

GOVERNING THE TONGASS: NATIONAL FOREST CONFLICT AND POLITICAL DECISION MAKING

BY
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The Article examines one of the most enduring and intractable environmental conflicts in the United States: forest management on southeast Alaska's Tongass National Forest. It analyzes the Tongass conflict by asking three broad questions: 1) what factors drive this conflict, 2) how has it been dealt with in the past, and 3) how might it be dealt with in the future? The Tongass is used as a springboard to investigate more inclusive issues about public lands governance—many of its lessons are applicable elsewhere. Conflicts over the Tongass are driven by multiple factors, from overlapping and problematic statutory language to adversarial processes. The article highlights how political disagreement, and the nature of public land law, move conflict about forest management onto alternative decision-making paths—resources planning, administrative appeals, executive involvement, appropriations, science, and litigation take up where Congress left off. Though often beneficial, many of these alternative processes are not well-designed for conflict resolution and problem solving. The analysis demonstrates that changes to these venues and processes will likely re-channel, rather than resolve, the underlying conflicts because of the stakes involved and their irrepressible nature. Nonetheless, part of the Article is devoted to sketching a few possible solutions drawing heavily from intriguing ideas and developments in public lands management. In this context, the article briefly outlines legislative reform, public participation and collaboration, and community forestry.

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I. INTRODUCTION

Management of the Tongass National Forest (Tongass) in southeast Alaska is one of the most divisive, intractable, high-profile, and longest running environmental conflicts in the United States. This Article examines the Tongass by asking three questions: what factors drive this conflict, how has it been dealt with in the past, and how might it be dealt with in the future? It analyzes the Tongass by examining the dominant “drivers” of this conflict and the political institutions and decision-making processes set up to handle it.

The paper is not an exhaustive history, nor is it written by someone who has long played a role in the politics of this place. I write about the Tongass as an outsider and from a bird’s-eye view. This has its drawbacks, for many of the devils are in the details. But it also has its advantages because it presents an opportunity to look anew at many of the entrenched divisions and questions important to this story. The goal is not for an outsider to propose “the solution” to the Tongass, but rather to find out what the Tongass can teach us about conflict and public lands decision making. The Tongass is appropriately used as a springboard to investigate more inclusive issues important to public lands governance. By no means is the Tongass situation the norm, but, as in medicine, analyzing the most pathological cases can have diagnostic value.

The narrative used here relies heavily upon traditional policy and legal analytic methods that are supplemented with extensive personal interviews conducted throughout southeast Alaska during the summers of 2004 and 2005.¹ Work was done in Juneau, Sitka, Ketchikan, and more remote places on Chichagof and Prince of Wales Islands. Representatives and people affiliated with the United States Forest Service (USFS), Department of Agriculture, timber industry, conservation groups, Native corporations, wildlife management, and various citizens, scientists, and political representatives and their staffs were interviewed. They were given an opportunity to explain how they interpret the underlying drivers of this conflict, how it has been managed, and how we might proceed.

The story of the Tongass is told by analyzing the dominant themes, patterns, and drivers of this conflict. A number of natural resource-based political conflicts in the United States seem to have an underlying logic about them, and so too does the conflict of the Tongass. Thus I use an analytical framework that I believe is quite useful in understanding natural resources conflict and governance in general.² Interwoven throughout the Article are numerous factors making the Tongass particularly acrimonious and intractable, including: the promises and overextended commitments found in public lands law, scarcity, symbolism, surrogate issues, tribal values, place-attachment, framing and communication patterns, the media, scientific disagreement and uncertainty, electoral politics, political strategies, mistrust, and the various venues of adversarial governance. Like a Spaghetti Western, it is sometimes easy to predict the backdrop, script, and next scene in the “rainforest wars.” The analysis shows that conflict over the Tongass is driven by many of the same factors governing public lands management in general, but that it is also much more complicated and sharpened in southeast Alaska. (On the other hand, the region does not have to deal to the same degree with many of the typical issues now challenging forest management throughout the country, like fire, invasive species, and high-volume motorized recreation problems).

In a nutshell, the Article examines the central drivers of the Tongass conflict and shows that the divisions are often deep and fundamental. Incompatible worldviews, values, and economic interests explain a lot here. But so too does the way in which these conflicts have been governed in the past. Political institutions and decision-making processes make a tough situation worse. There is, unfortunately, no constructive venue in which interests can engage one another and try to solve problems and plan for the future. The Article also shows how political disagreement in the Capitol and the resulting nature of public land law moves conflict about forest

¹ 41 interviews [hereinafter Interviews], usually lasting between one to two hours in length, were conducted throughout the region. These people were chosen because they are knowledgeable and/or important actors in this story and/or were recommended by others. Confidentiality was promised to each of these individuals, so their names and positions are not revealed.

² Martin Nie, *Drivers of Natural Resource-Based Political Conflict*, 36 POL’Y SCI. 307, 311–12 (2003) (analyzing 12 recurring drivers of conflict in the United States, such as scarcity and mistrust).

management onto alternative decision making paths: resources planning, appeals, executive involvement, appropriations, science, and litigation take up where Congress left off. When it comes to governing our public lands, each alternative has its share of virtues and problems, but many are simply not well designed for conflict resolution and problem solving. Certainly things could be improved, but changes to these venues and processes will likely rechannel rather than resolve the underlying conflicts because of the stakes involved and their irrepressible nature. My research also documents the role that raw political power and economic globalization play in public lands governance. This is not to suggest disempowering the people working hard to solve problems on the ground, but rather to highlight the backdrop in which this story unfolds. The Article also emphasizes how the thick layering of laws, rules, and judicial decisions complicates public lands governance and drive many conflicts. But from a conservation standpoint, it also shows how conflict can be beneficial. It has brought about considerable change on the Tongass and much of the landscape is now protected because of it. But as we'll see, not all conflict is to be celebrated, as it can be counter-productive as well.

II. THE TONGASS AS CONTESTED LANDSCAPE

At roughly 17 million acres, the Tongass is the largest and perhaps most controversial national forest in the country.³ It extends approximately 500 miles from Dixon Entrance northwest to Yakutat, and, with the Gulf of Alaska to the west and the Yukon and British Columbia to the east, it runs approximately 120 miles at its widest point. The Tongass makes up most of the more than one thousand islands of the Alexander Archipelago and consists of a rich ecological mosaic, including muskeg, ice fields, mountains, and forest lands. It is the largest remaining temperate rain forest in the world—a fact that is instinctively recited by almost everyone in this story. About one-third of it is forested with trees like Sitka spruce, red and yellow cedar, and Western hemlock, and much of this is old growth. About 74,000 people live in the region, most in cities like Juneau, Ketchikan, and Sitka, with others in more remote villages.⁴ About ninety-five percent of southeast Alaska is comprised of federal lands, with about eighty percent managed by the Tongass National Forest.⁵ The remainder is found in a patchwork of state, Native, and a small amount of private land ownership. The importance of this federal presence cannot be overstated as most important decisions in the region will usually involve the USFS one way or another.

³ Former Alaska Senator Frank Murkowski (R) recommends study of the Mideast peace process as a quick way to understand the interminable conflicts over the Tongass. *Tongass Land Management: Joint Hearings Before the S. Comm. on Energy and Natural Resources, and the H. Comm. on Resources*, 105th Cong. 3 (July 9, 1997) (statement of Sen. Murkowski, Member, S. Comm. on Energy and Natural Resources).

⁴ Juneau, for example, accounts for nearly 40% of southeastern Alaska's population. STEWART D. ALLEN, GUY ROBERTSON & JULIE SCHAEFFERS, *ECONOMIES IN TRANSITION: AN ASSESSMENT OF TRENDS RELEVANT TO MANAGEMENT OF THE TONGASS NATIONAL FOREST 7* (Pacific Northwest Research Station, General Technical Report No. PNW-GTR-417, 1998).

⁵ *Id.* at 1.

As some residents describe it, the “Southeast” economy has moved from “fish and chips” (salmon and pulp) to a more diversified one that is still based relatively heavily upon government, tourism, and the fishing, mining, and timber industries. Scale makes it difficult to generalize about this region, partly because Juneau and Sitka are such economic outliers with more robust and diversified local economies. Though there is serious disagreement about what caused it, there has been an undeniable decline in the number of sawmill and logging jobs in the region.⁶ Tourism, driven mostly by the cruise ship industry, has since exploded. But as we will see, its growth has caused a great deal of consternation as well.

Southeast Alaska has been a contested landscape for over a century. Its imperialist history is one of brutal colonialism and resource exploitation by Russians and Americans. For the latter, the region has long represented different values and opportunities. These disparate landscape visions are evident in the writings of those like John Muir and others participating in the much publicized Harriman expedition that explored the region and its people and resources in 1899.⁷ Even then, there were doubts, including among the most respected of foresters, about the viability of a large timber industry in southeast Alaska.⁸ Later on, the region’s environment and resources continued to be coveted, albeit for different reasons. USFS leaders like Frank Heintzleman, for example, committed a career to bringing a large timber industry to the southeast. But others, like forester and wilderness champion Bob Marshall, dissented and advocated that Alaska be kept largely as a wilderness.⁹ Such history shows that while the names and strategies may differ, environmental conflict has been the norm and not the exception in southeast Alaska.

Much of this conflict springs from the uniqueness of the region. Scarcity, and our perceptions of it, is a central driver of American environmental conflict.¹⁰ As more of the natural world becomes endangered, conflict over its protection escalates. This is especially so for those “last best places” and symbolic wild landscapes like Alaska, in general, and the Tongass, in particular. Alaska continues to be contested territory, with fights over the Arctic National Wildlife Refuge, wolf management, and the Tongass receiving a disproportionate amount of national debate and headlines.¹¹

⁶ There were an estimated 3450 jobs in this sector in 1990, but only 450 of them remained by 2002. See Neal Gilbertsen, *Southeast Alaska*, 24 ALASKA ECONOMIC TRENDS 3, at 3–4 (2004).

⁷ WILLIAM H. DALL ET AL., ALASKA, VOL. II: HISTORY, GEOGRAPHY, RESOURCES (1901) (a collection of papers from the expedition); see also THE HARRIMAN ALASKA EXPEDITION RETRACED: A CENTURY OF CHANGE, 1899–2001, at 3 (Thomas S. Litwin ed., 2005).

⁸ B.E. Fernow, *Forests of Alaska*, in DALL, *supra* note 7, at 254. As a member of the expedition, Fernow had his doubts about the region’s forestry potential because of its timber qualities, tough topography, and distance from markets. Given these factors, says Fernow, “we may readily see the reasons why this reserve will, for an indefinite time, be left untouched except for local use.” *Id.*

⁹ DANIEL NELSON, NORTHERN LANDSCAPES: THE STRUGGLE FOR WILDERNESS ALASKA 23 (2004) (providing a comprehensive account of wilderness history and politics in Alaska).

¹⁰ See Nie, *supra* note 2, at 312–14 (discussing the scarcity driver of natural resources conflict).

¹¹ See generally KEN ROSS, ENVIRONMENTAL CONFLICT IN ALASKA (2000) (providing a detailed description of dozens of such conflicts in the state over the years).

Alaska plays a central role in this scarcity narrative. As population and development run amok in the lower forty-eight states, Alaska becomes an increasingly iconic and contested place. This point is not lost on Alaskans, as emphasized by almost every person interviewed.¹² While some embrace this status, others deeply resent being seen in such terms. Thus, for some, the state represents the last chance to “get it right” and protect an intact ecosystem, while for others it remains “the last frontier,” a place begging for economic growth and development. Some of those with whom I’ve spoken clearly understand the special nature of southeast Alaska, but dislike being portrayed as bumpkins who cannot take care of their place, and are offended by not being allowed to live like other Americans.¹³ Why should the region, they ask, be off limits to further economic development just because so much of the lower forty-eight has been spoiled? Others argue that, fair or not, Alaska deserves heralded status, and Americans have a right to protect *their* public lands in Alaska, and if some Alaskans want to live like most Americans, they should move south.

The scarcity driver might seem curious given the enormity of the Tongass—a forest as large as the state of West Virginia. But the Tongass is the largest remaining temperate rain forest in the world and has thus become a very special and symbolic landscape at national and international levels. It is routinely listed by environmental groups like Greenpeace as one of the most “endangered forests” in the nation.¹⁴ Furthermore, out of these 17 million acres, the battle lines and trenches are dug most deeply over roughly 300,000 acres of productive and high value forest lands. Some conservationists argue this is the “biological heart” of the Tongass and the “scraps” left after a half century of the USFS-sponsored industry cutting, and “timber mining” practiced by Native corporations.¹⁵ They are thus fighting over what little remains after years of exploitation. But the timber industry also uses scarcity language to explain its position.¹⁶ Because so much of the Tongass is off-limits to logging, due to wilderness and other administrative withdrawals and various landscape characteristics, there is not a lot of land available for harvesting. The timber industry believes that it too is fighting over scraps—the tiny sliver of the pie that is still available for timber harvesting.

¹² Interviews, *supra* note 1.

¹³ *Id.*

¹⁴ See, e.g., NATIVE FOREST PROT. ALLIANCE & GREENPEACE, ENDANGERED FORESTS, ENDANGERED FREEDOMS: AMERICA’S 10 ENDANGERED FORESTS 27 (2003), available at <http://www.greenpeace.org/raw/content/usa/press/reports/endangered-forests-endangered.pdf> (including the Tongass in its list of America’s 10 endangered forests).

¹⁵ See *infra* Part III.C (describing Native corporations that arose following the Alaska Native Claims Settlement Act).

¹⁶ The Alaska Forest Association and Southeast Conference claims that “[f]or each 1 acre of the Tongass that can be harvested, there are 10 acres of forest land that will never be harvested and another 14 acres that are managed for recreation, wildlife habitat and other uses.” Southeast Conference and Alaska Forest Association, *Our Tongass Forest* (pamphlet) (on file with author). See also Alaska Forest Ass’n, Alaska Forest Facts, <http://www.akforest.org/facts.htm#tongass> (last visited Apr. 23, 2006) (emphasizing the scarcity issue).

Management of the Tongass is also controversial because of its sacred, spiritual, and place-based qualities. Environmental conflicts become particularly challenging when religious and/or cultural beliefs and practices involving sacred sites, species, and traditions are threatened or are perceived as such.¹⁷ Even a non-secular attachment to place will ratchet up the stakes, as citizens will fight with zeal those threatening their cherished landscapes and lifeways. Southeast Alaska's environment, communities, and unique way of life are widely embraced.¹⁸ Those supporting increased timber harvesting often use a language of identity, community, values, and lifestyle. They love their place and seek a degree of economic security that can provide for them and their children. They see themselves as stewards, wisely managing its abundant resources to provide economic livelihoods and community stability. Seen from this perspective, it is easy to sympathize with timber workers and their allies who take such umbrage at being targeted and stereotyped by various interests.

Conservation groups tell a slightly different story, though the language is often the same. For some, the Tongass represents "the last stand," for where else can we protect a relatively intact ecosystem of this scale? Its biophysical and cultural uniqueness are accentuated by these groups, and this helps explain the symbolic and strategic importance of the Tongass. It thus becomes another high-stakes battle royale and a much publicized line in the sand. As discussed in more detail later, subsistence takes the Tongass to a much higher-level as well. The Tlingit, Haida, and Tsimshian Indians have a special relationship with this landscape and its resources. The traditional subsistence life in the region "forms a deep web of connections between the people, the land, the sea, the wildlife, and the spirit."¹⁹ Hunting, fishing, and gathering—and the social and spiritual relationships that go along with them—are critical parts of Alaskan self-determination and are guaranteed by federal law.²⁰

III. CONFLICT AND FOREST LAW IN SOUTHEAST ALASKA

Legislation governing the Tongass is central to understanding the dynamics of this conflict for three general reasons. First, policies that were

¹⁷ See, e.g., Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 468–69 (2002); JUDITH V. ROYSTER & MICHAEL C. BLUMM, *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* (2002) (providing extensive discussion of Tribal resources management and sacred lands and species cases).

¹⁸ "Southeast Alaskans cherish their place, their closeness to the land, water, mountains, and wildlife—their lifestyles. Personal use of forest and marine resources is considered by many to be a vital component of local culture, lifestyle, and family provisioning." Kendall Foundation, *Listening to Communities in Southeast Alaska*, in U. S. FOREST SERV., *TONGASS LAND MANAGEMENT PLAN REVISION: FINAL ENVIRONMENTAL IMPACT STATEMENT: PART II*, 3–435 (1997) [hereinafter *TLMP FEIS* or *TONGASS PLAN*].

¹⁹ David Avraham Voluck, *First Peoples of the Tongass: Law and the Traditional Subsistence Way of Life*, in *THE BOOK OF THE TONGASS* 89, 91 (Carolyn Servid & Donald Snow eds., 1999).

²⁰ See *infra* Part III.D (describing how the Alaska National Interest Lands Conservation Act protects traditional Native uses of Alaskan resources).

reasonably crafted and designed in one particular historical context become antiquated and problematic in another. That is, much of the conflict over the Tongass is due to the legacy of various ideas, laws, rules and deals that were made over the years supported by outdated rationales. As discussed below, the “Lords of Yesterday,” as Charles Wilkinson describes them, still run rampant in southeast Alaska.²¹ Second, some of this conflict is due to the steady accumulation of various laws that were not designed to work well with others. As we will see, the Tongass has its own unique governing legislation, in addition to other system-wide mandates and obligations, and the courts have been forced to figure out how it all fits, and fails to fit, together. Third, as with the case of public lands law in general, the sometimes vague, ambiguous, and contradictory language found in some of the laws important to the Tongass invites conflict and litigation.²² Such language, often due to the nature of legislation forged through compromise, provides the legal toehold for disgruntled actors. These three patterns are evident in the important laws discussed below. Rather than providing an exhaustive review, the section analyzes these crucial events and laws from a conflict and decision-making perspective.

A. National Forest Law

Three laws are critical to understanding what USFS does and how it is supposed to do it: the Organic Administration Act of 1897 (Organic Act),²³ the Multiple Use Sustained Yield Act of 1960 (MUSYA),²⁴ and the National Forest Management Act of 1976 (NFMA).²⁵ The 1897 Organic Act states in part that “No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”²⁶ This broad mandate provides little resolution because some interest groups emphasize the “protect” and “water flows” provisions, while others highlight the “supply of timber” component.²⁷

²¹ See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 17 (1992) (suggesting that in the West “natural resource policy is [still] dominated by . . . nineteenth-century laws, policies, and ideas”).

²² See Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVT. L. & LITIG. 223, 223–25 (2004) (analyzing the discretion provided in various public land laws and the political implications).

²³ Organic Administration Act of 1897 (Organic Act), Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2000)).

²⁴ Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2000).

²⁵ National Forest Management Act of 1976, 16 U.S.C. §§ 1600, 1611–1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

²⁶ Organic Administration Act of 1897, 16 U.S.C. §§ 473–482, 551, 475 (2000).

²⁷ Note that the language actually establishes three purposes for the National Forests, not just the commonly cited water flows and timber supplies. Outside the federal reserved water rights context, one would think that issues like wildlife would be impacted by the “improve and protect the forest” language found therein. See *United States v. New Mexico*, 438 U.S. 696, 719–25 (1978) (Powell, J. dissenting in part) (highlighting Congressional intent, as embodied within

Superimposed on the Organic Act is the Multiple Use Sustained Yield Act of 1960 (MUSYA).²⁸ Through MUSYA, Congress formally articulated the multiple use mission of the Service: “It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”²⁹ Its lack of detail and prescription is notorious. One problem is the Act’s failure to specify the spatial scale for implementing multiple use: whether focus is placed on forest-by-forest level or on a national forest system level.³⁰ On the Tongass, for example, a number of people voice widely disparate understandings of multiple use. Some conservationists argue that it applies to the system as a whole, so the Tongass should focus on the multiple uses of fisheries, recreation, and tourism. But others argue that multiple use without harvesting timber renders the paradigm meaningless and indistinguishable from the National Park Service mission. This is not to say that MUSYA says nothing of importance, for the multiple use mission later proved to be a major challenge for an agency that became focused primarily on dominant use timber production.³¹ But MUSYA’s abstractness has been used by the USFS over the years to defend everything from designating 58.5 million acres as protected roadless areas³² to proposing an 8.7 billion board foot timber sale in the Tongass.³³

Sierra Club v. Hardin, provides a classic example of how far the multiple use concept can be bent by the Forest Service and the level of deferential review used by the courts.³⁴ In 1958, only 0.6% of commercial forest lands in the Tongass were reserved from logging, and the 1964 Multiple Use Management Guide for the Alaska Region planned on taking care of the rest: “About 95% of the commercial forest land of southeastern Alaska is occupied by over-mature stands of hemlock, spruce and cedar [and] these decadent stands should be removed by clear-cutting methods as soon as possible to make way for new stands of fast growing second growth timber.”³⁵ The total sale would have encompassed more than ninety-nine percent of the commercial forest lands in the Tongass, but the court still deferred to the agency’s “due consideration:

the Organic Act, to protect more than simply water flows and timber supplies).

²⁸ 16 U.S.C. §§ 528–31 (2000).

²⁹ *Id.* § 528.

³⁰ A Society of American Foresters (SAF) review, for example, recommends that “Congress should clearly articulate in new legislation that the concept of multiple use is not necessarily appropriate on every management unit, but may be better applied in the aggregate across the national forests and public lands.” *FORESTS OF DISCORD: OPTIONS FOR GOVERNING OUR NATIONAL FORESTS AND FEDERAL PUBLIC LANDS* 54–55 (Donald W. Floyd ed., 2002).

³¹ DAVID A. CLARY, *TIMBER AND THE FOREST SERVICE* 156 (1986) (providing a critical history of the Forest Service and its unique bureaucratic timber-oriented culture as “a case of public service wherein the servant believed firmly that it knew better than the public what the public really wanted”).

³² See *infra* Part IV.B (discussing the roadless rule and how it was defended using the idea of multiple use).

³³ *Sierra Club v. Hardin*, 325 F. Supp. 99, 122–24 (D. Alaska 1971).

³⁴ *Id.* at 121–24.

³⁵ *Id.* at 122.

While the material undoubtedly shows the overwhelming commitment of the Tongass National Forest to timber harvest objectives in preference to other multiple use values, Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.³⁶

The multiple use mandate was also used to justify the extensive clear-cutting and terracing of hillsides in the Bitterroot National Forest in western Montana, though many saw it quite differently.³⁷ Clear-cutting practices were also contested in West Virginia's Monongahela National Forest by the Izaak Walton League.³⁸ In a landmark decision, the Fourth Circuit fully agreed with plaintiffs, finding the practice contrary to the Organic Act's authorization to sell only "dead, matured, or large growth trees" that had been "marked and designated" before sale.³⁹ The Court also noted the changing posture of the USFS over the years, from a "custodian to a production agency."⁴⁰ On the heels of this victory, conservationists wasted no time in applying the *Monongahela* decision to win an injunction against clear-cutting in the Tongass.⁴¹ These cases triggered what would eventually become the National Forest Management Act of 1976 (NFMA).⁴² NFMA is primarily a planning-based statute, calling for new interdisciplinary forest planning processes and expanded opportunities for public participation. Some important prescriptions are also found in the Act, including clear-cutting guidelines⁴³ and a mandate to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives."⁴⁴

In short, NFMA added a planning element to the forest management policies and multiple use mandates of the Organic Act and MUSYA. The tension between Congressional prescription and agency discretion was apparent in the drafting of NFMA and the ensuing debate in Congress.⁴⁵ But

³⁶ *Id.* at 123.

³⁷ The "Bolle Report," a major milestone in USFS history and requested by Senator Lee Metcalf of Montana, aptly summarized the situation: "Multiple use management, in fact, does not exist as the governing principle on the Bitterroot National Forest." ARNOLD BOLLE ET AL., UNIVERSITY OF MONTANA, A SELECT COMMITTEE OF THE UNIVERSITY OF MONTANA PRESENTS ITS REPORT ON THE BITTERROOT NATIONAL FOREST I (1970) (on file with author) (later published as S. Doc. No. 115, 91st Cong., 2d Sess. (1970)).

³⁸ West Virginia Div. of the Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945, 946 (4th Cir. 1975).

³⁹ *Id.* at 954-55.

⁴⁰ *Id.* at 955.

⁴¹ See *Zieske v. Butz*, 406 F. Supp. 258, 259-60 (D. Alaska 1975) (applying the Organic Act language to enjoin clear-cutting by the Ketchikan Pulp Company).

⁴² 16 U.S.C. §§ 1600-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). See Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. L. 149, 153-55 (1996) (discussing the various planning processes under NFMA).

⁴³ 16 U.S.C. § 1604(E) (2000).

⁴⁴ *Id.* § 1604(g)(3)(B).

⁴⁵ See generally CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE

ultimately, Congress did not take away a significant amount of management authority from the USFS, and NFMA continues to be subject to a range of interpretations.⁴⁶ This vacuum was filled by an opportunistic type of politics wherein the agency could promise everything to everyone in the name of “intensive management” and multiple use. Unrealistic promises made to multiple use constituencies and an overextended commitment to intensive management became the agency’s Achilles’ heel according to historian Paul Hirt, who views Service history as a “conspiracy of optimism.”⁴⁷

From Gifford Pinchot through NFMA, the USFS has fought for maximum levels of administrative discretion, and Congress has largely obliged.⁴⁸ As a result, the venue of conflict has shifted from Congress to the administrative arena. While discretion once gave the USFS unencumbered authority to manage the public lands under the guise of scientific management, it now mires the agency in conflict because many interest groups believe the USFS’s actions are inconsistent with Congressional direction.

B. The Tongass Timber Act of 1947

Ideas that have long shaped the management of our public lands⁴⁹ range from scientific to ecosystem management, and are espoused in particular sociopolitical contexts that help explain their logic and social acceptance. The Tongass presents a perfect example of how such good ideas become so deeply embedded in conflict and why they are so difficult to change once rooted.

President Theodore Roosevelt established the Alexander Archipelago Forest Reserve by Presidential proclamation in 1902 and the Tongass

PLANNING IN THE NATIONAL FORESTS 138–51 (1987) (summarizing Congress’s efforts to exert more oversight of USFS management practices in response to concerns over previous timber policies).

⁴⁶ See, e.g., ELIZABETH BEAVER ET AL., SEEING THE FOREST SERVICE FOR THE TREES: A SURVEY OF PROPOSALS FOR CHANGING NATIONAL FOREST POLICY 13 (2000) (quoting the Wilderness Society’s interpretation of NFMA: “[Congress recognized] the shortcomings of MUSYA’s broad [grant of] discretion and sought to insure that timber production would not take priority over other uses and resources.”). On the other hand, the Society of American Foresters contend that neither the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), 17 U.S.C. §§1600–1614 (2000), or NFMA “changed management philosophy in a significant way.” *Id.* at 14.

⁴⁷ PAUL W. HIRT, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR II, at xxi (1994).

⁴⁸ See Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 625–48 (1997) (arguing that Gifford Pinchot sought Congressional support without Congressional supervision and won it in the *carte blanche* given to him in the “paradoxical” Forest Service Organic Act). It is in this statutory vacuum that Pinchot left his indelible signature on the USFS. See generally CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM 277–81 (2001) (discussing Pinchot’s attempt to preserve the integrity of the USFS from industry influence).

⁴⁹ See generally CHRISTOPHER MCGRORY KLYZA, WHO CONTROLS PUBLIC LANDS? MINING, FORESTRY, AND GRAZING POLICIES, 1870–1990, at 11 (1996) (analyzing the privileged ideas evident in the history of public lands politics).

National Forest in 1907.⁵⁰ It was not until forty years later, however, that the USFS developed a major timber industry in the region. The Tongass Timber Act of 1947⁵¹ was the result of years of debate over the future of this land and the Alaska Natives who lived on it. Its passage was a clear victory for those advocating the ideas of modern economic development and statehood in Alaska over the protection of potential Indian land rights and resources.⁵² The Act authorized the USFS to enter into long-term timber contracts despite Tlingit and Haida Indian land claims on the forest. A severe newsprint shortage following World War II and the fight for Alaska statehood provided the Act's genesis and historical backdrop.⁵³ Regional Forester Frank Heintzleman, who was an enthusiastic champion of economic development in the region, and who would later become Territorial Governor of Alaska, brought to fruition the idea of bringing pulp mills to the southeast. Heintzleman's long search for pulp investors paid off with the formation of the Ketchikan Pulp Company (KPC). Authorized by the Act, the USFS entered into an agreement with KPC in 1951 that provided the mill 1.5 billion cubic feet of timber on a fifty-year contract.⁵⁴

The aftermath of World War II also played an important role in another fifty-year contract signed with the Alaska Pulp Development Company (later Alaska Pulp Company (APC)) in 1957. This mill was built in Sitka with Japanese financing and would make pulp to support Japan's rayon and paper markets. As a result of the war, Japan lost much of its timber supply and looked to the U.S. for help in rebuilding its economy. It received a favorable response, though the U.S. would only provide the pulp under certain conditions, including its primary processing in Alaska.⁵⁵

Though other long-term contracts were signed, the mills in Ketchikan and Sitka have been the most enduring and controversial over the years.⁵⁶ Though now terminated, the Forest Service went to extraordinary lengths to honor these contracts, and their imprint on the land is still very much evident. This mega-industrial level view of economic development is an idea that influential interests in the region continue to embrace.

The conflicts surrounding these particular contracts are discussed later, but worthwhile to emphasize now are the ideas on which they are based and the historical context in which they were signed. In many ways, the contracts are exemplary of the enduring legacy of "the lords of yesterday" in

⁵⁰ Proclamation No. 37, 32 Stat. 2025-36 (Aug. 20, 1902) (establishing the Alexander Archipelago Forest Reserve); 35 Stat. 2152-53 (Sept. 10, 1907) (establishing the Tongass National Forest).

⁵¹ Pub. L. No. 80-385, 61 Stat. 920 (1947) (not codified).

⁵² Stephen W. Haycox, *Economic Development and Indian Land Rights in Modern Alaska: The 1947 Tongass Timber Act*, 21 W. HIST. Q. 20, 46 (1990).

⁵³ *Id.* at 23.

⁵⁴ See generally LAWRENCE RAKESTRAW, A HISTORY OF THE UNITED STATES FOREST SERVICE IN ALASKA 127 (2002) (detailing the background and conditions of the agreement between the USFS and KPC).

⁵⁵ *Id.* at 128.

⁵⁶ Environmental journalist Kathie Durbin provides extensive coverage of the conflicts surrounding the pulp mills and their long-term contracts. See KATHIE DURBIN, TONGASS: PULP POLITICS AND THE FIGHT FOR THE ALASKA RAIN FOREST 10-13 (1999) (detailing the rise of the USFS timber contracts with timber companies on the Tongass).

public land and resources law: “a battery of nineteenth-century laws, policies, and ideas that arose under wholly different social and economic conditions but that remain in effect due to inertia, powerful lobbying forces, and lack of public awareness.”⁵⁷ These laws, policies, and ideas, says Charles Wilkinson, are “the controlling legal rules, usually coupled with extravagant subsidies, [that] simply do not square with the economic trends, scientific knowledge, and social values in the modern West.”⁵⁸ Though not passed during Western frontier settlement, as is the case with so many other public land and water laws, the Tongass Timber Act was passed in the context of Alaskan settlement and statehood. While the Act made sense in 1947, at least to its advocates, its ideas about Alaskan economic development become problematic in the twenty-first century.

C. The Alaska Native Claims Settlement Act (ANCSA)

The Alaska Native Claims Settlement Act of 1971 (ANCSA)⁵⁹ continues to be an important part of forest conflict in southeast Alaska. Its legacy is clearly apparent to anyone who has seen the miles of clear-cuts on Native corporate land in the region. As Alaska began making its land selections under the Statehood Act⁶⁰ in the late 1960s, there was quite a bit of uncertainty surrounding the legal status of Alaska Native land claims.⁶¹ This coincided with the discovery of the Prudhoe Bay oil field on the North Slope of Alaska and the need to build an 800 mile pipeline to develop it. The pipeline could not be built without legal risk, however, until the land claim issue was resolved.

Unlike the reservation policies adopted elsewhere, ANCSA dealt with this issue in the most novel of ways.⁶² In exchange for the settlement of aboriginal land claims in Alaska, ANCSA provided a cash payment of nearly \$ 1 billion, and when completed will have transferred 45.5 million acres of land to Alaska Native corporations.⁶³ This piece of social engineering, which has been amended by every Congress since its original passage,⁶⁴ embraced a model of corporate governance for Alaska Natives.⁶⁵ Communal aboriginal

⁵⁷ WILKINSON, *supra* note 21, at 17.

⁵⁸ *Id.* at xiii. “This is not to say that these rules were irrational when originally adopted,” says Wilkinson, “for they arose for good reason in a particular historical and societal context,” but they are now difficult to justify in the modern West. *Id.*

⁵⁹ Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601 *et seq.* (2000)).

⁶⁰ Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, as amended; Presidential Proclamation of January 3, 1959, 72 Stat. 339.

⁶¹ See *generally* DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS’S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960–1971, at 337–493 (2001) (discussing the complete history of the ANCSA).

⁶² See *generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 155–85 (2d ed. 2002) (providing a comprehensive analysis of ANSCA).

⁶³ *Id.* at 162.

⁶⁴ *Id.* at 155.

⁶⁵ As noted by one observer, “By legislative stroke, the Congress converted all Alaska Natives into members of the corporate world, receivers of annual reports, proxy statements, solicitations and balance sheets. The Native received a shotgun initiation into the American

land claims were converted by the ANCSA into private property, in the form of shares of stock in more than 200 Native regional, village, urban and group corporations. Blocks of 100 shares were distributed to more than 80,000 Alaska Natives who were alive on the date of ANCSA's enactment. The land and money awards made in the Act were to be managed by thirteen "regional corporations" and more than 200 "village corporations." Their purpose was quite simple: to make money for their Native shareholders, and it is here where ANCSA's relevance to the Tongass story begins.

ANCSA established one regional corporation (Sealaska Corporation) and twelve village and urban corporations in southeast Alaska that were entitled to select approximately 550,000 acres of land from the Tongass. With their shareholders in mind, these corporations selected the most commercially valuable timber lands in the region and began aggressively harvesting them upon conveyance. These lands had an estimated standing timber volume of about 11 billion board feet, which was roughly ten percent of the timber volume available for harvesting in southeast Alaska.⁶⁶ Precise and up-to-date information on forest inventory and harvesting by Native corporations is not available (to the public anyway), but one study conducted in 1992 patches together different data sources to estimate that since 1983, more than half the timber harvests in southeast Alaska have occurred on Native lands.⁶⁷ More than 3 billion board feet were harvested by 1989, for example, including more than 600 million board feet in that year alone.⁶⁸ To place these numbers in perspective, one report conducted for the Forest Service estimated that 150 million board feet per year was the maximum sustainable harvest rate for Native lands in southeast Alaska.⁶⁹

Most of the village corporations have harvested all of their merchantable timber, and most of this was exported as round (unprocessed) logs, primarily to Japan.⁷⁰ These prime forest lands were quickly liquidated, as village or urban corporations generally failed to follow a sustained yield approach to timber harvesting.⁷¹ Most of these corporations cut all of their merchantable timber within ten years of beginning harvest⁷² and took

mainstream." Monroe E. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89, 95 (1979). Congress and Alaska Native leadership chose the corporate paradigm because it was seen as a way to assure self-determination, promote economic growth, and ensure permanence. For more on the importance of corporate governance and sustainable development as it relates to Alaska Native Corporate lands, see Linda Kruger & Graciela Etchart, *Forest-Based Economic Development in Native American Lands: Two Case Studies*, in AMERICAN INDIAN POLICY: SELF GOVERNANCE AND ECONOMIC DEVELOPMENT 191-222 (Lyman H. Legters & Fremont J. Lydon eds., 1994).

