

Statement
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Subcommittee on Forests and Forest Health
Committee on Resources
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Mr. Chairman,

Thank you for this opportunity to continue the dialogue we started late last year on the difficult, costly, confusing and lengthy processes that Forest Service line officers must follow to comply with the laws enacted by Congress, implementing regulations and procedures put in place by the Forest Service and other agencies, and standards imposed by the courts.

Six months ago, I told you I had tasked a team to update former Chief Jack Ward Thomas' study on the Forest Service's legal and regulatory framework to take into consideration new laws, regulations, and court decisions since the study was prepared in 1995. That report has been completed.

Today I want to discuss the report and how I intend to begin to unravel the procedural knot in which the Forest Service is bound. As I have said before, I need the Subcommittee's help if I am to be successful. This knot is no less tightly tied than the Gordian Knot of ancient Greek mythology. And unlike Alexander the Great, I cannot simply draw my sword and cut it.

By design, the report I'm giving you today does not contain specific recommendations for changes in Forest Service policy or guidance, the regulations or policies of other Federal agencies, or laws. Frankly, I felt that doing so would distract all of us from the more immediate task at hand: fully appreciating and agreeing on the existing legal, regulatory, and management framework under which the Forest Service must labor to get work accomplished.

Before we can begin to agree on solutions, we need to have general agreement that the current framework is not conducive to this agency getting the work that the Congress and public expects done, in a reasonable amount of time and at a reasonable

cost. I believe that report makes a persuasive case that the existing framework is an impediment to those ends. Unless we can change the existing framework, it is only going to go from difficult to impossible to get work accomplished on the national forests and grasslands.

The Team concluded, correctly I believe, that the difficulty of complying with the laws, regulations, and management procedures are not primarily the result of conflict between the laws. Rather they arise from the piecemeal imposition of regulations, court decisions, and internal agency process requirements over time. Over the several months that the team conducted its review and analysis, it generally agreed with the 1995 Task Force Report's findings that the legal and procedural requirements the Forest Service must comply with have not been systematically constructed. Rather, they have evolved over time, in response to laws, agency regulations, court decisions, public expectations and scientific understanding with little or no coordination. That circumstance results in three general problems.

1. Excessive Analysis

Regulatory agencies take very seriously their obligations to enforcing the statutes under their jurisdiction and they are properly reluctant to allow projects to proceed absent documentation of the anticipated impacts. Courts also demand a high level of analysis and documentation from the agency's decision documents.

This has led to lengthy consultation and a short-term, risk averse environment, frequently at the expense of far more significant long-term benefits. That means increased analysis and documentation, which is costly, complex and time consuming. The procedural requirements imposed by regulatory agencies and courts never seem to abate – they just continue to pile on.

Congress and the public have every right to ask, “At the end of the day, is the result a better decision?” I don't think so.

I can't think of a better example to illustrate this than the so-called “Beschta Report,” a commentary authored in 1995 by eight university and government scientists. Many members of the Subcommittee may not be familiar with this report.

The authors prepared the paper at the request of the Pacific Rivers Council. It offers 21 “principles and recommendations” regarding a wide range of topics. The topics include: erosion, soil impacts, noxious weeds, sensitive areas, effects of road building, reseeding, and fire management policies. The paper generally recommends against any active management of post-fire areas other than removal of existing roads. The paper has never been published in any scientific or professional journal, nor has it been subject to any formal peer review.

None-the-less, interest groups have filed numerous lawsuits challenging post-fire recovery projects in part on the grounds that the associated NEPA documents fail to

adequately document the agency's consideration of the "Beschta Report." I have been told that information on how to use the report to write comments on proposed projects and appeals of project decision documents is available on more than 100 Web sites. To date, there have been judicial opinions on the "Beschta Report" in six cases.

In four of these cases, the Courts have concluded that project decisions violated NEPA because the associated NEPA documents did not adequately document the agency's consideration of Beschta. In two other recent cases, Federal District Courts have ruled in favor of the Forest Service. In one case, *Native Ecosystem Council v. U.S. Forest Service* (D. Mont.) (Maudlow-Toston, Helena NF), the Court found that the EIS complied with NEPA even though the plaintiffs strenuously argued that failure to adequately consider the "Beschta Report" violated NEPA. In the other case, *Center for Biological Diversity v. Andre* (D. N.M.) (Corner Mountain Fire Salvage, Gila NF), the Court found that EA adequately considered the issues in the "Beschta Report," even though the EA did not reference the "Beschta Report."

