RE-EXAMINING THE GOVERNING FRAMEWORK OF THE PUBLIC LANDS

DANIEL KEMMIS*

The need to examine new approaches to public land management has been gaining broader recognition from both sides of the political aisle. Former Democratic Secretary of the Interior Cecil Andrus has described the public land governance system as "the tangled web of overlapping and often contradictory laws and regulations under which our federal public lands are managed."[1] Republican Congressman Scott McInnis, former chairman of the Subcommittee on Forests and Forest Health, describes "a decision-making apparatus that is on the verge of collapsing under its own weight."[2] Forest Service Chief Dale Bosworth speaks of this phenomenon as "analysis paralysis,"[3] while former Forest Service Chief Jack Ward Thomas simply calls it "the blob."[4]

The Forest Service itself recognizes the all but impossible circumstances under which it operates. In June 2002, Chief Bosworth presented to Congress a report called "The Process Predicament" describing the effects of regulatory and administrative gridlock on national forest management. The report focuses heavily on the agency's increasing inability to fulfill its primary duties. With regard to the agency's obligation to maintain forest health, the report states that "[l]arge portions of the National Forest System are in poor or declining health,"[5] and concludes that "the Forest Service operates within a statutory, regulatory, and administrative framework that has kept the agency from effectively addressing rapid declines in forest health."[6]

Throughout the report, the Forest Service maintains that one result

---

* Daniel Kemmis is the Director of the Center for the Rocky Mountain West at the University of Montana and the author of *This Sovereign Land: A New Vision for Governing the West.*

1. ANDRUS CENTER FOR PUBLIC POLICY, POLICY AFTER POLITICS: HOW SHOULD THE NEXT ADMINISTRATION APPROACH PUBLIC LAND MANAGEMENT IN THE WESTERN STATES? (June 1, 2000), *at* http://www.andruscenter.org/AndrusCenter.data/Components/PDF%20FILES/PP_whitepaper.pdf.

2. *Conflicting Laws and Regulations—Gridlock on the National Forests: Oversight Hearing before the Subcomm. on Forests and Forest Health of the House Comm. on Res.*, 107th Cong. (2001) (statement of Rep. McInnis, Chairman, Subcomm. on Forests and Forest Health), *available at* http://purl.access.gpo.gov/GPO/LPS30820.

3. *Id.* (statement of Dale Bosworth, Chief, U.S. Forest Service), *available at* http://purl.access.gpo.gov/GPO/LPS30820.

4. *The Lubrecht Conversations*, CHRONICLE OF COMMUNITY, Autumn 1998, at 9.

5. U.S. FOREST SERVICE, THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 38 (June 2002), *at* http://www.fs.fed.us/projects/documents/Process-Predicament.pdf.

6. *Id.* at 5.

of the "process predicament" is that the health of forests in the West is suffering. That linkage may be debatable, but it is hard to argue with the fact that the health of civic culture and public discourse is seriously undermined by the time-consuming and often frustrating procedures that are now typical of daily life in and around the Forest Service. The effect on morale within the agency is no less pronounced. People cannot be expected to remain enthusiastic about their work when its results often disappear into a procedural quagmire. Finally, while several factors—including global market forces—have contributed to the decline in the timber economy in many communities surrounded by public land, the frustration of many local residents over the paralysis they see within the Forest Service is very real.

Given the amount of complexity that has been built into the public lands system over the years, a "diversified policy portfolio" may be the best path forward. Investors dealing with similar complexity keep some money in stocks, some in bonds, and some in real estate to maximize the chances of substantial gains while diminishing the risk of losing all their investments. By a similar logic, a public lands policy portfolio should probably now include at least three elements: (1) comprehensive review of the entire public lands system, (2) incremental reform of the system, and (3) a deliberate period of experimentation.

The first element might involve creating a twenty-first century form of a public land law review commission. It has been nearly forty years since the last public land law review was commissioned by Congress, making this the longest period that the system has gone without comprehensive review. Beginning a new public land law review raises a number of questions, including how it would be formed, who would be included, and what the political costs would be. If it were proposed and supported by strong, credible, and, above all, bipartisan congressional leadership, a comprehensive review of laws might get to the heart of many problems facing the public land agencies. It could at least attempt to systematically address the basic structural problems that plague them.

While considering large-scale solutions to the operating system, attention should also be paid to opportunities for change on a more immediate scale. An example of this type of incremental reform was the bipartisan congressional effort to address the problems associated with the failing payment-in-lieu-of-taxes (PILT) program.[7] Because both sides of the political fence saw the need to address the problems of an incentive structure that encouraged local governments to push for unsustainable

7. Under the PILT program, the federal government compensates local governments for losses to their tax bases due to the presence of many types of federally owned land. The level of payments is calculated under a complex formula.

levels of timber harvest, while still leaving many of those local governments with dwindling revenues from the public lands, the political capacity developed to successfully adjust the program. The result was the bipartisan Secure Rural Schools and Community Self-Determination Act of 2000, which gave local communities incentives to balance restoration work with more sustainable levels of harvest, while stabilizing their revenue streams. Congress, agencies, and other interested parties should continue to look for similar opportunities to address acute problems and bring positive incremental change to the system.

The third element of the proposed policy portfolio, deliberate experimentation, is reflected in several recent proposals to experiment with new approaches to managing public lands. Many of these proposals call for legislatively authorized experiments or pilot projects that are to be implemented, monitored, and evaluated through various forms of collaborative governance. One of the more promising examples of this approach has emerged under the title of "Region Seven."

