Natural resources

LEGAL ASPECTS OF WILDLANDS MANAGEMENT

Sally K. Fairfax, Editor

Proceedings of a Conference on Legal
Aspects of Wildlands Management sponsored
by the School of Natural Resources of The University of Michigan in
Ann Arbor and the Natural Resources Law Working Group of the Society
of American Foresters
Ann Arbor, April 8-9, 1977

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Acknowledgments

These proceedings reflect the efforts of many people. Our speakers were an unusually fine group; their papers are thorough and useful, and their contributions to the panels and the conference were characterized by insight and a willingness to share and enjoy. We are very grateful to all of them for their time and their cooperative efforts. The good questions contained in these pages came from an alert and knowledgable gathering of Conference attendees. Their time and attention is also very much appreciated.

In addition to those essential ingredients, the Conference and this volume have been nurtured at every stage by a large number of colleagues. Dean William Johnson and Associate Dean Steve Preston of the School of Natural Resources have been a source of moral and financial support throughout. Gail L. Achterman and Milan C. ("Mike") Miskovsky, SNR alumni, gave much needed consultation regarding substance and participants for the Conference for a year before it took place. We are very grateful for the direction provided by these four fine souls.

This document has been produced with the assistance of a great many people. John Hall, Chairman-Elect of the Natural Resources Law Working Group, has been a needed guide and has provided invaluable assistance in the production of the final product. Nancy Saylor, Lois Witte and Ron Wilson were needed at critical points in the process. And from start to finish Joan Greear and her staff handled all the extra burdens that this undertaking entailed with dependable efficiency and good cheer. To Arthur Arroyo, Bill Mitchell, Sue Shaw, Gloria Wanty, Eva Weems and Barb West we give thanks.

We have rushed a bit to make these proceedings available promptly, trusting that this would enhance rather than diminish their utility. Conferences can be a chore. It is compensation to have worked with so many good and helpful people who share their skills and ideas and eat their chicken. It is a special pleasure to publicly acknowledge those who have been so fine. Thank you.

S. K. F.

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INTRODUCTION

Sally K. Fairfax

War as we have long known, is too important a topic to be left to the generals. What we haven't known about that intuitively, history has taught us. I think recent developments in this country have begun to tell us that land management is also too important a topic to be left to land management professionals and land use planners. The pressure on our land base has vastly increased since the second World War. It has become more and more obvious that we are dealing with these increased pressures on a finite resource base. The public makes many demands of the land: land for homes; more recently land for second homes; land for wilderness; for species habitat; for cultural preservation; land as a place to work, and land as a place to play. In addition, our society also demands fiber products, fuels, minerals and potable water for drinking to mention just some of the more important commodities.

For a long time striking a balance was not a hotly debated political or public issue. The assumptions were clear, the actors were clear and they acted on their assumptions. For example, forests were to grow trees. This is an oversimplification of course, but foresters grew trees and put out forest fires. As I say, this is not all that they did, but I think we can see basically the actors and the assumptions. Land management, the values and priorities that surround it, is appropriately perceived as a major social and values question. The issues which constitute choices for the wise use of our lands have become fundamental issues of how we live and, indeed, if we are going to be able to continue to live in the manner to which we have become accustomed, for you students, of course, in the manner to which you would like to become accustomed.

No issue is present very long in our society as a social problem before it becomes a legal problem. We have always, as a people, translated our social and value questions into legal questions and thereby given lawyers and legal tools, legal concepts and legal forums a critical influence over the decisions which shape our lives. As the public with new values and new assumptions have become more and more vociferous regarding priorities in land management, and as questions of land management become more and more central in defining our existence, lawyers have become increasingly visible in the process--as advocates, as defenders, as systematizers, as solution seekers and as major decision makers. This activity of lawyers is clearly most dramatic in the courts. Perhaps it's most dramatic because it's best publicized. Perhaps it is publicized because it's the most satisfying: how delightful it is to "sue the bastards", and how fun it is to win.

The courts and judicial remedies are, however, poor forums and crude tools for constructing integrated policies and total programs for managing the land. There is another whole side to the legal profession and another whole side to the relationship between the legal profession and land

management. Barristers are the ones that actually argue before the bar. Solicitors, on the other hand, counsel clients and deal with advising and directing them outside of court. It is in fact true, in my opinion, that if you are in court very frequently, the system is not working or at least it's under very severe stress. The courts, the barristers are, I would argue, the spice, the salt and pepper--perhaps if you view it in a tidying up function, the napkin--of the relationship between the legal and the land management functions. In my opinion the more important aspects, the real meat and potatoes of the relationship is the solicitor's role. By advising, by implementing legislation on regulation, by defining the scope of government agencies, the solicitor to a very real extent colors the direction in which all of our land management activities both public and private proceed.

For the next two days, we will have the opportunity to discuss these topics with a uniquely well qualified gathering of lawyers and non-lawyers; all these folks are not lawyers, I'm sure you have noticed public and private land managers, advocates, and academics. Hopefully, we will find ourselves tomorrow afternoon with a very tangible appreciation for the broad scope of the relationship between solicitors and land managers. Perhaps, in addition to having a feel for the scope of this interaction, you will also have some of this detail as well.

There is probably no one more qualified to give us some opening reflections on this topic and preside over our first panel which is called "What are Wildlands For" than John Whitaker. Mr. Whitaker is a geologist by training. He has a Ph.D. in that subject from Johns Hopkins. He spent the first part of his career in such spots as Alaska with the U.S.G.S., in the Rockies, the Cascades, the Pacific Northwest, the Andies, the Amazon, the Nile, West Africa and now Ann Arbor. For those of you students that are looking for a major, allow me to recommend geology as opposed to political science. I've been in Atlanta and Washington thus far. More recently, Mr. Whitaker served from 1969 to 1972 as Deputy Assistant to the President on the White House Staff coordinating energy, natural resource and environmental programs. From 1972 to 1975, he was Undersecretary of the Interior. Recently he wrote a book about his experience which was an absolute marvel.

Presently, Mr. Whitaker is Assistant to the President of Union Camp. He is going to give us a keynote address to begin the conference and then he is going to preside over this first panel. I can't think of anybody who is better qualified to get this gathering started off on the right foot.

John, thank you.

THE SWING OF THE PENDULUM

REMARKS BY JOHN C. WHITAKER
Union Camp Corporation, Before the
Conference on Legal Aspects of Wildlands Management

University of Michigan
April 8, 1977

INTRODUCTION

The legal emphasis in this gathering serves to remind me that besides the traditional arsenal of free speech, assembly and petition, the hallmark environmental laws of the early 1970's were fortified with a new and very potent weapon: the right to sue the bastards.

And sue they do; and you see it in the court records of the Alaskan pipeline, offshore oil leasing, nuclear plant siting and licensing, the application of air and water standards and in the issue of single versus multiple use of our public lands.

Today the confrontation between preservationists and developers is as strong as ever (although more rational than it used to be) with often equal and opposite reactions. But what I want to talk of today is the possibility of overreaction and how, in my opinion, the real possibility exists of losing some of the dramatic gains in environmental quality that we have made in the past few years unless we take a serious look at revising some of our environmental laws.

However, before I do that, I think it might be useful to spend a little time to better understand where the conservation/environmental movement has been in the hope that it might give us some clue as to where we should go.

Teddy Roosevelt's confidant, Gifford Pinchot, seemed to be one of the firs to put it all together. He wrote that one day as he was riding on horse back

through Rock Creek Park in Washington, the idea hit him - he understood that "the relationship of one resource to another was not the end of the story. Here were no longer a lot of different, independent, often antagonistic questions, each on its own separate little island, instead here was one single question with many parts. Seen in this new light, " Pinchot continued, "all these separate questions fitted into and made up the one great central problem of the use of the earth for the good of man."

Pinchot, probably without quite realizing it, had described an ecosystem.

Yet, even today, it seems to me, we often forget Pinchot's great lesson, each retreating to our narrow special interest island. There is the timber lobby, the wilderness lobby, the cattle and range lobby, the endangered species lobby, the recreation lobby, the mining lobby, and the clean air lobby - doing just what Pinchot warned us not to do - looking at Mother Nature as separate parts where in fact she is a wonderous unity of many interdependent parts.

THE CONSERVATION MOVEMENT

The conservation movement, as it was articulated by Theodore Roosevelt and Gifford Pinchot, was primarily focused upon utilitarian objectives.

Pinchot, for example, looked upon the nation's forests not as cathedrals but as woodlots, and the wilderness concept advanced by John Muir drove him bananas. The principal legacy of the conservation movement was one of giant dams and irrigation projects, of soil and water conservation, electric power development, forest management for sustained yield, and limitations on the taking of the game. Pollution and environmental degradation were viewed

mainly as local nuisances -- the regrettable but inevitable result of industrial progress.

THE ENVIRONMENTAL ERA

Until our own time, there was no specific concern for the quality of the environment that was large enough and structured enough to be recognizable as a national movement. And ironically, it arose out of the problems created by the sheer abundance of materials, not their scarcity.

The vast industrial expansion of World War II and the long period of prosperity which followed profoundly changed America and set the stage for the modern environmental revolution.

The number of automobiles doubled between 1950 and 1970. Per capita income increased by two-thirds in real terms. Farms dwindled and cities grew. A vast interstate highway system was built. Millions of mobile, well heeled Americans took to the roads and what they saw wasn't pretty: stinking power plants and industrial mills, choked and dying rivers, desecrated seashores, acres of rusting automobile hulks, miles of wasted, eroded hillsides, tacky and obtrusive signs and buildings, and litter, always and everywhere. And what they did not see for themselves the television carried to them in their living rooms.

By the mid to late 1960's, Americans began to realize the obvious. Man could no longer retreat to ever-shrinking unspoiled areas to renew himself, but instead he must turn and face the challenge of improving the quality of life in our cities. Mother Nature has been abused perhaps to her limits. As Theodore White, the Pulitizer Prize winning author put it, "the two natural containers of the environment, the air and the water, finally vomitted back on America the filth they could no longer absorb."

When Americans recognize a problem they usually set out to solve it with single minded attention. The cleansing of our environment was no exception.

The impact of Rachel Carson's Silent Spring and the pitiful site of helpless birds trapped in the oil glop on the Santa Barbara beaches did much to ignite the environmental revolution.

The movement climaxed in an outburst of national fervor on April 22, 1970, designated Earth Day, involving thousands of citizens in everything from teach-ins to volunteer brigades picking up trash from public parks and highways.

I would say that Earth Day 1970 was the high-water mark for the fiery zeal and enthusiasm of the environmental movement.

ITS CAUSES

It is always of interest, in retrospect, to speculate over causes for these great stirrings within the body politic. Why, for example, was the environmentalists awakening so long delayed? Why is it so much more advanced in the United States than in other countries? What are the factors that motivated so many millions to so much activity?

First, I would suggest that the environmentalist movement bloomed at the time it did mainly because of affluence.

Nothing in all world history compares even remotely with the prosperity America has enjoyed since the end of World War II, and which became visibly evident by the mid-fifties.

We began to back causes, because now we had both the spare time and the extra cash to take an interest.

There are other things, of course, besides affluence that have contributed

to the movement during the past decade. Science has contributed another -- and unique -- dimension to the national agitation. In addition to the obvious signs of pollution, like litter and dirty streams, which people could relate in some understandable way to their own reality, science uncovered a whole panoply of invisible threats: radiation, heavy metal poisons, fluorocarbon's PCB's -- all of which could potentially be more insidious, more pervasive, and more dangerous than the familiar nuisances that could be seen, felt, and smelled.

The press, and the impact of television, in this context served the pollinating function of a honey bee, transporting the latest scientific findings to the public which reacts with fear and misgivings which are relayed by the press back to the scientific community which is stimulated by public concern to intensify its investigations which lead to more discoveries of new perils, and so on. The result is that vastly more is known and noted about pollution in the United States than in any other country, and this in itself provides a climate in which support for environmentally-related causes can be elicited.

Finally, I suggest, there was the absence during this period of any great challenge to capture and mobilize the energies of the people. There were no frontiers to be assaulted and tamed; no more empires to be built; no great patriotic war to be fought: not even any hard times to be shared and survived. The effort to save the environment offered purpose and commitment to millions of people, old and young, who very much needed to be doing something positive to relieve the feeling of guilt, boredom and rootlessness which seem to be unwanted by-products of the prosperity and economic security of the sixties.

THE SWING OF THE PENDULUM

But a few years after Earth Day, and particularly after the Arab petroleum boycott of 1973, the pendulum of public opinion began to swing away from environmental emphasis toward concern for adequate energy supply, jobs and the fear of inflation.

Here are a few things that happened beginning in 1973 - events not likely to have happened, in my opinion, during the high water mark of the environmental revolution during 1970, 1971, or even 1972.

1. When the energy crisis hit, Congress was so concerned about expediting construction of the Alaskan pipeline that it voted to accept the adequacy of the Department of the Interior's environmental impact statement thus exempting the study from a review by the courts as provided for under the National Environmental Policy Act, a law they had themselves passed only a few years earlier.

2. President Ford was able to sustain his veto of federal strip mine legislation.

3. Land use, which previously enjoyed broad voter acceptance, failed to pass Congress.

4. And even back at Santa Barbara, where it all seemed to have started, in May 1975 the residence voted, (granted in a very close election) in favor of allowing oil companies to build a plant to process offshore oil. Time Magazine commented that "the plant's contribution to the nation's energy supply and the local economy helped out-weigh environmental fears."

5. Even opposition to offshore drilling, once a sure vote getter, turned around. A Harris Poll in April 1975 showed 73 percent approval.

6. And just last week something unheard of happened. For the first time in memory, Senator Muskie was defeated in his own subcommitee on Environmental and Public Works by a vote of 7-6 on an amendment offered by Senator Bentsen which would relax the clean air standard in urban areas to allow new industrial expansion.

As I said, I don't think the kind of events I've just described could have happened just a few years ago when the environmental winds were blowing at hurricane force.

These events, it seems to me, show how vulnerable environmental progress can become in the face of the always powerful pocket book issues of jobs and inflation and an adequate energy supply.

Overreaction can do much to slow progress. Here are a few things going on today that concern me.

LEGISLATIVE ADJUSTMENTS NEEDED

I think Congress needs to take action for a mid-course correction on national water pollution strategy. There is a real question whether the "Fishable, Swimmable Waters" 1983 Best Available Technology Standards, presently in the law, makes good sense. There needs to be a balance between the amount of improvement that can be gained and the overall cost of the additional treatment.

There comes a point - a difference point for each body of water - after which additional treatment of effluent can achieve no added benefit. To treat beyond this point not only wastes your taxes but runs contrary to the nation's energy goals.

Then there is the Endangered Species Act of 1973 which is making highways and dams another kind of endangered species.

Judges have been interpreting the law to mean that federally financed public works projects like highways and dams (and maybe someday even sewage treatment plants) cannot be built when the construction threatens a bird, fish, animal or plant that the U.S. Fish and Wildlife Service has classified as likely to be endangered.

In February the dam building world was shocked by a court decision that stopped the half finished Tellico Dam in Tennessee after millions of dollars had been sunk into the project. The dam was stopped cold by the now nationally famous 3 inch snail darter fish found along a stretch of the East Tennessee River where the unfinished dam sits as a monument to the legal talents of dedicated environmentalists.

In Maine, the Lincoln-Dickey Hydroelectric project seems dead because a rare kind of snapdragon (the Furbish Lousewort) may make the list of endangered plants.

The Lincoln-Dickey situation is typical. I think the present law which seems to stop a project on very narrow criteria, such as the loss of a specified endangered species, is an extreme law. Surely projects should be built or not built on broader environmental and financial criteria. For example, there are lots of other good reasons why perhaps the Lincoln-Dickey project shouldn't be built besides doing in a few snapdragons. It would flood 55 miles of a magnificant free flowing river and 200 miles of tributaries eliminate 86,000 acres of timber and destroy wildlife habitat.

Now let's take a quick look at how both federal and state land managers are belwildered by various land use restrictions even without passage of a federal land use law. Almost inadvertently, there are over 100 federal grant

and regulatory programs directly or indirectly affecting the use of private land resulting in de facto land use regulation.

To name a few: The comprehensive land use planning required under the HUD 701 program and NOAA's coastal zone management planning.

In developing a strategy to meet national air quality standards the states are required to consider the economic impact of specific land use programs. Regulations against significant deterioration of pristine clean air in rural areas and against non-attainment of clean air standards in urban areas often result in major land use decisions like the siting of new industrial plants soley on the narrow grounds of air quality. Surely there are other factors that should also be considered in such major decisions affecting the growth potential of a given area.

The Federal Water Pollution Control Act of 1972 also has strong land use implications, Section 208 for example, requires area-wide waste water management plans. Section 404 mandates a federal dredge and fill permit program which becomes a major factor in growth patterns and land use decisions on lands adjacent to navigable waters. Finally the sheer size of the federal multi-billion dollar sewer line and treatment plant program is playing a major role in land use decisions in the 1970's just as the federal highway program did in the 1960's.

So federally sponsored land use regulation goes on everyday without a conscious decision by Congress to take these steps.

Then let's look at the balance between wilderness and the need for an adequate timber supply from our national forest. About 12 million acres of our national forests are already designated as wilderness and another 12 million are under study for possible wilderness inclusion. That leaves about 44 million acres that have been proposed for resource management.

Environmental impact statements are being done for all this land. If the enviornmental impact statement process moves too slowly and, if after the EIS process is completed, the Forest Service decides not to propose a wilderness designation, then the decision if often contested in the courts. If time runs out reduced timber harvests could mean lumber shortages, higher prices, and then the inevitable backlash of pressures for overcutting if the economy gets into trouble.

Then the Bureau of Land Management is having its trouble with another law. The BLM Organic Act of 1976 requires a review of all BLM lands for inclusion as wilderness. But the law uses the same old definition for wilderness as was used in the 1964 Wilderness Act. Yet there are as much as 85 to 90 million acres of BLM land in roadless areas of greater than 5000 acres. Given this situation, predictabally the courts, not the professional land managers, will be making land use decisions unless the law is written defining the meaning of wilderness areas with more precision.

IN SUMMARY

What this means in my opinion is that the pendulum of public opinion could swing once again, and if it does then those in the forefront of the environmental movement should think twice about their strategy. Our vulnerability to adequate energy supplies plus a dip in the economy in the 1973-75 period showed how vulnerable we can be if environmental legislation is not balanced.

Fortunately, in the last five years an environmental ethic has started to become imbedded in our national being. Protection of the environment is becoming institutionalized in our federal, state and local governments and in the judicial system. It is becoming a way of life. But we must not forget that the recently planted concept of improved quality of life

is still a small tree - a mere sapling that needs careful nourishment and care. We must be sure it is not torn from the ground by those who ask for extreme and narrow based environmental legislation. We need to remember Pinchot's admonition and put it in modern times. Improved quality of life means that we must write laws that do not just focus on one narrow aspect of Mother Nature - endangered species, air and water quality, or wilderness concepts for example. Instead we must try to fit man into Mother Nature's entire ecosystem.

Nor do we need to risk a backlash that could impede the recently won environmental ethic by listening to those who do not admit that the well being of man also includes many economic factors, but instead would insist that the environmental movement take absolute priority over all consideration.

So in summary, we have come through an era of environmental revolution in the early 1970's and I firmly believe we are a better nation because of what has happened. By and large we are not so polarized as we were just 5 years ago. No longer can the industrialist ask if he will clean up, he must ask how he will do it. No longer can the environmentalists stand in loincloth and spear, so to speak, and demand that the world stop spinning. He must instead defend the economic consequences of his proposal.

My plea is simply that we keep this balance and I believe that means rewriting some of our environmental laws so that balance is maintained and backlash does not set in should economic hard times come along.

By and large up to now the Environmental Revolution in this country has steered a stable course - like looking forward in the bow of a ship, you hardly notice that a change in course has taken place, but when you look back in the wake of the ship you can see it has been profound.

NEW LEGISLATIVE DIRECTIONS FOR AMERICA'S WILDLANDS

Today, we as a nation have a new awareness of our wildlands. We recognize that the wildlands base is limited, and shrinking both in size and in its capacity to produce benefits. When land resources were abundant in relation to demands, conflicts could be resolved by redirecting demands to other areas. Today, with land resources becoming increasingly scarce, or already committed to a particular use, the old system of allocation is no longer feasible. We need new directions for meeting the demands, and, more importantly, for determining trade-offs. Congress has recently given us this direction through several laws which create a framework for making important policy decisions about wildlands.

Before I go any further, I should define a couple of terms that form the basis of my comments. I define wildlands in the broadest sense, to include: "Lands unoccupied by crops, pastures, urban, residential, industrial or transportation facilities." I define land management as "the intentional process of planning, organizing, programming, coordinating, directing, and controlling land use action." Both definitions come from the "Wildland Planning Glossary," which the Forest Service uses in land management planning. These definitions are those generally used in the natural resources field, but I want to make sure that we are communicating from the same base of understanding.

Presented by Rexford A. Resler, Associate Chief, Forest Service, U.S. Department of Agriculture, at the Legal Aspects of Wildlands Management Seminar, School of Natural Resources, University of Michigan, Ann Arbor, Michigan, April 8, 1977.

With greater competition for all benefits from all wildlands, the public has increasingly looked to the Federal lands--whether they be the public domain, National Parks, National Wildlife Refuges, or the National Forests. This has led to controversy over the Federal lands and how their uses should be allocated. This controversy resulted in Congress taking action to try to bring some order out of the chaos. This was done through several major pieces of legislation:

--First, Congress established a framework for important policy decisions in the Forest and Rangeland Renewable Resources Planning Act of 1974.

--The National Forest Management Act is far more than just timber management legislation, as some people believe. It set a renewable resources policy for the 187 million acres of National Forest System land, and considered our national resources future as well.

--The Federal Land Policy and Management Act of 1976, or as it's commonly called, the BLM Organic Act, is landmark legislation. For the first time, this Nation has a firm policy that the public lands should no longer be disposed of. In addition to other authorities, it also gave BLM a charter to manage its public lands under a multiple-use concept.

--And, the Agriculture Resources Conservation Act, which was ultimately vetoed, would have given the Soil Conservation Service a long-range planning mandate.

The Resources Planning Act recognized that all lands have a role in meeting future resource needs. Congress directed the Forest Service to prepare an Assessment of all the Nation's renewable resources, every 10 years, to project future supply and demand. We must also develop a program of Forest Service activities every five years, defining how we propose to help meet the projected needs. The President and Congress then review our findings and proposals, and, hopefully, provide the resources--in terms of funds and manpower--that we need.

The National Forest Management Act carries this process even further. What started out as a solution to controversies over timber harvesting methods evolved into some of the strongest policy direction on National Forest management that Congress has ever enacted.

The law was hammered out through an unusual format of joint sessions of the Senate Agriculture and Forestry Committee and the Interior and Insular Affairs Committee.

The National Forest Management Act, while not perfect, is a remarkable piece of legislation. In considering this legislation, Congress debated and chose between two options. Congress could provide specific direction in legislation as to how the resources should be managed. The other option was to provide broad policy objectives and authorities.

Congress opted for the latter. Senator Humphrey, sponsor of the bill, described the law this way:

"It deals with the question of who should manage the National Forests. And the answer to that question is that they should be managed by professionals, with full public involvement. While the Congress should set policy guidelines, and evaluate the stewardship of the professionals, forest management decisions cannot be made from the Senate or House Chamber."

The law has three major areas of emphasis. First, it lays out broad policy for land and resource planning. Secondly, it requires extensive public participation in Forest Service decisionmaking. Third, it sets guidelines for timber management actions, and requires that the Secretary of Agriculture develop specific timber sales regulations. In addition, we are pleased that for the first time, the National Forest System is designated by statute, and can no longer be disposed of by executive proclamation. Now only Congress, by enacting legislation, could make that kind of change.

You could say that Congress set the Nation's renewable resource policy in the findings of this law, which go far beyond the National Forest System. The major findings are:

--Management of the Nation's renewable resources is highly complex, and the uses, demands for, and supply of these resources are subject to change over time;

--The public interest is served by the Forest Service periodically assessing the Nation's renewable resources, and developing a renewable resource program of its activities.

--The program should be based on the assessment and on public involvement. I might add that public involvement is emphasized throughout the National Forest Management Act.

--Because the Nation's major capacity to produce goods and services is based on non-federally managed renewable resources, the Federal Government should act as a catalyst to encourage and assist these owners;

--The Forest Service has a responsibility and an opportunity to assure that the Nation maintains a natural resource conservation posture that will meet the long-term needs of our people.

The National Forest Management Act and the Resources Planning Act are linked together, to provide the kind of information Congress and the public need to set broad objectives. Congress can then hold oversight hearings to monitor how the executive branch follows this legislation.

The National Forest Management Act translates the RPA goals into on-the-ground direction. It established land management planning as the principle for land use allocations. The Secretary of Agriculture must issue regulations to describe the process for developing and revising land management plans. This process must include; Interdisciplinary planning; balanced consideration of all multiple resources; and public participation, with resulting decisions clearly set forth in one document or a set of documents available to the public at a convenient location. By September 30, 1985, all National Forests must have land management plans which meet the new requirements.

The Forest Service has since 1960 had a land management planning process. This process, however, will no doubt be extensively revised and refined under this latest legislation.

It looks as though our broadest plans will be what we call area guides. Although we've had some area guides for several years now, they will be revised to meet our new requirements. An individual area will cover anywhere from a fraction of State in some parts of the West, to a several-State area in parts of the East. This, of course, is because National Forests are concentrated in the West. These guides will help integrate National Forest planning with planning efforts on other lands, as well as coordinate planning within the entire National Forest System. To give you a better idea of how the parts add up to the total, I'll mention some of the tasks that the guides should address:

1. They will assess the economic, environmental and social relationships of the National Forests to the area;

2. The guides will summarize the forest and unit land management capabilities and opportunities.

3. They will dovetail with other planning efforts such as river basin planning, "208" areawide planning, Coastal Zone Management, "701" HUD planning and State planning;

4. They will indicate to field units the share of goods and services they need to provide in order to meet national RPA goals and objectives;

5. And finally, the area guides will provide a basis for annual budgeting, and meeting the 5-year RPA Program targets.

It has become increasingly clear that the public is extremely interested in all Forest Service activities, especially National Forest System management. People recognize the increasing importance of renewable resources in our society, and wish to be involved in the decisions which affect our resources.

Congress decided that meaningful public participation, in which the public is informed of the facts and involved in the decisionmaking from the beginning is the best way to minimize needless controversy on public lands. The National Forest Management Act specifically refers to public involvement in 11 places, and clearly indicates it in even more sections. One provision establishes a Committee of Scientists to advise the Secretary as we develop regulations for land management planning. Another provision encourages the Secretary to establish advisory committees to review and comment on both our regulations and specific programs.

Public involvement and land management planning are two major aspects of the National Forest Management Act. A third major area requires us to establish regulations containing general guidelines for timber management, within the broad policy direction that Congress has written. The law reaffirmed multiple use-sustained yield as the principle for managing all resources, including timber. It specifically reaffirmed the 1972 Church Committee guidelines for timber harvesting, which have been in operation on the National Forest System. In addition, the law required us to develop regulations for the advertisement, bidding, sale and disposal of trees. We're in the midst of this process at the moment.

So far we've been talking about the National Forest System portion of recent legislation. However, Congress also clearly directed the Federal Government to be a catalyst to assist and encourage private owners. The projections of increased needs for food, fiber and open space cannot be met at acceptable prices without full use of private lands.

The private lands, particularly the small, non-industrial ownerships, hold the greatest potential for increased wood fiber and other benefits from the forest environment. Obviously, increased production of goods and services also strengthens the economy. Private lands should be the principle source of goods and services, as well as providing economic benefits to the owners.

There's another trade-off that must also be considered. The only way that we as a Nation can afford to put investments in open spaces, recreation and wildlife habitat on public lands, is to have private lands meet more of the supply requirements. This takes the pressure off the public lands.

This can only be done, in our view, by effective cooperative efforts between the States and the Federal Government, in full partnership. Inadequate attention has been given to non-industrial owners. As a Nation, we need to explore more effective methods of incentives and technical assistance, to bring about a higher order of production and environmental protection on these lands.

We feel that some additional authorities are needed, and Congress has shown some interest in creating legislation to assist the landowner. We're hopeful that such legislation will be enacted in this Congress.

It is also clear that society will need the full range of goods and services available from all wildlands. Substantial increases in production are possible with scientific know-how and public understanding and tolerance. There is need not only for expanding the base of knowledge through research, but for strengthening the application of available technology. Congress is giving some consideration to strengthening research authorities for agencies involved in agriculture and resource management.

We in the Forest Service agree that Congress is the ultimate authority for determining needs and opportunities on the National Forests and other public lands. We welcome Congressional policy direction such as that recently enacted in the National Forest Management Act.

As we go about the business of managing the Nation's public wildlands, we must not lose sight of one important fact. It is the American people who own the land. Those of us who work for the Forest Service and other agencies manage the land for the people. The National Forest Management Act recognizes the fundamental fact that the public does own the land and should be involved in the management process.

Congress has put into law what it considers to be the desires of the people. It has provided for the people to become involved in helping make individual decisions. And, it has mandated the Forest Service to continue using professional expertise to manage these lands, to continue serving the people who own the National Forests. This is as it should be.

Public Lands and Their Management
Roman Koenings

The recently enacted Federal Land Policy and Management Act or BLM Organic Act, P.L. 94-579, raises as many questions as it answers. Before we can discuss the present and the future of the public lands, we need a basic understanding of their past history.

When the public lands were originally acquired by the United States either by cession, treaty, or purchase, they were administered by the General Land Office. There was little concern about managing the lands. The land was a resource to dispose of in order to build the nation. Laws like the Homestead Act, the Mining Law, and the Desert Land Act were passed to encourage this. Land was also granted to each new state to encourage their growth. The public lands were "vacant, unappropriated and unreserved." This is a polite way of saying that, "Whatever is out there is up for grabs."

Roughly 3,500 laws applied to public land management in one way or another. Somewhat less than 100 of these were really significant, but this haphazard structure of laws caused considerable misunderstanding about the authorities and the administrative capabilities of the Bureau of Land Management. The administrative problems were compounded by more recent legislation like the National Environmental Policy Act, the Historic Preservation Act, the Endangered Species Act, air and water quality acts, and the Outer Continental Shelf Lands Act. All of these new mandates had to be meshed with the old disposition statutes.

Today the Bureau administers about 450 million acres of land plus the Outer Continental Shelf. The Bureau is also responsible for approximately 60 million acres of mineral estate, where the surface is privately owned. It also is responsible for minerals on Federal lands administered by other agencies and for oil and gas pipeline rights-of-way across all Federal land.

There was, over the years, literally no resource management authority, precious little law enforcement authority, money, or personnel to do anything. What legislative direction toward management there was, usually applied to specific cases and seldom carried any manpower to do the job. We had the authority to arrest someone for shooting a wild horse or burro, but we could not arrest anyone for shooting another person on public lands. There were other equally amazing problems involved in trying to administer these public lands. There was authority to regulate the use of off-road vehicles, but no authority to enforce closures.

Most other resource management agencies, in comparison, were established with a specific mission. The Fish and Wildlife Service, the Park Service and the Forest Service all had "Organic Acts," stating their missions and giving them needed authorities. The lands these agencies administer were mainly carved out of the public domain. But even though they administer less acreage than BLM, they employ approximately 32,800 people compared to 5,057 employed by BLM.

Late in the 1960s and early in the 1970s with expanding population and energy shortages, public domain administration took a new direction --

management. To some extent, the management philosophy dates from 1934 and the passage of the Taylor Grazing Act, yet even the Taylor Act was premised on final disposition of the land. People have become interested in natural resource management. This concern combined with repeated pleas from the Bureau itself prompted passage of organic authority for BLM on Oct. 21, 1976.

In attempting to implement the new Act, the "directions in the new law must be accommodated to the lack of resource data necessary to make management decisions. The passage of a law does not provide the basic data necessary for implementation. This is a critical point, especially considering the Bureau's historic lack of funding, manpower and direction. The new Act seems to have rather straightforward language regarding multiple use, wilderness, areas of critical environmental concern, sustained yield and other management principles. But a close look at the wilderness provision will show the problems.

The wilderness provisions, if not properly handled, could become a major problem in implementing other related sections of the Act. The wilderness study section provides that the Secretary has 15 years to review roadless areas of five thousand acres or more, and roadless islands of the public lands for wilderness characteristics described in the Wilderness Act of September 3, 1964. It also provides that prior to any recommendation for designation of an area as wilderness, the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas.

Let us assume that roughly one-half of the public lands in the lower 48 meet the first basic criteria -- roadless areas of 5,000 acres or more, and roadless islands. That would leave roughly 85 million acres, or a land mass roughly 2-1/4 times greater than the total acreage in the State of Michigan. To identify those lands that have wilderness characteristics will require a very tight, systematic evaluation methodology so that all concerned will be able to understand the process and how it was applied. Public participation must be utilized from the beginning to the end. The areas that might be recommended for wilderness would require mineral surveys by the USGS or Bureau of Mines, requiring careful coordination. I have no idea what the acreage will be, but assume it is 15 million acres. This means 1-1/2 million acres of mineral surveys will be needed each year for the first 10 years in order to complete the entire process in the 15 year period.

The same section relating to wilderness also contains a subparagraph which states that, "During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act." There are other provisions of this section, but what I want to demonstrate is that the Congress has passed an Act with a provision which leaves considerable leeway for the administrator of the public lands. The wilderness

advocates read all of this language one way, and the mining and grazing interests no doubt will see it differently. The statute does not give any answers to the questions this section raises.

Other sections of the Act raise similar problems.

Section 401, sub-section (b)(1) addresses grazing fees and their use. It also states "the annual distribution and use of range betterment funds authorized by this paragraph shall not be considered a major federal action requiring a detailed statement pursuant to section 4332(c) of title 42 of the United States Code."

Obviously, a rancher interested in range improvements now feels he can get those improvements approved without going through the National Environmental Process, and no doubt reads that language very favorably. However, there are problems. One is that we are operating under a court order to do environmental statements on grazing of domestic livestock on federal public lands. Secondarily, the area where some of the livestockmen may wish to put these range improvements may well be in areas which meet the basic criteria for wilderness study. The rancher thinks his problem has been solved, but it actually has been complicated by the new Act.

I have used the wilderness and grazing provision of the Federal Land Policy and Management Act only to emphasize the difficulty of drafting legislation about multiple use management of the public lands. The only two agencies faced with these problems are the U.S. Forest Service and the Bureau of Land Management. I personally feel that the Bureau of Land Management has the greater problem due to the historical context in which the organization developed, the general attitude of the various user groups and the fact that basic management authorities were only recently passed. Many assume there will be great changes overnight. The size of the problem or the process itself is enough to cause consternation. When one considers multiple use in the management of wildlands, one must recognize that there will be disagreements and conflicts. Unfortunately, not all participate with an open mind -- which makes it difficult to come up with workable solutions. The impact of various laws on the management of wildlands is often not understood -- all too often people only look at the parts of a law they are interested in and do not understand the difficulty of putting it all together.

Thank you.

WHAT ARE WILDLANDS FOR?

JOHN F. HALL

By wildlands we mean all resource lands, not just those which are currently undeveloped or a wilderness or in an untouched state. Certainly wildlands ought to be used along with every other acre of our land, we believe, to meet the needs of the people. We are essentially looking to meet human needs and occasionally some of our desires. The difficulty is to determine what are our needs and what are the desires we would like to fulfill, but aren't that essential.

Speaking for the forest products industry our main interest is in providing the forest products needed by the American public. I am a lobbyist for that in several forums: daily, with the administrative agencies, BLM, the Forest Service congressional committees and occasionally we are active in the courts usually in defense of government positions on suits brought by certain environmental organizations. So my bias is clear out there, but I think that the goals that we see for meeting wood and wood fiber needs need to be melded with and are melded with the other needs of society, for other commodities and for non-commodity use of forest and other land. Some basic data on what we conceive to be the needs of the industry were found in three 1973 publications; I'm sure they're available to you here at the library: the President's Advisory Panel on Timber and the Environment, the publication of the National Materials Policy Commission, and the Forest Service's Outlook for Timber in the United States. Now all three of those publications came to the same conclusion: that based on current levels of forest management, the projected timber demand will considerably outstrip supply by the year 2000. Our objective, my role in advocacy, is to maintain and increase level of forest management to assure an increase in the growth of harvest of timber from commercial forest lands in all ownerships. This is not an anti-wilderness, not an anti-wildlife, anti-water, or anti-anything position, because we believe that those objectives on timber production can be done in a sound environmental and economic framework.

The basic laws your Forest Service must operate under are the 1897 Act and the Weeks Act, both of which specified timber production and watershed protection as two of the agency's major goals. This has been broadened by the Multiple Use Act in 1960 and of course by 1974 Resources Planning Act.. This requires the agency to develop and achieve congressional support for the goals of the agency in managing those lands.

Frankly, I believe that the timber productivity of the national forests ought to be more than doubled. I think the environmental organizations, at least in the law suits and in the discussions in the legislature we've been involved in the last year, have sought to decrease by 50% the yield of timber from the national forests. I'm sure that both of our interests will be using all the tools at hand to press forward our objectives. We will be working with the agencies as they develop their annual appropriations, requests, their management policies, the research to ensure continued improvement in

timber productivity. We will be on the legislative front annually in the appropriations process, and from time to time on modification of existing law or proposing new laws. And we will be involved in the courts. The new 1976 Management Act currently is under review in a lawsuit brought in Texas. It may quickly come to some judicial review. We're not quite sure this time whether or not the Forest Service activities currently underway in Texas are to be considered as meeting the requirements of the new National Forest Management Act.

A question we have and one you are going to be faced with irrespective of what the priorities in planning are is whether or not we make these projected goals for timber or for any other particular use. If you're not particularly interested in timber but have a wildlife or recreation or non-development bent, you're going to be as involved as we are, as an advocate or as a resource for advocates in seeking the adoption of those particular goals.

We have under the 1974 Resources Planning Act established a procedure by which we can each get our licks in and our facts before the decision-makers as to what the productivity levels should be. The Forest Service is required to come up with the assessment of need and a program to meet the need; public participation is required throughout; congressional guidance is part of the process; and the agency is then required to perform to the level specified by the Congress when it agrees to the agency's proposed program or modifies that program.

The 1976 Act was more specific in its guidance to the Forest Service and what the planning process should be in developing the unit plans for each national forest area. That particular law grew out of a lawsuit brought by the Sierra Club and others, the Izaak Walton League. Specifically the lawsuit dealt only with the type of tree to be harvested. Namely did the 1897 Act prescribe that the Forest Service was authorized to harvest only trees which were dead, mature, in large growth; or was the Forest Service authorized to harvest other types of trees in fulfillment of its management objectives? That would have been an easy question for Congress to take care of. But the legislation was prolonged for many months, and in the process we delved into almost every facet of national forest administration: export questions, non-declining yield, road construction standards and so on.

Now, in that 1976 Act Congress rejected, in my opinion, most of the proposals by the environmental organizations which would have significantly reduced the yield of timber from the national forests. It adopted only those provisions which the Chief of the Forest Service said that the agency was already by and large performing in its management practices. I believe that the Congress reaffirmed its support for the land/management job. We in industry also had some proposed amendments. We would like to see more specific direction to the Forest Service, because believe it or not, we also are not happy with current levels of management. We believe the Forest Service is far too conservative and too susceptible to the pressures of the environmental groups, and unwilling to stand out and do the management job which we clearly believe that agency ought to do. And Rex Ressler told me last night that as soon as I stop criticizing him he knows he's in trouble. But they also

may be in another bit of trouble, because in 1976 Management Act which I've said is fairly reasonable, has also been declared so by Mike McCloskey, the Executive Director of the Sierra Club and by Rex Ressler at a forum on which all three of us were at last November. And believe me, when all three of us happen to agree that a bill is reasonable, we are reading it differently and we're looking for some more problems. They are certainly going to be litigated.

Now, the 1976 Act didn't resolve a lot of basic questions and that I think is where our difference of opinion will come in. It provided a framework in which these questions may be resolved, but it didn't address them directly. The question is "what land should be managed for what purpose?" That is a land use allocation decision which is going to be hammered on continually at the local level to the management planning process. That hasn't been resolved by the National Forest Management Act. The Multiple Use Act still pertains, but the 1976 Act provides direction. There's no way in the 1976 Act to resolve what the level of management intensity will be. That will be a function of the provisions of the Resources Planning Act. The goals are set by the agency, concurred with by the Congress, and then funded by the administration.

The 1976 Act didn't in any way resolve the really significant controversy over what the rate of harvest should be for old timber particularly in the West and the conversion of these lands to a managed timber stand. In the West where most of the national forest timber is, future growth is dependent on current harvest. In the Eastern and Southern areas, future harvest is dependent in large part upon current growth. The 1976 Act didn't in any way give direction regarding road standards, the design and the location of the transportation system, questions of access. These again are a local management decision and open debate. Many timber harvest and cultural methods to be employed are still up in the air. The size of timber that should be grown: whether we ought to go for a 10 inch tree as the objective or for future utilization they should be 30 inches or 60 inches. That again has to be looked at continually. Then finally, which areas are not going to be touched at all for timber activities but remain in the undeveloped stage.

These aren't the only problems of the Forest Service. The endangered Species Act, Multiple Use Act, NEPA are clear, but the Federal Insecticide Act, the Water Quality Act, and the Air Quality Act (the latter three will be adjusted by your panel this afternoon) all have an impact on the ability of the agency to meet that doubling current level of harvest which we think are not only appropriate but are absolutely essential to the well-being of the economy in this country by the year 2020.

We have only a framework from these two pieces of legislation for making decisions based on facts. All the particulars will be added by subsequent decisions. There are two opportunities that you might take advantage of right now. First the Forest Service has circulated for comment a document called the Draft Assessment Element Outline. They are also circulating the proposed alternative Forest Service Program Directions and National Goals. These are the two planning documents on which the agency will base its assessment of resource needs, and its proposed program for 1980. It is a chance to get in

on the ground floor, to recommend what policies ought to be included by the agency in determining its assessment of resource needs and its program to meet them.

Now, in addition to the 1974 and 1976 Acts, we also urge that existing processes not be bypassed. John Whitaker mentioned the 13 million acres already in the national forest wilderness system--a system which incidentally forest products industry has supported. We testified in the support of the Wilderness Bill of 1964 and have testified in support of certain areas to be added to that wilderness system. We've also testified in opposition to certain areas. Our opposition to the inclusion of commercial forest land frankly has outweighed our participation in support of the inclusion of commercial forest land. The Forest Service has set aside about 12 million acres of roadless areas, for intensive review over the next 10 years. Unfortunately, I don't think the agency or the Administration has prepared the funding for the intensive review so that land is just sitting there. Meanwhile, there is another 40 million acres of roadless areas which have already been identified by the agency as roadless but not selected for intensive review. A recent court order requires that land for wilderness (along with other uses) be reviewed as part of the management planning practice before any harvesting can take place. That land is also just sitting there.

We did have differences with the Forest Service as to its proposed allocation of land. I think they're far too conservative and unwilling to go out and grab the forest management opportunities as we would like to see done, but we are supporting the process. We are therefore in opposition to a bill currently pending in the House, the so-called "Endangered Wilderness Bill," because it would short-circuit management review. It would identify certain areas as wilderness or set some up for congressional study as wilderness but not go through the agency review. We think that the existing system ought to be permitted to act. And we think that you, as the future land managers and attorneys, ought to be insisting on that type of review because for the first time it assures your participation, whatever your views happen to be in the planning process.

No longer does the Forest Service cozy up to the industry. In my 20 years I've never known it to happen anyway, but the public interpretation is that we are very close buddies. They are not aware of the battles we have over timber sale, harvest levels, timber sale contract levels. The public participation. we think, is helpful because it enables us to get our views in in a way which the agency must take a look at. Before, we don't think the agency paid that much attention to our views.

The issues of future timber harvest of the national forests and the road location questions are the two which come into greatest conflict with the environmental or the wilderness or the non-development side of the population. The general public believes that development, the timber harvest and timber regrowth is really inconsistent with any environmental soundness; they're inconsistent with long term scenic beauty, or wildlife habitat, or even water shed and water quality. This as forest managers, is the assumption we have got

to overcome. I think we have to overcome it for a variety of reasons; not just for the sake of timber production, but also for the benefit of wildlife habitat manipulation and for assuring adequate water supplies and adequate water quality.

Again, my perspective of this, of course, is as someone who would like to see the national forests' and certainly the entire Nation's timber supply, timber growth and harvest double by the year 2020. I firmly believe that it can be done in an environmentally and economically sound way, and my job is to assure that the wood fiber needs are met consistent with other human needs.

THE FEEL AND FLAVOR OF THE "BIG WILD"

ROGER CONNORS

To make clear to you what I am, I will tell you that I spoke before a class recently. Students were playing a word game and the teacher asked what a devil's advocate was. A kid popped up, I'm convinced that he was the youngster of one of the utility executives. He said, "That's a lawyer from the environmental group." Well, that's what I am, and I must say that being asked to speak for this group and with this panel I'm a little reminded, John, of what happened when George Gershwin wrote to the famous French composer Ravel, and asked if he could come and study with him for a year in Paris. Ravel wrote back a number of questions; included among them was "How much do you make a year?" Gershwin thought about that for awhile and thought of the royalties and the plays and everything and he wrote back $200,000 a year. To this Ravel responded with a wire, "Stay in New York, I'm coming to study with you."

Well, what I would like to do, is to say two things in introduction and then go to the substance of my remarks. First, in a general way you may be asking yourselves what is happening to the environmental movement? One view of that is the one that John put to you, and I'll offer you an alternative. There's been no change in public support for the protection of the environment. There's been no real shift in public concern. What has changed is an infinitely better organized lobby in opposition, by the energy industry and by the various interests in exploitation of the public lands and other public resources. Second of all, what happened was infinitely greater access by those interest groups to the last administration. And if you want evidence of that I'll point to the Michigan Bottle Bill--where all the money, the best advertising minds that money can buy, the best and the most advertising time that money can buy, the threat of the destruction of jobs, the threat of harm to the state economy, and the state hard pressed by the recession, resulted in 63% of the people voting in favor of the Bottle Bill and against the industry line. Public opinion hasn't changed; it's just that there was a period where we were well-organized and the industries interested in the use and exploitation of the public domain were ill-organized and they did not anticipate the effectiveness of our organizations.

The second thing I'd like to do is give a little lesson in vocabulary because I know at least a few of you are students and I think it's important for the sessions you're going to hear to know at least four terms so you have a little bit of background as to what the vocabulary means. The first word is balance. Now, if it's an interest group representative that says "I'm in favor of balance," that means, "I'm not getting enough and I want to strike the balance in my favor." But if an administrator says "I'm in favor of balance" he means "Let me do my job, and the people who sue me are the ones who want to get the thing out of balance." That's a balance.

