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National Forest System Planning: Legal Considerations

The United States Forest Service (FS) within the Department of Agriculture administers the National Forest System (NFS) and regulates activities on its 193 million acres of land, including 154 national forests. FS undertakes forest planning at the *programmatic* scale to establish a strategic framework for forest management, which is then implemented through various *project*-scale activities, permits, leases and contracts. This In Focus discusses the legal framework and decision-making processes for NFS planning at the programmatic scale, in consultation with federal agencies, state and tribal officials, and other stakeholders.

Statutes Pertaining to Forest Planning

The Forest and Rangelands Renewable Resources Planning Act (16 U.S.C. §§ 1601 et seq.), as amended by the National Forest Management Act (NFMA; 16 U.S.C. § 1604) establishes substantive and procedural requirements for NFS planning. The Multiple Use-Sustained Yield Act (16 U.S.C. §§ 528 et seq.) sets forth the multiple uses for the National Forest System, including outdoor recreation, timber, range, wildlife and fish, watersheds, and wilderness. Requirements related to forest planning are also found in the Healthy Forests Restoration Act (HFRA; P.L. 108-148) and Federal Land Policy and Management Act (43 U.S.C. §§ 1701 et seq.; requiring agency and tribal coordination). Requirements specific to Alaska, which contains more than 10% of NFS land, are found in the Alaska National Interest Lands Conservation Act (16 U.S.C. §§ 3101 et seq.). In concert, these authorities set the legal framework in which FS implements the various goals, policies, and processes that apply to the multiple—and sometimes competing—uses of NFS lands. FS has implemented these statutes through regulations including the *planning rule* (36 C.F.R. part 219)---which following years of litigation now routinely applies to new plans and amendments---and guidance documents including FS Manual 1921 and Handbook 1909.

Programmatic Decision Making

The FS makes land management decisions at both programmatic and project levels. Programmatic scale decisions are strategic forest management decisions applicable to broad-scale geographic areas such as a *forest unit* (for example, an entire National Forest) or at the *landscape*- and *watershed*-scale.

A key FS planning document is a 15-year land use framework known as a *forest plan*. Under NFMA, the forest plan governs the various areas, activities, and projects that may take place within a forest unit. Each forest plan contains a set of objectives related to the desired forest condition as well as binding standards and guidelines that provide the technical specifications and rules for projects,

as well as additional guidance. For example, multiple forest plans in the northwest incorporate regional standards and guidelines for the management of Northern Spotted Owl habitat.

NFMA sets out procedural requirements for creating or amending a forest plan. Key steps include forming an interdisciplinary team to prepare the plan, consulting about potential environmental impacts, issuing a draft, and receiving public comments. Forest plans must be updated every 15 years unless exempted by Congress and may be amended (pursuant to applicable requirements) at any time. Project-level decisions, such as commercial timber harvest, must then be consistent with the forest plan in effect.

Forest plans also establish different use requirements or zoning for various parts of the plan's overall geographic area. Those requirements are evaluated and chosen in part based on their *suitability* for promoting specific plan objectives such as identification of potential roads or roadless areas, species habitat protections, and timber production.

FS conducts planning in accordance with the procedural requirements of the Administrative Procedure Act (APA; 5 U.S.C. § 551 et seq.). In addition, the National Environmental Policy Act (NEPA; 42 U.S.C. §§ 4321 et seq.) and the Endangered Species Act (ESA; 16 U.S.C. §§ 1531 et seq.) apply to the planning process and often play a substantial role. Unless exempted by a specific federal law, if a forest plan or amendment could significantly affect the environment, NEPA requires FS to consider environmental impacts. This consideration typically requires FS to evaluate alternatives, consult with relevant agencies, allow public comment, and publish a detailed environmental impact statement. Under the ESA, FS generally must engage in inter-agency consultations to ensure the action does not jeopardize listed species or adversely modify critical habitat.

Forest Planning in the Courts

Federal courts have often had the opportunity to consider the interpretation and implementation of federal forest plans and planning processes, particularly in the Ninth and Tenth Circuits. Lawsuits that challenge only a forest plan decision are relatively rare. More commonly, a challenge to a project-level decision may include plan-scale concerns about new information or conditions not initially contemplated in the underlying plan, which may be more than a decade old.