In 1998, a group of individuals with a variety of perspectives on the Forest Service met several times at The University of Montana's Lubrecht Experimental Forest to discuss the complex issues facing national forest management and governance. This symposium, organized by the Northern Lights Institute with assistance from The University of Montana's Bolle Center for People and Forests and the Center for the Rocky Mountain West, came to be known as the Lubrecht Conversations.[8] The group addressed the changing management philosophies within the Forest Service, collaborative methods in forest management, shifting public expectations, and the agency's complicated mission. It concluded by proposing that the Forest Service establish a framework for deliberate experimentation in national forest management. The framework that the group described would test innovative approaches to forest management, including collaborative governance structures and other mechanisms to overcome some of the problems that now beset the agency. It suggested that the experiments be implemented under a "virtual region" within the Forest Service, to be called Region Seven.

The significance of choosing the name Region Seven derives from the unusual configuration of Forest Service regions. More than thirty years earlier, as a result of a 1965 national review of Forest Service management and organization, two existing regions of the Forest Service were combined and the original Region Seven in effect disappeared. The

8. The Conversations were informed by such voices as Gloria Flora, then supervisor of the Lewis and Clark National Forest; Tom Power, chair of the Economics Department at The University of Montana; Jack Ward Thomas, former chief of the Forest Service; Mary Mitsos, then a research associate with the Pinchot Institute for Conservation; and Pat Williams, former congressman from Montana.

Region Seven designation has not been used since.

The Lubrecht Conversations proposed that Region Seven be given new life, not as a geographically contiguous region but as a collection of experimental projects on national forest lands across the country. Such a framework would allow innovative solutions to be tested and evaluated at sites throughout the national forest system and would encourage agency managers and public land stakeholders to develop better options than those that currently exist.

Perhaps the strongest element of Region Seven is its emphasis on adaptiveness, in particular its incorporation of adaptive management concepts into the governance of public lands. Adaptive management derives from an acknowledgement that while ecosystems are appropriate units for public land planning, they are too complex and unpredictable to be managed according to traditional planning models. Ecosystems simply will not conform themselves to five- or ten-year plans. Conceding this, adaptive managers start with the best-informed management plan they can devise, knowing at the outset that applying that plan to a living ecosystem will produce unexpected and unintended results. As those results begin to accrue, the adaptive manager revisits the plan, adjusting it to the endless complexity of the ecosystem in question. Region Seven would apply this adaptive approach not only to public land management, but to public land governance as well. It recognizes the impossibility of providing an immediate and final fix to every problem within this very complex system and instead concentrates on building adaptability into the system. The value of such an experimental approach is that it does not attempt to change the entire public lands system at once, but recognizes problems and invites innovative solutions to test in a few carefully chosen settings.

Although the experimental component of the policy portfolio needs to be aggressively adaptive, and therefore should not be heavily constrained in advance, some overarching principles should guide development and implementation of a framework like Region Seven. To encourage the generation and careful testing of alternative approaches to national forest management, the enabling legislation for Region Seven should:

- Create a national competition for selecting promising projects;
- Establish a broadly representative advisory committee to guide project selection and monitoring;
- Emphasize the experimental, adaptive nature of projects;

- Authorize and encourage projects across a range of administrative and geographic scales;

- Require monitoring of both process and outcome against established baselines;

- Mandate the keeping of a cumulative record of project activities and outcomes; and

- Ensure broad dissemination of lessons learned.

The first step in implementing Region Seven legislation would be to conduct a national competition for the selection of experimental projects to test new models of management or governance. A blue-ribbon commission made up of respected representatives of all major public land stakeholder constituencies would be organized to solicit proposals for alternative approaches to public land management and governance, select promising projects, and guide the implementation process. The projects selected would make up the new Region Seven.

The Region Seven projects should test a broad range of models. The types of experiments tested would depend largely on what public land stakeholders are currently attempting or would like the opportunity to try in their own communities. The following list is not meant to be prescriptive but merely to suggest the possible range and variety of models:

- *Trust Model.* The public land in question would be managed by a board of trustees, pursuant to a binding trust instrument.

- *Budgetary Incentives.* After some initial period of federal budgetary support, the experimental area would be expected to generate most or all of its own funds.

- *Collaborative Planning Model.* A collaborative body would write a management plan for the area, while existing public land managers would be charged with implementing it.

- *Collaborative Governance Model.* A collaborative group would be empowered to write and oversee implementation of the management plan.

If these experiments are to be of consequence, it is very important that they be carefully monitored and evaluated and that the results be analyzed honestly. The resulting information must be broadly disseminated so that as many people as possible can learn from the experiments and adapt the lessons to their own settings. The experiments should also be allowed to operate for at least five years—preferably ten or even fifteen years—so that their long-term viability can be legitimately evaluated.

In summary, public land planning and management has become increasingly embroiled with statutory, regulatory, and judicial imperatives that too often prevent the system from working effectively, leaving both agency personnel and the affected public deeply dissatisfied with the process and the results. No comprehensive solution to this state of affairs is likely to be achieved in the foreseeable future. But there has been increasing interest, both among public land constituencies and within Congress, in authorizing a period of deliberate experimentation where a number of carefully conceived, broadly supported, and carefully monitored experiments could test the viability of alternative forms of public land planning and management. The opportunity that the Region Seven concept presents is to move beyond adaptive management to adaptive governance for our public lands.