Public Lands Primer

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Introduction:

Navigating the series of laws which govern public lands in the United States is a challenging task. There are many laws which apply solely to public lands, such as the Wilderness Act, other acts which seek to improve environmental quality throughout the United States, such as the Clean Waters Act, and a plethora of agencies which manage those lands, sometimes overlapping with regard to jurisdiction adding further to the confusion. In addition, public lands policy continues to be deeply impacted by "riders," an inappropriate legislative tactic where amendments are tacked onto unrelated bills to avoid serious discussion and controversy over the matter. The most notorious rider is the "salvage logging rider," added to highly popular relief bills for victims of the Oklahoma City bombing and war-torn Bosnia, that allowed essentially unrestrained logging on public lands with no requirement to follow environmental laws. This rider was coauthored by former timber lobbyist and President Bush's current Undersecretary of Agriculture, Mark Rey.

Public lands are owned by every citizen of the United States. We support their existence and upkeep with our tax dollars. Public lands are set aside for their scenic value, contribution to environmental quality such as clean air, wildlife value and contribution to our quality of life, among countless other reasons. The contention that public lands must financially support themselves with revenue from resource extractive industries such as logging, grazing and mining or recreational fees is contrary to their design. Undeveloped wild areas benefit a region in ways which cannot always be quantified. Commercial enterprises on public lands inherently exploit natural resources because wildland ecology isn't governed by market forces, and they undermine the public's right to enjoy public lands.

The most recent formal legislation effecting public lands is the absurdly and mistakenly named "Healthy Forests Act." Following major forest fires since the fire season of 2000 in the West there was a move to capitalize on people's preconditioned fear of large fires by creating legislation which claimed to prevent them by logging. Attempts to log burned, insect-infested, or simply old forests are nothing new. Although an extremely complex issue, fires are a natural part of western forests whose frequency and intensity are not helped with or mimicked by large-scale thinning.

The purpose of this public land primer is to provide basic descriptions of major legislation governing public lands today from the Wilderness Act in 1964 to the Clean Water Act in 1978. Some legislation has been excluded due to space, such as the Organic Act, which created the National Forest Service, and the Alaska National Interest Land Conservation Act (ANILCA), intended to protect over 100 million acres in Alaska public lands.

The Freedom of Information Act (FOIA) is worth a brief mention because it created unprecedented access to government documents for interested citizens. In addition, there are innumerable court decisions which have refined the interpretation and enforcement of each Congressional Act. The current administration has drastically curtailed public access to information for public documents using the claim of "national security risk" due the "War on Terror" regardless of subject matter.

Timeline of the Passage of Major Public Lands Legislation:

1964 The Wilderness Act
1968 Wild and Scenic Rivers Act
1969 National Environmental Policy Act (NEPA)
1973 Endangered Species Act (ESA)
1976 National Forest Management Act (NFMA)
1977 Clean Water Act

Endangered Species Act 1973

The Endangered Species Act (ESA) of 1973 is intended to protect species from becoming extinct. This act provides a program for the conservation of endangered species and the ecosystems upon which they depend for survival. This program creates two main processes – the designation of species and their critical habitat through listing, and protection.

Side Bar: Definitions

Listing

Anyone may petition the government to list a species as endangered or threatened. An endangered species is any species that is in danger of extinction through all or a significant portion of its range. A threatened species is any species that is likely to become an endangered species within the foreseeable future. The decision to list a species is designed to be based solely on science, not politics. However, political pressure can cause a species to sit on the species candidate list for years while waiting for adequate funding, as has been the case with the Florida Black Bear since 1992 among many others.

Critical Habitat

The ESA requires the designation of critical habitat for all listed endangered and threatened species. Defined by the ESA, critical habitat is the area occupied by the species at the time of listing and essential to its conservation. Typically, agencies do not designate critical habitat. In the past decade less than 10% of the nearly 1,200 species listed have been granted critical habitat due to the fact that these designations have been issued only after court order.

Taking

This term has the developed meaning pertaining to the ESA as: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct. Taking has been further defined as an act which actually kills or injures wildlife including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.

End Sidebar

Agency Actions

Several federal agencies, including the Fish and Wildlife Service (USFWS), the National Oceanic and Atmospheric Administration (NOAA) Fisheries, the United States Forest Service (USFS), and the Bureau of Land Management (BLM) are affected by the ESA in that they are required to abide by the Act in the process of carrying out their actions. The Act is implemented by either USFWS or NOAA.

For proposed land use actions by agencies such as the USFS or the BLM that have the potential of

affecting listed or candidate species under the ESA, consultation may be required. If so, either the USFWS or NOAA is responsible for issuing a "biological opinion" assessing the impacts to endangered and threatened species in the project areas and is known as an Environmental Impact Statement (EIS). If it is concluded that the agency actions are likely to adversely impact listed or candidate species, the agency preparing the EIS offers suggestions of conservation measures which will minimize the impact to the species and its critical habitat. The action agency is charged with carrying out these conservation measures which may include moving a planned road, waiting for the right season to construct structures or modifying dams. From 1979 through 1995, of 259,650 consultations on proposed agency actions, only 600 required significant changes, and only 118 were completely stopped.