Secondly, the words are needs and demands. Basically, it's my needs, your demands. Forest products industries will talk about meeting the needs of the country for forest products and the demand for recreation. The wilderness

advocates will talk about the need of the people to have quiet and escape and the demands for forest products. The implication is we've got to meet the needs, and the demands are somehow less important.

Third: management. Now, when you hear the word management read the following: when the forest products industry says, "we're in favor of management," they mean cut the big old trees. When the wildlife biologists say "we're in favor of management," they mean cut the small young trees, or at least as soon as they get out of the reach of the deer. When the environmentalist and wilderness advocates say we're in favor of management they mean "close down the roads, limit access, and prevent the forest products industry from getting in." That's management.

Fourth term, is overreaction. There is a tendency for us all to warn each other in the following terms: "Don't push too hard for your objectives, because if you do the public will overreact. When that happens, we, reasonable though we are, will be forced to do something bad." Example, the forest products industry says, "restrict cutting too much, there will be an overreaction. We don't want to overcut but we're going to be forced to by this wave of public opinion. Then there will be massive overcutting in the national forests."

I want to talk about four things: First, four terms for your vocabulary; second of all to talk about objectives and criteria for wildlands management; third in true lawyer fashion talk about the facts and the law; and then offer my conclusion. To put it differently I want to talk about objectives for wildlands management, the factual settings in which the opportunities for wildlands management occur, conceptual legal models for wildlands management. Finally, I will make a stab at my own suggestion.

Just recently, I had the chance to read some of the writings of one of Michigan's home grown public lands managers of an earlier time. A fellow by the unlikely name of P.S. Lovejoy. Lovejoy was a friend of Dana, a friend of Leopold, and many of the other seminal thinkers of the last generation in public lands management. Lovejoy wrote one memorandum which is almost etched on my memory in which he said, "Don't we all have a yen to escape the tulips, and the lawnmowers?" He talked about the fact that we have manicured parks, and he asked the question, "What is it that leads the super rich to buy up a Huron Mountain Club?"--probably the largest wildlands tract in Michigan. Most of us will never have the opportunity to use that; it is owned by a very small number of very wealthy people and it's maintained wild. What is it that leads them to that? What is it that leads John Whitaker to leave the excitement of Washington, D.C., and go to Nova Scotia to a place where he says only three people are there during the winter? Lovejoy tried to get a handle on what it is that leads us all to do those things. He said, "I claim that it's a yen for the feel and flavor of the 'big wild'". A better phrase I haven't discovered. He wrote in the one memorandum to the Natural Resources Commission here in Michigan. He said, "Isn't that what people" and then he qualifies that, "(or at least a big enough fraction of the people worth caring for) want to have?" Now the particular place that he wanted to try out his idea on was the now-famous Pigeon River country of Michigan.

He offered a single criteria for all the different people's ideas of management: foresters, wildlife people, and so on. He said anything which violates the "big wild feel and flavor" of the Pigeon River Country is all wrong, poison. He had a footnote, "No pansies around the stumps, please; no pansies around the stumps." Now, to me, the single objective, the source of this public support -- for the environmental organizations or the Wilderness Act, the wilderness designations, designations under the Wild and Scenic Rivers Act--is in the desire of people for escape, the desire of people for a place in which they can find that feeling and flavor of the big wild. That is the goal of wildlands management. Anything that violates that feel and flavor is all wrong--poison.

But what are the criteria as we look for places in which that feel and flavor is available? What are the criteria of such places? Well, I'd offer at least three. One, an absence of the forceful reminders of man's activity and his technology. Second, access limited to man's own power, his feet. Third a size that is great enough for a person to move through space for a substantial period of time. Now, to me, those three criteria are like a 3-legged stool, because if you take any one of those away you will not be able to meet Lovejoy's objective. For example, if you have an absence of forceful reminders of man's activity and you have access limited to foot travel that's o.k. But if it's not large enough for people to do more than go into it, stay in one place for a day and then go out of it again, then there's not enough time to slow down and to come into tune with a setting that is dominated by nature. Second, if you have the space and it's foot travel, but there are constant reminders of man's technology, that is a harsh and jarring experience.

Many of you have heard of stories similar to that of a couple that struggles to the top of the mountain all along the way feeling that they are alone with their fight to overcome their desire to quit and go back. They reach the top of the hill and look out across the countryside and then a mobile home comes chugging up the other side of the hill. That is an experience which is not consistent with Lovejoy's objectives. You have to have all three. That's the goal; those are the criteria.

Let me move to my second point which is what are the settings in which the opportunities for wildland management occur? There are three different settings and they're quite different responses. The first setting is the old growth forest of the West which has stayed in public ownership. We had an old growth forest in Michigan and it was changed to a "managed" forest. When you hear that phrase you can understand what it means by thinking of Michigan. The second place in which opportunity for wildland management occurs, is in the areas of the second growth in the East in which that second growth has been allowed to continue long enough, in large secluded areas where the opportunity for that feel and flavor of the big wild is there even though the areas are no longer virgin.

Finally, the bulk of state forest and national forest land in places like Michigan are lands that are heavily roaded, heavily used, and may have been cut over several times. I contend that they are the most important opportunities for wildland management here.

Let me say a couple of things about that and explain why. To understand Michigan's state national forests let me tell you a little bit about the Huron-Manistee National Forest. Most of the Huron National Forest was cut over by the robber barons. Much of it was cut over again at least once. In the National Forest there are 5,000 miles of low grade roads. That is the two track or old logging road. What that turns into is three miles of road for every square mile of land. The other characteristic of the forest is that much of the prime land is in private ownership. If any of you have gone out in the state forest/national forest in Michigan you have learned to your dismay that it is not enough just to look at the county maps and see where the national or state forest is because when you get close to the lake you start seeing no trespassing signs. The property around the lake is in private ownership and maybe in cabins. When you get near the stream access once again you discover strips of private land. Frequently the most important land is in private ownership. So this land is characterized then by heavy influence of man's activity, frequent reminders, extensive access to motorized vehicles and frequently we do not have blocked land in public ownership. That is why there is a big fight over the Pigeon River country. The Pigeon River country is exceptional in Michigan state forest in that we have over 90% public ownership. The principal attractions, namely the water, the lakes, and streams are almost exclusively in public ownership and there is no paved road across it. So those are the three settings then in which the opportunities for wildlands management occur. The old growth virgin forest of the West, the second growth forest of the East, and ill-used lands, if I may use the phrase, of places like Michigan.

What then are the conceptual legal models that we have to engage in wildland management in order to preserve that feeling and flavor of the big wild? One, most familiar to everyone is the Wilderness Act. The reason, if you want to understand, why the Wilderness Act grates on the public land managers so, is to understand where it came from and what it is for. The purpose of the Wilderness Act is to take away the management prerogatives, the management alternatives of the public land manager. The Wilderness Act was passed because people felt that the public land managers did not share their notion of balance. So, the reason the managers don't like the wilderness designation is that it takes away their management alternatives. It is there precisely for that reason. The Wilderness Act is one tool. As a conceptional legal model, it says one way to have management for the purpose of wildlands is to take away the management prerogatives of management. Don't let him cut, don't let him build roads, and eventually you will have a wild land.

Now the problem is that as a conceptual tool the Wilderness Act--the limitation of the management alternatives of the land manager--is only available in a limited set of circumstances. The best definition of wilderness I've heard is a place where the hand of man has not set foot. You can find places that at least approximate that in the first two categories of land that I talked about. But of course, that idea doesn't apply very well in a place like Michigan and our state forest lands and our national forest lands.

The second problem with that as a conceptual and legal model is that it does not permit, the latest phrase I heard, is "manipulation" of the forest cover. Now in real terms, in a place like Michigan, a lot of people who want to hunt are,

and the hunters in Michigan are, very sophisticated. They understand that if all the trees are allowed to grow up, and none of the trees get cut, wildlife habitat is not going to be more; there are going to be fewer deer to hunt and they are not going to stand still for that. So as a model for the management of that last category of land, the Wilderness Act concept, I don't think, is going to work.

The second conceptual model is what has been termed the Eastern Wilderness. The Eastern Wilderness Act is one which says, let's take those areas that are not virgin but have that same appearance and let's take away the management prerogatives of the land managers, particularly the national forests because of the fact if we don't take their management prerogatives away they will cut them all down.

The third conceptual model which we have today is identification of playpens. Now what I mean by that is we have in the state of Michigan and other places identification of small areas which are designated alternatively as quiet areas, as natural areas sometimes. Inevitably these are small, they are limited in size, and they will be around a single popular public access site to a stream, or maybe around a particular quality like the Kirtland's Warbler in Michigan. But the areas are too small to provide that opportunity for space and time that I identified earlier as being one of the key criteria.

So let me finally, having outlined objectives, the setting in which the options occur, and the conceptional legal models which we have available, make a stab at offering an alternative model for the development and management of wildlands in this third which I have described. It seems to me that we need to develop a tool which would permit us first of all to limit access to large tracts of land. Realizing that there are very few areas where you have blocked public ownership, you are going to have to focus your attention first on places where you have virtually blocked public ownership in order to be able to lawfully limit access. Second we need to recognize the necessity of permitting some management, in all three senses in which I used that phrase earlier, in these areas. There ought to be place for a quality hunting experience as well as for those who prefer to hunt mushrooms. Third, some of the substantial amount of the timber in these areas has to be permitted to become, in the phrase, overmature, to grow up because there is a fourth attribute which is nice to have-wildlands - and that is just a hint or little bit of grandeur.

In summary, let me say that if we look to the history of public lands management, we look back on the people who develop the idea of national parks. It is accepted by us now but we are thankful to the people who dreamed up the idea of developing a national park system. A little earlier some equally foresighted people had dreamed up the National Forest System. And we are thankful to them because now we have something to fight over, and I think that challenge of today, what we all ought to be asking ourselves about is, where is the idea that is popping up--whether it is in Grand Rapids or Ann Arbor, or Washington, D.C.--where is the idea that if seized upon and implemented the next generation in a setting like this will look up and say that was an idea that

really served our generation well. I at least offer to you a notion that we take those well-used lands, those that are close to centers of population and by deliberate choice create a place, and set aside a place, and yes, manage a place so that there we will find the feeling and flavor of the big wild. I think that future generations might look upon that as a really good idea.

QUESTIONS AND DISCUSSION

NEED FOR AND PROBABILITY OF CONGRESSIONAL ATTENTION TO RPA.

Question:

The RPA has application not only for the federal lands but for state lands as well. One of the assumptions is, however, that Congress will participate to the extent defined by the law. What kind of guarantees do you have that Congress will be doing its job?

Rex Ressler:

With respect to oversight hearings, there has been definite interest expressed specifically on the House side by Chairman Foley and the sub-committee chairman, Congressman Weaver from the state of Oregon. There has been some interest expressed as well on the Senate side by people such as Senator Humphrey from Minnesota. Now, the biggest problem it seems to me is the question of time--whether or not such little things as the energy legislation that has been put forward, the employment stimulus program, and things of that type will occupy so much Congressional effort that they just won't get around to it.

The second point is, in the absence of Congress taking action in oversight hearings, and lacking an assessment of what Congress wants which would provide us necessary guidance, then what? In other words, if the political process doesn't work we are going to get into a situation, as we have been in the past, when the public land administrators and federal agencies are going to make those decisions. Of course there's going to be disagreement about those decisions. We hope that Congress will therefore start this process of oversight hearings and direction that will relieve the professional land manager and the agency of the necessity of making these kinds of decisions.

BLM AND LWCF FUNDS

Question:

Why has BLM not taken advantage of land and water conservation funds in the past?

Rome Koenings:

We did not have the authority. Anytime in the past that we had any land and water conservation fund money it had to be addressed in a specific act. The point is we had to have specific authority; we just didn't have the authority in the land and water conservation fund except where they put us in a specific act with a reference to a specific river or trail or something. That's why we had so much difficulty. Now, of course, we would be most anxious to get our hands into that fund if the Forest Service would move over just a little bit and let us get in.

Rex Ressler:

I would be pleased to announce that the Forest Service will move over and give the BLM more elbow room in the land and water conservation fund if we could pursuade the Park Service to do likewise.

Now my point is this-the land and water conservation fund is broad. It provides authorities for the federal agencies to acquire recreationally-oriented land. As a matter of executive decision back at the early passage of the Land and Water Conservation Fund it was decided that the priorities would be first off to buy in-holdings within the national forests and park systems. This was a very logical decision. Secondly, in order to put some priorities on the money, it was decided we would then constrain it to buy the priority lands outside the national park and forest system within the wilderness system and national recreation areas in other Congressionally designated areas. That's all well and good. The fund has now been expanded to the point where we could accelerate the level of land acquisition. We have thus far acquired about four times as much land as Interior has altogether at about half the price. The reason for this is that we are acquiring, obviously, lesser valued lands. As soon as you create a National Park you automatically have an influence on the price and the real estate values. My point is that the fund has been expanded and we believe that the use of the fund ought to be expanded to include acquiring in rapid order those high priority recreational lands and do this as quickly as possible for the simple reason that every year we wait the price goes up 10-15% or 20%.

LWCF APROPRIATIONS

Question:

Will the appropriations for land and water conservation funds ever get up to the level of authorizations?

Rex Ressler:

There is distinct pressure that the appropriations should catch up to the authorizations but in most pieces of substantive legislation authorizations are always much higher than appropriations. Given that this fund is already well-established, there's much less hazard involved in going ahead and allowing these monies to be expended. But it tends to unbalance further the federal budget as this is strictly an executive decision which the President will make. We are hopeful that they will allow us all to use the money to proceed to acquire these lands. Congress has demonstrated substantial willingness to go ahead and appropriate the money. If we can get these two together we can move much more rapidly.

John Whitaker:

Just as an aside on these comments, these barbed references between the National Park Service and the National Forest Service although they are good-humored, make it readily apparent why Presidents from Hoover to Nixon and probably Jimmy Carter will try too, (and also fail) to create a Department of Natural Resources.

SHOULD THE WILDERNESS ACT BE AMENDED?

Question:

Should Congress amend the Wilderness Act and define wilderness or do we go ahead with the way it is and allow this decision to be made by administrators and in the courts?

Rex Ressler:

I do not believe the Wilderness Act ought to be changed; I don't think there's any way of defining wilderness in such a way that it will avoid controversy. The general purposes of the Wilderness Act are clearly defined. The question is one of addressing the nitty-gritty decisions of which area should be included in the wilderness system.

We, for one, would not like to see the Wilderness Act restated in such a way that any area could basically qualify for the wilderness system. We think that there are other authorities available to be able to accomplish some of the things that Roger mentioned earlier. Some of his very desirable objectives in public land management policy can be done under existing authorities.

Rome Koenings:

We really don't have any basic troubles with the Wilderness Act. There is, however, one little change we've been thinking about that would be beneficial. If you read the Act you will remember that there are certain criteria down in the bottom which says that the wilderness area may concern archaeological, historical, geological, cultural and all the other good things as a wilderness. We think that it would strengthen the classifications without tightening up the dialogue that could go in making these classifications of what should or should not be wilderness. As we plan and go through a process of trying to identify what is and what isn't wilderness, go up through all the planning and public involvement, we are finding it very difficult to define a roadless area. What is a road? We have some very meaty dialogues within our own staff as to what a road is. You can go through the whole thing and just go round and round. I think that including some extra criteria, Rex, would be helpful. It has to have something to make it a wilderness rather than just a mass of land out there without a road on it.

If we get too much of that stuff plugged into the wilderness system I'm really concerned that there's going to be a reaction to this as John has indicated -an assertion that this really can't be justified.

Roger Connors:

The reason that there is pressure for change in the Wilderness Act is that the federal land management agencies have taken about the narrowest possible view of those lands which could be considered for wilderness designation. I think the view of those who supported aggressive wilderness designation policy is not that half the public lands should be designated for wilderness, but that

the maximum possible lands should be looked at to be chosen from for designation of wilderness. And the reason that there's pressure, and that there's going to continue to be pressure for change in the definition in the Wilderness Act, is because there are some who would assert that the Act is right, the definition is right, and the Forest Service has been misinterpreting it. They're going to continue to do that until Congress changes the law. So fine, we're going to Congress and ask them to change the law to expand the lands from which land can be selected. The goal is not to lock up all the national forests but to have some wilderness areas in closer proximity to where people live.

John Whitaker:

I'd like to get an opinion on this-I work the other side of the fence. What worries me, there's a big argument regarding how much more wilderness there should be. On the other hand I don't see that the wilderness activists are quarreling with the decisions that have already been made on the areas recommended to Congress. I think they speak to an enormous lag which I recall in the Congressional action on those which past Administrations have proposed and which Congress hasn't acted on.

LAND MANAGEMENT & WILDERNESS MANAGEMENT

Question:

How can we permit management while we are restricting access?

Roger Connor:

The principle management actions are going to be timber harvesting. It is not necessary to maintain roads for 40 years-to make a timber harvest at the end of 40-year cycle. It is possible to either permit by natural acts or even to encourage the obliteration of roads. At the time when you want to have timber harvest in areas, you construct temporary roads and then at the conclusion of harvest, block and obliterate them. To the extent that management means cutting timber, you can cut timber while restricting access for long periods of time. During the short period of timber harvest, obviously you've got to get access to it. So, to implement my model it means you can't have a law that means you can never build a road.

Question:

The second question was, how much is enough?

Roger Connor:

My answer is that in the Lower Peninsula of Michigan we've got none today and none is not enough. That I'm sure of. So how much is enough? Well, why don't you give me a little and let me try it and see what it feels like and then we can talk about how much more. Should we also designate areas for intensive use? The answer is yes. One way it seems to me to get at the conflicting political pressures from off-road vehicle enthusiasts and other intense use

interests and from folks like me is to attempt to deal with both problems at the same time. This would be by identifying areas which are suitable for intense purposes more intense management that they're getting today while at the same time identifying some blocks and areas for the kind of use that I described. The problem with this is that it is easy in these areas of the country to lose the big blocks. This is as opposed to a forest track where there are no roads. In that case the situation of doing nothing favors keeping it like it is. In our situation when all areas are loaded doing nothing favors intense use, permitting those intense uses to get entrenched. If you think it is difficult to decide to create a wilderness area in a virgin tract which the off-the-road vehicles haven't gotten into, you try setting up an area as a roadless area where people have been running their motorbikes for the last 15 years. There will be a 10,000-member cycle conservation club on your neck. That's more of a reason to get the job done quick before somebody comes up with another reason for an intense use.

Rex Ressler:

One of the nice things about being a speaker is that you can define your own terms. I would argue with Mr. Connors' definition of the term management, because I would put a little different connotation on it. We define management as "controlling the use by whatever device." We manage wilderness. We manage it in a way that we consider to be pretty intensive; at least that is our goal. Manpower and money sometimes become a problem. My point is that management means to accomplish with resources what the decision has been regarding its use. In wilderness we manage use from the standpoint of hopefully keeping the trails in half-way decent shape, dispersing people use as unobtrusively as possible. That we consider to be management. This is just the same on some of the high quality sites where we believe that intensive management of the forest resource, up to the point of where all other values are given appropriate consideration, is management. It runs the full gamut of our skills and knowledge in trying to provide goods and services in the context of some broad decision as to what use should be made of the public lands. I think that's a concept we need to keep in mind.

You're right of course, that when you start changing established pattern of use you have got real problems. Doug and I can certainly remember some of the hassles we got into when we tried to eliminate seaplanes from the Alpine Lake lakes. When you do that sort of thing you're looking for trouble but that's also the kind of thing that public agencies are paid to accomplish.

We're hopeful, however, that in the long run, we will evolve a process of approaching these issues systematically, and that this will be more effective than leaving every issue to the consequences of political pressure by whatever device that can be generated. I admit that we're naively looking and hoping to see a systematic process evolve. I think the framework is there; I'm hopeful that it will work.

RETENTION OF PUBLIC DOMAIN LANDS

Question:

What standards has BLM established to make all decisions regarding their retention or disposition of the public domain?

Rome Koenings:

We really haven't made decisions to define it specifically. At least to start with, we are going to use the planning process and public participation to identify the kinds of uses that should be made of those lands. We will segregate out in that manner those lands which should be retained in public ownership and those which might be disposed of either through exchange or whatever. There's a whole process that you have to go through with public involvement in all because this is a very sensitive decision. It's very difficult to define specifically what reasons we would use; therefore, that it has to go through the planning process.

Question:

How would BLM define the public interest regarding this issue?

Rome Koenings:

We would have to define the public interest as being the people of the United States. I think what you're really asking me is are we going to let the livestock industry say to us "I think you ought to sell that to me for ranches" and let the mining interests say, "We need that for a mine?" The answer to you is no. We are going to go through a public participation process. It may be that we let land go for some of those reasons; but it's going to have to be very strongly demonstrated that it's in the public interest to dispose of those lands. And I mean broad public interest.

WILDERNESS IN THE ORGANIC ACT

Question:

What is BLM doing about wilderness under the new Act?

Rome Koenings:

We're trying to implement the Organic Act as rapidly as we possibly can. We're trying to put all the pieces together and we've been criticized because it's taking us so long but it's a very complicated piece of legislation. I can take you in a wilderness, one of them an area that we're looking at very hard. A mining company wants to build a road in it and they're raising all kinds of hell about our trying to keep them from building the road. I'm sure if they go in there and build a road we'll be accused of having let them do it. But we've tried every device we can think of to keep them from building the road. When you get up on that tundra you've got to remember that that bloody stuff is only 11 inches high. Other than the Brooks Range, it's as flat as this table and it's very sensitive. For a true wilderness, to get the kind of feeling that you're talking about here and I'm talking about here, you need more land. A guy could be three miles away from you and he's still visible--it isn't the same thing as somewhere else. And all I can say is you've got to go there to get this feeling of vastness. We're looking at a different situation; I could justify in southern Michigan a 5,000 acre wilderness but I think up in Alaska we're talking about 5 or 6 million acres.

We're going through hell's fire in Southern California desert. If we don't get going they're going to steal the damn thing on us. They're hauling all the plants off now. We're having one heck of a time finding out how they're doing it but there's money now in desert plants for decorating homes. The last time we went out there we got into a dope mess. Before we got through we had the FBI and the State Police and everybody else involved just trying to get some desert plants back. We busted up their Mexico Connection. This is one reason why our people, by the way, have to go through very intensive training. Our agents, for all practical purposes, go through, by federal law, an FBI training program before we can let them go out there and arrest people. I'm not sure I want that kind of person running our camp grounds after awhile, but that's where we are.

FORESTRY ON PRIVATE LANDS

Question:

Is intensive management under RPA Program sufficient to meet timber needs?

John Hall:

First of all, the national forests, even though they contain over 50% of the standing softwood saw timber, are not the total answer to the nation's future wood needs. Timber is currently standing on the national forests and the harvest there will promote future growth. Equally important, more important perhaps, are the industrially owned lands and the non-industrial privately-owned forest lands. We are interested in increasing the intensity of management there and in applying environmentally and economically sound standards. We look towards the non-industrial private forest lands as providing the timber supply beyond the year 2000. That's where investments now will pay off. We look to the national forest lands for picking up a large part of the timber supply between now and the year 2000 or shortly thereafter.

The national forests are achieving presently about 39% of their potential growth level. The industrial forest lands are achieving a higher percentage and the non-industrial private lands are somewhere in the middle. I think it's important that all three of these areas move ahead. The Forest Service also has programs that are aimed at increasing the level of productivity in management or non-industrial private lands. All three are essential but the area of use-conflict under the law becomes most pressing on the public lands-the national forests, BLM and other federal lands. There is less of the legal restrictions to use in timber management or intensive management on the private lands. However, there is a motivational problem to insure that the non-industrial land owner is encouraged in some cases perhaps by financial incentives to increase the level of forest management.

Rex Ressler:

We do not look to the national forests for the resolution of the fiber supply problem. They can make a major contribution but the size of the non-industrial forest land ownership in the U.S. is roughly the size of the BLM and

the national forest system lands put together. There's where the great potential is, as John was indicating. We're going to have to find effective mechanisms for influencing, through the good offices of the State and the State foresters, many ways in which we can provide an economic stimulus or incentive of some form to get that land, or portions of it, into higher orders of production. Obviously, a lot of these lands are being held in private ownership for purposes other than producing wood. I'm not suggesting that we'll ever succeed in getting all of those lands into production, but a good share of them can be brought into higher orders of production.

As far as the national forests are concerned, yes, their productivity can be substantially increased. Capital investments which we as a nation put in the land could result in an increase of 50-60% productivity on those lands in the next couple of decades. If we put the capital investment into stand culture, we could accomplish about a 16 billion board foot annual harvest level, as compared to the 11, 12 or 13 that we do now, but that's a high cost item.

The national forests, their yield level or their growth levels, are often compared and generally compared unfavorably in the minds of some, because the growth rates are lower than you will find, particularly, on the industrial lands. That's very true. They are very substantially lower...if you look only at fiber growth. But we are managing the public lands for many uses, and we just do not believe that we should maximize wood fiber production. We want to optimize that production. That means growth will have to be discounted. Secondly, growth rate is a function of how much land has old growth timber on it. In the West national forests are predominantly old growth. They produce lower levels of fiber; it doesn't take a biologist to know that. But they are <u>also</u> producing phenomenal value increments which is not often looked at. What is happening with the conversion of old-growth to younger faster-growing stands on industrial property is that the higher quality old-growth stands, which continue to be managed for wood and other commodities, are assuming higher values. We have seen substantial increases in the unit cost of the last two decades. One can argue that that's a function of scarcity, and I guess that in all probability it is. But operating at what I would like to define as an optimized level on wood fiber production is not all that expensive as far as the public is concerned because increased values are compensating for some sacrifice in maximized growth.

PUBLIC INVOLVEMENT

Question:

How do you evaluate public involvement?

Rex Ressler:

When you start looking at the volume of response we get on many issues it would be ludicrous for me to stand up here and say that we read, debate and deliberate on every issue. A lot of it comes in the form of newspaper clippings which say I support a certain agency position or opinion. We certainly do not count votes, that is a function of Congress and the political process. We do have a system for cataloging all of the input based on a computerized system

developed in the Pacific Northwest at our experiment station, by John Hendee in particular. We use that as one of the means in trying to glean from various voluminous inputs what the public is trying to tell us. Then you have to make a subjective judgment. Obviously those responses that are well-and factually-stated, the ones that are addressing issues or differences of opinion and give a rationale for them, they're automatically going to have a greater effect on the final decision than some of the responses we get which are largely emotional. It's not to say that one is necessarily better than the other, but it's a question of how we can manipulate that kind of information flow. Our system is far from perfect. I think we're developing a whole new cadre of people who are more expert in the communications process and in analyzing public response and anybody who has some real expertise in this field we'd be glad to have you tell us about it.

PROCEDURE AS A SUBSTITUTE FOR CONGRESSIONAL DIRECTION

Question:

Given the standardless legislation that Congress passes which establishes processes rather than goals, how does an agency make decisions in any way other than as a consequence of political pressure?

Rex Ressler:

We are engaged in a process based on the authorities that we have, but we are not foolish enough to think that we are going to eliminate the political hassels of the flow because there are going to be disagreements among various interest groups. There is no way under the sun that we can satisfy everybody's interests. So we are going to do the best job that we can to try and find a happy middle ground. What we would like to do is find some means for getting some national direction regarding what these lands should be used for and then try to allocate land to those goals, be they wilderness, timber, recreation or whatever back in the individual land management plans. All we can do is make an attempt to use the systematic process and then rightfully leave the political hassels up to successive administrations and Congress.

We are not trying to resolve all these issues nor are we going to put all the lawyers out of business. We merely want to try to do what we can to develop an information base and a planning process that will let the public and us, hopefully, make a little more intelligent long-term research decisions. I don't guarantee that we will be any smarter when we get done, but that's the best answer I can give you.

Roger Connor:

This is not the only area in which the laws that Congress passes are devoid of substantive guidance to the agencies. It is the fact rather than the exception that Congress declares that there is a problem and sets up an agency and defines procedures by which they will seek to solve the problem. And then says "go and do good." Given that that has been our historical experience, I don't think that it is going to change any. Congress is rarely going to resolve the difficult issues that we are struggling over. So what that means is that untidy as it is, the interest which is going to win is going to be that interest which is best organized, most articulate, and able to marshall both their good arguments and their constituency most effectively. The course that we are going to follow is going to have a zigzag course and the zigs and zags are going to be determined by which interest is best organized. In a sense, therefore, all of this discussion has been proceeding under a pretty unreal plane. We are all saying it would be great if there were planning and we're talking about a political process.

THE FEDERAL WATER POLLUTION CONTROL ACT AND WILDLANDS MANAGEMENT

HARRIET B. MARPLE

I would like to discuss with you the impact of the Federal Water Pollution Control Act on four different types of open spaces:

timberland or forested areas;
land used for grazing animals;
lands from which oil, coal or other mineral resources are to be extracted;
parks and wilderness areas.

The principal impact of the Act is felt through the mechanisms for control of point and nonpoint sources of pollution. The Act also regulates discharges of dredged and fill materials.

Let me discuss point source pollution first. "Point source" is defined in the Act as a discernible, confined and discrete conveyance from which pollutants are or may be discharged. It includes pipes, ditches, wells, and concentrated animal feeding operations. Nonpoint source is not defined in the Act. The distinction between point sources and nonpoint sources is not always clear. Speaking very generally, point sources are direct, concentrated discharges of pollutants, whereas nonpoint sources are more diffuse, intermittent sources of pollution. The discharge from an industrial plant is a point source, while rainwater runoff from farmland is nonpoint.

All point sources must meet effluent limitations which require the application of specified types of technology on a specified timetable. By July 1, 1977 these effluent limitations must require application of "best practicable technology currently available" and by July 1, 1983 they must require application of "best available technology economically achievable." These technologies are referred to as BPT and BAT. The Agency has defined the limitations achievable by BPT and BAT on an industry-by-industry basis.

The point source program is administered through a permit system known as the NPDES system - that stands for National Pollutant Discharge Elimination System. Where the NPDES program has been taken over by the State, the permit is called an SPDES permit, but the system is the same.

Many of the activities carried on by managers of open spaces are partly point source in nature and partly nonpoint in nature. For example, in the case of silviculture, the following activities generally result in nonpoint source pollution: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which runoff results, and runoff from orchards and forest lands. But some activities, such as the construction of stream crossings for roads, may involve point source discharges of dredged or fill material. Also, rock crushing, gravel washing, log sorting and log storage

facilities which are operated in connection with silvicultural activities are point sources. And timber processing results in point source discharges.

Another area of interest to you which involves both point and nonpoint source discharges is mining. The EPA has issued regulations covering point source discharges for the extraction of coal, ores and minerals. But runoff from mines is regarded as nonpoint in nature. The EPA has also issued interim final regulations covering point source pollution from oil extraction.

To illustrate how the NPDES system works, let us suppose that you wished to mine coal. You would have to apply for an NPDES permit covering your mining activities. The regulations covering coal mining break down the process into four subcategories - coal preparation; coal storage; acid mine drainage; and alkaline mine drainage. For each of these subcategories, the regulations set effluent limitations which are expressed as maximum concentrations of pollutants per liter of water. For instance, looking at BPT for acid mine drainage, the effluent limitation for total iron is 7.0 milligrams per liter, for total manganese 4.0 milligrams per liter, and so on. Unless the particular discharge qualified for a variance, your permit would be based on these limitations. Although the EPA reviews the technology capable of meeting the limitations before setting them, the permits do not require use of specific technologies - you may use any technology you deem best as long as you meet the effluent limitations.

Nonpoint source pollution is controlled in a completely different way. Section 208 calls for state and local planning for areawide waste treatment management. 208 plans must include a process to identify, if appropriate, various types of nonpoint sources of pollution and set forth procedures and methods to control such sources to the extent feasible. The following activities result in nonpoint sources of pollution:

- agriculture and silviculture - this includes runoff from manure disposal areas and from land used for livestock and crop production;

- mining - this includes surface and underground runoff from new, current and abandoned mines;

- construction - this includes earth-moving activities incident to construction of buildings or roads or modification of streams.

The point source regulations set forth national standards that are applicable everywhere. The opposite is true for nonpoint sources. While the Federal government establishes the standards for point sources, it plays a much more limited role in the area of nonpoint sources. Under section 304 the EPA must publish information concerning processes, procedures and methods to control nonpoint sources of pollution. (These are sometimes referred to as best management practices, or BMPs for short.) The EPA has published BMPs for construction and stream modification activities. A silviculture guidance is about to be published and the

EPA is developing information for agricultural and mining activities. To give you an idea of the breadth of the nonpoint source program, the agricultural guidance being developed is expected to cover nonpoint source pollution problems resulting from grazing of animals. The BMPs that will be discussed in the guidance will probably include such things as controlling the amount and timing of grazing, application of good pasture management practices, and sediment control measures.

The BMPs published by the EPA are not binding on the agencies developing 208 plans. However, 208 plans are subject to EPA approval. Each 208 agency must address the particular problems found in its jurisdiction and specify methods to control them. The degree of control will depend on the nature of the water quality problems in the area. Intensive planning will be required in complex problem areas, while minimal planning will be required in areas where no water quality problems exist.

208 planning has the advantage that it may be tailored to local conditions. For example, different BMPs would be needed for silviculture carried out on steep Northwestern slopes than those for silviculture carried out on flat lands in the South. The disadvantage of 208 planning is that persons managing large tracts of land may have to address themselves to several different 208 plans. This can be a burden for managers who wish to take advantage of the opportunity for public participation in the 208 planning process.

The scope of 208 plans is potentially very broad. It is clear that land use requirements can be imposed under 208 plans as well as use of physical measures to control nonpoint source pollution. The 208 planning process is in its infancy. No 208 plans have yet been approved. The full impact of the 208 planning process will only become known as the plans are developed and implemented.

There are some other aspects of 208 planning that I should mention. The 208 regulations require States to adopt an antidegradation policy. Under this policy existing instream water uses must be maintained. Existing high quality waters which exceed levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water must be maintained unless the State chooses to allow lower water quality as a result of necessary and justifiable economic or social development. In no event, however, may degradation of water quality interfere with existing instream water uses. Also, no degradation is allowed in high quality waters which constitute an outstanding national resource, such as waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance. This antidegradation policy could have far-reaching effects in terms of its impact on growth and land use.

One of the difficult questions that comes up with regard to 208 plans is whether regulatory programs are necessary. The EPA's current policy is that a regulatory program is required where the 208 agency determines that it is the only practicable method of assuring that a nonpoint source program is implemented. This determination is to be

based on economic, technical, social and environmental factors. Regulatory programs could use permits, licenses, contracts, notification, bonding, leases, plans and various other management techniques. The Regional Administrator must disapprove a nonregulatory program when he has reason to believe it will not be effective and will not lead to the application of best management practices. Factors to be considered include the severity of the nonpoint source problem, past experience of the involved governmental unit with the proposed approach, and the type of program that is proposed. For example, many states have voluntary soil conservation programs. If a state with such a program had a severe sediment control problem it would probably be difficult to persuade the Regional Administrator that a voluntary program would be sufficient to deal with the problem.

Another difficult issue is the question of who should bear the cost of 208 programs. In some areas it is fairly well agreed that the cost should be regarded as a cost of production - this is true of mining, for instance. In other cases, a good argument can be made that the public should bear the expense. For instance, the state of Iowa appropriates money to assist landowners in installing diversions and filter strips.

Another point I should mention is the impact of the point and nonpoint requirements on federal facilities. Section 313 of the Act states that federal facilities must comply with federal, state, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements. However, there are Constitutional difficulties involved in subjecting federal facilities to state and local requirements. The EPA has taken the position that in states which have taken over the NPDES program the EPA will not transfer to the state its authority to issue NPDES permits to federal facilities. This was upheld in a recent Supreme Court case. For nonpoint sources the situation is somewhat less clear. There is no provision in the Act for direct federal regulation of nonpoint sources. There is outstanding Executive Order No. 11752, which states that federal facilities must conform to federal, state, interstate and local substantive standards but not with state and local administrative procedures. This Executive Order also states that federal facilities must conform to federal, state, interstate and local water quality standards and effluent limitations respecting the discharge or runoff of pollutants adopted under the Act. This may imply that federal facilities do not have to follow the nonpoint methods and procedures prescribed under section 208 plans as long as applicable water quality standards are met. If federal facilities had to comply with methods and procedures specified in 208 plans, this could have wide-ranging implications because of the very broad powers potentially exercised by 208 agencies. Serious problems could arise if, for instance, states tried to improve land use controls on federal lands.

One final point to mention is that an owner of land may be responsible for activities carried on by previous owners. This could be the case, for instance, where there was runoff from abandoned mines worked by previous owners. A manager of lands cannot look only at his own activities in determining whether he is in compliance with applicable requirements under the Act.

THE CLEAN AIR ACT AMENDMENTS OF 1970
IMPLICATIONS FOR WILDLANDS MANAGEMENT

REMARKS BY
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Legal Aspects of Wildlands Management

I. Introduction: Development of a Federal Role in the Control of Air Pollution

Current federal efforts to attain and maintain nationwide clean air quality may be traced back more than a century to 1872 when, in the interest of conservation, Yellowstone National Park was established. Until the 1950's the setting aside of parks and other such lands was the only means of preserving air quality, save for occasional instances where individuals attempted to utilize the unwieldy mechanisms of the common law or equity to abate acute instances of air pollution as "public nuisances." In the 1950's 1/ and 60's, however, the federal government expressed a direct interest in air quality by means of modest grants and technical assistance to state and local air control agencies. The states were, in successive federal laws, 2/ repeatedly vested with

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1/ Air Pollution Control, Research & Technical Assistance Act, 69 Stat. 322 (1955).

2/ See, for example, the Clean Air Act of 1963, 77 Stat. 392, and the Clean Air Act of 1965, 79 Stat. 992.

primary responsibility for the control of air pollution, culminating in the Air Quality Act of 1967 (81 Stat. 485). That Act foreshadowed present day control efforts, with provision for the establishment of air quality standards, air quality control regions within the states and even a federal enforcement role. However, the effectiveness of the Act depended on federal-state cooperation, and more importantly, state initiatives, which simply did not materialize.

The Clean Air Act Amendments of 1970 ("The Act") 3/ articulated for the first time the concept of federal primacy in setting air quality standards and in the exercise of ultimate enforcement authority. Central to the Act was authority under §109 for the Administrator of the federal Environmental Protection Agency (EPA) to prescribe national primary and secondary ambient air quality standards (i.e. air quality objectives), the former for the protection of public health, the latter for the protection of public welfare (encompassing the protection of property and aesthetic values). In 1971 the EPA promulgated national standards for six pollutants: particulates, sulfur dioxide, carbon monoxide, hydro-carbons, nitrogen oxides and photochemical oxidants. 4/ [The latter four are termed "mobile" pollutants, related to automobile emissions.]

3/ 84 Stat. 1713, 42 U.S.C. §1857 et. seq.

4/ 40 C.F.R. Part 50, 36 Fed. Reg. 22384 (1971).

Although the drafters of the 1970 Amendments paid lip service to the concept of state responsibility for air pollution control, 5/ the role of the states under the Act is largely functionary. For example, under Section 110(c) of the Act, the federal government retained clear authority (or vested such authority in individual citizens) to force state compliance with statutory provisions designed to result in the attainment and maintenance of the ambient air quality standards. 6/ Primary among these provisions is the State Implementation Plan ("SIP")--the regulatory mechanism which each state is required to establish under Section 110 of the Act for the purpose of attaining and maintaining ambient air quality standards. SIPs must include, at a minimum, emission limitations for stationary sources, schedules and timetables for compliance with these limitations and any other necessary

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5/ Act §101(a)(3).

6/ Act §110(c) [Providing for the Administrator to prepare and publish implementation plans in lieu of state compliance--infra, page 5], §112 [federal enforcement--infra, page 7] and §304 [citizen enforcement--infra, page 9]. In this regard note Friends of the Earth v. Carey, ___ F.2d ___, 9 ERC 1641 (C.A. 2, 1977), which held a state-promulgated plan intended to attain and maintain primary and secondary ambient air standards through the application of transportation controls was binding and enforceable against state and local officials through a citizen suit brought under §304 of the Act. The Appeals Court, in ordering District Court enforcement of the plan, held that the citizen suit provision was constitutional for purposes of forcing compliance with the terms of the plan by the City of New York, despite the state and city's pleas of sovereignty under the 10th Amendment.

measures for compliance including land use and transportation controls and plans.

Under §116, the states retained the right to adopt and include in their SIPs emission limitations and schedules for compliance more (but not less) stringent than those required to meet ambient standards. Congress thus determined for the first time that economic considerations would be subservient to the necessity of achieving the ambient air quality standards, as has been underscored by a recent decision of the U.S. Supreme Court. 7/ Union Electric jolted American industry by holding that inasmuch as the Administrator may not consider such factors as economic or technological infeasibility in approving a state's implementation plan, such factors of infeasibility may not be raised on appeal of the Administrator's approval of the plan. The Court, however, did state that such factors may be relevant for the Administrator to consider in fashioning

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7/ Union Electric Co. v. EPA, ___ U.S. ___, 96 S. Ct. 2518, 49 L.Ed 2d 474 (1976). "As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject the States to strict minimum compliance requirements. These requirements are of a 'technology-forcing character,' Train v. NRDC, 421 U.S. at 91, 43 L.Ed 2d 731, 95 S. Ct. 1470, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." ___ U.S. ___, 96 S. Ct. at 2525, 49 L.Ed 2d at 483.

an appropriate compliance order. 8/ In this regard see also West Penn Power Co. v. Train, 9/ which applied Union Electric in upholding the Administrator's approval of Pennsylvania's SIP, while stating that "meaningful judicial consideration of its [West Penn's] feasibility contentions" could transpire by commencing "...an action seeking review of the compliance order which has now been issued." 10/

Other mandated state functions which must be included in the SIP are the monitoring of ambient air quality data and pre-construction review of proposed new sources. 11/ If a state fails to submit a SIP for the attainment and maintenance of primary standards (within three years 12/ of the approval of such plan, not considering certain provisions for limited extensions 13/) or secondary standards (within a "reasonable

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8/ Union Electric, supra at 49 L.Ed. 489, with reference to Act §113(a)(4) [federal enforcement, explained infra page 7].

9/ 538 F.2d 1020 (C.A. 3, 1976), cert. denied, 9 ERC 1765 (February 22, 1977).

10/ West Penn Power Co., supra, 538 F.2d at 1022, citing 5 U.S.C. §701 et seq. (the Administrative Procedures Act).

11/ Preconstruction review of new sources refers to the analysis undertaken by the State prior to commencement of construction of a "new" or "modified" stationary source of air pollution for the purpose of evaluating the air quality impact which would result from construction and operation of the source.

12/ §110(a)(2)(A)(i).

13/ Act §§110(e) [extending for two years the deadline for compliance in a given air quality control region] and (f) [providing for a one year extension of the compliance date for a given source or class of sources].

time" 14/), the Act requires the EPA Administrator to prepare and publish regulations establishing an adequate SIP for the state. 15/ Under the standards established in the Act, the deadline for attainment of the primary standards in each state, allowing for all extensions provided by the Act, is June 1, 1977. At the present time, many states have failed to attain and the EPA has failed to enforce the statutory provisions relating to compliance with the air quality standards. In light of the June 1, 1977 deadline, therefore, the provision in §304 of the Act for citizen suits to enforce compliance with the standards may be frequently utilized in coming months. 16/

The ambient standards are to be achieved within individual "Air Quality Control Regions," which were first authorized to be established by the states under the Air Quality Act of 1967. At the time of passage of the 1970 Act, little progress had been made by the states in establishing these regions. Now such regions, covering all areas of each state, have been created under §107, including interstate regions where appropriate.

14/ §110(a)(2)(A)(ii).

15/ §110(c).

16/ Discussion on enforcement, infra, pages 7-9. See discussion of Friends of the Earth v. Carey, supra, note 6, and see also Sierra Club v. EPA, 540 F.2d 1114 (C.A.D.C. 1976).

"New" sources were singled out under §111 of the Act for stringent control measures and are required to apply the "best system of emission reduction which...the Administrator determines has been adequately demonstrated." Significantly, in prescribing standards of performance for new sources the Administrator need not determine whether such "system" is economically or technologically feasible for particular sources, so long as it has been demonstrated. Thus, while standards may not be set on the basis of a "crystal ball inquiry," they need only be "achievable"; that is, standards which are more than purely theoretical or experimental but not necessarily "routinely achieved within the industry prior to its adoption." 17/

The seriousness of Congress' determination to force rapid improvement in the nation's air quality is exemplified by the the Senate Report on the 1970 Act, which offered large stationary sources (such as steel mills and steam electric generating plants) the option of meeting standards or being shut down. 18/ The Act's enforcement provisions (if not the enforcement activities undertaken pursuant to these provisions) reflect this determination, with authority for EPA to issue compliance

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17/ Essex Chemical Corporation v. Ruckelshaus, 486 F.2d 427, 433-434 (C.A.D.C. 1973); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 390-391 (C.A. D.C. 1973).

18/ Report of the Senate Public Works Committee, 91-1196, p. 3, and Legislative History of the Clean Air Act Amendments of 1970 (Senate Committee Print 1974, Vol. 1, p. 403). See also, Union Electric Co. v. EPA and West Penn Power Co. v. Train, supra at text accompanying notes 7-10.

orders, or bring civil actions under §113(a). 19/ Criminal sanctions are provided under §113(c) for knowing violations of applicable implementation plan requirements. There are also the required, if unspecified enforcement provisions the state's must establish as part of their implementation plans, pursuant to §110(a)(2)(F).

Despite the availability of various enforcement tools, it is nonetheless clear--as evidenced by the exceedingly slow rate of compliance by industry 20/--that additional incentives as well as compliance mechanisms are needed. The one incentive industry is readily responsive to--but which is not contained in the present Act--is the threat of monetary penalties, one form of which was incorporated in the Conference bill on the Clean Air Act Amendments of 1976. 21/

19/ During the 9-month period from January 1976 through September 1976, EPA initiated 719 enforcement actions pursuant to Section 113 of the Act. Notice of violations were issued in 433 cases, while administrative and consent orders were issued in 270 cases. Only 16 cases, however, were referred by EPA to the Department of Justice for civil or criminal enforcement proceedings. See EPA Enforcement: A Progress Report (U.S. EPA January 1977) pages 6-9.

20/ As of September 30, 1976, EPA reported that 92% of all "Class A sources" (those emitting 100 tons or more per year of a pollutant) have achieved compliance with applicable emission limitations. However, the 92% compliance figure is somewhat misleading since only 85% of Class A sources categorized by EPA as "major emitters" have achieved compliance with applicable emission limitations. (See EPA Enforcement: A Progress Report (U.S. EPA, January 1977) pages 6-7.