⁶⁶ GUNNAR KNAPP, NATIVE TIMBER HARVESTS IN SOUTHEAST ALASKA 1 (Pacific Northwest Research Station, General Technical Report No. 284, 1992).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Kruger & Etchart, *supra* note 65, at 206-07.

⁷⁰ Native timber harvests are not subject to primary processing requirements.

⁷¹ Unless one thinks of sustained yield as does Sealaska Corporation: "In regard to Sealaska Corporation's operation our sustained yield concern is ensuring that timber harvest and regeneration occur in a fashion such that second generations of timber will be available for harvest at a future date." Kruger & Etchart, *supra* note 65, at 207.

⁷² KNAPP, *supra* note 66, at 34.

advantage of a peak in the export market. As commonly practiced by corporations elsewhere, the liquidation's objective was to raise money for more profitable investments in other markets.⁷³ In other words, the Native corporations turned their timber assets into more lucrative cash assets for the benefit of their shareholders. This unsustainable level of cutting was done despite language in ANCSA mandating that "such lands are [to be] managed under the principle of sustained yield and under management practices for protection and enhancement of environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years."⁷⁴ This provision was not enforced or followed, partly because the twelve year timeframe was interpreted to begin in 1971, not from the time when lands were finally conveyed and harvesting began.⁷⁵

All of this has fueled conflict over the Tongass. While not as bad as the checker-boarded forested landscapes common in the Western United States, the corporate land selections from the Tongass, and the resulting public-private mixture, add to the Tongass's managerial complexity. There is also a compensation principle at work in Alaskan forest politics: the Tongass has become even more important politically because of the egregious timber practices that have taken place on Native corporation lands. As conservationists argue, proposed projects on the Tongass should be analyzed more holistically in order to assess their larger cumulative effects.⁷⁶ The USFS should not, for example, just analyze one road-building project and timber sale in isolation, but rather stand back and look at the bigger picture—one including massive clear-cuts on corporate lands. The USFS routinely refuses to do this, however, often declaring such requests beyond the project's scope and purpose.

Getting nowhere with this logic, environmental groups often sue the agency for other reasons. From a legal and political standpoint, the USFS is a much easier target than private Native corporations because of the various substantive and procedural legal hooks discussed herein. Not only do conservation groups have easier access to the courts over public forest management, but it is also extremely risky to challenge Alaska Natives and their corporations, even though corporate timber practices have deeply polarized a number of Native communities.⁷⁷ It seems as though some groups believe that the potential risks of alienating this important constituency outweigh the potential benefits of reform—most of the damage

⁷³ There were other incentives to accelerate harvest as well, like the ability to make profits by selling timber depletion losses by 1991, to cover corporate operating expenses, to make payments on loans, and to avoid future taxes. See Kruger & Etchart, *supra* note 65, at 208, 211.

⁷⁴ Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203 § 22(k)(2), 85 Stat. 715.

⁷⁵ KNAPP, *supra* note 66, at 5.

⁷⁶ See *infra* notes 268, 305–312 and accompanying text (discussing the politics and litigation of cumulative effects analysis on the Tongass)

⁷⁷ The liquidation of Native corporate timber lands has been very controversial within some Native villages who heavily rely upon fishing and Sitka black-tailed deer for subsistence, and whose viability very much depends on healthy forests. For a discussion of this conflict within Native communities see Paula Dobbyn, *A Clear-Cut Legacy*, ANCHORAGE DAILY NEWS, Feb. 11, 2001, at A1; and Paula Dobbyn, *Treeless in Southeast*, ANCHORAGE DAILY NEWS, Feb. 18, 2001, at A1.

has already been done anyway.⁷⁸ This approach irks some critics of environmental groups in the region who see it as an unfair double standard.⁷⁹

D. The Alaska National Interest Lands Conservation Act (ANILCA)

The legacy and sweep of ANILCA is central to understanding the politics of conservation in Alaska.⁸⁰ Signed into law by President Carter in 1980, the “Alaska Lands Act” is the result of nearly a decade of political maneuvering and bargaining at the highest levels in Washington.⁸¹ Many of its fundamental provisions run outside the scope of this article, but important to note are the more than 104 million acres of federal land that Congress protected or added as national parks, national wildlife refuges, and conservation areas in Alaska. This massive piece of legislation also sets aside 56.5 million acres as federally designated wilderness, including 5.4 million acres in the Tongass.⁸²

The Act includes what is often referred to as the “no more” clause, which states:

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.⁸³

⁷⁸ Greenpeace, however, has recently targeted the timber practices of the Forest Service and Native corporations. For more on the campaign, see Greenpeace USA, *The Tongass Rainforest: Alaska's Crown Jewel*, <http://www.greenpeace.org/usa/news/the-tongass-rainforest-alaska> (last visited Apr. 23, 2006).

⁷⁹ One wise use publication claims that:

Environmental groups, which have tried to ally themselves with the traditional lifestyle element among the Natives, have been strangely silent on Indian logging, which allows a much wider latitude of operator judgment than Forest Service timber harvesting. This double standard of complaining loudly about non-Native industry on tightly regulated Forest Service lands while turning a blind eye on the looser standards regulating Indian lands illustrates the environmentalists' hypocrisy, political cynicism and blatant racism.

K.A. SODERBERG & JACKIE DURETTE, *PEOPLE OF THE TONGASS: ALASKA FORESTRY UNDER ATTACK* 340 (1988).

⁸⁰ Alaska National Interest Lands Conservation Act of 1980 16 U.S.C. §§ 3101–3233 (2000).

⁸¹ See NELSON, *supra* note 9, at 181–248 (providing a history of the struggle over Alaska's public lands and resources).

⁸² Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 1132 note (2000).

⁸³ *Id.* § 3101(d).

Often cited along with this provision is language prohibiting future executive branch action that withdraws more than 5,000 acres of public lands in the state unless approved by a joint resolution of Congress.⁸⁴ It also states that “[n]o further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.”⁸⁵

One of the most important parts of ANILCA is Title VIII, which sets a priority for subsistence uses of fish and wildlife on federal lands in Alaska. This means that preference is given to “the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation,” and for other purposes like the making and selling of handicrafts and customary trade and barter.⁸⁶ This subsistence mandate places serious procedural and analytical requirements on the Forest Service and other agencies. For any decision that would “significantly restrict subsistence uses” USFS must determine, among other things, that “such a significant restriction of subsistence uses is necessary [and] consistent with sound management principles for the utilization of the public lands.”⁸⁷ This language, when read together with other forestry laws, has been weakened by a pivotal court decision declaring that the word “necessary” does not prohibit timber sales that are within the USFS’s discretion, even if subsistence resources are impaired.⁸⁸

The Tongass played a central role in the political logrolling over ANILCA.⁸⁹ In order to reach compromise, and make up for the amount of land set aside for conservation purposes, Congress drafted Section 705 one of the Act’s most contentious provisions. Section 705, the National Forest Timber Utilization Program, required that the federal government provide “at least \$40,000,000 annually or as much as the Secretary of Agriculture finds is necessary to maintain the timber supply from the Tongass National Forest to dependent industry at a rate of four billion five hundred million foot board measure per decade.”⁹⁰ The provision was interpreted by the USFS as a mandate to supply at least 450 million board feet (mmbf) of timber for sale each year, regardless of cost or market demand. ANILCA also exempted the Tongass from part of NFMA, specifically NFMA’s requirement that the USFS remove lands from the timber base that are not physically, economically, or otherwise suitable for timber production.⁹¹ Unlike the

⁸⁴ *Id.* § 3213(a).

⁸⁵ *Id.* § 3213(b).

⁸⁶ *Id.* § 3113.

⁸⁷ *Id.* § 3120.

⁸⁸ *Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223, 1226–29 (9th Cir. 1999). *See infra* notes 159, 410 and accompanying text.

⁸⁹ *See* Glenn E. Cravez, *The Alaska National Interest Lands Conservation Act: Directing the Great Land’s Future*, 10 UCLA-ALASKA L. REV. 33, 48–52 (1980) (arguing that ANILCA took the “middle road” to the Tongass timber controversy).

⁹⁰ Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 539(d) (2000).

⁹¹ Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487 §705(d);

relatively uniform and integrated National Forest System with a consistent, albeit vague, mandate of multiple use, ANILCA effectively brought the Tongass outside the fold. While the USFS continues to herald its professional expertise, as it has since the days of Pinchot, servicing the contracts and meeting the timber sale mandates eliminated much of the agency's managerial discretion. The Act's aftermath is also clearly apparent in the number of clear-cuts—though regenerating—now scattered across the region.

ANILCA has helped shape conflict over the Tongass in a few different ways. First, and as discussed in the next section, the timber supply provision clearly placed timber harvesting as the dominant use on non-wilderness lands in the Tongass, and this was not acceptable to many interests who fought for a decade to remove this language.

Second, despite judicial weakening, the subsistence mandate places an analytical requirement on the USFS in Alaska. Legal setback aside, this provision provides subsistence users a limited tool for challenging various USFS decisions, like building roads and cutting old growth that impact subsistence resources like salmon and deer.

Third, debate continues over the exact meaning of the “no more” clause as it relates to the Tongass. On one side are those that see complete finality in the Act and thus view any effort to legislatively or administratively protect more of the Tongass from resource use as reneging on a promise. This “broken promises” theme is voiced often by Alaska's congressional delegation and resource industries, and it helps explain the high level of mistrust among many actors in the region. A deal was cut in 1980, they argue, giving environmentalists more wilderness in exchange for a more stable and intensive timber program.⁹² Likewise, the Pacific Legal Foundation, which represents a number of resource industries, argues that “ANILCA has proven not to be the last act in the struggle over Alaska's resources, but a starting point from which all further attempts to lock up more of Alaska begin.”⁹³ Similarly, the Alaska Miners Association (AMA) argues that the USFS clearly violated the intent of Congress by studying additional land set-asides during the Tongass and Chugach land management planning processes.⁹⁴ The legal arguments here turn on the phrase “for the

National Forest Management Act of 1976, 16 U.S.C. § 1604(k) (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). This exemption, partially modified by the Tongass Timber Reform Act (TTRA), was included to allow the Forest Service to harvest marginal lands to make up for the more commercially valuable timber that was set aside as wilderness by ANILCA. S. REP. NO. 101-261, at 8 (1990). The TTRA, *see infra* Part III.E, reapplied this provision to the Tongass, except that it “need not consider economic factors in the identification of lands not suited for timber production.” Pub. L. No. 101-626, § 102 (1990). *See infra* notes 104–08 and accompanying text.

⁹² *See, e.g.*, Ted Stevens, *The Tongass Solution: Is It On Capitol Hill?* AMERICAN FORESTS, July–Aug. 1987 (providing the Alaskan Senator's interpretation of wilderness politics in Alaska preceding the TTRA).

⁹³ James S. Burling, *ANILCA—Promise versus Performance*, in PART 2: A REPORT TO THE PEOPLE OF ALASKA ON THE LAND PROMISES MADE IN ANILCA: 20 YEARS LATER 87, 87 (J.P. Tangen ed., 2000).

⁹⁴ Steven C. Borrell, *Alaska National Interest Lands Conservation Act of 1980—Promises Broken*, in PART 2: A REPORT TO THE PEOPLE OF ALASKA ON THE LAND PROMISES MADE IN ANILCA:

single purpose of considering” found in the Act. While AMA views this as a breach of the no more clause, conservationists argue that the USFS has a statutory obligation, spelled out in NFMA, to review lands for possible wilderness and wild and scenic rivers designation, and the Alaska District Court agrees.⁹⁵

Instead of “broken promises” pertaining to ANILCA, other groups complain of “unfinished business.”⁹⁶ The Wilderness Society argues that there are at least 137 million acres of federal lands in the state that qualify as wilderness that have yet to be reviewed, as called for by Congress.⁹⁷ The Wilderness Society points to several sections of the Act requiring additional wilderness review of parks,⁹⁸ refuges,⁹⁹ and forests,¹⁰⁰ and complains about a stalled recommendation process.¹⁰¹ It also contends that the business of wilderness review on USFS lands is not finished, because the prohibition on further wilderness reviews “applies only to ‘single purpose’ studies, not to wilderness reviews undertaken as part of comprehensive land-use planning such as national forest plan revisions.”¹⁰²

E. The Tongass Timber Reform Act

The Tongass Timber Reform Act of 1990 (TTRA)¹⁰³ amended ANILCA and brought the Tongass closer in line with other national forest units in the system. The TTRA was intended to correct the dominant use timber regime that was in place since the Tongass Timber Act and reaffirmed in ANILCA.¹⁰⁴ Perhaps most importantly, the TTRA tried to eliminate the USFS’s “timber first” approach to managing the Tongass. The TTRA repealed ANILCA’s \$40 million permanent fund and 4.5 billion board feet per decade timber supply mandate. In its place is compromise language that has been subject to extensive litigation:

20 YEARS LATER 80, 84 (J.P. Tangen ed., 2000).

⁹⁵ *Sierra Club v. Lyons*, No. J00-0009 CV [JKS], slip op. at 31 (D. Alaska, Mar. 30, 2001). The court ruled that the Tongass Timber Reform Act does not contain any language prohibiting the USFS from considering proposals to consider additional wilderness in the Tongass.

⁹⁶ THE WILDERNESS SOC’Y, ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT CITIZENS’ GUIDE 27 (2001) [hereinafter TWS, ANILCA] (discussing the wilderness review mandates found in § 1317 and Title XIII of ANILCA).

⁹⁷ *Id.*

⁹⁸ Alaska National Interest Lands Conservation Act § 3197(a) (2000).

⁹⁹ *Id.*

¹⁰⁰ Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 708, 94 Stat. 2371 (1980).

¹⁰¹ See H. Michael Anderson & Aliko Moncrief, *America’s Unprotected Wilderness* 76 DENV. U. L. REV. 413, 432 (1999) (examining the legal framework for future wilderness designations and for administrative study and protection of roadless areas).

¹⁰² TWS, ANILCA, *supra* note 96, at 56.

¹⁰³ Pub. L. No. 101-626, 104 Stat. 4426 (amending 16 U.S.C. § 539d).

¹⁰⁴ See, e.g., 136 CONG. REC. H12,832 (daily ed. Oct. 26, 1990) (statement of Rep. Miller) (moving to amend the Alaska National Interest Lands Conservation Act so as to designate certain lands in Tongass National Forest as wilderness).

[T]he Secretary shall, to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle.¹⁰⁵

In short, ANILCA's timber supply mandate was replaced with language requiring the Secretary of Agriculture to meet market demand for timber from the Tongass—a responsibility that is supposed to be balanced with other statutory obligations. According to judicial interpretation, the TTRA was enacted to replace the “contract driven planning process” with a methodology designed to ensure compliance “with all applicable environmental laws and standards.”¹⁰⁶ The revision, according to the Ninth Circuit, was crafted to provide the USFS more flexibility than it had under ANILCA: “TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation. It thus gives the [USFS] leeway to choose among various site-specific plans, provided it follows the procedural requirements of the applicable statutes.”¹⁰⁷

The TTRA also declares that all provisions of section 6(k) of NFMA shall apply to the Tongass, “except that the Secretary need not consider economic factors in the identification of lands [not] suited for timber production.”¹⁰⁸ This provision was designed as a way to “redirect the [USFS] away from its past course of promoting the excessive harvesting of the highest volume old growth timber from the Tongass” and thus give the agency “some flexibility to allow for the harvesting of marginal timber stands.”¹⁰⁹ The Act also provides for additional fisheries protection by mandating maintenance of buffer zones on certain streams in the Tongass.¹¹⁰ Additional lands were also set aside for protection, including 296,080 acres as wilderness¹¹¹ and 722,482 acres as Land Use Designation II (LUD II), which are to be managed in a generally roadless state to retain wildland character.¹¹²

¹⁰⁵ Tongass Timber Reform Act, Pub. L. No. 101-626, § 101, 104 Stat. 4426, 4426 (1990) (amending 16 U.S.C. § 539d(a)).

¹⁰⁶ *City of Tenakee Springs v. Franzel*, 960 F.2d 776, 779 (9th Cir. 1992).

¹⁰⁷ *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995); *see also* *Alaska Forestry Ass'n v. United States*, No. J94-007 CV (JKS) (D. Alaska, Oct. 19, 1995).

¹⁰⁸ Tongass Timber Reform Act, Pub. L. No. 101-626, § 102, 104 Stat. 4426, 4426 (1990) (amending 16 U.S.C. § 539d(d)).

¹⁰⁹ 136 CONG. REC. H12,833 (daily ed. Oct. 26, 1990); *see, e.g.*, S. REP. NO. 101-261, at 11 (1990) (recommending revision to the TTRA to eliminate the requirement that the Forest Service supply a specified amount of Tongass timber to the timber industry and modifying various long-term timber sale contracts).

¹¹⁰ Tongass Timber Reform Act, Pub. L. No. 101-626, § 103, 104 Stat. 4426, 4427 (1990) (amending 16 U.S.C. § 539d).

¹¹¹ Tongass Timber Reform Act, Pub. L. No. 101-626, § 202, 104 Stat. 4426, 4429 (1990) (16 U.S.C. § 1132 note).

¹¹² *Id.* § 201; *see also* S. REP. NO. 101-261, at 15 (1990) (recommending amendment and subsequent passage of the Tongass Timber Reform Act).

Furthermore, the TTRA made a number of modifications to the long-term timber contracts. These modifications were intended to “enhance the balanced use of resources on the forest and promote fair competition within the southeast Alaska timber industry.”¹¹³ To do this, Congress required that USFS draft the contracts consistent with various forestry, environmental, and other applicable laws,¹¹⁴ and provided the USFS with more authority over timber harvest planning.¹¹⁵ Congress also provided rules designed to prevent “high-grading,”¹¹⁶ or the “practice of harvesting a disproportionate amount of old growth timber.”¹¹⁷ In an effort to correct the unfair advantages previously given to the long-term contracts, the Act also eliminates the pricing advantage given to the contract holders.¹¹⁸ In sum, Congress perceived that the long-term timber contracts were a major part of the Tongass problem, so these and other changes were designed to correct them.¹¹⁹

Many of its supporters understood the TTRA to be a true compromise. In general, the House bill provided for more lands protection and tougher restraints on the timber industry than did the Senate’s version.¹²⁰ “In merging the two approaches,” said Rep. George Miller (D-Cal.), “the conference committee has produced strong, comprehensive reform legislation aimed at curbing the abuses which have long plagued our Nation’s largest national forest.”¹²¹ Restoring a better balance among multiple uses was a major theme reiterated by its supporters.¹²² Critics, on the other hand, painted the “reform” as yet another example of “broken promises” related to ANILCA. Rep. Don Young (R-Alaska) was outraged at environmentalists and cynically suggested that “[t]he name of the bill should be ‘it’s never enough’ [for] [t]he ink wasn’t even dry on the Alaska Lands Act before they were complaining about timber harvesting on the rest of the Tongass.”¹²³ He also declared the Act to be “un-American,”¹²⁴ and yet another example environmental elitists and liberal Democrats showing no concern for American workers and treating Alaska like a colony rather than a state of the union.¹²⁵ Though this

¹¹³ Tongass Timber Reform Act, § 301(b).

¹¹⁴ *Id.* § 301(c)(1).

¹¹⁵ *Id.* § 301(c)(4).

¹¹⁶ *Id.* § 301(c)(2).

¹¹⁷ *Id.* § 301(c)(2) (16 U.S.C. § 1132 note).

¹¹⁸ *Id.* § 301(c)(8).

¹¹⁹ *See, e.g.*, H.R. REP. NO. 101-84, pt. 1, at 6-7 (1989) (recommending amendment and subsequent passage of the Tongass Timber Reform Act).

¹²⁰ *Compare* H.R. REP. NO. 101-931 (1990) (providing stream buffer zones of 100 feet and requiring that the Secretary complete comprehensive studies and environmental assessments of certain areas), *with* S. REP. NO. 101-261 (1990) (allowing wider stream buffer zones without the study and environmental assessment requirements).

¹²¹ 136 CONG. REC. H12,832 (Oct. 26, 1990) (statement of Rep. Miller (D-Cal.)).

¹²² *See, e.g.*, 136 CONG. REC. H12,837 (1990) (statement of Rep. Vento (D-Minn.)) (discussing the compromise reached in the Tongass bill); 136 CONG. REC. S17,995 (1990) (statement of Sen. Johnston (R-La.)) (expressing that the Tongass bill represented a compromise between conflicting interests); S. REP. NO. 101-261, at 9 (1990) (proposing amendments to H.R. 987).

¹²³ 136 CONG. REC. H12,836 (1990) (statement of Rep. Young (R-Alaska)).

¹²⁴ *Id.*

¹²⁵ *Id.*

contingent was defeated, the delegation went down with a warning: unlike ANILCA, this would be the end of legislating the Tongass.¹²⁶

More than a decade of conflict has surrounded the intent, interpretation, and implementation of the TTRA. Its relevance to forest conflict in southeast Alaska will be discussed again later, but a few key points should be introduced here. First, the controversy highlights how problematic statutory language, often resulting from political compromise, drives so many public land conflicts. The “seeking market demand” language, for example, is fraught with uncertainty and has resulted in intense disagreement over its meaning.¹²⁷ Conservationists supported this language as a way to force the USFS to start considering market demand before offering so much Tongass timber for sale. But determining market demand in an era of globalized timber markets and fluctuating mill capacity is not easy. As discussed below, this means that the Tongass must not only deal with the typical “science wars,” but must also grapple with controversial and contested economic analyses.

The market demand provision was also interposed on top of myriad other USFS statutory obligations. In many ways it is an excellent example of the Service’s history of being “a conspiracy of optimism,” a tendency to promise everything to everyone without fully appreciating the choices and trade-offs involved.¹²⁸ This time, however, the TTRA’s market demand provision served as an example of Congress making too many promises to too many people. At least one Senate Report conveys the belief that a version of the TTRA allows us to have it all: “[it] seeks to improve management of the Tongass by balancing the commodity and non-commodity resources of the forest in a manner which will not harm nor destabilize the local economy.”¹²⁹ This is a goal certainly worth striving toward, but such assertions can also raise expectations and provide false hopes. Although the Act left the USFS with more discretion, its enactment

¹²⁶ 136 CONG. REC. S17,999 (1990) (statement of Sen. Stevens (R-Alaska)). Inserted into the Record by Sen. Stevens was also a letter from Bart Koehler of Southeast Alaska Conservation Council that assured the Senator “that there will be no more requests for wilderness in the Tongass.” *Id.*

¹²⁷ See, e.g., DAVID J. BROOKS & RICHARD W. HAYNES, *TIMBER PRODUCTS OUTPUTS AND TIMBER HARVESTS IN ALASKA: PROJECTIONS FOR 1997–2010*, at 2 (1997), available at <http://www.fs.fed.us/pnw/pubs/brooks.pdf> (analyzing the assumptions and uncertainty involved in predicting market demand); KATHLEEN S. MORSE, *EVALUATING THE DEMAND FOR TONGASS TIMBER: EVALUATING ADAPTIVE MANAGEMENT TO IMPLEMENT SEC. 101 OF THE 1990 TONGASS TIMBER REFORM ACT* (United States Forest Service, Region 10, 1998) (analyzing a number of factors influencing demand for Tongass timber).

¹²⁸ Hirt’s analysis, *supra* note 47, at xxi, is particularly on the mark with the Tongass situation:

Rather than making the difficult but necessary decision to regulate uses to moderate levels, the [USFS] tried to maximize production to meet every group’s demands, especially the timber industry’s. When facing conflicts among users or situations that called for a choice between production and preservation, managers adopted instead the optimistic view that choices did not really have to be made yet if foresters simply applied more intensive management.

Id.

¹²⁹ S. REP. NO. 101-261, at 9 (1990).

prior to the end of the long-term timber contracts left some feeling as though the legislation was not implemented as Congress intended and that timber harvesters still reigned supreme.¹³⁰

F. Summary

From the 1897 Organic Act through the TTRA of 1990, inadequate statutory language has been a fundamental driver of forest conflict in southeast Alaska. The over-extended commitments and problematic language contained within these laws practically guaranteed intractability and judicial intervention. While this is generally the case in public lands governance,¹³¹ this conflict is especially acute in the Tongass because of additional statutory obligations. With the benefit of hindsight, the laws now look as though they were designed to ensure intractability. But this is merely the tip of the iceberg, for myriad other substantive and procedural laws complicate the situation immensely.

These laws are troublesome for both what they say and what they fail to say. In the past, Congress has promised more than it can deliver, be it big industry, subsistence resources, healthy runs of salmon, viable populations of wildlife, or genuine multiple use management. The pie looks bigger in the halls of Congress than it does on the ground. The contested language, like “seeking to meet market demand,” means that many of these conflicts are managed by the courts who must decipher sometimes baffling Congressional intent. Moreover, similar to the National Park and National Wildlife Refuge experience, the Tongass must also find a way to meet the obligations expressed in system-wide laws like MUSYA and NFMA, as well as the site-specific legislative requirements mandated by the TTRA and other laws.¹³²

¹³⁰ See SE. ALASKA CONSERVATION COUNCIL, DEFENDING THE PROMISE OF TONGASS REFORM: A REPORT ON THE FOREST SERVICE'S FAILURE TO IMPLEMENT THE TONGASS TIMBER REFORM ACT, at i (1992) (on file with author) (contrasting the mandates of the TTRA with the USFS's implementation of these reforms); Steven A. Daugherty, *The Unfulfilled Promise of an End to Timber Dominance on the Tongass: Forest Service Implementation of the Tongass Timber Reform Act*, 24 ENVTL. L. 1573, 1628 (1994):

The [USFS's] inadequate implementation of the TTRA may largely reflect both Congress's reluctance to micro-manage the Tongass and its resulting failure to impose clear, explicit, and easily enforceable standards for the [USFS] to follow. . . . As a result, the [USFS] has seized upon real and imaginary statutory ambiguities to justify business as usual on the Tongass.

Id. Jim Grode, *The Tongass Timber Reform Act: A Step Towards Rational Management of the Forest*, 62 U. COLO. L. REV. 873, 874 (1991) (arguing that TTRA's contract modification provision did not go far enough).

¹³¹ See Nie, *supra* note 22, at 224 (suggesting that ambiguity in public land law has led administrative rulemaking and planning processes to become the dominant ways of dealing with public land conflicts).

¹³² Unlike most National Forest units, National Park and National Wildlife Refuge units are managed in accordance with their overarching Organic Acts as well as their more individualized “enabling” or “establishment legislation.” See Robert Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and its Relationship to Pollution Control Law*, 74 DEN. U. L. REV. 779, 786–96 (1997) (describing the general trend in Congress in providing greater statutory detail in pollution control law and park establishment legislation); Robert L.

Not only does such language place USFS leadership in a bind,¹³³ it also perpetuates conflict and can undermine democratic accountability. After all, if Congress gives vague and/or contradictory directives, and these directives are not effectively implemented, who is responsible? What is not stated in these laws also matters. By avoiding some of the most difficult choices, Congress has delegated these decisions to the Forest Service, and this helps explain the alternative decision making venues and processes outlined in Part V.

IV. POLITICAL CONFLICTS OVER FOREST MANAGEMENT

This section introduces some of the larger issues and conflicts over forest management in southeast Alaska. Their basic shape is drawn first, followed by political analysis. The following section examines how these issues are often managed. For now, I simply describe how they are framed by stakeholders and the basis for disagreement. Like so many other divisive environmental conflicts, this one is multifaceted with a number of “symbol and surrogate” issues playing a role. It is often impossible to unbundle and isolate one issue, because that issue will inevitably be hitched to others—each equally controversial. These conflicts are hardly unique to the Tongass, for “the issue of timber harvesting in the national forests represents the single longest-running unresolved conflict in federal public land law and policy.”¹³⁴ But they are often heightened in the Tongass because of the scale, symbolism, publicity, and stakes involved. Nonetheless, the case forces us to ask some difficult questions about forest management in general: what is the purpose of our national forests, what forest values should be prioritized, for whom should they be managed, what factors are responsible for closing timber mills throughout the nation, and what should our communities be based on in the future? As the Tongass demonstrates, from Pinchot to today, we are still asking “what is the greatest good for the greatest number.”¹³⁵

Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 592–612 (2002) (examining the tension between site-specific standards and uniform national goals for the wildlife refuge system); ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 163–82 (2003) (providing extensive coverage of the refuge system and what it might teach us about public lands governance in general).

¹³³ See, e.g., JACK WARD THOMAS: *THE JOURNALS OF A FOREST SERVICE CHIEF* 71–74, 82–83, 88–89, 227–28, 241, 300–01, 339–40 (Harold K. Steen ed., 2004) (providing a number of candid journal entries focused on the “damned complicated” Tongass situation, including the conundrum presented by the long-term contracts and what it was like dealing with Alaska’s congressional delegation).

¹³⁴ Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 *U. COLO. L. REV.* 659, 665 (1997).

¹³⁵ This is a central question that the USFS continues to ask after its much celebrated centennial. See *THE GREATEST GOOD: A FOREST SERVICE CENTENNIAL FILM* (United States Forest Service 2004); see also United States Forest Service, *The Greatest Good: A Forest Service Centennial Film*, <http://www.fs.fed.us/greatestgood/index.shtml> (last visited Apr. 23, 2006) (providing additional materials and information about the Forest Service’s first 100 years of service).

A. Clear-cutting, Old Growth, Wildlife, and Subsistence

The extent of clear-cutting and even-aged management as a silvicultural tool in forest management is a central issue in this debate and forest history in general.¹³⁶ After all, it is the image of extensive clear-cuts on the Tongass and Native corporate lands that has caused so much controversy and gained so much interest group and media attention.¹³⁷ As the bumper sticker goes, "Stumps Don't Lie." Clear-cutting is a method of harvesting and regenerating trees by clearing all of them from a site and then growing a new, even-aged stand. Clear-cutting, and similar silvicultural techniques, have long been the primary method of timber production and management in the National Forests.¹³⁸ Though it has declined nationally in usage, it has historically accounted for more than ninety percent of all timber harvesting in the Alaska Region of the USFS,¹³⁹ and it continues to dominate.¹⁴⁰ Due to provisions in NFMA¹⁴¹ and the TTRA,¹⁴² nationally these clear-cuts, though regenerating, are also spread out in a patchwork pattern across a larger

¹³⁶ Clear-cutting and even-aged management has been controversial for over 40 years and played a central role in the crafting of the NFMA, though adoption of the NFMA did not ban the practice. *See* *Sierra Club v. Espy*, 38 F.3d 792, 798–801 (5th Cir. 1994) (holding that the NFMA does not bar even-aged management or require exceptional circumstances for the application of even-aged management). *See generally* WILKINSON & ANDERSON, *supra* note 45, at 138–159 (1987) (providing extensive coverage of the "[Frank] Church guidelines" on clear-cutting and its politics preceding NFMA); Stephen H. Spurr, *Clearcutting on National Forests*, 21 NAT. RESOURCES J. 223 (1981) (tracing conflicts about clear-cutting and the subsequent Executive and Congressional responses). *See also* HIRT, *supra* note 47, at xxvii; CLARY, *supra* note 31, at 180–94. For a literature review, see DEBRA L. CLAUSEN & ROBERT F. SCHROEDER, SOCIAL ACCEPTABILITY OF ALTERNATIVES TO CLEARCUTTING: DISCUSSION AND LITERATURE REVIEW WITH EMPHASIS ON SOUTHEAST ALASKA 8–35 (Pacific Northwest Research Station, General Technical Report No. PNW-GTR-594, 2004).

¹³⁷ The importance of images in political debate should not be underestimated, as landscape photography has often been used as an effective tool of persuasion. Photographs of the Tongass by Robert Glenn Ketchum, for example, have certainly made a political impression. *See* ROBERT GLENN KETCHUM & CAREY D. KETCHUM, *THE TONGASS: ALASKA'S VANISHING RAIN FOREST* 6 (1987) (providing photographs of the Tongass region and discussing forest management in the Tongass). So too did the Sierra Club's shocking pictorial showing massive clear-cuts throughout the United States and Canada, including on Native corporate land in southeast Alaska. *See* *CLEARCUT: THE TRAGEDY OF INDUSTRIAL FORESTRY* 68–79 (Bill Devall ed., 1993) (illustrating the effects of clear-cutting in North America's forests).

¹³⁸ The Congressional Research Service reports that clear-cutting accounted for 59% of the area harvested for regeneration in the national forests (excluding other types of harvesting not intended to establish new stands) between 1984 and 1997, and that other even-aged cutting systems accounted for another 28% of the area harvested. ROSS W. GORTE, CONG. RESEARCH SERV., *CLEARCUTTING IN THE NATIONAL FORESTS: BACKGROUND AND OVERVIEW* 98-917 (1998), *available at* <http://www.ncseonline.org/nle/crsreports/forests/for-21.cfm>?

¹³⁹ *Id.*

¹⁴⁰ The 1997 TLMP Record of Decision estimates that 80% of regeneration timber harvesting will consist of clear-cutting. U.S. FOREST SERV., *TONGASS LAND MANAGEMENT PLAN REVISION: RECORD OF DECISION, DECISION 5* (1997) [hereinafter 1997 TLMP ROD].

¹⁴¹ National Forest Management Act of 1976, 16 U.S.C. § 1604(m) (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476) (requiring forestry standards to ensure trees throughout the National Forest System generally reach the culmination of mean annual increment of growth).

¹⁴² Tongass Timber Reform Act, Pub. L. No. 101-626, § 102, 104 Stat. 4426 (1990).

percentage of the landscape when contrasted to the much larger ones found on Native corporate lands.

The debate over clear-cutting nicely illustrates the periodic disconnect between public values and professional expertise in forestry.¹⁴³ While large segments of the public may find the practice appalling from an environmental and aesthetic standpoint,¹⁴⁴ many foresters defend its use in terms of effective forest management, economic efficiency, and the drawbacks inherent in the alternatives. Selective harvesting might be attractive, for example, but it could also provide an incentive to high-grade the most commercially valuable trees because of the method's costs. Nevertheless, it seems that clear-cutting is a powerful symbol to many Americans of forestry run amok, especially when done in such a symbolic and rare landscape like the Tongass.

The issue of clear-cutting is compounded, moreover, when old growth forests are being cut. Even though much of the Tongass consists of old growth, the scarcity driver is evident here, as USFS statistics show that fifty-five percent of the nation's forests are less than fifty years old, and only six percent of the nation's timber land is more than 175 years old.¹⁴⁵ The dynamics of this debate are picked up again later, but for now recognize the general gist of this disagreement. Statistics are the weapon of choice for the USFS. It contends that about seven percent of the "total productive old growth" has been harvested on the Tongass over the last 100 years and that about eighty-five percent of the Forest's highest volume old growth remains unharvested.¹⁴⁶ The USFS also advertises that ninety percent of the commercial-size timber stands on the Tongass are off limits to harvesting and that over the next 100 years the current forest plan will only permit harvesting of an additional three to four percent of the productive old growth.¹⁴⁷

The USFS urges the public to look at the big picture when it comes to old growth and its management. But, by using biology as its stick, many conservationists contend that the agency is torturing these data with dubious definitions of old growth and disingenuous explanations of the ecological role it plays. Contesting the numbers, the southeast Alaska Conservation Council (SEACC), one of the most important players in the region, counters that the Forest Service can only state that about "15 percent of the very highest high volume stands have been harvested"¹⁴⁸ on the

¹⁴³ See John C. Bliss, *Public Perceptions of Clearcutting*, J. FORESTRY, Dec. 2000, at 4, 4 (analyzing the widespread public opposition to clear-cutting).