Jurisdiction: Fish

For most of the endangered species located within the jurisdiction of the USFS and BLM, the management and conservation efforts belong to the agency presiding over the area in which the listed species is found. When dealing with coastal area fisheries, however, the jurisdiction is not so clear.

With the anadromous, or ocean-dwelling/freshwater spawning, salmon and steelhead, an overlap of jurisdictional boundaries is created as with the bull trout and the white sturgeon. In areas such as the Columbia River Basin, the bull trout and white sturgeon are full time residents, while salmon and steelhead share the same waters during certain times of the year while they make their voyages to and from the Pacific Ocean. Even though these four species share the same habitat, they are managed by different agencies. Because salmon and steelhead are anadromous, they fall under the jurisdiction of the NOAA, and the land-locked bull trout and white sturgeon are managed by the USFWS. To ensure that all listed species are managed appropriately, NOAA and USFWS are required to work together to ensure that each specie under their jurisdiction is being managed efficiently and effectively.

The Clean Water Act

Clean water regulations in the United States started in 1948 with the Federal Water Pollution Control Act and was amended in 1972 then transformed in 1977 to become the Clean Water Act.

The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." It not only helps to protect areas threatened by future misuse, but also to restore abused areas to the most natural state possible. The goal set forth by the Clean Water Act is to attain a sustainable environment for "beneficial uses" that is, for fisheries and recreational uses.

There are general requirements associated with the implementation of the Clean Water Act. The Act identifies two types of pollution, point source and non-point source. Point source is pollution discharged from any identifiable point including pipes, ditches, channels, sewers, tunnels and containers of various types. Non-point sources are defined as pollution discharged over a wide land area, such as agriculture, timberlands, and grazing allotments, not from a specific location. Non-point source pollution includes sediment loading and elevated temperatures as well as urban runoff.

The Environmental Protection Agency (EPA) is charged with the authority to regulate the programs to control pollution rates in a cooperative arrangement with each state. State governments are responsible for recognizing water quality problems within their state and creating programs to meet the requirements of the Clean Water Act. The EPA is instructed to intervene if a state fails to enforce the CWA, but in

practice, the EPA rarely interferes. However, when the State of Idaho had not established a water temperature range for bull trout populations, the EPA sued the state to force compliance.

When a body of water is labeled “water quality limited” by the State of Idaho (often due to litigation), the Department of Environmental Quality will establish a total maximum daily load (TMDL) for major pollutants to that waterway, which is the maximum level of a pollutant allowed on a waterway. TMDL designations essentially provide the minimum protection for ecological functioning such as salmon spawning. They do not maintain pristine waters. Idaho alone has over 900 bodies of water described as “water quality limited” by the Clean Water Act.

Wilderness Act

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

-The Wilderness Act, 1964

With this definition, Congress designates wilderness, restricting travel and forest management activities on the land. Generally, motorized equipment is prohibited, including motor boats and planes, and in some wilderness areas, bikes. An exception is the use of motor boats on rivers within wilderness area. Generally, only primitive means of transport are allowed, taken to mean by foot or animal. Roads, permanent structures and any commercial enterprises are also prohibited. Previously existing structures and land ownerships are grandfathered into wilderness designations. Air strips were largely permitted to remain, although the number of landings on them per year is limited by the managing agency.

Management of wilderness areas is the responsibility of the Bureau of Land Management (BLM), United States Department of Agriculture, United States Fish and Wildlife Service, and the National Parks Service. In all there are around 105,000,000 million acres of designated wilderness, the majority of which is managed by the U.S. Forest Service. Since wilderness areas are untrammeled and free of human manipulation, agency management activities are greatly excluded to only what is necessary for preservation of wilderness character. Many land management agencies have interpreted that to allow for forest fire suppression, herbicide application and management intended to stem insect infestations.

The wilderness is explicit in disallowing commercial enterprises within wilderness areas, however, there are exceptions. Due to the 1872 mining law, oil and mining claims can be developed within wildernesses, although in 1984, the acclamation of mineral leases was outlawed in wilderness areas. Grazing also continues on wilderness areas, largely BLM land, but there is also a grazing allotment on the Frank Church River of No Return Wilderness.

The Wild and Scenic Rivers Act was passed in 1968 to close a loophole in the Wilderness Act that could allow "impoundments" (dams) on a river, unless they previously existed. It defined wild rives as free flowing and essentially primitive. The Act limits road access to a "wild and scenic" river and development on its shoreline to what existed at the time of designation. Motorboat usage is also grandfathered in, although, there is provision within the Act to phase out motor boat usage on wild and scenic rivers.

National Forest Management Act

In 1976, Congress passed the National Forest Management Act (NFMA), which specified the basic rules and regulations the National Forests use to manage public lands. The act is intended to update laws governing logging and create constraints on common logging practices such as clear cutting.