21/ Conference Report to accompany S.3219, House Report 94-1742. Title I, Section III of the Conference bill would have established provision for Delayed Compliance Orders, which would have amended the 1970 Act to require that a source pay a "delayed compliance penalty" each month during

[Footnote continued]

The Conference bill has been resubmitted in the 95th Congress for renewed Congressional consideration. 22/

A further factor worth noting is the largely "private" way in which EPA has pursued its enforcement activities. Although the day of government-in-the-sunshine has arrived, EPA has yet to promulgate its regulations for public enforcement proceedings, despite the fact that such regulations were proposed in April of 1975. 23/ Thus, the vast majority of EPA's negotiations and related enforcement activities with non-complying industries presently are conducted without the direct knowledge of, or more importantly, the input from those elements of the public with a personal stake in the public health and welfare. 24/ The citizen suit provisions of §304, of course, could prove to be a potent vehicle for assuming EPA's enforcement of SIP's and the attainment of the ambient air standards those plans are meant to achieve. The viability of such suits as a means of keeping honest both the EPA and the industries

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[Footnote continued]
which a state of noncompliance exists, in an amount equal to the capital costs of compliance and debt service over a normal amortization period, operation and maintenance costs foregone as a result of noncompliance, and the economic value which a delay in compliance would have for the source owner or operator.

22/ S. 253, introduced by Senator Muskie. Further discussion of the proposed amendments follows on page 15.

23/ 40 F.R. 14876, April 2, 1975, to amend 40 C.F.R. Part 65--Enforcement Authority.

24/ The "public welfare" is a term of law related to the secondary ambient air standards required to be achieved under the Act. See discussion of item 2 infra, page 11.

the Agency is required to regulate is demonstrated by the recent successes of such suits in federal courts. 25/

II. Wildlands Management: Impact of Policies and Provisions of the Clean Air Act Amendments of 1970

From the foregoing, it is clear that the Clean Air Act Amendments of 1970 provide the statutory basis for the development of comprehensive state and federal air pollution control programs. Those provisions or policies of the Act which are of particular concern for purposes of "wildlands management" 26/ include the following, in order of ascending importance:

(1) Nonattainment of ambient standards within an air quality control region, or part thereof. Deadlines for achieving compliance with the primary ambient air quality standards will not be met in some regions. Thus, the question arises not only over how best to achieve the attainment of applicable standards (short of the wholesale closing of major stationary sources), but also how best to regulate and control

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25/ See Friends of the Earth v. Carey and Sierra Club v. EPA, supra note 16. Also note Friends of the Earth v. Potomac Electric Power Co., 419 F. Supp. 528 (D.D.C. 1976), where the federal District Court upheld the use of a citizen suit as a means of enforcing a "zero-visibility emission regulation" of the District of Columbia which had been part of a SIP earlier approved by EPA. The Court, in issuing a declaratory judgment that PEPCO's facility was in violation of D.C. Health Regulations (which constitute part of the D.C. SIP approved by EPA), applied Union Electric (supra note 7) in refusing to consider PEPCO's pleas of technological and economic infeasibility.

26/ The term "wildlands management" encompasses not only wilderness areas and parklands, but also private lands dedicated to silvicultural activities.

construction of new sources in such regions. Each SIP, as earlier mentioned, must provide for preconstruction review. Current law requires that new sources not be built where they will prevent the attainment or maintenance of ambient standards within any air quality control region [§110(a)(4)]. In December 1976 EPA announced new rules 27/ governing growth in so-called "non-attainment areas", which would allow industrial growth. In effect, existing sources would be required to offset pollution of new sources (which must in any case apply best available technology) with greater reductions than otherwise required under an applicable SIP for existing sources. The implications of this policy for wildlands are two-fold. First, expansion in non-attainment areas can be carried out, thus relieving to an extent the incentive to build in "clean air" regions, where the effect on wildlands would be more pronounced (see discussion of significant deterioration, infra, page 13). Second, in order to build a new or modified source the source owner or operator's emissions from all sources would have to be reduced overall, resulting in further progress in the attainment of ambient air standards which will have a beneficial impact on adjacent wildland areas.

(2) The attainment and maintenance of secondary ambient air quality standards. These are of special concern for

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27/ 41 Federal Register 55524, December 21, 1976. The Agency also issued notice of a proposed rulemaking to amend the Agency's regulations for preconstruction review of new or modified sources, which are presently codified in 40 C.F.R. §51.18 (41 Federal Register 55558, December 21, 1976).

those areas of the country where the primary human health standards have been achieved, but for which secondary standards relating to "public welfare" have not been achieved. Of relevance to wildlands management are the following "effects" to be controlled by the secondary standards: effects on soils, water, crops, vegetation, animals, wildlife, weather, visibility and climate [§302(h)]. At the present time, however, attainment of the primary standards has preoccupied EPA and the states. Furthermore, there have been reports from New York and New Hampshire that even in areas with air quality superior to that required by the secondary standards, allowable sulfur dioxide levels have produced acid rainfall deleterious to vegetation. 28/ Thus, the establishment of proper secondary standards and their attainment remains a concern of diverse elements of society, from those engaged in commercial forestry to those concerned with wilderness preservation.

(3) Continuous v. Intermittent Control Strategies. When the Act was initially implemented by EPA, it appeared that "dilution could be a solution to pollution." Specifically, the use of intermittent control strategies ("ICS"--shutting down or cutting back the operation of polluting facilities as required by changes in ambient air quality) and tall stacks (to disperse emissions) were considered valid means of attaining and maintaining ambient standards. Such is largely not the case today, as Federal Courts of Appeals have

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28/ Federal Environmental Law (1974), edited by Erica L. Dolgin and Thomas G. P. Gilbert for the Environmental Law Institute, page 1084.

limited the use of non-continuous emission control strategies to instances where 1--ambient standards would be attained anyway, or where 2--emission limitations necessary to attain ambient standards are unachievable or infeasible and the state has adopted regulations requiring the maximum degree of emission limitations achievable. 29/ This trend away from ICS and tall stack strategies is significant for wildland and rural areas, as such practices necessarily result in the "packing" of emissions to the maximum legal extent, and in spreading them to as wide a geographic area as possible.

(4) Prevention of Significant Deterioration. This policy is derived from §101(b) of the Act, which in setting forth the purposes of the 1970 Amendments, calls for the protection and enhancement of the nation's air quality. For obvious reasons, the prevention of significant deterioration presents EPA with a mirror-image task when compared to that of expansion in non-attainment areas. Here, construction in areas of pristine air quality is at issue.

Pursuant to court order (upheld in 1973 by an equally divided Supreme Court 30/), EPA promulgated final regulations 31/ for the prevention of significant deterioration.

29/ NRDC v. EPA, 489 F.2d 390, 410 (C.A. 5, 1974). See also Big Rivers Electric Corp. v. EPA, 523 F.2d 16 (C.A. 6, 1975) and Kennecott Copper Corp. v. EPA, 526 F.2d 1149 (C.A. 9, 1975).

30/ Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C. 1972), aff'd per curian, 4 ERL 1815 (C.A.D.C. 1972), aff'd by an equally divided Court, sub nom. Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed 2d 140 (1973).

31/ Published at 39 Federal Register 42510, December 5, 1974.

These superseded earlier regulations which had only required the states to prevent ambient air pollution levels from exceeding secondary standards. Under EPA's regulations, those "areas" (portions of Air Quality Control Regions "AQCR") which have air quality superior to that required by the ambient air standards are to be classified as eligible for one of three allowable increments above the levels of ambient particulate matter and sulfur dioxide that existed as of January 1, 1975. All areas were initially designated Class II (where the deterioration "normally accompanying well-controlled growth would be considered insignificant"), although each "area" was ultimately to determine which designation would prevent significant deterioration of its air in light of its own environmental, social and economic requirements. 32/ Redesignation to Class I or III could be initiated by the State, Federal Land Manager, or responsible Indian body. 33/ At the present time, the Federal Land Manager--the Secretary of the Interior--is in the process of assessing lands which are appropriate for Class I designation. 34/

32/ Class I was intended for those areas where any increase in pollutants would be significant, while Class III would denote those areas where the addition of pollutants up to the limit allowed by the ambient secondary standards would be of no significance.

33/ Federal lands may only be redesignated to a stricter, not more lenient, classification.

34/ See exchange of letters between EPA Administrator Train (letter of October 26, 1976, to Kleppe) and Secretary of the Interior Kleppe (letter of November 30, 1976 to Train. Kleppe in his letter refers to the "uncertainties occasioned by...the proposed legislation "as having

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Clearly, any discussion of development in rural or wilderness areas--be it industrial or otherwise--must come to grips with EPA's significant deterioration policy. This policy has recently been upheld in the U.S. Court of Appeals from attack both by those opposing the regulations as being too strict and by those opposing the regulations as being too weak. 35/ The Court first answered the agruments of the industrial petitioners by upholding the basic validity of the regulations where they prohibit the deterioration of air cleaner than that allowed in the ambient standards. 36/ It then upheld EPA's provision for Classes II and III against attack by the Sierra Club, in holding that the "significance" of air quality deterioration may be determined by balancing environmental considerations against "the competing demands of economic growth, population expansion, and development of alternative sources of energy." 37/

III. Overview: Legislative Proposals Which May Affect Wild-Lands Management

The 95th Congress again has under consideration (as it has for the past two years) several serious problems posed

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34/ (Continued from previous page)

clouded the application of the regulations for the prevention of significant deterioration. Congressional proposals are discussed infra.

35/ Sierra Club v. EPA, 540 F.2d 1114 (C.A.D.C. 1976).

36/ Ibid., at 1124.

37/ Ibid., at 1132.

by the Act's implementation. The following analysis will refer primarily to the Conference bill which was filibustered to death in the last moments of the 94th Congress, 38/ and H.R. 4151, which is the primary vehicle for current House consideration.

Nonattainment. By its terms, the present Act bars the construction or modification of new sources which would "prevent the attainment or maintenance within any air quality control region...of a national ambient air quality primary or secondary standard." (emphasis added) 39/ One implication of this language is that new sources may be constructed in a "nonattaining" AQCR (a portion of which has not achieved compliance), if the construction occurs in an attaining portion and the emissions of such new construction will not "prevent" the attainment or maintenance of ambient standards in any portion of the AQCR. Viewed from this standpoint, it is clear that §110 (a)(4) does not require a total ban on new construction in nonattaining portions of AQCR's.

The House version of the Clean Air Act Amendments of 1976 40/ initially contained in its nonattainment provision 41/

38/ Conference Report No. 94-1742, to accompany S.3219, 94th Congress, 2nd Session, hereinafter "Conference bill." The Conference bill has been re-introduced by Senator Muskie in the 95th Congress, as S.253.

39/ Act §110(a)(4).

40/ H.R. 10448, [Report No. 94-1175], 94th Congress, 2nd Session.

41/ Supra, §115(a).

an inaccurate restatement of current law, to the effect that new construction in any AQCR a portion of which is in a state of non-attainment is prohibited, regardless of that new source's effect (or non-effect) on the non-complying portion. The Senate version, 42/ as adopted in the Conference version, 43/ did not alter the current Act's allowance of new construction which does not prevent the attainment or maintenance of ambient air standards, but did establish an allowance for new construction in non-attaining "areas" 44/ much stricter than that contemplated by EPA. 45/ The Conference bill would have allowed such new construction only at an existing site or facility, and then only under rigid compliance requirements for the owner's new and existing sources. 46/ As noted earlier, the Conference bill died at

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42/ S. 3219, Section 11 [Report No. 94-117], 94th Congress, 2nd Session.

43/ Supra, note 37.

44/ Areas in which, it may be inferred, any additional emission must necessarily hinder the attainment of ambient standards.

45/ Current EPA non-attainment policy is discussed infra.

46/ The Conference bill would require (1) that best available control technology be utilized by the new source, (2) that all of the owner's existing sources within the same AQCR be in compliance with the SIP, (3) that total cumulative emissions at the proposed site (from the existing and new sources) will at no time increase, and (4) that total allowable emissions at the site "will

(Continued on next page)

the close of the 94th Congress, disagreement over its non-attainment provision being a major contributing cause. The Conference bill, including the nonattainment provision, has been re-introduced in the Senate as S.253. The House, however, is currently focusing its consideration on Congressman Rogers' Bill, H.R. 4151, which addresses the nonattainment issue only to the extent of authorizing a six month study of current non-attainment policies and alternative proposals. 47/

By way of contrast to the evident bewilderment of Congress, (as shown by its erratic appreciation of the need for a reasonable policy for providing growth in nonattainment areas), are the rules EPA announced late in 1976 for development in non-attainment areas. As explained supra at pages 10-11, EPA's scheme adopts a system of "offsets" which, by allowing the construction of new sources using best available control technology, also stimulates industry to achieve greater emission reductions at existing sources through enhanced emission control strategies than otherwise required under applicable SIP's.

Intermittent Controls and Tall Stacks. The Conference bill adopted the House's firmly-held stance that emission

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46/ (Continued from previous page)

> be sufficiently less than the total allowable emissions under the original implementation plan so as to represent reasonable further progress toward attainment of the ambient air quality standard, taking into account progress already made toward attainment of that standard."

47/ H.R. 4151, Section 117.

limitations, standards, and standards of performance require continuous, not intermittent, emission controls. 48/ The issue of tall stacks is specifically addressed, as the dispersal effects of any stack height greater than 2 1/2 times the height of a source may not (for all practical purposes) be credited in terms of assessing compliance with ambient standards. As a result, the overall ambient emission concentration of restricted pollutants such as sulfur compounds will be somewhat reduced in "clean air" regions, which would otherwise have received emissions spread far and wide by ICS and tall stacks. The significance of this decision by Congress is underlined by the deleterious effects visited upon trees and vegetation even where ambient air is maintained at or above levels required by the secondary standards. 49/

Prevention of Significant Deterioration. This extremely complex subject has been the object of differing approaches in the House and Senate amendment proposals, although one fact is clear. Congress is determined to reassert the underlying policy of allowing "no significant deterioration" embodied in the current Act, 50/ and establish clear guidelines for

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48/ Conference bill, §301.

49/ Discussion of secondary standards, supra pages 11-12.

50/ See discussion, supra, pages 13-15 regarding EPA's policy of significant deterioration, and the upholding of that policy in Sierra Club v. EPA.

its application. The Conference bill 51/ would establish for all areas currently surpassing national ambient standards three classes of increments 52/ for growth of emissions levels for specified pollutants. 53/ Of central concern, of course, is what class particular lands are initially assigned to, and the means by which areas can be switched to a stricter (or more lenient) class.

All international parks, wilderness areas and national memorials of greater than 5000 acres, and all national parks of greater than 6000 acres, are initially classified as Class I areas. All other areas are classified initially as Class II, while the State retains the right to reclassify any such areas as Class I. The Federal Land Manager may recommend to Congress that certain federal lands be reclassified Class I from Class II, upon consultation with the States. Generally speaking, a State may reclassify Class II areas as Class III upon public notice and hearing, although appropriate federal agencies may submit analyses

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51/ Supra, note 21.

52/ The Class I increment would provide for practically no increase in emissions; Class II would allow an increase in emissions up to approximately 25% of the national secondary ambient standards; and Class III would allow an increase of up to approximately 50% of the national secondary standards.

53/ For particulates and sulfur immediately, and for nitrogen oxides, hydrocarbons, carbon monoxide and oxidants within two years.

and recommendations concerning the proposed reclassification.

The focus of debate has concerned the problem of "intrusion" of emissions from sources in, for instance, a Class III area into a Class I area. An initial industry concern was that for many miles around a Class I area new construction would be effectively prohibited. This however is not the case, as new sources in clean air areas would have to comply with "best available control technology," resulting in lower emissions than required by the otherwise-applicable new source performance standards of §111. The result is that the impact of new sources will be much more limited, allowing, for example, the placement of such sources much closer to Class I areas. Thus, fears of large-scale federal land-use planning are clearly overblown in light of the Conference bill, although an element of land-use planning is nonetheless evident in the significant deterioration provisions.

With respect to federal land-use authority, there would be provision for the Federal Land Manager charged with responsibility for Class I areas to monitor new source construction in adjacent areas which could affect emissions levels within Class I areas. A permit 54/ may not issue where the Federal Land Manager, the Administrator, or Governor of an adjacent state files notice that the construction will cause an

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54/ As required for new construction in areas designated Class I, II or III, pursuant to Conference bill Section 123, adding Act §160(e).

adverse impact on Class I air quality, unless the proposed source's owner or operator demonstrates the emissions will not cause or contribute to concentrations exceeding the maximum increase allowed in the Class I area. Moreover, whenever the Federal Land Manager demonstrates to the State that the proposed source would have an adverse impact on the air quality-related "values" of the Class I area, regardless of whether the source's emissions would result in concentrations exceeding the allowable Class I increment, a permit may not be issued. 55/

Unquestionably, the policy adopted by Congress with regard to the issue of no significant deterioration will have a most telling impact on wildlands. The intent of both Houses is essentially to firmly endorse the policy as promulgated by EPA, although there will most likely be a shift to the States from the federal government of the authority to make basic decisions with respect to significant deterioration. The searching analysis by Congress of this subject marks the climax of this nation's efforts to come to grips with the problem of achieving clean air, for the policy of allowing no significant deterioration--more so than any other articulated in the Clean Air Act--requires a committment to decide how the future will be planned, and not how the mistakes of the past will be corrected.

55/ Conference bill Section 123, adding Act §160(e)(1)(C)

HISTORY - FIFRA-EPA
WILLIAM LAWRENCE

First Federal Pesticide Regulations 1910

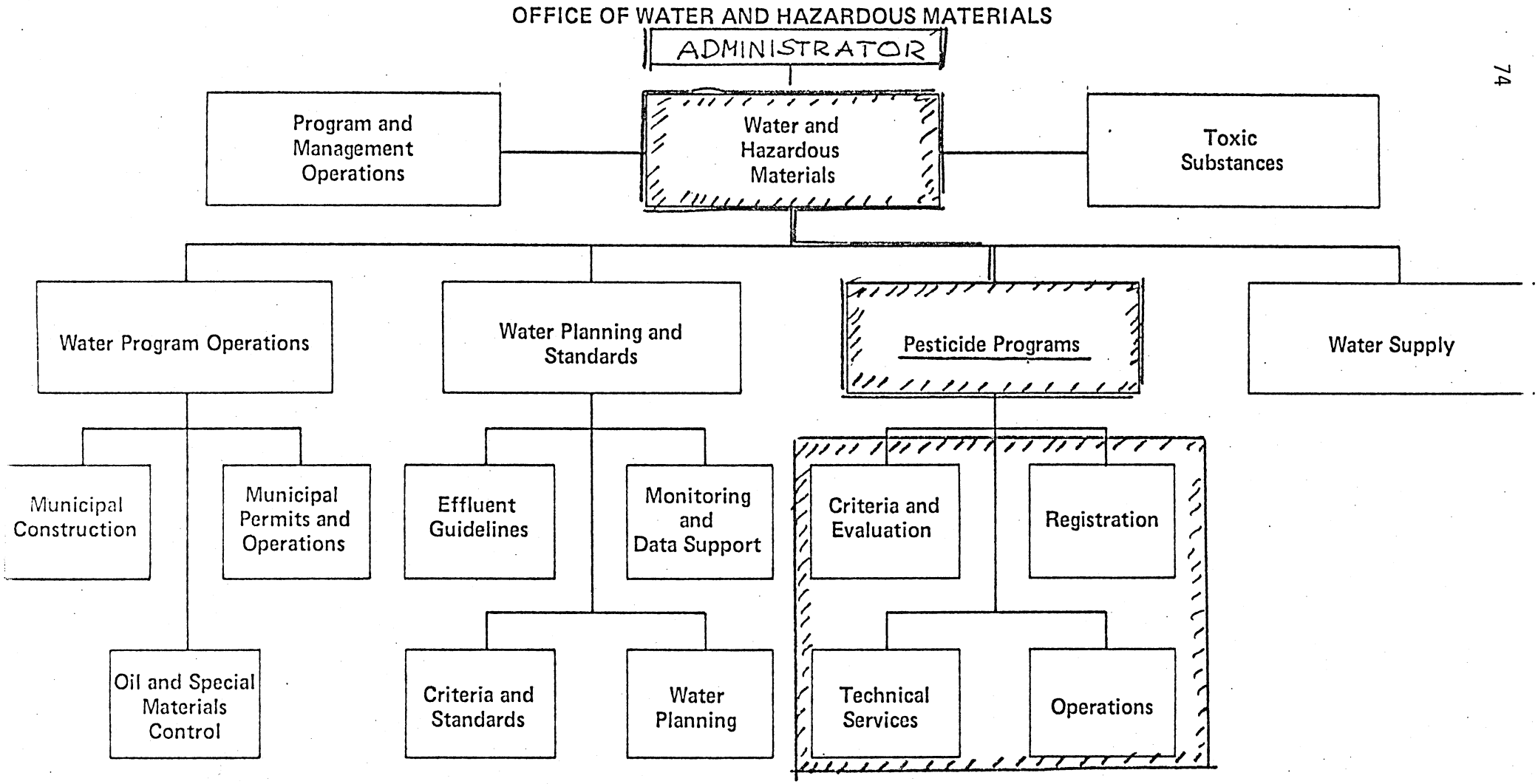
First Federal Insecticide, Fungicide,
and Rodenticide Act
= FIFRA . . . . . 25 June 1947

Environmental Protection Agency created
by executive order by R.M. Nixon
= EPA 1970

First Amended FIFRA to give EPA teeth, called
Federal Environmental Pesticide Control Act
= FEPCA . . . . . 25 June 1972

Second Amended FIFRA - more teeth . . . . . 21 October 1972

Third - and presently: last Amended FIFRA . . . 28 November 1975
(Public Law 94-140)


OFFICE OF WATER AND HAZARDOUS MATERIALS
ADMINISTRATOR
Program and Management Operations
Water and Hazardous Materials
Toxic Substances
Water Program Operations
Water Planning and Standards
Pesticide Programs
Water Supply
Municipal Construction
Municipal Permits and Operations
Effluent Guidelines
Monitoring and Data Support
Criteria and Evaluation
Registration
Oil and Special Materials Control
Criteria and Standards
Water Planning
Technical Services
Operations

FIFRA ("THE ACT") HAS 27 SECTIONS. EACH SECTION IS IMPLEMENTED BY ISSUANCE OF INTERIM OR, EVENTUALLY, FINAL REGULATIONS ISSUED BY EPA.

SECTIONS AFFECTING FORESTRY OPERATIONS MOST DIRECTLY:

#	SUBJECT	COMMENTS
3	REGISTRATION, RE-REGISTRATION, CLASSIFICATION	FINAL REGULATIONS ISSUED 3 JULY 1975. INTERIM GUIDELINES FOR REGISTRATION ISSUED 25 JUNE 1975. SECTION 3 C(1)(D)(COMPENSATION FOR SHARING OF DATA) MAJOR CAUSE FOR PRESENT BOTTLENECK. (SEE ALSO SEC. 10.)

BECAUSE OF THE DELANEY CLAUSE, PESTICIDES FOUND TO CAUSE TUMORS (MALIGNANT OR BENIGN) IN TEST ANIMALS WILL NOT BE REGISTERED OR REREGISTERED.

4	USE OF RESTRICTED USE PESTICIDES - CERTIFIED APPLICATORS	CERTIFICATION SUPPOSED TO BE NEEDED AFTER 21 OCT. '77, BUT EPA HAS NOT YET CLASSIFIED PESTICIDES. (SEE ALSO: MOVES AFOOT.)

#	Subject	Comments
5	Experimental Use Permits (EUP)	Restricts experimentation with new chemicals or new uses to less than 10 acres without permit; EUP required for work on more than 10 A.
10	Protection of Trade Secrets	This section used by chem. industry as subterfuge from 3 C(1)(D). Squabble over these two is holding up registrations and progress with reregistration. No new chemicals or new uses coming forth!
12	Unlawful Acts	Because of (A)(2)(G) the label is now a binding legal document - no minor uses are legal unless the label is amended; once amended, damage resulting from labeled use is liability of manufacturer; manufacturer shuns risks disproportionate to revenue from minor use.

#	Subject	Comments
18	Exemption of Federal Agencies	Provides for emergency authorization for State & Federal agencies to use the best available pesticide, whether banned otherwise or not.
19	Disposal and Transportation	Requirements of Section often impossible to carry out. May conflict with RCRA (Resource Conservation & Recovery Act = Prevention of Land Pollution).
24	Authority of States	Sec. 24 C - State registration for special local needs is one solution to minor use problem.

STATE FOREST PRACTICES ARE TIED TO FIFRA THROUGH PUBLIC LAW 92-500, WHICH HAS PROVISIONS RE FOREST CHEMICALS USE AND ITS IMPACT ON WATER QUALITY.

PESTICIDE ENFORCEMENT POLICY STATEMENTS - PEPS

ORIGINAL INTENT BY EPA'S ENFORCEMENT BRANCH TO EASE SOME OF THE MORE RESTRICTIVE REGULATIONS BY THE REGISTRATION BRANCH.

MAY BE ILLEGAL.

OF THE 7 ISSUED TO-DATE, MOST ARE USELESS FOR ALL PRACTICAL PURPOSES; SOME, E.G. CAN BE IMPLEMENTED ONLY UPON RECOMMENDATIONS BY A RECOGNIZED AUTHORITY - GETTING SUCH AN EXPERT IS VERY DIFFICULT.

REBUTTABLE PRESUMPTION AGAINST REGISTRATION - RPAR

AN EPA-INSTIGATED REVIEW PROCESS FOR PESTICIDES DEEMED - BY EPA - TO BE ESPECIALLY HAZARDOUS.

A TOTAL REVIEW OF ALL DATA ON THE PESTICIDE - SUPPOSED TO BE NONPOLITICAL PROCESS - DOUBTFUL!!

Impacts of FIFRA

Section 3: Registration, Reregistration, Classification.

1. By law, EPA must meet 21 October 1977 deadline for classifying and reregistering about 40 000 pesticide formulations.

2. By that same deadline, or before, EPA also must issue final guidelines for registration.

3. EPA will not be able to meet this deadline. Thus, unless law (date) is changed, no pesticide that has not been reregistered and classified can be sold after 21 Oct. '77!

4. One major stumbling block is Section 3 C(1)(D) which deals with compensation by "me too" applicants for data generated by the original manufacturer or registrant. Law suits are pending, and issue must be settled before progress can be made.

   Manufacturers using Sec. 10, Trade Secrets, to keep EPA from making data public; EPA doesn't like it.

5. Because of all of the above, no new products get registered, either.

6. IMPLEMENTATION OF SECTION 3 TIES REGISTRATION TO THE DELANEY ACT WHICH BANS ANY PESTICIDE WHICH, IN TESTS WITH ANIMALS, WILL CAUSE TUMORS, BENIGN OR MALIGNANT, REGARDLESS OF THE CONCENTRATION AT WHICH TUMORS MAY OCCUR.

(FOODS AND DRUGS - BUT NOT TOBACCO WHICH IS NEITHER! - FALL UNDER THE SAME ACT - HENCE THE BAN ON SACCHARIN, EVEN THOUGH ONE WOULD HAVE TO DRINK 1 200 BOTTLES OF COKE A DAY EVERY DAY FOR (3 MONTHS OR) 2 YEARS TO INGEST THE AMOUNT OF SACCHARIN WHICH CAUSED CANCER IN MICE!)

CONTINUED STUDIES SHOW AN EVER INCREASING NUMBER OF CHEMICALS - AND PESTICIDES - TO CAUSE TUMORS IN TEST ANIMALS, USUALLY AT EXTREME CONCENTRATIONS, HENCE THESE PESTICIDES ARE BANNED, THEIR USE SUSPENDED OR CANCELLED.

SECTION 4: PESTICIDE APPLICATOR CERTIFICATION

1. NOW RECOGNIZED AS A DESIRABLE REGULATION.

2. AFTER 21 OCTOBER 1977, EPA MUST HAVE ALL PESTICIDES CLASSIFIED AS TO BEING FOR GENERAL USE OR FOR RESTRICTED USE.

ONLY CERTIFIED APPLICATORS CAN HANDLE THE LATTER.

3. By now, 46 of the 50 States have been certified (fully or interim) by EPA to train and certify applicators (and to issue State 24 C permits). These States are worried that they wasted time, money and effort if EPA does not come through with classification.

Section 5: Experimental Use Permits (EUP's).

1. Experimentation with new compounds or for new uses of registered compounds limited to a maximum of 10 acres total per compound.

2. Once these experiments have established usefulness of product for the purpose, basic toxicity data must be generated and all further experiments require an EUP.

3. States cannot issue EUP's, are trying to obtain that right.

4. One requirement for an EUP is that applicant must not derive economic benefit from experiment. (Don't disguise operational use as an experiment!)

5. The experiment under an EUP is expected to provide data leading to full registration under Sec. 3.

Section 10: Protection of Trade Secrets.

1. Until Sec. 3 C(1)(D) - data compensation - is settled, industry is using this Section to protect its property, i.e. test data generated in support of registration.

2. EPA disapproves of this, so hassle further delays re-registration and classification.

3. There is a legitimate question whether Sec. 10 is adequate to really protect trade secrets. - Who prevents former EPA employees from "spilling the beans"?

Section 12: Unlawful Acts. Minor Use / Liability

1. FIFRA, through Sec. 12 (A)(2)(G) has converted the product label from a guideline into a binding legal document; the rule reads:

   "It shall be <u>unlawful</u> for any person to <u>use any registered pesticide</u> in a manner <u>inconsistent with its labelling</u>."

2. EPA is interpreting "inconsistent with its labelling" in the narrowest sense.

3. MANUFACTURERS HESITATE TO CONDUCT EXTENSIVE EFFICACY TESTS NEEDED TO REGISTER (AND ADD TO THE LABEL) MINOR USES, INCLUDING THOSE IN FORESTRY, OF THEIR PRODUCTS.

4. ONCE A USE IS STATED ON THE LABEL, AND IF THE PRODUCT, WHEN USED IN ACCORDANCE WITH LABEL INSTRUCTIONS CAUSES DAMAGE, THE MANUFACTURER IS LIABLE FOR THE DAMAGE.

5. MINOR USE, IN FORESTRY, MEANS SMALL REVENUE AT A POTENTIALLY HIGH RISK FOR LARGE LIABILITY SO THE CHEMICAL INDUSTRY IS NOT VERY HELPFUL IN THE FOREST CHEMICAL AREA.

SECTION 18: EXEMPTION OF FEDERAL (AND STATE) AGENCIES.

1. EPA, UPON REQUEST FROM (AND CONSULTING WITH, SUPPOSEDLY) STATE SEC'Y OF AGRICULTURE AND GOVERNOR MAY WAIVE ALL FIFRA REQUIREMENTS AND ISSUE EMERGENCY PERMITS TO USE MOST ANY CHEMICAL - INCLUDING, E.G. DDT WHICH WAS BANNED OTHERWISE LONG AGO.

2. CONGRESS IS BEGINNING TO WORRY ABOUT THIS, WANTS MORE SAFEGUARDS THAN ARE NOW WRITTEN INTO THESE PERMITS.

   DDT VS. THE TUSSOCK MOTH IN THE PNW - AN EXAMPLE OF PESTICIDE USE UNDER THIS PROVISION.

Section 19: Disposal and Transportation.

1. Present regulations often cannot be met, or are impractical or ineffective.

2. Many cities, counties, States, and even EPA Regions have not yet designated official disposal sites, thus user left to his own devices.

3. The recently enacted

   RCRA

   Resource Conservation and Recovery Act,

   a euphemism for land pollution control,

   may bring about drastic changes in pesticide disposal regulations.

Section 24: Authority of States.

1. Section 24 C gives States the right to issue State registration "for special local needs" IF the product is EPA-registered for other uses, and IF the proposed new use is at, or below, the EPA-registered level of use of the product.

2. The registrant - the manufacturer or a State or Federal agency (e.g. U.S. Forest Service as "second party" or a user as third party) must supply efficacy data and a supplemental label.

Section 24 C is one solution to the minor use problem

but in most states the manufacturer must approve or may disapprove the application if made by a second or third party.

Some States will issue a label - the right to use the product - to a specific applicant/user. This diminishes the liability of the manufacturer.

The Kennedy Committee Report

In essence this Congressional committee rapped EPA's knuckles for being soft on registrations, kow-towing to pesticide manufacturers, not having carried out the intent of the law, etc.

Congressional oversight committees do not necessarily concur with that Report.

What Changes are in the Wind?

1. Changes in Sec. 10 (Trade Secrets) and 3 C(1)(D) (data compensation) to solve the problem so EPA can get on with the business of reregistrations.

2. Separating the classification (Section 3) from registration - reregistration.

A PRELIMINARY LIST HAS BEEN PREPARED, COULD BE ACCEPTED ANY TIME.

3. EXTENDING THE DEADLINE FOR EPA'S REREGISTRATION COMPLETION - 10 YEARS SEEMS A REALISTIC GOAL (1987!). or 15 years ?

4. AN ALTERNATIVE: REGISTER (AND REREGISTER) ONLY THE ACTIVE INGREDIENT, NOT ALL ITS FORMULATIONS. THERE ARE ABOUT 1 500 ACTIVE INGREDIENTS VS. ABOUT 40 000 FORMULATIONS!

5. OTHER ALTERNATIVES: DEVELOP STANDARDS AND REGISTER ALL PRODUCTS THAT COMPLY.

6. RE MINOR USE: (A) CREATE "LIABILITY INSURANCE", E.G. THROUGH A TAX ON SALES; (B) FORM A QUASI-PUBLIC CORPORATION WITH LIABILITY TO REGISTER MINOR USES (BECOME THE LIABLE REGISTRANT); (C) MODIFY SEC. 12 A(2)(G) BY DIFFERENT INTERPRETATION OF "USE INCONSISTENT WITH" THE LABEL.

7. CONGRESS MAY PUT SOME RESTRICTIONS ON EMERGENCY PERMITS, SECTION 18, "TO SAFEGUARD THE HEALTH OF THE PEOPLE".

8. OTHER FAR-OUT AND UNLIKELY TO SUCCEED EFFORTS ARE: RESTRICT EPA FUNDING AND MAKE EPA INOPERABLE;

- TRANSFER PESTICIDE REGISTRATION BACK TO USDA AND/OR FDA (FOOD & DRUG ADMINISTRATION);

- OVERHAUL FIFRA (THAT MAY COME ABOUT IF THE NEW TSCA (OR TOSCA = TOXIC SUBSTANCES CONTROL ACT) TURNS OUT TO BE "SOFTER" THAN FIFRA;

- REVOKE THE DELANEY ACT. (CHANCES QUESTIONABLE.)

SUMMARY REMARKS

Henry Garson

I was at EPA when a lot of the environmental laws that we are talking about were enacted. Let me rise to the partial defense of that agency. EPA was given by Congress a lot of missions in a very short time. It was asked to prepare regulations which would stand the test of court and time, try to clean up the air and the water, control pesticide application, and do a lot of similar things. Environmentalists expected great things of the agency and industry was fearful that all hell was going to break loose.

What I'd like to do is I'd like to read two letters which were reprinted in the Natural Resources Lawyer in 1976 from an imaginary nine-year-old boy. One letter is to the Administrator of the Environmental Protection Agency, and one letter is to Friendly Industry who was despoiling his environment. The first letter says:

Dear Mr. Administrator:

I have two pet white rats; they are friendly and kind. My uncle shoots rats on his farm and some people set poison traps for rats in their homes or their stores. When is EPA going to protect rats from destruction?

Signed,

Martin Bearer

Dear Martin,

As chief Deputy to the Assistant Administrator of the Environmental Protection Agency, I have been asked to respond to your thoughtful letter to the Administrator. It is indeed heartwarming to hear from a young citizen who is concerned, as we are at EPA, with the wanton destruction of nature's creatures, and with the need to protect this nation's wildlife areas.

Like you, we are upset that your uncle and other farmers, as well as so many home-owners and store keepers, are willing to endanger the very existence of an entire species of animal just because they wish to protect their own selfish economic interests or their own well-being.

Although our lawyers have advised that EPA has no statutory authority to regulate directly or prohibit this vicious slaughter of our rat population, I have been authorized to say that it is our intention to discuss this matter with our friends in the state agencies who look to us for leadership, direction and funds. We have reason to believe that most states and cities will recognize it is in their interest to undertake immediate and effective rat protection programs without regard to the

irresponsible claims as to the cost of such programs or their economic impact upon the public.

Sincerely,

William Nowital

The second exchange of letters is equally illustrative. The point I'm trying to make is that the regulator has it rough I guess.

Dear Mr. Seedsbottom:

You're the President of a very big company. And you should be able to make your factories stop polluting the air and water. My little brother and I are afraid to swim in our swimming hole because stuff from your factory makes the water dark and smelly. Also our clubhouse and playground are covered with dust from your smokestacks. Why don't you obey the law?

Your friend,

Martin Bearer

Dear Martin,

Thank you for your interest in the operations of our company. Capitalism will not be able to survive without the active participation and interest of young citizens like yourself in the business affairs of the country.

You'll be interested to know that the Belch Fire Company has an outstanding record of public support for anti-pollution laws. As President of the company I have give dozens of speeches and have sent hundreds of telegrams to Congressmen expressing our commitment to a clear environment. Many of our advertisements portray the beauties of nature around our plants and lines.

The charge that our company's policy is one of lip service rather than action is of course ridiculous. Let me assure you, Martin, that we have every intention of complying with the stack emission limitations for particulate matter, which you refer to as dust, as soon as the variance we obtained from the State EPA expires in 1982. And you can be assured that your swimming hole will be as clean as can be, and we will be in full compliance with our effluent discharge permit very shortly after our lawyers advise me that we have exhausted our pending appeals in the Court of Appeals and then the U.S. Supreme Court.

Sincerely,

I.M. Seedsbottom

These letters tell me a lot. I've worked in the environmental area at a time when we were getting it from both sides, from the environmentalists and from the industry. We felt many times that if we got sued by everybody we were doing our job right. If only one side sued us we'd probably screwed up somewhere. I think they also demonstrate that there really is no single truth when you're dealing with environmental issues, and that objectivity in environmental regulation rarely if ever go hand in hand.

One thing I think our panelists have in a sense missed, although I assume I would have done it anyway is that a lot of the environmental efforts are moving away from the federal level to the state and local levels. A lot of the more recent legislation, from the Water Pollution Control Act on up to some of the more recent pieces of legislation like the Safe Drinking Water Act, the Non-Nuclear Research and Development Act and other similar statutes, intend eventually for a state-controlled environmental program meeting certain minimal federal standards.

At present I think some of these statistics will be fairly interesting. Thirty forest states now have power plant citing laws. Thirty-eight states regulate strip mining in one form or another within their borders. Forty-two states provide certain tax incentives to keep and encourage open spaces. Thirteen defend certain kinds of critical environmental habitats and areas. Twenty-six states control flood plain development. Five have shore line protection laws, and thirty participate in the federal coastal zone management program while only one has an approved program.

I think overall between the state and the federal agencies you've seen a lot of progress in the last ten years. The Cuyahoga and the Buffalo River are no longer burning every other weekend. And the air quality is improving. I think hopefully that litigation rounds on the earlier statutes are now over. Industry is now starting to comply with both the air and water acts and hopefully soon it will be a better place to live.

QUESTIONS AND DISCUSSION

ECONOMIC IMPACT OF 2, 4, 5-T ELIMINATION

Question:

I'm Jim Snow. I'm an attorney in Agriculture working for the U.S. Forest Service. I guess by your definition we are doing all right because we get sued by everybody. I want to ask Bill Lawrence what difference it will make in the annual board feet production if herbicide spraying for silvicultural purposes and also tussock moth and spruce tip bud worm control measures are eliminated? Secondly, how do you see NEPA as juxtaposing with the herbicides and pesticide Acts as far as limiting their use?

Bill Lawrence:

I'll answer your first question. It is an area I know more about than the tussock moth. I'll talk about 2, 4, 5-T. 2, 4, 5-T is a selective herbicide used to eliminate unwanted hardwood brush competition from conifer plantations. It's used in site preparation work in preparing the site for the new forest, and it's used to effectively reduce competition of hardwood brush to an established forest. These are the two uses.

We're in the process of making an economic impact assessment of T and the loss of T. So, I'm not prepared to give you figures on a national scale right this minute. I can however, talk about an ownership in the Pacific Northwest where we find that in the State of Oregon about 100,000 acres of forest land need to be treated with T to eliminate brush. The economics of a T treatment are somewhere on the order of $10 an acre, aerial application. If we were to pick this hypothetical owner that treats say, 50,000 acres a year - we're talking about a bill of a half million dollars. If T drops out of the picture and same level of site preparation and brush control needs to be done, then we're going to have to go either to mechanical or hand. It costs about $100 a day to put a man in the field including fringe benefits, all the rest, salary or wages in this instance. So there's $100 a man-day. If we're very generous in our estimate we'll say that a man can clear an acre a day. This I think is being extremely liberal. Where do you get 50,000 man days of labor in the Pacific Northwest? You don't.

Now how does this translate into yields? This represents the delayed regeneration; this represents reduction in yields from a prescribed level of yield because of competition. You can carry this kind of an analysis onto actual housing unit starts, meeting national housing goals. We did this and this can translate into about 13,000 less homes. The equivalent amount of wood would be lost and you can translate that into board feet of lumber, square feet of plywood; it comes out to that order of magnitude of houses. Ok, that's your first question. There is a real economic loss if T is banned. In the South the economics will be different; the rotations are shorter, wood grows more rapidly.

I think what I'm saying here is that without the use of herbicide to control this unwanted brush we're not going to be able to realize the full potential of the land to produce a forest crop.

NEPA and PESTICIDE APPLICATION PROGRAMS

Question:

We currently have a law suit on the Siuslaw Forest. One of the major issues there is the adequacy of our impact statement regarding the herbicide application. Could you comment on NEPA as it related to pesticide programs?

Bill Lawrence:

As I understand the case you refer to, the decision dealt with the adequacy of one impact statement in dealing with dioxin in 2, 4, 5-T. Dioxin is a contaminant in the manufacture of T. It is now possible to manufacture 2, 4, 5-T with one tenth to five hundred parts per million which is well below any really biological significance. More recently there was a paper out in Science which indicated that the half life of dioxin in the environment on leaf surfaces is something on the order of a week or so or less. I think this recent finding has indicated that perhaps dioxin is not an environmental hazard. As I understand the decision, the judge has asked the Forest Service to address the dioxin issue in their impact statement, which I understand the Forest Service is preparing to do. This was not perhaps treated in the full light that the judge thought it should have been in the initial statement. I do think however the Forest Service is to be complimented for the environmental impact statement that they did prepare. Its perhaps one of the best in the country that deals with this element of intensive forest management.

Question:

When you put that initial investment per acre in herbicide or even fertilizer for that matter on a fifty year rotation, you amortize that over a period of years with the prevailing interest rates. Do you really think you economically come out ahead?

Bill Lawrence:

We will be releasing that information here. We are going to be dealing with EPA. 2,4,5-T is coming up for examination on a rebuttable presumption provisions and so these documents will become a matter of public record shortly, I trust. In talking with Rex this morning I queried him as to whether the Forest Service is going to pursue a vigorous course of action in this matter, and he allowed that yes they were.

Hank Webster:

It seems to me that there is another side to the point Bill is making about the impact of these regulation. I'm not in disagreement with what you said; there is another dimension. If we manage land by low intensity methods we are simply going to have to use more land to achieve any given level of timber growth. The conflicts between

timber and wilderness are simply exacerbated. Using more land for the timber activity concentrated on relatively fewer acres via more intensive management of those acres is one way to resolve these conflicts. I guess you can take your time in one area or you can put it in another.

Bill Lawrence:

I think you put your finger on a very important issue in terms of utilizing wildlands for wilderness experiences. We tend to need more land for people to get out and have a wilderness experience with more people. I am certainly in favor of this. I am a wilderness canoer myself. I enjoy that activity. But if we don't allow our commercial forest lands to be as productive as possible and, we are going to have to meet certain wood product needs, then the solution will be to spread out and encompass more forest land. I think it would be our hope that as the public comes to understand that working forests are important, we will be able to define these productive areas and to allow the practice to become intensified. I think organic farming is great for those who have a patch of land who want to do it, but you are not going to feed the people of the world or of this nation with organic farming. It is a hobby and I think it ought to be recognized as such, as is back-to-nature forestry a hobby. If we are going to have intensive land management and produce our renewable natural resources efficiently, then let's identify those lands and provide the resource manager with the tools.

BATs, BPTs, and WATER QUALITY

Question:

Harriet spoke about BATS and BPATS, or something. I wonder if you could clarify what those are, and what the difference is.

Harriet Marple:

We call them B-A-Ts (Best Available Technologies), not BATS. They are part of the NPDES (National Pollutant Discharge Elimination System). With both of these methods you comply with a number and it doesn't make any difference what technology you use. But the number is defined with the available technology in mind. B-M-Ps (Best Management Practices) are different. B-P-T is the 1977 technology, the best practicable technology currently available. It is defined for each industry. The agency categorizes all industrial activities that result in point source pollution, and it looks at the technology available for that industry, and then sets limits based on what it determines best technology handles. The NPDES permits will not tell you what technology you can use. It will just set a number limit on pollutants emmitted.

The other technology I mentioned was B-A-T. This is the 1983 technology, best available technology economically achievable. In the example that I gave, certain industries could compare B-P-T to secondary treatment and the B-A-T to tertiary treatment; in some industries you can't talk about that kind of treatment. Also, in industrial application,

B-A-T will involve in-plant process changes and the B-P-T generally does not.

B-M-P is for non-point pollution; the plans set forth specific methods for non-point source pollution and you have to comply with a specific method or procedure set forth in the plan. Although you don't directly comply with a number, B-M-Ps are designed to meet various criteria so indirectly the numbers make a difference. For example, when the 208 planning agency draws up its 208 plan for water quality standards, it looks at a number and decides that if enough people engage in this management technique, this number will be met. Unless you had a regulatory program that involves a permit, which you still can have under the 208 planning, you normally have to meet specific processes and procedures, not numbers.

208's IMPACT ON COMMUNITY LAND MANAGEMENT.

Question:

What is EPA's position in this aspect of 208 planning: can a local community under 208 formulate a local regulation which would prohibit certain activities in a basin? For the sake of argument say all new nuclear power plants in a river basin?

Harriet Marple:

Well, I think that certainly 208 does intend to have land use requirements, how strict they would be depends on how severe the particular problem was in the area. The state would have to give the 208 agency the necessary where-with-all to pass the plan. I think what you are asking is whether a state can confer that authority and the answer is, it can. But if the state didn't, in my opinion, I don't think the federal law would independently give land use planning authority to a local 208 planning agency.

208 AND STATE FOREST PRACTICE

Question:

I think there is an important connection between water quality considerations with non-point source pollution and state forest practice regulations. EPA did come out with a model forest practice law; is this a dead issue with them?

Harriet Marple:

You're a little bit over my head, Bill. However, I get the strong feeling that people that I spoke to about 208 planning are not taking the position that they once did, that they can set what is going to be done by 208 planning agency. Instead, what they are looking at more is whether the 208 planning agency has adequately surveyed its problems and adequately identified methods to deal with the problem. I think that the states could look at the usefulness of their state forest

practices acts in view of their water quality problems. Perhaps the Forest Practice Act, like the voluntary Soil Conservation Act, might have proved to be inadequate. Perhaps something more might be needed.