¹⁴⁴ See *id.* at 5-6 (highlighting public opinion polls that show public opposition to clear-cutting is deep and widespread).

¹⁴⁵ U.S. FOREST SERV., U.S. FOREST RESOURCE FACTS AND HISTORICAL TRENDS, FS-801, at 10 (2004).

¹⁴⁶ U.S. Forest Serv., Tongass National Forest: Questions and Answers (Feb. 12, 2004) (on file with author). This controversial release was reworked and is now available online. U.S. Forest Serv., Tongass National Forest, http://www.fs.fed.us/r10/tongass/forest_facts/faqs/resources.shtml#7 (last visited Apr. 23, 2006) [hereinafter TNF Q & A] (providing questions and answers on the Tongass National Forest).

¹⁴⁷ TNF Q & A, *supra* note 146.

¹⁴⁸ Letter from SEACC to Alaska Rainforest Campaign and SEACC member groups, Detailed

Tongass by including in its definition virtually all commercial-sized timber—not just the “biggest trees and best timber stands.”¹⁴⁹ This also misses the point, SEACC argues, because the issue is over the amount of the most biologically productive forest acreage remaining uncut.¹⁵⁰ If we want to look at a region-wide portrait, with public, corporate, and other lands included, SEACC argues that over seventy percent of the very best timber stands forest-wide—the biological heart of the Tongass—have been cut.¹⁵¹ Furthermore, SEACC contends that wildlife in the Tongass depends disproportionately on a tiny percentage of very productive forest, and because of roads and the patchwork nature of USFS harvesting, the impacts of logging are not only limited to the acres cut.¹⁵²

Conflicts over clear-cutting and old growth often come to a head over wildlife. High volume old growth stands typically provide the best wildlife habitats in the region, especially in winter. The Tongass is home to an amazing suite of biodiversity, with some of the most controversial species being Sitka black-tailed deer, gray (Alexander Archipelago) wolves, brown (grizzly) bears, northern (Queen Charlotte) goshawks, and salmon, to name a few. Though at the time of this writing none are listed on the endangered species list—meaning the ESA has not been as potent in the Tongass as it is elsewhere—there was at one time a USFS obligation of ensuring viable populations of wildlife.¹⁵³ This meant that these and other species became a major focal point in forest management and related appeals and litigation. Take Sitka black-tailed deer, a dominant subsistence resource in the region, as an example.¹⁵⁴ After old growth is clear-cut, second-growth stands initially provide deer with abundant forage, but this then gives way to a more homogenous and closed forest canopy that shades out most of the vegetation essential to the species.¹⁵⁵ Similar dynamics affect other wildlife as well and, as discussed below, this means that conflict is often waged in terms of scientific and biological disagreement. Wildlife also changes the

Response to Forest Service Web Site Q & A (May 18, 2004) (on file with author) [hereinafter SEACC May 18 letter].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2.

¹⁵¹ David Katz, Background Paper On: Ghost Trees: Measuring the Vanished Forests of Southeast Alaska 6 (2000) (prepared for Southeast Alaska Conservation Council) (on file with author).

¹⁵² SEACC May 18 letter, *supra* note 148, at 2.

¹⁵³ NFMA includes language to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” 16 U.S.C. § 1604(g)(3)(B) (2000). 1982 USFS planning regulations on fish and wildlife resources stated that: habitat “will be managed to maintain viable populations” of existing species.” 36 C.F.R. § 219.12(g) (1982). The 2005 USFS planning regulations no longer include this language. *See infra* note 394.

¹⁵⁴ *See generally* Thomas A. Hanley, *Balancing Economic Development, Biological Conservation, and Human Culture: The Sitka Black-Tailed Deer* *Odocoileus hemionus sitkensis* *as an Ecological Indicator*, 66 BIOLOGICAL CONSERVATION 61 (1993) (discussing how the biology and ecology of black-tailed deer can serve as an ecological indicator for use in resource management).

¹⁵⁵ Paul Alaback, *Dynamics of Understory Biomass in Sitka Spruce-Western Hemlock Forests of Southeast Alaska*, 63 ECOLOGY 1932, 1937–38 (1982).

shape of this conflict because salmon and “charismatic megafauna” like wolves and bears have a way of mobilizing a very wide audience.

Subsistence is interwoven into these conflicts as well. There is a heavy reliance upon fish, game, and other subsistence resources among residents of southeast Alaska.¹⁵⁶ Title VIII of the Alaska Lands Act is designed to protect important subsistence resources like salmon and Sitka black-tailed deer, not only for physical and economic survival, but also because such resources are critical to the cultural and social identity of Alaska Natives.¹⁵⁷ Thus, land management decisions, like building more roads and culverts in salmon habitat, or clear-cutting more deer-dependent old growth forests, take on extraordinary environmental and cultural importance. This conflict has been driven in large part by overlapping statutory direction. Recall that ANILCA promised the protection of subsistence resources. At the same time, it promised at least 450 million board feet of timber for sale each year,¹⁵⁸ and that any significant restriction of subsistence uses must be “necessary, consistent with sound management principles for the utilization of the public lands,”¹⁵⁹ and “involve the minimal amount of public lands necessary to accomplish the purposes of such use.”¹⁶⁰ It also guaranteed that “reasonable steps”¹⁶¹ would be taken to minimize any adverse impacts resulting from such actions.

Before the termination of the pulp mill contracts and the 1997 forest plan revision, interests often disagreed on the meaning of such language and where it comported with other USFS goals, like servicing the contracts and seeking market demand. Critics argued that USFS often interpreted such

¹⁵⁶ See Alaska Dep’t of Fish & Game, Division of Subsistence, *Subsistence in Alaska: A Year 2000 Update* (2000), <http://www.subsistence.adfg.state.ak.us/geninfo/publctns/cpdb.cfm> (last visited Apr. 23, 2006) (showing that in rural areas of southeast Alaska 48% of households harvested game and 79% used game, while 80% harvested fish and 95% used fish). Other studies show that “30 percent of rural southeast Alaska households obtain 50 percent or more of their meat from subsistence activity . . . [a]bout 40 percent of all households get at least a quarter of their food from subsistence harvest activities,” and “85 percent of rural southeast households harvest subsistence food.” ALLEN ET AL., *supra* note 4, at 39. See generally Linda Kruger, *Community and Landscape Change in Southeast Alaska*, 72 LANDSCAPE & URB. PLAN. 235 (2005) (reviewing other ethnographic work done in this area showing similar levels of dependence).

¹⁵⁷ Judge Thomas Berger’s account is among the most often-cited on this and so many other matters important to Alaskan and Canadian Natives:

The traditional economy is based on subsistence activities that require special skills and a complex understanding of the local environment that enables the people to live directly from the land. [Subsistence] also involves cultural values and attitudes: mutual respect, sharing, resourcefulness, and an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment.

THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* 51 (1985). The courts agree with the important cultural components of subsistence. See, e.g., *Native Village of Quinhagak v. United States*, 35 F.3d 388, 393–94 (9th Cir. 1994) (determining federal and state regulations against subsistence rainbow trout fishing interferes with Alaska Natives’ way of life and cultural identity).

¹⁵⁸ Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a)(3) (2000).

¹⁵⁹ *Id.* § 3120(a)(3)(A).

¹⁶⁰ *Id.* § 3120(a)(3)(B).

¹⁶¹ *Id.* § 3120(a)(3)(C).

language so that it could continue to “get the cut out.”¹⁶² USFS could do so, for example, by offering as many timber sales as “necessary” to meet its timber harvest goals expressed in its land management plan and the long term contracts.¹⁶³ Predictably, of course, the courts have been forced to untangle the Act’s subsistence language and congressional intent, and the Act is now read as mostly procedural in nature.¹⁶⁴ Because of declining timber harvests, the issue has not been as prominent as it once was, but it continues to be a major conflict in Tongass land management, and it places yet another significant procedural requirement on the USFS.

B. Roadless Areas

The issue of building roads on public lands has been a lightning rod for conflict and controversy for almost a century.¹⁶⁵ There are roughly 3640 miles of roads¹⁶⁶ and about 9.5 million acres of inventoried roadless areas outside of federally designated wilderness in the Tongass.¹⁶⁷ Numbers like these are used extensively by groups to make their respective cases. Put simply, industry argues that most of the Tongass remains unroaded, and that new roads must be constructed in inventoried roadless areas if it is to remain viable. Unlike forests in the lower forty-eight, some in the industry say most second growth timber is not yet ready to be harvested in the Tongass, so old growth must be cut, and this means building roads to get to it. This, then, is the crux of the matter: conservationists generally want

¹⁶² See Dan Cheyette, *Breaking the Trail of Broken Promises: “Necessary” in Section 810 of ANILCA Carries Substantive Obligations*, 27 ENVTL. L. 611, 626–28 (1997) (arguing the Forest Service has found ways to interpret section 810 to honor timber commitments at the expense of subsistence activities).

¹⁶³ *Id.* at 612.

¹⁶⁴ See *Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223 (9th Cir. 1999) (emphasizing the procedural nature of section 810 as it relates to federal decision making). The court also emphasizes that ANILCA’s use of “necessary” is to be understood in light of the sentence’s other provision regarding the “utilization of public lands.” *Id.* at 1227. The Supreme Court has also ruled that “preservation of subsistence resources is a public interest and established a framework for reconciliation, where possible, of competing public interests,” and that the Act clearly did not subordinate all other uses to subsistence uses. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545–46 (1987) (emphasis in original) (determining that Congress expressly declared that preservation of subsistence resources is a public interest and established a framework for reconciliation of competing public interests).

¹⁶⁵ See generally PAUL S. SUTTER, *DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT* 3–11 (2002) (explaining how the interwar period’s road-building frenzy led to the American wilderness movement); JOHN C. HENDEE & CHAD P. DAWSON, *WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES* 3–47, 101–73 (3d ed. 2002) (providing a history of American wilderness and the roadless area review and evaluation processes).

¹⁶⁶ U.S. FOREST SERV., 1 FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT 3-374 (2000) [hereinafter ROADLESS FEIS], available at http://roadless.fs.fed.us/documents/feis/documents/vol1/chap3_hs.pdf.

¹⁶⁷ Including 1,918,000 acres (12% of the forest) allowing road (re)construction and 7,422,000 acres (45% of the forest) not allowing road (re)construction. See U.S. FOREST SERV., 2 FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT, MAPS OF INVENTORIED ROADLESS AREAS 7 (2000), available at <http://roadless.fs.fed.us/states/ak/tongl.pdf>.

either no cutting at all or they support smaller mills or “independents” relying on timber from the existing road system. But many in the timber industry and USFS hold that such a vision is not realistic. They argue that until second growth timber is ready for harvest in thirty to forty years, they have to cut old growth in roadless areas to transition into second growth cuttings.

The Forest Service also uses numbers to gain political advantage. USFS’s “talking points” include statistics showing that approximately ninety percent of the Tongass is roadless and undeveloped and that, under the 1997 forest plan, timber harvesting would be allowed on only 300,000 acres, or about two percent of the more than fifteen million acres of roadless areas on the forest.¹⁶⁸ Multiple use is also invoked, because roads can provide transportation routes to isolated communities and myriad recreational opportunities—even though most of these roads were built to access timber sales and not to provide this type of infrastructure.

Many conservation groups, on the other hand, appear to have a de facto policy of opposing all roads in inventoried roadless areas, and if projects in such areas are proposed, they will generally be administratively appealed and/or litigated.¹⁶⁹ There is a sense among some conservationists in the region that the timber industry already received its fair share, and now it’s time to protect these last few biologically significant places. These conservationists also combat the statistics used by industry and the Forest Service by reminding people that much of the Tongass remains unroaded because forty-one percent of it is non-forested (i.e., rock, ice, muskeg, lakes, etc.). And again, they argue that the real issue is over the amount of *biologically productive* forest land that will remain off limits to logging. Forest-wide percentages miss the point, the argument goes, because it is distribution and composition of forest land that matters most.

Conflict over roads is further compounded by questions over how the issue should be decided.¹⁷⁰ President Clinton’s roadless rule¹⁷¹—an attempt to set aside nearly fifty-nine million acres as roadless—has played a large and acrimonious role in this story. This is partly because of the vast acreage at stake (roughly 9.5 million acres in the Tongass), the number of timber-dependent jobs in the region, and the laborious nature of writing the Tongass Land Management Plan (TLMP). Some people in the region believe that the rule reignited some of the conflicts and re-opened wounds that were just beginning to heal with the tumultuous closing of the pulp mills. But,

¹⁶⁸ E-mail from Steven A. Brink, U.S. Forest Serv. Deputy Regional Forester for Natural Resources, Alaska Region, to Martin Nie (June 21, 2004) (on file with author).

¹⁶⁹ See, e.g., Sitka Conservation Soc’y, *About Us*, http://www.sitkawild.org/index.php?option=com_content&task=blogcategory&id=19&Itemid=60 (last visited Apr. 23, 2006) (“We seek to protect every untouched roadless area, coastline, and the associated biota from roads, timber sales, and types of visitation that compromise Wilderness character.”).

¹⁷⁰ See Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service’s Roadless Rule*, 44 NAT. RESOURCES J. 687 (2004) (analyzing the roadless rule and the use of administrative rulemaking in public lands governance).

¹⁷¹ Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244, 3272 (Jan. 12, 2001) [hereinafter 2001 Roadless Rule].

alas, the warring tribes resumed positions, and the debate became as polarized as ever.

Prior to the rule's 2001 promulgation, about two-thirds of planned timber harvests on the Tongass were to take place in inventoried roadless areas; thus, with road construction prohibited, approximately ninety-five percent of the harvesting within those areas would be eliminated.¹⁷² This would have drastically reduced the planned timber harvests as set forth in the TLMP.¹⁷³ Hence the stakes of the rule were enormous. The USFS, under different leadership at the time, unusually acknowledged the trade-offs involved and decided that "the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those local communities."¹⁷⁴ The rule was also framed in terms of appropriate scale of decision making—that this was an important *national* issue that must be dealt with at the national level,¹⁷⁵ not through the traditional forest planning process.¹⁷⁶ Of course, political leaders in Alaska and timber-based industry and communities did not see it this way. They castigated the rule as a one-size-fits all political edict that would cripple much of the southeast. The Bush Administration agreed and settled litigation over the rule with the state of Alaska,¹⁷⁷ and then promulgated new rules exempting the Tongass from the original rule's provisions,¹⁷⁸ while then giving state governors unprecedented influence over roadless areas and forest management in general.¹⁷⁹

C. Subsidies

Subsidies in the form of "below cost timber sales" are another dominant issue in the Tongass story. It is an economic analysis used extensively by

¹⁷² *Id.* at 3254.

¹⁷³ The Tongass National Forest contends that the rule had the potential to reduce the 1997 forest plan allowable sale quantity (ASQ) from about 267 million board feet (mmbf) to about 50 mmbf. Tongass National Forest, *Tongass Land and Resource Management Plan (1997) Five Year Review* 2, 8, available at http://www.tongass-5yearreview.net/p/5-year_Review_Final_Determination_Paper.pdf.

¹⁷⁴ 2001 Roadless Rule, 66 Fed. Reg. at 3255. The USFS did attempt to soften the blow, however, by providing some mitigation measures for a period of adjustment for southeast Alaska's timber program. *Id.*

¹⁷⁵ *Id.* at 3246.

¹⁷⁶ Still, some critics contend that the rule violated the spirit, if not the letter, of the NFMA because forest management decisions are to be made regionally. See Jennifer L. Sullivan, *The Spirit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 ALASKA L. REV. 127, 158–59 (2000) (arguing that the Tongass National Forest requires a more flexible approach to road building than prescribed in the roadless rule and that the issue should be dealt with through the forest planning process).

¹⁷⁷ See *infra* notes 449–57 and accompanying text.

¹⁷⁸ Special Areas, Roadless Area Conservation, Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294); USDA Forest Service, Proposed Revision Roadless Rule for Tongass National Forest: Supplemental Information Report, 36 C.F.R. pt. 294 (2003), available at http://www.roadless.fs.fed.us/documents/tnf_roadless_exemption_sir_clean_final_102303.pdf.

¹⁷⁹ Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005); 36 C.F.R. §§ 294.10–.18 (2005).

conservation groups trying to change national forest policy. But the argument is even more fatigued in southeast Alaska because of the outlays involved. It also illustrates how far USFS has shifted its thinking regarding this issue. Gifford Pinchot and other forestry pioneers have long argued that the national forests would pay for themselves and be based on good business policy, even though the timber sales program never achieved this goal.¹⁸⁰

Groups like SEACC complain that taxpayers lose millions every year because the USFS in Alaska spends far more money on preparing logging projects and building roads than timber corporations pay in return for the timber.¹⁸¹ By its counting, taxpayers have spent more than \$1 billion for the Tongass timber program since 1982.¹⁸² In 2002 alone, SEACC says that the USFS spent \$36 million to plan and administer timber sales and received only \$1.2 million in receipts from the sale of this timber.¹⁸³ By its calculation, then, in 2002 every Tongass timber worker cost taxpayers more than \$170,000.¹⁸⁴ "It is not that the [USFS] should make a profit," says SEACC, "but that it should stop providing large subsidies to a small and declining industry that contributes little to southeast Alaska's economy, causes great biological destruction, and harms other more vibrant industries—industries which depend for their livelihoods on a healthy forest."¹⁸⁵

This argument raises the hackles of the USFS, which has come to see things otherwise. For a variety of reasons, USFS counters that "profitability is a poor yardstick for evaluating the performance of the national forest timber sale program."¹⁸⁶ First, it argues that NEPA-related responsibilities, including appeals and litigation, raise costs substantially.¹⁸⁷ Second, USFS is not to be run like a private timber business, so it is unfair to judge the agency using a profitability standard.¹⁸⁸ Congress, in fact, has not actually mandated that national forests turn a profit, and has even directed the agency to make some decisions without primary consideration being given to profit maximization.¹⁸⁹ Third, timber sales are often used as a method of

¹⁸⁰ Robert E. Wolf, *National Forest Timber Sales and the Legacy of Gifford Pinchot: Managing a Forest and Making It Pay*, 60 U. COLO. L. REV. 1037, 1038 (1989). The Forest Service, says Congressional Research Service emeritus Bob Wolf, "[H]as changed its position 180 degrees from the view of a century ago that hard dollar profits were the real measure of the success of a commercially managed forest, public or private." *Id.* at 1038. He quotes from Pinchot: "You see, the whole work of the [USFS] is intentionally based on perfectly clear-cut business principles. We advocate nothing in the way of forestry that will not pay. We do not ask a man to practice forestry for any other reason than that it is good business policy." *Id.* at 1076.

¹⁸¹ Se. Alaska Conservation Council, *Taxpayer Losses and Missed Opportunities: How Tongass Rainforest Logging Costs Taxpayers Millions 3* (2003) (on file with author).

¹⁸² *Id.* at 4.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ SEACC May 18 letter, *supra* note 148, at 13.

¹⁸⁶ TNF Q & A, *supra* note 146.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Section 6(g)(3)(E)(iv) of the NFMA directs the agency to "insure that timber will be harvested from [NFS] lands only where . . . the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber." Pub. L. No. 94-588, 90 Stat. 2949, 2954 (1976).

achieving other desired land management objectives, like improving forest health and reducing the risk of catastrophic fire.¹⁹⁰ And fourth, it argues that timber sales provide benefits beyond the revenues earned, like the jobs that are created, taxes paid, and forest access opportunities gained.¹⁹¹

Like most politics, it appears that the issue is not really about subsidies, but in what direction they should flow. Conservationists have no problem with programs like wilderness or recreation generating little to no revenue for the USFS, but it makes no sense, they argue, to spend millions on a comparatively disadvantaged timber program that wreaks so much ecological havoc. Some are no doubt tired of Alaska's hypocritical position toward federal largesse, a Western stance first noted by historian and provocateur Bernard DeVoto: "[G]et out and give us more money."¹⁹²

D. Community Stability and Economic Development

The obligation of the USFS to provide for community stability and economic development is another core issue in this conflict. How much weight, in other words, should be given to the needs and demands of communities that are more dependent on cutting timber on the Tongass? And if the USFS should give special consideration to timber-dependent communities, how should they be defined and from where does such authority originate? This is not all that unique to southeast Alaska, for there has been a widespread assumption that national forest policy ought to promote community stability and economic development.¹⁹³ This belief has influenced USFS policies and has been a common theme throughout the agency's history.¹⁹⁴ After all, the USFS was created partly because of "cut and run" corporate timber practices that left communities in disarray. Pinchot thus assuaged community fears about federal control by explaining how the USFS would manage its lands in a manner beneficial to the long-term interests of rural communities.¹⁹⁵ A continuous supply of timber, managed in accordance with sustained yield, therefore became closely tied to the goal of community stability.¹⁹⁶

¹⁹⁰ TNF Q & A, *supra* note 146.

¹⁹¹ *Id.*

¹⁹² Bernard DeVoto, *The West Against Itself*, in THE WESTERN PARADOX: A CONSERVATION READER 45, 61 (Douglas Brinkley & Patricia Nelson Limerick eds., 2001).

¹⁹³ See, e.g., *Hearing on Impact of Federal Land Use Policies on Rural Communities, Hearing Before the H. Comm. on Resources*, 105th Cong. 2d Sess. 1 (Jun. 9, 1998) (examining the impact of federal land use policies on rural communities, focusing on the effects of environmental regulations).

¹⁹⁴ See Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81, 92-104 (providing an overview of the USFS's experience with communities of place and interest).

¹⁹⁵ *Id.* at 92.

¹⁹⁶ See SAMUEL T. DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* 331-32 (2d ed. 1980) (discussing the nondeclining even flow provisions in section 11 of NFMA, which refers to the commitment of most state and federal forest managers to "schedule harvest in such a way that the yield is sustainable in perpetuity without downward variation"). The concept of nondeclining even flow can be understood in this context as well. This is a conservative formulation of sustained yield forestry, meaning that the yield is

Nonetheless, there exists little explicit statutory guidance about how large a role consideration of community stability and economic development should play in USFS decision making.¹⁹⁷ NFMA provides some direction,¹⁹⁸ but much of this emphasis on community stability stemmed from USFS planning regulations, like that calling for the maximization of “net public benefits”¹⁹⁹ and the consideration of public comment (much of it coming from these communities). But while planning regulations called for consideration of economic stability and development, there is very limited explicit statutory authority to do so.²⁰⁰ Of course, Congress has said a number of things about this matter over the years, but it has not been explicit about where this goal ranks in multiple use nor provided any operational guidelines for how it is to be achieved or reconciled with other goals. Furthermore, there is some serious question as to how much forest policy can do to reach this goal.²⁰¹ Note, however, that the unique historical

sustainable in perpetuity without downward variation. The Forest Service, say Dana and Fairfax, “justified this rigid commitment primarily because of its responsibility to maintain economic stability in timber-dependent communities,” though the authors are skeptical of such an assumption. *Id.*

¹⁹⁷ See Con H. Schallau & Richard M. Alston, *The Commitment to Community Stability: A Policy or Shibboleth*, 17 ENVTL. L. 429, 460 (1987). They note that “[p]ublic land legislation contains a general theme of concern for the economic stability of communities. However, there is little explicit statutory direction on how large a role community stability concerns should play in Forest Service decisions.” *Id.* at 460. They go on to say that “[c]onfusion about community stability stems from the fact that although Congress frequently reaffirms its desire to achieve community stability, it has not provided any operational guidelines for doing so.” *Id.* at 479. See also SOC’Y OF AM. FORESTERS, COMMUNITY STABILITY 13 (1989) (on file with author) (noting that “the agency’s community stability policy is permissive rather than prescriptive”); James P. Perry, *Community Stability: Is There a Statutory Solution?* in COMMUNITY STABILITY IN FOREST-BASED ECONOMICS, PROCEEDINGS OF A CONFERENCE IN PORTLAND, OREGON, NOVEMBER 16–18, 30, 32 (Dennis C. Le Master & John H. Beuter eds., 1987) (noting that “Congress has not, in any legislation which applies generally to all National Forest System lands, provided any direction that requires the agencies to meet a community stability requirement”).

¹⁹⁸ In conducting timber sales, the NFMA directs the Secretary of Agriculture to select bidding methods that, among other things, “consider the economic stability of communities whose economies are dependent on such national forest materials, or achieve such other objectives as the Secretary deems necessary; and “are consistent with the objectives of this Act and other Federal statutes.” 16 U.S.C. § 472a(e)(1)(C)–(D) (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

¹⁹⁹ 36 C.F.R. § 219.1(a) (1982).

²⁰⁰ Congress most explicitly recognized the community stability concept with passage of the short-lived Sustained Yield Forest Management Act of 1944, Pub. L. No. 78-273, 58 Stat. 132 (1944), that was intended to “promote the stability of forest industries, of employment, of communities and taxable forest wealth, through continuous supply of timber.” The Act also established sustained yield forest management units, and allowed the sale of timber locally without competitive bidding. Bates, *supra* note 194, at 93. The Oregon and California Sustained Yield Act of 1937, 43 U.S.C. § 1181a (2000), also provides relatively explicit direction as to how more than two million acres of timber-rich land in Oregon is to be managed, most notably for “permanent forest production” and “contributing to the economic stability of local communities and industries.” *Id.* One of the main purposes of the Oregon and California Act was to provide relevant counties with a promised stream of revenue. *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1183 (9th Cir. 1990).

²⁰¹ Securing community stability and predictability though national forest policy might be setting communities up for further disappointment. There are simply too many factors complicating these goals, including the unpredictable nature of fire, insect outbreaks and

context of the Tongass and the amount of federal land in the region complicates the lack of explicit statutory guidance on this matter. The pulp mill contracts were sought after partly as a way to advance statehood and develop the region, so plenty of mixed signals have been given throughout the years.

It is quite clear that Alaska's congressional delegation, the USFS, and the timber industry believe that there is an obligation to these communities. In exchange for allowing the Tongass Land Management Plan to move forward, for example, Sen. Ted Stevens (R-Alaska) extracted \$110 million from the Clinton White House in "Tongass Disaster Relief Funds" that were distributed to the southeast's timber-dependent communities.²⁰² This added up to payouts in the range of \$35,000 per lost job in Sitka and more than \$100,000 per lost job in economically distressed Wrangell.²⁰³ Alaska's congressional delegation has consistently advocated for increased timber harvesting in the Tongass as a way to develop the region and has blamed declines in cutting for various economic hardships. As discussed below, it also explains why the appropriations process has become one of the dominant ways that the Tongass is governed.²⁰⁴

On top of all of its other promises, the USFS commits itself to this obligation as well. One of the USFS's primary goals for the Alaska Region, for example, is to "[e]nhance the health, stability, quality of life, economic vitality, and adaptability of communities in south-central and southeast Alaska and natural resource dependent communities throughout the state."²⁰⁵ This includes the objective of providing "opportunities for the maintenance and development of high paying, year-round jobs."²⁰⁶

Because so much of southeast Alaska is comprised of the Tongass and so much of its history dominated by the long-term contracts, serious economic impacts result from declining timber harvests. Of course, how much of an impact, and what really caused it, is disputed—in Alaska and

disease, new scientific knowledge, swings in public opinion, drought, climate change, agency budgets and Congressional appropriations, market demand, housing starts, and globalized timber markets, to name a few. For former USFS Chief Jack Ward Thomas, "[g]iven the myriad of interacting variables, it is time for concerned citizens and leaders to accept the reality that the dream of a stable timber supply from public lands is an illusion." Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 14 (1996). Dana and Fairfax are also highly suspect of the assumptions on which this goal is based. See DANA & FAIRFAX, *supra* note 196, at 332; see also notes 125, 127 and accompanying text.

²⁰² Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title II (a), 110 Stat. 1321, 1321-182 to -183.

²⁰³ David Whitney, *Tongass Plan to Cost \$110 Million: Taxpayers Will Pay Compensation for Timber Job Losses in Southeast Alaska*, ANCHORAGE DAILY NEWS, May 12, 1996, at C1.

²⁰⁴ See *infra* Part V.C (discussing the relationship of government hierarchy and how it affects the policies governing the Tongass).

²⁰⁵ U.S. Forest Serv., Alaska Region, *Emphasis Areas*, Jan. 2003, at 6, http://www.fs.fed.us/r10/ro/policy-reports/r10_mgmt_goals.shtml [hereinafter *Emphasis Areas*] (last visited Apr. 23, 2006) (guiding the agency's budget requests and programs of work). At least the goal of diversifying timber-dependent rural economies is found in law. See National Forest-Dependent Rural Communities Economic Diversification Act of 1990, Pub. L. No. 101-624, § 2371, 104 Stat. 3359, 4045 (Title XXIII, Subtitle G, Ch. 2 of the 1990 Farm Bill).

²⁰⁶ *Emphasis Areas*, *supra* note 205, at 7.

beyond.²⁰⁷ Industry estimates that a seventy-five percent decline in the volume of timber harvested in the Tongass has resulted in a total job loss (direct and indirect) of approximately 2,900 jobs and over \$100 million in annual payroll in southeast Alaska and has been especially harmful to smaller communities that are not as diversified as Juneau and Sitka.²⁰⁸ Industry also asserts that these communities were especially hard hit by the “dramatic decline” in shared stumpage receipts due to twenty-five percent of gross annual national forest receipts from timber sales dedicated to these communities for the purposes of public roads and schools.²⁰⁹ Industry also uses the traditional “economic base” argument, asserting that the decline of timber industry jobs has a large ripple effect.²¹⁰ Its vision, then, is to sustain a viable, integrated timber manufacturing industry in the region—one needing an annual harvest of about 360 million board feet (well over the harvesting limits set in the 1997 TLMP) and a predictable three year supply of timber sales.²¹¹

The conservation community has refuted the “jobs versus environmental protection” dichotomy for years, with the collective refrain

²⁰⁷ See e.g., Rachel Baker, *The Ketchikan Gateway Borough*, ALASKA ECON. TRENDS, Jan. 2001, at 11 (showing how Ketchikan has been particularly hard hit, with the mill closure affecting other sectors of its economy). But see Erickson & Associates, *Beyond Tongass Timber: The Changing Role of the Tongass Timber Industry in the Economies of Southeast Alaska: A Local Perspective* Feb. 1999 (documenting that intended negative effects did not actually occur). “Despite the closures, and substantial reduction in timber harvests, the economies of these communities and the region as a whole remain strong and growing.” *Id.* at 1.

²⁰⁸ McDowell Group, *Economic Impacts of Declining Tongass Timber Harvests* (Sealaska Corporation, City of Wrangell, Ketchikan Gateway Borough, and Alaska Forest Association), Feb. 2000, i.

²⁰⁹ *Id.* at 18. This complaint was made before changes to forest receipts policy were made by Congress. The Secure Rural Schools and Community Self Determination Act of 2000, Pub. L. No. 106-393, was passed as a way to stabilize county (and borough) payments. It gave counties the option of sticking with the 25% fund model or choosing another payments formula established by law. For more information, visit http://www.notes.fs.fed.us:81/r4/payments_to_states.nsf. (last visited Apr. 23, 2006). This contribution is quite significant, and in places like Sitka the funds constitute a major source of revenue for school districts. In Fiscal Year 2004, for example, the total borough payments (based on acreage and 14-year historical payments) for the Tongass were calculated at \$9,200,989.79. (Tongass school receipt data on file with author). Without reauthorization of the Act, one school administrator estimates an 80% reduction in payments to Alaska communities.

²¹⁰ But even this assumption is challenged by recent USFS research showing “that even in small communities where shifts in basic employment may be quite extreme, the economic base hypothesis is not supported by the empirical evidence.” GUY C. ROBERTSON, U.S. DEP’T OF AGRIC. FOREST SERV., GEN. TECHNICAL REP. NO. 592, *A TEST OF THE ECONOMIC BASE HYPOTHESIS IN THE SMALL FOREST COMMUNITIES OF SOUTHEAST ALASKA* 84 (2003).

²¹¹ Says the Alaska Forestry Association:

Various studies indicate that demand for wood products from Tongass timber is open-ended; the only constraint has been lack of a consistent, economic wood supply due to anti-logging obstructionists and inconsistent application of [USFS] rules and policies. The challenge is for government and private landowners to consistently provide logs at a reasonable cost and in sufficient volume to attract manufacturing facilities for both the high grade and low grade logs available from Southeast Alaska forestlands.

ALASKA FORESTRY ASS’N, *NEW VISION OF THE TIMBER INDUSTRY ON THE TONGASS NATIONAL FOREST* 1, 2 (Nov. 14, 2002) (on file with author).

usually being “it’s more complicated than this.” It has also done so in southeast Alaska, using its own set of assumptions, numbers, and arguments. This can be done, for example, by enlarging the geographic scope of analysis to include the rather anomalous city of Juneau, which has a much more robust and diversified local economy, as this changes the numbers significantly.²¹² The conservative community also argues that federal policy is not solely responsible for the losses, as globalized timber markets and declining timber harvests on Native corporate lands have also played key roles.²¹³

This issue, along with the “seek to meet market demand” language found in the TTRA, quickly becomes complicated in the context of globalization. Even Alaska’s own economic research shows that the state’s timber industry has struggled for multiple reasons and that globalization has impacted not just the Tongass, but also the Pacific Northwest and British Columbia.²¹⁴ “The economic reasons are complicated, but the underlying essence is the fact that the growing worldwide production of timber has exceeded demand for most of the past decade.”²¹⁵ A number of trends have impacted the entire region, including various mergers and consolidations in the timber industry, the opening up and exporting of vast Russian forests, and the growth and productivity of tree farms in places like Scandinavia, New Zealand, and Brazil.²¹⁶ Costs are also at the forefront, of course, and “Alaska is a high cost area within the United States and the U.S. is a high cost area within the emerging world economy.”²¹⁷ Alaska does not have strong comparative advantage when it comes to the supply of largely unfinished common timber. The state’s Department of Labor and Workforce Development summarizes: “While Alaska timber will continue to find specialty markets and niche opportunities, the economic realities of the early twenty-first century point towards a world market dominated by less expensive sources.”²¹⁸

USFS research similarly shows the region’s economy is “driven by changes in the international markets in which Alaskan products compete,

²¹² See GREGG ERICKSON, McDOWELL GROUP, INC., PLAYING THE SYMPATHY CARD: A REVIEW AND CRITIQUE OF “ECONOMIC IMPACTS OF DECLINING TONGASS TIMBER HARVESTS” 4 (2000) (on file with author) (finding that with Juneau included, since 1990, the region’s population has grown 6%, employment by 4%, and non-agricultural jobs by 3%).

²¹³ One report concludes that “some of the economic decline now occurring in rural Southeast is a hangover from the commercial decisions Native Corporations made” and these “can’t be blamed on federal policy.” *Id.* at 9.

²¹⁴ ALASKA DEPT’ OF LABOR & WORKFORCE DEV., 23 ALASKA ECONOMIC TRENDS: NATURAL RESOURCES: MINING AND TIMBER 3 (Dec. 2003), *available at* <http://labor.state.ak.us/trends/dec03.pdf>.

²¹⁵ *Id.* at 8.

²¹⁶ Though enormous in acreage, the forest resources of the Tongass are less impressive when viewed in a global context. It represents roughly 1% of United States forested lands and less than 0.1% of the global total. Russian forests, on the other hand, “represent 22 percent of the world’s forest supply and contain over half the world’s standing softwood.” *Id.* at 12. “In 1995, Russia replaced the United States as the world’s largest exporter of logs” *Id.* at 9.

²¹⁷ *Id.* at 10. “In 2001, timber fallers in Alaska, for example, earned an average annual wage of \$60,920,” nearly twice the national average. *Id.* at 12.

