sustainable peace.