Bill Lawrence and Ann Burns, would you like to comment on that? I thought you might.

STATE FOREST PRACTICE ACTS and 208 PLANNING

Ann Burns:

I am a forester and a lawyer, and that is probably why I ought to comment. I'm from Seattle and the state of Washington has had some very interesting experiences with the use of a state forest practices act as a best management practice for purposes of 208 planning. It's the industry's position in the state that if they comply with the state forest practices regulations, and because we have a law that says that state forest regulations will be written in such a way as to achieve compliance with our state water quality standards, the water quality standards as numbers are not directly enforceable against any particular forest operation.

That has not been tested in court and we hope it won't be. But it does get at some interesting questions as to whether you should even have a state forestry act and strict regulatory program. Washington's program is certainly not voluntary. We had at one point years and years ago a voluntary program that was declared unconstitutional.

EPA's EXEMPTION FROM NEPA

Question:

I have often wondered, and I suppose I should know but I don't, why it is that EPA, of all the federal agencies, is the only one that seemingly doesn't have to comply with the National Environmental Policy Act? When agencies like the Forest Service and the Bureau of Land Management do land use planning, it is a very up front, straight forward operation where the public can participate and there are documents they can look at and you can draw little circles on maps and you can see what they propose to do. They have to go through the whole impact statement process which is very long and drawn out and expensive. Yet EPA operates in a very insidious fashion which the public can't follow very well. Through 208 and air quality planning, which is mind-boggling, they effectively achieve land use planning. Yet they don't have to do any impact statement work at all and I think it's very hard for the public to participate.

Henry Garson:

Your observations are probably fair to some degree. Congress did specifically exempt EPA from NEPA and several of its actions. One, there is a specific exemption in the Water Act for issuing existing

sewers NPDES permits. Under the Water Act EPA has to do environmental impact statements only for municipal treatment grants and for new source discharge permits.

Under the Air Act EPA took the position that the air was too inexorably linked to the environmental considerations so that if EPA did an adequate job of addressing the environmental issues in its regulation promulgation under the Clean Air Act it was exempt under NEPA.

With other statutes EPA administers, you have to look to the particular statute for the most part to see whether or not EPA finds an exemption. One other example of a statute would be the Alaskan oil pipeline specifically containing an exemption from NEPA.

Question:

Doesn't the Office of Management and Budget have some hold on EPA's decisions in terms of energy, inflationary impacts and meeting national goals?

Henry Garson:

EPA is required in promulgation of its water regulations to consider the economics of certain kinds of its regulations as it's required to consider the energy impacts of the effluent guidelines. OMB reviews EPA's economic analysis and if OMB or the Commerce Department thought the economic impact would be great EPA ended up not being able to promulgate those regulations. This was up until very recently when John Quarles repudiated the Quality of Life Review.

Question:

John Quarles repudiated Quality of Life Review? Does this mean EPA doesn't have to do the Quality of Life Review?

Henry Garson:

One of his last acts at EPA was telling OMB what to do with Quality of Life Review.

Bill Lawrence:

Quarles is now looking for a job.

Question:

Does Washington State's Forest Practices Act treat point or just non-point sources of pollution?

Ann Burns:

The Washington State Forest Practices Act does not use the words point and non-point; we do not make that distinction. Washington State's

Department of Ecology was the state agency given the "can of worms" to write water quality standards. And they wrote some rather unreal standards in terms of what they would be able to do in silvicultural practices because there is a 5 JTU upper limit on everything.

Now we are talking in terms of our culverts that have 500 JTU for half a day. To answer your question, the answer is no; our water quality standards do not speak to point and non-point. Throughout the whole State, people working in water quality decided not to pursue the question of a separate set of standards. This is simply to say that the forest practices regulations would be, in so far as they deal with water quality, promulgated jointly by our Forest Practices Board and the State Department of Ecology. So those forest practice regulations that deal with water quality are the regulations of the Department of Ecology. When we give them to EPA we can say, "Here are the Department of Ecology recommendations; we have throughly examined them."

Bill Lawrence:

In addition, doesn't it mean that they are not important regulations in the protection of water quality? They are very effective and realisic even though they have not tried to make this distinction. When we are in compliance with forest practices, we're in compliance, we hope, with water quality.

Question:

I wanted to ask Miss Marple if she would be willing to respond to some of the comments made this morning about the EPA's compliance targets for 1977 and 1983, in particular. It could be EPA has been subjected to bad law; and it could be EPA's backed against the wall; or it could be the EPA is dragging its heels as we heard this morning, but I would be interested to hear how EPA feels about these standards or goals. Are these goals they should try to meet or are they unrealistic and "we'll try to get through this period until Congress passes something more practical?"

Harriet Marple:

I have only worked at EPA since October, so there are some things I don't know the agency's position on. But in reviewing the 208 and 404 point source process, I was told by the agency that legislation now in Congress, passed by the House, which would extend the 1977 and 1983 deadline in selective cases, complies with the position that the agency has already taken about the 1977 and 1983 limitations. It has indicated it will not take enforcing action, in selected cases where it believes that the company or the municipality has proceeded expeditiously and was simply unable to meet the limitations. I feel, on the basis of the opinions expressed to me by individuals during discussions on this paper, the agency is in favor of this provision in the House bill.

Question:

Would John Proctor address this issue on the Water Act?

John Proctor:

Representing industry I don't have the pleasure of sitting back and speculating about whether EPA will enforce the July deadline or what the 1983 deadline is all about. The way we look at it, if July 1, 1977 rolls around and we are not in compliance with the effluent limitation requirements or BPT requirements talked about a minute ago we are subject to citizen suits, and we are subject to enforcement action by EPA. The penalities go up to $10,000 a day, criminally, they can't be less than $2500 a day and can go to $20,000 and involve a jail sentence. We are facing a rather substantial problem because we have clients who are simply not going to meet that deadline. Our problem is compounded because personally I have no faith in this enforcement "compliance schedule letter" that the agency used mirrors to dream up. They are saying, yea we have the July 1 deadline, but gee, we have some sort of discretionary enforcement authority and we will look the other way if you are a good guy and we'll prosecute you if you're a bad guy. If we don't like you, you're U.S. Steel, for example, we are going to examine you really hard. That's a heck of a situation to find yourself in. Quite frankly I think we have come to the conclusion, with respect to the clients we represent, that we will be much more comfortable going to court. I know I was critical about this earlier in respect to the Clean Air Act, but the simple fact of the matter is that you don't get any adequate protection from an enforcement compliance schedule letter. If we can't make an arrangement through some sort of enforcement mechanism, maybe a stipulation that we would go before a United States District Court and have them prove in effect saying, "Hey the agency is not going to prosecute you," and if a federal judge approves that stipulation then you get over the fear of a citizen's suit too. We will probably go that route as opposed to accepting the compliance schedule letters. Statistically I'd say that maybe half of major industry is not going to comply with that July 1 deadline. It's really too early to start thinking about 1983 only because in many cases the 1983 BAT requirements are not an awful lot different than the BPT requirements. Electrical utility industry, for example, the numbers are the same and they just put one label on it for 1977 and a different label for 1983.

Henry Garson:

Another question is rather whether that 1983 standard will survive when you start enforcing it and, as a result, will effluent limitations guidelines litigation, which basically said it was premature to use on those issues, survive as well.

Another problem on this same thing is that the Act fairly clearly, in legislative history anyway, says the agency has no enforcement discretion per se. When it finds a violation it must act. I guess the only discretion is whether and when it finds a violation.

John Proctor:

That's right. The words "find a violation" we've always argued with you guys means that you have discretion not to find a violation.

Henry Garson:

No, I'm on your side now, remember?

Bill Lawrence:

Quick, somebody find a question.

Question:

I was wondering if there are any efforts being made to correlate water quality and air quality plans. Now I can tell you two instances where this is a problem. First, the City of Detroit is trying to build a sewage treatment plant. They were forbidden from doing so because they were violating air quality standards with the sewage disposal system that they were going to try and put in. So they were in violation of water quality, but they can't build a sewage treatment plant because it would violate air quality. The second thing I was thinking of was the research that is showing that airborne pollutants that carry long distances can significantly degrade the standard of water quality.

John Proctor:

The answer to your first question is no, and it's exceptionally unfortunate that there is not closer coordination between what happens under the Air Act and Water Act. I have had similar problems. We want to build a cooling tower for an electric generating facility but we can't comply with the state of New Jersey's particulate matter regulation which the State of New Jersey is arguing applies -- it's going to be a salt water cooling tower -- to the salt drift. I've really got a Hobson's choice; what do I do? The only way you can solve that kind of problem is to sit down with the various regulators and say look we've got to draw a line down the middle someplace, because we are talking about the environment and that usually works. You are talking about airborne pollutants. Yeah, that's one of the basic aspects of secondary ambient air quality standards, the welfare related standards and the transport problems today. Sulfates, for example, can move literally hundreds of miles. There are problems with the automobile pollutants, the non-methane hydrocarbon kinds of things which tend to be as bad in rural areas as you have them in metropolitan areas. Hopefully the kinds of things that EPA has been working on for seven years and that maybe Congress will get around to doing something about this year will start focusing more specifically on resolving this problem. There are provisions in the 1977 amendments which would attack exactly the kinds of things you are talking about.

Question:

I have made much, and others have too, about 208 of the Water Quality Act as land use planning. You hear much less about the land use aspects of the Air Quality Act. Could you discuss that briefly?

John Proctor:

I can't understand why more people haven't discussed the Clean Air Act Amendments in the context of land use planning. If someone comes to me and says I want to put my plant in Clearview County, Pennsylvania and I say well if you want to put it there you've got to meet the significant deterioration requirements if modeling shows that the air is really good. My client shrugs his shoulders and says well gee, I don't want to spend the money to go beyond the best available control technology. Then he says, well maybe I ought to move to Alleghany County where the air is really rotten; I say, no, you can't really do that either because we have EPA's non-attainment policy, and you are going to have to provide that more than one emission offset. If that's not land use planning, nothing is. If I have a plant that I'm a proponent of, the plant is the focus for these land use kind of things coming into play and clearly it's land use planning legislation, at least the way it's developed in the last half dozen years or so. One of the things that has always surprised me is why, in licensing activities for new power plants or other kinds of industrial facilities, citizens and environmental groups haven't been more active and haven't explained to the hearing officer, who may not be fully aware of the implicaitons, just how the Clean Air Act and the Water Act and the objectives stated in these pieces of legislation really have land use implications for that particular facility. It's just not happening as frequently and as quickly as I thought it would.

Henry Garson:

I'd like to add to that point, even assuming that the air problems are taken care of, it's a new source and EPA has no source standards. Environmental impact statements requirements will apply, if EPA is the permit issuing body. You can have yet another level of environmental and land use review of that plant siting.

Bill Lawrence:

I was interested in your comments about having a plant and meeting certain air quality standards when the region is saturated. I don't know whether you facetiously said well if a company goes out of business you can sell your air quality block, sort of like a liquor license that moves around town when it's saturated. Or, another interesting problem is thermal pollution and particularly streams where you need to maintain cold water. Who gets the heat load first? Does the guy that has the most active force management plan that does the logging? He builds up the thermal load in the stream and then somebody comes along downstream and wants to cut but can't? Who owns the air quality, water and air rights?

John Proctor:

Well again you are asking a lot of questions. I was not being facetious, by the way, with respect to this non-attainment emission offset thing. EPA's regulations contemplate that it's entirely pos-

sible for you to go out and buy up a block of emissions. And why not? I'm proposing to locate a new plant in downtown Passaic, New Jersey, which is a heavily polluted area. I know that a chemical plant located four blocks away which is emitting a thousand tons per year is going out of business next month and I go to EPA and I say, "Look, I've a thousand tons here that I am going to build in downtown Passaic and that guy is going out of business and he has a thousand tons and I've got one for one. What I'll do is put a little more control technology in and I'll only emit nine hundred tons." EPA says, "Fine, you just ask for an emission offset policy." As a matter of fact, I just completed that kind of problem, only I wasn't trading 900 tons I was trading 100,000 tons. But that's the way it works. I think that at some point some enterprising entrepreneur is going to come along and, if this policy survives a court test, in all probability we'll set up an emissions bank and people who are planning on locating in an area will go to this entrepreneur and say, "Look I've got X tons of this. Who do you know in an area that has some for sale or maybe is going out of business?"

By the same token, the significant deterioration area I mentioned has these little increments available to you when you go into the area. If you're there first and use up that increment, the next guy that may be planning his facility three years later is out of luck. That's it. And the same thing is true of your water quality. It's really first come, first serve, and is similar to the gold rush in the 1840s and '50s. I think you are going to see a lot of major industrial companies wake up in the relatively near future and start running around allocating sites and grabbing sites and applying for permits only so thay they can put their tag on that air quality increment or take advantage of that facility which is going out of business and beat the next guy off.

Roger Conner:

I sat on the Michigan Air Pollution Control Commission for six years. From the other side of the fence, I think that the tone of the way you described them is not appropriate. Let me try another way of describing it. You talked about the company going out of business and giving up its hundred thousand tons and somebody else coming in with 90,000 tons. But of course the problem to which EPA is responding is national goals for determining air quality generated through a political process. Then EPA looked at the fact that there were areas, particularly industralized areas like the Detroit Metrpolitan area, which were not able to meet those goals. These same areas are the ones in which, for social reasons, we want to encourage economic growth. EPA looked and said, "How can we blend these competing goals?" They had what appeared to be only one choice, and that is, to say you can't put another industrial facility in Detroit until we improve the air quality. So they offered a different approach to try to blend goals of trying to reach the air quality goals while also adding to the industrial base in those areas. So they said, "Let us assume the following facts: first, every industry in the area is meeting the emission limitations or is on a program to meet the limitations. When

everyone has complied, we are either going to be right at the level, or we are going to be a little bit over." Then along comes Chrysler Corporation and wants to build an assembly plant in Detroit. The EPA says, "What do we do now?" One way is to have no more industrial facilities in a place already too dirty. The EPA is asking, "Is there a way to try to blend these goals." What they said was, "If a corporation comes in and proposes to add on a thousand tons a day, if they can go to their own facility that's already there or another facility, not one that is going to be closing down, more likely they will stay there and convince that facility to install equipment that wouldn't otherwise be required by law to reduce their emissions by the same amount or more than the emissions about to be introduced, there would be a net improvement in air quality consistent with both social goals (clean air and increasing employment in cities) to permit that to happen." One of the positive consequences of that policy would be to develop new and better air pollution control equipment. I hope your entrepreneurs are out there because if those entrepreneurs are successful what they will be doing is identifying people who can for least cost improve their emissions beyond those required by law. Then they'll come to one new plant that wants to locate and say that that's the place where the money should be put to improve the emissions by enough so you can build your new plant. Now thats a different way of looking at the process - a little less skeptical; but I find it real difficult to be critical of the EPA. They try to be sensitive to some competing goals. They try to show a little balance rather than saying you're a non-attainment area so you can't have any industrial growth. I think its sort of creative -in fact- and I'd like to ask you what do you propose as an alternative to that in those areas where everybody's complying with the standards and they can't have any more or they're over the limit. What's your alternative?

John Proctor:

Well let's start with the alternative. First of all it's my view, which is obviously shared by EPA, that this whole question of the non-attainment/emission offset thing resulted from a misapprehension and misinterpretation on the part of some industry as to the meaning of Section 110A 4A of the Clean Air Amendments of 1970. I think, and I think EPA agrees with me or they wouldn't have proposed the policy, that 110A 4A does not prohibit all new industrial siting and construction in a non-attainment air quality control region. What it does do is say that if your new facility is going to impact on the air emissions or going to impact on the ambient air quality in that part of the region where the air is lousy, then you can't build it there. It's not the same thing as saying you can't locate anywhere in the whole region. For example, there are air quality control regions in Pennsylvania where you might have seven or eight counties where the air is really pretty darn good. But one of them may be Allegheny County and wouldn't you think that the whole region is designated priority one. So first of all I think thatas to this whole policy thing we really didn't need it because 110A 4A of the Act doesn't mean what it says, doesn't mean

what some people said it means. Secondly, I don't really intend to be cynical about policy and I'm just looking at it in a little bit different perspective than you. Quite frankly, I don't think its practical to expect Chrysler to go to Ford and say, "Hey Ford, how about spending two hundred million dollars to rachet down your emissions by 900 tons a year so I can put a facility next door and charge $150 less per car because you spend $150 per car building the facility."

Roger Conner:

Obviously that's not going to happen. They will go to a utility or some other non-competitor and help them finance the improvement.

John Proctor:

Your assumption is that everybody in that particular area has pretty much gone to the extent of technology.

Roger Conner:

No, they have complied with the emissions limitations.

John Proctor:

Alright, then what I expect would happen is that the applicant in that case would go to the state agency and say, "Look, you want X number of new jobs, you've got to think about changing your regulations a little bit so that when you do your analysis of a more stringent regulation, we can demonstrate to EPA that the increment we need or the number of thousands of tons we need is available." By the way that's probably the way it's going to be done initially. A lot of the sources are uncontrolled. Most indirect sources, if not all of them, are uncontrolled. Parking lots, shopping centers, sports areas, you know that kind of thing, and particulates, fugitive dust, is a tremendous problem. So I think you are going to have states initially regulating in areas where they are not presently regulating. I don't know about Michigan but New Jersey, for example, has regulations which will apply to dry cleaning operations. Now those are the same kinds of pollutants you get from automobiles. I think you are going to see a lot of that. The initial effort in the non-attainment policy will not be as simplistic as walking down the street and saying, "Hey, how much is it going to cost me to convince you go out of business?" It's probably going to be states that are anxious to attract industry. But no state is interested in attracting electric utilities. So what do the electric utilities do? That's a horrible problem.

Roger Conner:

What about outside of non-attainment areas?

John Proctor:

Yeah, but if you build outside of non-attainment areas then you've got to comply with a significant deterioration regulations. I'm not saying the problem is hopeless. The technology is there to meet these kinds of requirements, but its not something that can be easily

understood or easily done with a small amount of money.

Question:

I don't think that your argument that a facility could move out of a non-attainment area to somewhere else in the region is valid. That is not a valid charge for the municipality which may want the industry tax revenues and faces the employment base going elsewhere in the region. We have a case like that here in Michigan. General Motors is expanding significantly in Lansing. They are in violation of the state's standards and regulations. The City of Lansing went ahead and gave them building permit. They said to hell with air quality standards. We want jobs. Somebody's going to sue but we are going to go ahead because we want General Motors to expand in Lansing.

John Proctor:

The problem with that kind of attitude is that if the industry does go ahead and starts building, they are running one hell of a risk. For example, the first paragraph in EPA's non-attainment policy is that any permits issued after December 21, 1976 which are inconsistent with this policy are unlawful. I mean it does not mean that a bolt is going to come out of the sky and hit you in General Motors. What it does mean is that they are leaving themselves open for citizens suits, to suits by EPA. How can you allocate hundreds of millions of dollars and bond the property? I mean I couldn't give an opinion that that property is bondable so you can't just say damn the torpedoes, full speed ahead.

Question:

But then the kind of tradeoff Roger was talking about could be a viable idea.

John Proctor:

Yes, but you trade off first. You don't get your permit from the local authority and start building until you do your tradeoff. You make an important point because if the local community is anxious to have the jobs, which I'm sure they would be, what better advocate can you ask for to go pounding on your state legislator or your state environmental pollution control guy's door who can say, "Hey look you know we need those jobs; how about figuring out how we're going to get that number of emissions out of the community." That's a very effective kind of thing.

Question:

Does this tradeoff idea run into conflict with equal protection?

John Proctor:

You know that's an interesting question. The reason it's interesting

is that there are a lot of us who feel that the whole policy is unlawful, that EPA has no authority under any provision of the Clean Air Act to promulgate. I think at the appropriate time after the regulations are promulgated it will be contested. Some of the reasons I mentioned, leaving aside the constitutional issues for the moment are the things about 110A 4A; I don't think it's necessary. I think it's a good policy. I think it's needed. I think it's a very smart, logical, creative kind of innovation to a real problem but whether it will stand a court test I don't know. I will say it will be tested.

Question:

You are talking about the sale of the right to pollute. This involves the definition, registration, sale and transfer of title of such a thing. How would you go about that?

John Proctor:

Very, very easily. There are complete emission inventories of what are generally called "Majors" -- anybody who emits more than a hundred tons per year of something. EPA has an inventory and at the state level there are probably complete inventories of even smaller kinds of sources. All you have to do is contract, if a guy is going out of business, to take his tons of emissions per year. It's like in water law where you have an entitlement to draw so much water per year out of a stream and that has been done for years. I would expect this to work in a similar fashion.

Question:

So the holding of a right to pollute would carry with it the right to transfer it?

John Proctor:

No, I wouldn't put it in a context of a "right to pollute." I think that is a little heavy, a little hard. You may be right practically but an "allocation of emissions" is probably a better term. But, yes, if you're going to go out of business, you have the right to hold it out to sale for somebody who wants to come into the area.

Henry Garson:

We've run into some airplane schedules. Before we break I would like to make one observation though. And that is on the issue we were just talking about. The energy crisis is going to make all of this seem like Mickey Mouse and it is going to make it a lot worse. The FEA is in the process of requiring a whole bunch of plants which are now burning natural gas and oil, relatively clean burning fuels, to switch to coal and we are now getting a lot more discharges from these plants. That is probably just the beginning of what we are going to have to be doing in terms of converting reasonably clean burning fuels to dirty fuels, so I am not sure where the tradeoff policy is going to go anyway. Thank you very much.

TOWARDS A PHILOSOPHY FOR LAND MANAGEMENT

JOSEPH L. SAX

After a hard long serious day it really would be nice to have a kind of lively speech. The trouble is I always write these speeches after breakfast, and it's just an accident that they get delivered after dinner. I was only able to attend part of the session this morning and I sense that much of the discussion turned on at least potential conflicts between various kinds of recreational uses and industrial uses of land. I really want to talk about a somewhat different although obviously related question, and that is an issue that grows out of conflicts over the land which involves competition among various different kinds of recreational uses, and I hope that this will be a useful kind of addendum to much of the agenda for today.

I want to talk about this in the context principally of wild undeveloped and wilderness lands. The idea of wildness and wilderness has both captured and founded the American imagination. Despite substantial, even spectacular political success over the last dozen or so years, wilderness proponents continue to be seen and to see themselves as beleaguered purists, buffeted by the combined forces of mass recreation, industrial productivity, egalitarian idealism. Paradoxically, public willingness to establish wilderness and undeveloped areas has outrun the evolution of a theory to sustain that which we have done. The public consensus about wilderness is thus quite as fragile as it is perceived to be. The fragility of the wilderness movement rests largely on a political posture that while perhaps expedient at one time, has proven too weak a source of support today. Recognizing quite rightly that wilderness was not an attraction to everyone, its proponents quickly and often conceded that recreation was a matter of taste and put much of their advocacy into the claim that public lands should be managed for diverse uses. It seemed easy and appealing to claim, as early wilderness advocates like Bob Marshall often did, that even the most extravagant demands of wilderness supporters would require only a tiny fragment of the federal public domain. But diversity as a management theory works comfortably only so long as there is great abundance. Otherwise, as we see in various settings with the concept of multiple use, the expectation of satisfying everyone is soon turned to an issue of priorities. And when wilderness has to compete with mass recreation and with demands for mineral and timber production, it is wilderness which finds itself under seige.

Another serious problem has been what I would describe as narrow elitism, by which I mean the treatment of wilderness by its proponents as something wholly distinctive from other recreational and land policy questions, too often surrounded by a moral self-rightousness. The result of this has been to isolate the question of wildness from the larger considerations of which it is only a part although certainly an important part.

Having thus briefly introduced the subject in a critical way, what I want to do is to put before you, to try out on you, a tentative theory about the use of land for leisure purposes that embraces wilderness but is not limited to it. I draw upon what Professor Rawls in his book A Theory of Justice calls the Aristotelian principle of the "good life" in which he

describes this way: "Other things being equal, human beings enjoy the exercise of their realized capacities, their innate or trained abilities, and this enjoyment increases the more the capacity is realized or the greater its complexity." The intuitive idea here is that human beings take more pleasure in doing something as they become proficient at it. And of two activities they do equally, they prefer the one calling on a large repertoire of more intricate and subtle discriminations. For example, someone who can do both generally prefers playing chess to playing checkers. Presumably, complex activities are more enjoyable because they satisfy the desire for novelty and variety of experience and leave room for a piece of ingenuity and invention. It also invokes the pleasures of anticipation and surprise, and often the overall form of the activity, its structural development, is fascinating and beautiful. Simpler activities exclude the possibility of individual style and personal expression which complex activities permit or even require, for how could everyone do them in the same way? So says Professor Rawls.

Well, everyone who has ever pitted themselves against the wilderness for a substantial time or climbed a challenging mountain or committed themselves to the intricacies of trout fishing or hunting in the classical manner will recognize a description of the powerful pleasure of their experience in this philosophical statement. They will also recognize in it the beginnings of a theoretically coherent explanation with a seemingly subjective and highly personal unease which many feel at the elaborate development of the urban style campgrounds in our parks and forests, with proposals to build tramways to mountain tops, with a casual replacement of trout streams with annually stocked reservoirs behind dams, inexorable safari land-hunting enterprises which have proliferated around the country in recent years. They also perceive in Rawls's statement the foundation for justification of governmental action in promoting activities like wilderness as an important order of public affairs rather than as simply one of many competing and conflicting consumer demands under which public land managers daily labor and among which they so often find themselves intellectually unable to discriminate except by adopting the common, like a shop clerk, approach to their job: that is, a serving up to each customer that which the customers demand until they run out of goods. Rawls's analysis suggests a role which philosophers call a supererogatory governmental function. That is a task which is taken on over and above basic duties in order to advance an idea of the good life as contrasted simply with the maintenance of the essentials of life. Note that Rawls says one who knows how to do several things equally will choose the more complex and challenging. To make such a choice, of course, one must have the knowledge, and the knowledge can only arise from the existence of the opportunity. In light of the conventional view frequently expressed by public land managers that it is incumbent upon them, as officials of the democratic society, simply to respond to consumer demand and not to evaluate it, here is a striking alternative approach quite consistent with the ideals of the democratic society: a role for government in providing opportunity to note different kinds of experience so that the citizen would have the opportunity to choose among them, providing thus the possibility of Aristotelian good life. Nothing in this approach implies that other simpler (in Rawls's terms) activities will

be unavailable to people. They will be, and of course they are, abundantly provided by the private market. To some extent they will be provided on public lands, too. But it is important to note that, by their nature, complex activities tend to rely more on the internal resources of the individual than upon externally provided goods and services. Thus they tend to be less profitable for private entrepreneurs. It is, therefore, not surprising that entrepreneurs find it more remunerative to build Disney Lands and Mineral King resorts than to sell wilderness experience. When they do begin to sell wilderness experience commercially as in the now popular wild river boat trips, there is a powerful tendency to prepackage the experience, taking a significant element of risk, adventure, and self-reliance out of them in favor of professional services, predictable days, and a full set of food, clothing, and shelter needed by the customer. For the same reason television networks find it more profitable to package the familiar programs we see, consuming large amounts of talent and resources, than to sell great books, of which a little goes a very long way. Because a consequential book draws upon the inner resources and knowledge of the reader, man never runs out of material to read, while popular TV is chronically and predictably always short of good material to service its voracious audience.

Now having just put the philosophical theory before you, let me turn directly to its application to recreational activities. The essence of mass recreation is the simplification of experience. The essence of recreation built upon the Aristotelian principle is, conversely, the complication of experience. As an example, let me use the much abused but entirely germaine model of Disney World treating it as the archetype or culmination of mass recreation phenomena. It is a brilliant exposition of the idea of the totally managed environment, designed to provide the ultimate in passive entertainment. It is a managerial triumph in the sense that the visitor is managed. Nothing is left to chance and nothing remains for the imagination of the guest. All the imagination has been provided by the manager. By contrast with a complex experience like the wilderness--one that is endlessly open to further examination, rich in nuance, stimulating to the mind and the acuity of the senses--the entertainment center is a fully bounded experience. There is nothing more than meets the eye. Each visitor's perception is precisely the same as that of each of the other millions of visitors. The visitor sees a castle but learns nothing of either the architecture or lives of the people who lived in castles. He traverses in jungle but takes away no sense of a true tropical habitat. He has been occupied, he has been dependent. His capacity for the use of leisure time has been turned over wholly to others to provide stimulus and satisfaction. Now how is the complex of experience to be contrasted with this? I shall, because of the constraint of time, rely principally upon a single example drawn from what I find the most profoundly interesting book written about the theory of recreational activity. It is Jose Ortega y Gasset's Meditations Upon Hunting. Ortega's work was begun as a preface to another writer's conventional book about hunting. But it self-expanded into a full volume as Ortega puzzled over the question: Why do men hunt? He was struck, as everyone must be, by the fact that from the beginning of history people have hunted and the essence of the activity has not changed. Indeed, the central premise of the

book is that rather than using every technological advantage available to him, the hunter has self-consciously neutralized his technological advantage in favor of the opportunity to develop his technical ability. Ortega puts it this way: "Hunting is not simply casting blows right and left in order to kill animals or to catch them. The hunt is a series of technical operations, and for an activity to become technical it has to matter that it works in a particular way and not in another. Technique presupposes that success in reaching a certain goal is difficult and improbable. To compensate for its difficulty and improbability one must exert oneself to invent a special procedure of sufficient effectiveness. A good hunter's way of hunting is a hard job which demands much from him. He must keep himself fit, face extreme fatigue, accept danger. It involves a complete set of ethics of the most distinguished design. Doubtless, in all happiness there is pleasure, but pleasure is the least of happiness." Pleasure is a passive occurrence and it is appropriate to return to Aristotle for whom happiness always clearly consisted in an act, in an energetic effort. The truth is Ortega concludes the important and appealing aspects of hunting are neither pleasure nor annoyance, but rather the very activity that comprises hunting.

A striking statement this is, and how appropriately it reverberates to familiar controversies over the development of public land for recreation. We live in a world in which it is always assumed that to make things easier is to make them better. This of course is the philosophy of technology. Thus the National Park Service recently proposed the building of a mechanical tramway to take business this summer to Guadalupe Peak and Guadalupe Mountain National Park. The reason it said was "All visitors should be offered the opportunity to reach such strategic points by a mode of access convenient to the majority." This is the very summit of technological thinking, and it is the genius of Ortega that he understands the human difference between technique and technology. Like his fellow Spaniard Cervantes who summed it up in a sentence, "The road is always better than the end," Ortega appreciated the simplification of experience is not the essence of human aspiration. The purpose of the mountain climb is not to be at the top but to get to the top. Now the beauty of hunting, Ortega repeatedly observes in his book, is the fact that it is always problematic, and exactly this may be said of all true recreation.

In one of the deservedly famous books that hardly anyone reads any more, Isaac Walton's The Complete Angler, the narrator Piscator says "Angling may be said to be so like the mathematics that it can never be fully learned. It is an art not easily obtained to, an art worthy of the knowledge and practice of wise men. An angler must not only bring an inquiring, searching, observing wit, but he must bring a large measure of hope and patience." And one of his companions says, "I see now it is a harder matter to catch a trout than a chub. For I have put on patience and followed you these two hours and not seen a fish stir." Piscator replies, "Well, scholar, you must endure worse luck sometimes or you will never make a good angler." What Walton explains with good natured humor is precisely what Ortega means when he speaks of the true hunt as always problematic, and says that its essential quality is a combination of high technical ability and ethical sophistication. By way of contrast I would call to your attention Hemingway's brilliant short story The Snows of

Kilimanjaro: the ugliness and the decadence of the traditional African safari is the kind of managed experience to which I referred earlier, and the way its unfolding strips the guest hunter of his manhood is the perfect literary counterpart to that which Ortega reveals to us in the meditations. One might proliferate examples endlessly. You can rest comfortably in the confidence that I will not.

I will however call one more, and only one more, example to your attention. Today we find ourselves in the midst of the popular movement to save the great whales from distinction. One can hardly help but feel revulsion at the prospect of extinction for these stately giants. Yet I never see "save the whale"literature but that I am reminded of Moby Dick. I wonder if anyone who reads that book ever leaves it with a feeling that its message has been a protest against whale hunting. Surely, that is not the emotion, or even one of the emotions, that Melville sought to invoke. And the reason is that for all the madness of Ahabs' obsession even Ishmael Starbuck is caught up in the appeal of whaling. It is in Ortega's terms authentic and problematic, a playing out what Ortega calls life as a terrible conflict, combining high technical ability and ethical sophistication. But when whaling becomes an industry, an example of technology rather than technique, everything that comprises its human quality disappears and we are left with nothing but extinction or sentimentality.

Ultimately, the experience of recreation in the wilderness is an artifice in which man reaches out to realization of human potentiality. Its whole purpose is to provide contrast to the dreary conditioning process which is inevitably much a part of daily life. For us to follow policies to force public recreation to imitate urban life--to seek regularities, security, comfort, and the absence of ambiguity--is to move precisely in the wrong direction. At its profoundest level the issue is not merely complexity against simplicity but the acceptance of what Ortega calls the problematic element, a recognition that a full lived life embraces and accepts the final irresolution of experience.

It is not casually that I have chosen as examples hunting and fishing and whaling which offend the sensibilities of some within the environmental movement; or that I have spoken of one of the failures of that movement as narrow elitism; or that I have referred to the tramway proposal with its emphasis upon security, safety, and convenience. For there is a deep and dark side to the wild. Recall Melville's chastisement of the sentimental advocates of wilderness in Moby Dick, a point precisely the same Ortega makes elsewhere in his book The Revolt of the Masses. Speaking of today's average person, whom he compares to the spoiled child, Ortega observes the unquestioning confidence that, in his words: "Tomorrow will be still richer, ampler, more perfect, as if we enjoy this spontaneous inexhaustible power of increase." Like children we, the beneficiaries of a technological society want, to Ortega's words again, "want something but not the consequences of that something." To spoil, to be spoiled means to put no limit on caprice, to have the impression that everything is permitted. "One can," Ortega says in the meditation, "refuse to hunt, but if one hunts one has to accept certain ultimate requirements without which the reality evaporates. Life is a terrible conflict, a grandiose and atrocious confluence," he says. "Hunting submerges

man deliberately in the formidable mystery and therefore contains something of a religious right and emotion in which homage is paid to what is divine and transcendent in the laws of nature."

It is in this ultimate and philosophical sense that the aspiration for the wild and its allied activities must ultimately find its support. And it is in this sense, and this sense only, that the enterprise is ultimately elitest. Not elite in the cheap and unworthy sense of excluding any social or economic group but in its refusal to accede to those who demand simplification, who refuse to allow the skills and knowledge to grow, who avert their faces from ambiguity and what Melville called the "ungraspable phantom of life, the ultimately unknowable."

I have imposed upon so many philosophical and literary illusions, let me end with one more which seems to me a useful motif for a conference on wildlands. It is Socrates saying in the Republic, "Look how obstructed and overgrown the woods are, what a dark and hard to see place. But there is nothing to do but go forward."

Thank you.

QUESTIONS AND DISCUSSION

TOWARDS A PHILOSOPHY FOR LAND MANAGEMENT

Question:

When does technique become technology? You say in one you draw on inner resources and in another you draw on external technology. How can you make that distinction?

Professor J. Sax:

I think, like any distinction it is perfectly clear in some instances, moderately clear in others, and obscure elsewhere. The example I gave of the tramway is to me a pristine kind of an example. The reason I say that is, it seems to me it is a proposal undertaken under exactly the wrong theory. What I am trying to say is to point out some of the reasons we find this decision-making so puzzling. I have been very powerfully struck by this puzzlement in the last several years in a seminar I teach in which we bring people from agencies like Forest Services, Park Service. These people have got a hard job and they feel themselves squeezed among conflicting constituents. As I think I said in the talk, they do not have an intellectual framework by which to try to sort out the claims that are made on them. Now, I don't mean that they are not philosophers. What I mean is that you can't do the job unless basically you have some notion of what it is you are after, what you are trying to achieve. To say that one ought to have a view about where you are going doesn't mean in this area or any other area that you don't have hard problems to solve. You are always going to have hard problems of discrimination. What I guess I'm trying to do is tap intuitions. There are a lot of people who have an intuition, for example, that there is something troublesome about the development of high intensity, high energy, high cost ski resorts on public lands. The Mineral King controversy is a current example of this. And then they say to themselves, "It troubles me, there is something about that that bothers me. I don't know why it bothers me. Some people want to ski and some people want to hike, some people want to go on motorbikes, and some people want to walk, some people want to cross-country ski, and some people want to down-hill ski, and how can you say that one is better than the other?" Who are you or who am I to say that what I am doing is good, and what you are doing is not so good. Isn't that just another way of saying that I want to try to elevate my preferences to a higher level of importance than someone else's preference. I mean, that's the way things like the wilderness movement are preceived largely from the outside. Now, what I am trying to do is to bring to bear on that puzzle an element of an important philosophical tradition which says there is a basis on which activities can be ordered, ordered in terms of priorities and preferences. It relates to what is called the Aristotelian principle. I will say it in the simplest possible terms, "Why do people who know how to do both things, prefer playing chess to playing checkers?" That seems to me not an insignificant commentary. The point I am trying to suggest tonight is to make that philosphical notion widely understood and widely accepted in other areas of life and bring it to bear on intuitions we have about public land use, and I think you will find some connections.

Question:

I am not clear that I understand how someone who uses a heliarc welded backpack is less reliant on high level technology than someone who uses a tramway?

Professor J. Sax:

It isn't a question of where you rely or don't rely on high technology. It is possible to utilize technology. One does not have to abandon technology in order to understand the appeal of things like a wilderness. It isn't the point of whether your backpack is made of nylon or not. I think the questions you are asking are interesting and helpful. To me at least, they point out the way we have polarized these things. The notion that someone who thinks that wilderness experiences, for example--I'm not talking only about wilderness experiences--that anyone who has an intellectual or philosophical or personal commitment to that is someone who adjures, eschews all technology. Nothing could be further from the truth. I'm not saying what you were saying is not true. What I'm saying is that this polarization is highlighted by some of the things you are saying. It suggests, in my view, how we have been misconceiving the question that we have before us.

Question:

Don't you think absence of standards in recent legislation completely avoids the question that you have raised this evening in that it is relying instead on public involvement and adjudicatory proceedings to resolve these issues rather than setting standards or guiding principles for resource managing agencies.

Professor J. Sax:

I think I want to say yes to that but as is always the case with you, Gail, you ask very clever questions. There are a lot of times--I'm sure you felt this way yourself--you want to say yes but you think maybe you ought to say no. I think, let me say this, to the extent that the so-called public participation movement and so-called adjudication direction rests on an assumption that nobody knows what we ought to do and therefore what we somehow ought to do is to find some way for getting a consensus--I mean the kind of thing the Park Service did with Yosemite--go out and take a poll--and doing the same thing with the Grand Canyon, seems to me to be exactly wrong. I don't believe you can have an intelligent, meaningful, coherent public land policy unless you believe in something and you know what you are doing. What we need is the acceptance and tolerance and understanding of the public for leadership and at some point, of course, rejection. At some point the public will reject things that you do. If we didn't have leadership, we wouldn't have a national park system today. And as someone said this morning about the leadership of the Forest Service, setting aside wilderness areas in the 1920's --you wouldn't have had that without leadership and without the threat, of course, that the National Park Service would take over the recreation functions of the Forest Service. That wasn't said this morning--but, all the truth you can get is worth having. So, in that sense, I think that the essence of your question

is: Am I arguing for public leadership? My answer to that is yes. I am a strong admirer of the people in both public and private spheres, people like Olmstead and Steve Mather, Muir, Leopold, and so forth, who had views and said this is the way we ought to go. Of course, this is what philosophy is all about. These philosophers write books. What am I talking about Aristotle for? That stuff is out there and at some point these are the great ideas we have to learn to apply in the dreary, dirty, grubby little decisions that most of us spend our lives making. It has something to do with us and it's important.

Question:

What are the chances of making one decision which evinces leadership and then being able to be around the next day to make yet another good decision?

Professor J. Sax:

That's a hell of a good question and I think it's the important question. And I think the answer is yes, but there are always limits of public tolerance First of all, talking about public land management--let's say we are talking about a Forest Supervisor or Park Superintendent, that level of management. Those people have to have support and consensus within the whole agency about the function of the agency and where it's going. And they themselves have to have some idea of where they want to go because they make interstitial decisions. Their superiors have a job to take those ideas to the Congress and to take those ideas to the public. That's what their superiors are there for. Their superiors are there in my judgement to protect them in making the right kind of decision against the wrong kind of intrusion. But they've got to have something to do. They've got to know what they want to do. Now at some point you're going to run up against public resistance that cannot be denied. That's what democracy is really all about. In my view, if I were to tell you what I thought good government was, I would say good government is public leaders trying to direct decision-making toward a vision of the good life limited by the political constraints that public tolerance puts on them. There are some that sometimes want to do the right thing but we can't do it. Of course, at that point, you give up. That's what democracy is all about. But it doesn't mean not having any values. Motorized recreation vehicles, I think, are an issue that's been a source of a great deal of trouble to public land managers. There is a great deal of controversy in which the limits of what's possible for them is unclear, and in which there is a lot of resistance among people who are public land managers about accommodating some of these activities. But I've heard it said over and over again, "Who am I to say to walk is good and to ride is bad?" I think that within the context of these kinds of ideas we can begin to evaluate activities. This is an urban experience, a simplification experience. It is a reiteration of exactly what people do every day, a reiteration of exactly the kinds of thing that recreation experience ought to give them an opportunity to get away from. I don't mean "get away from" in the sense of trying to escape, I mean get away from in the sense of trying to build inner resources. If you believe that and you say, this is not a kind of use that ought to have a large role in public land management, and you move in that direction, at least you have an opportunity to get the policies developed that you want to get developed. At some point you meet resistance and then you've done all that you can do.

Question:

I noticed that you base all your comments on a philosophical basis. Your point is that regarding some of the more highly developed technological kinds of motorized recreation, we will want to weigh them very carefully. You haven't talked about not having enough gas. I can't help, as the manager of your State Forest, thinking that you've overlooked an important factor. At any point of any weekend on 1-75, there is enough rolling stock being pulled up that highway to move Rommel's army across Libya and Egypt. Is this a factor?

Professor J. Sax:

I'm glad you asked that because I'm troubled by this. I know what I said tonight and I think what I said reflects what I believe. I started by saying that the wilderness movement found itself making some expedient arguments and expedient arguments are very helpful at times. It's great in times of a gasoline shortage to say, "My God, we all see them, going up Route 23 hauling four snowmobiles at a time. That's a terrible waste of gasoline in a time when gasoline is in short supply." Well, that's right, and as long as one understands that that is an issue that is appropriate in a time of gasoline shortage that's fine. But you've got to be very careful that you view that as a kind of tactical thing that gives additional weight to an argument, but not the reason for the argument. If you use those expedient kinds of argument as your central argument, you're going to find the rug pulled out from under you when those expedient arguments no longer work, or in circumstances in which they don't work. It depends in what capacity you're asking me the question. If you said to me, I want to hire you (I don't wish to sell my services commercially) but I want to hire you to fight this proposal and I was on the right side of the energy issue, sure I'd say, "Look fellows, I'm on the right side of the energy issue. Those turkeys are on the wrong side of the energy issue; give me at least two points for that, OK." I think it is very important not to lose sight of the fact that ultimately these issues are issues of philosophy or value and that the other things are only conveniences which come and go. I feel strongly about that.

Question:

The question that bothers me is that you seem to be making an argument based entirely on the matters of taste. We heard this morning that what is one person's need is another person's simple desire. How would you answer that?

Professor J. Sax:

The whole premise of philosophy, of course, is that ethical principles are something other than matters of taste and at the same time other than matters subject to rigorous mathematical type proof. I believe that; I have conviction that that is true, if I have a conviction about anything. And in that sense the notion that all issues, for example, relating to the use of public land are simply matters of taste is something that I profoundly reject because, of course, it's wrong.

SIX BASIC MINERALS LAWS

Fred Ferguson

I have been with the Department of Interior now for twenty-five years and I think a great deal of it, but I want to point out that today I am on my own. A lot of things have been happening since I took the bar exam in September 1949 here at the University of Michigan. In between many things have changed in the manner in which we handle federal land. It's been very striking to me in my years of Interior working on legal problems involving lands to see the drastic changes.

For example, for years the only people who ever came to me and spoke about the legal problems on federal lands were those who wanted oil and gas leases or coal leases. The general public seemed to pay no attention. Everything changed in 1969. The oil spill in Santa Barbara probably touched it off, and since that time there has been a general flood of inquiries. I've had close dealing with environmental groups. The general public has come in with questions. I think it's a good thing that so many people are taking an interest. Like every good thing it also has some drawbacks but I think on the whole it's been a wonderful development.

I'm going to start off by talking a little about the general laws that cover minerals on federal land. We usually start with the Mining Law of 1872. The objective of the Mining Law of 1872 seemed to be to get mineral deposits into the hands of those who would develop them. There was little concentration on the management of those lands by the federal government. There were millions of acres in the West, it was thought to be a good thing for mineral rich lands to pass into the hands of those who would develop them for their mineral riches. The government did not exert great control over what was done.

Through the years, of course, this concept of extensive management has changed. It was certainly a problem in the 1930s. We were talking about multiple use management, multiple purpose management of lands and we began to look at ways that we could exert more control over the ways the minerals were developed. And this has progressed steadily with increasing control by the federal government.

Now the goal of the Department today in mineral development which has always seemed to me to be a very good goal is threefold. We talk about timely and orderly development of the mineral resources, with proper protection for the environment, and a fair return to the public. I think these are three fine goals and I can agree with them. But like everything else that's expressed in general terms, each of us interprets them a different way. What seems "timely and orderly development" to me might seem ruthless exploitation to somebody else. Yet, on the other hand, what I look upon as timely and orderly development might seem a slow-moving thing to some people who want great development. At the same time there can be great disputes as to the meaning of "proper protection to the environment". When it comes to "fair return to the

public" I often feel that that's a principal concern of the Office of Management and Budget; and yet in Interior we think of the other goals probably ahead of that. So we have that goal and I think it's a goal towards which all of us should try to advance, recognizing that its going to be interpreted differently by different people.

Now the interesting thing about the statutes that, although many of them were passed long ago, we have discovered, by a certain amount of "creative law," that there is a lot of authority there we didn't think we had before and that can be used. There are six major statutes under which federal minerals are developed. The basic one was the Mining Law of 1872 that was passed at a time when the country was very much involved with the development of the mineral riches in new, unexplored lands in the west. There had been various methods used before, but 1872 really was a new start. The theory was that anybody could go out and look for minerals, and if he discovered a valuable deposit of minerals, would have a right to develop those minerals. If he liked he could get a patent to land where the minerals were. In other words, he would become a private land owner and the federal government would no longer have any control at all over the development of those materials. Furthermore the government would not collect a royalty from him. He paid a small sum when he obtained the patent but he didn't actually even have to get a patent. He could explore for the minerals and produce them without a patent. The general belief at that time was that the federal interest was served by having those minerals developed and that it was not necessary to obtain a royalty.