²¹⁸ *Id.* at 14.

and are largely independent of Tongass forest management.”²¹⁹ For example, timber harvests on Native corporate lands have decreased by seventy percent between 1996 and 2001, and one large corporation got out of the business citing international market conditions as a reason why.²²⁰ Other evidence includes the fact that in recent years timber supply outpaces demand.²²¹ This trend is among other factors “likely attributable to the marginal position of Alaska wood products firms in the cyclical, integrated, and increasingly competitive markets for their products.”²²² Some in Alaska’s timber industry argue that much of this is nonsense. Markets may be involved, they say, but most of the problems stem from a lack of consistent timber coming off the Tongass.

The factors responsible for closing the two big mills invoked a public relations battle. Industry asserts that environmentalists, and the TTRA, are primarily responsible for the closures and lost jobs. But others point to evidence supporting a contrary conclusion. After Alaska Pulp Corporation (APC) sued the federal government for damages resulting from the TTRA, the court record shows an astonishing history of corporate losses dating to the beginning of the contract.²²³ Relying heavily upon internal company information, the court found that hard times at APC were the result of a “structural” decline in the pulp market, not because of the “unilateral terms” imposed by the TTRA. It became evident to the court “that APC could not afford to take the timber it was permitted to take”²²⁴ and that this was due to a reduction in demand for rayon.²²⁵ So, while APC sued for damages up to \$8.7 billion, the court ruled that APC was entitled to nothing. Some people see the decision as sweet affirmation that “[a]ttacks on environmentalists were a smokescreen for low markets and the company’s bad business practices.”²²⁶

The appropriate role and scale of tourism in southeast Alaska is also related to conflict over economic development and community stability. This conflict is not that much different than debate over the “new West” in

²¹⁹ Lisa K. Crone, *Southeast Alaska Economics: A Resource-Abundant Region Competing in a Global Marketplace*, 72 LANDSCAPE & URB. PLAN. 215, 215 (2005).

²²⁰ *Id.* at 229.

²²¹ *Id.* at 230.

²²² *Id.*

²²³ Complaint at 10, *Alaska Pulp Corp., Inc. v. United States*, No. 95-153C (D. Alaska Jan. 28, 2004). A considerable amount of money was lost on the Japanese “national project,” including almost a \$20 million deficit by 1964. *Id.* Furthermore, the project had accumulated losses of over \$180 million after more than 30 years. *Id.* at 33.

²²⁴ *Id.* at 29.

²²⁵ Judge Lawrence M. Baskir summarizes:

[W]e posit one undeniable element of Plaintiff’s circumstance: by the time the contract was breached, APC’s long-standing agreement with the [USFS] was a losing contract. The market for its primary product, rayon-grade dissolving pulp, had diminished. . .its current problems were the result of market trends and other adverse circumstances that it determined would not improve in the 20 or so years remaining on the contract.

Id. at 2.

²²⁶ Don Muller, *My Turn: Timber Industry Hasn’t Been Honest About Decline*, JUNEAU EMPIRE, Mar. 8, 2004, available at http://www.juneauempire.com/stories/030804/opi_myturn.shtml.

general, except that Alaska takes it to the extreme. Many western states are transitioning their economies from more commodity and natural resource-based models to more diversified and service-based models.²²⁷ Likewise, in southeast Alaska, some economic research shows that unearned income and tourism “have replaced resource-extractive industries as the principal source of income growth in the region,” so “[f]orest management policies that enhance the comparative advantage the region enjoys in providing both tourism opportunities and quality of life attributes will aid communities in maintaining and expanding their economic opportunities.”²²⁸ These changes, in Alaska and Westwide, have challenged our understanding of regional economies and identities while forcing Westerners to collectively question what they do for a living.²²⁹

Tourism, most prominently in the form of the cruise ship industry, is a major part of the southeastern Alaskan economy, especially in ports like Juneau, Sitka, and Ketchikan. These cities are inundated by cruise ship passengers during the summer months, and there is an increasing regional reliance upon tourism.²³⁰ But, there is also considerable ambivalence about the rise of the cruise ship-based tourism industry and whether or not it can provide authentic, well-paying, and year-round jobs.²³¹ For many Alaskans, there is not much appeal in selling of the stereotypical rubber tomahawks to “walking wallets,” even if it does pay a living wage.

There is also concern that the industry has negatively changed the character of the region, a concern compounded because of the concurrent demise of well-paying timber industry jobs. Also worth considering is whether the southeast is simply trading corporate dominance by the timber industry for out-of-state dominance by the corporate cruise ships. As it is elsewhere, tourism is a devil’s bargain.²³² It routinely fails to be the economic panacea promised but rather, another form of colonial economy having a tremendous “psychic and social impact on people and their places.”²³³ The commodification and stealing of a place’s authenticity often results. Those invested in tourism—developers, realtors, and the like—benefit, while other residents struggle to find meaningful, well-paying work that keeps them in a place that was once unique. Historian Hal Rothman

²²⁷ Service goes beyond tourist kitsch, and includes industries like education, health care, and financial services. *See generally* THOMAS MICHAEL POWER, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE* 131–69 (1996) (documenting the transition and arguing that the protection of Western natural resources is economically advantageous).

²²⁸ Crone, *supra* note 219, at 215.

²²⁹ *See* POWER, *supra* note 227, at 169 (arguing that “[l]andscapes stripped bare, silted streams with dead fish, fragmented ecosystems devoid of wildlife—this isn’t what draws people and business”).

²³⁰ *See* ALASKA DEP’T OF LABOR & WORKFORCE DEV., 24 ALASKA ECONOMIC TRENDS: SOUTHEAST ALASKA 3, 5 (2004), *available at* <http://labor.state.ak.us/trends/mar04.pdf> (discussing the difficulty in substantiating tourism generated economic benefits, but noting that the presence of tourism is visibly apparent).

²³¹ *See generally* Kruger, *supra* note 156 (reviewing tourism growth, trends and issues in the region).

²³² HAL K. ROTHMAN, *DEVIL’S BARGAINS: TOURISM IN THE TWENTIETH-CENTURY AMERICAN WEST* 27 (1998) (providing a critical look at tourism in the West).

²³³ *Id.* at 12.

believes that transformation is at the core of the devil's bargain: "Success creates the seeds of its own destruction as more and more people seek the experience of an authentic place transformed to seem more authentic . . . [and] these seekers of identity and amenity transform what they touch beyond recognition."²³⁴ Communities have often underestimated this transformative power, says Rothman, and as a result, many places have "evolved into caricatures of their original identities."²³⁵ In southeast Alaska, the importance of this choice will become increasingly clear. As ports in Juneau and Sitka become saturated with tourists, the cruise ship industry is beginning to expand its transformative powers even deeper, with stops now in some of the more isolated villages in the region.

E. Analysis

These issues, along with those introduced in Part III, help explain why the Tongass is so controversial. Politics make them even more intractable. Take, for example, the way in which the conflict is so often framed by political actors: What is it about? What are its core issues? Why is it occurring? What are the motivations of the parties involved? And how should it be settled?²³⁶ This is how we make sense of the world. And, as social scientists have shown, framing offers a partial but powerful "explanation for why some environmental disputes resist resolutions."²³⁷ As we will see later, framing also impacts governance because it helps determine the types of strategies and venues chosen by political actors. Framing the Tongass primarily in terms of science or economics, for example, will lead to the privileging of technical and expert analysis, while couching it terms of rights and duties will move the conflict toward the courts, and so on.

Groups also try to advance their preferred definition of a policy, because they know that if successful, their preferred solution will also prevail.²³⁸ Defining the "Tongass problem" is therefore an essential part of this story and remains highly contested. E.E. Schattschneider summarizes this nicely in his classic text on American politics: "Political conflict is not like an intercollegiate debate in which the opponents agree in advance on a definition of issues. As a matter of fact, *the definition of the alternatives is the supreme instrument of power.*"²³⁹ With the Tongass, ideas and competing

²³⁴ *Id.* at 27.

²³⁵ *Id.* at 370.

²³⁶ Barbara Gray, *Framing of Environmental Disputes*, in MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS: CONCEPTS AND CASES 11, 11–12 (Roy J. Lewicki, Barbara Gray & Michael Elliot eds., 2003).

²³⁷ *Id.* at 12.

²³⁸ See generally Janet A. Weiss, *The Powers of Problem-Definition: The Case of Government Paperwork*, 22 POL'Y SCI. 97 (1989); David A. Rochefort & Roger W. Cobb, *Problem Definition: An Emerging Perspective*, in THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA 1, 4 (David A. Rochefort & Roger W. Cobb eds., 1994) (analyzing the problem definition phenomenon from political and policy making perspectives).

²³⁹ E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 68 (1960) (emphasis added).

problem definitions jockey for position and public embrace. Ideas about scarcity, wildness, community, cultures and customs, and self-reliance are worked into larger narratives and policy stories cast with heroes, villains, and victims. We can, therefore, take our pick among stories of greed, corporate abuse, ignorance, outsider influence, arrogance, misanthropy, and others.²⁴⁰ Like in *Star Wars*, the “Light Side” is pitted against the “Dark Side” of the Force, though everyone believes that they are followers of the former. (In fact, the federal building housing the Forest Service in downtown Juneau is popularly called the “Death Star”).

Conservationists have been very successful in framing the Tongass as a national issue and thus expanding the “scope of conflict.”²⁴¹ They target a national audience by emphasizing that the Tongass is their *national* forest, subsidized with federal taxes, and it should therefore be managed in accordance with the country’s values and preferences. This is time-tested political strategy.²⁴² As noted by Schattschneider, the nub of politics is the definition, spread and/or control of conflict. “Therefore the contagiousness of conflict, the elasticity of its scope and the fluidity of the involvement of people are the X factors in politics.”²⁴³ And “every change in scope changes the equation.”²⁴⁴

Other actors, however, try to localize these disputes and deeply resent “outsider” influence, be it that of Greenpeace, the Californians and New Yorkers that pushed so hard for passage of the TTRA,²⁴⁵ or the non-Western politicians that use the “Alaskan rainforest” as a “cheap environmental vote.”²⁴⁶ Resentment about the federal control of natural resources has been a dominant theme throughout Alaskan history.²⁴⁷ The narrative lives on, as a

²⁴⁰ See generally DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* ch.6 (1997) (analyzing policy stories and their literary devices). “Often what appears as conflict over details is really disagreement about the fundamental story.” *Id.* at 138.

²⁴¹ SCHATTSCHNEIDER, *supra* note 239, at 2.

²⁴² See George Hoberg, *From Localism to Legalism: The Transformation of Federal Forest Policy*, in *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* 47–73 (Charles Davis ed., 1997) (discussing the “nationalization” of American forest policy with a focus on the Pacific Northwest).

²⁴³ SCHATTSCHNEIDER, *supra* note 239, at 3.

²⁴⁴ *Id.* at 5.

²⁴⁵ The TTRA was introduced by Democratic freshman Rep. Bob Mrazek (D.-N.Y.) and was shepherded along by Democratic Rep. George Miller (D.-Cal.).

²⁴⁶ Coastal political pressure continues to be noticed by Alaskans, most recently in the form of the proposed Alaska Rainforest Conservation Act, H.R. 979, 108th Cong. (2003), that has only a few sponsors from the intermountain West. See *infra* note 472 and accompanying text.

²⁴⁷ According to historian Daniel Nelson, the foundation of political life in Alaska is the perception that “Alaskans were victims of distant forces that made it impossible for them to share the prosperity and comforts that other Americans enjoyed.” Nelson, *supra* note 9, at 5. Alaska historian Stephen Haycox finds the same in his research. See STEPHEN W. HAYCOX, *FRIGID EMBRACE: POLITICS, ECONOMICS, AND ENVIRONMENT IN ALASKA* 10 (2002) (offering a historical commentary on the character of Alaskan culture and how it has affected Alaska’s natural environment). Local people, he says, have often felt victimized by national preservation campaigns like that over the pipeline, the Alaska Lands Bill, and the Tongass. Self-governance, after all, is a core principle of American ideology, and one of the reasons for the American revolution. “Conservation decisions made by Congress in response to national environmental campaigns, endorsed and supported by people who have no direct economic stake in the consequences, and who may not even know the location of the land in question, are painful for

number of interests continue to complain about outsiders—after ruining their own landscapes nonetheless—trying piously to save Alaska from itself. For politicians, the “federal control” frame provides the perfect wedge issue and never-ending sagebrush rebellion, and its defiant language of federal arrogance and environmental elitism is a wonderful way to rally the troops.

Personal identity and how stakeholders characterize others also help explain the intractability of the Tongass. Conflicts often escalate when people feel that their personal worldviews and sense of themselves are under attack. This is one reason why there is so much trepidation about the declining timber industry, because it signifies much more than an economic transition. Though only a small minority of southeasterners work in the forest products industry,²⁴⁸ the move towards a recreation and tourism-based economy poses a challenge to the region’s collective identity and sense of place, as it does Westwide.²⁴⁹

Many people interviewed also frame the Tongass in very moralistic and ethical tones. Conservationists speak of posterity and a society without limits, while asking if the Tongass is the best place in the world to grow two-by-fours. But those in the timber industry also ask whether it is ethical to shut down business on the Tongass given the nation’s insatiable appetite for wood products. Why externalize our problems elsewhere, they ask, when the United States has such stringent environmental regulations ensuring responsible forest management.

The ways in which others are characterized polarizes the debate as well. Conservationists, for instance, are routinely portrayed as elite outsiders, with no grassroots support, who are using the Tongass as a “cash cow,” an effective way to raise money and membership from a safe distance. It is an easy target, some say, because of its grandeur and the meager number of people in the region to fight back. “The Tongass as fundraising strategy” was one of the most dominant framings expressed in the interviews, as many people believed that these conflicts are often manufactured by corporate environmental groups to generate publicity and revenue.²⁵⁰

local communities affected.” *Id.* at 105. Building on similar assessments of northern settlements, Haycox suggests that there is a widespread regional consciousness based on opposition and antagonism in Alaska. *Id.* at 15.

²⁴⁸ See ALASKA DEP’T OF LABOR & WORKFORCE DEV., *supra* note 214, at 7 (documenting the decline in logging employment in Alaska).

²⁴⁹ See, e.g., James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy*, 31 ENVTL. L. 1, 7 (2001) (suggesting a more thoughtful and sensitive consideration of the impact of public lands policy on Western rural communities).

Thoroughly confident in our political and moral sentiments and in our economic calculus, we have set out, both consciously and unconsciously, *de jure* and *de facto*, to move many of our rural communities away from their dependence on the public lands and to create a new West of urban archipelagoes surrounded by public lands preserved for our aesthetic and recreational enjoyment.

Id. at 6.

²⁵⁰ This framing is very similar in nature to a set of articles written by Tom Knudson and published by the *Sacramento Bee* focused on “Environment, Inc.” (published Apr. 22–26, 2001) that were widely circulated in the Alaska State Legislature (legislative packet on file with

The media also play a role in how these conflicts are framed and debated.²⁵¹ Following the lead of conservation groups, the national media have taken an extraordinary interest in the Tongass, and regularly criticizes its management. Because of the national lands and tax dollars at stake, editorials often frame the Tongass as a national issue deserving federal government action. It also has all the trappings of a good adversarial environmental story: two diametrically opposed sides, power politics, big industry, clear-cutting, old growth, jobs, and other familiar story lines. Headlines like “The Alaska Chainsaw Massacre” are not uncommon.²⁵² The quality of coverage varies, with most of it focused on how the game is being played by the major power brokers. Reporters often define it “as a classic struggle between jobs and the environment,”²⁵³ and in many ways, it is. Rarer is the story covering an alternative to the extremes, like whether smaller-scale logging on the existing road system is a viable political and economic option for the southeast.²⁵⁴

The media’s intense focus on the Tongass also helps explain the communication strategies used by interest groups and the Forest Service. Tongass “talking points” drop off the tongue like casual weather conversation. Each side uses the language, numbers, images, and narratives designed to get their issue on the public and institutional agenda. And because of the enormous complexity of the Tongass situation, and some of the pathologies of the modern press,²⁵⁵ media coverage is often reduced to the mere retyping of these talking points, leaving readers undoubtedly frustrated and confused.

Outside of court, opposing camps rarely engage one another. Rather, they use a public relations tool bag and “stay on message” to advance their agendas and win the nation’s hearts and minds. Conservation groups pay for full-page ads in newspapers across the country warning that “our heritage is at risk without protections for the Tongass National Forest,”²⁵⁶ and promote dozens of favorable op-ed pieces to prove that they are the ones in the mainstream.²⁵⁷ But this nationalization strategy, using the media in its

author).

²⁵¹ See generally Michael Karlberg, *News and Conflict: How Adversarial News Frames Limit Public Understanding of Environmental Issues*, ALTERNATIVES J., Winter 1997, at 22, 24 (finding that dichotomy, extremism, and confrontation are some defining features of how the media frames environmental news).

²⁵² Osha Gray Davidson, *The Alaska Chainsaw Massacre*, ROLLING STONE, Feb. 5, 2004, at 34.

²⁵³ Felicity Barranger, *In Alaska, Help for Logging Comes Late*, N.Y. TIMES, Feb. 29, 2004, at 14.

²⁵⁴ See Todd Wilkinson, *Alaska Locals Want a Sliver of the Forest*, CHRISTIAN SCIENCE MONITOR, Aug. 5, 2004, at 2 (covering the promise and challenges of the micrologging program).

²⁵⁵ See generally INSTS. FOR JOURNALISM & NATURAL RES., MATCHING THE SCENERY: JOURNALISM’S DUTY TO THE NORTH AMERICAN WEST (2003), available at <http://www.ijnr.org/programs/stegner/pdf/Duty.pdf> (last visited Apr. 22, 2006) (analyzing the strengths, weaknesses, and institutional challenges facing environmental reporting in the American West); Conference, Dateline: The West (2003), http://www.andruscenter.org/AndrusCenter.data/Components/PDF%20FILES/DLTW_Transcript.pdf (last visited Apr. 22, 2006) (conference transcript focusing on media coverage of Western issues and its impact on public policy).

²⁵⁶ Advertisement, MISSOULIAN, June 17, 2003, at A8.

²⁵⁷ See, e.g., Alaska Rainforest Campaign, *Press Archive*, <http://www.akrain.org/pressroom/>

implementation, has provoked the wrath of many Alaskans. As a former senator, Frank Murkowski regularly chastised "East Coast media editorial writers" like the "forestry experts at the *New York Times*,"²⁵⁸ while others rail at the supposed ignorance and bias of the media elite.²⁵⁹

A pervasive mistrust results from these and other factors. The residual effects of past events continue to poison the political environment. Conservationists have a difficult time trusting an agency that has made so many poor decisions over the years. It was not that long ago, they say, that the Tongass was dominated by "timber beasts" doing everything they could to "get out the cut." As conservationists see it, and whistleblowers tell it, the USFS has turned a blind eye to such things as massive timber export violations, scaling fraud, and timber theft on the Tongass.²⁶⁰ These and other highly publicized stories are told when asked about trusting the USFS.²⁶¹ On the other hand, timber industry supporters continue to complain about the "broken promises" of ANILCA and believe that environmentalists will always come back for another bite of the apple. Whatever their stated position, "zero cut" is their ultimate goal, and appeals and litigation are the tactics used to make logging prohibitively expensive and uncertain. As evidence, some offer a sequencing of events wherein environmentalists once demonized the long-term contracts, while giving rhetorical support to the smaller mills in the region. But now, industry supporters contend that these same environmental groups have turned on the smaller mills while championing the even smaller "independents." When it comes to the Tongass, they say, environmentalists will never be satisfied, so additional compromises are viewed as tying your own noose.

In sum, the sides view each move by the other as part of a cohesive planned strategy to fully industrialize the region or turn it into a gigantic wilderness preserve. As players see it, every step is choreographed and meant to break the other's back. The implications of such deeply-seated mistrust are serious. It makes experimentation, finding common ground, and the search for solutions problematic. Many of the alternatives sketched in Part VI will be viewed cynically by actors in the region because of the risks involved and trust and cooperation required. No one wants to be duped again.

index_html#Press%20Releases (last visited Apr. 23, 2006) (touting Alaskan Village residents joining with conservationists in order to take on Forest Service over rainforest logging).

²⁵⁸ *Tongass Land Management: Joint Hearings Before the S. Comm. on Energy and Natural Resources and the H. Comm. on Resources*, 105th Cong. 34–35 (1997) (statement of Sen. Frank H. Murkowski (R-Alaska) criticizing the media for its coverage of the revised Tongass Plan).

²⁵⁹ See, e.g., Letter from Dennis Watson, Mayor, City of Craig, Alaska, to USA TODAY (Jan. 29, 2004) (on file with author) (writing in response to the "propaganda piece" written by the newspaper about conservative hunters and the Tongass); SODERBERG & DURETTE, *supra* note 79, ch. 1 (citing Jim Skow, *The Forest Service Follies*, SPORTS ILLUSTRATED, March 14, 1988, at 77, and rebutting the misrepresentations and "lies" told in Skow's widely circulated article on the Tongass in *Sports Illustrated*).

²⁶⁰ See *Stealing The Tongass: Playing by Alaska Rules in the U.S. Forest Service* (Public Employees for Environmental Responsibility, White Paper, 1996).

²⁶¹ See, e.g., DURBIN, *supra* note 56, at 136–48 (discussing some of the most egregious USFS and industry practices of the past century).

V. FOREST GOVERNANCE: THE INSTITUTIONS AND DECISION MAKING PROCESSES
USED TO MANAGE POLITICAL CONFLICT

The Tongass is regularly at the center of high-level political conflict, and this conflict is driven by a number of interrelated factors. But how does the USFS deal with these and other issues once they are underway? How are such high-level, intractable, and acrimonious policy problems dealt with in existing decision making processes? Part V of this Article examines these important questions by mapping the USFS decision-making process from a conflict perspective. It examines the most important decision-making points to assess how conflict is managed in theory and practice. Forest planning, administrative appeals, executive higher-level decision making, appropriations politics, the scientific process, and litigation are examined.

These decision-making processes are not unique to forest politics. What is happening on the Tongass, in fact, is representative of American environmental policy in general. Gridlock in Congress has pushed environmental policymaking onto less traditional pathways.²⁶² Such pathways are being used because of the nature of environmental laws (as discussed *supra*) and the state of gridlock in Congress. As two political scientists put it, “[j]ust as a spring freshet seeks new channels around a dammed streambed, so too has environmental policy sought new channels around a blocked legislative process.”²⁶³ This congressional stalemate is often attributed to such factors as increased partisanship, divided government, a more pervasive media presence, and the hyperpluralistic nature of American politics.²⁶⁴ But while gridlock may characterize the legislative response to environmental problems, this does not mean that policy making has ceased altogether. Instead, decisions are being made in different and sometimes more troubling ways, like through administrative rulemaking, appropriations, and the courts. In some cases, types of “backdoor policy making” have replaced traditional processes and venues

²⁶² See generally Christopher McGrory Klyza & David J. Sousa, Environmental Policy in the Post-Gridlock Era: New Paths, New Problems (paper presented at the Annual Meeting of the Western Political Science Association, Denver, CO, Mar. 27–29, 2003) (on file with author) (explaining the causes of such gridlock and how it has pushed policy making onto new and sometimes troubling paths).

²⁶³ *Id.* at 16.

²⁶⁴ See generally *id.* (discussing the causes of Congressional gridlock); SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 4–11 (2003) (finding bicameral differences, partisan polarization, and the disappearing political center as important reasons explaining gridlock); JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 36–63 (1995) (discussing the hyper pluralistic state of American politics and its negative impact on government’s ability to adapt and solve problems); Michael E. Kraft, *Environmental Policy in Congress: From Consensus to Gridlock*, in ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 129 (Norman J. Vig & Michael E. Kraft eds., 2003) (discussing divergent party policy views, the constitutional separation of powers, the complexity of environmental problems, lack of public consensus, the influence of organized groups, and weak political leadership as commonly suggested reasons for gridlock).

that are more legitimate, accountable, transparent, and predictable.²⁶⁵ These principals and other issues are discussed below.

A. Forest Planning

The forest planning process, guided by NFMA and the National Environmental Policy Act (NEPA), has become a dominant way of dealing with the types of conflicts outlined in Part IV, partly because of the problematic nature of the forestry laws discussed in Part III. Simply put, the enthusiastic embrace of planning has moved political conflict from Congress to the bureaucracy. Despite the complexity of the Tongass situation, it presents perhaps the perfect (though extreme) case study to analyze the promises and pitfalls of using planning processes as a tool for political decision making and conflict resolution.

Shortly after NFMA was passed, with the Tongass National Forest the USFS completed the nation's first forest plan in 1979.²⁶⁶ As it was first in drafting the Tongass planners would also lead the way in revising its original forest plan, beginning in 1987. Writing this ten- to fifteen-year management plan would eventually cost the agency more than \$13 million and take almost ten years to complete, partly because the TTRA was enacted during the process. The 1997 plan was quite different from the 1979 version, including among other significant differences an annual harvesting limit that was cut in half.²⁶⁷ Nonetheless, many political actors were hardly impressed by such a massive investment in time and resources, as the plan faced thirty-three appeals upon completion, and faced considerable litigation soon thereafter. The planning process is still ongoing. As this Article goes to press, the USFS is adjusting its 1997 plan because of a Ninth Circuit decision. The decision ruled the plan arbitrary and capricious and in contravention of NEPA, because it was based on an inaccurate and inflated interpretation of market demand for Tongass timber, and because it failed to adequately consider the cumulative impacts of logging high-volume old growth forests.²⁶⁸

²⁶⁵ See Klyza & Sousa, *supra* note 262, at 30 ("As problematic as making policy through Congress may be, the legislative process is more stable, rational, legitimate, and accountable than policy made through these other paths.").

²⁶⁶ U.S. FOREST SERV., TONGASS NATIONAL FOREST LAND MANAGEMENT PLAN: FINAL ENVIRONMENTAL IMPACT STATEMENT (1979).

²⁶⁷ See 1997 TLMP ROD, *supra* note 140, at 8–9. The 1997 TLMP FEIS has a 220–267 mmbf average ASQ, while the 1979 plan had one of 520 mmbf. Unlike the original plan, the 1997 revision also includes over one million acres in old growth habitat reserves, new river and beach buffers, and karst protections, among other things. *Id.*

²⁶⁸ *Natural Res. Def. Council v. United States Forest Serv.*, 421 F.3d 797 (9th Cir. 2005). The USFS misinterpreted a study of projected market demand (as required by TTRA) within the published record of decision (ROD) and EIS, nearly doubling the projections made in the economic analysis. The court found this clear error of judgment harmful because it impacted how the USFS and public evaluated the range of alternatives in the 1997 plan, while influencing subsequent project-level decisions and timber harvest goals. *Id.* at 806–808. The court said that the Forest Service's error "fatally infected its balance of economic and environmental considerations." *Id.* at 816. It also found the plan in violation of NEPA because it failed to "consider the cumulative impacts of past and reasonably foreseeable future non-federal logging

Planning processes are ubiquitous in natural resources policy.²⁶⁹ In many areas, forestry included, NEPA's Environmental Impact Statement (EIS) process is fully integrated into resources planning, so agencies are fulfilling dual statutory obligations.²⁷⁰ This means that many of the benefits and challenges of planning discussed herein are applicable to forest planning and to NEPA in general. Both processes, for example, are theoretically founded upon the rational comprehensive model of planning. This is the "synoptic" ideal in which a decision maker collects all of the information relevant to a decision, considers all alternative policies and possible consequences of each, and then chooses the policy with the highest probability of achieving the agreed upon goals in the most efficient way possible. In many respects it is a continuation of a progressive era political philosophy emphasizing administrative expertise, scientific management, and a dichotomy between politics and the "science" of administration. Its language is recognized by anyone even vaguely familiar with an EIS or planning document. In the Tongass plan, for example, the USFS considered eleven alternatives and extensively analyzed them using a variety of scientific and economic models. They were assessed in terms of various environmental laws, rules, and orders by which the agency is bound. After such an exhaustive review, and using boilerplate language, the Regional Forester chose Alternative Eleven as "the best strategy for maximizing net public benefits," finding that it "best balances the many interrelated environmental, social and economic issues that arise when managing for multiple uses."²⁷¹

In a general sense, forest plans involve only zoning and suitability decisions.²⁷² They tell us what types of activities may be allowed within a planning area and under what conditions, acting as a gateway through which subsequent activities must pass. They do not, however, authorize site-specific projects and activities. Instead, plans address such issues as general multiple-use goals and objectives, what land is suitable for timber management, the allowable cut on that land, and what harvesting and regeneration methods will be used.²⁷³ In the Tongass, for example, nineteen

in high-volume old growth forest of the Tongass." *Id.* The USFS is responding to the decision by adjusting its 1997 plan through another EIS process. *See* Tongass National Forest Plan Amendment Environmental Impact Statement, 71 Fed. Reg. 15,372 (Mar. 28, 2006) (providing notice of another EIS process evaluating a potential significant amendment to the 1997 plan); U.S. Dep't of Agric., Forest Serv., *Tongass National Forest Plan Adjustment*, <http://tongass-fpadjust.net/> (last visited Apr. 23, 2006).

²⁶⁹ *See, e.g.*, Federal Land Policy Management Act (FLPMA), 43 U.S.C. § 1712 (2000) (detailing planning requirements for rangelands); National Wildlife Refuge Improvement Act, 16 U.S.C. § 668dd (national wildlife refuges); Endangered Species Act, 16 U.S.C. §§ 1533(f)(1), 1539 (species recovery).

²⁷⁰ *See, e.g.*, 16 U.S.C. § 1604(g)(1). The NFMA requires forest plans be prepared "in accordance with" NEPA. *Id.* Also, Forest Service planning regulations provide that, "[t]o the extent feasible, a single process shall be used to meet planning and NEPA requirements." 36 C.F.R. § 219.12(a) (1991).

²⁷¹ 1997 TLMP ROD, *supra* note 140, at 16.

²⁷² *See* Scott W. Hardt, *Federal Land-Use Planning and Its Impact on Resource Management Decisions*, in Public Land Law II, Paper No. 4, 4-7 to 4-32, (1997).

²⁷³ *See* WILKINSON & ANDERSON, *supra* note 45, at 117-200.

land use designations (LUDs) were established, with roughly 5.9 million acres classified as wilderness and national monument, 7.5 million acres as mostly natural, 1.1 million acres for moderate development, and 2.7 million acres for intensive development like timber and mineral production.²⁷⁴ The plan also set the allowable sale quantity (ASQ) at an average of 267 million board feet (mmbf).²⁷⁵ This number, a type of holy grail in forest politics, represents the upper limit on the amount of timber that may be offered for sale from suitable timberland as part of the regularly scheduled timber sale program. The plan also estimates that the use of clear-cutting will predominate in the future, representing about sixty-five to eighty percent of harvesting methods used.²⁷⁶

Although there are several substantive obligations found in NFMA that are used as litigation handles for interest groups,²⁷⁷ the courts generally give the agency wide discretion when determining what these plans look like and how they are implemented.²⁷⁸ Courts will also give the USFS discretion in what scientific methodologies it uses to write and base its plans, meaning that it can be an uphill battle for groups challenging the agency-sponsored science used in the planning process.²⁷⁹

The dominance of planning in public lands management has changed the dynamics of political conflict in numerous ways. First, it means that in many cases the venue of conflict has shifted from Congress to the planning arena. This is due to the site-specific nature of forest management, in large part because this type of delegated discretion was more acceptable to most members of Congress than a more prescriptive approach.²⁸⁰ Hereafter, the tough choices would have to be dealt with through NEPA and planning procedures or by politicians working through different channels. It also explains why NEPA's EIS requirement has led to more lawsuits than any other environmental statute.²⁸¹

The rational comprehensive foundation of NEPA and resources planning also tends to camouflage value and interest-based political conflicts as scientific-technical ones, and this is a major reason why scientific disagreement and uncertainty are central drivers of natural resources conflict.²⁸² The structure of NEPA places a very heavy emphasis on the

²⁷⁴ 1997 TLMP ROD, *supra* note 140, at 3.

²⁷⁵ *Id.* at 8. *But see* Natural Res. Def. Council v. United States Forest Serv., 421 F.3d 797, 807–808 (9th Cir. 2005) (holding that the USFS's mistake in determining market demand had an unacceptable bearing on its decision to adopt Alternative 11, with its ASQ of 267 mmbf/year).

²⁷⁶ *Id.* at 5.

²⁷⁷ *See* WILKINSON & ANDERSON, *supra* note 45, at 120–28, 159–61 (describing some of the substantive requirements NFMA imposes).

²⁷⁸ The deferential “arbitrary and capricious” standard of the Administrative Procedures Act (APA) is used by the courts when reviewing the multiple-use “decisions” contained in plans. 5 U.S.C. § 706(2)(A) (2000).

²⁷⁹ *See, e.g.,* Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995) (holding the USFS did not violate NEPA or NFMA by deciding not to implement conservation biology principles).

²⁸⁰ *See* WILKINSON & ANDERSON, *supra* note 45, at 138–73 (giving a comprehensive review of NFMA's Congressional debate).

²⁸¹ JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 255 (2004).

²⁸² *See infra* Part IV.D (discussing the impact of legislating via appropriation).

predictive capabilities of scientists and agencies.²⁸³ The EIS process demands incredible amounts of information that are used by agencies to make one-shot predictions about expected environmental impacts. The bases for these predictions are then challenged by political actors who assert that the information was incomplete or incorrectly interpreted, assuming that if it was, the agency would make their preferred decision. Unfortunately, many of the predictions made during the EIS process turn out to be wrong.²⁸⁴ In other cases, their accuracy is unknown, as agencies implementing NEPA encourage prediction, not post-project monitoring and assessment. This structure, based firmly in the rational-comprehensive tradition, encourages the type of “analysis paralysis” so lamented by the USFS, and also explains why so many conflicts about the Tongass are waged in terms of risk assessment, confidence levels, and other scientific details.

The purported scientific rationality of the synoptic planning process creates other challenges as well. Foremost is that many of the decisions coming out of the process often have little to do with science.²⁸⁵ Instead, they are often value-laden political choices. Many of these are based on the tenets of political pluralism, including interest group negotiation, bargaining, and compromise. This means that agencies and interest groups often approach the planning process with incompatible sets of expectations.²⁸⁶

The USFS explains the forest-planning process using the language of synopticism and scientific management. When asked to explain the role of public participation in the planning process, for example, planners answer that it is to ensure that all possible viewpoints and information are “considered” by the agency, thus fulfilling its synoptic obligations. On the other hand, interest groups participating in the process often view their participation as an opportunity to engage in political posturing and bargaining, and to gain standing in the courts. They are skeptical of the scientific rationality claims made by the agency, but will play the process in whatever way might advance their agenda.

The courts have changed the nature of planning politics as well. The Supreme Court’s decision in *Ohio Forestry Association v. Sierra Club* helps explain the number and timing of lawsuits over forest management.²⁸⁷ In that

²⁸³ See Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 908 (2002) (proposing a smarter-yet-streamlined NEPA by using more monitoring and adjustments rather than mere ex-ante predictions). Karkkainen argues that NEPA’s flaws are structural and conceptual: “NEPA ambitiously, and naively, demands the impossible: comprehensive, synoptic rationality, in the form of an exhaustive, one-shot set of ex-ante predictions of expected environmental impacts.” *Id.* at 906.

²⁸⁴ *Id.* at 926–27.

²⁸⁵ ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 145 (1995).

²⁸⁶ Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53, 75 (1996) (analyzing NEPA’s public participation requirements from a synoptic, pluralist, and deliberative standpoint).