Hitting .333 is very good in baseball. It's not much of an average in natural resource case law. As a result of these 4 decisions, land managers wishing to reduce the risk that their decision will be reversed in Federal Court should feel compelled to thoroughly document their consideration of the "Beschta Report" even though the underlying land management issues are already addressed. This includes documenting why some elements of the "Beschta Report" are not relevant to the specific proposed project.

The judicial opinions against the agency have inspired some interest groups to demand that the agency consider numerous other papers and articles that they assert are relevant to the some proposed actions. Sometimes the list of references exceeds 100 articles and papers. To minimize the risk of adverse judicial opinions, land managers are advised to fully document within the body of the NEPA document their detailed consideration of each and every paper or article.

So, when critics assert that the Forest Service is its own worst enemy by spending so much time preparing large NEPA documents, I ask that you remember the "Beschta Report" - an unpublished document of questionable science proposed for an advocacy group that has never been peer-reviewed - but whose consideration now must be documented in several if not all judicial districts in order to build a defensible NEPA document.

It's a powerful example of the incentive for land managers to fill, or overstuff, NEPA documents with excessive amounts of information - even if the information is of questionable relevance and does not illuminate the reasons for the decision - all in an effort to protect their decisions from charges they failed to adequately consider some piece of information. As a result of these efforts to increase the legal defensibility of decisions, project analysis and documentation processes are very time consuming and costly, but the additional documentation contributes little to the quality of public involvement or land management

Consider the following from the article, “Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance,” by Bradley C. Karkkainen that was published in the Columbia Law Journal (May 2002).

“...The upshot is that agencies have an incentive to overstuff the EIS with information from every available source, regardless of its quality, so as to achieve a protective layer of redundancy or “overkill” while at the same time inoculating themselves against the charge that they overlooked relevant information. Eighty-three critical comments from NGOs, academic experts, EPA or other federal agencies at the scoping and draft EIS stages quickly translate into an even more bloated final document, as agency managers seek to incorporate, recharacterize, or rebut relevant details of the critiques. If high quality information is included, it may be diluted or simply lost under the avalanche of lesser quality information, vague case-specific analysis, marginally germane off-the-shelf studies, reports and data sets and boilerplate cribbed from previous EAs.”

Is that what Congress wants? Is that what the public wants?

If not, it is something I would like to change for the Forest Service.

2. Unproductive Public Involvement

As the Subcommittee has stated previously (for example, in the November 29, 2001, letter co-signed by the Chairman and Mr. Udall (NM), the public is vitally interested in community-based land management approaches that bridge ideological differences and focus on results. Your letter suggested an opportunity to translate that interest into legislation authorizing a pilot to implement and monitor innovative approaches to land management drawn from communities. The Administration’s FY 2003 Budget included a similar proposal to establish pilot forests administered outside the normal Forest Service structure. The details of that proposal have not been finalized. The idea has merit.

There is no federal agency that provides more specific opportunities for public review and comment on its proposed plans and projects than does the Forest Service. These opportunities occur at multiple planning levels and include: Federal, state, local and Tribal agencies; advocacy groups; user groups; and private citizens. A district ranger who wants to seek consensus advice from a range of opinion leaders in the community must be extremely careful to avoid any technical violation of the Federal Advisory Committee Act and that’s not easy to do.

We encourage competing interests to sit down and reason together to find ways to accommodate their diverse objectives. We try to do it early in planning a project. While the decision still rests with the agency, the theory behind this approach is that it will lead to more informed decisions that have broad public support. It cannot reasonably be expected to mean that there is unanimous support for every aspect of a project.

Ultimately, Forest Service officials must render decisions based on a wide range of factors, some of which may not be represented.

However, the benefits of this dialogue is too often not as productive as one would hope. Consider the efforts of the Hiawatha National Forest to remove an existing concrete bridge across North Light Creek within the Grand Island Research Natural Area that was breaking apart and falling into the creek. Although it's signed "closed," snowmobilers and other non-motorized traffic still use the bridge. Visitors not using the bridge cross the creek by scrambling down banks, causing bank erosion. The Forest wants to replace the bridge with a single-span, 6-foot wide, treated glue laminated arch bridge with railings at the existing crossing. The scoping on the project started in early-1995.