Now the 1872 law covered nearly all minerals. It did not cover coal but there is a somewhat similar situation for coal with a statute in 1873 I believe. For many years the 1872 law was in existence. Of course there was the question of what was a "valuable deposit?" And that was a good thing for lawyers; we immediately had to begin to interpret "valuable deposit." We came up with a wonderful concept of the "prudent man rule." Now this meant that there was a valuable deposit if a reasonably prudent man would be justified in the expenditure, labor, and means to develop the minerals. That prudent man rule was expressed first in the Department about 1894 (although I think we find some evidence of it even as early as 1873, a year after the statute). It was approved by the Supreme Court, and it has been established. I should point out, however, that through the years what the Courts believe a reasonably prudent man would do has changed somewhat.

Now it was felt that while the 1872 law was very helpful for most mineral development there were several minerals that required different kinds of statutes. About 1911 or 1912 when there was a very strong conservation movement, you remember how the general interest in the federal lands arose under Theodore Roosevelt. After that, people began to think about new ways of developing minerals, new statutes that would give the federal government some control. There was a great concentration at that time on oil and gas, and also on coal. Certain other minerals went along with them -- phosphate, sodium, and oil shale. Back in that day there was a feeling on the part

of many people that oil shale had a very promising future that was only a few years away from development. Of course that was the feeling in 1969, 1973, and right now all our leases are suspended. Someday it's going to be a great thing. Back in the days of World War I careful plans were made for its development.

The result of this concern was passage of the Mineral Leasing Act of February 25, 1920. It covered specific minerals (with a few later additions); I'll name them: oil, gas, oil shale, coal, phosphate, sodium, potassium and (for two states only, New Mexico and Louisiana) sulphur. Later on tar sands were included.

The theory of the mineral leasing act was that a person would be able to obtain a right to extract the mineral for a period of time. Sometimes it was limited by a length of years, but the general practice was that he would receive his lease for a set number of years. For as long thereafter as he produced he would pay a royalty to the federal government. The minimum figure set for royalty in those days was a little unrealistic to us. It used to be not less than 5¢ a ton on coal. That seemed like a small royalty, but for oil and gas it was twelve and a half percent of the value.

There are two general ways in which a person could obtain a lease. First of all, if the land was known to be valuable, it was thought he should compete for a lease, or that the Secretary should be able to establish methods for issuing a lease directly. The emphasis was on competition. But where the resource was not actually known to exist, or its technical feasibility for development was not known, it was thought that a first applicant could obtain what was called a "prospecting permit." A prospecting permit would run for a fixed number of years, two or four years, and the permitee would go out and search for the mineral. If he could show that he had discovered a valuable deposit of the mineral within the period of the permit, or as we call it with coal, if he could discover a deposit in "commercial quantities," then he would be entitled to a noncompetitive lease. This method of obtaining leases was used for oil and gas from 1920 to 1935. Prospecting permits for most areas, followed by a non-competitive lease to the permittee who showed a valuable deposit. Where the land was on the "known geologic structure" producing oil field and gas field then it was competitive right from the beginning. The lessee as I said would receive the lease. He would pay us a certain rent, he would have the lease for a set number of years and as long thereafter as he produced in paying quantitites.

This 1920 act seemed to be quite satisfactory for a long time, and it gave the Secretary broad authority in the establishment of lease terms. It gave the Secretary very broad authority to control which lands were allowed to be offered for lease. Nobody had a right to go in and get a lease, the person could come in and apply for a lease, but it was always discretionary with the Department whether the land would ever be offered in the first place. Our discretion disappeared once we had given a prospecting permit. Then the matter depended on whether the permittee could show the necessary discovery. There was nevertheless

certainly room for management there, and how much management was exerted depended on the actions of the Department at the time. I will later talk about some of the very good provisions in the statute.

Later on there was a Mineral Leasing Act for Acquired Lands which passed in 1947. It followed the same pattern as the Mineral Leasing Act of 1920 which was applicable only to public lands. Then in 1955 certain "common varities" of minerals such as sand, stone, gravel, pummice, pummicite and cinder were taken out of the mining law and they were offered for sale under the Materials Act.

So we now had three forms of disposition resources on the federal lands. We had the locations systems of the old mining law: a person could go out and make a discovery, and develop it paying the federal government no royalty. If he wanted to patent, upon his paying a very small sum, a few dollars an acre, the land would turn into private ownership and no control was exerted once valid claim was established. There was no control by the federal government. Second, we have the leasing system which applied to oil, gas, and coal. The federal government issues a lease and received a royalty, where the government had certain supervisory controls, but still the lessee had a right to develop as long as he could keep on producing. The third system for the common varieties of construction minerals is a sales system. The federal government would sell a number of cubic yards of gravel and the purchaser extract it. That was a simple contract to watch over.

Along this time there was a great controversy over offshore development. In 1953 there were two very important statutes passed. The Submerged Land Act passed in May. That granted to the coastal states the lands beneath navigable waters within their boundaries out to the three miles limit, or as it turned out in the case of Texas and Florida, three leagues on the Gulf Coast. Poor Louisiana, Alabama and Mississippi only got three miles on the Gulf, while the other two fortunate states had three leagues. Later that year, in August, the Outer Continental Shelf Lands Act was passed, which provided for the leasing of everything beyond that three mile or three league limit. It was to be released by the federal government on a strictly competitive basis. Oil and gas were the principal concern, though there were special provisions for sulphur and other minerals. But oil and gas were the main concern. I should say when I was first in the Department and that statue was passed maybe I was young and impressionable but we thought that was a great statute. It gave the federal government supervisory control, lots of discretion, it was a wonderful way to produce oil and gas. I think that on the whole everybody was extremely happy with it back in those halcyon days of the late fifties. It was producing oil and gas and no troubles at all. For fifteen years the program just seemed to be thriving -- it was bringing in money, lots and lots of money, and bonuses, and no troubles. The Department had very little litigation except with the states. Of course there were disputes as to whether the state boundaries would be drawn. But as far as trouble with lessees, it seemed a wonderful statute. Then on January the 28, 1969, the OCS lease that had been issued to Union Oil Company out in the Santa Barbara Channel started leaking. Every television show had pictures of oil seeping ashore, and like everybody else, I was horrified and I thought of the poor birds and what it was doing to the coastline of Santa Barbara. Suddenly we all began to concentrate on the OCS Act.

I think a lot of people ascribed a lot of evil to it which was probably not justified. It certainly changed our attitude and I may say it at least doubled the work of the lawyers in the Department of the Interior.

The government has been exciting for the last few years as the environmental movement has come to a head. I've always thought that if there was any one incident which was the final straw in the passage of the National Environmental Policy Act it probably was that oil leak in Santa Barbara Channel.

On January 1, 1970 the National Environmental Policy Act of 1969 was signed into law. One day after, you know -- it's always been interesting to me, it's the National Environmental Policy Act of 1969 -- but only it was signed Jan. 1, 1970.

It's been a very interesting statute. I have sometimes wondered if the environmental statements that are written today are beyond what the authors contemplated when they first wrote that statute. I remember the very first environmental statement that was ever written on an OCS sale. I worked on it in June 1970; it was about 35 pages long and we started writing it at noon Friday and finished it at 4:00 a.m. on Monday: an environmental statement written in 72 hours. Today, it takes about six months probably. Six months and thousands of pages. But, we had to learn, so that was the beginning. I think it's been a wonderful thing for the government to have to think about these things. I think that our mineral programs are far, far better than ever before, even though I recognize there's still a lot of room for improvement.

Then there was one final important statute for the disposition of minerals that came along soon after that: the Geothermal Steam Act of 1970. That provided for the leasing of natural geothermal resources. We were thinking primarily of geothermal steam, but of course they may be hot rocks, and so forth. Most people have liked the thought of geothermal development which ought to be environmentally pretty sound. It does have a tremendous noise problem. So far that has not been a major program outside of California.

By 1970 we had the six statutes and over them all we had the National Environmental Policy Act. It says that every one of the other federal statues must be interpreted and administered to the fullest extent possible in a manner consistent with the National Environmental Policy Act. We have had to look at these other statutes to see if they can be interpreted in a way that is more consistent with the National Environmental Policy Act than they were when they were passed in 1872 or 1920 or 1953. That's been a very good challenge for lawyers and we looked into it and have managed to discover that there is authority we didn't know that we had before.

For example, I was thinking last night when I heard Professor Sax talk about the need for people with principles and standards to be the leaders, I realized there could be great dispute amongst people as

to what those principles and standards would be. I thought to myself, could there be anything that would allow a man in charge to exert his own principles more than this provision which is in the 1920 Mineral Leasing Act? The provision says that each lease shall contain provisions for certain purposes. It then lists the social problems of 1920: no company shop; freedom of purchase; payment of wages at least twice a month; no underground employment of young people or women or children at anytime. All those social problems of 1920 we've read about in the history books were mentioned. Then it goes on, it takes care of the future when it says the regulations shall contain "such other provisions as the Secretary may deem necessary for the protection of the interests of the United States and for the safeguarding of the public welfare." Well - that's a wonderful provision. In 1920, nobody was thinking of protecting the environment the way people are thinking of today. But, it seems to me that that's a perfect opening for a Secretary to say, "I want to put these provisions in to protect the environment."

I hope you have a general idea now of the kinds of things we've done through the location, the leasing, the sales system. We have moved from general dispostion to encourage development. This constitutes a form of management by the federal government. We always tried to say there would be that person who had to do something to justify getting his title. We said he had to meet the requirements of the prudent man rule in order to have a mining claim. At one time that prudent man rule was rather loosely interpreted. Then people began to recognize that a prudent man didn't spend his money unless there was a market. So the Department came up with the concept of "marketability" under the prudent rule that was sustained by the Supreme Court in 1968. So now there is a requirement of marketability.

In 1974 we began to look into this question of what, indeed was a valuable deposit for a prospecting permitee. We have discovered the Department was not examining very carefully -- well, I shouldn't say that - - no, let us say that there was a question as to how much prospecting a permittee had to show in order to get a non-competitive lease for coal or phosphate. It seemed to us that Congress has used the term "valuable deposit" and that the Congress had meant the prudent man rule for the Mineral Leasing Act just as it had used the prudent man rule for the Mining Law. After a lot of discussion in the Department, we finally came up with regulations which very clearly imposed this prudent man rule. Nowadays thanks to one of our young lawyers, who was drafting regulations, that says the prudent person rule. The prudent person rule has been applied and we are now saying that for a coal permittee to obtain a non-competitive lease for coal, he has to show that there is a market for it, and that he can do it meeting all the requirements of the lease. This is very important. I told you about the broad authority the Secretary has to impose these terms and conditions. For a permittee to obtain a non-competitive lease he has to show that he can indeed meet those requirements and still have a market for his product. This is I think a forward step. I may say that matters in litigation as to whether it can be applied to permits that were issued before those regulations; naturally we think it can, but that's in litigation now.

There are a few serious flaws left in the Mineral Leasing Act, however. I do myself think it's highly questionable that we should always issue oil and gas leases non-competitively. I think that it is, except at the time it was the main geologic structure producing oil and gas field and issued leases competitively. Other times even when the general public knows that oil and gas is there and is eager to get leases, the first applicant has a right to lease non-competitively. Then he gets it for a very small sum. It used to be 50¢ an acre, now it's about a dollar an acre. Then, of course, that first applicant could turn around and hold his own competitive sale for the oil companies. I don't think that is right. I would like to see us able to extend or add to our authority to issue oil and gas leases competitively. When the Congress changed the law on coal last year it required that all coal leases in the future be competitive. The only exceptions would be those few remaining prospecting permittee's applications which were pending at that time. I think that should give you some idea of how we should dispose of minerals on federal lands. I hope that after the other speakers have talked a little bit, you're all going to ask lots of questions. You know I'm prepared to talk indefinitely on this subject. I think, however, it would only be right now if I called on the next speaker.

WESTERN COAL DEVELOPMENT

Carolyn Johnson

I think it best to start off with an evaluation of where we are now with respect to wildlands management and coal development in the West. To get a perspective on where we are today, let's look at the way we used to be. The management and managers of these lands were dominated by the desires and needs of the special interests, that is, the economic users: the grazers, timber cutters, and miners, while the managers, those in responsibility, expounded broader values and goals, which were only incidentally put into practice. Today it is business as usual, but a change is in the wind.

Historically, these Western lands, including the lands that are being or are proposed to be affected by coal development, have been divided into two opposing categories: the sacred and profane. This division was largely the situation in the general view of the public, the managers, and the Government. The sacred lands were the national parks and the more well known national monuments. Their right to existence, although their real legal purpose and intrinsic values were often misunderstood, was nevertheless championed and major incursions on their integrity were resisted, with a fair amount of success. Today, whatever the public view of them -- tourist temples, shrines to nature -- they are even more prized by millions and supported by millions more.

The other half of this dichotomy is the profane lands, which includes everything that wasn't a national park. They were ignored by the public, mostly because the public knew little or nothing about them. They became the domain of the special economic interests, and generally little care or concern was exercised. There was so much western land that it was thought that it would neven run out; any activity could be carried out with no seeming long-term effects on the whole of it. And, thus, many of these lands were dug up, overgrazed, de-watered, and poisoned. Now the results are showing up: severe erosion, saline rivers, polluted air, poisoned earth and disappearing wildlife.

The margin of safety -- that margin that healthy ecosystems use to weather and survive natural periods of stress -- is gone for many of these lands. Yesterday, Mr. Koenings spoke about the some 75% of the public grazing land managed by BLM that is moderately to severely overgrazed because of drought. I want to clarify the sequence. Healthy lands can and do survive droughts and can recoup. We have had a drought in many parts of the West for the last several years. But these lands went into the drought in very poor condition; they were overgrazed before the drought.

In the last couple of decades, many more Western lands have acquired "sacred" or at least "revered" status in the public's mind. This has come about through new protective categories being created such as wild and scenic rivers, national recreation areas, wilderness areas, BLM primitive areas; and it has come about through increased appreciation

for long-standing designations such as national wildlife refuges, state parks, the national forests, and original wildernesses.

Increasingly, the borders are being blurred between these types of lands in the public consciousness as we find out how systems interact, as new land use laws are passed and as we gain greater awareness of the implications of those logged long on the books, and as the public begins to develop a land ethic that is based on the needs of all life rather than the ability of man to use resources. And the borders are further being blurred between the sacred and profane, these old categories, as we find that nothing is sacred, not even the Grand Canyon National Park, from the threat of incursion. Quite simply, it is becoming clear that nothing is sacred or untouchable, that the principal issue is not one of guaranteeing the borders of enclaves, whatever their size, but it is an issue of instituting management practices that strive for long-term stability and diversity of ecosystems on all our wildlands.

We have many of the legal tools for such a system now; we have a supportive public. But these tools have not been used and, in large part, are not being used today. The failure to use these tools is, I believe, one of the central issues in energy development in the West today.

I think in order to understand this issue, it is necessary to step back and take a quick look at the land itself and how management has been carried out on the coal lands.

The most obvious characteristics of the wildlands in the Rocky Mountain and Great Plains region are the their aridity, ruggedness and vastness. It is sparse land and demands a special effort to appreciate its rhythms and nuances, if one is accustomed to testing the values of lands by a cosmetic appeal in the degree of bright green luxuriant vegetation and gentle, intimate landscapes.

As I stated in the introduction, these lands, although owned by the public at large, have been and are being managed for the benefit and at the behest of the economic user, such as the coal developer, timber cutter, the grazer, or ski operator. The implication is that these economic users can get what they want. The implication is that there are no national policies that govern these lands, no laws whose constraints have to be taken into account.

As far as taking into account the wishes and concerns of the owners of these public lands, namely all the people of the nation, that simply was not done. There was no effective program of outreach to the public, except at a local level. For example, the BLM advisory boards were made up of local grazers largely and other economic users. The advisory board system was based on the assumption that an economic user can examine other, perhaps competing uses of these lands without bias. That is a put-on. The advisory boards were totally internalized to the agency - that is BLM picked the people to serve on the boards and set the agenda as to which items they wanted to be advised on. That was a put-on. The belief -- not the law -- was that these lands could be used at will, the charge for multiple use and sustained yield was ignored by the agency.

In essence, the managers did not level with us that this land was owned by the nation and that their management and many of the users' desires do not conform to our charge and fall within our legal constraints.

As to coal, it was leased by the square miles, with no regard to the requirements that leasers prove that economic quantities of coal were there and that it would be developed. Instead, by the early 1970s when a temporary halt was finally called to the rampant coal lease speculation, over 800,000 acres of federal coal land had been leased. This contained more than 16 billion tons of coal, very little of which is being or is planned to be produced. But the land grab had been made.

And so, the stage was set for the present conflict. In early 1973, before the oil embargo, after the coal companies had positioned themselves on the richest lands, and for all intents and purposes staked their claims to the coal and water and other resources, the President, after the fact, set into motion a brave new program to meet our energy needs through making available western coal. He proclaimed in concept what was already a fact.

Then Department of Interior officials pronounced that the first priority for the management of the western lands would not be the development of energy resources: oil shale and coal. That was nothing new, but to hear it aloud was new. It was in the national interest. It was the national policy, by fiat, to dig the coal, build the giant conversion facilities, powerlines, and railroads, bring in thousands of new residents -- in short, he declared an open season to industrialize the West.

Furthermore, this development was going to be good for the land and the people: "Reclamation of coal-mined land would put it back better than it was before" -- whatever that was intended to mean -- and besides, the creation of jobs at the mines and generating plants would "do wonders for the local people and the agriculturally based economy." With respect to oil shale development, the Department said not to worry; filling some rugged canyons in Western Colorado with millions of cubic yards of black, sterile mining wastes would be a "beneficial use of canyons."

Within months of these pronouncements, the hypocrisy of these statements and others began to come through. Interest and knowledge about past and present land management policies and practices on the part of the public became active and deep.

With coal, for instance, investigation soon showed that successful reclamation of western coal-mined lands was an unknown: unproven, untried and unlikely. The ability to restore these lands to a level equal to their pre-mining productivity was a hope on the part of the companies and land managers that was fantasized into stated fact. The management tools to deal with the relict soils and spectrum of native plant species do not exist. And the severe, arid climate cannot be managed. Lands recently stripped in the West have not been reclaimed.

Further, investigation shows that other regions had experienced the supposed benefits of extensive coal development. How had they fared? Appalachia stands as a bleak example of the broken promises and a scarred testimonial to the economic and resource disaster of strip mining. In Appalachia, with its temperate climate, the land and the people are still being bled. We have little confidence that the West can expect better. In response to the claims that this time we'll do better, many are saying, "Fine, prove it on the existing areas."

Aside from these specific considerations, the system has flip-flopped. The directive had gone out to local managers to develop coal, to give it priority, and yet this was done in the absence of policy on which to base this order. The practice of apparent local control of these lands and of paying even lip service to the ideals of multiple use and sustained yield was dropped wherever necessary in order to comply with the number one priority of coal development.

Since industry wanted to lease still more coal, in addition to the 800,000 acres and over 16 billion tons already under lease, new ways of manipulating the management and new acronyms were introduced. For example, for several years BLM has had a system called the Management Framework Plans which it heavily promotes as a well-designed, rational planning process with meaningful public participation, with particular emphasis on the local level. How has it worked? Despite the stated purposes, MFPs are basically nothing more than a rather simple inventory of resources for a given area, with major emphasis on identifying the economically attractive, usually strippable, coal resource. The "public participation" aspect of the program is primarily a series of lectures by agency personnel, and the written materials and maps, which are the substance of the MFP, have been nearly impossible for the public to obtain so that their participation could be effective. How has local feeling been accommodated? Well, it depends on how they feel. If public feeling is opposed, then that feeling is ignored. In the Birney-Decker MFP in Montana, the socio-economic analysis included a survey of local residents which showed that over 80% were opposed to strip mining. Yet the final agency recommendation was that nearly all the strippable coal be leased.

The new federal coal leasing amendments act and the organic act both mandate comprehensive land use planning to take place before leasing.

Although the Organic Act regulations have not been published, in Colorado we have been told that the MFPs in the northwest Colorado coal leasing area will be "recycled" after the decision is made to lease but before the actual leasing takes place. Quite frankly, I don't know what that means, but I'm skeptical because the base of the original MFP is so shaky.

The Organic Act does have some sections that we are looking at with great interest. It specifies protection for areas of critical environmental concern. It codifies procedures for right-of-way grants. It mandates comprehensive land use plans. But right now, so soon after the Act's passage, we have no idea how these will work in practice.

What do we have going for us? How can today's public perceptions and priorities be instrumental in changing the management tools for wildlands? We have some laws on our side. These laws, however, are sometimes distorted, sometimes ignored.

For example, the Endangered and Threatened Species Act of 1973 stands virtually alone as our major nongame statute. It includes the protection of both plant and animal species. Psychologically, the Act attempts to provide a salve to our conscience for our terminal cases of wildlife. Sec. 7 sets a mandatory requirement on federal agencies to ensure that their actions don't jeopardize endangered species by destroying or modifying habitat critical to them. It applies to the entire range of program stages. It expressly states that actions authorized, funded, or carried out must meet the mandatory requirement- no grandfathering in here.

Recently, the Department of Interior released the final environmental statement on coal development in the Northwest Colorado region. Construction of a 25-mile long railroad spur up the Yampa River would adversely effect the last remaining habitat of two federal and two Colorado endangered species of fish. What does the Department propose to do? Well, it will go ahead and approve construction of the railroad and then it will begin a colossal mitigating measure for these endangered species. It will study the "exact use and value" these impacted resources have for the endangered species. It will document their demise.

Studies don't mitigate impacts. Studies don't remove the jeopardy as required by the Act.

Soon after passage of the Act., the Forest Service produced an internal memorandum documenting how the Act would affect the Service's programs in land use, recreation, minerals, timber, research, et al. It was remarkably specific and lengthy, listing many of the actions that would have to be taken. How has the Act been incorporated into in-the-field management? It hasn't.

Recently, the six state Great Plains, Central Rockies and Southern Rockies areas put out a description of the potential issues. They are to serve as a basis for planning the future programs of the Service in these states. The only significant issue was grizzly bears in the Yellowstone area. Some others did get a mention, however. Habitat for the Northern Rocky Mountain wolf, peregrine falcon, and other threatened and endangered species "was not a significant issue." In fact, to read their description of the Act, any unenlightened person would interpret it as an Act referring to grizzly bears.

Yet, in this same document, extensive attention is given to "wildlife management". Wildlife management is confined to elk, game birds, small game mammals and predator control, which is a euphemism for wildlife destruction.

I don't know why the endangered species act, its constraints and requirements aren't reaching the field managers, but there may be a clue here in this way of addressing wildlife management.

The National Environmental Policy Act is another legal tool, albeit an indirect one. Let's look at an aspect of the Act that's working. When an E.I.S. is to be done many of the agencies put together writing teams of specialists. They put these people in some out-of-the-way motel, often in a very small town with no nightlife and far away from their families. The theory is that in throwing together persons from ten different disciplines, an integrated, multi-disciplinary study will result. It does not. However, what does happen is that there's little to do but work and sit around and "shoot the bull." And there's not much to "shoot the bull" about except work. So, by the force of circumstances, they're becoming knowledgeable about other fields; the integration is taking place, not always in the written form.

What happens when an agency tries to meet its charge? In Montana, the Bureau of Reclamation's Yellowstone River Project, earmarked for coal development use, is a hotbed of contention. The wildlife values of the lands to be flooded are diverse, sustaining and productive. The U.S. Fish and Wildlife Service, emphasizing the 11-mile stretch of prime trout waters, acquiesced and agreed to start the diversion below the prime trout waters. And there it stood, eleven miles of trout stream for hundreds of square miles of coal lands -- whole ecosystems. Mitigation? Do eleven miles of trout stream make an ecosystem?

The Montana Wildlife Division was harder to appease than the Federal government. They didn't take the 11-mile bone, diverting them from their charge. They are asking for natural flow levels and are holding firm. That this would preclude coal development is not their problem; wildlife is their problem. Further, the Department is doing a total ecosystem study of the area which they plan to use to support their case of like species for like species -- no elk myopia there.

In conclusion, I want to make a couple of observations.

The supply of wildlands is limited. There are no more to be had. We can't create more, and we can't manipulate the supply we have. We must give attention to all our wildlands. In truth, the way we manage the least of our lands determines how well we manage the best.

The tools are there. In large part, we don't need to write lots of new laws, but to implement what we have. The professional manager who has the management tools to implement the public's priorities needs the active participation of the citizen so we can all get the job done.

OUTER CONTINENTAL SHELF DEVELOPMENT

DAVID LINDGREN

It is a pleasure to speak on the subject of outer continental shelf development here at The University of Michigan rather than in Santa Barbara or Boston. It is refreshing to be away from the oceans where the emotions are not so heavily involved. We are however seeing today a diminution in the intensity with which these matters are discussed. People are still aware of offshore development, and they are still aware of the problems associated with it, but people are getting a better grip on the issues and tradeoffs involved. Also by way of introduction, let me note that there are several areas--notably Louisiana, Texas and, of course, Alaska--where state lands are being developed for offshore resources. I shall talk entirely about the federal lands administered by the Department of the Interior.

Unlike the acts that were discussed yesterday afternoon, the basic legislation in the area of OCS development is relatively simple. I know people that have read portions of the Water Quality Act, and who are experts in different sections of it. I'm not sure that anybody has actually read the whole act. The OCS Lands Management Act is different. You can read it and have, at one reading, a good idea of what it's about. I don't know whether this is because of increasing sophistication today, or whether it is a result of the fact that 25 years ago Congress felt that one should be able to understand statutes.

Because of this we find that while there has been much written about the OCS Lands Act, and there has been a lot of litigation (three cases recently involving the Gulf of Mexico, several cases involving development in California, in Alaska, in the Atlantic), all the writings and almost all of the cases deal with environmental impact statements. Are they adequate, and how do you go about writing them? Interestingly most of the writings and cases thereby completely avoid the real issues of what we should be talking about: resource development, when should it be done, where should it be done, how should it be done. None of the litigation and almost none of the legal writings (here I am distinguishing legal writings from the work of advocates and resource managers) address the real issues that I believe people in this country should be concerned about in this process. The reason for this I think is simply because the statutes are sound. They allow the whole spectrum of the issues to be decided within the framework of the statutes and it is difficult although not impossible to challenge the decisions that resource managers make under those statutes. The challenges instead are conducted more in the political or administrative arena.

Last night Professor Sax spoke of the idea and directed our attention to the idea of a guiding policy or a guiding idea for resource management. I think that that's a very useful place to begin as far as offshore development is concerned. You have to scrounge around in the statutes, but you can find some rather basic guiding principles that do apply. I think there are about four.

The first one is in the Outer Continental Shelf Land Management Act itself, in which Congress has said that "in order to meet the urgent needs of the further exploration and development of the oil and gas deposits in the Outer Continental Shelf," then it goes on to authorize the Secretaries

to grant various oil and gas leases. This act recognizes as of 1953, at least, an urgent need for further exploration and development on the OCS.

There is a second act about 18 years later, the Mining and Minerals Policy Act which states that it is the continuing policy of the federal government in the national interest, to foster and encourage private enterprise in, among other things, the orderly and economic development of domestic mineral resources to help assure satisfaction of industrial security and environmental needs. There is a second point which the managers can look to for basic policy guidance depending upon what decisions should be made.

The third statute I would choose would be the National Environmental Policy Act. It contains a short section of fundamental policies in the United States and then the second section states certain goals. I am going to make the statement that I think the act has a dual purpose and it has a dual thrust. One of them is obviously protection of the environment in this generation and for future generations. The other relates to development of resources. So the act talks about "creating and maintaining conditions under which man and nature can exist in productive harmony." It talks about "the wisest use and beneficial uses of the environment without segregation and achieving a balance between population and resource use." So there is the third facet which I think has a kind of a dual purpose/dual approach and it begins to change the thrust of the first two statutes.

The fourth is the Coastal Zone Management Act. In that Act Congress declared a national policy to preserve, protect, develop and where possible, to restore or enhance the resources of the nation's coastal zone. This statute also requires states, as they develop their coastal zone programs, to consider ecological values as well as needs for economic development.

I think one can scrounge a lot more but we really don't come up with any more policies. If these statutes can really be said to provide guidance to a resource manager, I think it is simply that national policy of developing our natural resources in an environmentally sound and acceptable manner. I don't see any statute, however, that takes us the next step and suggests what an environmentally sound or acceptable manner is. Statutes, in my judgment at least, leave that decision to the resource manager who makes the ultimate decision to develop a natural resource. In the context of what I am talking about today which is the development of oil and gas on the offshore, that individual is the Secretary of the Interior. So far to date, although under a number of delegations officials of the Bureau of Land Management have the power to decide whether to develop offshore resources, in every instance for about the last six or seven years, decisions have been made by the Secretary of the Interior and no one else. But ultimately I think the statutes lead to the resolution of these conflicts by the Secretary.

I would like to mention a few of the specifics which you can find in a couple of these statutes going back again to the OCS Act. This is as I mentioned is a rather short and clear statute. It provides the method by which resources on the Outer Continental Shelf are developed if the decision is to develop. The first thing this statute does is authorize a Secretary to develop; it also authorizes a Secretary to decide not to develop. It gives to this total discretion control over the timing of committing an area to development.

The second thing I think the act does is give him very broad powers to set terms and conditions for development. And the Secretary has done so. As I have said, the statute is short; the regulations are not terribly lengthy. The next set of controls or implementing body of law are called "OCS Orders" which are issued by the Geological Survey and are even longer. They set the technical constraints within which an operator on the OCS has to operate.

And the fourth area is specific terms which go into the lease. And they can be extraordinarily broad and cover many, many subjects -- everything from the protection of biological communities, to the way platforms are set, to how bottom settled sediment problems and faulting problems will be handled, disposal of oily residue on platforms and so forth. Fred was reminding me before we started of one of the interesting sidelights on all this. Most of these lease terms and provisions are issued under a little provision that gives Secretaries authority to do all sorts of things in the interest of conservation. And what the Secretary has done has, surprisingly, never been challenged by industry which is regulated by this, except once. That was as a result of the Santa Barbara blow-out. The Secretary after that blow-out had basically shutdown a lot of exploratory activities in the Santa Barbara channel: "suspended operations under the lease" is the technical term for it. The operations were suspended "in the interest of conservation" which is the statutory phrase. Fred reminds me, and he is absolutely right, that initially this provision was put in the act and was interpreted by the Department for something like fifteen years as referring to conservation of the natural resources that were the subject of the act, namely oil and gas. The Secretary used that authority to suspend operations, not just for conservation of oil and gas, but conservation of fisheries, conservation of the shoreline, conservation of the environment, and so forth. In the District Court decision and the Court of Appeals, the Secretary's interpretation (with a little assistance from the National Environmental Policy Act) was sustained. I think this is one of the more interesting examples of where the original concept of statute has been switched around about 180 degrees and it has been adopted (or adapted I should say) by the managers and sustained by the courts in this instance to the problems of contemporary time.

We have mentioned a lot about the National Environmental Policy Act and, of course, it cuts across any one of these issues. For this purpose, particularly looking at resource development questions, I think simply referring to the environmental impact statement process itself, the way the department has molded its procedures and the way it has molded the program of late, is to fit the requirements of that act. It is that act (along with a couple of other things, but that act primarily) that gives resource managers who may be affected or whose lands may be affected by an offshore decision a shot at that decision. In fact, it gives them several.

The third statute I would refer to is the Coastal Zone Management Act. The Coastal Zone Management Act has been discussed a little bit but its primary purpose is to provide an incentive or force states to develop plans for the development of the coastal zone with the principles that I mentioned before. It also requires every federal agency and this would include Interior and its management of the Outer Continental Shelf Program to conduct their program in a manner which is "to the maximum extent a practicable," (whatever that means) consistent way of approving state management plans.

I have to digress here a moment to point out that once a lease is given, it is not the end of Interior's involvement. A lessee obtains a lease and that means that the lessee may do precisely nothing on the Outer Continental Shelf without further authority from the Department. If they want to explore, if they want to drill a well, if they want to cap a well, they have to come running back to the Geological Survey for a permit to do it and the Geological Survey approves their specific plan before they can go ahead.

So coming back to the Coastal Zone area, the recent amendments to the Act require that any time a lessee seeks one of these subsequent permits from the Department the lessee must certify that the proposed activity under that permit is also consistent with the state's coastal zone plan. There are two caveats: (1) the state has adopted and has had approved the coastal zone plan, (2) that the activity affects land use or water use in the coastal zone. The state would then appear to have some veto power through its coastal zone plans over what happens on the Outer Continental Shelf. There is an override provision in the Act, however, which allows the Secretary of Commerce to authorize a program even if the program has not been said to be consistent by the state, or even if it is consistent with the state's program, the Secretary may authorize the activity to proceed nonetheless under two circumstances: (1) If the Secretary finds that after standing all this the proposed activity is still consistent with the purposes of the Coastal Zone Management Act itself, not the state program, or (2) if it is otherwise necessary in the interest of national security, again, whatever this means.

There are a couple of issues that this statute I think raises for offshore development that, at least as far as I know, haven't really been addressed yet. First of all, what activities affect land or water uses in the Coastal Zone Act? We talk about offshore development. For instance, many activities may be taking place off New Jersey in the area that was sold for leases. It's about 50 or 60 miles offshore of the coast. If you talk about development in the Georges Bank you are 200 miles from land. On the other hand, if you are talking about Santa Monica Bay in California you may be 3.8 miles from the shore. So to what extent does drilling an exploratory well, for example, affect land or water uses within the coastal zone? These areas are all outside the coastal zone, I might add. That is one of the questions that is going to have to be addressed. As you go down the line and you start talking about pipelines to bring oil ashore or gas ashore, obviously it has an effect as it goes into the coastal zone. As a matter of fact, it has to. And so there is an obvious effect. So I think that is one of the questions that is going to be raised and I think it is going to be interesting to see where that comes out.

The second point that is very interesting is what is consistency with the state's coastal zone program? A coastal zone management program of a state is presumably to get some kind of hold on development within the coastal zone with the idea that where development is going to be located within the coastal zone and how it is going to be somewhat controlled. There are going to be provisions for the protection of beach lands, of marsh lands and of title lands and so forth. That's what it is going to be directed to. So again, to what extent, to what point and where is an activity consistent which takes place 10 miles, 50 miles, 200 miles off that shore, even if it has some sufficient possibility of

affecting land. To put it the other way, where is it going to be inconsistent with the program that is basically designed for protection of the shoreline? I think it is going to be interesting to see how some of these issues develop and they are certainly going to be raised at some point. What I see is an area of potentially serious problems and potentially great opportunity as coastal zone plans are being developed; it may turn out to be nothing, but at the moment I think those are two interesting aspects of it.

These I think are the basic statutes that provide the framework for some of the issues that are involved in offshore development. I think I would like to suggest some of the issues and I think there are others here who will be able to tell me that I have missed all of the really important issues that are such and such. Carolyn will add a few to my list. I think these are issues that are not only pertinent in the national sense but pertinent to resource managers.

First is do we in fact need development of offshore resources at all, and I have restricted myself to oil and gas. As you look at that question you have to take a look at what the alternatives are. One of them is conservation. Another one is switching to coal. Another one is switching to nuclear power. And another one is importing whatever oil we would otherwise use if the offshore resources were developed. Everyone of those issues as we pick and choose among all of these alternatives are going to affect resource managers. If you were in charge of managing wildlands in Wyoming, for example, there is going to be an impact on how the decision is made as to whether or not to develop oil and gas resources in the Atlantic. You may be deciding not to develop resources in the Atlantic and put increased pressure on coal. And as you look around the world for some coal, there is coal in Wyoming. So that effect may come. Conservation can have economic impacts and it can impact, in a sense, the way wildland management occurs elsewhere. This is the same with nuclear, and so forth. Imports - more likely you are talking about coastal zone area but again you get to the interesting trade-off of what is worse? Offshore development or tankers coming into harbors? Where are the greater risks? Where are the greater impacts? What has the greater development? Do we want to drill offshore or would we like to create offshore terminals? Or dredge harbors tremendously deep to accommodate tractors? These are some of the questions and they do affect a wildlands manager.

Some of the other issues I mentioned - oil spills - and I think the concern for that one has somewhat decreased. Everyone does remember oil in the Santa Barbara Channel after 1969. If you fly in a helicopter low out of Santa Barbara airport flying north along the coast about two miles out of shore you will be appalled by the stench of oil. You will be appalled by the continuous oil slicks across the water. Those are the results of the natural oil seep, they have nothing to do with offshore development. So, what I am saying here is simply that I think the oil spill issue has today left the emotional charge - the ducks which were oil covered - and is being put in a more careful prospective. The probabilities of spills, the probability of where the spills are going to wind up are being rather carefully assessed and there is continuing concern,

for example, over what are the effects and what resources might be exposed to and impacted by oil development? What is the exposure to kelp beds and what is going to happen to them? Other examples are certain biotic communities, fisheries and so forth. But I think those questions are being more accurately addressed today than emotionally addressed.

Some of the other issues that should be talked about: What is the impact of offshore development on marshes and habitat along the coast, areas that have basically been set aside for man's development. Are they in fact going to be impacted? Where should pipelines be brought ashore or should they be brought ashore at all? Should oil be transported ashore by alternative methods, barging for instance, tankers with offshore terminals when the oil is transferred from a holding station two hundred miles off into a tanker and brought ashore? I think these are some of the questions.

The biggest questions probably today are those of the associated industrial development. Where should it be located, what is going to be the extent of that development? Here I am talking about staging areas for oil crews, places for the equipment for offshore developers to store it in a shipment room, as well as treatment facilities for the oil and gas, and separation facilities when it comes ashore and ultimately refineries. Where are they going to be located? What is the capability of an area to absorb this kind of industrial development? What are going to be the tax-based consequences to the community? These I think are some of the major questions.

And finally I refer to air pollution, which is more than Los Angeles at least has raised in terms of not only offshore development but increased tankering. If development occurs closely enough there is an oil pollution effect and an air pollution effect in that some of the oil, some of the vapors do get into the atmosphere and they can have an impact. But again we get back to the tradeoffs.

So with that I think I have given a brief tour of the Act. As I say, for those who love statutes, read it. It is refreshing these days. And I have given you a tour of some of the issues. I really haven't suggested any resolution of the issues, but I would hope that when we get done here perhaps we could discuss some of those issues or some of the other problems that I have ignored. Thank you.

MINERAL LANDS AVAILABILITY

GAIL L. ACHTERMAN

After Caroline's remarks I really feel like I should be talking about the BLM Organic Act instead of about mineral lands availability. Gary, who was supposed to be speaking today, was going to address this question. He worked and really got the task force off the ground. So I'm going to try and focus on what I think Gary would have said if he were here. He's a professional economist so maybe some of that aspect will also come out in the talk.

During the past day and a half there's been a lot of discussion of land use planning and management framework planning process for the Bureau of Land Management. There are new statutory requirements for land use planning in the BLM Organic Act, the National Forests Management Act and also in the coal amendments to the Mineral Leasing Act that were passed last year. When we try to think about the legal mandate to plan land use in the context of mineral development, unique problems are presented that most people trained in resource management don't even think about. This is because most of them are trained in surface management and sub-surface management skills. The reason that this is a problem is that you can go out and you can inventory the trees and look at the hydrological system, you can look at the soils, and at the wildlife resources. There are very difficult problems that are presented by these things but they're all there, and if you go at it right you can figure out what is there and then you can begin to plan for how it's going to be utilized and managed in the future. The difficulty with mineral resources is obviously if they are underground, you can't just go out and find them as easily. I guess I should make a distinction that geologists have told me that you need to make. Hard rock minerals, the ones covered by the 1872 Murray Law are particularly hard to find because they're located in narrow veins or loads. That's why gold is so valuable--obviously it's very difficult to find and there is not much of it. So when you're going out there to plan land uses as a resource manager, you can't figure out in advance what all the mineral values are. It's a little bit easier to do things like coal and oil and gas where there are sedimentary deposits and, as I understand it, you can anticipate better where they're going to be. But you do have this difficulty that you can't figure out in advance what's there.

The second difficulty is that there's a unique degree of conflict with other land uses when you're talking about mineral development. You can cut the trees down and they're going to grow back, and the grass can be eaten up by domestic livestock and it'll grow back if you do it right. All these uses obviously have some impact on the natural system and sometimes, very severe impact. That's considerably different when you strip-mine an area. No matter what you do, if you take out a three hundred foot deep vein of coal, even if you reclaim the land you're going to be three hundred feet lower when you reclaim it. The same thing is true in terms of mining gold or silver whether it's placer mining or underground mining. You are really talking about very severe impact on that local resource system and these conflict levels

are intense. That's why people get so uptight about stripmining in the West. Obviously it's because the level of conflict with the other uses is much greater than if you're just letting cows out there to graze.

So you have this legal mandate for land use planning and yet it's extremely difficult to implement if you try to consider planning for mineral resource development along with the other uses. And, the system of planning for mineral development has historically been very, very crude and it's led to a lot of industry claims which I'll try to explain.

The industry groups--mineral development companies--are taking a very strong position today. Much of the remaining mineral resources in the United States are on public lands. They are saying that the Federal Government has closed so much of that land's mineral development that we aren't going to have the material resources that the economy demands in the future. In fact they contend that about two thirds of all the public lands in the United States are now closed to mineral development. That's their argument. They make this argument and they use some pretty esoteric terms. I'd like to just go to, very quickly, the terms which they contend, using these legal tools that these terms reflect, close public lands to mineral development.

These legal tools were developed in the context of the old public land statutes that Rome Koenings was addressing yesterday. They were all disposition-oriented and there were thousands of them and there was no such thing as land-use planning. The agencies didn't have the authority to do what we now term land-use planning. They had to develop what I call little tricks to achieve land-use planning consistent with all of these disposition statutes. The first trick that they developed was something called "withdrawal." Withdrawal occurs when the Secretary of the Interior usually or the President says, "I'm going to take this particular tract of land and set it aside, and none of these laws are going to apply to it anymore." Now normally you'd think that there's a law in the books that applies to the public lands that is going to continue to apply because that's what Congress said. Well that's not the way it works. In the land law field the Secretary of the Interior can say, "Not for this land; those laws are not going to apply anymore." The Secretary of the Interior has made very extensive withdrawals of public land. In fact, all of the public lands in the United States are withdrawn for one purpose or another. The reason why there's not been homesteading from 1934 until October 21 of this year when the Homestead Law was finally repealed was that all those lands were withdrawn from the operation of the Homestead Law. Many of the lands are also withdrawn from the 1872 mining law and others are withdrawn from the Mineral Leasing Act. The reason that withdrawals are particularly prevalent from the 1872 mining law is because of the patenting provision that Mr. Ferguson referred to earlier this morning. You're managing a large block of public land. If somebody goes in there and stakes a claim under the 1872 mining law, they can acquire fee simple title to a parcel of land right in the middle of the land that you're managing. If you don't want them to be able to go in there and mess up your ownership pattern, among other things, or if you feel that mining in that area would be detrimental to the other resource needs that you're managing for, then you withdraw the land from the operation of the mining law. I believe very firmly that the patenting provision of the 1872 mining law has been a real incentive to widespread withdrawals of land. Now, the very

same mining industry that argues that there are way too many withdrawals also argues that the 1872 mining law is just wonderful and that we really need the patenting provision. Now this isn't an argument that's being made by the large mining companies. A lot of the small miners are very much in favor of the patenting provision and yet at the same time are very much opposed to withdrawals. They want to have their cake and eat it too. It's really kind of an internally inconsistent position. But, when you talk about mineral land availability, many people talk about it in terms of withdrawal because if the land is withdrawn from some kind of mineral development, obviously the many mining companies can't go in there for development.

Another term which isn't as important to understand as "withdrawal", but is used and often confused with "withdrawal" is "classification." We had, as previously noted, until October, 1976, thousands of public land laws. Lands were often classified for dispositon under a particular statute. If land was particularly suitable for agricultural use, it might be classified for homesteading or desert land act entry, some kind of agricultural development. Or, on the other hand, if it was very valuable for coal development, it could be classified for disposition under the Mineral Leasing Act and then somebody couldn't go out there and homestead on it. So, "classification" is the opposite side, if you will, of "withdrawal." In "withdrawal" you're saying these statutes don't apply, they don't operate on this land acreage any more. In "classification" you're saying land is particularly suited for the operation of this one particular law.

A third concept which is important to understand, is "reservation." All of the parks, the national forests, national wildlife refuges, monuments and so forth were reserved from the public domain and set aside for a particular public purpose. Generally, lands that are reserved are also withdrawn. If you reserve the land for national parks, obviously, you don't want mining going on there, so you withdraw it from the mining laws as well. Usually those things went simultaneously. But some people will say that our general public domain lands administered by BLM when they're just withdrawn- they'll say that they are "reserved." There is a lot of confusion in terms that makes the controversy very difficult. You'll be having a discussion with someone and they will switch terminology on you. The mining industry today is arguing that the Secretary of the Interior and the federal government generally through the use of the withdrawal mechanism have locked up the mineral resources in the nation and an economic crisis is going to occur if a more logical approach to land allocation for mineral development isn't made. The difficulty with their argument goes back to the problems that I initially mentioned regarding land use planning. It would be nice to say that we are not going to have to use the crude old withdrawal techniques any more because all the public land laws have been repealed. Of course, the 1872 Mining Law wasn't repealed. Therein lies one rub. It's nice to say now we can go to modern land use planning. It's not going to have to be a black and white decision on whether or not you can have mineral development. We will plan for mineral development and, depending upon what total resource needs of an area are, we will condition mineral development on that particular situation. So, if you have a very valuable oil and gas deposit under a national monument, you can go ahead and have the development of the oil and gas. But instead of having the pipes, the towers, the pumps site right above the deposits on the surface of the national

monument, we will put a term and condition in your lease and you'll have the plant do directional drilling to get at the oil and gas. You can put the pump site off the national monument. Or, we will allow you to go in and do mineral exploration in this wilderness area. Except instead of going in with off-road vehicles and chewing up the landscape, you'll have to use remote sensing devices and other kinds of exploration techniques that don't have any impact on the surface resources of the land area. Then if you find something, we will design lease terms that meet the total resource management needs of the area. But again, if you don't know what the minerals are to begin with, this system might not work as well as people would like to think it would.