²⁸⁷ *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733–38 (1998). According to the Court, plans are “tools for agency planning and management” that “do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability;

case, the Court put an end to some types of “pre-implementation” challenges of forest plans by ruling them not ripe for review. This means that in many cases an interest group cannot challenge a plan, but must instead wait for a site-specific project to be initiated. This helps explain the number of lawsuits filed at the project level. The main point, as interpreted by the USFS, is that plans are merely strategic and aspirational in nature; they “are neither commitments nor final decisions approving projects and activities.”²⁸⁸ This interpretation is curious, especially in the Tongass planning case, for it is hard to see how a plan in preparation for ten years and costing 13 million dollars is nothing more than strategic and aspirational.²⁸⁹

This decision puts conservation groups at a disadvantage, because it takes away an opportunity to challenge the general direction set forth in a plan. It also affects levels of public participation in the planning process. Why participate in such a lengthy process, after all, if plans may have no impact on the ground and may not be binding?²⁹⁰ While it certainly makes sense to use the ripeness doctrine as a way of preventing the judiciary from becoming entangled in abstract disagreements and preventing “premature adjudication,”²⁹¹ forest plans are important guiding documents. The 1997 Tongass Plan makes this clear, stating that the Plan “guides all natural resource management activities and establishes management standards and guidelines,” “sets forth in detail the direction for managing the land and resources,” and that “[a]ll future plans and administrative activities will be based on the Forest plan.”²⁹²

they create no legal rights or obligations.” *Id.* at 733. The Supreme Court made a similar decision about planning by the Bureau of Land Management (BLM). In *SUWA*, 542 U.S. 55, 65–73 (2004), the Court ruled that plans are a preliminary step in land management and are tools by which present and future uses are projected. It is “generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them.” Plans, in other words, are not a “legally binding commitment” but are rather strategic in nature. *Id.* at 71–72.

²⁸⁸ National Forest System Land Management Planning, 70 Fed. Reg. 1026 (Jan 5, 2005) [hereinafter USFS 2005 Planning Rule].

²⁸⁹ The General Accounting Office, for example, concluded that the Tongass Plan constituted a “rule” under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 804(2) (2000), designed to restore balance between Congressional laws and executive implementation. According to its General Counsel, “[I]t meets the elements of a ‘rule’: it is of general applicability (it affects many parties, private and governmental concerning the National Forest) and future effect (10 to 15 years in duration), and it implements, interprets, and prescribes law and policy.” GEN. ACCOUNTING OFFICE, CONGRESSIONAL REVIEW ACT: APPLICATION TO THE TONGASS NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN, GAO/T-OGC-97-54 3 (Jul. 1997) (statement of Robert P. Murphy, General Counsel).

²⁹⁰ Speculating before *Ohio Forestry*, Charles Wilkinson expressed dismay about such a possibility and believed that such a decision “would cut to the heart of the NFMA planning process.” Wilkinson, *supra* note 134, at 675. He also sees it as contrary to the intent of the NFMA: “Congress intended that NFMA planning would have exactly the same effect as local land-use planning—the plans would be binding on future agency actions and enforceable in court—and it is in the enlightened self-interest of the [USFS] not only to accept that fact, but to advocate it.” *Id.*

²⁹¹ *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1969) (explaining the reasoning behind the ripeness doctrine).

²⁹² 1997 TLMP ROD, *supra* note 140, at 1-1.

This is hardly an abstract brainstorming exercise, rather it is a plan placing the agency on a long-term trajectory that is hard to stop once begun. Judicial review at the plan level may be necessary to counteract the effects of the “bureaucratic steamroller” that keeps lumbering ahead in the direction set forth in the plan.²⁹³ As one commentator notes, the phenomenon is like the “tyranny of small decisions” because of its ability to travel far in misleadingly small steps.²⁹⁴ In other words, the USFS could implement a forest plan by taking a number of discrete steps that may seem reasonable when viewed in isolation, but problematic when seen in context.

The traditional tiered planning process has also provided the USFS a useful political move. When a site-specific project is challenged, the USFS can say that the issue has already been addressed at the plan level; and when an issue contained in the plan is criticized, it can say that it is a project-level decision. Critics see it as a type of shell game. The process also creates serious informational and analytical problems. The draft Tongass plan revision, for example, contained about 2500 pages and weighed close to fifteen pounds. But many believed that the information contained in the plan was either wrong or too general to be of much use.²⁹⁵ Instead, it shifted a much greater burden onto project-level planners who then analyze and implement site-specific decisions.²⁹⁶

NEPA’s purpose and intent—based on clearly articulated environmental values and vision²⁹⁷—has been rendered impotent by two factors: 1) the courts which have basically eviscerated the meaning of NEPA and now read it as mostly a procedural statute,²⁹⁸ and 2) preexisting agency missions, values, and discretion secured by NEPA section 105.²⁹⁹ These two factors

²⁹³ Amanda C. Cohen, *Ripeness Revisited: The Implications of Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547, 555 (1999).

²⁹⁴ *Id.* at 557 (citing Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS: INT’L REV. SOC. SCI. 23, 29–30 (1966)).

²⁹⁵ Randal O’Toole, *The Tongass Two-Step*, FOREST WATCH, Sept. 1990, at 12, 16.

²⁹⁶ *Id.* at 13.

²⁹⁷ National Environmental Policy Act of 1969 § 101, (codified at 42 U.S.C. § 4321 (2000)). The environmental values and ambitious language found in § 101 has been analyzed extensively, and a number of interests want it revitalized. *See, e.g.*, O’CONNOR CTR. FOR THE ROCKY MOUNTAIN W. & INST. FOR ENVT. & NATURAL RES., RECLAIMING NEPA’S POTENTIAL: CAN COLLABORATIVE PROCESSES IMPROVE ENVIRONMENTAL DECISION MAKING? 2–4 (2000) (finding that the original purposes of NEPA had not been achieved and discussing the potential for collaborative processes to achieve them); LYNTON K. CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE 23–47 (1999) (detailing the legislative history of NEPA and arguing for a renewed commitment to the goals that led to its enactment); U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, REPORT AND RECOMMENDATIONS ON A NEPA PILOT PROJECTS INITIATIVE 4 (2001) (responding to a request from several western Democrat Senators, the Institute prepared a report on how to better implement the goals of NEPA), available at <http://www.ecr.gov/pdf/USIECR%20Report%20to%20Senators%208-30-01.pdf>. Related Institute information is available at <http://www.ecr.gov/necrac/reports.htm> (last visited Apr. 23, 2006) (explaining the impetus for the report as well as information on obtaining copies).

²⁹⁸ *See* Stryker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (ruling that NEPA is primarily a procedural statute that does not require a particular substantive result); Robertson v. Methow Valley Citizen Council, 490 U.S. 332, 351 (1989) (stating that “NEPA merely prohibits uninformed—rather than unwise—agency action”).

²⁹⁹ NEPA § 105 states: “The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.” 42 U.S.C. § 4335 (2000). The

help explain why NEPA so often flounders—a case of paperwork without purpose. Agencies too often act as though the EIS process is an end in itself, a type of procedural paper chase that must be done before they do what they were going to do anyway. This was not what some architects of NEPA intended, for section 102 (what has become the EIS requirement) was envisioned as the vehicle or “action-forcing mechanism” to fulfill NEPA’s more lofty goals.³⁰⁰

Nonetheless, in typical legislative fashion, Congress simply laid the sweep of NEPA onto preexisting responsibilities, like multiple-use, forest planning, biodiversity protection, and market demand achievement. How the parts are supposed to fit together has been left to the USFS, interest groups, and the courts to figure out. This piling up of responsibilities helps explain the political backlash to NEPA-based planning as well. The USFS complains about “analysis paralysis” and the time and resources necessary to “bullet proof” its plans from scientific and legal scrutiny.³⁰¹ The result, it says, is more paperwork and less stewardship.

Grafting NEPA’s EIS requirement onto preexisting missions and mandates also helps explain the types of projects so often proposed by agencies. After all, agencies, not the public, get to define the “project purpose and need” and thus determine the “reasonable range of alternatives” considered.³⁰² This is the rub of NEPA: the agency defines the problem, and therefore defines the type of solutions considered.³⁰³ Thus, agencies often focus on a very constricted set of alternatives aligned with their congressionally-written mandate, organizational values, biases, and predilection towards proposed actions.³⁰⁴ This logic is aggravating for some

problem was foreseen by at least one analyst early on. See Sally K. Fairfax, *A Disaster in the Environmental Movement*, 199 SCL 743, 744–45 (1978) (contending that NEPA is built on ill-founded assumptions about the supposed rationality of bureaucracies).

³⁰⁰ The Council on Environmental Quality (CEQ) emphasized that NEPA is about action, not just paperwork:

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

40 C.F.R. § 1500.1(c) (2005).

³⁰¹ U.S. FOREST SERV., *THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT* (2002), available at <http://www.fs.fed.us/projects/documents/Process-Predicament.pdf>.

³⁰² CEQ rules dictate that agencies shall “rigorously explore and objectively evaluate all reasonable alternatives,” including “the alternative of no action.” 40 C.F.R. §1502.14. But once an agency has considered a reasonable range of alternatives, it may base its preference on relevant factors including its statutory mission. 40 C.F.R. §1505.2(b).

³⁰³ As Schattschneider reminds us, “[t]he definition of the alternatives is the supreme instrument of power.” SCHATTSCHNEIDER, *supra* note 239, at 68.

³⁰⁴ Anne Steinemann, *Improving Alternatives for Environmental Impact Assessment*, 21 ENVTL. IMPACT ASSESSMENT REV. 3, 10–17 (2001) (examining three broad categories of problems that lead to an inadequate range of alternatives). Steinemann’s study of EISs in the United States shows that “alternative designs” rather than “alternative approaches” usually dominate the set of alternatives considered in the EIS by agencies. The latter refers to a “functionally different way to achieve the objectives.” *Id.* at 6. An alternative approach to the construction of

conservationists in Alaska, who desire alternative approaches to proposed actions, or want a larger say in what actions are proposed in the first place. Rather than providing input on how and where another road should be built, for instance, they question the underlying premise of the proposal.

Another major area of conflict and litigation related to NEPA-based planning pertains to the scope of environmental analysis undertaken by the USFS.³⁰⁵ NEPA regulations require that agencies consider cumulative impacts in their decision making, defined as “the incremental impact of past, present, and reasonably foreseeable future action regardless of what agency (federal or non-federal) or person undertakes such other actions.”³⁰⁶ This obligation is most often carried out by agencies conducting a cumulative effects analysis.³⁰⁷ But many conservationists in southeast Alaska feel strongly that the USFS too often analyzes environmental impacts in isolation, not giving due consideration to their previous actions, nor to the extensive cutting and timber liquidation taking place on Native corporation lands. This was one of the most dominant themes in the public comment about the 1997 Tongass forest plan and subsequent litigation,³⁰⁸ and was mentioned many times during the interviews. An array of interests wanted the plan to deal more adequately with cumulative effects on watersheds, marine resources, old growth, habitat, subsistence, recreation, and other areas. These actors want the agency to stand back and take more of a landscape-level view of the region, with Native lands included.³⁰⁹ Many are also frustrated with how such analysis can be done given the two-step (plan and project) forest planning process.³¹⁰ Some interests believe that the forest plan is the best place to evaluate cumulative effects of timber harvesting, but that not enough detail is provided at this level, including where logging will actually occur.³¹¹

a highway, for example, would be expanding public transit; whereas an alternative design would be a different alignment of the highway. *Id.*

³⁰⁵ See, e.g., *Thomas v. Peterson*, 753 F.2d 754, 757–58 (9th Cir. 1985) (challenging USFS decision to treat the construction of a timber road and the following timber sale as two separate actions for the purpose of environmental assessment).

³⁰⁶ 40 C.F.R. § 1508.7 (2005).

³⁰⁷ See, e.g., COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997) (discussing the mandate, methods, and importance of cumulative effects analysis).

³⁰⁸ All of the public comments submitted were published in Appendix L (Public Comments and Forest Service Responses) to TLMP FEIS, *supra* note 18. See also *Natural Res. Def. Council v. United States Forest Serv.*, 421 F.3d 797, 815 (9th Cir. 2005) (holding that the 1997 Tongass plan violated NEPA because the EIS failed to adequately “consider the cumulative effects of disproportionate high-volume logging on non-federal land,” and “because it does not assess the potential impacts of reasonably foreseeable, continued ‘highgrading’ in the future.”)

³⁰⁹ TLMP FEIS, *supra* note 308 at app. L-61 (commenting that the cumulative effects on wildlife of logging on state and native lands were not adequately analyzed) (comment by Greenpeace).

³¹⁰ *Id.* at app. L-60 (predicting that the two-step process would fail without cumulative effect and site-specific analysis) (comments by Tongass Conservation Society and others).

³¹¹ *Id.* at app. L-22, 60 (comments by SEACC, state of Alaska, and Greenpeace). The USFS responds to such pervasive complaints by reminding the public about the general nature of forest planning, and that these studies will be done if necessary at the more site-specific project level. See, e.g., *id.* at L-22, 31, 60, 61. In other cases, as discussed below, some cumulative

A focus on cumulative impacts, and how they are predicted, brings us back to NEPA's rational comprehensive design. Desirable or not, such an approach places extraordinary emphasis on data collection, and scientific analysis and predictions, which perpetuates conflicts based on scientific disagreement and uncertainty. Other critics are skeptical of cumulative effects analysis for different reasons, seeing it as code for more land set-asides, and as a way for environmentalists to mask their social goals in complicated, inaccessible scientific models.³¹² For some advocates of resource development, it is yet another insurmountable hurdle that will end up driving more industries to other countries having no such onerous analytical requirements. On whatever side one stands, one must not allow the technical nature of this dialogue to mask what is at stake, because it raises fundamental questions about public lands governance, including the scale at which decisions ought to be made, whether the preservation of public lands ought to compensate for degraded private lands, and whether such analysis will help resolve conflicts.

To summarize, forest planning is an important but problematic venue for conflict resolution. Political disputes often are masked as scientific-technical disputes, and while it produces important information, there is no guarantee that planning will make a difference. Most of its problems, and all of its politics, flow from its rational comprehensive design. This decision-making ideal is practiced in the messy world of countervailing political pressures, organizational values, budgets, compromises, sunk costs, and legislative programs and mandates.³¹³ The remainder of Part V illustrates how the theory of planning is regularly trumped by the practice of politics. The planning processes governed by the NFMA and NEPA are inevitably impacted by external decision-making forces. While the Tongass National Forest muddled through the impossibility of synoptic planning, some of the more important decisions were made in other venues and processes. Appropriations, courts, and executive appointees often rule—not the professional expertise and rational comprehensive ideal found in forest

impacts were addressed with the innovative use of science panels. *See infra* Part V.E (discussing the use of scientific "risk assessment panels").

³¹² *See, e.g.*, Ernesta Ballard, Commissioner, Alaska Department of Environmental Conservation, NEPA Should Take 12 Months and Other Public Land Myths, Alaska Forest Association Meeting (Oct. 23, 2003) (on file with author). "Effects assessment," says Ballard, a long-term player in the Tongass conflict, and currently Senior Vice President of Corporate Affairs for Weyerhaeuser, "has been shanghaied for social engineering." *Id.* at 2. Science can only do so much, she says, and the void it leaves is filled with values. *Id.* From a conflict standpoint, she is critical about planning in general, because it cannot achieve consensus about allocation and use: "The Forest Service has discovered that it cannot plan the people's way to a common view." *Id.* at 3. "Planning has failed to achieve consensus and has become mired in disillusionment and litigation." *Id.* From her standpoint, the problem with NEPA and planning is that it too often gets in the way of developing our resources.

³¹³ There is an extensive bibliography documenting the shortcomings of rational comprehensive decision making. A few classics in political science and public administration include: Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959); GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971); and Michael Cohen, James March & Johan Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1 (1972).

planning. Such dynamics might make some resource professionals uncomfortable, and offer proof of politics mucking up the science of forest management. But in some cases, such politics should be expected with federal lands management.

B. Administrative Appeals

Citizens have long had the opportunity to administratively appeal forest plans and projects,³¹⁴ and they have done so quite frequently in southeast Alaska. The use of this process has become controversial, because the USFS and others believe that some groups are abusing the process and using it as a tool to obstruct decision making, and to forestall projects concerning fire and forest health that must be made more expeditiously.³¹⁵ Others, however, dispute the accuracy of such claims³¹⁶ and view the process as an essential way to improve agency decision making. As usual, the issue eventually worked its way through the rulemaking process into court: The USFS tried to severely restrict the types of decisions that could be appealed, and a district court ruled its action “manifestly contrary” to the legislation governing the process.³¹⁷

“The right to object” to USFS decisions has been governed by a few different laws and rules, with the Appeals Reform Act (ARA) chief among them.³¹⁸ Taken together, these laws allow for interests to appeal forest plan

³¹⁴ See Mary J. Coulombe, *Exercising The Right to Object: A Brief History of the Forest Service Appeals Process*, 102 J. FORESTRY 10, 10 (2004) (describing the evolution of the appeals process since 1907).

³¹⁵ See, e.g., U.S. FOREST SERV., *supra* note 301, at 28 (noting that the appeals process can be used to stall implementation); U.S. FOREST SERV., FACTORS AFFECTING TIMELY MECHANICAL FUEL TREATMENT DECISIONS 3 (2002) (noting that individuals and organizations can stop projects through an appeal). For comprehensive analysis see JACQUELINE VAUGHN & HANNA J. CORTNER, GEORGE W. BUSH’S HEALTHY FORESTS: REFRAMING THE ENVIRONMENTAL DEBATE 73 (2005) (discussing the debate over reform of the appeals process).

³¹⁶ Research shows that while appeals are used quite often, they have not been generally targeted at fuels reduction and restoration related projects, and proving that they have is not as straightforward as it sounds. The methodological challenges stem largely from the USFS’s inconsistent and problematic definition of fuels reduction and restoration related projects. See Hanna J. Cortner, Gretchen M.R. Teich & Jacqueline Vaughn, *Analyzing USDA Forest Service Appeals: Phase I, the Database*, in ERI PAPERS IN RESTORATION POL’Y, at 52–53 (Mar. 2003), available at <http://hdl.handle.net/2019/56> (discussing difficulty of classifying projects). See generally GEN. ACCOUNTING OFFICE, GAO-04-52 FOREST SERVICE: INFORMATION ON APPEALS AND LITIGATION INVOLVING FUELS REDUCTION ACTIVITIES 10–11 (2003) (discussing difficulties in determining the number of decisions involving forest fuels reduction activities due to a lack of uniform definition).

³¹⁷ *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1005 (E.D. Cal. 2005). The USFS used the latter decision to hold up all sorts of non-controversial projects, not just timber sales and other contentious decisions. Some conservation groups saw the drama and overreaction as a way for the USFS to create yet another crisis in our National Forests. The decision was then clarified. *Earth Island Inst. v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 3284289, at *2 (E.D. Cal. Nov. 30, 2005).

³¹⁸ Department of the Interior and Related Agencies Appropriation Act of 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (reprinted at 16 U.S.C. § 1612, note, § A) (codified at 7 U.S.C. § 6912(e)) (implementing regulations at 36 C.F.R. §§ 215.20, 217).

revisions and amendments,³¹⁹ projects or activities,³²⁰ and other decisions.³²¹ Administrative appeals are reviewed internally, meaning that challenges work their way up the agency hierarchy. Citizens and groups that want to challenge various agency decisions use this process often, mostly to challenge timber harvesting and grazing, permits, and plans.³²² They see it as an essential and healthy part of the democratic and administrative process, often leading to better decisions and less litigation in the long run,³²³ and view new rules and legislation governing the appeals process as efforts to stymie legitimate public participation, making the USFS less accountable for their controversial decisions.³²⁴ But some others on the agency and industry side see the process as a way for a few groups to stop any commercial activity on forest lands, or at least to tie up time-sensitive decisions in costly paperwork.³²⁵ The rather arcane workings of the appeals process thus have become a surrogate for those generally unhappy with forest management and what they believe are cumbersome analytical requirements and obstructionist environmental strategies.

The appeals process has been used extensively by conservation groups and others in southeast Alaska. Along with litigation and rulemaking/planning-based public comment, the process is a dominant method of conflict management and communication between interest groups and the USFS in the region. One source of 2004 USFS data shows that about twenty-four percent of environmental assessments (EAs) and eighty-eight percent of EISs are appealed on the Tongass.³²⁶ Another database shows that 122 administrative appeals were filed in the Tongass between January 1, 1997 and December 31, 2003.³²⁷ Most of the projects and decisions appealed were timber sales, permits, and development activities.³²⁸

³¹⁹ 36 C.F.R. § 217.3 (2000).

³²⁰ 36 C.F.R. §§ 215.11–215.16 (2005).

³²¹ See, e.g., 36 C.F.R. § 218 (2005) (appeals process of the fuels hazard reduction projects under the Healthy Forest Restoration Act of 2003, Pub. L. No. 108-148 §2, 117 Stat. 1888 (2003) (codified at 16 U.S.C. § 6501)); 36 C.F.R. § 251 (2005) (allowing appeals for issued permits and special use authorizations).

³²² Gretchen M.R. Teich, Jacqueline Vaughn, & Hanna J. Cortner, *National Trends in the Use of Forest Service Administrative Appeals*, J. FORESTRY, Mar. 2004, at 14, 18. For a more complete analysis, see Cortner et al., *supra* note 316.

³²³ See, e.g., Michael Anderson, *Response: Appeals Process Provides Multiple Benefits*, J. FORESTRY, Mar. 2004, at 48, 48 (2004) (defending the appeals process as senior resource analyst for the Wilderness Society).

³²⁴ PAMELA BALDWIN, *FEDERAL LAND MANAGEMENT: APPEALS AND LITIGATION* (Cong. Res. Serv., No. 97-274) (Feb. 26, 1997) (discussing criticisms of the appeals process).

³²⁵ See, e.g., Charles H. Burley, *Response: Appeals and Litigation: A View from Industry*, J. FORESTRY, Mar. 2004, at 49, 49 (criticizing the appeals process from an industry perspective). See generally BALDWIN, *supra* note 324, at intro. (providing statistics of appeals of USFS decisions, including frivolous law suits).

³²⁶ E-mail from Steve Brink, Deputy Regional Forester for Natural Resources, Alaska Region, U.S. Forest Serv., to Martin Nie (Jan. 12, 2005) (on file with author) (providing data on administrative appeals and litigation).

³²⁷ Information provided by Northern Arizona University's Ecological Restoration Institute, <http://www.eri.nau.edu/> (last visited Apr. 23, 2006). I would like to thank Professor Jacqueline Vaughn and Jim Buthman for compiling and sharing this information (on file with author).

³²⁸ *Id.*

They were filed by various groups and citizens, with business interests often appealing permit decisions, and conservation groups (national and local) appealing timber sales.³²⁹ Despite its widespread use, many conservationists complain that the USFS treats the process as a hurdle to be jumped rather than as a way to make better forest management decisions. Many complain that the agency often responds to detailed site-specific questions and challenges with generic form letters stating that their complaints are outside the scope of the project. Shortcomings aside, these groups are glad the process exists, and continue to use it extensively, especially when it comes to timber sales in roadless areas.³³⁰

The following discussion illustrates how the appeals process is but one part of forest governance. First, its design encourages higher-level decision making—what some see as political micromanagement—by presidential appointees. Second, further restrictions on the appeals process might unintentionally result in increased litigation, as groups simply take their complaints to a more formal venue. And third, it shows the potential benefits and limitations of correcting the appeals process with increased public participation.

C. Higher-Level Decision Making

Forest plans, projects, and appeals are also subject to higher levels of executive decision making and thus to national politics. NFMA and its regulations set up a hierarchy of decision making, with the Regional Forester establishing regional policy for forest planning and approving forest plans within a region,³³¹ and the Forest Supervisor having overall responsibility for the plan's preparation and implementation.³³² The Secretary of Agriculture, working at the pleasure of the President, is ultimately responsible for the development and implementation of forest plans.³³³ This means that the Undersecretary for Natural Resources and the Environment also plays a crucial role, because the undersecretary is charged with providing leadership in forestry and can review decisions made by the Chief Forester.³³⁴ Those holding this position have become quite controversial because of their power to influence forest management from Washington. Due to the federal presence, this is especially so in southeast Alaska, as a single executive-level decision maker can bring about considerable change with the stroke of a pen. Those invested in the planning process, moreover, can reasonably question the endeavor's meaning when, in the end, such "decisions" get eviscerated at higher levels.

³²⁹ *Id.*

³³⁰ *See, e.g.,* Sitka Conservation Society, *Tongass Timber Sale Information Center*, <http://www.sitkawild.org/content/view/69/87> (last visited Apr. 23, 2006) (mapping current sales and appeals on the Tongass).

³³¹ 36 C.F.R. § 219.10(a)(1) (2000).

³³² *Id.* § 219.10(a)(2)–(3).

³³³ 16 U.S.C. § 1604(a) (2000).

³³⁴ *See* 36 C.F.R. § 217.7(a) (2000) (describing the process for reviewing decisions made by the Chief Officer).

A classic case of this type of politics involved President Clinton's Undersecretary, Jim Lyons. In 1999 Lyons took the unprecedented step of intervening prior to the Chief Forester's review of the 1997 Tongass Plan. In the record of decision (ROD), he made several important changes to a forest plan that took roughly ten years and cost \$13 million to write. He reasoned that he should use his discretionary power to make a good plan better, and that it was in everyone's best interest to end the administrative appeals process as quickly as possible.³³⁵ He thus used his discretionary power to review and decide on the thirty-three administrative appeals filed after the 1997 plan was published. Most of these focused on the plan's potential risk to the environment, particularly the practices of clear-cutting and road building.³³⁶ Lyons made a number of changes to the 1997 plan increasing the protection of old growth forest, subsistence uses, and areas of special interest. These included 1) removing 234,000 acres from timber harvesting and development, 2) increasing from 100 to 200 years the time that must elapse between timber harvests at the same location on about forty percent of the Tongass where timber harvesting is allowed, and 3) decreasing road densities in areas where they have been determined to contribute to wolf mortality.³³⁷

This higher-level decision, known as the Lyons's "re-ROD," caused a great deal of controversy and resulted in litigation. Critics were outraged that a Clinton appointee would make such substantial unilateral changes to a forest plan. Though the substance of the decision likely mattered most, as it further limited timber harvesting, critics complained about the process. They saw it as yet another example of presidential meddling and micromanagement intended to please the environmental community. The Alaska Forestry Association (AFA) charged that Lyons had improper *ex parte* discussions with leaders representing SEACC, Earthjustice, and the Natural Resources Defense Council,³³⁸ thus fueling criticism about back room deal making. The court agreed with part of AFA's argument and ruled that Lyons's decision made "significant and substantial" changes to the 1997 forest plan, and that without a supplemental analysis and a chance for public comment, the decision was "unreasonable, arbitrary and capricious."³³⁹

Lyons was neither the first nor the last to exercise his discretionary power to impact public lands management.³⁴⁰ President Bush's

³³⁵ Record of Decision: Tongass National Forest, Land and Resource Management Plan, Alaska 1-2 (1999) (on file with author). Although the "re-ROD" is not available at the Federal Register, see 64 Fed. Reg. 25,274 (May 11, 1999) (giving notice of the Under Secretary's modification of the Land and Resource Management Plan).

³³⁶ See U.S. GEN. ACCOUNTING OFFICE, TONGASS NATIONAL FOREST: PROCESS USED TO MODIFY THE FOREST PLAN, GAO/RCED-0045 at 40 (2000) (providing extensive background on the Lyons' re-ROD).

³³⁷ *Id.*

³³⁸ Alaska Forest Ass'n v. United States Dep't of Agric., et al., No. J99-0013, slip op. at 19 (D. Alaska Mar. 30, 2001).

³³⁹ *Id.* at 28.

³⁴⁰ Close connections between USFS and the White House date to the chummy days of Pinchot and President Theodore Roosevelt. See MILLER, *supra* note 48, at 156-57 (describing the creation of the USFS during the presidency of Theodore Roosevelt).

Undersecretary, Mark Rey, has made similar types of controversial decisions, and has faced extraordinary criticism because of it. He and his deputy have also not shied away from using the appeals process in a way similar to Lyons, including on the Bitterroot³⁴¹ and White River National Forests.³⁴² As a former timber industry lobbyist, dubbed the “Darth Vader” of forest policy by his critics, Rey’s influence has undergone intense scrutiny by the courts, media, and interest groups.³⁴³ Lyons was perceived by his critics as beholden to elite environmental interests, and Rey to his corporate cronies. However accurate, the criticism demonstrates the situational nature of forest politics at the highest levels: Once in power, the last administration’s publicized transgressions are not only adopted but perfected.

The proper level and direction of decision making—top down versus bottom up—is one of the central issues in public lands governance. As discussed earlier, there is a constant struggle over framing the Tongass as a national or local issue. Conservationists urge us to see the big picture and remind Americans that the Tongass is theirs, while others try to localize these decisions and limit the scope of conflict. This tension helps explain the acrimony over President Clinton’s roadless rule, another controversial example of higher-level decision making.³⁴⁴ The USFS, under Clinton and Chief Dombeck, partially framed the original roadless rule with talk of administrative leadership and the proper scale of decision making.³⁴⁵ It reasoned that a national rule was needed to address a prolonged national conflict,³⁴⁶ that USFS officials “have the responsibility to consider the ‘whole picture’ regarding the management of the National Forest System,” and that

³⁴¹ See *Wilderness Soc’y v. Rey*, 180 F. Supp. 2d 1141, 1142–50 (D. Mont. 2002) (concerning the challenge to Rey’s circumvention of an appeal regarding salvage logging in the Bitterroot). Following the wildfires in the Bitterroot National Forest in 2000, the USFS approved a final EIS that selected a new preferred alternative not included in the draft EIS, while attempting to deny groups the chance to file any administrative appeals. *Id.* at 1142. The district court criticized this “extra legal effort to circumvent the law.” *Id.* at 1144. “This unique approach looked to create a non-existent statutory exception by relying upon a strained textual reading of the governing statutes and regulations.” *Id.* at 1145.

³⁴² In a very controversial decision, Deputy Under Secretary David Tenny used his “discretionary review” powers to change the White River National Forest Plan’s provisions regarding water standards and lynx habitat. Tenny, a prominent critic of the higher-level roadless rule, felt it necessary to change a plan that was painstakingly put together with compromises and a great deal of public participation. See David P. Tenny, Under Secretary for Natural Resources and Environment, U.S. Dep’t. of Agric., Discretionary Review Decision on the Chief’s Appeal Decision Regarding the White River National Forest Revised Land and Resource Management Plan 2–4 (Dec. 2, 2004). According to the *Denver Post*, “It’s an egregious example of the Bush Administration’s fraudulent claims about heeding science, local control and public input.” Editorial, *Public Ignored in Forest-Plan Changes*, DENVER POST, Feb. 15, 2005, at 6B.

³⁴³ See, e.g., Jane Braxton Little, *Forestry Nominee: Rey of Light or Death Rey?*, HIGH COUNTRY NEWS, July 30, 2001, at 4 (describing the controversy surrounding Rey’s appointment).

³⁴⁴ See Nie, *supra* note 170, at 696–714 (outlining the development of the roadless rule and the political and legal challenges it faces).

³⁴⁵ Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).

³⁴⁶ *Id.*

"[l]ocal land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape."³⁴⁷ The USFS also reiterated the preamble to the 2000 NFMA planning regulations in effect at the time, stating that "[p]lanning will be conducted at the appropriate level depending on the scope and scale of the issues," meaning that the national level roadless issue should be addressed at "the appropriate scale and level of organization."³⁴⁸

Though its application to the Tongass has been eliminated by the Bush Administration,³⁴⁹ the roadless rule illustrates how higher-level decisions can preempt lower-level ones produced through planning and other processes. There is a need to look at the national picture when it comes to public lands. But this hierarchy of decision making, retained in the 2005 forest planning rule as well,³⁵⁰ can frustrate local, collaborative decision making, and even the most participatory of planning processes. In this vein, some critics argue that the roadless rule violated the spirit of NFMA and its emphasis on public participation.³⁵¹ For them it constitutes an executive circumvention of NFMA planning and threatens the stability and predictability afforded by this process.³⁵²

Assessments of higher-level decision making ultimately turn on our understanding of political accountability. In one sense, it is in the institutional self-interest of the executive branch to retain the authority to make the most important decisions. Now that plans are seen as nothing more than strategic and aspirational documents imposing fewer substantive obligations, the lure of making more high level decisions will be even greater. This is the rub in calls for greater administrative discretion and professional expertise: it gives political appointees more power and authority to make decisions, not just district rangers, supervisors, and scientifically trained resource professionals. One could argue that in some cases, it is improper meddling, and usually driven by the special interests

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 3250. Still, some critics contend that the rule violates the spirit, if not the letter of NFMA because forest management decisions are to be made regionally. *See, e.g.,* Sullivan, *supra* note 176, at 158–59 (arguing that the Tongass National Forest requires a more flexible approach to road building than prescribed in the roadless rule and that the issue should be dealt with through the forest planning process).

³⁴⁹ *See supra* note 178.

³⁵⁰ The USDA noted in the Federal Register:

[T]he final rule provides the option for higher-level officials to act as the Responsible Official for a plan, plan amendment, or plan revision across a number of plan areas when consistency is needed. . . . The Department intends the final rule be flexible in addressing different issues that may arise at different levels. Therefore, the Department does not believe that the final rule should provide the specific criteria for when a higher ranking official becomes the Responsible Official.

National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1038–39 (Jan. 5, 2005). This is similar to language and logic used by Chief Michael Dombeck in defending the controversial roadless rule.

³⁵¹ Sullivan, *supra* note 176, at 141.

³⁵² *Id.* at 144, 149.

most favored by the White House; hence, public process, science, expertise, and law takes a back seat to Presidential power politics. Seen this way, Lyons is meddling to please Clinton's environmental base, while Rey does the same thing for the timber industry.

On the other hand, the counter argument reminds us that the President, and his appointees, are the heads of administrative agencies, and bureaucrats work for them, not vice versa. By delegating discretion to agencies, Congress is voluntarily giving power to the executive branch; thus, appointees like Lyons and Rey are simply fulfilling their constitutional duties.³⁵³ In other words, delegation of power to administrators can in fact improve governmental responsiveness and accountability because Presidents are elected heads of administrations.³⁵⁴ In short, say some, presidential control of agency decision making provides democratic accountability through the ballot box.³⁵⁵ We will return to this issue in Part VI, as support or opposition to the various statutory and administrative reform measures sketched in this section will largely be determined by disparate understandings of democracy in the modern administrative state.

D. Appropriation Politics

One of the most significant trends in environmental politics is the use of the appropriations process as a way to make controversial policy choices. While hardly a new phenomenon,³⁵⁶ it has become a standard but troubling way of making public policy. Its abuse in public lands governance is long-standing.³⁵⁷ Instead of open debate, majority-building, and an honest and

³⁵³ See *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984) (discussing Congressional delegation of authority).

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities.

Id. at 865–66.

³⁵⁴ *Id.*

³⁵⁵ Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 407–08 (1987) (discussing the capabilities of the executive branch as it applies to delegation and democratic accountability).

³⁵⁶ In 1907, for example, the agricultural appropriations bill was amended to terminate the President's authority to create or expand forest reserves in several states. The tactic backfired, however, when President Theodore Roosevelt designated 16 million acres as National Forests before the bill's enactment. The controversial "midnight reserves" episode illustrates the type of higher-level appropriations politics that has long characterized public lands management. See MILLER *supra* note 48, at 163–164. For a broader look at the practice outside of public lands see generally Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L. Q. 457, 457–93 (1992).