This Act calls upon the USFS to be a leader in resource conservation and to develop and encourage recycling of forest resources. It directs the Secretary of Agriculture to report to Congress on such topics as forest products diversification, efficiency, forest health, and reforestation. Detailed timber stand analyses are required and Congress is to receive regular reports on the costs of reforestation and other operations. This Act also defines "allowable sale quantities" for a National Forest, which courts have interpreted to mean the maximum amount of timber harvested from a National Forest annually and is not a target amount to be harvested.

To comply with the NFMA, all National Forests and Grasslands are required to prepare Forest Plans. Each Forest Plan requires a minimum of three months of public scrutiny before their enactment, with public hearings in locations throughout the relevant area. Forest Plans set forth specific standards regarding wildlife, roads, water quality and other factors of a National Forest that each management plan must comply with. NFMA requires that resources be managed for sustained yield of timber harvests, and to not damage soils, slopes, and watersheds irreversibly. The Secretary of Agriculture is required to identify lands not suitable for timber harvest and review their status at least every ten years. Currently, the Nez Perce and Clearwater National Forests, along with other National Forests in north Idaho are in the process of updating their forest plans, pushing for vague standards that may not sustain the land. The Act directs the USFS to actively manage resources for optimum production, but must not consider only the economic return or total timber output.

NFMA requires that timber harvest roads be returned to their natural states of slope, vegetation, etc. within ten years after harvest, unless the roads are to become part of the National Forest road system. In practice, few roads are ever recontoured due to the cost. Timber companies are required to construct roads suitable for harvest, although small companies can request that the Forest Service do the road construction for a sum. Historically, road construction has been heavily subsidized by government funds.

National Environmental Policy Act

"The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to

establish the Council on Environmental Policy."

-National Environmental Policy Act

The National Environmental Policy Act (NEPA) was signed into law on January 1, 1970. It has been described as a planning statute. It established a policy for the environment and has three main parts:

1. To establish the Council on Environmental Policy CEQ) which was been characterized as the "federal watchdog of environmental policy;"
2. To require federal agencies to take into account environmental consequences when they make certain decisions. Before NEPA, most agencies could not, or did not, do this because it was not a factor in their decision making process. Although NEPA requires federal agencies to discuss publicly more environmentally sound alternatives, the agencies are not required to select those alternatives.
3. To Require federal agencies to prepare an Environmental Impact Statement (EIS) for every major legislative proposal or other federal agency action that has a significant impact on the human environment.

NEPA is the core environmental statute in the US for two main reasons. First, it requires an analysis of environmental impacts of proposals that also considers alternatives to the proposal. Second, it mandates that the public be involved and have the opportunity to provide comments on the analysis in the environmental impact statements or the smaller environmental assessment.

Public Lands: Graphical Overview

1. Notice of Intent (Scoping) Letter

-This is a letter sent to all parties who have requested from the Forest Service the NEPA documents for a particular National Forest. It provides a vague description of the proposed agency action and requests citizen input within a 60-day comment period (starting from the publication of the Notice of Intent in the Federal Register)

Step 1: Citizen Input.

Step 2: Categorical Exclusion. The Agency can categorically exclude an area from detailed environmental analysis by a “Finding of No Significant Impact,” meaning that the action is too small to have a significant effect on the landscape and hence no environmental assessment is needed. The agency pursues the project, and, there is no further opportunity for citizen involvement, except litigation. This was intended for small actions, such as campground revisions, but it is a qualitative judgment call that can easily be abused. For example, the Forest Service has exempted several small timber sales adjacent to one another from a complete environmental analysis rather than considering the environmental impacts collectively of the sales.

2. Draft EA/EIS

The draft Environmental Impact Statement (EIS) and the Environmental Assessment (EA) are detailed documents about the proposed management activity and its impact on the natural resources, including biological and economical. These include a detailed description of every proposed alternative for the management activity, mandated “No Action” alternative and biological opinions from relevant agencies when sensitive, threatened or endangered species may be impacted by the land use decision. Management activities could be a herbicide application, a timber sale, road

construction, among other actions.

Step 1: Citizen Input. Citizens have 60 days (again from the date of notice in the Federal Register).

Step 2: Incorporate citizen input. Management agencies are required to consider the concerns of all citizens who participate in the process. They are not required to weigh opinions like a democratic vote, but must use the best available science to help guide their decisions.

3. Final EIS/EA/ROD

Step 1: Final EIS/EA and ROD. The initiating agency will issue a final EIS or EA which incorporates citizen comments and will typically issue a "Record of Decision" (ROD) giving their official Decision for the proposed action. Occasionally a final EIS/EA is issue followed by an additional comment period before the ROD is determined.

Step 2: Citizen Appeal. A decision can be appealed by citizens who commented previously on the project within 45 days of the decision. Previously appeals could be taken to the highest level, Chief of the Forest Service, where success was met relatively frequently compared to now. Following a series of appeal confirmations, appeals were limited to the level of the Regional Forester, where appeals are now won much less frequently.