But another side to this whole system of limiting mineral lands availability by posing terms and conditions on leases is that it tremendously increases the cost of operations in the mineral industry. And this can occur in a number of different ways. Obviously, if you can't get at many of the mineral resources, you restrict mineral land sales. That obviously increases the cost of the remaining resources. But I would like to reflect just very briefly on the increased operating costs which are imposed by some aspects of the BLM Organic Act. I am talking about simple things like recordation. The BLM Organic Act has a provision in it so that for the first time in history mining companies are required to record their mining claims under the 1872 Mining Law. It may seem incredible to all of you, but up until October there was no legal requirement that anyone going out staking claims on public lands ever told the Federal government where they were going or what their claims were. So that any time the Bureau of Land Management or the Forest Service wanted to find out who had claims on the land they were managing, they had to go to the local county courthouse and do very complicated mineral claims surveys searches. These are quite expensive and because it's very expensive and very complicated the agencies didn't do it when they wanted to contest someone's right to have a claim. So there were hundreds of thousands of claimants out there the government didn't even know about. Well, finally in the BLM Organic Act the requirement was put in that mining companies come in and record their claims. And if they don't record their claims, then they lose whatever right they have and it will be considered an abandonment of their claim. That seems very logical from a public policy standpoint. Yet it does impose some very real costs on the mining industry. They have really thousands and thousands of claims. They have to go out and file a piece of paper for every single one with the Bureau of Land Management and in some cases the Park Service. That's an expense. It's going to increase the operating expenses of those industries. They aren't protesting too much about recordation. They don't have very many good arguments to make against recording mining claims. But they are protesting vociferously against the surface mining regulations. While the surface mining regulations that the Bureau of Land Management has were just recently proposed the Forest Service had adopted them about two years ago, I guess. Mr. Ferguson referred to sort of reinterpretation of old statutes. It's the firm belief of the Department of the Interior and the Department of Agriculture that these regulations are legally authorized under the 1872 Mining Law. But in addition the BLM Organic Act has a provision in it that further supports the notion that you can condition mining on the public lands in order to protect other resource values. Every single time that you require a mining company, instead of using an off-road vehicle to go into an area to do its work, require them to use helicopters or require them to do directional drilllng instead of ordinary drilling,

or if you require them to do reclamation of the land, you have an economic impact. All of these things, while they are very important public purposes to be served, have tremendous costs to the mineral industry. I'm not saying that they shouldn't bear those costs but as we make and develop laws we have to think very carefully about the economic consequences and the tradeoffs involved. Things that you can get into are reliance on imports, as Mr. Lindgren suggested, or reliance on other types of minerals. If you put too many terms and conditions on coal development, industry is going to shift to oil and gas development-those kinds of tradeoffs. So, every law, every rule that we write has an economic consequence that has to be considered. That's a little bit of a reflection, I guess, on the impact of mineral lands availability, surface reclamation requirements and how they operate in an economic system.

QUESTIONS AND DISCUSSION

PUBLIC INVOLVEMENT IN THE LEASING PROGRAM

Question:

Do you feel that the public participation aspects of the leasing program are adequate?

Fred Ferguson:

Public participation is something that we have worked at in recent years. There wasn't very much public participation in the '60s. The public's participation takes several forms. I don't think I can go through all the minerals but I'll mention some. For example, on the outer continental shelf oil and gas leasing: the very first time we have any participation is this, the Department looks over areas and decides that there is a possibility that a certain area may be good for oil and gas development and leasing and, therefore, it calls for "nominations" in that area. For example, this might be the mid-Atlantic area. We would distribute a map showing several hundred thousand square miles that is marked off in tracts and ask for comments. Now originally back in the 1960s a "call for nominations" was a call for nominations by interested oil companies. The Department wanted to know which tracts the companies would like to see put up. The companies would submit nominations for tracts 251, 255 and so forth that they were interested in and then the Department would review those and decide whether or not it was interested in putting them up. That's been changed drastically because now the call for nominations is a double call. It's still a call to find out who's interested in putting up the tracts and having tracts offered for lease, but also they very specifically ask all the public - the environmental groups, states and so forth-to tell us of areas that should not be offered for lease. So the call for nominations is both a call for nominations and a call for anti-nominations. This is an opportunity for public participation. Before we can even make a decision on which tracts to write an environmental impact statement on, we may very well have eliminated large areas because of the fact that we now know that public needs or an environmental group is very conscious of a certain fragile area there or some reason like that may exclude it completely.

Now then the next step in the preparation for an OCS sale is the choice of the tracts that will be studied in the EIS. At that point, as I said , we consider what companies it recommended and we consider just as strongly and perhaps more strongly the adverse nominations. On the basis of that it is decided that we'll go ahead and we will write an EIS on, say, 250 tracts. We write a draft environmental statement discussing those tracts and the impact of development on them. Then there will be public hearings on the EIS and, at this time, we don't just rely on written comments that come. We have an opportunity for people to come in and actually comment on why areas should be or should not be included in a sale. So that's a good opportunity for public participation. That's followed by the writing of a final EIS and the decision of whether or not to have a sale. No decision is made until 30 days after the EIS is published. So there is that kind of opportunity.

Now under onshore we have been moving without any particular statutory requirement for more public participation. I thought there was a very interesting development in the oil shale area. I suspect that Miss Johnson may not think it was a success, but at least it was a step forward. We established an oil shale environmental advisory panel and the panel is composed of representatives of all the interested departments. Every department that has any interest is offered an opportunity to submit a person for appointment to this panel. The Environmental Protection Agency is also invited to do so. The different bureaus in Interior - Indians, Fish and Wildlife, Parks, BLM and so forth-have representatives. Each of the governors of States are offered the opportunity to nominate three people: two could represent the state agencies and one would represent environmental groups or people with environmental interests. Generally speaking actions taken under the oil shale leases are to be referred to the panel, not for a decision, but for comments. Also the Department committed itself to having public hearings on the mining plans for the oil shale leases. The oil shale leases are all suspended at this moment and not much is happening, but there was an effort being made to get public participation. On the other hand, for the geothermal resources we established a Geothermal Resources Advisory Panel. We only included federal agencies and certain state representatives and we did not get members of the general public. There wasn't that much interest shown. The Department does react to public demand and there wasn't the same public demand on geothermal resource as there was an oil shale.

Recently, we are required to have much more public participation under the new coal leasing amendments. Frankly, I wish I could just recite that as easily, but I'm still not completely used to the new provisions. But here we are required to have an opportunity for the public to participate in the preparation and decisions whether or not to lease coal and also, and I thought this was really very interesting, an opportunity for the public to comment on the fair market value of the coal. Before the Secretary will be able to issue the lease, he has to determine the fair market value of the coal. It's quite natural to see "no bid shall be accepted that is less than the fair market value" as determined by the Secretary. Prior to the Secretary's determination of the fair market value of the coal, the Secretary shall give opportunity for a consideration to public comments on the fair market value. It's a very interesting thing that we are actually getting the public comment on how much it's worth. I personally think that all these are a step forward, though some people are not happy with it. All of these steps that are being taken to include public participation also are making operations more sluggish. Unfortunately some of the same people who demand public participation are also denouncing the government for being cumbersome and slow but there has to be a balance.

Question:

Could you expand a little on the concept of diligent development?

Fred Ferguson:

There are raised lots of questions and Tuesday afternoon, I was suddenly called up to the Hill to be present while Congressman Dingle berated. He questioned us about certain activities. This is a question of whether we demand that I let these (leases) produce. Mineral Leasing Act has long said there

will be reasonable diligence. But on the whole the Department was willing to lease for so many years as long thereafter as there is production on say a non-competitive oil and gas lease. It seemed to be Congress which said to give the lessee 10 years in which to get in production; if he is in production he can keep the lease. So therefore, in effect all through the 1960s the Department was allowing lessees to hold the leases for 10 years and do nothing. It's a rather shocking figure to some people to realize that over 90% of non-competitive oil and gas leases issued by the Department are never drilled. They are held by people for relatively small sums who are hoping that some major oil company will show an interest some day and perhaps there will be development nearby which will enhance the value of their leases. They just hold it for speculative purposes and as the 10 years go by nothing is done. That seems bad. A lot of coal leases were never drilled or produced even though the statute did say that coal leases would be held on condition of diligent development.

By the way the OCS Act said nothing about diligent development but it provided that leases would be for five years or as long thereafter as there is production in paying quantities. However, the Secretary has broad authority to include provisions in leases and therefore, the OCS leases and onshore oil and gas leases have this provision: that the lessee agrees after due notice in writing to diligently drill and produce such wells as the Secretary may reasonably require in order that the leased area or any part thereof may be properly and timely developed and produced in accordance with good operating practice. Under that provision, the Secretary can write to a lessee and tell him to start to drill wells and if he finds any oil to produce them. Of course there are four adverbs here: "diligently," "reasonably," "properly" and "timely." Then we also have "good operating practice." I don't think it takes much imagination to know that some lawyers around here could make quite a lot of those terms. We have that authority. We have talked about it for several years. It's always a little embarrassing to ask how often we've used it. The answer as far as I can determine is that we've never written to a lessee and told him he had to produce. But nevertheless, we do have that authority.

About 3 or 4 years ago, the Department decided that it should start insisting that coal lessees produce. The thing that strikes so many people as strange about our coal program is that we have so many coal leases on which there has never been a shovel full removed. So the Department produced new regulations after a lot of fighting and discussion in the Department. The regulations require lessees to produce, gave them ten years in which to get into development. They have to be producing 2 1/2% of the estimated reserves by the end of the 10 years and then keep up a schedule. You understand, you have to be very practical about this. Companies need time to get into production and coal is not something in which they get into production quickly. It takes some years so the Department wrote that in.

We did begin to enforce the requirements. I think that was about June 1st. Meanwhile, Congress was proceeding with the new coal leasing amendments and that became law on August 4th. We had to rewrite our regulations somewhat because the Congress has now put in this provision and it's taken the tenure and it said that they must be in production by the end of ten years and there are specific provisions. So, nowadays on coal, there are definite diligent requirements with the object being generally that the coal will be produced in

40 years from the approval of the mining plan. Under the statute they must now come in with the mining plan within three years or so. We, of course, have to take some time to review that mining plan. Then there will be a period in which the coal is produced. So, I hope that answers you somewhat on diligence.

LEASING AND ENDANGERED SPECIES PROTECTION

Question:

Could you comment on the potential for conflict between the coal leasing program and the Endangered Species Act.

Fred Ferguson:

Under the Act there is a technical determination by the Secretary that a species is endangered. He doesn't have, in a legal sense, discretion. If the determination is made that it is an endangered species, then we have to proceed under that. I don't know all the requirements of the Endangered Species Act. In fact, I have a feeling that Ron Lambertson who is going to talk this afternoon may be able to speak more competently than I can. I don't know just what to say. We will put into a lease a requirement to protect the endangered species and if the endangered species cannot be adequately protected, I don't know that we could issue the lease. Would you like to say anything, Ron?

Ron Lambertson:

To answer your question, the Endangered Species Act precludes the Department from doing anything which would jeopardize the continued existence of an endangered species or any effort that would modify its critical habitat. A hard issue that is going to be addressed sometime is what happens when someone has a property right or a right to a lease and the Endangered Species Act will not allow the exercise of that right. That is the hard case. Generally, we think the answer to the Endangered Species Act is to be sure that the lease is written with assistance of knowledgeable biologists who will know what the impact on endangered species will be. We will generally be able to issue a lease and say at the same time that there will not be jeopardy to endangered species. Hopefully that will protect those endangered species. Eventually we will come to the hard facts where nothing can be done to protect them except to avoid the lease and that's going to be a very tough issue.

NEPA AND WATER SCARCITY

Question:

Are questions of water scarcity adequately addressed under NEPA?

Fred Ferguson:

Well, those should be covered in the environmental impact statement on the lease. The Secretary has discretion whether or not to issue leases and I believe that he exercises that discretion in view of the knowledge he has. The knowledge is supposed to be provided in the environmental impact statement.

MINING IN WILDERNESS AREAS: THE TAKINGS ISSUE.

Question:

I'm Jim Snow from the Office of General Counsel in Agriculture. When I am not answering Doug Scott's letters, I do have another job I'm interested in and that's federal land use control for special areas. I think something we ought to bring out here is the problem that we run into when we advocate the designation of special areas. I'm speaking of wilderness, wild and scenic rivers, and national recreation areas. One point that I want to bring out is the taking issue as applied to regulation of mining interests. I want to cite two case examples.

We have two problems. One concerns the Eastern part of the United States as a relation to the Eastern Wilderness Act. Presently we have a law suit in the Daniel Boone National Forest of Kentucky. A portion of a designated wilderness has valid mining claims: coal claims. The coal company wants the Forest Service to let them in and mine in a wilderness area. You have there the basic confrontation: when the sub-surface mineral rights are owned by a private party, to what extent can we use the Wilderness Act to prevent them from coming in and virtually destroying the area? Most of the lands in the East are acquisitions and therefore a lot of the mining or mineral interests are outstanding--third party or second party as the case may be. That case is in district court right now and in fact it's in the preliminary pleading stages so there is really no way to determine the outcome.

The second case in point concerns something I'm more directly involved in and that's the Sawtooth Recreation Area in Idaho which was set up under Public Law 92-400 in 1972. It concerns 25,000 acres of private land which we just got through litigating in the Supreme Court. The touchiest question concerns mining interests. First, the law provides that there will be no more patents this year. Second, the law contains a provision which says we can regulate mining interests, valid mining claims in the public interest so that they do not "substantially impair" the values for which the area was designated.

Presently we have a law suit on that question which we haven't resolved yet as to what "substantial impairment" and how far we can go to regulate someone who owns a valid land claim. The person who has the most interest, unfortunately, hasn't sued us yet. American Smelting has a valid claim to over a billion dollars worth of molybdenum in those mountains. Now, you tell me what are we going to do about it if they want to go in there and mine that. We can't buy it out. The public treasury will have to be a little more generous than they have been in the past, but that's silly. To what extent can we regulate it without it constituting a taking? Certainly we can regulate it to a point. We seem to feel the point is where we maintain some possibility in the operation of how much profit they have a right to. Maybe you'd like to comment on that.

Fred Ferguson:

First of all I'm going to have to start off with a caveat. You said you'd like Interior's view. Well, on that one you're not going to get an Interior view. You might at the most get a few random meanderings from me. It's a very difficult issue, I recognize and I do not know what the answers are.

I would say first of all we have always thought that a mining claimant who had made a valid discovery had a right to proceed to a patent. That was one of your questions. If in fact he had made his valid discovery before the statute was passed saying there would be no patents in future it would seem to me he probably had a right to a patent. If we do not give him that right to a patent I would think he'd have a right to compensation. Now, on the other hand, obviously, until he's made that discovery there really are no rights against the United States at all. He can be wiped out at any time. Unless he could show that he had in fact made that discovery before any provision about no more patents was passed I would think that he was out of luck.

On the determination of whether it's a valid discovery we have to consider all the different laws with which he must comply. When we say that a prudent man would spend his time and energy in developing mineral resources, we have to consider all the laws under which he would have to develop that mineral resource. If the development would be subject to extremely strict requirements it seems to me that he just is not going to be able to show that he could do it profitably, or that a prudent person would develop. For example, if he were to get a patent he would pass under a state law. Suppose a state law prohibited all strip mining and the only way he could make any profit out of this was by strip mining. I think it is clear that he has not made a discovery.

The really tough one, namely a person who clearly had made a valid discovery before there was any restriction on patents, is something that would just have to be decided in courts. I would have to say we have always thought that one of the rights of a valid mining claim holder must proceed to a patent. We have various court cases which have said that there are restrictions that are right to impose conditions on that patent.

Jim Snow:

Congress ignores the critical issue, I think, in designating the special interest areas. They always establish these special areas, subject to existing rights. In the Sawtooth we have the power to regulate the mining operations. If we assume that they have a valid discovery and if we assume that they can mine, how much can we regulate without it constituting a taking? It's just a classic taking issue. I don't think there's an answer but it's certainly something that ought to be considered.

INTERIM MANAGEMENT OF MINING IN WILDERNESS AREAS--THE BLM ACT.

Gail Achterman:

I'd just like to make a comment about what I consider to be the major problem in the Wilderness Act. I was in the library at Interior digging around reading all the back issues of Living Wilderness since 1964. I was trying to figure out what has been controversial in the implementation of the Wilderness Program by the Forest Service, the Fish and Wildlife Service and the Park Service and there was one article entitled "Mining in Wilderness Areas: Loophole Big Enough for a Bulldozer." That's really the truth.

Congress seems to have a penchant for drafting laws that are internally inconsistent and the Wilderness Act is certainly a statute of that kind. The BLM Organic Act is also a statute like that. It has this marvelous statutory prose here, sort of classic. I would like to read it to you. Section 603 in the BLM Organic Act is the one that deals with the crucial issue of interim management of wilderness areas. Interim management issues center on how you manage wilderness areas between the time that you start thinking about putting land into wilderness, proposing it for wilderness designation, and the time that Congress actually acts to create the wilderness area. This is where all the controversies of wilderness management have come. Well, Congress gave the BLM this extremely lucid guidance. The Act says, "During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness; subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of the approval of the Act." It gets better:"...Provided that in managing the public lands, the Secretary shall, by regulation or otherwise, take any action required to prevent unnecessary and undue degradation of the lands and their resources or to afford environmental protection." And then just to cap things off so that we completely don't know what we're supposed to do it says, "Unless previously withdrawn from appropriation under mining laws such lands shall continue to be subject to appropriation during the period of review unless withdrawn by the Secretary under the provisions of this Act for reasons other than preservation of their wilderness characteristics."

Well, what are we supposed to do? We're supposed to continue letting people mine but they can't mine in any way that destroys the wilderness characteristics. This is a completely impossible situation and all that the Secretary can do with such wonderful guidance from Congress is try and do the best he can to come out someplace in the middle. The Director of the BLM recently sent a letter to a mining company in Utah. It has valid mineral leases on state lands that are completely surrounded by public lands. The public land has very, very, high wilderness values. In fact, they were proposed for primitive area designation prior to the time that the wilderness provision passed. So the mine company has this lease, this valid lease from the state, right in the middle of the public land. In addition they have mining claims on the surrounding public land itself. They say, look, we got a property interest in there from the State, we've got a property interest on these mining claims and we're going to put a road right up to this cave that you want to put into a wilderness area. The Utah State director said "My God, we can't let him put that road in. What are we going to do?" We can't withdraw the land to preserve its wilderness characteristic because that's specifically prohibited, we can't deny the guy access to his state lease and his mining claims because that's prohibited under the mining laws. So we're sort of flailing around at the moment. The decision was made that I think that we're going to send a letter to the mining company saying, "Don't you dare put that road in there."

After we wrote the letter we decided we'd withdraw it, but not because of its wilderness characteristics. They came up and asked if we could withdraw it because of the wilderness characteristics. I said, "No, can't you find

something out there, some creature? Don't you have some animal that can be endangered or something. The state director said "Well, this area is about 10,000 acres, we do have a couple of rare species and one that might be endangered but we aren't really sure it's there." I said, "Well, we'll withdraw to protect it just in case it is there."

But the company still has the valid claims, that if we withdraw it today doesn't invalidate the claims that they had up there already. The next step seems to be to figure out some way to condition their access to grant them access, to make them do it by helicopter or something.

I don't know what's going to happen. But with laws like that, is it any wonder we have controversy and conflict and is it any wonder that the Secretary of Interior is always in court? If we do it one way we get sued by one side and if we do it the other way we get sued by the other. It's really just a question of deciding who's going to sue you, who do you want to litigate with? Provisions like that really highlight the fact that Congress simply has refused to confront this issue. The same thing's true of various other similar acts. There are similar provisions in the Wild and Scenic Rivers Act, similar provisions in the Wilderness Act itself. And it's really terribly difficult for land managing agencies.

Fred Ferguson:

That was quite an interesting vignette of the life of a government employee, wasn't it.

ENERGY PLANNING

Question:

Given the fact that we recognize the relationship between the outer continental shelf, energy development and Wyoming strip mining, what is being done in the Federal Government to coordinate plans for these energy developments?

Dave Lindgren:

If you are thinking about a totally comprehensive and detailed road map for energy which is called a "National Energy Plan," nothing is happening right now -- it is impossible.

There is an awful lot that is happening in terms of looking at projected demands for various forms of energy. What happens to these demands if various kinds of conservation measures are adopted? What happens if you try to substitute one form of energy for another? FEA, for instance, is very slowly attempting to force utilities to convert from oil and gas in some facilities to coal. All of these questions are being looked at. Some understanding is being gathered that if you do something here, something else happens over there. That <u>is</u> being done. In terms of a definitive road map that takes you through all the possible combinations and gives you the path across it,

I think nothing is being done. Further, I think nothing will be done. There's probably nothing that can be done.

Carolyn Johnson:

You have to be very careful when you think of energy policies, and start explaining them that you don't make regional chauvinists out of us all, particularly in regard to tradeoffs. The story is that if we don't have OCS development, then we have Wyoming coal. Well the truth of the matter is that we are getting all of them. It is not an either/or question. That's the push and that's where the direction has been up until the last month or so. It's to develop everything. Now President Carter tells us he's coming out with a new energy policy. I don't know what it is going to be like, I'm going to be very interested to see if this one goes through Congress, what portions of it may go. Two or three years ago, we had Project Independence, and I don't know if any of you were active at that time but we had a big hullabaloo over Project Independence. It came out at about August-September of 1974 and after the mid-term Congressional elections it died right on the vine. I think on our talk about energy, particularly of recent years, there is the implication that we are in such desperate straits that if we don't move now our complete standard of living is going to be drastically reduced and we'll all be in caves with, you know, Sierra Club-run generators or maybe a bare light bulb or something. Well, that's not true, we really need to make a distinction when we're talking about energy and energy policies between standard of living and quality of life. I submit that those are two different things and that it's often very possible to have a quality of life at a far lower standard of energy consumption than we're having right now.

Another thing with energy policy is that all of the emphasis has been on the fossil fuels, the non-renewables. We keep hearing these dates that come cold out of the air. It's the magic year when we're going to switch from fossil fuel or we can think about solar and it's always 2,010 or beyond.

You know, I come from a state that has literally thousands of buildings that are solar heated; most have never been recorded in publications. I was amused coming in on the airplane to read--I think it was a U.S. News and World Report. It said why, oh my goodness, there's over a hundred buildings in Colorado that have solar--actually, there's thousands, but they're not tied into government programs. People are just out there doing it. They can buy their plans for five dollars, figure out how it works and they're doing it. But in our fossil fuels themselves we're always selling them coal and oil shale, particularly examples of 600 years of energy supply. But that 600 years assumes no increase over today's usage. Yet our energy use has been expanding exponentially: it's been doubling about every seven to eight years. If we apply that growth rate to coal or to oil shale we come out with maybe 50 years; 50 years and it's all gone. So we'd better start making that transition now.

The point that can be made there is that we so often talk of using these resources, about how much we need them, and how vast they are, as if they could really provide it for us forever. Yet there's no look at what that means to our present consumption rates and that's the exponential growth working in all of them. None are exempt.

Dave Lindgren:

I'd like to make a couple of remarks. First of all, I know of only one person in this country who is suggesting that as far as fossil fuels and so forth that they'll be there forever, Carolyn Johnson. No one else is saying that. No oil company is saying that, no coal company, no utility is saying that - quite the contrary. They are saying exactly what she is saying in terms of a finite supply, that the country is going to be out of them very quickly. By the same token, the only person who I know who has said that oil shale is the answer for everything is Carolyn Johnson. I don't know of anyone else who has said that very recently. Even Philip Hart receded from that point some years ago. So did Justice Douglas, although they both had said that originally.

What the Department was doing when it was looking at oil shale was suggesting six prototype leases to simply see if it could be developed technically and economically, and then to assess the results of that and go forward. For the moment at least the answer to the second question, economically, is with us the answer is no.

By the same token I don't know anyone who is saying that the choice is continuing with our current program of energy development and utilization or living in the cave except Carolyn Johnson. No one else has. But she did focus some of the issues that we've taken a very hard look at. If you look at whether or not we're going to develop oil and gas, whether or not we're going to develop coal, whether or not we're going to develop uranium and go to nuclear fuels--at least light water fuels--and so forth, I think my answer and the answer in a lot of administrations, and I think the answer of the Carter Administration, will be that we have to use everything. But to say that we have to use every form of energy is not to say that we have to develop everything in sight or that everything in sight should be developed.

But look at a couple of facts as you start trying to address what are we going to do. Solar power can be used; it can be used today in what is going on in terms of people in Colorado using it is highly worthwhile. It can be used elsewhere. But also take a look at some of the French installations. Are we going to have it, and finance it, do we want something that large and so forth? I think the answer will be ultimately we will be using it and ultimately we're not talking about 2010; it will be used commercially to some extent. But what's it going to supply? It's going to supply electric power. What's the largest single field of consumption of oil -- transportation: automobile and the airplane. And where is the substitute fuel? Where is the substitute there that we can see in the reasonable time? Electric cars have been talked about. A new development was very recently announced that might be a breakthrough in terms of storing electric power within something that is moving and is not attached to something like an electric train is. But these are the questions--are we going to cut back on the size of cars, making more efficient? You get into tradeoffs immediately. One of the tradeoffs we got to first was the tradeoff of air pollution and air quality vs. fuel consumption. So far the devices that are necessary for air quality have increased fuel consumption. Are we going to

decrease weight of cars? President Carter was talking about it. One of the big problems is 40 miles to the east-Detroit. Take a look at the economic impacts if you do it.

So all these things are related and the thing that I'm suggesting is that there are simply no simplistic answers. There is nobody who is waving the cave man theory that I know. There's nobody saying develop everything in sight. But there are a lot of people saying to take an awfully hard look at all the issues that are involved, and that's what I hope we get on with around here.

Carolyn Johnson:

I think that the point on oil shale and coal is simply this, that it has been said. I am not the only one! People have talked about the caves; it is still there. It is less frequent than in 1974 or 1975, but it has been a force in shaping our energy thinking. It is a force that we really have to try to get out from under. Now the point is that it makes sense to go to any one energy source. I don't think that when these statements were made they were thinking that and that wasn't the point I was making. To try to pull that point out as Mr. Lindgren did is a little bit of lawyer trickery perhaps. The real essence of energy policy should be a good mix. A healthy mix is something that is reliable, something that we can go to on the long-term and that is stable enough. The goals that we talk about with relationship to energy policy can be taken from concepts of ecosystem management. I think we can see how the basic ideas might translate over: diverse, stable, and long-term survivability. I think that the principles can apply to both areas.

OIL SPILLS AND PRIORITIES IN DEALING WITH OILY & HAZARDOUS SUBSTANCES

Question:

If you concentrate all your efforts on oil spills in protection of the ocean environment, won't you miss most of the problem because the real hazards are not from the oil spills.

Dave Lindgren:

First in terms of the sources of oil in the oceans, I'm not sure of the statistics but last time I looked, offshore oil and gas development contributed the least oil to the ocean. Tankers are higher, shipping higher, indeed waste water running from onshore that has picked up oil from garages, etc., contributes more to the ocean than offshore development.

Second in terms of long-term persistent consequences: from what I know there is still somewhat of a debate going on, although the debate seems to be shifting toward what you are talking about as long as you were talking about spills of crude oil in basically open waters. If you are talking about product or spills in closed basins you begin to have the very long-term persistent problems.

If I were to look at it myself in oil spill consequences, I guess you have to look at three or four questions.

There are some biological communities most of them as I understand are in very finite geographic areas, mile by mile, or something like that, that is adversely affected by oil, even crude when it is in to the area and it probably shouldn't have developed there. Interior has refused to develop tracts for that kind of reason. Then you have the long-term problem of pollution. I happen to be one who believes that it is not a significant problem from offshore development. Third, there is the issue of what is the probability of an oil slick arriving at shore and what will be economic impact if it arrives and on whom? And another problem is not spills, accidents, but the continuing injection of oil from an ongoing operation. No matter how good your gutters are around the platform, if you have a storm going across that platform, there is going to be some oily residue which storms are going to pick up and dump into the ocean. All sorts of stuff gets dumped overboard and it has oil. But if we are careful where it goes and reduce as far as possible the amount, I really believe that we don't have that much of a problem.

ENERGY DEPARTMENT. PROPOSED REORGANIZATION SEPARATES LEASING FROM LAND MANAGEMENT.

Question:

It is very easy to be critical of the Department of the Interior's handling of mineral leasing and the whole mining program. However, I think it's fair to ask the view of the critics on the possibility that those responsibilities might be shifted from Interior to a new energy department. How will BLM critics feel if mineral and energy development is taking place exclusively in the context of energy development rather than in the context of a multiple use land management scheme?

Johnson:

Well, I must confess that as a long time supporter of the Department of Natural Resources, I died when I read in the paper that they were going to take leasing into an energy department. I really see the need, I think it is so clear, to have some of the existing departments and a lot of these existing authorities, such as energy, combined administratively, I must confess that I really feel uncomfortable with putting the leasing authority into the energy agency while the land management aspects which, of course, don't stop with the twelve inches of the top soil, stay within BLM. I have a feeling that it would probably increase, if that is the way it works out, that they are split, a present split that we have between BLM and GS. Geological Survey has authority for the underground: the coal resources. BLM takes the surface. It makes sense, a certain amount of sense on paper. In practice, relations between the agencies have not always been as smooth as one would like. Perhaps they are the best that we can hope for, I don't know. But there has been a lot of misunderstanding on who has authority for what, and even as recently as 1972 the Geological Survey, particularly the Conservation Division which I am talking about here, was in the field not aware that it had to share responsibility with BLM and that they had to coordinate and to talk to each other. There was a lot of friction between them. In Washington, I don't know, it may have worked out better. I can't give you a clear answer, I just feel queasy about it.

Fred Ferguson:

I would like to say a few words about the Department of Energy. I have been working from time to time on the legislation and, of course, it is something that administration is behind. The Department of Energy would set goals. It will say that so much production is needed. Now the Department of Energy would be concerned with more than just federal lands. It will say that by such and such year so much will be needed and such and such a proportion will have to come from public lands. This would be a goal, this would guide the Department of the Interior in the establishment of decision of what to lease. The Department of Energy would also have a right to establish diligent requirements of various sorts. But the actual leasing would continue to be in the Department of the Interior. We would continue to write lease terms and provisions which would define people's behavior and that they would do other than as regards diligence.

Now obviously this is going to require very careful coordination between the two departments. We have been used to that kind of decision making in the Department of Interior. Anyone who has worked in the Department of Interior knows that it is not monolithic. The disputes we can have inside of that Department are really quite striking. But there has always been a Secretary of the Interior who made that final decision as to what would be done. Obviously if we have leasing taken out of Interior then disputes as to management of land are going to have to be referred to some higher authority for decision. Therefore, I think it is very important that the leasing remain in the Department of Interior even though the Department of Energy may establish certain goals that will guide Interior in its leasing program or goals that will set the diligence requirements that the Department should have. The proposal also reads that such things as an oil royalty and gas royalty should be handled by the new Department of Energy. As it is now we can take 12-1/2% on noncompetitive gas leases either in kind or in money. If we take it in kind, that in the future should be turned over to the Department of Energy for disposition. That seems all right to me but I think it is important that the actual leasing remain in Interior in the same Department that is managing the lands for other purposes.

Dave Lindgren:

I have to agree with what Carolyn said, all the way down in terms of what makes sense. In terms of the President's proposal for the Department of Energy, if you look only at the legislative proposal itself, I don't think it is as good as having all the resources in one place. You wind up with the result that Fred has mentioned. You have to read the fine print however. The fine print is found in Dr. Schlesinger's press conference when he announced it. He referred to the agreement that will be worked out between the Department of Energy and the Department of the Interior and therein is the problem. Because of the way Schlesinger was talking at the time, the inference, which came from him and a lot of others in Washington, is that the Department of Energy will choose when leasing occurs, and where it occurs the Interior Department will sign a lease. As long as you have that mechanism it winds up as being a

political power struggle between the Secretaries of the Department of Energy and the Department of the Interior. Even if the working relationship between Secretary Andrus and Dr. Schlesinger is as good as it appears to be, it is the function of two individuals and it doesn't become institutionalized, and that's a problem.

I would also have to say that there are rumors going around about changes in the legislation to need leasing. That is one of the things that has disturbed me very much during the last few days.

LAND AND THE MODERN EQUILIBRIUM

SUSAN SCHREPFER

The speakers at this conference represent government, industry, and citizen activism--forces that shape our landscape. Yet the three constitute an equilibrium that is little more than one hundred years old and in definitional flux. In 1972 the Sierra Club asked the United States Supreme Court for standing to sue as a public defender. Behind the Court's adverse decision in the Mineral King case was a tacit assumption regarding the constituency of the plaintiff. Yet few friends or foes have addressed themselves to the veiled question raised by the suit: Who is the citizen activist? And how has his pressure affected our governmental structure? The description of history and the practice of law have much in common. By sketching certain aspects of the citizen activists' impact upon our political and judicial system, I hope to lend credence to this adage and to make an observation on the direction of land preservation--the subject of this panel.

In the millenium from the fifth through the seventeenth centuries, the legal relationship between the western European and his soil was not shaped by government, industry, and citizens. It was determined by the tension between the land-intensive economy of the peasant and the ownership rights of the lord. The peasant claimed common rights of usage on the lord's land--the right to graze, log, gather. As the peasant sought to maintain or expand his common rights, the lord either cooperated or fought to restrict these usages.

In the eighteenth and nineteenth centuries this medieval equilibrium was shattered in western Europe. Seeking the economic benefits of commercial agriculture and forestry, the German and English lords drove the peasants off the land. Swayed by revolutionary antagonism toward the old regime and English theories of economic liberalism, the early nineteenth century French confiscated the aristocrats' forests, along with attendant common rights, and sold the lands as private property.

Yet there, as elsewhere in western Europe, the era of unrestrained privatism was brief. By the second half of the nineteenth centry the governments of Britian, France, Germany, and the United States had begun to establish legal systems restraining resource use, systems that combined acquisition of public lands and regulation of private holdings. Representatives of the new professions of agricultural science and forestry supported the emergence of such controls and the destruction of common rights. They believed consolidated ownership and government regulation would prove conducive to efficient land use.[1] In the United States private citizens also supported federal protection for scenic values. By 1900 it was apparent throughout the Atlantic community that land use was to be determined by the interplay of property rights, government, and private citizens.

The United States, however, has given unique definition to this modern equilibrium. By right of possessing a vast landed public domain, our federal government had the basis for an extensive system of centralized environmental controls, similar to those established over all the Canadian forests. But in the eighteenth and nineteenth centuries, the bulk of these lands was turned over to the private sector and jurisdiction over them relegated to local government. Federal regulation was to be restricted to direct ownership of residual, often marginal, public domain lands. Unlike Germany or France, the United States developed no federal regulation of private forestry. Private economic interests and local government became the strongest determinants in land use. The weakness of the federal sector called forth the strong presence of the citizen conservationist in twentieth century America.

Prior to World War II conservation and preservation organizations in the United States were generally what the sociologists call "cooperative and integrative."[2] That is, they worked in partnership with government. Federal and state administrators, for their part, cultivated alliance with these activists as a way of expanding support and influence.[3] Private associations and donors have annually contributed to park acquisition, a phenomenon promoted by National Park Service directors since Stephen Mather in the 1920s.[4] The fact that private associations can perform functions forbidden to public agencies has similarly politicized administrators. The potential of a symbiotic relationship with organized citizenry was demonstrated again in the 1930s when Secretary of the Interior Harold Ickes crossed the continent to woo the Sierra Club into supporting the transfer of Kings Canyon from Agriculture into Interior.[5]

Despite the common integrative denominator, there were political differences among pre-World War II preservationists. The liberal sectors favored direct, large-scale expansion of the federal sphere of action. The conservatives preferred state and private associational solutions and bitterly opposed the New Deal. Yet the efforts of both diminished local control over select scenic areas.

These conservationists were most often residents of either the central Pacific coastal zone or the northeastern and midwestern urban corridors--regions of earliest and densest settlement. These individuals represented an urban civilization with its greater appreciation of wild land and open space.[6] But, modifying the balance of governmental powers was more than simply countering local economic self-interest and rural boosterism. The conservationists were also educated and mobile and therefore men with national frames of reference. Local control denied them a voice in the fate of areas in which they were acutely interested. As scientists many had a stake in distant wild lands.[7] Working in cooperation with federal and state agencies, these citizens acquired a vote in the fate of regional and national lands.

Today many activist organizations like the Save-the-Redwoods League or Conservation Associates represent a continued, cooperative response to industry and minimal government. But since World War II the activism of a Sierra Club or a Wilderness Society has come to be an increasingly hostile reaction to material progress and to certain structural and philosophical proclivities of our government. In the 1950s these antagonists began to see federal and state

levels as lacking internal, anticipatory checks to hazardous development. Indeed, without the British notion of a loyal opposition, on occasion Washington's conscience was purposefully stilled. In the mid-1950s the National Park Service found it politically awkward to oppose the Bureau of Reclamation's proposed reservoir within Dinosaur National Monument once Secretary of the Interior Benton McKaye had established Departmental priorities.[8] This lack of institutional anxiety appeared especially dangerous since the federal level had historically been as dedicated to economic growth as had any local government. Moreover, environmentalists came to believe that regulatory agencies had succumbed to the proximity of industry.[9] Other bureaus ignored the environmental effects of their own programs, and none possessed the broad perspective necessary for ecological planning.

In the late 1950s activists made a first bid to limit what they saw as the excessive discretion possessed by federal agencies.[10] The first and most significant for public land use was the Wilderness Act. This and such subsequent measures as the Environmental Protection Act brought land decisions into a public forum and provided a conscience for the government. But the legislation also offered mandates activists could use to intervene through the courts. The government had invited citizen scrutiny.

In the early 1960s citizen groups searched for ways to exploit judicially the legislative definitions of administrative functions. Public agencies have traditionally used the courts to enforce regulatory judgements. Citizens have long been allowed to sue private individuals under laws protecting wildlife. But there were few precedents for private citizens, not acting as property owners, to sue the public sector. In 1948 the Sierra Club was denied standing to testify before the Federal Power Commission regarding the City of Los Angeles's proposed dams in Kings Canyon. The denial was reversed only when the club pointed out that its property at Zumwalt Meadows would be adversely affected by the reservoirs.[11] Legal and administrative processes required of plaintiffs a direct, economic stake before granting standing. America's substantive and procedural law offered an unsatisfactory framework for non-economic, public interests.

Lawyers debated methods for expanding tratitional burden of proof and standing criteria, for employing class action suits or common law concept of nuisance.[12] Then, in 1965, the Scenic Hudson decision established precedent in public interest advocacy. An unincorporated association of non-profit conservation organizations sued the Federal Power Commission for granting Consolidated Edison a permit for a power plant at Storm King Mountain on the Hudson River. In its decision the Second Circuit Court affirmed the legal validity of scenic values under the Federal Power Act and granted the conservationists standing to sue as an aggrieved party under the Federal Power Act. The justices emphasized the direct aesthetic, rather than the economic, aspects of the plaintiff's interest in the Hudson River.[13]

In 1967 the Sierra Club and the Citizen's Commission for the Hudson Valley, a residential group, sued to block a highway along the Hudson River. The Federal District Court of New York granted standing in the absence of a specific "aggrieved persons" provision in the statute establishing the Bureau of Public Roads. Although the legislature had not provided a mandate for court action in defense of public recreational and aesthetic interests, the court ruled that the environmental groups and local citizens had sufficient direct interest to be proper plaintiffs.[14]

These and other environmental and non-environmental decisions clearly affirmed the legal validity of recreational and scenic values.[16] But in each the full implications of judicial review by private activists were blurred. The environmental groups had either proved direct and sometimes even economic interest or had combined with local residents. The Sierra Club resolved to extend the definition of standing by entering into a suit against the U.S. Forest Service. The issue was Disney Enterprises's plan for a ski resort in the Mineral King Valley of the Sierra Nevadas.

In pleading before the lower courts, and the Supreme Court, the Sierra Club deliberately refrained from naming its personal interest in the valley or using local residents as co-plaintiffs. The lawyers sought to establish that as an association of proven expertise, the club should have the right to defend the public's interest in this valley. In 1972 the Supreme Court denied the organization the right to act as a private attorney general or public guardian.

Some have suggested that the effort to create new law was no more than a delay tactic, rhetoric, or "much ado about nothing." It is true the Club had deliberately not stated its personal harm.[17] It is true that the group quickly fell back upon its history of recreational use of the valley to re-enter the courts, an action the Supreme Court had invited. Moreover, in its verdict the Court had recognized the judicial validity of recreational and scenic values and indicated that plaintiffs could argue public interest once they had obtained standing. The justices had also reaffirmed the precedents set by the Scenic Hudson and Road Review decisions.[18]

Evidence as to subsequent definition of standing is mixed. In the fee-switching decision on the Alaskan pipeline, the Supreme Court again rejected the private attorney general doctrine.[19] But in the case of railroad rates for recycled materials, the court drastically liberalized, though did not abandon, direct injury requirement for standing. The practical significance of the adverse 1972 decision is here to stay in the courts.

But it is precisely this fact--that they will remain a force--that gives the decision its significance. The 1972 case does not lack a principle. For plaintiff, defense, and judges alike, standing was not a technicality. The judges at each level rendered their verdict on the basis of fundamental assumptions regarding citizen activism in general.

We can conclude from their decision that the high court justices saw the plaintiff as a special interest group with a direct stake in certain environmental issues, a stake that may or may not coincide public welfare.

But they avoided discussing the Club's membership or function. Sensitive to charges of elitism, environmentalists shy away from the issue. Some 20 now follow William O. Douglas's argument that the Club should have standing to defend, not the public, but the natural object about to be despoiled.[21] As the activists are not an economic interest they might defend the environment. Yet the nature of their constituency is still pertinent.

A partial answer to this issue lies in the relationship of private conservationists and government. In the 1960s these activists expressed strong distrust of Washington. They pointed out that federal agencies like the Forest Service even stood to realize substantial financial benefits from public projects. A lawyer testifying for the Sierra Club in the Mineral King suit stated that environmentalists had only two options in fighting Washington--"civil disobedience or relief in the courts."22 Yet like their predecessors these activists have significantly expanded the federal sphere. Their oppostion to Washington was outweighed by the disadvantages of a political structure that relegated land-use decisions to local jurisdiction. Federal and state agencies have been no less dedicated to economic growth than local levels. But from the nineteenth century to the 1970s environmentalists have drawn their strength from America's urban belts. Local jurisdictions effectively denied to these mobile cosmopolitans a voice in matters within their frame of reference, from coastal beaches beyond suburban belts to distant wildernesses.

It is overwhelmingly apparent that the legislation sponsored by post-war activists has moved decision-making at least one level upward. Since the nineteenth century conservationists have advocated federal acquisition; under such provisions as the Antiquities Act many today press for a doubling of the national parks and the addition of urban parks. More complex regulation includes such regional control measures as the California coastal commissions. In Connecticut, California, New York, Oregon, and Colorado activists have successfully supported state development and conservation plans outlining standards for local planning. Some States now require environmental impact considerations, further diminishing local discretion. Measures like the Land Conservation Fund or the Historic Properties Preservation Act of 1966 have centralized control through federal aid to States. The Environmental Preservation Act of 1969 and the Clean Water Act amendments of 1970 have given Washington extensive direct and indirect influence. Activists have helped to extend national control through hearings, legislation, and the courts to areas other than and of genrally lesser population density than those within which they live.

The process has transferred jurisdiction from local residents to professionals. Despite talk of pastoral arcadianism and Indian gurus, the activists are rational planners par excellence who want to place an ever-increasing amount of our terrain into scientifically designed projects. Pre-industrial man often destroyed his land as thoroughly, if not as quickly, as modern man. But the former lacked the knowledge of physical laws necessary for corrective action. Both technology and conservation are predicted upon rational empiricism. The activists are highly educated. They believe in professional expertise. In reflecting upon the California coastal

commissions, one environmentalist commented that no future control board should include local participation, "unless the officials have some expertise."[23]

In their education, urbanity, and broad interests, nineteenth century conservationists were a small minority. The 1960s demonstrated that the cosmopolitans have become a large sector of the population and one whose economic interests are often sufficiently diffuse to allow for activism.

Can we then describe this as a democratic upsurge? Joseph Sax aptly noted that the citizen-initiated suit has democratized decision-making by bringing it into open forum.[24] Legislation has similarly increased public input. Yet the answer to the question, how democratic, depends upon how democracy is defined. When it means local control, the response must be no. If judged by increased numbers of participants, yes.

In hearings on National Land Use legislation of 1973, environmentalists found themselves testifying on the same side as the oil companies, power interests, and coal companies.[25] This alignment is surprising but understandable. Both big industralists and modern activists work in non-local perspectives that, in fact, tend to rise rapidly from regional, through national to international settings. Problems of energy generation and pollution go beyond local considerations. Industry and activists are actors on a technological stage that is potentially world-wide. Thus oil is shipped under flags of convenience (necessity) and American cosmopolitans promote international preservation. Small wonder both want to raise the American locus of decision-making.

Centralization is legitimate and may be inevitable. But the paradox of industrialists and their opponents on the same side has significance. In testifying for the planning act, one environmentalist called localism a sacred cow. He recommended slaughter. Another stated that "local governments have a congenital inability to deal effectively with land use . . ." Why then is big industry supporting national land-use legislation? In testifying, representatives of industry pointed out the ominously protectionist direction local and state control has taken in California and Delaware.[26] Urbanization and attendant economic diffusion often dim boosterism. Activists may one day rue their stampede into centralization.

Nor can they afford to ignore the economics behind local opposition. The question of who shall pay for land preservation is most starkly present in local planning. Property tax revision and transfer of development rights are vital. Not all decisions can be taken out of local hands or away from congressmen responsive to constituencies. Washington is not able or even willing to implement all the vague and jurisdictionally confused controls passed in the last ten years; implementation is falling to the states. Federal purchases may have practical limits. Local or state zoning may be the only answer for protection of the redwoods or the Everglades National Park.[27]

Who is the citizen activist? He is better educated than average, and believes in the primacy of rationalism. He represents a large and growing segment of the American public whose economic focus is diffuse and whose frame of reference rendered existing political balances obsolete. He is an instrument in our adjustment to technology.

[1]Bernard E. Fernow, Economics of Forestry (New York: Thomas Y. Crowell and Company, 1902), pp. 90, 278; William L. Thomas,Jr., ed., Man's Role in Changing the Face of the Earth (Chicago: University of Chicago Press, 1956), pp. 78-83.

[2]H. Spiegel, ed., Citizen Participation in Urban Development vol. 1 (Washington, D.C.: National Training Laboratories Institute for Applied Behavioral Science, 1968), pp. 12-13.

[3]For discussion of the "politicalization of administration," see Ian G. Barbour, ed., Western Man and Environmental Ethics, Attitudes Toward Nature and Technology (Menlo Park, California: Addison-Wesley Publishing Company, 1973), p. 218.

[4]Robert Shankland, Steve Mather of the National Parks (New York: Alfred A. Knopf, 1970), p. 167.

[5]Joel Hildebrand, Sierra Club Leader and Ski Mountaineer, an interview conducted by Ann and Ray Lage (San Francisco: Sierra Club, 1974), pp. 23-24.

[6]Roderick Nash, Wilderness and the American Mind (New Haven, Conn.: Yale University Press, 1967), pp. 44-45.