³⁵⁷ See generally Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 457–511 (1997) (arguing that the appropriations process is not a suitable way to formulate major changes in policy and for establishing national priorities); Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L. 329–385

rigorous exchange of ideas and positions, adding policy “riders” to gigantic spending (omnibus) bills has become a favorite method used by Congress members to get what they want. Members simply add various provisions on to these bills, knowing that the entire bill is voted up or down by Congress. Other members are often willing to accept controversial provisions to keep government running, and to ensure that they get their special projects through the process as well. Questionable and controversial items are thus regularly attached to these bills because the representatives pushing them understand that such items might not pass if subject to isolated debate and scrutiny.

The Consolidated Appropriations Act of 2005 serves as a modest example of appropriation politics.³⁵⁸ Hung like a Christmas tree with thousands of local projects, and buried in millions of dollars of federal spending are several important policy decisions related to such things as the slaughter of wild horses and burros on public rangelands,³⁵⁹ the issuing of grazing permits on National Forests without NEPA review,³⁶⁰ the surprising extension of the controversial fee demonstration program,³⁶¹ and a Tongass provision allowing for the exportation of cedar.³⁶² Provisions like these are seldom debated on the floor, and sometimes not even in committee, and therefore provide a perfect vehicle for sometimes sketchy legislation.

The budgetary process also provides a vehicle for Congress members to influence agency decisions. They use the power of the purse to get what they want, and this happens outside the planning process. “Funding is the fuel that drives most land management activities,” says former USFS Chief Jack Ward Thomas.³⁶³ Forest plans do not come automatically funded. Rather, they are wish lists drawn up by the USFS with the hope of congressional budgetary acquiescence. And such hope is often misplaced, as plans can run one way and budgets another.³⁶⁴ Congress members regularly “earmark” funds to be spent in particular areas and prohibit the spending of funds in others. So while much of the public’s attention is focused on the more overt

(1990) (examining the use of riders to exempt various forest management actions from judicial review).

³⁵⁸ Pub. L. No. 108-447, 118 Stat. 2809 (2005).

³⁵⁹ *Id.* § 142, 118 Stat. at 3070.

³⁶⁰ *Id.* § 339, 118 Stat. at 3103.

³⁶¹ *Id.* § 801, 118 Stat. at 2924 (to be codified at 16 U.S.C. § 6801. This law within a law is called the Federal Lands Recreation Enhancement Act. *Id.*

³⁶² *Id.* § 317, 118 Stat. at 3096.

³⁶³ Thomas, *supra* note 201, at 11.

³⁶⁴ See Timothy J. Farnham, *Forest Service Budget Requests and Appropriations: What Do Analyses of Trends Reveal?*, 23 POL’Y STUD. J. 253, 253 (1995) (showing how “Congress has been an important external agent of change concerning the agency and its policies”). There is a structural problem in how the USFS is budgeted. See NAT’L ACAD. OF PUB. ADMIN., RESTORING MANAGERIAL ACCOUNTABILITY TO THE UNITED STATES FOREST SERVICE 15 (1999) (finding, for example, a fundamental problem in “the mismatch between the budget structure, which is based on the resource-specific Congressional appropriation structure, and the nature of the work the Forest Service actually performs, which is multiple-use and ecosystem-based.”). This disconnect undermines accountability because it is difficult if not impossible “to relate expenditures back to the budget and to track performance accurately.” *Id.*

authorizing process, most of the action takes place in the more arcane world of federal budgets.³⁶⁵

Budgets and riders are two dominant ways that Alaska's congressional delegation has managed the Tongass and its planning processes. This type of congressional intervention has been noted before, especially in those Western states with senior representatives sitting on the most powerful appropriations committees.³⁶⁶ But again, the situation is exaggerated in Alaska, due mostly to the influence and committee responsibilities of its delegation, with Senator Ted Stevens (R.-Alaska) providing most of the muscle. Serving as one of the most senior members of Congress, and former chairman of the Senate Appropriations Committee, Stevens has described himself as "one mean SOB,"³⁶⁷ and has turned the use of riders in to an art form.³⁶⁸ He is a primary reason why Alaska regularly ranks at the top of the list in federal dollars coming into the state in proportion to the taxes leaving.³⁶⁹ As the saying goes, the three biggest industries in Alaska are oil, tourism, and Senator Ted Stevens. His influence is even more impressive when one considers the population of Alaska. As a result of the Great Compromise guaranteeing each state two Senators, Alaskans have a staggering level of political "over-representation" when compared to more populous states.³⁷⁰

The Consolidated Appropriations Resolution of 2003³⁷¹ is a case in point. Tucked away in this massive spending bill (544 pages of small script) is section 335, blocking potential administrative appeals or lawsuits over a court-ordered and USFS-conducted wilderness review for the Tongass. The USFS failed to study the possibility of additional wilderness designation in its 1997 Forest Plan, and thus the court ordered the agency to do so.³⁷² But even before this supplemental wilderness EIS was complete, Stevens added a provision stating that it "shall not be reviewed under any [USFS]

³⁶⁵ See generally V. ALARIC SAMPLE, TOWARD INTEGRATED RESOURCE MANAGEMENT ON THE NATIONAL FORESTS: UNDERSTANDING FOREST SERVICE BUDGET REFORM iii (Pinchot Institute for Conservation ed., 1997) (discussing the importance of budget reform in guiding agency policies).

³⁶⁶ See generally Elise S. Jones & Will Callaway, *Neutral Bystander, Intrusive Micromanager, or Useful Catalyst?: The Role of Congress in Effecting Change Within the Forest Service*, 23 POL'Y STUD. J. 337, 337 (1995) (empirically examining the role of Congress in forest policy). For a colorful account of budgetary politics in USFS management see RICHARD W. BEHAN, PLUNDERED PROMISE: CAPITALISM, POLITICS, AND THE FATE OF THE FEDERAL LANDS 33-38 (2001).

³⁶⁷ David Whitney, *A Less Contentious Delegation Chalks Up Victories in Congress*, ANCHORAGE DAILY NEWS, Dec. 21, 1997, at A1.

³⁶⁸ Liz Ruskin, *Riders: Spending Bills Make Alaska Senator a Formidable Power*, ANCHORAGE DAILY NEWS, Nov. 9, 2003, at A1.

³⁶⁹ For data on Alaska's return on the federal dollar, see the Northeast-Midwest Institute's tracking of federal spending, <http://www.nemw.org/fundsrank.htm> (last visited Apr. 23, 2006), showing that for every dollar spent by Alaska in taxes, Alaska receives almost two dollars in federal funding.

³⁷⁰ When it comes to the Senate, a vote in Alaska is worth about 54 times as much as a vote in more populated California—a disproportion that is quite rare in other democracies. See ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION 48-50 (2d. ed. 2003). Dahl, a prominent political scientist, is troubled by such overrepresentation.

³⁷¹ Pub. L. No. 108-7, 117 Stat. 11 (2003).

³⁷² *Sierra Club v. Lyons*, No. J00-0009, slip op. at 11 (D. Alaska Mar. 30, 2001)

administrative process, and its adequacy shall not be subject to judicial review by any court of the United States.”³⁷³ As expected, many citizens and conservation groups were outraged by yet another controversial Tongass rider. It also illustrates why there is little trust among some actors in forest planning, as many believed that Stevens surely knew that the supplemental wilderness EIS would recommend little to no wilderness. As executive director of the Alaska Coalition Tim Bristol said, “[i]t already sounds like the fix is in.”³⁷⁴ Fix or not, Stevens was right, of course, as the Alaska Regional Forester chose the alternative with no recommended wilderness.³⁷⁵

The pattern in this case and others is to load the House or Senate versions of these bills with multiple over-the-top provisions that have little chance of passing but can be used as bargaining chips if needed. The proposed House counteroffer to the 2003 Omnibus bill, for example, contained rider provisions that would have prohibited citizens from appealing anything in the 1997 management plan, an Alaska exemption from the 2001 roadless rule, and a change in the Tongass Timber Reform Act that would have compelled the USFS to “meet market demand” instead of “seek to meet market demand.”³⁷⁶ In this vein, all sorts of controversial Tongass riders have been used politically with varying levels of success. Examples include: a 1995 rider that would have increased the amount of timber cut on the Tongass;³⁷⁷ a 1995 rider that would take away the USFS’s power to set new limits on logging in the Tongass and have the agency quit studying environmental issues after a set date;³⁷⁸ a 1998 provision that would open wilderness areas of national parks, refuges, and national forests in Alaska to helicopter tourism;³⁷⁹ and another 1998 rider that would require the USFS to prepare 253 million board feet of timber for sale the following year, and if it failed to do so, timber companies could sue in court and any losses in federal timber receipts paid to southeast Alaska communities would come out of the budget of the USFS’s Alaska Region.³⁸⁰

The use of riders to make policy decisions facilitates and subverts the democratic process. Perhaps this is why the winning side refers to them as “amendments” while losers complain about “sneaky rider” provisions. On

³⁷³ Pub. L. No. 108-7, § 335.

³⁷⁴ Joanna Markell, *Stevens’ Bill Would Block Appeals on Wilderness*, JUNEAU EMPIRE, Jan. 17, 2003.

³⁷⁵ U.S. FOREST SERV., TONGASS LAND MANAGEMENT PLAN REVISION, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT: ROADLESS AREA EVALUATION FOR WILDERNESS RECOMMENDATIONS: RECORD OF DECISION 8 (2003), available at http://www.tongass-seis.net/seis/pdf/Record_of_Decision.pdf.

³⁷⁶ Liz Ruskin, *Tapping Tongass’ Timbers*, ANCHORAGE DAILY NEWS, Feb. 11, 2003, at B1.

³⁷⁷ This interior appropriations bill was vetoed by President Clinton, citing the Tongass provision as the reason he did so. See David Whitney, *Tongass Timber Plan Draws Veto*, ANCHORAGE DAILY NEWS, Dec. 19, 1995, at D1 (detailing Clinton’s opposition to the bill).

³⁷⁸ David Whitney, *Enough “Fooling Around.” Stevens Demands Forest Service Stop Studying, Start Cutting*, ANCHORAGE DAILY NEWS, July 27, 1995, at D1.

³⁷⁹ This provision and others set up another showdown with the Clinton Administration. See David Whitney, *Gore Warns Against Special Interest Riders, Cites Alaska Issues*, ANCHORAGE DAILY NEWS, June 17, 1998, at C1.

³⁸⁰ David Whitney, *Stevens Puts Alaska Items in Bills*, ANCHORAGE DAILY NEWS, June 24, 1998, at B1.

one hand, it provides Congress an expeditious way to fund government and make policy choices. After all, it is unrealistic to expect exhaustive debate on the thousands of issues with which Congress must deal.³⁸¹ And of course most of the horse-trading done by members will be through personal and staff negotiation and in committee, not in front of a national C-SPAN audience. But its abuse also poses a threat to the principles of deliberative representative democracy. Because of seniority alone, Stevens and the Alaska delegation can essentially undo or circumvent legislation that was passed the hard way—that is, by marshalling a political majority. Whatever their merit, many riders seldom get the political debate and public attention they deserve. Their use can also make a mockery of the forest planning process. Why should the public take the time to engage in such a laborious undertaking if the most important decisions end up getting made by political representatives using sneaky legislative tactics? While Congress has every right to involve itself in the planning process, it should do so using methods that are subject to debate, compromise, and public scrutiny.

Appropriation politics can also foster greater levels of mistrust in the agency. Even the broad generalities contained in forest plans come with no guarantees of being funded, so many of the “decisions” made in these documents are taken with a pound of salt. What might look good on paper may never happen on the ground because a lone member of Congress might have other ideas about what the agency should be doing. This goes for negotiated settlements between interest groups and the agency as well. The deals agreed to by these actors, like exchanging increased timber harvesting for more restoration work, can easily be undone by Congress funding one and not the other. This dynamic complicates any effort at building trust among stakeholders and the agency, one of the main goals of the USFS. In short, it is difficult to build trust given such fragmented decision-making authority—the USFS should not make promises it cannot keep. To do so sets itself up for increased cynicism by stakeholders who feel hard-done-by.

E. Science

By design and default, science has become a problematic way of dealing with forest conflict in southeast Alaska and beyond. There is no doubt that conservation science has fundamentally reconfigured the “forest wars” and helped shape how the public thinks about such things as old growth, fire, and biodiversity, to name a few. But often, instead of explicit

³⁸¹ One notable legislative scholar sees trends in “unorthodox lawmaking” as part of an ongoing story about congressional adaptation and change. We must be realistic, she says:

If we expect a Congress that gives all interests a full and fair hearing on each issue and then, in every case, expeditiously passes legislation that both satisfies a majority, preferably a large one, and effectively addresses the problem in question, we are doomed to disappointment. Congress has never been able to come up to that standard, and the environment in which the contemporary Congress functions makes that even less feasible

BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 234 (2000).

debates about different “desired future conditions,” we get planning processes, appeals, and litigation wrought with disagreement about the science underlying those disparate visions. Science thus often becomes a surrogate for the explicit political choices we must make.³⁸² This in no way belittles the scientific endeavor, for it can provide the warning signals and compass necessary to move forward.³⁸³ It just shows us that science alone cannot answer all the important questions facing the future of the Tongass. Pretending otherwise jeopardizes the legitimacy of agencies and scientists, for they should have no privileged position in answering political questions like how much risk is tolerable and how much diversity and wildness we want on our landscapes. Once those types of political judgments are made, science can help guide us there.

For a number of reasons, science plays a large, but contested, role in the Tongass story. First, numerous environmental laws mandate its serious consideration in decision making. The ESA, for example, requires that the decision to list a species on the endangered or threatened list be made “solely on the basis of the best scientific and commercial data” available,³⁸⁴ though this phrase is not defined in this or other environmental statutes. ESA politics is thus characterized by “science wars,” from questions about the taxonomic uncertainty of defining a species and its historic range to

³⁸² The line between science and forest politics is not always clear. The USFS has a tradition of framing political debates over how to prioritize different multiple uses in technical terms, and has often used scientific committees as a way of dealing with such conflicts. For example, NFMA’s planning regulations in 1982 and 2000 were guided by a “committee of scientists,” as called for by Congress. 16 U.S.C. §1604(h) (2000). This means that politics shifted to the rulemaking venue, with the committee playing a prominent role. But critics took exception to the last committee’s embrace of sustainability as its “guiding star” and the prioritization of “ecological sustainability,” charging that it went beyond its charter in providing “scientific and technical advice.” Roger A. Sedjo, *Mission Impossible*, 97 J. OF FORESTRY, May 1999, at 6, 13–14 (criticizing what he believes was an effort by the committee to rewrite the statutory mission of the USFS). A committee of scientists, in other words, should not rewrite the mission of the USFS and “cloak those significant changes in the mantle of science,” say critics. George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle over the Forest Service Planning Rule*, 44 NAT. RESOURCES J. 1, 24 (2004) (criticizing how the value of ecological sustainability found its way into the committee’s “scientific and technical” recommendations). Once again, we see the implications resulting from the broad discretionary language of forest law, scientists will continue to be in a difficult position until important policy questions are answered by Congress. As one study of the committee sums it up, “scientists were the wrong people for the right job.” Brian Scott Pasko, *The Great Experiment That Failed? Evaluating the Role of a “Committee of Scientists” as a Tool for Managing and Protecting Our Public Lands*, 32 ENVTL. L. 509, 546 (2002) (examining the inability of scientists to manage national forests without a clearly defined management framework).

³⁸³ See KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT 5–6 (1993).

I have come to think of science and democracy as compass and gyroscope—navigational aids in the quest for sustainability. Science linked to human purpose is a compass: a way to gauge directions when sailing beyond the maps. Democracy, with its contentious stability, is a gyroscope: a way to maintain our bearing through turbulent seas.

Id.

³⁸⁴ Endangered Species Act of 1973, 16 U.S.C. 1533(b)(1)(A) (2000).

addressing its viability and critical habitat needs.³⁸⁵ As elsewhere, Tongass politics has changed enormously because of the ESA's "best science" mandate and the groups willing to judicially enforce it. We therefore expect scientists to answer tough questions when road building and timber harvesting threatens biodiversity and subsistence resources. This is understandable, of course, because we want management decisions to be based on our best available science and understanding of risk and uncertainty.³⁸⁶ But science can also provide an easy out for political decision makers.³⁸⁷ Instead of making hard choices and trade-offs, politicians can pass them along to scientists and agencies, or disguise their political decisions as scientific ones. This means that conflict over the Tongass, and environmental management in general, is increasingly characterized by scientific disagreement, uncertainty, and adversarial analysis.³⁸⁸

Science can also fit uncomfortably in political decision making processes. First, because science is rarely dispositive, its uncertainty is used by actors to postpone unfavorable decisions. Thus, industry and critics of regulation invoke "sound science" as a means to avoid costly compliance, while conservationists cling to a "precautionary principle" which gives the no-action alternative the benefit of the doubt. When faced with uncertainty, judgments must be made about what level of confidence we want before making a decision, and what decision will carry the burden of proof.³⁸⁹ Public comment, appeals, and litigation make it clear that such methodological battles are being fought over the Tongass as well, because actors understand that the constraints imposed by these different methods will likely lead to very different outcomes.

Science, instead of providing finality to these debates, is often strategically used by political actors to get what they want. Every lawyer, as the saying goes, knows what good science is: the science supporting his or her case.³⁹⁰ High-level officials are also tempted to use their power to play

³⁸⁵ See Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L. Q. 1029, 1034 (1997) (challenging the assumption that better science can resolve the questions and problems surrounding the ESA).

³⁸⁶ For comprehensive analysis of risk, uncertainty and "wicked" environmental problems in the Sierra Nevada forest planning process, see RONALD E. STEWART ET AL., MANAGING WICKED ENVIRONMENTAL PROBLEMS: REPORT TO JACK BLACKWELL, REGIONAL FORESTER, USDA FOREST SERVICE, PACIFIC SOUTHWEST REGION (2004), available at http://gunston.doit.gmu.edu/snfpa_risk/May25%20FinalReport.pdf.

³⁸⁷ See Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181, 203 (1999) (critically explaining Congress's tendency to "scientificate" environmental policy choices and its societal costs).

³⁸⁸ Consider how many times the National Academy of Sciences is called into the fray in various resource disputes, and how often, thankfully, it acknowledges the limits of science in answering political questions. For an overview of the National Academy of Sciences, and the National Research Council, including a list of recent reports focused on environmental issues, see Environmental Issues at the National Academies, <http://www.nationalacademies.org/environment> (last visited Apr. 23, 2006).

³⁸⁹ Such methodological disagreement represents the new battleground in ESA politics. See J.B. Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 576-599 (2004) (analyzing the very different methodologies used in ESA decision making and the significant policy questions they raise).

³⁹⁰ See Oliver Houck, *Tales from a Troubled Marriage: Science and Law in Environmental*

with inconvenient scientific findings, as controversy over the Bush Administration's transgressions attest.³⁹¹

Once again, the USFS finds itself in the middle, and though the courts generally give deference to the agency's use of science,³⁹² it must prove in the administrative record that the evidence was given a hard look, and that the methodology chosen can reasonably be expected to meet its legal obligations.³⁹³ This means that appeals and lawsuits often read like a scientific literature review, with claims that the USFS is basing decisions on outdated, incomplete and/or incorrectly interpreted science.

With that background, we can now move to the Tongass, for it presents a classic example of how scientific disagreement and uncertainty drive conflict, and the problems this presents to political decision making. But it also shows how some administrative leaders are trying to find a more constructive role for science in forest management. Regarding the Tongass, much of the historic conflict turned on assessing the diversity and viability of fish and wildlife populations. NFMA's diversity regulations required the agency to maintain well-distributed viable populations of existing native and desired non-native vertebrate species in planning areas.³⁹⁴ There was serious disagreement about this mandate and it often came to a boil during the forest planning process. What did it mean exactly? How much weight, relative to other multiple use responsibilities, should it have been given? How should it have been measured, implemented, and monitored?

Policy, 302 Sci. 1926, 1928 (Dec. 12, 2003) (examining the political use of science in environmental policy).

³⁹¹ The Union of Concerned Scientists has taken a lead role in documenting the Bush Administration's alleged misuse of scientific knowledge. One survey of United States Fish and Wildlife Service scientists, says the Union and Public Employees for Environmental Responsibility, shows widespread political interference in scientific determinations, including in Alaska where "the responses indicate a pervasive culture of political pressure and intimidation of scientists." U.S. Fish & Wildlife Serv., Survey Summary, http://www.ucsusa.org/scientific_integrity/interference/us-fish-wildlife-service-survey.html (last visited Apr. 23, 2006).

³⁹² See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (applying the deferential "arbitrary and capricious" review standard of the APA). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.*; *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983) ("[A] reviewing court must remember that the [agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."); *Sierra Club v. Marita*, 46 F.3d 606, 621 (7th Cir. 1995) (upholding a decision by the USFS to not use the science of conservation biology in its forest plan, finding that it "is entitled to use its own methodology, unless it is irrational").

³⁹³ See *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 972 (9th Cir. 2002) (enjoining timber sales on the Boise National Forest because "the Forest Service's methodology does not reasonably ensure viable populations of the species at issue").

³⁹⁴ This language was removed by the 2005 planning regulations. 70 Fed. Reg. 1022, 1028-29 (Jan. 5, 2005). In its place is language about sustaining ecological systems: "The overall goal of the ecological element of sustainability is to provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species in the plan area." 36 C.F.R. § 219.10(b) (2006).

Lawmakers have wrestled with these and other questions since the NFMA was first implemented.³⁹⁵

The Tongass National Forest began revising its forest plan in 1987. Like all plans, this one focused on fish and wildlife, habitat, viability, and other issues. But early in the planning process the agency's initial wildlife strategy was questioned. While science is always changing and forcing reconsideration, this was a particularly dynamic time in conservation science. Decisions about old growth and owls in the Pacific Northwest challenged many assumptions about wildlife viability and the amount of old growth necessary to retain it. In this context, a viable population (VPOP) committee was formed by the TNF to identify species whose viability might be impaired by various forest management activities and to develop recommendations to maintain those populations.³⁹⁶ With that charge, and foreshadowed by developments in the Pacific Northwest, the VPOP committee recommended the use of large areas of old growth reserves adjacent enough so that wildlife populations could interact.³⁹⁷ These habitat conservation areas would be off-limits to logging, and the committee saw the recommendations as the minimum action necessary to protect viable populations in the region. This strategy was then rejected by the team responsible for preparing part of the draft plan.³⁹⁸ That team carried out another viability study and risk assessment and included it as an appendix to the final forest plan. Appendix M proved very controversial and eventually led to a Congressional committee request that a peer review process be used to evaluate these studies.³⁹⁹ The scientific reviews gave generally "high marks" to the VPOP study, though they did not believe it went far enough to ensure viable populations on the Tongass, and criticized Appendix M for not being "as thorough or well motivated."⁴⁰⁰

Into this political morass walked a new Alaska Regional Forester. Clearly understanding the problems and mistrust resulting from the VPOP fiasco, he established a new innovative planning structure.⁴⁰¹ The new planning team consisted of two groups: an interagency policy group and an interdisciplinary team. The latter was then divided into a policy and management branch and a science branch. The science branch, assembled by the Director of the Pacific Northwest Research Station (a research arm of the USFS), was comprised of research scientists in fields like wildlife biology, forestry, forest ecology, and the social sciences. Its charge was to gather information and provide reviews and advice on the risks involved in adopting various management options. The research scientists analyzed a

³⁹⁵ See generally Michael A. Padilla, *The Mouse That Roared: How the National Forest Management Act Diversity of Species Provision is Changing Public Timber Harvesting*, 15 UCLA J. ENVT'L. L. & POL'Y 113 (1996-1997).

³⁹⁶ See GAO/RCED-00-45, *supra* note 336, at 22 (providing background on the viable population committee).

³⁹⁷ *Id.* at 23.

³⁹⁸ The USFS was also accused of trying to cover up the information found in the VPOP Committee's draft report. See *id.* at 24.

³⁹⁹ GAO/RCED-00-45, *supra* note 336, at 25.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 27-28.

number of issues important to the Tongass, like wildlife viability, caves and karst resources, fish and riparian management, alternatives to clear-cutting, and socioeconomic impacts. They did this by gathering existing scientific information, reviewing assumptions and strategies used in the plan, and developing estimates of risks to resources that might result from various management alternatives. These reviews were then subjected to the peer review process.

This new planning structure was designed to help keep science and policy/management in separate boxes and more constructively use science in the decision making process. Instead of forest managers solely evaluating the risks to resources for each considered alternative, scientific "risk assessment panels" were convened "to assist decisionmakers in interpreting and understanding the available technical information and to predict levels of risk for wildlife and fish, old growth ecosystems, and local socioeconomic conditions resulting from the different management approaches."⁴⁰² The Director of the Research Station saw the structure as a way "to assure that credible, value-neutral, scientific information was developed independently without reference to management decisions."⁴⁰³ Advocates of the process believe that the use of these "consistency checks" ensured that management decisions were consistent with available scientific information. Consistency, in this case, happened when "[a]ll scientific information made available to managers was considered in the decision . . . [s]cientific information was understood and correctly interpreted by managers," and "[r]esource risks were acknowledged and documented by managers."⁴⁰⁴ For the Station Director, "[s]cientists should not advocate any particular outcome or decision; they should, however, determine whether the decision is consistent with the science information."⁴⁰⁵ This model better appreciates the different roles played by science and management in planning.⁴⁰⁶ Determining acceptable levels of risk, for example, is a decision designed for resource managers, not the scientific method. Here, the proper role of scientists is to advocate that the relevant science is considered when a management decision is made, not to champion a preferred alternative or management direction.⁴⁰⁷

This new approach to planning deserves serious debate as a possible way to deal with conflict at the policy-science interface. Advocates believe that the consistency checks effectively communicated scientific information to decision makers early in the process and helped scientists maintain their legitimate role in planning. Consistency checks also helped identify research

⁴⁰² KENT R. JULIN & CHARLES G. SHAW III, *SCIENCE MATTERS: INFORMATION FOR MANAGING THE TONGASS NATIONAL FOREST 2* (1999).

⁴⁰³ *Id.* at 1.

⁴⁰⁴ *Id.* at 26.

⁴⁰⁵ *Id.*

⁴⁰⁶ Charles G. Shaw III, Fred H. Everest, & Douglas N. Swanston, *Working with Knowledge at the Science/Policy Interface: A Unique Example from Developing the Tongass Land Management Plan*, 27 *COMPUTERS & ELECTS. IN AGRIC.* 377, 378 (2000).

⁴⁰⁷ Charles G. Shaw III et al., *Independent Scientific Review in Natural Resources Management: A Recent Example from the Tongass Land Management Plan*, 73 *NW. SCI.* 58, 60 (1999).

needs, that have since been pursued with Tongass plan follow-up studies.⁴⁰⁸ This type of “science audit,” moreover, ensures that managers cannot so easily misrepresent, reinterpret, or selectively use information in ways not supported by the best available science.⁴⁰⁹ No longer could USFS decision makers cloak explicit political decisions in questionable scientific dress. Now, dubious science-based assertions would be subject to more rigorous review by a more independent body of scientists.

But this design has also received a fair share of criticism. Some question what good these panels are if, in the end, the best available science is “considered,” and then ignored. Many conservationists in the region feel strongly that science is on their side. These conservationists advocate that decision makers give science more weight in the planning process, and believe that the 1997 plan does not deal adequately with the risks made clear by the panels. In short, these conservationists understand that consistency, in this case, means consideration, and consideration is not good enough. Some also see the panels as providing a clever shield for the USFS in that the agency can brag about their use of cutting edge science while not ever implementing it.

There is no lack of recommendations in how science might be better integrated into political decision making.⁴¹⁰ The “science-consistency check” used in the Tongass is but one possibility that might be adapted elsewhere.⁴¹¹ Whatever value such reform measures might have, we should continue to acknowledge the limits of science in the Tongass conflict and elsewhere. The central conflicts in this story transcend scientific analysis. They are mostly political judgments: How much of the Tongass should be

⁴⁰⁸ See generally Douglas A. Boyce Jr. & Robert C. Szaro, *An Overview of Science Contributions to the Management of the Tongass National Forest, Alaska*, 72 LANDSCAPE & URB. PLAN. 251 (2005) (providing an overview of what has since been learned).

⁴⁰⁹ See generally FRED H. EVEREST ET AL., EVALUATION OF THE USE OF SCIENTIFIC INFORMATION IN DEVELOPING THE 1997 FOREST PLAN FOR THE TONGASS NATIONAL FOREST (Pacific Northwest Research Station, General Technical Report 415, 1997) (discussing the standards of scientific objectivity utilized by the Tongass Land Management Planning Team, of which the authors were members).

⁴¹⁰ See, e.g., Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENVTL. L. 397, 450 (2004). “The current treatment of science, hiding the uncertainties and nonscientific decisions, is not building credibility. More transparent decision making, a commitment to continually increasing knowledge, appropriate use of outside peer review, and a demonstrated willingness to pursue all responsible parties could help supply needed credibility.” *Id.*

⁴¹¹ Change could happen by statute, judicial intervention, administrative reform, or further experimentation. Laws, for example, could be rewritten so that scientific uncertainty becomes less important because of clarified agency missions and mandates. There would be no need to study the effects of additional road building on salmon populations, for example, if no more roads were allowed to be built. But such congressional resolution is unlikely, so Congress might instead clarify new burdens of proof and acceptable levels of risk, or even mandate types of peer review for certain decisions. Standing scientific advisory panels could also be mandated and called upon in times of controversy. Courts, with or without congressional direction, might also rethink the level of deference afforded to agencies, forcing them to apply the lessons learned from the “scientific frontiers” and actually monitor what happens after their expert-based predictions are implemented. Adaptive management could also be forced at the administrative level. This would treat more management actions like experiments from which to learn and apply elsewhere, perhaps changing the NEPA one-shot prediction model.

off-limits to timber harvesting? How much old growth do we want to protect? How much risk is acceptable when it comes to protecting biodiversity and subsistence resources? Are the existing 3600 miles of roads in the forest enough? Should subsidies continue and in what direction should they flow? Should Congress and the USFS prioritize community stability and economic development? And if so, how? Such questions have obvious scientific elements—like the important relationship between unroaded old growth areas and biodiversity protection—but it is inappropriate to ask scientists to answer questions like these. As was done in the Tongass, agencies should make their political choices as explicit and transparent as possible. Equivocal data and uncertainty should be clearly explained to the public, including the burden of proof and level of risk found acceptable by the decision maker. Pretending that no such judgment exists sets agencies up to face both public cynicism and legal challenge.

F. Litigation

The conflicts sketched in Part IV inevitably play themselves out in the judicial system. This is due to a number of interrelated factors, including: 1) the problematic language of forest law discussed in Part III, 2) other environmental laws, rules and orders that have substantive and procedural standards limiting agency discretion, and 3) an American political culture of “adversarial legalism.” After explaining these factors, this Section briefly examines the promise and challenges of litigation from a conflict resolution and decision-making perspective, using the Tongass for illustration.

Litigation has affected the management of the Tongass in innumerable ways. With varying levels of success, and using a raft of environmental and procedural laws to draw from, dozens of high-profile lawsuits have been filed over such issues such as: the legality of clear-cutting prior to the NFMA,⁴¹² conspiracy and anti-competitive practices by the pulp mills,⁴¹³ forest plans and timber sales,⁴¹⁴ subsistence,⁴¹⁵ the construction and implementation of the TTRA’s “market demand” language,⁴¹⁶ and the

⁴¹² *Zieske v. Butz*, 406 F. Supp. 258, 260 (D. Alaska 1975) (enjoining clear-cutting by Ketchikan Pulp Company following the landmark Monongahela case that led to the passage of NFMA).

⁴¹³ *See, e.g., Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1307 (9th Cir. 1983) (upholding the district court’s decision finding conspiracy and anti-competitive behavior by Ketchikan Pulp Company and Alaska Lumber and Pulp Company).

⁴¹⁴ *See, e.g., City of Tenakee Springs v. Block*, 778 F.2d 1402, 1404–07 (9th Cir. 1985) (discussing challenges to timber management plans and site-specific timber sales).

⁴¹⁵ *See, e.g., Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223, 1225, 1232 (9th Cir. 1999) (upholding a USFS decision to implement timber sales that would impair subsistence resources defined in ANILCA); *City of Tenakee Springs v. Clough*, 915 F. 2d 1308, 1310 (9th Cir. 1990) (ruling that subsistence needs defined in ANILCA include customary and traditional practices and are not limited to maintaining a sufficient food supply).

⁴¹⁶ *See, e.g., Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995) (holding that the USFS must still comply with prior NEPA requirements despite passage of the TTRA); *City of Tenakee Springs v. Franzel*, 960 F. 2d 776, 779 (9th Cir. 1992) (holding that passage of the TTRA eliminates the possible harms caused by errors in supplemental EISs created for Tongass timber sales); *Alaska Forest Ass’n v. United States*, No.

mandate to consider additional wilderness designation during the forest planning process.⁴¹⁷ As Alaska District Judge James Singleton summarized, the parties “have literally been debating the same factual, ethical, and aesthetic contentions for decades.”⁴¹⁸ The cases continue to mount, moreover, as the TNF counts twenty out of forty-two EISs since 1991, mostly timber sales, resulting in litigation, and the rate of litigation is expected to increase in the future.⁴¹⁹

The courts have come to play a large, but contested, role in public lands governance. While certainly not the only interest group to use litigation, conservationists have extensively relied upon it as a way to stop projects and force agency change. On top of the hundreds of administrative appeals filed, the USFS must deal with a very heavy load of lawsuits that has grown tremendously over the years.⁴²⁰ While the USFS wins most of these cases, it also loses quite a few, and this can lead to changes in forest management. As the courts have become masters in various areas of public policy, their role has also become quite controversial. Depending on who is in political power, they are seen as either an essential check on the arbitrary and capricious behavior of bureaucrats, or judicial activists that routinely thwart the will of the majority by legislating from the bench.

Environmental law promotes high levels of litigation because of its vagueness *and* specificity. In forest law, too many promises have been made to too many constituencies, and those not getting what they want often sue the agency basing their claims on contested statutory language. The USFS thus finds itself attacked by all sides. It also knows that the most important decisions it makes will be judicially reviewed, and thus “bullet-proofs” its

J94-007, slip op. at 2 (D. Alaska Oct. 19, 1995); *see supra* note 268 and accompanying text.

⁴¹⁷ *Sierra Club v. Lyons*, No. J00-0009, slip op. at 11 (D. Alaska Mar. 30, 2001).

⁴¹⁸ *Natural Res. Def. Council v. United States Forest Serv.*, No. J03-0029, slip op. at 2 (D. Alaska June 9, 2004). Singleton continued:

Years of presiding over environmental litigation convinces this court, however, that the overwhelming majority of our fellow citizens are not concerned with these disputes [the proper utilization of old growth forest respectively for habitat and development]. The Court is equally convinced that the members of the public who are concerned are generally allied with one side or the other and that these individuals have already committed to heart each of the arguments going back to the feuds between Pinchot and Leopold.

Id. at 10.

⁴¹⁹ Brink E-mail, *supra* note 326 (providing data on administrative appeals and litigation). The Tongass National Forest also blames litigation and court orders for why it is offering a level of timber for sale that is so far below that permitted under the 1997 forest plan ASQ and planned programmed harvest. *See Tongass Nat'l Forest, Tongass Land and Resource Management Plan (1997) Five Year Review*, at 2 (2004), available at http://www.tongass-5yearreview.net/p.5-year_Review_Final_Determination_Paper.pdf. The Tongass National Forest contends that “[d]elays caused by litigation have stalled the Tongass in achieving a reliable or predictable Federal timber supply,” and that as of May 2005, 14 projects representing 238 million board feet of timber are under litigation. Tongass NF Management Briefing (May 2005) (on file with author).