There was considerable public support to replace the bridge. At the initial scoping period and EA comment period, island residents, recreation interests, and local environmental groups all supported the project, without exception. The Decision Notice to replace the bridge was signed in mid-1998. One individual, who had participated earlier in the process, but who had not opposed the project, appealed. Although the appeal was not based on the agency's consideration of alternatives, the Regional Office review found that the documentation of other alternatives was lacking, so the District Ranger withdrew the decision several months later.

The Forest subsequently decided to consider the bridge project in the context of revisions to the RNA Establishment Area. Revision of the Establishment Record and the Forest Plan Amendment took 1.5 years to complete and was not appealed.

New scoping for the bridge replacement project began in last June. The new EA is underway. Construction of the replacement bridge could begin in 2005. So, a single appellant overrode broad public support for the project when it was proposed in early 1995 and has pushed bridge replacement back almost 10 years.

Is this what Congress wants? Is this what the public wants?

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3. Management Inefficiencies

When I testified before the Subcommittee last year, I admitted that we were part of the problem:

"I want to address this problem head on, not engage in finger pointing, or blaming everybody but us for the current problem. In written reports and hearing testimony, the General Accounting Office and others have detailed their views on the underlying causes of inefficiency and ineffectiveness in the Forest Service's decision-making. No question - - we share responsibility for the problem. But we cannot fix the current problem by ourselves."

In its work, the Team also found that agency leadership and management in planning and decision-making needed to be improved. The case studies in the report we are submitting illustrate situations where process management decisions cost the Forest Service. Sometimes distracted managers and line officers have hurt us. There is a clear need for us to better train and inform our line officers so that they, in turn, can clarify the scope of decisions being made, undertake the appropriate analyses required to make an informed decision, and adequately document decisions in a timely and cost-effective manner.

The Forest Service is currently engaged in a number of efforts to make the decision process more efficient, including the work done by this Team. Others include: revising the planning regulations under the National Forest Management Act, updating the agency's categorical exclusions under NEPA, a developing an array of tools for assisting with NEPA compliance.

We need to make a substantial investment in technology. Consider what I said about the many Web pages that provide information on how to use the "Beschta Report" to challenge proposed projects. There is no reason that the agency can't use the same technology to assist our line officers in responding to those challenges, and whatever new ones arise at some point down the road. We are doing that. We need to do more. We will.

I have asked Tom Thompson, Deputy Chief, National Forest System, to undertake a comprehensive re-engineering of our processes to address those parts of the report that we can correct as an agency.

Mr. Chairman, I'll close today with much the same message as last year.

We are extremely frustrated with the status quo. Forest Service employees are committed to the goals of protecting and improving the quality of our land, our water, our wildlife, and our air and with the goals of protecting and preserving this nation's precious historic and cultural resources. But, we find ourselves too often unable to do the work that we know needs to be done, the work that Congress and the public expect us to do because of unnecessary and unproductive process and procedure.

I believe the report I am providing you today makes the case for change. At the least, it makes it hard, if not impossible, to argue that current environmental laws and regulations couldn't be implemented more efficiently and effectively. Who would argue the laws and regulations shouldn't be implemented as efficiently and effectively as possible?

I am dedicated to revising, not just reviewing, Forest Service processes to provide the best tools and training for our line officers and staff. We will do a better job of managing our processes. But I do not want us to just get better at playing a bad game. I want to fix the game.

I expect our endeavors to resolve analysis paralysis will take significant effort and a great deal of time and will generate opposition. At the end of the day, those who are determined to keep projects from going forward, the merits notwithstanding, are afforded a considerable advantage by the dysfunction of the our decision making process. They will not cede that advantage without a struggle.

The Council on Environmental Quality, which, as you know, is responsible for the NEPA regulations that apply to all federal agencies, and the other federal agencies and departments with whom we closely work, such as the Department of Commerce, the Department of the Interior, and the Environmental Protection Agency, share our desire to improve the effectiveness and efficiency of our processes. I know we can count on their support as we undertake this task.

Today, I ask you and the other Members of this subcommittee to look at this report with an open mind and give me a chance to work with you to find a way to make Forest Service land management decisions in an effective, efficient and timely manner that do not compromise protection of the natural resources we are entrusted to manage for the American people.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions from you and the other Members of the Subcommittee.