[7]Samuel P. Hays, Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920 (Cambridge, Mass.: Harvard University Press, 1959).

[8]Elmo Richardson, Dams, Parks, and Politics (Lexington, Kent.: University Press of Kentucky, 1973), pp. 62-63; Richard M. Leonard Mountaineer, Lawyer, and Environmentalist, an interview conducted by

Susan Schrepfer (Berkeley: University of California, Regional Oral History Office, 1975), p. 109.

[9]Malcolm Baldwin and James K. Page, Jr., eds., Law and the Environment (New York: Walker and Company, 1970), p. 124.

[10]James W. Moorman, "Bureaucracy v. the Law," Sierra Club Bulletin 59, no. 9 (October 1974): 7-11.

[11]Leonard, pp. 54-58.

[12]Baldwin and Page, pp. 105-114, 128-138.

[13]Ibid., pp. 126-127; Allan R. Talbot, Power Along the Hudson (New York: E. P. Dutton and Co., Inc., 1972), pp. 130-135; 354 F. 2d 608 (2d Cir. 1965).

[14]Baldwin and Page, p. 128; Talbot, p. 162; 270 F. Supp. 650 (S.D. N.Y. 1967).

[15]Peggy and Edgar Wayburn, "Alaska--the Great Land--America's Last Legacy," Sierra Club Bulletin (June 1973), p. 16; Richard Liroff, A National Policy for the Environment, NEPA and Its Aftermath (Bloomington: Indiana University Press, 1976), p. 146; 479 F. 2d 842 (D.C. Cir., February 9, 1973).

[16]Paepcke v. Public Building Commission of Chicago (Ill. Sup. Crt., no. 43240, May 1970).

[17]Leonard, pp. 234-236.

[18]Sierra Club v. Morton et al., 405 US 727 (1972); "Mineral King Valley: Who Shall Watch the Watchman?" 25 Rutgers L. Rev. (1970) 103.

[19]Liroff, pp. 146-149.

[20]Hearings before the Subcommittee on the Environment of the Committee on Interior and Insular Affairs, House of Representatives 93rd Cong., on H.R. 4862, March 26, 27, April 2, 3, 4, 1973, p. 398; Christopher D. Stone, "Should Trees Have Legal Standing? Toward Legal Rights for Natural Objects," 45 S. Cal. L. Rev. (1972) 450.

[21]Sierra Club v. Morton et al.

[22]Amicus Curiae Brief filed by the National Environmental Law Society, pp. 5, 9, Sierra Club v. Morton et al.

[23]Robert G. Healy, Land Use and the States (Washington, D.C.: Resources for the Future, 1977), p. 93.

[24]Joseph L. Saxe, "Emerging Legal Strategies: Judicial Intervention," Annals of the American Acad. of Political and Social Science 389 (May 1970): 75.

[25]William Duddleson, "National Land-Use Legislation," Sierra Club Bulletin 58, no. 7 (July-August 1973): 14-28; Hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 1st sess., February 6, 7, 26, 27 and April 2, 3, 1973, Pt. 3, pp. 160-163, 454-455, 457-458; Hearings before the Subcommittee on the Environment of the Committee on Interior and Insular Affairs, House of Representatives, March 26, 27, April 2, 3, 4, 1973, pp. 368-401.

[26]Hearings before the Committee on Interior and Insular Affairs, U.S.Senate, 1st sess., February 6, 7, 26, 27, 1973, p. 162.

[27]Healy, Land Use and the States, pp. 1-13, 114-115, 190-193.

CONSERVATION AND HISTORIC PRESERVATION

A CULTURAL UNITY

presented by

CORNELIUS W. HEINE

NATIONAL PARK SERVICE

at

THE CONFERENCE ON LEGAL ASPECTS OF

WILDLANDS MANAGEMENT

UNIVERSITY OF MICHIGAN

APRIL 9, 1977

HISTORIC PRESERVATION AND CONSERVATION FORM A CULTURAL UNITY. THEY HAVE A COMMON HERITAGE AND ETHIC. THEY REPRESENT AN IDEAL CLOSE TO THE AMERICAN ETHOS. THAT IDEAL CAUGHT FIRE 107 YEARS AGO AS MEMBERS OF THE WASHBURN-DOANE EXPLORING PARTY SAT AROUND A CAMPFIRE IN THE DARK WILDERNESS OF YELLOWSTONE. THESE MEN HAD VIEWED UNBELIEVABLE SCIENTIFIC WONDERS AND SCENIC GRANDEUR. IN AN AGE MARKED BY EXPLOITATION OF NATURAL RESOURCES, THEY COULD HAVE THOUGHT OF A FAST PROFIT. AS THE FIRE FLICKERED, A YOUNG JUDGE FROM MONTANA--CORNELIUS HEDGES--EXPRESSED AN UNSETTLING IDEA. HE SAID, "THAT THERE OUGHT TO BE NO PRIVATE OWNERSHIP OF ANY PORTION OF THAT REGION, BUT THAT THE WHOLE OF IT OUGHT TO BE SET APART AS A GREAT NATIONAL PARK..." TWO YEARS LATER, IN 1872, THE CONGRESS ESTABLISHED THE WORLD'S FIRST NATIONAL PARK, BASED ON THE CONCEPT OF PRESERVING A WHOLE NATURAL ECOSYSTEM AND ITS HISTORIC HERITAGE FOR THE BENEFIT OF PEOPLE. THE NATIONAL PARK CONCEPT IS THUS COMPOSED OF TWO DYNAMICS--PRESERVATION AND USE, MAINTAINED IN DELICATE BALANCE BY NATIONAL PARK SERVICE MANAGEMENT.

FROM THE INCEPTION OF NATIONAL PARK PHILOSOPHY, THERE HAS BEEN AN INTERLOCKING OF NATURAL AND HISTORIC VALUES. THE TWO ARE INSEPARABLY INTERTWINED AS WITNESS THE ACT OF 1916, CREATING THE NATIONAL PARK SERVICE TO MANAGE A NATIONAL PARK SYSTEM FOR THE FUNDEMENTAL PURPOSE "TO <u>CONSERVE</u> THE <u>SCENERY</u> AND THE <u>NATURAL</u> AND <u>HISTORIC</u> OBJECTS AND THE <u>WILDLIFE</u> THEREIN AND TO PROVIDE FOR THE ENJOYMENT OF THE

SAME IN SUCH A MANNER AND BY SUCH MEANS AS WILL LEAVE THEM UNIMPAIRED FOR THE ENJOYMENT OF FUTURE GENERATIONS". THERE WE HAVE THE IDEAL--WHICH IS STILL THE GUIDEPOST FOR THE MANAGEMENT OF THE NATIONAL PARKS. EVEN THOUGH MANY SUBSEQUENT ACTS, REGULATIONS, ADMINISTRATIVE PROCEDURES, AND REPORTS HAVE ACCUMULATED--PERHAPS ENOUGH TO FILL A ROOM, THEY HAVE NOT CHANGED THIS FUNDAMENTAL PURPOSE OF THE NATIONAL PARK SYSTEM. A MASS OF SUBSEQUENT LEGISLATION HAS, OF COURSE, REFINED, CLARIFIED AND SUPPORTED ADDITIONAL ACTIONS DESIGNED TO ACHIEVE, AND IN SOME CASES WITH MORE SOPHISTICATION AND GREATER TECHNICAL SKILLS, THE ORIGINAL PURPOSE--THE ORIGINAL IDEAL. THE MASS AND COMPLEXITY OF THESE LAWS AND REGULATIONS, AND THE RESULTANT PROCEDURES TO CARRY THEM OUT--ALL IN THE INTEREST OF PRESERVING THE GENERAL IDEAL SUCCINCTLY STATED IN 1916--HAVE MADE IT AT TIMES, DIFFICULT FOR GOVERNMENTAL AGENCIES THEMSELVES, FOR PRIVIATE ORGANIZATIONS & COMPANIES, AND INDIVIDUALS TO BE FULLY KNOWLEDGEABLE OF THE MANY NEW AUTHORITIES, PARTICULARLY RELATING TO HISTORIC PRESERVATION, AND TO THE OPPORTUNITIES TO PRESERVE ADDITIONAL WORTHY EXAMPLES OF OUR HERITAGE.

THERE IS NEED TODAY TO RE-EMPHASIZE AND ADHERE TO THE BASIC PURPOSE OF THE NATIONAL PARK SYSTEM--TO EVER REACH OUT FOR THAT IDEAL WHICH IS EXEMPLIFIED IN THE NATIONAL PARK CONCEPT. THIS IDEALISM, COUPLED WITH FAIR-MINDED CONSIDERATION, IS PARTICULARLY RELEVENT IN THIS TIME WHEN SIGNIFICANT ENERGY SHORTAGES WILL NECESSITATE MAJOR

DECISIONS AND WHEN THE TOTAL NATURAL RESOURCE BASE MAY NOT POSSESS A VAST AMOUNT OF UNKNOWN AREAS. IN FACT, IT MAY BE RECEEDING IN TERMS OF TOTAL SIZE. RECENTLY SECRETARY OF THE INTERIOR, CECIL ANDRUS, STATED THAT "ONE RECURRENT THEME IS CLEAR. INTERIOR IS THE MAJOR FEDERAL GUARDIAN OF THE NATURAL AND HISTORIC HERITAGE OF THE NATION NOT JUST THE LAND IT ADMINISTERS BUT THROUGH THE LAND & WATER CONSERVATION FUND, THE GRANTS-IN-AID FOR HISTORIC PRESERVATION AND A HOST OF OTHER LAWS AND FUNCTIONS.

THERE IS A GREAT NEED FOR BETTER UNDERSTNADING OF THE LEGISLATIVE HISTORY OF CONSERVATION AND HISTORIC PRESERVATION UP TO THE PRESENT TO PROVIDE A MORE INFORMED BASE TO ENABLE ADMINISTRATORS TO MAKE THE TOUGH DECISIONS THAT LIE AHEAD. IN CITING SOME OF THE MOST IMPORTANT LAWS,PARTICULARLY THOSE RELATING TO HISTORIC PRESERVATION, WE SHALL REFERENCE THE LAW AND GIVE ONLY ITS MOST ESSENTIAL PURPOSES, SINCE WE HAVE ALREADY CITED THE FUNDAMENTALLY SIGNIFICANT 1916 ENABLING ACT CREATING THE NATIONAL PARK SERVICE, WE SHALL BEGIN WITH THE EXECUTIVE ORDER OF JUNE 10, 1933. THAT ACTION MADE THE NATIONAL PARK SERVICE THE SINGLE LARGEST ADMINISTRATOR OF HISTORIC PROPERTIES AS IT TRANSFERRED MANY HISTORIC SITES AND CIVIL WAR BATTLEFIELDS TO THE NATIONAL PARK SERVICE AS WELL AS THE PARK SYSTEM OF THE NATION'S CAPITAL. IT FUTHER SOLIDIFIED THE LEADER-SHIP OF THE DEPARTMENT IN THE PROTECTION OF HISTORICAL AND ARCHEO-LOGICAL RESOURCES.

THEN CAME THE HISTORIC SITES ACT OF 1935--THE ORGANIC LEGISLATION FROM WHICH ALL SUBSEQUENT HISTORIC PRESERVATION LEGISLATION HAS FLOWED. THE ACT APPROVED ON AUGUST 21, 1935, DECLARED "THAT IT IS A NATIONAL POLICY TO PRESERVE FOR PUBLIC USE HISTORIC SITES, BUILDINGS, AND OBJECTS OF NATIONAL SIGNIFICANCE FOR THE INSPIRATION AND BENEFIT OF THE PEOPLE OF THE UNITED STATES." THE ACT OF 1935 MANDATED THE SECRETARY OF THE INTERIOR "THROUGH THE NATIONAL PARK SERVICE" TO EFFECTUATE THIS NATIONAL POLICY. THE HISTORIC SITES ACT FURTHER AUTHORIZED:

A) THE DOCUMENTATION OF DRAWINGS AND DATA ON HISTORIC AND ARCHEOLOGICAL SITES AND BUILDINGS--THE HISTORIC AMERICAN BUILDINGS SURVEY.

B) A NATIONAL SURVEY OF HISTORIC SITES AND BUILDINGS TO DETERMINE THOSE WHICH POSSESSED EXCEPTIONAL VALUE OR NATIONAL SIGNIFICANCE.

C) RESEARCH STUDIES TO OBTAIN ACCURATE HISTORICAL AND ARCHEOLOGICAL INFORMATION CONCERNING SITES, BUILDINGS, OR OBJECTS.

THE 1935 ACT ALSO CREATED A GENERAL ADVISORY BOARD KNOWN AS "ADVISORY BOARD ON NATIONAL PARKS, HISTORIC SITES, BUILDINGS, AND MONUMENTS" TO ADVISE THE SERVICE ON ANY MATTERS RELATING TO NATIONAL PARKS AND THE ADMINISTRATION OF THE ACT. THIS BOARD, COMPOSED OF ELEVEN HIGHLY QUALIFIED CITIZENS FUNCTIONS TODAY AND WILL BE MEETING IN WASHINGTON APRIL 18, 19, and 20TH.

THE 1935 ACT ALSO GAVE MANY OTHER BROAD POWERS TO THE SECRETARY OF THE INTERIOR TO ADMINISTER A NATIONAL HISTORIC PRESERVATION POLICY. FROM THOSE POWERS HAS COME THE NATIONAL HISTORIC LANDMARK PROGRAM, WHEREIN SITES POSSESSING HISTORIC, ARCHEOLOGICAL, AND NATURAL VALUES ARE STUDIED IN THE NATIONAL SURVEY. THOSE RECOGNIZED AS BEING NATIONALLY SIGNIFICANT BY THE SECRETARY OF THE INTERIOR ARE DESIGNATED NATIONAL HISTORIC LANDMARKS. OWNERS OF SUCH PROPERTIES WHO PLEDGE TO RETAIN THEIR INTEGRITY ARE GIVEN A CERTIFICATE AND A BRONZE PLACQUE FROM THE SECRETARY OF THE INTERIOR. THE MORE THAN 1400 NATIONAL HISTORIC LANDMARKS, ARE FOR THE MOST PART, LOCATED ON PROPERTIES OUTSIDE OF THE NATIONAL PARK SYSTEM.

ON OCTOBER 15, 1966, THE NATIONAL HISTORIC PRESERVATION ACT OF 1966 WAS PASSED TO PROVIDE FOR ADDITIONAL HISTORIC PRESERVATION ACTIVITIES THROUGHOUT THE NATION.

THE 1966 ACT EXPANDED THE NATIONAL INVENTORY OF SITES STUDIED UNDER THE EARLIER NATIONAL SURVEY INTO A NATIONAL REGISTER OF HISTORIC PLACES. IT ESTABLISHED A PROGRAM OF MATCHING GRANTS-IN-AID TO THE STATES, AND PROVIDED FOR STATEWIDE HISTORIC SURVEYS. TO ASSIST THE SECRETARY OF THE INTERIOR IN MANAGING THIS COOPERATIVE PROGRAM, THE SECRETARY REQUESTED THAT STATE HISTORIC PRESERVATION OFFICERS BE APPOINTED IN ALL OF THE STATES. THE CULTURAL IMPORTANCE OF STATE

AND LOCAL HISTORICAL PROPERTIES WAS RECOGNIZED AS WELL AS THE SIGNIFICANCE OF HISTORIC DISTRICTS.

THIS ACT FURTHER PROVIDED THROUGH SECTION 106, THE STIPULATION THAT ANY FEDERAL OR FEDERALLY ASSISTED UNDERTAKING TAKE INTO ACCOUNT THE EFFECT ON PROPERTIES LISTED ON THE NATIONAL REGISTER AND THAT SUCH PROJECT BE REFERRED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION. THE LATTER WAS CREATED BY TITLE II OF THE ACT TO ADVISE THE PRESIDENT AND CONGRESS ON MATTERS OF HISTORIC PRESERVATION AND RECOMMEND MEASURES TO COORDINATE ACTIVITIES OF FEDERAL, STATE AND LOCAL AGENCIES.

IN 1971, EXECUTIVE ORDER 11593 ON THE PROTECTION & ENHANCEMENT OF CULTURAL ENVIRONMENT WAS ISSUED BY PRESIDENT RICHARD NIXON. IT REITERIATED THE POLICY OF THE FEDERAL GOVERNMENT TO PROVIDE LEADERSHIP IN PRESERVING AND MAINTAINING THE HISTORIC AND CULTURAL ENVIRONMENT OF THE NATION. IT EMPHASIZED COOPERATING RESPONSIBILITIES TO THE MANY FEDERAL AGENCIES, REQUIRING ALL SUCH AGENCIES TO INVENTORY HISTORIC SITES UNDER THEIR JURISDICTION AND NOMINATE THEM TO THE NATIONAL REGISTER OF HISTORIC PLACES.

THE EXECUTIVE ORDER REQUIRED AGENCY HEADS TO REFER ANY QUESTIONABLE ACTIONS TO THE SECRETARY OF THE INTERIOR FOR AN OPINION RESPECTING THE PROPERTY'S ELIGIBILITY FOR INCLUSION ON THE NATIONAL REGISTER OF HISTORIC PLACES. THE SECRETARY, IN TURN, WOULD CONSULT WITH THE STATE LIAISON OFFICER FOR HISTORIC PRESERVATION FOR THE STATE INVOLVED,

IN ARRIVING AT HIS OPINION. IF THE SECRETARY MADE A "DETERMINATION OF ELEGIBILITY" THE AGENCY HEAD WAS REQUIRED TO CONSIDER THE HISTORIC PROPERTY IN LIGHT OF THE NATIONAL ENVIRONMENTAL AND HISTORIC PRESERVATION POLICY--AND IF A BUILDING WAS TO BE DISPENSED WITH OR ALTERED, THE CASE WAS TO BE REFERRED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION.

BY ACT OF SEPTEMBER 28, 1976, THE 1965 LAND & WATER CONSERVATION FUND WAS AMENDED AND THIS NEW ACT HAD MAJOR EFFECTS ON HISTORIC PRESERVATION. FIRST, THE PROJECTED AUTHORIZED LEVELS OF FUNDING FOR HISTORIC PRESERVATION FUND WERE GREATLY INCREAED UNDER TITLE II--THE NATIONAL HISTORIC PRESERVATION FUND PROVIDING FOR AUTHORIZATIONS OF $100,000,000 IN FISCAL 1978 & 1979 and $150,000,000 FOR FISCAL 1980 & 1981; SECTION 201 ALSO ESTABLISHED THE ADVISORY COUNCIL ON HISTORIC PRESERVATION AS AN INDEPENDENT AGENCY OF THE GOVERNMENT.

ANOTHER MAJOR ACT HAVING INCREASED EMPHASIS ON PRESERVING OUR FINEST CULTURAL SITES AND IN A RE-EMPHASIS BY CONGRESS OF THE ESTABLISHED ROLE OF THE NATIONAL PARK SERVICE IN NURTURING THE ENTIRE HISTORIC PRESERVATION MOVEMENT WAS PUBLIC LAW 94-458 PASSED ON OCTOBER 7, 1976, AND COMMONLY REFERRED TO AS THE GENERAL AUTHORITIES ACT. THIS OMNIBUS LEGISLATION CLARIFIED NUMEROUS ADMINISTRATIVE AND PROTECTIVE RESPONSIBILITIES OF THE NATIONAL PARK SERVICE, AND IT CONTAINED PARTICULAR MANDATE RELATING TO HISTORIC PRESERVATION. IT DIRECTED

THE SECRETARY IN SECTION 8 TO INVESTIGATE AREAS WHICH EXHIBIT THE QUALITIES OF NATIONAL SIGNIFICANCE. THIS, OF COURSE, IS BEING DONE UNDER THE 40 YEAR OLD NATIONAL SURVEY OF HISTORIC SITES AND BUILDINGS AND THE SURVEYS OF NATURAL AREAS, AND THE SERVICES NEW AREAS STUDIES PROGRAM. BUT THE NEW CHARGE CALLED FOR AN ANNUAL REPORT TO THE CONGRESS WHICH WILL BE PUBLISHED. SAID REPORT WILL LIST 12 OR MORE SITES WHICH MAY HAVE POTENIAL FOR INCLUSION WITHIN NATIONAL PARK SYSTEM. A SECOND LIST OF NATIONALLY SIGNIFICANT PROPERTIES FROM THE NATIONAL REGISTER OF HISTORIC PLACES, WHICH MAY BE THREATENED OR ENDANGERED MUST REPORTED WITH NOTATIONS OF THE SPECIFIC DANGERS, AND A COMPLETE LIST OF NATURAL LANDMARKS MUST BE SUBMITTED. WORK ON THESE IMPORTANT REPORTING RESPONSIBILITIES IS ALREADY UNDERWAY IN THE NATIONAL PARK SERVICE THROUGH NINE REGIONS COVERING THE UNITED STATES AND FROM THE SOME 300 INDIVIDUAL FIELD UNITS IN THE 30 MILLION ACRE NATIONAL PARK SYSTEM. THE REGIONS ARE COLLECTING DATA FOR THE REPORTS. AIDING IN THIS, WILL BE INFORMATION GATHERED FROM VISITS BY SERVICE REPRESENTATIVES TO THE ALMOST 2000 NATIONAL HISTORIC LANDMARKS AND NATURAL LANDMARKS. INFORMATION FROM SUCH VISITS MAY AID IN ISOLATING OUTSTANDINGLY SIGNIFICANT PROPERTIES FOR THE CONGRESSIONAL REPORT, AND ALSO FINDING PROPERTIES THAT ARE FACING SEVERE THREATS.

THE TAX REFORM ACT OF 1976 ALSO HAS BROAD IMPLICATIONS FOR THE

PRESERVATION OF HISTORIC PROPERTIES AS WELL AS NATURAL PROPERTIES. SECTION 1325 OF THE ACT OF SEPTEMBER 13, 1976, PROVIDES INCENTIVES FOR PRIVATE REHABILITATION OF CERTIFIED HISTORIC STRUCTURES. IT PROVIDES POSSIBLE TAX DEDUCTIONS FOR OWNERS OF DEPRECIABLE CERTIFIED HISTORIC STRUCTURES, WHO UNDERTAKE REHABILITATION OF THEIR PROPERTIES. IT ALSO ELIMINATES PREVIOUSLY AVAILABLE TAX ADVANTAGES TO PERSONS WHO DEMOLISH CERTIFIED HISTORIC STRUCTURES TO MAKE WAY FOR THE CONSTRUCTION OF NEW BUILDINGS--UNLESS THE BUILDING REMOVED IS CERTIFIED BY THE SECRETARY PRIOR TO ITS DEMOLITION NOT TO BE OF HISTORIC SIGNIFICANCE.

A FEATURE WHICH AFFECTS BOTH HISTORIC AND NATURAL PROPERITES WAS AN ALLOWANCE FOR A CHARITABLE DEDUCTION FOR DONATIONS OF LESS THAN FEE INTEREST OR A CONSERVATION EASEMENT DEDICATING THE PROPERTY TO BE PRESERVED FOR "CONSERVATION PURPOSES" FOR NOT LESS THAN 30 YEARS; HOWEVER, THIS PROVISION EXTENDED ONLY TO JUNE 14, 1977.

THE PROPOSED RULE MAKING GOVERNING CERTIFICATION OF HISTORIC PROPERTIES WITH RESPECT TO THE TAX REFORM ACT OF 1976 HAS JUST BEEN PUBLISHED IN THE FEDERAL REGISTER AS OF MARCH 15, 1977; FOR ANY QUESTION ON CERTIFICATION PLEASE WRITE THE CHIEF, OFFICE OF ARCHEOLOGY AND HISTORIC PRESERVATION, NATIONAL PARK SERVICE, DEPARTMENT OF INTERIOR, WASHINGTON, D.C. 20240. FOR ALL QUESTIONS RELATING TO THE ACTUAL APPLICATION OF TAX POLICIES RELATING TO HISTORIC PROPERTIES--

CONTACT THE U.S. INTERNAL REVENUE SERVICE.

THE NATIONAL PARK SERVICE HAS ALSO PIONEERED IN THE USE OF THE OPEN SPACE AND PRESERVATION EASEMENTS, HAVING UTILIZED THEM AS PRESERVTION TOOLS SINCE THE EARLY 1930'S. IN 1975, THE SERVICE CONTRACTED FOR A DEFINITIVE STUDY ON THE VALUES OF PRESERVATION EASEMENTS IN THE PROTECTION OF NATIONAL HISTORIC LANDMARKS BY RUSSELL BRENNEMAN OF HARTFORD, CONNECTICUT.

IN JANUARY 1977, THE NATIONAL PARK SERVICE PUBLISHED IN THE FEDERAL REGISTER PROPOSED GUIDELINES TO ASSIST FEDERAL AGENCIES IN RECOVERING SCIENTIFIC AND ARCHEOLOGICAL DATA UNDER THE REQUIRMENTS OF THE ARCHEOLOGICAL AND HISTORIC PRESERVATION ACT OF MAY 24, 1974 (88 STAT 174) MORE POPULARLY KNOWN AS THE MOSS-BENNETT ACT. THE DEPARTMENT OF THE INTERIOR--THROUGH THE NATIONAL PARK SERVICE IS RESPONSIBLE FOR CO-ORDINATION OF ACTIVITIES AUTHORIZED UNDER THAT ACT WHICH WAS DESIGNED TO STRENGHTEN THE PROTECTION OF ARCHEOLOGICAL RESOURCES AND PROVIDE GUIDELINES FOR THEIR RECOVERY. THE MOSS-BENNETT ACT WAS NOT INTENDED AS A SUBSTITUTE FOR 1969 ENVIRONMENTAL PROTECTION ACT OR EXECUTIVE ORDER 11593; BUT RATHER, IT PROVIDES A MEANS BY WHICH ARCHEOLOGICAL DATA MAY BE RECOVERED, IF THERE IS NO OTHER WAY TO ASSURE ITS CONTINUED PROTECTION.

THE AFOREMENTIONED LEGISLATION, ADMINISTRATIVE LAW, AND POLICIES

ARE ONLY SOME OF THE MOST IMPORTANT WHICH BEAR ON CURRENT EFFORTS TO PRESERVE OUR HERITAGE AND MAKE IT A MORE MEANINGFUL PART OF OUR CULTURAL LIFE. ONLY HIGHLIGHTS OF THESE LAWS HAVE BEEN MENTIONED. IT IS SAFE TO SAY WE DO NOT KNOW WHAT ALL THE RAMIFICATIONS OF THE MORE RECENT LEGISLATION MAY BE.

TO PRESERVE OUR HISTORIC AND NATURAL HERITAGE--TO ENHANCE THE QUALITY OF LIFE--THERE IS GREAT NEED FOR A UNIFIED APPROACH--A COMMON GOAL. A GOAL SUCH AS THE MEN AROUND THE YELLOWSTONE CAMPFIRE IN 1870 EXHIBITED--A GOAL THAT WAS FIRED BY ALTRUISTIC IDEALISM. THERE IS ALSO NEED FOR GREATER COORDINATION BETWEEN FEDERAL AGENCIES--ALL LEVELS OF GOVERNMENT, AND ABOVE ALL, THE PRIVATE COMMUNITY--TO BOTH PRESERVE VALUABLE TREASURES OF OUR CULTURAL ENVIRONMENT, WHILE AT THE SAME TIME PROVIDING FOR THE EQUITABLE MANAGEMENT OF PUBLIC PROPERTIES, AND UNDERSTANDING CUSTODIANSHIP OF PRIVATE PROPERTIES WHICH HAVE INTRINSIC VALUES.

RECENT MAJOR LEGISLATIVE ENACTMENTS WHICH I HAVE LISTED, AS WELL AS NEW TOOLS IN PRESERVATION, HAVE GENUINELY ATTEMPTED TO AID PRESERVATION; BUT THEIR COMPLEXITY AND THE IMMENSITY OF THEIR EFFECTS ON ALL LEVELS OF GOVERNMENT AND INDIVIDUALS RAISES AN IMMEDIATE NEED FOR A UNITY OF PURPOSE AND COORDINATION IN MANAGING HISTORIC PLACES AND WILDLANDS, AND IN COOPERATING WITH PRIVATE OWNERS IN PRESERVING

VALUES WHICH HAVE CULTURAL BENEFITS TO SOCIETY. THE SERVICE SHOULD STAND EVER READY TO SHARE ITS EXPERIENCE WITH THE STATES AND THE PRIVATE SECTOR IN A TRI-PARTE COOPERATIVE PROGRAM TO ADVANCE THE GOALS OF HISTORIC PRESERVATION--BEARING IN MIND THE RESPONSIBILITIES OF ITS SINGULAR LEADERSHIP ROLE, A ROLE GRACIOUSLY RECOGNIZED BY OUR PARTNERS IN THE STATES AND THE PRIVATE COMMUNITY, STRIVING TO FULFILL OUR RESPONSIBILITY, WE SHOULD REALIZE THAT WE CAN LEARN MUCH FROM EACH OTHER. BY A TOTAL INTERLOCKING OF EFFORTS OF THE MANY AND VARIED KINDS OF PRESERVATION AND CONSERVATION GROUPS, THE OVERALL INTERESTS OF CULTURAL ENHANCEMENT CAN BE SPLENDIDLY ADVANCED.

THE NATIONAL PARK SERVICE LOOKS FORWARD TO A CLOSER RELATIONSHIP WITH DIVERSE GROUPS AT ALL PUBLIC LEVELS, WITH PRIVATE ORGANIZATIONS, AND WITH INDIVIDUAL CITIZENS. HELPING ONE ANOTHER NOT ONLY TO PRESERVE HISTORICAL VALUES BUT NATURAL WILDLANDS AS WELL BECAUSE THE CONSERVATION OF NATURAL VALUES AND PRESERVATION OF HISTORIC VALUES HAVE FORMED A CULTURAL UNITY AND A NEVER CEASING OBLIGATION AND GOAL OF THE NATIONAL PARK SERVICE.

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Land Management Opportunities in Alaska

Delivered at the Conference on The Legal Aspects of Wildlands Management

Ann Arbor, Michigan

April 9, 1977

By Ronald E. Lambertson

When I was first contacted and asked to participate in this program, I spent some time considering a variety of topics which would fit into the scope of the subject of this conference - "Wildlands Management." I considered discussing the many traditional legal problems associated with the management of the millions of acres of land presently within the 500 units of the National Park and National Wildlife Refuge Systems. I settled upon the subject of "Land Management Opportunities in Alaska" because of historic decisions which are presently being made about the future of America's last frontier - Alaska. A wide variety of forces are presently converging on Alaska.

The development of oil has become the major propellant for changes in Alaska. During the late 1960's when the proposed development of the vast oil reserves on the north slope was

delayed by conflicting claims to Alaska lands, there developed a national recognition of the need for a prompt land claims settlement.

In addition to oil, Alaska has many other nationally significant resources. Fish, wildlife and associated natural and scenic values have long been a major attraction in Alaska. Originally supporting an estimated 75,000 eskimos, aleuts, and Indians, these resources have long been the target for those seeking sea otter, fur seal, whale, salmon and crabs. Present day Americans also treasure Alaska for more than the exploitation of her resources.

Within Alaska's many unique ecosystems can be found our cleanest rivers, millions of significant marine, shore, and water birds, nearly 40 per cent of this Nation's waterfowl nesting habitant, unique populations of mammals such as grizzly bear, polar bear, caribou, wolves, musk ox, and huge populations of marine mammals. Here, too, can be found the scenic grandeur of magnificent mountains ranges along with artifacts and sites of early ancient visitors to North America.

Though gigantic in proportion, Alaska is a fragile land. Extreme care must be taken by man to protect its delicate ecosystems. Generally, it is a land of severe climate, of thin soil often under laid by permafrost, and of short growing seasons. The natural web of life is stretched nearly to the breaking point. For example, simple vehicle tracks across the tundra can become ugly gullies, growing worst with time. Some vehicle tracks which was made in 1941 exposed the permafrost which eroded so badly that gullies became streams. The streams, in turn, have subsequently drained several lakes.

As America's last frontier, Alaska remains the symbol to many Americans of a vast unpeople wilderness. A few short generations ago Americans could feel this way about other places in the country as well. Yellowstone National Park, for example, was a wild and pristine area protected by its remoteness. Alaska remains such a place today.

For many years, decisions regarding the management of federal lands in Alaska were slow in coming. As late as 1970, 97 per cent of Alaska's lands were still under federal jurisdiction. Even though the 1958 Statehood Act granted the State

of Alaska the right to chose over 100 million acres of land, the state selections were slow in coming because there had not been a settlement of the aboriginal claims of the Alaskan natives. In 1971, Congress passed the Alaskan Natives Claims Settlement Act 1/ which recognized the needs of alaskan natives through the award of approximately one billion dollars and over 40 millions acres of land. In so doing, the settlement Act permitted the completion of the state selections under the Statehood Act.

Some major provisions of the settlement act include : (1) the establishment of a ten-member joint federal-state land use planning commission to help plan Alaska land use. (2) the authority for the Secretary to withdraw from all forms of appropriation under the public land laws, up to 80 millions acres of lands, for possible addition to "four systems" - the National Park, National Wildlife Refuge, National Forest, and the National Wild and Scenic Rivers Systems. Legislative proposals for the areas were submitted by the Secretary to Congress on December 18, 1973 and are currently awaiting legislative action. The lands designated under this provision have become knowning as the "D-2" or "national interest" lands.

The settlement did more than provide for state and native needs. Recognizing the significant impact of mass state and native land selections, Congress also addressed the "national interest" in the Alaskan lands. In so doing, the settlement act provides a congressional mandate to the Secretary of the Interior to conduct the most comprehensive land use planning in the history of the management of our federal lands.

The four systems "D-2" proposals resulted from ongoing Alaskan studies by the National Park Service, the Fish and Wildlife Service and the Forest Service. These proposals are now contained in legislation pending before Congress and include eleven new areas or additions to the National Park System, thirteen new areas or additions to the National Wildlife Refuge System, four new areas or additions to the National Forest System, and twenty new additions to the National Wild and Scenic Rivers System.

In essence, the Alaska Native Claims Settlement Act gives America the opportunity to "do it right the first time", based on experience gained over the years in other parts of our country. Never again will this country have an opportunity on such a scale.

The legislative proposals to protect the "D-2 lands" which are presently before Congress anticipate a variety of possible uses of these lands -- scientific research, conservation, recreation, education and subsistence hunting and fishing by the indigenous peoples. It is problems associated with the development of a workable program of subsistence hunting and fishing that I would like to focus on today for the remainder of my time. The legal, social and biological problems associated with the development of a workable subsistence policy in Alaska have presented the federal and state land managers with a whole set of unique problems.

It can be anticipated that there will be sharp conflicts between subsistence harvest and other proposed management activities on the proposed "D-2 lands". For example, conservation programs may hamper subsistence taking. The development of a meaningful subsistence policy will require a balancing between historically establish use patterns, and the culture needs of the subsistence takers. Resource managers in Canada are also facing demands by their native peoples for a reallocation of the wildlife resources which will recognize subsistence taking.

The Alaskan Native Claims Settlement Act provides no clear congressional guidance for the development of a subsistence program. The drafters of that Act may have seen it as an inappropriate vehicle for dealing with subsistence needs; or they made have been reluctant to deal with the thorny subsistence issues at that time. Whatever the reason, all language pretaining to subsistence had been deleted by the time the Act emerged from the Congress. Since a meaningful subsistence policy was not developed at the time of the passage of the settlement act, it can be anticipated that the legislation establishing the new parks and refuges in Alaska will be the vehicle for the development of a subsistence policy.

Before Congress passes legislation establishing these parks and refuges, there must be a careful review of the possible legal constraints to the development of a meaningful subsistence policy in Alaska. Consideration must be given to the development of a policy which will be administratively flexible to allow adjustments for changed user needs. Discretion to adopt subsistence regulations to fit regional variations in resource productivity is also crucial.

The first legal issue which must be examined is whether the existing legislative authorities for the management of the national park and national wildlife refuge systems are compatible with the concept of subsistence hunting.

The Congressional mandate for the management of the National Park System generally requires the service to "promote and regulate" the areas within the National Park System:

> . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 2/

It would appear that a subsistence program would fit within this broad legislative directive as long as the wildlife, scenic, natural and historical objects of the subsistence area are not impaired for the future. Indeed, traditional subsistence users and cultures in the proposed Alaskan parks could be integral components of the natural and historical values intended to be preserved by the parks system. Carefully managed

subsistence taking could be of value to these parks areas by allowing the survival of skills and cultures which have existed as part of these areas for many generation.

The Parks Service has traditionally shown a interest in harmonizing existing federal policies with the subsistence needs of rural Alaska. For example, the Park Service has proposed a policy of encouraging subsistence activities by the rural people in Alaska as a means of helping to maintain ethnic integrity and strong ties with the cultural past. The proposed Park Service policy states that the subsistence harvest of wild food and other biological resources from the land proposed as additions to the National Park System in Alaska provides an important opportunity for retaining an unbroken link with the Nation's culture past. Notwithstanding this apparent flexibility in existing Park Service authority, it will be necessary to designate the level of priority which subsistence taking is to be given in relation to the management of park resources.

The development of a workable subsistence policy for the proposed additions to the national Wildlife Refuge System in Alaska will also require careful consideration.

Presently, the National Wildlife Refuge System is administered pursuant to the National Wildlife Refuge System Administration Act of 1966. 3/ That Act authorizes the Secretary to permit the use of any area within the system for any purpose -- including but not limited to hunting, fishing, public recreation and accommodations -- whenever he determine that such uses are compatible with the major purposes for which such areas were established.

Since each proposed use upon a wildlife refuge must be meansure against the original purpose for which that refuge was establish, it is important that the Act establishing the new refuges in Alaska clearly set forth the role of subsistence taking.

It is the creation of the new wildlife refuges which is most likely to bring into focus the potential conflicts between subsistence taking and refuge management. Refuges are by definitions areas set aside for the nesting, production and protection of wildlife. The subsistence taking of large numbers of bird eggs and nesting birds, often by means which would appear unsportmanlike, will seem to many to be totally foreign to the entire refuge concept. It can be anticipated

that there will be future conflicts between subsistence takers and the sport hunting activities of migratory game birds, upland game, and big game which is currently authorize on many existing units of the National Wildlife Refuge System. The Department of the Interior will need congressional guidance on the role of subsistence to the extent that it requires adjustments among sport users, bag limits, open seasons, and other management details.

In addition to the necessity of receiving congressional guidance on the role of subsistence taking in Alaska, it is necessary to consider the legal constraints impose by existing treaties. The United States is a party to numerous international agreements which could be construed to limit the scope of permissible subsistence activities. There are several treaties which present potential problems on the development of a workable subsistence policy. Most notable among these are the treaty between the United States and Canada covering migratory birds. 4/ This treaty, which was signed in 1916, establishes restrictions upon the takings of various classes of birds. The treaty includes quite limited exceptions for native takers of both countries:

> the close season on other migratory non-game birds should continued throughout the year, except eskimos and Indians make take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing but the birds and eggs taking should not be sold or offered for sale.

This extremely limited provision is the extend of subsistence authorized under that treaty. Under this provision only a few species of birds can be taken at any time and the taking of all other species is restricted. Unfortunately, both Alaskan and Canadian natives consider these exceptions to be inadequate for their needs.

Unless Alaskan subsistence users are willing to severely limit their taking in the manner prescribed by the canadian treaty, a severe limitation is imposed upon the subsistence use of migratory birds.

A 1936 treaty between the United States and Mexico does not deal with the subsistence issue at all. The provisions in that treaty, which required closed season and prohibit the gathering of eggs, may also be troublesome to the development of a subsistence policy.

In 1972, the United States entered into a treaty with Japan for the protection of migratory birds and their environment. However, that treaty provides a specific exception for the taking of Eskimos and Indians "for their own food and clothing".

Other treaties which might impose restrictions upon the development of a subsistence policy include agreements for the protection of fur seals, various whaling treaties, and various fisheries treaties.

A new treaty between the United States and the Soviet Union for the conservation of migratory birds and their environment was recently signed in Moscow in November of 1976. Although this convention has not yet been ratified by the Congress, it is significant in that it contains an article which deals specifically with the subsistence needs of the indigenous inhabitats of Alaska. Generally, article II of that Convention provides an exemption for the taking of migratory birds by an Indian, eskimo or aluet who is an Alaskan native residing in Alaska as well as to any nonnative permanent resident in Alaskan native villages. All residents of Alaska with recognized subsistence hunting needs, therefore, would be treated equally regardless of race.

The Soviet Convention authorizes the taking of migratory birds for "nutritional and other essential needs". Nonedible by-products of birds taken for nutritional purpose could be incorporate into authenic native articles of handicraft and sold in limited situations. In this fashion, the Soviet Convention would respond to the legitimate nutritional needs of the indigenous inhabitats of Alaska while strictly controlling the commercial utilization of nonedible by-products. The Convention also impowers the United States to impose additional restrictions on taking when necessary to ensure the overall preservation and maintance of the stocks of migratory birds.

In conclusion, the development of a national subsistence policy on the federal lands in Alaska is presently in a state of flux. Important biological and social considerations must be evaluated and legal conflicts resolved if the prized resources in Alaska are to be wisely managed.

PRESERVATION THROUGH CLASSIFICATION

DOUG SCOTT

I am very glad to follow a presentation on Alaska made by a properly cautious federal official. I am not a properly cautious federal official, I am a citizen advocate. The Sierra Club is an advocacy group. We are a special interest group. Our special interest is not one in our own pocket and that distinguishes our group from the special interest group that was represented here yesterday morning. Other than that I am not subject to the same cautions as my predecessor so I will say that we will have a bill for the preservation of lands in Alaska that makes the proposals made by the Secretary of the Interior pale into insignificance. We are talking in terms of hundreds of millions of acres of new national parks, and restricted categories in wildlife refuges and preserves. We are not interested in the creation of an additional acre of national forest land in the State of Alaska, and we are not particularly concerned for the future of BLM in that State either.

So with that introduction I would like to say that I am going to focus primarily on the wilderness system and the Wilderness Act. I don't mean to avoid the issue of preservation by classification of national parks, wild and scenic rivers, refuges, national recreational areas. Generally speaking each of those other kinds of proposals for the protection of areas not now protected have such unique circumstances that it is not as easy to generalize as it is on the subject of wilderness. Also, wilderness affects all of those other categories and achieves the further purpose, that is, that airtight preservation of an area as opposed to merely its classification as a national park. One of the things that the conservation movement learned in its maturity, as traced earlier, was that by preserving an area in a national park, or wildlife refuge, or Forest Service area, whatever it may be, one merely changes the focus of one's concern to make sure that it is properly managed and protected: getting it out of the hands of exploiters and into the hands of managers that have to be watched quite as closely to avoid freeways, tramways, and the other kinds of things that Professor Sax spoke to us about last night.

Also, I don't mean to denegrate the importance of the subject that will follow me, that is the preservation of wildlands by acquisition. It happens that it is basically a side issue, although an important side issue, to classification. By definition the classification route to preservation applies to land that you already control, that is, in essence to publicly owned lands. There are some exceptions to that but they are quite rare. The acquisition problem comes in the more recent national park areas and the national recreational areas beginning in the 1960s with Cape Cod, in the 1970s with Sleeping Bear Dunes in this State and others, where you're creating an area whose ultimate purpose is preservation but you're having to begin that process by making those lands public in the first instance, or at least by securing scenic assessments.

To focus on my subject, which is preservation by classification, I will define for you what I consider to be the two critical elements of the term classification. The first is an action that relatively permanently defines a boundary. You can have an amorphous wilderness concept floating around in the air, but until it is tied down to some stakes on a piece of land some place, it

means very little. Secondly, the classification action must also establish a firm policy and a management regime for those lands.

The whole history of the wilderness movement in this century can be looked at as effort to find the most efficacious way to accomplish those two purposes -- to get a line established on the ground some place, and to define in some sort of permanent terms the policy that is going to affect the lands within that line and how they're going to be managed and what the constraints on that management regime will be. That long history can be looked at mostly in terms of a trend from administrative protection to legislative protection and a trend from protection at the hands of bold individuals of the kind that Professor Sax was certainly referring to, to protection at the hands of institutional means of a political nature.

All of this is important, and the citizen movement has played a vital role in shaping all of this, I think the most vital role, because we have driven a consistent goal for the last sixty or seventy years. That goal sees a value in wilderness that has virtually nothing to do with recreation as presently defined by most of the managing agencies; it has a cultural significance quite a part from on-site use. This is a point that gets lost routinely now. And the Forest Service is shoved into the same department with all other recreations so the cleaning out of latrines and campground, and the maintenance of pristine wilderness areas are handled by the same staff in the agency and reports up to the same chain of command. This is a serious error because it gets away from the real function that wilderness areas have in the eyes of those people advocating them. Although I never knew him, my mentor in this work was a man who is little known except to historians and followers of the details of these things but who in fact wrote the Wilderness Act -- conceived of and shaped its entire nature. The man's name was Howard Zahniser. He spoke and was known as "Zahney" to his friends and Zahney spoke of the goal-being perpetuity-in how incredibly bold it was for human beings that live nearly a life time to consider that they were trying to accomplish something to preserve an area of natural land, not for the next generation to decide what to do with all of that, but of course, the option always remains open. Their real goal was perpetuity ....forever. Very few of the leaders of the conservation movement have found it possible to sustain a faith in administrative proceedings as a way of preserving land. The faith that they had was a faith which depended on who the administrators were. For, in fact, the wilderness movement was begun by the kind of bold individuals that Joe Sax spoke of, notably Aldo Leopold and Robert Marshall, and Leopold and Marshall were exactly that kind of person. They singlehandedly, with a few other cohorts, grasped this area of federal policy particularly in the Fish and Wildlife Service and in the Forest Service. They simply said we are by will of our character, seeking that goal in perpetuity, going to do something to preserve wilderness. As long as they had that impact their being in the agency was acceptable to the movement. Aldo Leopold was an employee of the Forest Service at the time the preservation of wilderness was begun in that agency. Bob Marshall ran the Division of Recreation and Lands in the Forest Service which was responsible for these matters in the early 1930s. And in that period, all the other people that were working on the preservation of wilderness could take great faith from the fact that Bob Marshall was sitting there and had the final say over most of these decisions, or had the ear of the Chief of the Forest Service who had the final say. Bob Marshall died at the early age of 39 in 1938. His sudden, tragic, and unexpected death really sent a shock wave through the wilderness movement and the then President of the Wilderness Society, a lawyer by the name of Harvey Broome from Knoxville, Tennessee wrote a letter to Olaus Murie who was another great founder of the wilderness movement who lived in Moose, Wyoming. Broome, right after

Bob Marshall's death in late 1939 or early 1940, said to Murie, "While Bob was alive, I had great faith in the system of preserving wilderness from the administrative orders of the Chief of Forest Service. Now, with Bob not there, I'm not so certain. What would you think of submitting an act to Congress?" And that is one of the earliest serious elements in the trend toward the Wilderness Act. Well, without those essential individuals in the Forest Service and other agencies into the 1940s and beyond the war years, the movement turned to a broader-based political kind of devotion--first trying out the idea of putting pressure on an administrative agency to get the Chief of the Forest Service to establish and protect the primitive areas and wilderness service. In sum it didn't work. It didn't work worth a damn, to coin a phrase. The process worked fine when there weren't any use conflicts and in the days when the Forest Service (remember Rex Resler yesterday telling us about how the Forest Service invented wilderness) set wilderness areas aside in the 1920s and the 1930s. It was cheap and easy. It was a good way for a local forester to draw a line on a map and forget it. He didn't have to do anything; he didn't have to manage it, he didn't have to spend so much money on it and it was not intended to be permanent. In the whole history of the L-20 Regulation, and the U-1, U-2, and U-3 Regulations under which these designations were made administratively, there was not the least hint of any dedication to this idea of perpetuity in the preservation of the area. In fact the primitive areas were widely understood to be simply only a holding category until the economics caught up with these areas which were relatively remote, far from the mills or other economic opportunities.