⁴²⁰ The Department of Justice estimated that there were 78 USFS-related court cases active during 1996 and a total of 299 USFS-related cases pending. BALDWIN, *supra* note 324, at 6.

planning and project documents using the language of synopticism and scientific expertise mandated by environmental laws. This leads to the type of “analysis paralysis” that the agency so dislikes.⁴²¹ The courts have taken a lot of blame for this pattern, but not all judges relish the role they have been forced to play in public lands management.⁴²² After all, if the laws were written more clearly, politicians could answer these questions instead of judges. With the status quo, however, politicians can stand by the goals expressed in various environmental laws, while chastising judges who put these goals into motion, knowing full well that their target will not fight back in the public arena.

The prescription and specificity found in forest law also helps explain high levels of litigation in forest management. Though many public land laws “breathe discretion at every pore,”⁴²³ many of them also carry serious obligations that are judicially reviewable. Myriad environmental laws invite citizens to challenge agency decisions while providing a host of substantive and procedural legal hooks they can use to do so.⁴²⁴ Laws are simply tools, in short, and to matter they sometimes have to be pushed by interest groups and citizens and enforced by the courts.⁴²⁵

A culture of adversarial legalism provides a broader explanation of why the judiciary now plays a central role in forest management, as it does in American life in general.⁴²⁶ Compared to other Western democracies, the U.S. model of policymaking, implementation, and dispute resolution is characterized by adversarial lawyer-dominated litigation. Adversarial legalism springs in part from the nature of American laws. Viewed in cross-national terms, American laws governing land use and environmental protection are extraordinarily complex and vague.⁴²⁷ These “indeterminate”

⁴²¹ See U.S. FOREST SERV., *supra* note 301, at 21 (describing ten years of litigation over a pilot project in Nantahala National Forest).

⁴²² See, e.g., *Natural Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1063 (D. Nev. 1985). In this pivotal case upholding the extraordinary amount of discretion afforded to the BLM with the multiple use mandate, Judge Burns points his finger at our elected branches of government for why judges have become “masters” of various policy areas: “At bottom, however, the primary reason for the large scale intrusion of the judiciary into the governance of our society has been an inability or unwillingness of the first two branches of governments—both state and federal—to fashion solutions for significant societal, environmental, and economic problems in America.” *Id.*

⁴²³ *Id.* at 1058 (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

⁴²⁴ The list of statutes, regulations, policies, and agreements relevant to forest management is impressive. See U.S. Dep’t. of Agric., Forest Service Directives System, <http://www.fs.fed.us/im/directives/> (last visited Apr. 23, 2006) (stipulating agency policy, practice, and procedure).

⁴²⁵ Environmental laws are not self-implementing and can languish because of agency culture, competing priorities, and political pressures, among other reasons. Therefore, along with public participation requirements, environmental laws were designed by Congress with legal hooks that could be used to challenge agencies that are “captured” by the various interests that they are supposed to be regulating. In many ways, then, we are witnessing the collective effects resulting from the suite of environmental laws passed in the 1960s and 1970s.

⁴²⁶ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 209 (2001) (exploring the ways in which the adversary system shapes the struggle between environmental protection and economic development).

⁴²⁷ *Id.* at 218.

laws often lack coherence and require ad-hoc “corrective” legislation. Compromised laws are often the result of divided government and the hyper-pluralistic nature of American politics. Vague language, loopholes, side payments, and the like are regularly used to build majorities and pass laws. But the result is often legal uncertainty and the continuation of politics in a different, more legalistic venue.⁴²⁸

There are several arguments to be made for the positive role litigation can play in public lands governance. First of all, it is used because it often works for the engaged party and can be an effective way to force social change and protect the environment. Litigation over the northern spotted owl in the Pacific Northwest provides an excellent example, as it forced the USFS and BLM to rethink their management paradigms and start planning on an ecosystem-wide basis.⁴²⁹

Environmental litigants have been quite successful when challenging the USFS, and favorable decisions in the courts often lead to changes on the ground, providing further incentives to litigate. Despite the extremely deferential standard used by the courts when reviewing agency decisions,⁴³⁰ conservation interests win an impressive percentage of cases. Using data from the 1970s through 1992, for example, one study shows that the overall odds of winning lawsuits against the USFS were about 37% for NFMA cases and 45% for NEPA cases.⁴³¹ Another study finds that the USFS lost 42.9% of all published courts of appeals cases decided from 1970 through 2001 in which the USFS was a defendant in a lawsuit challenging a management decision.⁴³² And even though the courts have largely turned the NEPA into a procedural statute, environmental plaintiffs have been very successful in using it. From 2001 to 2004, environmental plaintiffs had a 46% success rate when bringing NEPA claims to federal district courts, and a 35.3% success rate in circuit courts.⁴³³ Such success makes it odd, then, that environmental interests have been charged with filing so many frivolous lawsuits, when in

⁴²⁸ “Thus to the participants in these controversies,” says Kagan, “the law’ often appears to be simply an arena for ongoing political struggle, not the authoritative normative anchor that it represents in most other democratic nations.” *Id.* at 219–220.

⁴²⁹ For a comprehensive analysis of the spotted owl controversy, see ROBERT B. KEITER, *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA’S PUBLIC LANDS*, 79–126 (2003).

⁴³⁰ See, e.g., Vic Sher, *Breaking Out of the Box: Toxic Risk, Government Actions, and Constitutional Rights*, 13 J. ENVTL. L. & LITIG. 145, 147–149 (1998) (analyzing the limitations of litigating under the extremely deferential standard set forth in the APA). “The truth is that litigation victories against the government are more often a function of the government’s arrogance, incompetence, or outright efforts to evade the law, than anything else.” *Id.* at 149.

⁴³¹ Elise S. Jones & Cameron P. Taylor, *Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service*, 23 POL’Y STUD. J. 310, 323 (1995).

⁴³² Robert W. Malmshemer, Denise Keele, & Donald W. Floyd, *National Forest Litigation in the U.S. Courts of Appeals*, J. OF FORESTRY, March 2004, at 20, 21. Of the 119 published cases, the USFS won 68 (57.1%). They note, however, that focusing on published cases probably leads to underestimating the USFS’s success rate. *Id.* at 21.

⁴³³ JAY E. AUSTIN ET AL., *JUDGING NEPA: A “HARD LOOK” AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT* 8–9 (Environmental Law Institute ed., 2004). The authors count a case a success when the litigant prevailed on at least one of its NEPA claims and was awarded some type of judicial relief. *Id.* at 7.

fact, pro-development interests regularly lose more frequently in the courts.⁴³⁴

Harder to measure is the more implicit impact the courts have on agency behavior. There is certainly a “rule of anticipated reaction” in effect, for who knows what the agency wanted to do, but did not do, because of the threat of possible litigation.⁴³⁵ The threat of judicial review, injunction, remand, and the like cast a very long shadow on agency decision making. The Center for Biological Diversity’s (The Center’s) petition to list the Queen Charlotte Goshawk provides an example. In 1994, the Center, along with a national coalition, petitioned the U.S. Fish and Wildlife Service (FWS) to place the goshawk on the endangered species list and designate the necessary critical habitat.⁴³⁶ While the FWS fought the courts over its listing,⁴³⁷ the petition did have a major impact on how the Tongass developed its forest plan revision. The viability of the Goshawk was studied extensively, using the risk assessment panels discussed above,⁴³⁸ and this is one reason why the 1997 revision looks so different than the original plan written in 1979. The USFS knew it had a potential problem on its hands, and that conservation groups would use the NFMA and ESA to force the issue in the courts if necessary.

Conversely, the threat of litigation can cut in the opposite direction. Though it might be due to a lack of trust among players in the region, some believe that the USFS builds the appeals and litigation factor into its timber sale plan requests, and thus proposes much more than it thinks it can get because of interest group challenges. True or not, such suspicion demonstrates the rampant mistrust and type of legal logic at play in the Tongass.

Buying time is one of the most important roles that litigation has played in the Tongass and elsewhere. The protracted nature of the legal process can provide a valuable time-out, so that groups can seek change in the political process. Many wilderness areas have been protected because of this strategy—litigation has been used as a way to stop various projects and development activities so that places could be more seriously considered for

⁴³⁴ Jones & Taylor, *supra* note 431, at 310, 324–325, show that environmental litigants had higher success rates than pro-development interests in using the NFMA and NEPA. Malmshiemer et al., *supra* note 432, at 23–24, show that environmental interests won 48.2% of the 85 district court cases they appealed, whereas commodity interests won only 12.5% of the 16 cases they appealed. Finally, AUSTIN ET AL., *supra* note 433, at 8–9, show similar findings with the much smaller group of pro-development plaintiffs who invoked NEPA provisions having a 35% success rate in district courts and an 18.2% success rate in circuit courts.

⁴³⁵ See generally PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT, 279–283 (1981) (outlining the rule of anticipated reaction and its influence on public land management).

⁴³⁶ Petition to List the Queen Charlotte Goshawk *Accipiter Gentilis Laingi* as a Federally Endangered Species, at 2 (1994), available at http://www.biologicaldiversity.org/swcbd/species/goshawk/qs_PETITION.pdf.

⁴³⁷ The Center’s most recent victory came as the Court ordered the FWS to reconsider and explain its determination of the Goshawk’s significant portion of its range. *Sw. Ctr. for Biological Diversity v. Norton*, No. 98-0934 (D.D.C. 2002).

⁴³⁸ 1997 TLMP ROD, *supra* note 140, app. N. at 5.

wilderness designation and other types of protection.⁴³⁹ When congressional and executive races are so closely contested, delaying tactics make even more sense because a slight tilt in power can change the dynamics of a situation very easily. In politics, it's called playing defense, and it's what you do when not in power. Along with other plaintiffs, Earthjustice's docket is representative of the type of defense played by the conservation community in southeast Alaska: dozens of timber sales proposed in roadless areas, a new proposal for a long-term (ten-year) timber contract, and a bill introduced at the state level requiring litigants to pay the other side's attorney fees when they lose in court, among several others.⁴⁴⁰ Like other groups, they have drawn a line in the sand when it comes to new sales in roadless areas, and they hope the strategy can buy precious time so that these places can be more permanently protected in the future.

Earthjustice uses the story of Admiralty Island as an example of what litigation has done for the Tongass.⁴⁴¹ At roughly one million acres in size, and with the densest concentration of brown bears in the world, Admiralty, or Kootznoowoo as the Tlingit call it, is one of the longest and most complex campaigns in this organization's history. The sides first engaged when the USFS proposed the now infamous 8.75 billion board feet timber sale that would take place on parts of Admiralty. As discussed above, the court in *Sierra Club v. Hardin* found that clear-cutting roughly ninety-nine percent of commercial timber lands in the Tongass, at five dollars per thousand board feet, was consistent with the broad discretion granted by the MUSYA.⁴⁴² But emerging out of this colossal setback was a victory of sorts. New scientific information about the ecological impacts of the sale came to light during the appeals process and a new trial was ordered. Nearly two years after this trial ended, United States Plywood-Champion pulled out of the timber sale, and Admiralty was temporarily spared.

Similar dynamics played out again following the passage of the ANCSA. This time, Native corporations intended to select land on Admiralty for timber harvesting. The implications for the island and its people would largely be the same, so litigation commenced. As it played out, President Carter and Secretary Andrus declared Admiralty a National Monument to be

⁴³⁹ See generally TOM TURNER, *WILD BY LAW: THE SIERRA CLUB LEGAL DEFENSE FUND AND THE PLACES IT HAS SAVED* (1990) [hereinafter TURNER, *WILD BY LAW*] (providing case studies in how litigation has helped save various places from development); TOM TURNER, *JUSTICE ON EARTH: EARTH JUSTICE AND THE PEOPLE IT HAS SERVED* (2002) [hereinafter TURNER, *JUSTICE ON EARTH*] (providing an update on the positive role that litigation plays in conservation and wilderness preservation); Vawter Parker, *Natural Resources Management by Litigation*, in *A NEW CENTURY FOR NATURAL RESOURCES MANAGEMENT* 209, 214–219 (Richard L. Knight & Sarah F. Bates eds., 1995) (providing more examples of how litigation efforts prevented development by buying time for public intervention); DOUG SCOTT, *THE ENDURING WILDERNESS: PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT* (2004) (discussing methods of protecting and creating wilderness).

⁴⁴⁰ Earthjustice, Juneau Office Docket, <http://www.earthjustice.org/regional/juneau/index.html?ID=&show=Docket> (last visited Apr. 23, 2006).

⁴⁴¹ TURNER, *WILD BY LAW*, *supra* note 439, at 32–42 (providing the Sierra Club Legal Defense Fund's interpretation of how Admiralty was saved from development).

⁴⁴² *Sierra Club v. Hardin*, 325 F. Supp. 99, 127 (D. Alaska 1971).

managed by the USFS.⁴⁴³ Its status was codified as such in the ANILCA,⁴⁴⁴ though so too were some controversial inholdings granted to Shee Atika. As this Native corporation prepared for harvesting, numerous lawsuits were filed by conservationists and the residents of Angoon, a village on the west coast of the island who have fought the USFS for years. While these legal battles are won and lost, 900,000 acres (more than ninety-seven percent of the monument) remain protected wilderness, owing much to the litigation and those groups using this tool.⁴⁴⁵ As with litigation in general, counting victories and defeats is not as easy as it appears. But as this case shows, what matters most happens on the ground. Admiralty, moreover, is just one example. In conjunction with other strategies, litigation has helped protect large parts of the Tongass and is a major reason why the USFS has modified its position.⁴⁴⁶

As Earthjustice sees it, they are fighting Goliath—corporations with deep pockets and political allies. Given the tilted playing field, the courts become the last resort, to force agencies to obey public laws. Litigation also serves the purpose, then, of creating a crisis atmosphere that gets disputants to the negotiating table.⁴⁴⁷ Empowerment and accountability are often invoked in the defense of the litigation as a tool for reform. For Earthjustice, “[i]t allows ordinary citizens to confront far more powerful adversaries in industry and government and forces them to play by common rules. And it can prolong battles until the public at large becomes aware of the dispute and can work its will through its elected representatives.”⁴⁴⁸ The organization recognizes the limitations of litigation, and that it must be backed by public support and a larger environmental campaign. But it also believes that this tool has changed the terms of the Tongass debate, with a more lasting impact. Juneau-based Earthjustice attorney Eric Jorgensen offers an example: “Even if we lose the roadless rule, the public attitude has firmed up. Millions of people are now paying attention thanks to all the commotion. Any time the Forest Service tries to sell timber in a roadless area it will be a big deal.”⁴⁴⁹

The extensive use of litigation also presents a number of problems and challenges to public lands governance. First of all, courts do not generally have to wrestle with the trade-offs and compromises inherent in political decision making. They can order their decrees and injunctions with ease, but

⁴⁴³ Proclamation No. 4611, 43 Fed. Reg. 57,009, 57,131 (Dec. 1, 1978). Section 17(d)(2) of ANCSA authorized the withdrawal of unreserved public lands by December 1978, but Congress failed to meet this deadline. Faced with the prospect of these lands becoming developed, Carter and Andrus used their power under the Antiquities Act, 16 U.S.C. § 431 (2000), to withdraw 56 million acres of public lands in Alaska for designation as national monuments.

⁴⁴⁴ Pub. L. No. 96-487, §503(b), 94 Stat. 2399 (1980) (designating 921,000 acres as national monument to be managed by the Forest Service).

⁴⁴⁵ FRIENDS OF ADMIRALTY ISLAND, ADMIRALTY ISLAND: A CELEBRATION, 1978–1998 (1998) (providing a history of Admiralty Island and the people whom have fought for it).

⁴⁴⁶ See generally TURNER, JUSTICE ON EARTH, *supra* note 439, at 165–185 (providing additional examples of Earthjustice litigation in southeast Alaska).

⁴⁴⁷ *Id.*

⁴⁴⁸ TURNER, WILD BY LAW, *supra* note 439, at xvii.

⁴⁴⁹ TURNER, JUSTICE ON EARTH, *supra* note 439, at 185.

do not have to manage other agency responsibilities, nor grapple with their limited budgets and political pressures. Litigation is also primarily a negative strategy of environmental protection. It can stop a lot of things, but it is generally not a pro-active and future-oriented tool that can be used to create a different future. Without an active movement behind it, litigation can help win the battles, while losing the war.

When used frequently, adversarial legalism is also subject to political backlash and perceptions of environmental obstructionism. This is a common framing in southeast Alaska: well-paid environmental “gladiators” are abusing the judicial system by filing frivolous appeals and lawsuits that have the effect of creating too much uncertainty for the timber industry and too much paperwork for the USFS. The response has been multifaceted. Instead of questioning why the agency loses so often, representatives like Senator Stevens (R.-Alaska) have used appropriation riders as one way to remove judicial review from the equation.⁴⁵⁰ Other strategies include further restricting what is subject to NEPA analysis and review,⁴⁵¹ and trying to make losing litigants pay for the associated court costs of suing the government.⁴⁵²

Also worth questioning, though hard to measure, is the relationship between winning in the courts and more enduring conservation benefits on-the-ground. While countless ill-conceived projects have been stymied by litigation, the victories are often fleeting and incomplete. Like a bad horror movie, the proposals come back time and again, only in different dress. Winning in the court certainly buys time. Without a larger political advance, it does little more.

While proponents see the courts as venues of authentic and meaningful public participation, critics see a judicial system run amok due to an exclusive set of actors fighting for their special interests. Critics of “institutional reform litigation” see a process dominated by an exclusive “controlling group” of interests that end up negotiating complicated court decrees and injunctions that decide what idealistic statutory goals will be obtained, and “[t]he great mass of less organized and sophisticated interests and the public at large get no seats at this judicially managed, invitation-only table of government.”⁴⁵³

Litigation can also be a double-edged sword. Ironically, public law litigation has been used by the Bush Administration as a “Trojan Horse” approach to public land reform.⁴⁵⁴ A number of intractable public land conflicts have been dealt with by settling lawsuits brought by commodity interest groups against Clinton Administration policies. The roadless rule, wilderness study areas in southern Utah, R.S. 2477 highway rights of way

⁴⁵⁰ See *supra* notes 362–77 and accompanying text.

⁴⁵¹ See *infra* Part VI (discussing management alternatives for the Tongass National Forest).

⁴⁵² See H.R. 145, 23d Leg., 1st Sess. (Alaska 2003) (requiring unsuccessful public interest litigants to be liable for the opposing sides attorney fees).

⁴⁵³ ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 158 (2003).

⁴⁵⁴ Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10,397, 10,397 (2004).

claims, and the Northwest Forest Plan, among several others, have followed a similar pattern: the Bush Administration chooses not to litigate or to “get sued and supply a sweetheart settlement.”⁴⁵⁵ Avoiding the environmental analysis required by the NEPA is another prong in this strategy, as the Bush Administration regularly chooses to make arguments in Court that are hostile to NEPA.⁴⁵⁶

The roadless rule’s application to the Tongass is an example say critics. The Tongass was included in the 2001 roadless rule,⁴⁵⁷ but was then removed because of a settlement between the U.S. and Alaska.⁴⁵⁸ The state argued that the rule violated several laws pertaining to Alaska, including the ANILCA’s provision forbidding new reserves in Alaska without congressional consent.⁴⁵⁹ Though roadless areas are not federally protected wilderness “reserves,” the Administration settled with Alaska and exempted the Tongass from the roadless rule,⁴⁶⁰ providing an example of what some conservationists consider to be the Bush “sue and settle” strategy.⁴⁶¹ Others suggest that the skids of the deal were greased by the close relationship between Governor Murkowski, his Chief of Staff Jim Clark who is a former timber industry lawyer, and Undersecretary Rey, who is a former timber industry lobbyist and former aide to the Governor.⁴⁶² Evaluating the precedent and legitimacy of this approach is beyond our purview. But the strategy does show how litigation, by itself, is a tenuous political weapon that can be used at cross purposes.

Having to manage so many environmental conflicts can also give the judiciary an imperial-like reputation. Members of the Alaska delegation, for example, regularly attack Ninth Circuit decisions due to perceptions of

⁴⁵⁵ *Id.*

⁴⁵⁶ WILLIAM SNAPE III & JOHN M. CARTER II, WEAKENING THE NATIONAL ENVIRONMENTAL POLICY ACT: HOW THE BUSH ADMINISTRATION USES THE JUDICIAL SYSTEM TO WEAKEN ENVIRONMENTAL PROTECTION 5 (2003) (“[S]tatistics illustrate that the Bush administration is not only frequently making arguments hostile to NEPA in federal court, but is also frequently finding these arguments rejected by the federal judiciary.”).

⁴⁵⁷ Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

⁴⁵⁸ Special Areas, Roadless Area Conservation; Applicability to the Tongass National Forest, 68 Fed. Reg. 75,136, 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294) (explaining the settlement between Alaska and the Department of Agriculture).

⁴⁵⁹ *Id.*

⁴⁶⁰ See National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 68 Fed. Reg. 41,864, 41,864 (July 15, 2003); Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 41,865, 41,865 (proposed July 15, 2003) (to be codified at 36 C.F.R. pt. 294).

⁴⁶¹ Letter from Mike Anderson, Wilderness Soc’y, to Interested Persons (June 11, 2003) (on file with author). According to Anderson, “the Administration is simply using the State of Alaska settlement as legal cover for what is a patently political deal to benefit the timber industry.” *Id.* The Bush administration, says Anderson, “schemed to defeat the Rule by failing to defend it in court.” *Id.*

⁴⁶² See Press Release, Alaska Rainforest Campaign, Alaska Wilderness League, Alaska Coalition, Bush Administration Set to Strip America’s Rainforest in Alaska from Roadless Rule (June 9, 2003), available at http://www.alaskawild.org/releases/2003/release6_9_03.pdf (discussing the environmental impact of lifting the Tongass Roadless Rule because of the influence of biased government officials).

liberalism, ideological bias, and error.⁴⁶³ And this is one reason why they support legislation to remove Alaska from the Ninth Circuit's jurisdiction and place it into a newly created Thirteenth Circuit.⁴⁶⁴

A more substantial challenge to environmental litigation comes from the contemporary nature of conservation problems and science. Rapid advances in ecology, trends in collaborative conservation, the nature of "second generation" environmental problems, and the growing use of experimentation will pose tremendous challenges to traditional environmental "rule of law" litigation.⁴⁶⁵ As discussed in greater detail below, environmental law may likely play an important but different role in the future, serving as a backstop and "regulatory penalty default" that provides an incentive to find different methods of problem-solving and conflict resolution.⁴⁶⁶

VI. MOVING FORWARD

This Section outlines a few options and alternatives in how we might proceed with conflict about the Tongass. Rather than provide an exhaustive reiteration of proposals floating about,⁴⁶⁷ it focuses on a few possible areas of reform and how they might shape the conflicts and governing arrangements discussed herein.⁴⁶⁸ But, before beginning, a few caveats and

⁴⁶³ *Tongass Land Management: Joint Hearings Before the S. Comm. on Energy and Natural Resources, and the H. Comm. on Resources*, 105th Cong. 5, 5 (1997) (statement of Frank H. Murkowski) (criticizing the Ninth Circuit for various reasons related to forest planning).

⁴⁶⁴ Press Release, Congressman Young, Congressman Young Supports Amendment to Split the Ninth Circuit Court (Oct. 5, 2004), <http://donyoung.house.gov/PressRelease.aspx?NewsID=1062> (last visited Apr. 22, 2006). Young noted that the Amendment was good for Alaska "because we will no longer be governed by adverse court decisions made for San Francisco and that way of life." *Id.*; see also The Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong. (2005) (proposing to split the Ninth Circuit into three separate circuits).

⁴⁶⁵ See generally A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation*, 19 PACE ENVTL. L. REV. 575, 609 (2002) (analyzing the future of the "rule of law" strategy to environmental protection).

My heretical, normative conclusion is that if environmental protection is to succeed as a legitimate, permanent policy perspective, it must evolve from a negative strategy of trying to stop an action that disturbs a mythical natural baseline to a pervasive, affirmative one which provides incentives for creative super-legal protection solutions that are sometimes 'extra' legal.

Id.

⁴⁶⁶ See *infra* notes 496-97 and accompanying text.

⁴⁶⁷ See Beaver et al., *supra* note 46, at 14-26 for a helpful comprehensive review.

⁴⁶⁸ Administrative planning-based reform and forest certification are two more alternatives worth consideration and were included in the draft manuscript. Learning from the Tongass and other recent planning endeavors, the USFS adopted a new set of planning regulations that it believes constitutes a "paradigm shift in land management planning." National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005) (to be codified at 36 C.F.R. pt. 219). I am not as enthusiastic as the Forest Service for several reasons. See Martin Nie, *The 2005 National Forest System Land and Resource Management Planning Regulations: Comments and Analysis*, (Paper presented at the Bolle Center for People and Forests, The U.S. Forest Service Planning Rules: What They Mean, Why They Matter Mar. 7, 2005), <http://forestpolicy>.

qualifiers are necessary. First, however locked it might seem, opportunities and new approaches to public lands conflict and governance abound. Each comes bundled with an assortment of possibilities, risks, and unknowns. Some level of continued conflict is the only certainty. These are public lands and we will continue to debate their meaning and importance well into the future. Messy, but such is democracy.

At this point, many conflicts over the Tongass and public lands are irrepressible. Though the means by which they are governed often exacerbate them, many of these conflicts are based on competing values, visions, and interests. Therefore, changes in political institutions and decision-making processes may simply shift conflicts from one venue to another. It will be called the “whack-a-mole” principle because of its similarity to the game in which one tries to “whack” a mole, only to find it reappearing in yet another unpredictable hole. Similarly, suppressing conflict in one venue will likely result in its emergence somewhere else. The alternatives outlined below thus address how changes in governance may likely redirect, rather than resolve, conflicts about forest management.

In policy, an inverse relationship exist between political feasibility and potential effectiveness. For instance, an overhaul of forest-relevant law would certainly change things, but it is unlikely that such an undertaking is going to happen anytime soon. Though obvious, it is also important to recognize the situational nature of any proposed “solution” to the Tongass problem, and to public lands management problems in general. None of the approaches sketched below are value-neutral. Each has its own assumptions, arguments, and ideological biases. So approaches that might seem attractive to some readers, others will find quite objectionable. The remedy ultimately depends on the diagnosis, or in policy-speak: how the issue is framed and the problem defined. Thus, readers wanting more permanent resolution—either to protect more lands or harvest more timber—may favor friendly legislative reform. If the problem, however, is defined in terms adversarial governance and the need for more compromise, some sort of collaborative endeavor might prove most attractive. Or, a market-based approach might be the ticket for those defining the problem in terms of economic globalization. The following discussion is by no means exhaustive, but it does highlight a few approaches that are relatively feasible and have some interest among various actors in southeast Alaska and beyond. Its grouping is mainly for organizational purposes, for many of the approaches are cross-cutting and contain statutory, administrative, and economic measures.

typepad.com/nfma/nie_bolle_2005 (last visited Apr.23, 2006). As for using the Forest Stewardship Council’s certification program on the TNF, I seemed more interested than many of my interviewees at the time whom were mostly suspicious of the idea. The USFS, however, is not as dismissive and is currently experimenting with its application on a few national forests. See United States Forest Serv., Forest Certification Test Project, <http://www.fs.fed.us/news/2005/releases/08/factsheets.pdf> (last visited Apr. 23, 2006) (describing study of how third party auditing standards to help the Forest Service determine necessary future policy and management changes).

A. Legislative Reform

The most obvious way of managing the conflicts discussed herein is by new legislation. We have seen that the decision-making processes in forest policy—planning, appeals, higher-level involvement, appropriations, science, and litigation—are often used and abused as a direct or indirect result of the nature of our public land laws. Clarified legislation, one way or another, would fundamentally change the nature of these processes. This is not a revelation. The Government Accountability Office (GAO, formerly the General Accounting Office), among others, has provided an in-depth analysis of USFS decision making, finding that many conflicts and management problems are rooted in disagreement over the agency's mission, mandate, and long-term strategic goals.⁴⁶⁹ The GAO report returns time and again to this central issue, declaring that “[w]ithout agreement on the Forest Service's mission priorities, GAO sees distrust and gridlock prevailing in any effort to streamline the agency's statutory framework.”⁴⁷⁰ A Society of American Foresters' report also focuses on the statutory mission of the USFS. It is based, perhaps surprisingly, on the belief that “[t]he purposes of the national forests and public lands are no longer clear” and that “the problems cannot be resolved through regulatory reform or through the appropriations process” and that “new legislation is warranted.”⁴⁷¹

A number of statutory solutions have been proposed for the Tongass. The Alaska Rainforest Campaign, for example, is pushing a bill in Congress that would designate millions of acres in the Tongass and Chugach as wilderness, with millions more off limits to commercial logging, clear-cutting, and economic development.⁴⁷² Logging, instead, would have to take place along the existing road system. Because development proposals in roadless areas trigger so much opposition, another approach is to pass roadless area conservation legislation; to do by statute what the USFS tried to do administratively.⁴⁷³ Of course, both proposals are heresy to Alaska's timber industry and congressional delegation. That delegation has

⁴⁶⁹ See GEN. ACCOUNTING OFFICE, FOREST SERVICE DECISION-MAKING: A FRAMEWORK FOR IMPROVING PERFORMANCE, GAO/RCED-97-71 5 (1997).

⁴⁷⁰ *Id.* at 12. The GAO's analysis of the Tongass planning process is similar: “The friction on the Tongass over mission priorities is characteristic of an agency in transition and mirrors conflicts within the Forest Service as a whole—some Forest Service personnel support the agency's shift in emphasis while others continue to believe that timber should receive the same priority it did in the past.” GEN. ACCOUNTING OFFICE, TONGASS NATIONAL FOREST: LACK OF ACCOUNTABILITY FOR TIME AND COSTS HAS DELAYED FOREST PLAN REVISION, GAO/RCED-97-153 5 (1997) [hereinafter GAO/RCED-97-153].

⁴⁷¹ FORESTS OF DISCORD, *supra* note 30, at 50–51.

⁴⁷² The Alaska Rainforest Conservation Act, H.R. 979, 108th Cong. (2003). The Act protects 9.16 million acres in the Tongass and has 124 co-sponsors. For an overview, including a map of protected areas, see the Alaska Rainforest Campaign, <http://www.akrain.org/> (last visited Apr. 23, 2006).

⁴⁷³ Two such bills were introduced following the roadless rule's controversy. See Roadless Area Conservation Act of 2003, S. 1200, 108th Cong. (2003) (establishing a uniform national policy for protecting inventoried roadless areas); National Forest Roadless Area Conservation Act, H.R. 2369, 108th Cong. (2003) (directing the Department of Agriculture to implement 66 F.R. 3244, 36 C.F.R. § 294 which “establish[es] prohibitions on road construction, road reconstruction, and timber harvesting in inventoried roadless areas . . .”).

introduced alternative legislation that would transfer significant acreage from the Tongass to the state, with the purpose of increasing timber harvesting as a way of generating revenue for Alaska's university system.⁴⁷⁴ If one cannot get more trees from the Tongass, the logic goes, then get the Tongass out of the national forest system.

A congressionally sanctioned omnibus wilderness package provides another legislative approach. With much controversy, federally designated wilderness is moving forward by Congress in "omnibus style"; that is, as part of larger deals involving economic development, land transfers and exchanges, water rights, and motorized recreational access, and other items. Though the history of the Wilderness Act is one of compromise, including the "release" of some acreage to multiple use management in exchange for other acreage being designated as wilderness, these new proposals seem to be of a different order. Such is the case in Nevada, for example, whereby recent wilderness designation is but one part of huge mega-deals involving federal land sales and transfers to accommodate Nevada's growth, water rights-of-ways, and the release of wilderness study areas.⁴⁷⁵ "Collaboration" is also driving some of these processes, like Oregon's Steens Mountain Wilderness designation in 2000,⁴⁷⁶ Idaho's equally controversial Owyhee Initiative,⁴⁷⁷ and the Boulder-White Cloud wilderness proposal.⁴⁷⁸ The Steens

⁴⁷⁴ At the state level, Governor Murkowski pushed for legislation transferring 251,661 acres. H.B. 130 (Alaska 2005), ch. 8 2005 1st Spec. Sess.; University of Alaska, Land Grant List, http://www.dnr.state.ak.us/mlw/planning/ualands/land_grant_list.pdf (last visited Apr. 23, 2006) (summarizing land distributions authorized by H.B. 130). His daughter, United States Sen. Lisa Murkowski (R-Alaska), has introduced similar legislation in Congress transferring up to 275,000 of federal lands. S. 293, 109th Cong. § 2(a)-(b) (2005).

⁴⁷⁵ See The Clark County Conservation of Public Land and Natural Resources Act, H.R. 5200, 107th Cong., 116 Stat. 1994 (2002). Among other provisions, the Act designates additional wilderness, releases wilderness study areas, grants electrical transmission lines rights-of-way, allows various land exchanges, calls for the sale of federal parcels with proceeds going to various uses, and includes a number of other "public interest conveyances." See also the Lincoln County Conservation, Recreation, and Development Act, H.R. 4593, 108th Cong., 118 Stat. 2403 (2004). Among other items, it similarly designates wilderness, releases wilderness study areas, provides for water pipeline rights-of-way, and calls for the disposal, and conveyance of other federal lands.

⁴⁷⁶ Steens Mountain Cooperative Management and Protection Act, H.R. 4828, 106th Cong., 114 Stat. 1655 (2000). The Act designated the Steens Mountain Cooperative Management and Protection Area, including the Steens Mountain Wilderness, with one objective "to promote and foster cooperation, communication, and understanding and to reduce conflict between Steens Mountain users and interests." *Id.* § 102(b)(5). It also established an advisory council and a science committee to provide advice on how to manage the area. *Id.* §§ 131-32.

⁴⁷⁷ The Owyhee Initiative is a collaborative effort among various stakeholders to resolve a host of public lands issues in the high desert area common to Idaho, Oregon, and Nevada. At the time of publication, the process is ongoing, though a number of deals have been made, and Sen. Michael Crapo (R-Idaho) has agreed to introduce the agreement as legislation. For more on the substance and process, see Owyhee Initiative, <http://www.owyheeininitiative.org/> (last visited Apr. 23, 2006).

⁴⁷⁸ See Central Idaho Economic Development and Recreation Act of 2004, H.R. 5343, 108th Cong. (2004). Among a host of other items, this bill proposed to convey selected federal USFS and BLM lands to counties and cities in Idaho, partly in exchange for the creation of new central Idaho wilderness areas. Other provisions include the continuation of some motorized trails, the construction of "motorized recreation parks," and a voluntary federal grazing permit buyout for ranchers in the area. *Id.* §§ 108, 203, 402-03.

and Owyhee projects also contain provisions setting up outside scientific review panels, something of relevance to the Tongass. Proponents seem to see any progression toward wilderness positively, and are especially encouraged when it is taking place in Idaho, the most Republican-dominated state in the country. For proponents, it is a practical way around the congressional gridlock and western opposition that has stymied the wilderness movement for years. Critics, on the other hand, are alarmed by such “quid pro quo” wilderness, seeing it as capitulation and setting dangerous precedent that would facilitate development, privatization, and intensified land use.⁴⁷⁹ Also, critics are not impressed by the so-called collaboration that is being used to cut these deals and are disturbed by the exclusivity and secrecy of the process.⁴⁸⁰

The point here is to simply raise the possibility of using a similar approach to the Tongass. For example, instead of administratively protecting roadless lands in the region, perhaps some portion of them could be federally designated wilderness in exchange for something else. As in Nevada and Idaho, this would take careful shepherding by Alaska’s congressional delegation, because at least one member would have to play central broker. If the sides were willing to compromise, this approach could help correct some of the conflicts driven by the legislation discussed above, result in more wilderness designation, and perhaps provide a little more stability for Alaska’s timber industry. Of course, such a proposal might be viewed as sacrilege by some interests. I certainly would not volunteer to initiate such a discussion with Senator Stevens, given his understanding and impatience about the “broken promises” of the ANILCA and TTRA. Nor would I relish proposing the idea to conservationists who have fought so hard to protect the region’s roadless areas. Courage aside, there is also the philosophical issue of whether or not the quid pro quo wilderness template creates an unsustainable dichotomy between resource use and protection. It perhaps unnecessarily limits our options to wilderness-style preservation and large-scale economic development, when the future could include a more innovative mixture. Then again, such a package could include any number of interesting trades and governing arrangements.