NFMA does not provide an independent mechanism for judicial review, so challenges to forest plans are typically brought pursuant to the APA, under which courts consider

whether an agency action is inconsistent with statutory authority or is arbitrary, capricious, or an abuse of discretion. Under this standard of review, courts have determined that forest planning laws afford considerable discretion to the FS to prioritize specific uses, provided the agency follows the appropriate decision-making processes. For example, a forest plan may identify areas to be managed for recreation, wildlife and fish conservation, watershed protection, timber production, or grazing, and courts will typically respect those substantive decisions as long as FS provides a reasoned basis for them. As a result, much of the litigation related to forest planning under the APA involves challenges to the planning *process*, including the adequacy of consultations under the ESA or analyses under NEPA. Courts may set aside decisions where FS did not follow required procedures for decision-making.

Conservation

Litigants challenging planning decisions may rely on particular forest plan objectives or guidelines, broader regional planning efforts that may be incorporated into forest plans, or applicable laws such as those discussed above. While reviewing courts generally defer to FS in choosing between multiple uses, they have scrutinized whether forest planning and project decisions are consistent with applicable statutes (such as NEPA and the ESA) and have taken all relevant factors into account.

Conservation concerns may be raised as new information becomes available after a forest plan is adopted. For example, in *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), the Ninth Circuit held that the FS must reinstate ESA Section 7 consultation on an existing forest plan when a new species is listed or critical habitat is designated in the area affected by that forest plan. Congress responded with a law that exempted the FS from this requirement if certain other conditions are met (P.L. 115-141 Div. O, Title II §208), but it did not alter the requirements of the ESA for new agency decisions.

Resource Extraction and Other Land Uses

Forest plans also identify areas suitable for resource production and extraction, such as timber harvesting, grazing, and mineral exploration and development. Occasionally, litigants may challenge FS's decisions about the long-term impacts from grazing or which areas may be suitable for timber production. Consistent with a governing forest plan, the FS may authorize occupancy and use of NFS lands for other purposes which are also typically litigated at the project level. For example, in *U. S. Forest Service v. Cowpasture River Ass'n*, 140 S. Ct. 1837 (2020), the Supreme Court affirmed that FS can grant an easement for a pipeline across the Appalachian Trail.

Wildfires and Forest Health

At Congress's direction, a group of federal agencies and states developed a comprehensive strategy for reducing wildland fire risks. Pursuant to HFRA, the FS incorporates that strategy into its planning to improve forest health and

reduce the risk of uncharacteristic wildfire. For some specific activities at the project scale, HFRA reduces or excludes some NEPA requirements, and courts have therefore affirmed NEPA exclusions for forest health *projects* that remove wildfire fuel (including forest debris and vegetation), preserve old growth forests, and support resilience. Courts have been more divided, however, about reviewing wildfire risk management planning impacts at the landscape level. In 2020, the Tenth Circuit declined to consider forest plan-level impact concerns arising under multiple HFRA projects categorically excluded from NEPA in *Wild Watershed v. Hurlocker*, 961 F.3d 1119, while the Ninth Circuit required a hard look at strategies to reduce wildfire risks in *Bark v. U.S. Forest Service*, 958 F.3d 865.

Considerations for Congress

Backlogs

The FS is legally required to monitor and improve plans, and to update them at least every 15 years. FS sets a goal of completing an updated forest plan process in four years. According to the FS, as of February 2021, 25 forest plan updates (more than 20% of forest plans) had not been finalized within this 15-year period. Staffing, budget, and procedural considerations have all been cited as reasons for the backlog of outdated plans. Congress regularly provides for plan timeline extensions (see, e.g., P.L. 116-6, Div. E, Title IV, § 407). More permanent solutions may be to change the timeline legislatively for forest plan updates from 15 years to a longer or indefinite period of time, increase funding for forest planning, or reduce procedural requirements for updates, among others.

Discretion

Given the broad agency discretion that Congress has established to manage the NFS for multiple uses, the courts have typically granted substantial deference to the FS in balancing those uses in forest plans. Some of the legal requirements described above, in particular NEPA and ESA requirements, apply only when an agency makes a discretionary decision. Some have suggested that the persistent delays in forest plan updates could be mitigated by reducing the scope of the FS's discretion or by reducing the types of environmental factors or alternatives the FS must consider. Others have suggested that such changes could restrict the ability of the FS to adapt to local conditions or to balance multiple uses at a programmatic level.

Additional references: CRS Report R43872, *National Forest System Management: Overview, Appropriations, and Issues for Congress*; CRS Report R46976, *U.S. Forest Ownership and Management: Background and Issues for Congress*; CRS Report R46504, *Forest Service Inventoried Roadless Areas (IRAs)*

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