So when there was no conflict it was easy. When there was conflict, the agencies collapsed vertically every time, and they collapsed for a variety of reasons. One, Bob Marshall wasn't there. Two, the conservation movement was not a strong political force at that time, by any stretch of the imagination. It was not professionally staffed; it did not have a large membership; it did not have lawyers; so in comparison with the timber industry, the graziers, etc., it tended to come out badly. Moreover, the national administrations in that era were not particularly receptive to this kind of argument. You could not look at Eisenhower's Cabinet and convince yourself that it was a large host of conservationists who controlled the Interior Department and the Department of Agriculture. In fact, perceptions that Broome and Murie had discussed in that correspondence and, it was widely being discussed in this leadership circle and movement at that time, were very quickly borne out.

Two particular cases it seemed to me to be worth mentioning. One Susan touched on already. That was what I considered to be the single most important environmental issue in the shaping of the political environmental movement that there probably will have been by the time the century is over. Certainly to date, it is the most important. That was the fight over our Dinosaur National Monument and the Echo Park Dams that were proposed there by the Bureau of Reclamation beginning in 1951 and going to 1956. The fight is over a billion dollar public work project which Eisenhower supported and the Secretary of Interior supported. Newton Drury, Director of the Park Service, was muzzled and finally forced out because of his opposition to building a dam in a national monument that virtually no one had ever heard of. Zahniser and Brower are a couple of other people who said to themselves, we are not quite sure what the values there are, very few people can get there, there is only one crummy dirt road. It is however, a part of the National

Park System. We will fight to the death for the principle that you don't build dams in even the most remote and even the most little understood and little known national park areas. They held up, via a campaign built on shoestrings and beeswax (not to mention the Saturday Evening Post and a couple of other large publications which weighed heavily in that campaign), they held up a billion dollar upper Colorado River Storage Project Act for six long years against absolutely impossible political odds, with some strange bedfellows to be sure, over the issue of "you simply don't do that as a matter of principle."

In the process they built a political movement and they gained, particularly Brower and Zahniser, the political experience which said, "Wait a minute, maybe Congress is the answer. Maybe we can make that institution work." Meanwhile the Forest Service was going through the lethargic process of reviewing the old area they had set aside as primitive areas and seeing which portions they would now put in the wilderness system. In particular, during the Eisenhower years, the portions of the old primitive areas which ended up in the wilderness system were only those portions which had not in the meantime assumed economic viability for timber or for other resources. And the most famous of those cases affected the area in my home state of Oregon called the Three Sisters Primitive Area which in 1957 was reclassified, like Forest Service, by the Secretary of Agriculture as a wilderness area. Everybody was very pleased and if you look at the bottom of the press release it looked like Oregon got a few more acres of wilderness. What happened, 53,000 acres of deep, low elevation, long season valleys full of Douglas fir were taken out of the Three Sisters Primitive Area and scheduled to be chopped down. The tops of the few adjacent mountains were added to the wilderness system. It was a classic case of what Aldo Leopold once called a paper gain and a real loss. That happened in the face of opposition by the entire Oregon Congressional delegation. The Secretary of Agriculture said, "Buzz off, I'm going to do it just the way I darn well please." He signed the order and it was done.

That is at the point at which people said, "Yes, we will have to come together and make an effort for a legislative vehicle to change the institutional mechanism by which these decisions are made." Two sponsors of the Wilderness Act when it was originally introduced with the two senators from the State of Oregon who were so enraged by what had happened in the Three Sister's Wilderness. This is where the movement got its speed. It got its political education at Echo Park. It got its morale imperative from what was happening to the primitive areas through the review process at the hands of the Forest Service. So Zahniser and Brower and several other people cooked up, developed carefully, worked out amongst themselves in a long and elaborate process, the Wilderness Bill which was finally introduced in June, 1956. It took eight long years to pass. There were a variety of changes that were made. There were some things that were loosely referred to as loopholes inserted along the way, and the result was the Act we now have today. It has not been changed materially since.

The Act can be said to have done five particular things, five exceedingly important things. First off it said for purposes of classification,

we will have a consistent policy. For the first time it said it is the policy of the United States of America that wilderness is important, and not just for recreation. It has a cultural importance to society in the long run. Also, in its declaration of policy, its purpose is to preserve an enduring resource of wilderness. There is that objective of perpetuity, painted on the ceiling.

Secondly, the Act established the National Wilderness Preservation System. It really isn't anything new. It's all lands that are in some other system: forests, parks, whatever. But it is absolutely vital. Zahney learned the lesson in the Echo Park Campaign that when fighting for some obscure place somewhere that was under threat, the way to make a national issue out of that was to say a threat to Dinosaur National Monument, which nobody ever heard of, is as good as a threat to Yellowstone National Park, which everybody has heard of. If they can do it here, they can do it anywhere so it is a threat to the system. He was designing a wilderness system for that same function. The day someone comes with an effort to unplug an area from the National Wilderness Preservation System, that is the argument they will have to contend with. You don't do something that threatens the integrity, not just of some obscure little area in Nebraska, but a whole wilderness system. That is what gets you page one of The New York Times and The Los Angeles Times and The Sierra Club Bulletin, I can promise you.

The third thing that the Act did was to establish for the first time a vitally needed single standard for the classification of wilderness. What is it? A definition, if you will, which is found in Section 2(c) of the Act. This definition reaches across all jurisdictions. It now reaches into the Bureau of Land Management by provision of the BLM Organic Act. It is the same definition for everyone. We have spent now twelve long years fighting with the Forest Service and the Park Service and everybody else to try and get everybody to understand that they may wear different uniforms and they may talk about different areas, but as regards wilderness, there is only one standard in one Act.

We had for a while the circumstance of President Nixon proposing wilderness in Shenendoah National Park, sixty miles from Washington, D.C., at the same time that the Forest Service was saying, "There is no wilderness in the East," with their hands cheerfully attached to their eyes. Forest Service wanted to amend the Wilderness Act in 1973 in order to save the areas in the East that qualify under a loosened standard. They lost that battle. There isn't an Eastern amendment to the Wilderness Act. What passed as Public Law 93-622 was the Eastern Wilderness Areas Act. It added a substantial number of areas, including several in this state, to the wilderness system under that one single definition of wilderness.

The fourth thing that the Act did was to shift the locus of decision making power out of the agency and into the Congress. The power to decide what will be a wilderness area and where that boundary line will be is entirely Congressional. The question of what is suitable for wilderness is totally Congressional. The only function that is left with the agency in that process of classification is the power to make a recommendation which has no more weight or validity than the recommendation I might choose to make, or

you might choose to make. The power to decide what is wilderness and what will be preserved is utterly Congressional and that is a very lucky thing. The payoff for that little bit of genius, on Zahniser's part came two years ago when President Ford finally sent up to the Congress his recommendation for the reclassification of the Idaho Primitive Area in the State of Idaho. It was 1.5 million acres, the core of the largest chunk of roadless area left in the lower 48. President Ford at the behest of the Boise Cascade Corporation recommended that the 1.5 million acres be reduced by 400,000 acres by taking land out of the existing primitive area in the process of reclassification. Had there been no Wilderness Act the Chamberlain Basin would be logging area today. Because of the Wilderness Act, people on Capital Hill fell right asleep when they heard Secretary Butz and President Ford say that they wanted Chamberlain Basin taken out of the wilderness. It will never happen, the area is absolutely as safe as houses, simply because all Secretary Butz could do was make a recommendation. No one had to pay any attention to it and no one did.

Finally the Wilderness Act established a single generalized management regime for wilderness areas regardless of jurisdictions. There are certain provisions in the bill which establish a general scheme of management for wilderness areas regardless of who is administering it. However, that is conditioned by the fact that these areas remain within the jurisdiction of whichever particular agency happens to have had them at the time that they were classified and the purposes of some of those lands differ in some degree. So there are slight variations in the technical details in the management of wilderness. There is no variation on such things as you may not use a chain saw except in extraordinary circumstances. There are no variations in some of the general provisions of the bill. But hunting is allowed in national forests and will be allowed in BLM wilderness areas. Hunting will be allowed in those wilderness areas of the refuge system that are otherwise open to hunting. In those areas of the refuge system that are closed to hunting, the Wilderness Act won't change that. National parks, of course, are closed to hunting; so that is an example. Grazing may continue where it has been allowed; motor boat use, a number of these things vary a little bit between agencies. But the basic administrative framework of the Wilderness Act was to preserve the wilderness character as best you can, subject to any valid existing uses that may apply, and subject to a very rigorous but flexible test on management activities that the agency itself can do.

The Wilderness Act applies to the National Park System not just the National Forest System. The reason is what I said earlier. The National Park Service is the only person likely to screw up the national park area. Therefore the maximum roadless country and national parks ought to be shoved into the wilderness system so they would put the legislative mandate around lands that would otherwise be, and everyone of these is real, an interfaith chapel on the south brim of the Grand Canyon, a tramway up Guadelupe Peak, two tramways in North Cascades National Park, and the list goes on forever. So it is equally important that national park areas be added to the wilderness system. I am pleased to say that the one that I cut my teeth on, Isle Royale National Park in the State of Michigan, is now in the wilderness system to the tune of 99.7+% of the land area of that national park. And that park at one time had one of the finest superintendents in the Park System. He said,

"I don't want the discretion to build anything here." That is the attitude that of course the Sierra Club would applaud with great enthusiasm.

The Forest Service immediately became the principal antagonist of the Wilderness Act the minute it was passed, assuming a purity stance that nothing would qualify or virtually nothing. To protect the lofty quality standards of the wilderness system, we couldn't put anything in that wasn't as pure as the driven snow. This was a deliberate policy, adopted after a series of meetings by the Director of the Division of Recreation of the Forest Service and blessed by the then chief. It was a deliberate policy to keep down the acreage in the wilderness system not by saying we're opposed to wilderness (Smoky the Bear wasn't that stupid), but by saying, as much as we would like to save more acres, nothing qualifies, nothing is as pure as the driven snow so hardly anything can get in and that is exactly the train of thought that led the Forest Service down the track of saying that there was nothing in the East that would qualify as wilderness.

Well, the Act settled a lot of those problems except that the fight lingers on. We are still fighting with the Forest Service about some of those. What is a road? I can see we're going to have some problem with the BLM about that. Can you make an area on the immediate outskirts of Salt Lake City a wilderness, a place called Lone Peak, even though you can hear the noise of a freeway down in the canyon; and if you look carefully you can see Salt Lake, it is right there. Does it qualify as a wilderness, or is it disqualified by the sights and sounds of civilization intruding? The answer is Zahniser knew what he was doing. The Wilderness Act legislative history is absolutely clear that what is going on outside that line has nothing to do with it.

The political implications of the Wilderness Act are what I would like to conclude emphasizing. The political implications, first off, are that we need not go venue shopping quite as much as we used to. You know the conservation movement used to have little fights to say, "Let's take this Forest Service area which they aren't planning to protect very well and give it to the Park Service." The ideal technique was to get the Park Service and the Forest Service fighting over who was to protect more wilderness better in the same place. Now that is absolutely the key to the Olympic National Park and to Kings Canyon National Park. There were fights between Harold Ickes and the Forest Service over who could protect more wilderness better. Now if you can get that kind of a fight going you can go home, go to sleep, forget things, and just know you're going to come out alright. But you don't need to do all that; I mean that is an enormous big battle. North Cascades, Sawtooth, and other places where that battle has been fought out are very difficult when you get into the jurisdictional jealousies of the agencies. With this consistent wilderness policy that affects them all now, it doesn't matter. If you can get it into the system in the particular agency it is with, you don't have to take on the added burden of a jurisdictional transfer. So I think we will see considerably less of the Forest Service to National Park kind of transfers which dominated the conservation politics of the early Kennedy Administration. I am not yet prepared to make a prediction about whether we will see transfers from BLM to National Parks or conceivably from BLM to the Forest Service. He who is most favorable to wilderness will always have our undying support as long as he remains that way.

The other political implications of the Wilderness Act is that we got away from the job finally that we had been doing for forty years. In 1939 the Forest Service stopped identifying primitive areas and started shifting those into a higher classification called wilderness areas. The Wilderness Act continued in this process by saying that the outstanding primitive areas that were left all had to be reviewed. All the parks had to be reviewed. All the refuges had to be reviewed. We've been reclassifying land that is already relatively safe for the last forty years. Only about in 1969 or 1970 as we began to get the process of implementing the Wilderness Act into a nice routine posture and shoving these areas throught the Congress did the conservation movement finally say, "Well, wait a minute. What about all that other acreage out there?" In effect the shift is now virtually complete. There is very little sentiment in the circles that I circulate in to spend our priority time, effort, money and attention on the re-classification of the Idaho Primitive Area, the Spanish Peaks Primitive Area, the Yellowstone National Park, whichever ones you might mention that haven't yet passed the Congress because they are on their way. They are in the pipeline and they are all protected in the interim. Our concern is for those lands which in fact are wilderness now but are not protected. Dave Brower coined the term a long time ago calling these the "de facto wilderness". Wilderness in fact, but not yet protected in any particular way. This is the great wilderness issue in the western United States today. It affects particularly the National Forest Service and the BLM. It focuses not on land that everybody agrees ought to be studied and added to the wilderness system. That's cheap, that's easy. It takes no political cost to say that you ought to study some area that is sixty miles from Seattle and 300,000 acres large with very few trees and see whether you want to make it into a wilderness. That was easy. The problem is where the conflicts come on lands that aren't protected at all. Now this conflict began to focus in the late 1960's as citizens in other parts of the country said, "Hey, we've got this great Wilderness Act. Hooray, but it is not helping us in Missouri because there are no primitive areas, no National Parks, so there is nothing that we're going to get in the wilderness system and yet we've got the Mark Twain National Forest in this favorite little area out there. How do we save it?" Well, the Wilderness Act says it takes an act of Congress to add an area to the wilderness system. Go to your local congressman, go to your local senator, get him to introduce a bill to make the Irish Wilderness and Mark Twain National Forest. We had the Lincoln Scapegoat Wilderness in Montana added to the system over the objections of the Forest Service. It never was a primitive area. Bills began to get introduced and Congress was getting into this business and the Forest Service was running around saying, "Wait a minute, wait a minute, we haven't done the study." They were clearly losing control of the politics of this situation. And so in 1971 the Forest Service dusted off an obscure old regulation and polished it up and produced the thing called the Roadless Area Review and Evaluation Program. It inventoried all the roadless areas left on the National Forest, leaving quite a few. They didn't look at the East except peripherally; they didn't look at the national grassland; they didn't look very well at Alaska. But they looked at the western United States and they found 56 million acres. Then they went through this great long computer program and came out with 12 million of those acres as wilderness study areas. Now a good six million of that were areas they were all ready to study into the mandate of the Wilderness Act and so those didn't count. So they added about 6 million

acres to the study category beyond what the Wilderness Act had said to study through the rare program. That left in excess of 44 million acres of roadless lands, wilderness today, assumed by somebody who grew up like I did, that that roadless country up around Mount Hood was always going to be there, it was a part of the back-drop of my life. Forty-four million acres that today are the front lines of the battle.

Because what is sweeping across the West right now is a single five or six year program to radically and massively alter the visual environment in which Westerners live, by making a sweeping change on the vast majority which up until quite recently had no particular value and simply stayed wilderness, de facto wilderness, because of the lack of any particular alternative to do anything with them. Nobody wanted them.

The Sierra Club has been in law suits; the Sierra Club has been in administrative appeals, many other people have, trying to organize and enforce a policy that coherently will look at those 44 million acres of roadless land to see what can be done. That conflict has been going on for some time and is focused in all of the forums we have been talking about.

The levels of decision-making are all confused. A forest supervisor in Podunk Falls, Idaho can make a decision tomorrow that a large area of half a million acres could be chopped down without so much as a review by anybody. If he says,"I would like to make this a wilderness study area, not a wilderness area, just a wilderness study area," he must go to his regional supervisor. He must go to the chief, the chief must look at it, it has to get approved all the way up the line. Now that's an anomoly. It's not quite fair. The hurdles to get an area out of the factual wilderness status and into a log truck are very low. The hurdles to even think about whether that should be a wilderness or not are impossibly high and as a result very few areas are being added.

An alternative that we're seeing that harks right back to the era of the Forest Service's opposition to the Wilderness Act is to do a wilderness study on an area and say, "Oh, this doesn't qualify," or "Oh, this wouldn't be well managed as a wilderness, so we will make it an administrative area. We will call it a scenic area, a natural area, a pioneer zone, a crest zone." They have all sorts of wonderful terms; they simply cannot use the term wilderness because Congress forbids using that except by its own actions.

I could go on and rant here about the issues that are involved in the West; the crucial issue is timber vs. wilderness. We have an economic anomoly that is equally as bad as the decision-making anomoly. What Rex Resler said here yesterday was, "We want to think ahead and figure out how big the wilderness system is going to be." Don't let future demand bother you, don't let the fact that it might be more valuable in the future as wilderness than as timber bother you. We're going to decide <u>today</u> through RPA and all of these wonderful statutes we have had, how much wilderness there should be. Twenty-four million acres in the national forest, 25.7 million acres, we will set this little goal there and then we will ring the bell, all the wilderness is saved.

Hurrah, we can chop down the rest. That's not how they do timber. Timber is open-ended demand. Whatever you want, up goes the cut and we will chop it down. Intensify the management, keep the commercial forest base as wide as you possibly can. In other words, increasing demand in the future under the Forest Service scheme for wilderness recreation and wilderness use will have to be answered by the intensifying use on a limited acreage base. Increasing demands for timber are assumed to be solved by keeping the base that the timber can be chopped from as open as possible, by not allowing any more wilderness areas, and by intensifying the use of that land for timber production. It is an anomoly which cannot last. Sooner or later people are going to discover it and it's kind of crazy.

The clincher is it doesn't make good sense economically. In fact we are now into such marginal lands on the average in the National Forest in terms of new lands being opened up for timber that the cost of building, with federally appropriated funds, forest system roads to access presently roadless lands on the average western national forest is greater for the return of timber than would be the use of that money in intensifying management on lands that are already accessed and are not available for wilderness in any event. You cannot put a pre-commercial thinning sale on most western national forests today because you haven't got the money. If you took the money that you are using to build roads into roadless areas to get marginal timber and put that money which is already there--you don't have to go find a pot at the end of the rainbow--it is appropriated every year in the range of millions of dollars -- and put that into timber culture, particularly pre-commercial thinning and reforestation on better site lands already accessed, you would get a better board foot return at a lower dollar cost per unit. It is that kind of new approach to the tradeoff problem that we're trying to foment now in the political process. The wilderness fights until quite recently--the last two or three years--have been fights about lands that were saved by Bob Marshall. The wilderness fights for the next five, ten, fifteen or twenty years will be fights to save all the other land of which there is vastly more that Bob Marshall didn't even aspire to. It is asking too much of heros like Aldo Leopold and Bob Marshall to think that in the thirties and the twenties they could conceive, in their wildest imagination, of the degree to which public enthusiasts would support that goal--the perpetuity of wilderness up there, and the degree to which wilderness demands, back-packing, river trips, all the different kinds of things and uses of onsight and uses of wilderness, the incredible reaction to television specials and so forth, the public demand for wilderness--in their wildest imagination these men could not have conceived of that demand. And it is only in this margin of de facto wilderness that we're going to save enough to meet the demands, not of future generations, just of our own. Thank you.

PRESERVATION THROUGH PURCHASE

ROD MILLER

Thank you. I'd like to especially thank the students for staying because on a nice Saturday, I know what I would have been doing. I try to do my best when I speak at something like this. I start out by saying I feel very much like a mosquito at a nudist colony. I know what to do. I just don't know where to begin. Stay with the mosquito just a moment. I'm sure that mosquitos in this state are keenly aware there are about 19,000 acres a year of wetlands. Vital important wetlands are lost through development and misuse of the resource. Probably nationwide 200 times that number are lost. Natural areas such as unspoiled wetlands, prairies and forests preserve and protect natural diversity and that's what the Nature Conservancy is all about. The why and how we go about preserving environmentally significant areas and biologically significant parts of this planet are to be the focus of this presentation.

First, I'd like to consider the why of what we do. Why do we work at preserving natural areas and the biotic diversity that they represent? I'd like to relate a story to you. Hopefully, we can draw some parallels from it. An Englishman by the name of Sir Robert Cotton amassed a vast library of old manuscripts and old books. Unfortunately, most of this stuff was written in nearly forgotten early English. Since neither he nor any of his contemporaries could read this, what he was in fact doing was saving things that he didn't know what he had or what he was saving. So he had to develop a very unusual classification system. Around his library there were busts of Roman emperors. When he would place a manuscript under the emperor, he would classify it according to the name of the emperor it sat under, the shelf it was on, and its place on that shelf. One of these books, and it's still known as "Cotton Vitellius A XV," later became one of the single most important volumes in English literature. Many of you probably read it. It's the old English saga of Beowulf.

By the time that Cotton got his hands on it, Vitellius A XV already had a long history. We now know from the language the manuscript was written probably around 1000 A.D. It contains words from the 8th century and at least one reference to an historical event that happened in the 6th century. The saga has all the earmarks of an oral poem much like the Iliad of Homer, one that had been kept in man's memory and passed down from generation to generation changing gradually to accommodate social change. By the time the scribe wrote it down, the poem was probably centuries old. The scribe himself must have been a monk. No one else could write or could command the amount of parchment needed. Now the poem is blatantly pagan, and it has some Christian sugar coating thrown in. But God only knows how this monk justified to his abbot writing 2,000 lines. We were lucky that he did because a couple of generations later, Anglo culture was disrupted during the conquest of 1066. A century after the conquest nobody could have read Beowulf. For the next 500 years the unintelligible manuscript laid in English monasteries escaping theft, flood, fire, worms, mold, all the things that go with being a manuscript of that period, until Henry VIII celebrated a break from the Church of Rome by burning all the English monasteries and all the libraries that went with them. Someone rescued Vitellius A XV for reasons that we probably will never know. When the manuscript showed up in Cotton's library a century later, its travels

and troubles were not over. The entire library was moved to Westminster College where in 1731 a fire destroyed or damaged much of Cotton's collection. The fire only scorched Vitellius A XV, but it charred the edges and they began to flake away. But still no one could understand it, but some thought it an ancient Danish ethic. An Icelander made two copies of the poem in 1787 and reconstructed the words that were at the frayed edges of the book thinking he was preserving part of his Danish heritage. More of the manuscript has disintegrated since then, in 1815 the first printed copies came out. I think the question you're interested in is, what does Beowulf have to do with long-toed salamanders? But probably the more important question is, why do we save things. The Beowulf saga had been rescued from extinction for several people at various times and I would like to know what they would have said if someone asked them why they did it. I'm sure two things. Their answer would have been greatly different and not one of them would have known that he was preserving that manuscript for my pleasure. Except possibly for the original bards and the monk who wrote the manuscript, none of them knew exactly why they were saving it, but they all had their own sufficient reasons.

In my mind, the Nature Conservancy is a descendent of Sir Robert Cotton. In his time, it was vitally important to save rare and endangered elements of intellectual and cultural history. In our times it is our natural heritage that is threatened. Like Cotton, we do not have a very clear idea of what's in our library. What's the genetic message from the long-toed salamander? And what's so important about saving it for this or future generations? We haven't the faintest idea. In fact, even if the salamander were vitally important to us, what could we say is the importance of that salamander to people in the year 2077? More importantly, what about 3077, which is probably more in keeping with the Beowulf time frame. We are trying to save as complete a library as exists for as long as possible. The why of what we do may not always be crystal clear, but we take on intellect and instinct that what we are doing is right and is important and must be done.

The how of what the Conservancy does is much easier to define and explain. I've put together a series of slides which will give you an idea of the techniques most commonly used by the Conservancy. Like the first rule of the politician is to get elected, the first rule of the wildlands manager should be, I've got to have some lands to manage.

I'm not an ornithologist, but I do know that this is a Great Blue Heron. It says so in my notes. This is taken on a piece of property that the Conservancy acquired in a way which is very common. It was a gift. About half of the properties that we acquire at any given time come to us as gifts. It was a gift of a very clever guy by the name of Willey Brown. It's called the Theodore Roosevelt Reserve. Because Mr. Brown was a great admirer of Teddy Roosevelt, one of his requests was that it be named after Roosevelt. This property, the 361 acres, represented the total sum of Mr. Brown's assets. Probably at the time he gave this to the Conservancy in 1969, it was worth $1.2 million. He had nothing else, really. Probably today the way land value has gone, especially in Florida, it may be worth $3 million. At any rate Willey Brown's father told him that when he was 16 years old that the land was his, protect it. Willey and his brother stayed out there. He was 87, I believe, when we got the land, and he lived for another four years. We were able to locate a donor who made a donation to the Conservancy and in return the Conservancy paid Willey a very small amount but it allowed him to meet his needs. He took advantage of a

"life estate" on part of the property and lived out the rest of his days there. "Life estate" is where someone may give you something and in return they keep use of it, at least during their lifetime.

The Pascagoula hardwood tract on the Pascagoula River in Mississippi consists of 33,000 acres. It was a purchase. The Conservancy acquires quite a bit of property as purchase. Usually when we start talking about tracts that are as big as 33,000 acres, we're doing it with a governmental agency under what we call a governmental co-op program. The property is coming on the market, the agency is very anxious to get it, but they have no money, but they think they can get it in a year or two. So in this case, this property didn't come on the market. We found this property. Mississippi undertook what we call a Heritage Trust Program. We set up an inventory system for the state, went out to look at the environmentally critical areas and then came back and tried to decide on some strategy for preserving those areas. The Pascagoula hardwood tract was the top priority for the state of Mississippi. It belonged to a lumber company. There were about 100 stockholders in this lumber company, one of which owned 25% of the stock. The others we talked to were interested in selling it, especially to a conservation buyer. The other gentleman, while he never said he wasn't interested in selling it, but he wanted to make a stock swap. Most governmental agencies and most private groups can't make a stock swap because we have no stocks to swap. So we purchased the 75% of the outstanding shares from the other people. We called together a stockholders meeting and voted to liquidate the company. We were able to buy up 75% leaving the guy holding the other 6,000 acres that we couldn't pick up. When we divided it up, we got the most important part. It was about 13 miles of river frontage, 40 oxbow lakes in here and quite a number of endangered species.

This is Marion Island up in the west arm of Grand Traverse Bay. The Conservancy became involved in this property when I first came to Michigan. That was about two years ago now, and this was one of the first properties I acquired. It belonged at the time to a coal company. The citizens there were interested in preserving it but the price tag was too steep for anybody to meet. Some of the people up there dug up a donor. I was dealing over the telephone with somebody I didn't know and didn't know how to find out who they were for a long time. Everybody just kept telling me he can put up the money if you can get the property. So we got an option from the Company. The donor said that he'd come up with half the money and we were able to work with the Soil Conservation Service through one of their programs to come up with the other half of the money. We have since transferred it to the County of Grand Traverse and the majority of the island is to be left in its natural state. It's been called Ford Island at different times. It was also once, I guess, called Renny Island.

This is the Grass River, again here in Michigan. We've been able to pick up close to 1,000 acres. The state of Michigan owns 182 acres up in the grassy part to the north here. We've been able to acquire everything on both sides of the river down to where it flows into Clam Lake which is the lower lake. Again, we've been able to raise the money through a local group. The Grass River Natural Areas Committee has been able to raise to date approximately $75,000 and we'll be able to match that with some federal funds and the final cost will be about $150,000. And we'll transfer that to the county. They

will use it as a natural area. They already have plans for developing a school program where they will be able to take the kids out and teach them about the area. It's just a delightful area. In the summer swans come into this area. One of them will station themselves at the bottom where the river flows into Clam Lake. If you come in with a canoe or something that is approximately the swan's size, he'll attack it and turn it over. He seems to get a great deal of amusement out of that.

The Virginia Barrier Islands are probably the single most significant acquisition in the Conservancy's effort to date. They include approximately 33,000 acres, 13 Barrier Islands off the Delmarva Peninsula. This is what is referred to down there as the Eastern Shore. This is on the Atlantic side of the Delmarva Peninsula. We picked up these properties. Most of the money to do this came to us through a grant from a Cary Foundation - The Mary Cary Trust, I believe. We're willing to hold onto these properties. We think we can manage them better than anyone else. We're in the process now of setting up laboratory on the mainland where we will be using a consortium of universities doing research to kind of tell us what's happening out there.

I think one of the more important things of having these kinds of properties and Conservancy ownership, it gives you a kind of benchmark to measure how public lands are being used. There are some really interesting things about these Barrier Islands. If any of you have been around Ocean City, Maryland, you know what's happened there in types of developments. The developers were interested in doing the same thing to these Barrier Islands. They are close enough to Washington, D. C. to get people there for second homes. They wouldn't sell to the Conservancy because the conservation buyer could certainly screw up their being able to develop these properties. So we had to set up a corporation called Off-Shore Islands Development Corp. We'd go in and buy a piece of the island, what ever we could get, we'd buy it. Then due to the nature of the islands after a big storm, you might have 80 acres before the storm and now you've got 120. Most of these islands were measured by the metes and bounds system. So if you've got 120 and you used to have 80, that might mean that the owner next to you has 60 acres less. You can tie the thing up in legal action forever. Some of the developers figured that out a little bit too late.

This is the Great Dismal Swamp. I saw on the agenda that you had John Whittaker from Union Camp yesterday. Union Camp made a bargain sale to the Conservancy for 49,000 acres in the Great Dismal Swamp. The property was appraised at approximately $12-14 million. I think they sold it to us for $2.5 million. They took the tax write-off and were able to use their tax savings to go out and buy properties that were more productive for a timber company to own. Mr. Calder, the Chairman of the Board, the day that they announced this, got something like 600 telegrams on his desk, all of them positive, from stockholders saying it was a good thing for the company to do. Since then the company has instituted a program which they call their Legacy Program. They inventoried their properties and systematically are transferring some of these properties to the Conservancy. These properties from an ecological standpoint are very important, but from a timber production standpoint may be low production properties. This is in Lake Drummond, probably the prettiest and most interesting areas in the swamp. I don't think they really know, but Lake Drummond may be a crater from a large meteorite.

This is a prairie. At one time prairies occupied about one fifth of the North American continent. There are probably less than a million acres of virgin prairie now. We had a man down in Missouri who was handling the acquisitions for us in the Missouri, Kansas, Nebraska area and a lot of the farmers down there would say, "Ah hey, I'd love to sell it to you, but I might need it to graze on." And a lot of these prairies have been grazed, but it doesn't seem to affect them too much because the buffalo at one time grazed them very heavily also. Anyway, after he talked with a number of them, they all kept saying how they'd like to do it but they were afraid they might need it. We developed a technique that's commonly used in other areas. We would buy the property from them and then lease it back to them. We would spell out what they could do and what they couldn't do. One of the things they might be able to do is cut it two times a year for hay. Or they may be able to run x number of cattle on it at a given time. But they don't live forever and sometimes they didn't really need it. It was kind of a convenient excuse without turning somebody down. So, we've been able to put together sizeable chunks of prairie in all the prairie states.

Another technique that is commonly used by the Conservancy, especially in the east where they tend to be a little bit more sophisticated about land matters, possibly from necessity, is the "conservation easement." This is where you don't purchase the property or the property is not given to you, at least outright, but certain rights in that property are given to you. Real estate operates on the bundle of sticks theory: that if you own the fee interest to a piece of property you own all the bundle. Theoretically, you can do with that bundle whatever you wish. So you may choose to give or sell certain sticks in that bundle to organizations such as the Conservancy. On the Maine coast here, we've been able to put together about 33 islands and probably 120 miles of coast. That's not solid -- these are in-holdings in there. But as long as you can tie the easements together in a line of sight, then you have what's called an appurtenant easement, which is a perpetual easement. This property is called the Rachel Carson Maine Sea Coast named after Rachel Carson with whom most of you are familiar.

This is another bargain sale property. Anyway this is an area which was a large Spanish landgrant, about 65 miles south of Albuquerque. It's 220,000 acres, 343 square miles. It has four small towns in it that have no way to go but up. We own all the land around them. Since 1969 the tax statutes have said that the Tax Act says the foundations had to give away six percent of their assets. That's been changed now. They give away five percent of their total assets each year to comply with the law. This Foundation's main asset is land and was really just thinking well all we have to do is give away money. In 1973 the Feds told them that by December 31 they better dispose of this land and make good on their tax liability. So the last month of 1973 everybody in the Conservancy was running around to get legal work and title work done. The property has still not been surveyed. I estimate it's going to cost $400,000 to survey this property.

This last property is up in the Upper Peninsula. I think the interesting part about it is some land developers from Chicago and Atlanta purchased a little over 10,000 acres up there and they split it up into ten acre lots. By splitting it up into 10 acre lots you comply with the Interstate Land Act and

you can sell it through the mail. What they are doing was going to airports. They would announce they were going to have an auction. They would go to the airports and auction this stuff off at $300 an acre. Someone in Chicago who hasn't seen $300 land in probably 20 or 30 or 40 years thought they were getting a hell of a deal so they would buy it. But the stuff is way up in the Upper Peninsula. When the gas crunch came along, real estate dealings up there just died. We were able to go in and offer the purchasers $51 an acre and then pick it up. I think that's all the slides. I think you can see how land is acquired and we have an idea, though not always a very clear one, of why we acquire it.

I'll conclude with a thought from Aldo Leopold which seems to be quoted quite frequently: the first step to intelligent tinkering is to keep all the parts.

QUESTIONS AND DISCUSSION

NATURE CONSERVANCY LAND MANAGEMENT POLICY

Question:

Can you elaborate on what the Nature Conservancy does with the land that it acquires; and secondly, while you are holding the land, do you permit public access?

Rod Miller:

The properties owned by the Conservancy are open to the public. That's the basis for our tax exemption. If, however, the property is a very fragile property, then you can limit access to that property. You do what's best for the land. We have a cave in Texas which is the only site for the Texas blind salamander and the cave was open to the general public. We did have a manager who lived close to the property. We come to find out that he was packing the blind salamanders and selling them to universities for research. In that case, we put up a chain link fence with a lock at the gate. Only people who applied in advance to the Conservancy and stated what they were doing, and agreed to give us copies of what they did in there were allowed to go in. To answer the other part of the question, the Conservancy holds 50% of the properties that we acquire. We usually try to set it up with local volunteer units managing the property for us. This summer I hope to have an intern who will go out and work with these volunteer groups and get them to draw up a master plan on the different preserves in their area with the idea we can then start deciding how that property is going to be used so that people do get out on the property but the property is not abused.

Question:

Since the land is open to the public, how do you find out where it is and how do you find out how to gain access to it?

Rod Miller:

Write my office.

SUBSISTENCE IN ALASKA

Question:

Given that many different users take different kinds of resources off the public lands in Alaska for different reasons -- nutrition, cultural, psychological -- how is the Fish and Wildlife Service going to define subsistence? Then Doug, since this definition will affect the wilderness areas, how does the Sierra Club feel about this?

Ron Lambertson:

The one point I hope to make on defining subsistence is that it has not been defined. Everyone has a different idea. One of the points I wanted to

make out of all those treaties was that each treaty had a different concept of what subsistence was: very low level to very high level.

I see one of two things coming out at the Congressional hearings. Either Congress is going to put in a one liner saying the Secretary of the Interior can go out and develop subsistence regulations for natives on the new parks and refuges, or, preferably, Congress will set forth some clear guidelines. Guidelines are needed especially in the area of the use of modern methods for hunting and in the area of economic uses. What I'm afraid of is that Congress will put in a one liner: "let the Secretary develop the regulations." We will have the natives, the Sierra Club, everyone will be screaming, "do it this way." As Joe Sax was talking last night, through this public participation approach, policies are developed and maybe they're not such wise policies. I think it would be a lot better in the legislative process if we would get some general guidelines from the legislative process. As far as the courts are concerned of course, it depends completely on the guidelines we get from Congress.

Doug Scott:

I am not an expert on the details of Alaska so I will not venture to state the Sierra Club's position on subsistence; it's a very touchy subject. The proposals that the Sierra Club, in a very broad coalition with other organizations, is supporting for Alaska are based on very close work in the field in Alaska, and in contact with native organizations and a lot of other people up there and elsewhere. The results are that our proposals for new parks and refuges are almost all proposals for areas that will go into the park system and into the wilderness system one hundred percent: just like that, all at once, no double process. Subsistence policy is a very tricky issue and it's absorbed an enormous amount of time and I would do an injustice to you, myself and the people who know more about it if I could see what our position was, because I don't know.

Question:

What makes this such a touchy issue?

Doug Scott:

It's not that I don't want to tell you, it's literally that I do not know. Like anything, this will be a political issue with a great many contending forces. One does all one can do to see that one avoids antagonizing any of the forces that would be involved.

Now the opportunity to secure these millions of acres in Alaska -- it will be a lot more than 80 million acres -- is an opportunity that was not created by any government agency. It's something created by the Wilderness Society and the Sierra Club. No one but the Wilderness Society testified at the hearings on the Native Claims Act that there was any possibility of doing something about preserving Alaska through that process. The Administration, the Department of the Interior, native groups, virtually every civil rights group in the country, the unions and the oil companies were all arrayed against section 17-D-2. It went into the Act because of our lobbying campaign.

Now you know, we were arrayed against a rather substantial coalition. We're certainly hopeful in many instances it's going to work that the development of final decisions for the allocation of lands that are set up in Alaska are going to involve much greater cooperation between groups than have been at other times. That's why there'll be an enormous amount of discussion back and forth involving all sorts of people, not just the Sierra Club and the natives. Since I am not in it, I can't tell you the answer -- I'd like to.

EXTENT OF WILDERNESS SYSTEM

Question:

How much of the "de facto wilderness" should be included in the designated wilderness system and does your group care what the productivity of the land that is included is?

Doug Scott:

Wilderness is not defined as land that isn't worth anything else. Now there's a great tendency -- one has to be very careful about the arguments one develops and uses. That's, I think, what Joe Sax was saying last night. I am very glad that much of the land that I'm interested in seeing added to the wilderness system tends to be marginal land on the timber spectrum, but that isn't one of its characteristics. I'm very eager, coming from the Western slope of the Cascade Mountains, to see the wilderness system populated by a great many elderly and stately Douglas fir trees. Looked at through eyes different than mine, those trees add up to many a board feet, so that isn't how we decide.

Secondly, as I tried to say before, I have a personal, fundamental, deep disagreement with the whole concept of the Resource Planning Act as is being applied by the Forest Service to the prior decision on where we're going with land allocations. A good example of this is that the Forest Service must necessarily project ahead its timber sale and sale preparation work of individual forests. In doing that they have to have some assumptions. I grant you that. We recently came across, from three different sources in three different national forests in California, a memo (that was not intended for our eyes) from the regional forester to each of the forest supervisors. It instructed them on the setting of their timber sale goals for planning purposes for the 1980 fiscal year. What it said was we have x acres of roadless lands left in California on the national forests and for the purposes of deciding where and how much you're going to be able to cut in the fiscal year 1980, assume that one-half of the roadless areas will be available in the year 1980 to be opened up and chopped down or to go into the sale planning program. Now that's known before the land use planning for most of those areas has even been started. California is quite late in the land use planning process. And the result is that you sort of have a cart the wrong way around. No one has said we're going to set a ceiling on how much timber we're going to cut off the national forests. It's going to be 9 billion board feet per year and that's all we can expect from the national forests -- end of discussion. That's exactly what they're asking us to do for wilderness, see, and then everything else is wide open for what is laughingly called multiple use. I just don't see how you can do that. Wilderness demand is increasing more rapidly today than the demand for timber

products and paper fiber products and from the wood of the national forests. Wilderness demand, if you believe at all what Joe Sax was saying last night, if you believe at all the fundamental proposition that there is some kind of progression in human culture towards an appreciation of these extensive uses of lands for wilderness, then the answer to growing use of wilderness is not to figure out how to build more trails and stuff more people per acre per hour through the national wilderness system of a set acreage. That demand is growing; you answer growing demand in our system of "free enterprise" by increasing supply and you increase the supply of wilderness by designating more. You can't build it; you protect it. So to say we're going to decide in 1977 that the wilderness system will have 24 million acres of national forest land in it, which is what the Forest Service goal is, seems to me impossible. Furthermore, it's quite counterproductive and I'm not alone in that view. Here is the Committee Report of the U.S. Senate on the Wilderness Act first passed in the Senate in 1961. It says the Committee is convinced that "the values of wilderness areas, largely intangible values, are great and in many instances outweigh the values of competing uses which may be forfeited by wilderness preservation." Now that's the Congress speaking and I just think that's true. I'm very much against the idea of saying we're going to have 24 million acres -- we've already got 12 so we've got 12 to go, so let's go around and see where we can get it and as soon as the gong rings that's the end of the process. How much does the Sierra Club want? I haven't the slightest idea. Because I don't know what lands we're talking about. There's an area in Central Idaho of great importance to us today that we didn't even see five years ago. Nobody saw that this wasn't just a little pile of rocks in separate areas and that if you looked at it from just a different direction it was really one place. All of a sudden it is a very important concern of ours and many local people in that area.

So we can't predict. You know if you were to have asked somebody from the Sierra Club 10 years ago, they'd just say, well, we're pleased just by the thought about the Wilderness Act and we'd be happy for the primitive areas. Well we wouldn't be happy about that anymore. I think that the figures that we're talking about for the wilderness system ultimately, outside of the last good range, are upward of 80 to 100 million acres. We're talking about 3, 4, 5 percent of the American continent, of the American land. At some point, as Joe said last night, at some point society will say through the legislative process, enough! And that's fine, you know we chose to go that course a long time ago. But you can't start the process of looking at the values of an individual piece of land *in situ* and say, no that won't be wilderness because we saved something in Montana. Therefore, we can't look at this little hunk of Nebraska because we've already reached that limit.

I can only tell you what we think is right for land that we have studied and about which enough is known to say what's the proper thing for that piece of land. That's largely what Ron was saying. We don't know enough about areas in Western United States. It's very hard to see sometimes from back here perhaps, but for many areas in the Western United States we know virtually nothing about them or their resource situation other than they have some trees.

All of these decisions that have been made, have been made without the first ounce of public involvement by the people of Connecticut. But the process says we'll hold the hearing for the little hunk of land in Grangeville, Idaho.

I can tell you how that's going to come out and so can anybody in this room: That's disenfranchising the people of Connecticut, and those are the people who all turn on Wild Kingdom every week which is a vote for wilderness. We all sat here and looked at those pretty things in the slide show. Everybody's attention was on the slide show because we care. Those people in Connecticut can't get to a hearing in Grangeville; they never even know when it is. Trying to combat this from the global land backwards, it seems to me, is impossible. And it's a game I won't play. Lots more than we've got now is, the best answer I can give you.

PURCHASING RIGHTS TO POLLUTE

Question:

Yesterday, when we spoke about air quality we said that in areas which were too dirty, a new industry couldn't come in and make it any dirtier. But if they wanted to build a factory or something they could purchase the rights to pollute from someone who was already there. I wonder if the Nature Conservancy has ever considered the idea of buying rights to pollute for air or water quality areas and holding ?

Rod Miller:

About 10 seconds ago.

Seriously, one of the decisions that was made early on in the Conservancy is that we would do one thing, and we would try to do it well. I think we do it rather well. Our goal is the acquisition of natural areas. Sometimes we get pulled away from that, but cooler heads prevail and we get kind of pulled back. I don't think that we can do a lot of other things and still be effective; so we just kind of made a decision and we try to stick with it.

SUBSISTENCE VS. NATIVE AMERICAN RIGHTS

Question:

As I recall, the Bald Eagle Act and some other acts like the Endangered Species Act have tried in varying degrees to take account of subsistence hunting. Clearly, however, the Native American groups are making claims that go considerably beyond subsistence needs. You get into the situation like the fishery situation in the Great Lakes, and the fishery situation in the Puget Sound, the Endangered Species situation with the Indians in the Rocky Mountain West. Do you really think that given the political climate on Native American groups that Congress is going to be able to act effectively when they take subsistence into account in addressing legislation on Alaska?

Ron Lambertson:

Well, I think somebody is going to have to take into account. Whether Congress will do it or whether it's going to be the Secretary of the Interior who'll get it, I'm not sure. Basically all we've had in the past in things like the Endangered Species Act, the Marine Mammal Act and the Eagle Act, are little

provisions saying that if the natives or the American Indians pursuant to treaty have some right to preserve, to kill these animals, we aren't going to interfere with that; let them go on. That though is very different from addressing a complete land management system while you're setting aside 80 or more million acres of land and you're going to decide how those lands are going to be managed. At some point I guess it is the same issue, but I think that Alaska is the harder issue. I think it's going to come to the front a lot clearer when someone starts talking about specific issues. There are so many caribou on that wildlife refuge -- what's going to happen, Mr. Congressman and Mr. Senator, to those caribou? Where does the native subsistence right go? Are they entitled to all of them? Or, are they entitled to no more than 10% of them as long as the population maintains its vigor? Those are the kinds of decisions and there can be drastic impact upon the wildlife populations.

Some of you might be familiar with what has happened to the caribou herd in Northwestern Alaska. A herd was set aside by the State of Alaska for strictly native subsistence taking. I think it's pretty well documented that that herd has been almost completely decimated -- gone from something like 400,000 animals down to less than 50,000 in a period of less than five years. So, there's the problem there. I've heard the Sierra Club people testify before on this exact issue. There is a tremendous problem there and there are going to have to be some hard decisions made and I don't think we have any guidance from the past. The fact that there were treaties for Indians in the lower 48 doesn't give us any guidance in Alaska because there aren't treaties in Alaska. The fact that there were exceptions in the Endangered Species and Marine Mammals Acts for natives doing certain limited things and not to be protected or covered by those acts, I don't think really gives us any answers.

Question:

Well, have those even worked?

Ron Lambertson:

They've worked in that we have a declaration from Congress that the law doesn't apply to them. Up to now we haven't had an endangered species or marine mammal severely impacted by natives so that somebody can point to that situation and say look what the natives did to that endangered species -- they wiped it out or something like that. That hasn't happened yet. But the potential for something like that is going to be a lot greater once we get into the Alaskan situation.