B. Public Participation and Collaboration

The persistent and pervasive call for increased public participation and collaboration in environmental management is impossible to ignore.⁴⁸¹

⁴⁷⁹ See Janine Blaeloch & Katie Fite, *Quid Pro Quo Wilderness—A New Threat to Public Lands* 1 (Western Land Exchange Project & Western Watersheds Project, 2005) (“If this trend continues, the days of the stand-alone wilderness bill, along with the strict observance of the letter and spirit of the Wilderness Act, may become relics of the past.”), available at <http://www.westlx.org/assets/quid-pro-quo.pdf>.

⁴⁸⁰ *Id.* at 8.

⁴⁸¹ See generally ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST 1–11 (Philip Brick et al. eds., 2000) (reviewing the growth of collaborative conservation in Western environmental management); Ronald Brunner & Christine H. Colburn, *Harvesting Experience*, in FINDING COMMON GROUND: GOVERNANCE AND NATURAL RESOURCES IN THE AMERICAN WEST 201, 201–47 (Ronald D. Brunner et al. eds., 2002).

NFMA, for example, was passed partly as a way to democratize forest management. No longer would the public simply acquiesce to the professional expertise of narrowly trained foresters who terraced too many hillsides and clear-cut too many acres. Instead, the decision making process would become more participatory.⁴⁸² NFMA thus reemphasized the need for public participation⁴⁸³—mandated in other legislation as well—and its use and “consideration” has become a routine part of national forest management.⁴⁸⁴

Many people are not satisfied with a primarily reactive and minimalist approach to public participation, like that found in a rulemaking model, and they often deride it as “decide, announce, and defend,” partly because of their perceptions of predetermined decision making. Various forms of alternative dispute resolution and “stakeholder-based collaborative conservation” (or “civic republicanism”) have emerged as a way of dealing with a variety of intractable environmental disputes. Often arising from the grassroots, “coalitions of the unlike” have tried to find areas of common ground to provide more integrated, longer-lasting, and less adversarial approaches to natural resources governance.⁴⁸⁵ Many are based on the assumption that the fundamental drivers of conflict are the adversarial institutions and processes used to resolve them.⁴⁸⁶

(examining the process of innovation, diffusion and adaptation in collaborative conservation and natural resources governance); DANIEL KEMMIS, *THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST* xvii–xxiv (2001) (exploring the possibility of decentralizing public lands management from the national to regional level); MATTHEW MCKINNEY & WILLIAM HARMON, *THE WESTERN CONFLUENCE: A GUIDE TO GOVERNING NATURAL RESOURCES* xvii–xx (2004) (advocating more collaborative approaches to Western natural resources governance); JULIA M. WONDOLLECK & STEVEN L. YAFFEE, *MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT* 3 (2000) (explaining the importance of “building bridges” and the key factors often associated with successful collaborative efforts).

⁴⁸² As Dean Bolle saw it, the public may know little about how a clear-cut ought to be done, but it should have a whole lot to say about whether there should be a clear-cut in the first place. See Arnold W. Bolle, *Public Participation and Environmental Quality*, 11 NAT. RESOURCES J. 497 (1971) (analyzing why public participation should be used throughout the administrative decision making process, including at the problem identification and definition stage); Wilkinson, *supra* note 134, at 662 (discussing Bolle’s contribution to the National Forest Management Act); Donna Metcalf, *Tributes to Arnold Bolle*, 15 PUB. LAND L. REV. 1 (1994) (paying tribute to Bolle and his life’s work).

⁴⁸³ National Forest Management Act of 1976, 16 U.S.C. §§ 1601(d), 1604(d) (2000).

⁴⁸⁴ Over 30,000 comments were received and analyzed throughout the Tongass planning process, for example. Oral, written, and postcard-type comments were solicited through numerous public hearings, open houses, NEPA, and rulemaking procedures. TLMP FEIS, *supra* note 18, app. at L-2. The input, coming from all fifty states, was thoroughly organized and “considered” by content analysis teams, planners, and other decision makers. See U.S. FOREST SERV., ALASKA REGION, ANALYSIS OF PUBLIC COMMENT FOR THE TONGASS LAND MANAGEMENT PLAN REVISION, REVISED SUPPLEMENT TO THE DRAFT ENVIRONMENTAL IMPACT STATEMENT AND FOREST PLAN 1 (1996) (administrative use document on file with author) (providing a typical content analysis of approximately 21,000 letters and questionnaires and 452 hearing testimonies). Ultimately, officials consider the comment along with myriad other legal mandates and responsibilities, like multiple use, endangered species protection, and subsistence.

⁴⁸⁵ Donald Snow, *Coming Home: An Introduction to Collaborative Conservation*, in *ACROSS THE GREAT DIVIDE*, *supra* note 481, at 6.

⁴⁸⁶ See, e.g., John A. Kitzhaber, *Creating a Society to Match Our Scenery: Resolving Natural Resource Disputes in the 21st Century*, 25 PUB. LAND & RESOURCES L. REV. 1, 2 (2004) (arguing

In forest management, the most well-studied and controversial “collaborative” is the Quincy Library Group (QLG), formed as a way to promote ecological sustainability and community stability in the Sierra Nevada of northern California.⁴⁸⁷ The group emerged from a context partially similar in many ways to that in southeast Alaska, with a backdrop of declining timber harvests and increasing animosity. Like the Tongass, conflicts were being managed through adversarial channels, like planning, appeals, and litigation. Cutting to the chase, a disparate band of citizens were unhappy about the level of conflict in their communities and how it was being managed by the USFS. Taking matters into their own hands, the group hammered out a “Community Stability Proposal” on how to manage the Lassen, Plumas, and part of the Tahoe National Forests. With the USFS unable or not willing to adopt the proposal, the QLG took to Washington and succeeded with passage of The Herger-Feinstein Quincy Library Group Forest Recovery Act.⁴⁸⁸ The Act required that the pilot project must be consistent with applicable federal laws,⁴⁸⁹ but it also provided place-specific direction concerning how these national forests should be managed, in terms of fire, silviculture, roadless area protection, and other things.

This pilot project forced a constructive and wide-ranging debate about public lands conflict and governance. For proponents, it is a model to be replicated elsewhere, a way to more collaboratively govern public lands, within the parameters of federal environmental law, while also ensuring Congressional accountability.⁴⁹⁰ For critics it represents a dangerous slide toward devolution and an unlawful abdication of responsibility.⁴⁹¹ They see it as empowering local economic interests over the will of a national majority, with “communities of place” given preference over more numerous “communities of interest.”⁴⁹² There is also the tricky question of what role a

that the problems are “not so much with the people engaged in the debate, but rather with the institutions and organizational structures through which they are seeking to resolve their disputes”).

⁴⁸⁷ See generally Quincy Library Group, <http://www.qlg.org/> (last visited Apr. 23, 2006) (providing information and updates on QLG activity); U.S. Forest Serv., Herger Feinstein Quincy Library Group Pilot Project, <http://www.fs.fed.us/r5/hfqlg/> (last visited Apr. 23, 2006) (providing statutory background, Forest Service involvement, and other information); Dave Owen, *Prescriptive Laws, Uncertain Science, and Political Stories: Forest Management in the Sierra Nevada*, 29 *ECOLOGY L.Q.* 747, 747–804 (2002) (analyzing the QLG model); Christine H. Colburn, *Forest Policy and the Quincy Library Group*, in *FINDING COMMON GROUND*, *supra* note 481, ch. 5; Timothy P. Duane, *Community Participation in Ecosystem Management*, 24 *ECOLOGY L.Q.* 771, 784–96 (1997) (treating QLG as a case study for community participation management).

⁴⁸⁸ Pub. L. No. 105-277 (A), §101(e) (Title IV, §401), 112 Stat. 2681-305 (1998).

⁴⁸⁹ *Id.* § 401(I), 118 Stat. 2681-309 (“Nothing in this section exempts the pilot project from any Federal environmental law.”).

⁴⁹⁰ For a sympathetic accounting see generally Brunner & Colburn, *supra* note 481 at 201–47.

⁴⁹¹ George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOLOGY L.Q.* 602, 603 (1998) (arguing that it is the latest ideological fad and way of passing the buck on controversial allocation issues). For a comprehensive review, see DOUGLAS S. KENNEY, *ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS ACTIVE IN NATURAL RESOURCES MANAGEMENT* 1–5 (U. Colo. Nat. Resources L. Ctr. ed., 2000).

⁴⁹² See, e.g., Michael McClosky, *Local Communities and the Management of Public Forests*, 25 *ECOLOGY L.Q.* 624, 627–28 (1999) (arguing that the shift toward localism disenfranchises

proposal like this plays vis-à-vis more traditional planning processes. The question of how to reconcile the Quincy legislation and the larger “Sierra Framework” guiding forest planning in the Sierra Nevada is yet to be answered.⁴⁹³

Might a collaborative approach like the Quincy group be a way of moving forward in southeast Alaska? For one, it might foster a more constructive and much needed dialogue among stakeholders who regularly talk past one another by using selective talking points aimed at shifting public opinion, not solving problems. It could add an important element of democratic deliberation, a value that is sometimes missing from the mandated mass participation considered in agency decision making.⁴⁹⁴ It might also help ground some of the more abstract conflicts in real, tangible places—a way to localize disputes one watershed at a time. There is also the quite reasonable hunch that increased collaboration might decrease the number of administrative appeals and lawsuits over forest management,⁴⁹⁵ or in Washington talk, create more “pre-decisional dialogue” than “post-decisional” challenge.

Of course, litigation is here to stay, but it may very well play a different role in the future.⁴⁹⁶ On the one hand, its dominance in the Tongass is a disincentive for stakeholders to collaborate, because a lawsuit could undo the hard work and compromises forged by those at the table. But litigation might also provide the incentive to collaborate in the first place, making it look preferable to drawn out and highly uncertain legal proceedings. Viewed together, the strict mandates of various environmental laws thus serve as “penalty default” provisions, and litigation enforcing those rules becomes the “nuclear option” in a larger negotiating and collaborative strategy.⁴⁹⁷

Collaborative approaches are also well-suited to resolve the integrated nature of most public land conflicts, by focusing on the connections between ecological and community health. Unlike appeals and litigation that must isolate disputes, a collaborative approach has the ability to take a more

distant stakeholders); Michael Axline, *Federal Lands And Invisible Hands*, 25 *ECOLOGY L.Q.* 611, 623 (1999) (“Ecosystems on federal lands are in trouble. One of the main reasons is that historically state and local interests that stand to benefit economically from development of federal resources have enjoyed excessive influence over decisions about how much development to allow on federal lands.”).

⁴⁹³ See Owen, *supra* note 487, at 748–51 (examining the conflicting plans and suggesting a resolution based on both “science and values”).

⁴⁹⁴ See, e.g., Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *NW. U.L. REV.* 173, 212–17 (1997) (examining the relationship between mass participation and democratic deliberation in administrative law).

⁴⁹⁵ See, e.g., Rene H. Germain, Donald W. Floyd, & Stephen V. Stehman, *Public Perceptions of the USDA Forest Service Public Participation Process*, 3 *FOREST POL’Y & ECON.* 113, 122 (2001) (finding many appellants dissatisfied with the equity of the public participation process, though many are not always willing to adequately engage in more collaborative approaches).

⁴⁹⁶ See Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 *WIS. L. REV.* 555, 571–74 (2002) (situating rule of law litigation in the new context of collaborative ecosystem management).

⁴⁹⁷ *Id.* at 567; see also Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 *MINN. L. REV.* 943, 944 (2003) (borrowing from contract theory to assess more adaptive and flexible approaches to ecosystem management).

holistic look at the problem and its context. In theory, moreover, collaborative solutions might be less prone to higher-level “meddling,” as it provides decision makers a convenient way out of making risky decisions. Collaborative efforts could also punch through the science wars, by rejecting adversarial analysis and the myth of scientific omnipotence.⁴⁹⁸ Instead, a more honest and constructive role for science could be found, with local knowledge playing a larger role, and diverse interests providing guidance in what science they need in order to make better decisions.

There are definite challenges with this approach to the Tongass as well. Among them are the tight legal boundaries within which such an approach must maneuver.⁴⁹⁹ Few if any supporters of collaboration argue that its outcome should displace national environmental laws. Rather, they advocate it as a way to supplement or more effectively implement those mandates.⁵⁰⁰ This means that any such collaborative solution would have to find agreement and toe-the-line when it comes to multiple use-sustained yield, endangered and threatened species, NEPA-based forest planning, APA’s rulemaking, ANILCA’s subsistence, and the TTRA’s market demand mandates, among dozens of others. Like the game “Operation,” a group must perform surgery without triggering the alarms and penalties built into these statutes. It might be done, but it will require legal counsel, patience, and steady hands along the way.

Political strategies, policy frames, and the lack of trust among actors in the region also raise questions about the feasibility of this approach. As discussed earlier, conservation groups have tried to nationalize the Tongass, so many are suspicious of increased localization, even if the big national environmental groups get a seat at the table. For some, breaking gridlock by collaboration is code for increased timber harvesting (as was recommended by the Quincy group) and economic boosterism in new garb, which is not their conception of the public interest. As for local input, it is also hard to argue that Alaskans have not been fairly represented in the past given the enormous clout of its Congressional delegation and its level of demographic over-representation.⁵⁰¹

Different actors invoke scarcity when responding to questions about potential collaboration. Some conservationists complain “that industry already got theirs,” while others are non-negotiable when it comes to roadless areas. If the Tongass is a war of attrition, conservationists might have the upper-hand, so why stop swinging when you have industry on the

⁴⁹⁸ See Daniel Kemmis, *Science’s Role in Natural Resource Decisions*, 18 ISSUES SCI. & TECH. 31, 34 (2002) (“A constructive next step would be for agency leaders and elected officials to begin conscientiously resisting the temptation to appeal to good science as a shortcut to decisions that can only be made by democratic deliberation.”).

⁴⁹⁹ See generally Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67, 140–41 (2003) (placing collaborative groups in their larger legal context).

⁵⁰⁰ See, e.g., Edward P. Weber, *Bringing Society Back*, in GRASSROOTS ECOSYSTEM MANAGEMENT, ACCOUNTABILITY, AND SUSTAINABLE COMMUNITIES 40 (2003) (analyzing how three prominent collaborative groups provided a supplementary system of accountability by being nested within larger state and federal statutes and systems of accountability).

⁵⁰¹ See *supra* note 370 and accompanying text.

ropes? Likewise, some within industry, the USFS, and the Governor's office complain of environmentalists giving a little and taking a lot, so there is not much left to compromise. Some are also critical of "value debates" taking place in ill-suited planning processes, partly because of a perceived lack of ballot box-based accountability. "The contemporary belief that butcher paper and round tables can resolve conflict has driven many government agencies into the same swamp," says Ernesta Ballard.⁵⁰² Alaska's Chugach National Forest provides an example for other skeptics because its planning revision process was unusually participatory. It just so happens that Chugach National Forest has no significant timber program—for them, an unlikely coincidence or the reason why collaboration worked.⁵⁰³ Until a more focused assessment is conducted, whether these sentiments are the norm or exception will be unknown.

Lastly, it is worth asking whether collaboration might foster unrealistic expectations. The "decisions" coming out of such processes are advisory, after all, and they must be weighed against other national mandates and interests. It is Pollyannaish to believe that the warm and fuzzy rhetoric of collaboration cannot be used for political cover by political appointees with executive-level agendas and interest group connections.

Furthermore, localization strategies inevitably unfold in a globalized economy. This is the great challenge of political devolution: it is taking place during unprecedented economic integration and global competition. This is why collaboration has so much appeal for some, as it provides a locally-rooted counterforce to the giant of globalization.⁵⁰⁴ Nonetheless, collaboration in southeast Alaska will do little about the larger economic forces that significantly determine the fate of timber harvesting in the Tongass.⁵⁰⁵ Reaching consensus is not going to revitalize the Japanese market nor will it help the industry compete with lower-cost suppliers in Europe, Russia, Canada, and South America. Modesty is in order, then, for while it is not going to stop the tide, the approach could help stakeholders find areas of common ground on which a sustainable and competitive economy might be built. As an example, diverse interests might agree on an economic path to pursue, like nurturing smaller-scale logging and more value-added niche markets, using the more valuable place-specific Sitka spruce, as a way to compete in the global timber economy.

Another broad approach is to embed various participatory and collaborative groups within existing processes, like rulemaking and NEPA-

⁵⁰² Ernesta Ballard, *Why the Forest Service Misunderstands Its Stewardship Role 2* (Paper presented at Tongass National Forest: The Next 100 Years, Aug. 20, 2002) (on file with author).

⁵⁰³ A participatory "collaborative learning process" was used by the Chugach in revising their forest plan. GEN. ACCOUNTING OFFICE, NATIONAL FORESTS: INFORMATION ON THE PROCESS AND DATA USED TO REVISE THE CHUGACH FOREST PLAN, GAO-02-855 7 (July 2002). For more on this innovative approach to natural resource management, see STEVE E. DANIELS & GREGG B. WALKER, *WORKING THROUGH ENVIRONMENTAL CONFLICT: THE COLLABORATIVE LEARNING APPROACH* 244–55 (2001) (providing an overview with Chugach examples). This is not to suggest that the Chugach did not have to deal with a variety of controversial decisions.

⁵⁰⁴ See DANIEL KEMMIS, *THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST* 94 (2001) (discussing the renewed interests in regionalism as a counter to the forces of globalism).

⁵⁰⁵ See *supra* notes 219–22 and accompanying text.

based planning. The use of resource advisory councils (RACs) in public rangeland policy serves as one model. RACs, part of a larger administrative reform package,⁵⁰⁶ were designed to enhance public participation and broaden the types of values and interests considered in BLM decision making. Their role is advisory, as it must be under the Federal Advisory Committee Act,⁵⁰⁷ but the rule allows for RACs to appeal decisions to the Secretary of Interior upon unanimous agreement that their advice is being “arbitrarily disregarded.”⁵⁰⁸

ANILCA’s participation provisions provide another example.⁵⁰⁹ It sets up a Federal Subsistence Board, comprised of regional agency directors, and a number of Regional Advisory Councils throughout the state. These Councils “provide recommendations and information to the Board; review proposed regulations, policies and management plans; and provide a public forum for subsistence issues.”⁵¹⁰ The ANILCA also specifies the extent of these recommendation powers, with language forcing the Secretary of Interior to take them seriously.⁵¹¹ At the very least, the arrangement shows that there is an alternative decision making model that could be used in the Tongass, one that might provide a more constructive venue for debate and problem solving.

Similar types of institutional designs could be applied to the Tongass or other national forests,⁵¹² though other advisory group models might prove more attractive.⁵¹³ For example, the Secretary could establish and consult newly formed advisory boards, allowed by the NFMA,⁵¹⁴ or greatly expand

⁵⁰⁶ 60 Fed. Reg. 9894 (Feb. 22, 1995). See generally Todd M. Olinger, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. COLO. L. REV. 633, 665 (1998) (providing a detailed analysis of administrative rangeland reform and the creation of RACs).

⁵⁰⁷ 5 U.S.C. app. 2 §§ 1–15 (2000).

⁵⁰⁸ Membership and Functions of Resource Advisory Councils and Subgroups, 43 C.F.R. § 1784.6-1(i) (2005).

⁵⁰⁹ Alaska National Interest Lands Conservation Act, 16 U.S.C. §3115 (2000).

⁵¹⁰ See Federal Subsistence Management Program, <http://alaska.fws.gov/asm/who.cfm> (last visited Apr. 23, 2006) (discussing the Federal Subsistence Management Program and its multi-agency effort to provide public participation).

⁵¹¹ Pub. L. 96-487, §805(3)(D)(c) (1980).

⁵¹² Three BLM RAC models are explained at 43 C.F.R. § 1784.6-2 (2005).

⁵¹³ See John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 905 (1998) (reviewing the use of citizen advisory boards in agency rulemaking and contrasting their use to interest group pluralism and regulatory negotiation). Citizen advisory boards, says Applegate, “[R]epresent a useful new alternative to the one-way, often adversarial, communication of the review-and-comment models and to the narrow representation of regulatory negotiation.” *Id.* at 957.

⁵¹⁴ NFMA states:

In providing for public participation in the planning for and management of the National Forest System, the Secretary, pursuant to the Federal Advisory Committee Act (FACA) (86 Stat. 770) and other applicable law, shall establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities. The membership of such boards shall be representative of a cross section of groups interested in the planning for and management of the National Forest System and the various types of use and enjoyment of the lands thereof.

16 U.S.C. § 1612(b) (2000).

the scope of USFS resource advisory committees, currently being used in a much more limited fashion than the BLM approach.⁵¹⁵ The design and rules of such groups would be subject to public comment and rulemaking procedures. In addition, the groups could also be used to craft compromise language that is then subject to NEPA planning, and rulemaking processes. With the latter, they could be used to alter the “decide, announce, defend” model of administrative rulemaking, by giving citizens a greater say in what is proposed in the first place. While not a panacea, if done correctly, such an arrangement might provide a constructive venue for conflict resolution, increase citizen deliberation, and help crystallize areas of fundamental disagreement.

Another approach is to fold collaboration into the NEPA alternatives framework. This could be done as a pilot project, part of a larger effort underway to revitalize the purpose of the NEPA and its collaborative potential.⁵¹⁶ We could additionally encourage a collaboratively-written alternative that is considered during the forest planning process in which diverse interests craft a compromise alternative that is then subject to further NEPA analysis and public comment.⁵¹⁷ Unlike the dozens of alternatives that are often submitted by individual interest groups, this option would encourage proposals that are more broad-based and collaborative in nature.⁵¹⁸

⁵¹⁵ Resource Advisory Committees were formed under the Secure Rural Schools and Community Self-Determination Act of 2000, with the purpose of recommending funding for projects meeting various criteria. Pub. L. No. 106-393. For more information, see Payments to the States, http://www.notes.fs.fed.us:81/r4/payments_to_states.nsf. (last visited Apr. 23, 2006) (discussing the purposes of the Secure Rural School and Community Self-Determination Act of 2000).

⁵¹⁶ The U.S. Institute for Environmental Conflict Resolution is investigating “how pilot projects can be used to evaluate the potential role of collaboration, consensus building, and appropriate dispute resolution processes in improving implementation of [NEPA], specifically within the context of federal lands and natural resource management.” U.S. Institute for Environmental Conflict Resolution, Report and Recommendations on a NEPA Pilot Projects Initiative 4 (Aug. 29, 2001), *available at* <http://www.ecr.gov/pdf/USIECR%20Report%20to%20Senators%208-30-01.pdf>.

⁵¹⁷ This approach was used in the proposed reintroduction of grizzly bears into the Selway-Bitterroot ecosystem of Montana and Idaho. The FWS chose a collaboratively-written preferred alternative, with a citizen management committee given some implementation authority. Note that this option would not have to include the controversial citizen management component. *See* U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY IN THE BITTERROOT ECOSYSTEM: FINAL ENVIRONMENTAL IMPACT STATEMENT 2-11-2-17 (2000) (describing the duties and responsibilities of the citizen management committee in the implementation process).

⁵¹⁸ A number of conservation groups submitted alternatives during the forest planning public comment period, including the Alaska Rainforest Campaign, the Association of Forest Service Employees for Environmental Ethics, Defenders of Wildlife, and SEACC, among others. These alternatives were not considered in detail, as some were folded into existing and more detailed alternatives. *See* 1997 TLMP ROD, *supra* note 140, at 13; and TLMP FEIS, *supra* note 18, at 2-12 (addressing alternatives proposed but not considered in detail).

C. Community Forestry

A general rethinking of the timber industry in southeast Alaska provides yet another way of envisioning the future. It is roughly based on the core principles of “community forestry,” including a goal to improve the health of the land and well-being of communities, while emphasizing the “triad of environment, economy, and equity.”⁵¹⁹ Instead of a single-minded focus on serving the market at any cost, community forestry strives to ensure that local communities and their environments benefit from forest management as well, and that forest protection and economic development are not mutually exclusive goals.⁵²⁰

As we have seen, several actors in this story advocate a larger integrated timber manufacturing industry in the region. For this to happen, advocates want either a more predictable stream of timber coming off the Tongass or want to move parts of the Tongass into the state forest system. They insist that this is needed to secure long-term industry investment and provide year-round, high-paying jobs. The timber volume needed to realize this vision would inevitably mean harvesting old growth in roadless areas, a trade-off that they believe is in the public interest. For others, this is the archetypical “view through the rear view mirror.”⁵²¹ Instead of resurrecting the past, these commentators urge a rethinking of the terms “industry” and “federal investment.” Regarding the former, they emphasize the number of smaller mills and “independents” in the region that could add value and survive without big controversial timber sales in roadless areas.⁵²² They recommend that the USFS cater more to these smaller outfits, for example by offering more “micro-sales” along the existing road system.⁵²³

⁵¹⁹ MARK BAKER & JONATHAN KUSEL, *COMMUNITY FORESTRY IN THE UNITED STATES: LEARNING FROM THE PAST, CRAFTING THE FUTURE* 8 (2003) (providing a history, overview, and philosophy of community forestry in the U.S.). Some helpful overviews are provided by the National Network of Forest Practitioners, <http://www.nnfp.org/> (last visited Apr. 23, 2006); the Communities Committee of the Seventh American Forest Conference, <http://www.communitiescommittee.org/> (last visited Apr. 23, 2005); the Pinchot Institute, <http://www.pinchot.org/> (last visited Apr. 23, 2006); Sustainable Northwest, <http://www.sustainablenorthwest.org/> (last visited Apr. 23, 2006); and the Aspen Institute’s Community-Based Forestry Demonstration Program, <http://www.aspeninstitute.org> (last visited Apr. 23, 2006) (promoting economic strategies for turning forest resources into sustainable resources for the vitality of rural and urban communities). For analysis of related national legislation and programs, see Christina M. Cromley, *Community-Based Forestry Goes to Washington*, in *ADAPTIVE GOVERNANCE: INTEGRATING SCIENCE, POLICY, AND DECISION MAKING* 221–67 (Ronald D. Brunner eds., 2005).

⁵²⁰ Thomas Brendler & Henry Carey, *Community Forestry, Defined*, J. FORESTRY, Mar. 1998, at 21, 22.

⁵²¹ See POWER, *supra* note 227, at 9 (examining this tendency Westwide).

⁵²² See generally Tim Bristol, *The Independents: Hope All Over*, in *THE BOOK OF THE TONGASS* 185 (Carolyn Servid & Donald Snow eds., 1999) (discussing the economic shift toward independent producers as the giants of the southeast Alaska timber industry fall); and John Sisk, *Logging and Learning in the Tongass Rain Forest*, in *THE BOOK OF THE TONGASS* 143 (Carolyn Servid & Donald Snow eds., 1999) (tracing the history of logging in southeast Alaska and suggesting that the needed balance between economy, community, and ecology can be met largely by supporting independent local logging and wood crafting businesses).

⁵²³ The North Prince of Wales Collaborative Stewardship Group, for example, recommends that local ranger districts offer a more steady and predictable supply of down and dead timber

Unsurprisingly, such proposals smack of tokenism to some larger industry players.

Other ideas could be implemented in the spirit of community forestry as well. One favorite response is to embrace “value-added” industry, so that money and jobs are kept in the region and not shipped elsewhere. For many reasons, most timber harvested on the Tongass is not processed in Alaska. Much of it is shipped south as green lumber where it is dried, planed, graded, and then sold on the market—and often reshipped back to Alaska. Crazy as it sounds, Alaska has a trade-deficit in lumber and other finished wood products, meaning that it is not even a net supplier of forest products.⁵²⁴ By federal law all yellow cedar and some red cedar may be exported.⁵²⁵ Though such exportation benefits some in the industry, it frustrates others who see lost opportunities to add value and jobs locally.⁵²⁶

The term “value-added” is probably so popular because of its multiple meanings. The pulp mills were adding value, after all, and so too would a proposed and controversial veneer mill necessitating a large and steady amount of timber volume.⁵²⁷ Others believe that while it may score political points, Alaska’s economic context (e.g., lack of infrastructure, distance from markets, relative costs) makes most value-added proposals infeasible, and that the free market should determine where raw materials are processed.⁵²⁸

along roadways to local, small operators. The USFS has responded with its “roadside program.” U.S. DEP’T OF AGRIC., TONGASS NATIONAL FOREST, ROADSIDE: ENVIRONMENTAL ASSESSMENT 1–3 (May 2002) (acknowledging that the project is proposed in direct response to the need identified by the North Prince of Wales Collaborative Stewardship Group).

⁵²⁴ Jamie Kenworthy, *A Vision for Revitalization of Alaska’s Forest Products Industry*, in PROCEEDINGS: LINKING HEALTHY FORESTS AND COMMUNITIES THROUGH ALASKA VALUE-ADDED FOREST PRODUCTS 5 (Pacific Northwest Research Station, General Technical Report No. 500, 2000).

⁵²⁵ Related provisions are found in § 333 of the FY 2000 Interior Appropriations Act, Pub. L. No. 106-113 § 1000(a)(c), 113 Stat. 1501A-197–198 (1999); § 328 of the FY 2001 Interior Appropriations Act, Pub. L. No. 106-291, 114 Stat. 922, 995–996 (2000); § 323 of the FY 2002 Interior Appropriations Act, Pub. L. No. 107-63, 115 Stat. 414, 469 (2001); and § 318 of the FY 2003 and FY 2004 Interior Appropriations Acts, Pub. L. No. 108-7, 117 Stat. 216, 273–274 (2003); Pub. L. No. 108-8, 117 Stat. 12412, 1305–1306 (2004).

⁵²⁶ Letter from John Bruns, Prince of Wales Chamber of Commerce, to Jerry Ingersoll, USFS District Ranger (July 16, 2004) (on file with author) (urging the USFS not to exempt a timber sale from domestic manufacture because of the sawmill capacity and employment opportunities that could be created on Prince of Wales island).

⁵²⁷ The politics of the proposed mill brings us back to the issue of mistrust as well. Conservationists have long advocated value-added industry in the region, so some question why they are now opposed to the proposed veneer mill in Ketchikan. One more example, says industry, of environmental groups saying one thing and doing the other. Conservationists, on the other hand, still desire value-added industry, but see the proposal as yet another example of mega-industrialists trying to resurrect the past. A mill of this scale, they say, would put enormous pressure on roadless areas in the region, and this is not at all the type of development they want.

⁵²⁸ One industry interpretation states:

[I]t has been conventional wisdom touted by the environmentalists that the timber industry should be limited to value-added processing. The implication is that more “value” in employment and financial benefits would result from producing wooden “widgets.” The fact is that a free market will best determine where the raw material should go—whether to export markets or local manufacturing. The best example of

Of course, the free market argument breaks down immediately on the Tongass, so why not choose this type of subsidy rather than others generating fewer jobs? Arguments aside, there are efforts underway to install dry kilns and other infrastructure to process lumber regionally, and the USFS and a wide range of stakeholders view such developments positively.⁵²⁹ Quite a few people interviewed, for example, agree that the Tongass should help meet Alaska's demand for timber and that the resource should be as locally rooted as possible.

Another possibility includes the use of stewardship contracts. Originally implemented on a pilot basis, Congress extended the authority of the USFS to use stewardship contracting as a way to achieve various land management goals, like restoring forest and rangeland health and water quality, improving fish and wildlife habitat, reestablishing native plant species, and reducing hazardous fuels.⁵³⁰ The contracts allow the exchange of goods for services, so the USFS could, for example, combine timber sales with restoration projects. It is also authorized to enter into stewardship projects to achieve land management objectives that meet local rural community needs, while complying with applicable environmental laws and regulations.⁵³¹ The projects require a collaborative process, including multiparty monitoring and evaluation, and such a mandate could help the USFS build bridges and trust with various actors in the region.⁵³² Such an approach, while no panacea, is an especially interesting prospect because of the restoration work needed at places like Prince of Wales island, what was once the Tongass's timber breadbasket. Perhaps this tool, or some other vehicle for ecological restoration, could provide the requisite time and federal investment necessary to bridge the period of transition until second growth timber is ready for harvest in a few decades. If this tool is expanded in the region, it will require oversight, mainly because of how far the term "restoration" can be bent, and to ensure that needless development does not become its substitute.

value-added processing was the two pulp mills—they produced a relatively high value product and many jobs from the lower value trees harvested, however the environmental community opposed this because it did not further their goals of turning Southeast Alaska into a park. . . . For the timber industry in Southeast Alaska, the future is clear—unless more timber is made available and it is able to access all available markets, the timber industry, as we know it, will cease to exist by 2009.

Clare Doig, *A Prognosis for the Future of the Timber Industry in Southeast Alaska*, ALASKA TIMBER TIMES, Jan/Feb/Mar. 2005, at 4 (on file with author).

⁵²⁹ See, e.g., Tongass NF Management Briefing, *supra* note 419, at 3 (discussing positively the installations of lumber finishing infrastructure in southeast Alaska, and expecting a relatively large new area of market demand with good product value will be available).

⁵³⁰ Pub. L. No. 108-7, § 323, 117 Stat. 11, 275 (2003). For more background see Stewardship End Result Contracting, 68 Fed. Reg. 38,285, 38,286 (June 27, 2003); U.S. Dep't of Agric., Stewardship Contracting, <http://www.fs.fed.us/forestmanagement/projects/stewardship/index.shtml> (last visited Apr. 23, 2006) (providing news and information about USFS stewardship contracting); Pinchot Institute, USDA Forest Service Stewardship Contracting Pilots (2003), <http://www.pinchot.org/> (last visited Apr. 23, 2006) (reporting on the program's purposes and objectives).

⁵³¹ 68 Fed. Reg. at 38,286.

⁵³² *Id.*

VII. CONCLUSION

The Tongass crystallizes and exaggerates some of the toughest issues in public lands governance. Conflicts about it are driven by multiple interrelated factors and play out in a variety of venues. Political disagreement and the resulting nature of public land law move conflict about the Tongass into different venues and decision making processes. While these laws provide significant parameters, some of the most controversial issues in forest management get re-routed to venues and processes that are not always well designed for political conflict and problem solving. Sometimes these governing arrangements frustrate an already difficult situation. But we must be careful when tinkering with the system and be realistic about the limitations and politics of any proposed reform. On one hand, we should recognize that most process-based reforms will simply redirect rather than resolve many of deep-seated conflicts discussed herein. We must also place conflict in context and acknowledge the changes it has brought to the Tongass. Certainly southeast Alaska would be much different today if not for conflict over such things as the Alaska Lands Act and the TTRA. More recent acrimony over roadless areas has shifted the very terms of the debate. On the other hand, it is hard to argue from a governing standpoint that the status quo is the best we can do. And while conflict has generated lots of conservation benefits, it can be counter-productive at times as well. Just imagine what could be done given a shared vision and more positive relationships. Fortunately, there are numerous ways to move forward, and the next chapter of the Tongass story could be much different than the last.