

Endangered Species and Other Wildlife (Oct 2019)

CHAPTER 12B WILDLIFE DIVERSITY AND NATIONAL FOREST MANAGEMENT: A GOAL OR OBSTACLE FOR THE U.S. FOREST SERVICE?

Martin Nie
Professor, Natural Resources Policy
Director, Bolle Center for People and Forests
W.A. Franke College of Forestry and Conservation, University of Montana
Missoula, MT

[Page 12B-1]

MARTIN NIE is Professor of Natural Resources Policy and Director of the Bolle Center for People and Forests in the W.A. Franke College of Forestry and Conservation at the University of Montana. As appointed by the Secretary of Agriculture, Nie served from 2014-2018 on the U.S. Forest Service's National Advisory Committee for Implementation of the National Forest System Land Management Planning Rule and in 2010 was part of the Forest Service's National Science Panel focused on the development of the planning rule. Nie is author of multiple articles focused on federal public lands and wildlife conservation and is recent co-author of "Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 Planning Rule (*Natural Resources & Environment* 33, no. 3, 2019) and "The Forest Service's 2012 Planning Rule and Its Implementation: Federal Advisory Committee Member Perspectives (*Journal of Forestry* 117, no. 1, 2019).

*Martin Nie is Professor of Natural Resources Policy and Director of the Bolle Center for People and Forests in the W.A. Franke College of Forestry and Conservation at the University of Montana. As appointed by the U.S. Secretary of Agriculture, Nie served as the "science community" representative on the U.S. Forest Service's National Advisory Committee focused on implementation of the 2012 Planning Rule (2014-2018). In 2010, he was part of the USFS's National Science Panel focused on the development of this Rule. Nie's most recent work focused on wildlife and national forest management includes: Susan Jane Brown & Martin Nie, "Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule," *Natural Resources & Environment* 33 (Winter 2019), 3-8; and Nie et al., "Fish and Wildlife Management on Federal Lands: Debunking State Supremacy," *Environmental Law* 47, no. 4 (2017), 797-932.*

I. Introduction

Cliché as it may sound, the U.S. Forest Service (USFS) is at a crossroads regarding the conservation of biological diversity on National Forest System (NFS) lands. National Forests across the country are at various stages of revising decades-old forest plans using a new and potentially paradigm-shifting 2012 Planning Rule. Wildlife diversity, couched in the broader context of ecological integrity, is at the core of this Rule and some of the most high-profile national forests and wildlife issues in the nation will be impacted as a result, from the management of grizzly bears and sage grouse to the revision of the Northwest Forest Plan. The latter, focused on forest management and the viability of the Northern Spotted Owl, provides a benchmark and point for reflection. More than 25 years ago, in another paradigm shifting moment, a district court in Washington made clear "the Forest Service's duty to protect wildlife" and that this duty "requires planning for the entire biological community--not for one species alone."¹

Since this decision in 1992, the NFS has become only more crucial to the conservation of the

nation's fish and wildlife. The most recent comprehensive assessment focused on the distribution of ESA-status species, and those species defined by NatureServe as imperiled, shows that national forests are particularly important refuges for fish and wildlife.² Lands managed by the USFS and Department of Defense stand out in terms of supporting the greatest number of species with status under the Endangered Species Act (ESA). Both agencies harbor about 23 percent of species with ESA-status (at least 355 species for each agency), followed by the

^[1]Seattle Audubon Society v. Moseley, [798 F. Supp. 1484, 1489](#) (1992) (“NFMA and the regulations direct that the forests be managed so as to preserve animal and plant communities”). *Id.*, at [1490](#).

^[2]Bruce A. Stein, Cameron Scott, and Nancy Benton, *Federal Lands and Endangered Species: The Role of Military and Other Federal Lands in the Sustaining Biodiversity*, 58(4) *BioScience* 339 (2008). NatureServe provides independent conservation status assessments for extinction risks facing species in the U.S. *Id.* at 340

[Page 12B-2]

National Park Service (NPS) (19 percent), the U.S. Fish and Wildlife Service (USFWS) (18 percent) and the Bureau of Land Management (BLM) (16 percent).³ The USFS also harbors the most NatureServe-defined imperiled species, approximately 27 percent of the total (at least 821 species).⁴

To put these percentages in context, consider the importance of National Forest lands to fish and wildlife more broadly:

The 193 million acres of the National Forest System support much of North America's wildlife heritage, including: habitat for 430 federally listed threatened and endangered species, six proposed species, and 60 candidate species, with over 16 million acres and 22,000 miles of streams designated as critical habitat for endangered species; approximately 80% of the elk, mountain goat, and bighorn sheep habitat in the lower 48 States; nearly 28 million acres of wild turkey habitat; approximately 70% of the Nation's remaining old growth forests; over 5 million acres of waterfowl habitat; habitat for more than 250 species of migratory birds; habitat for more than 3,500 rare species; some of the best remaining habitat for grizzly bear, lynx, and many reptile, amphibian and rare plant species; over two million acres of lake and reservoir habitat; and over two hundred thousand miles of fish-bearing streams and rivers.⁵

The issues and political pressures impacting wildlife conservation have become more varied and acute since Judge Dwyer's decision in 1992 and passage of the agency's governing statutes in 1897, 1960 and 1976. These core laws and related regulations, as they pertain to fish and wildlife on the National Forests, are reviewed in Part II.⁶ This includes a more detailed review of the wildlife provisions found in the 2012 NFS Land Management Planning Rule [hereinafter 2012 Planning Rule]. These laws and regulations make clear that the USFS has an obligation, and not just the discretion, to conserve biological diversity on National Forest System lands. But as shown below, these statutes provide some discretion to the USFS in how it strikes a balance between wildlife conservation and providing for other multiple uses.

^[3]*Id.*, at 343.

^[4]*Id.*

^[5]U.S. FOREST SERV., BIOLOGICAL ASSESSMENT OF THE USDA NATIONAL FOREST SYSTEM LAND MANAGEMENT PLANNING RULE FOR FEDERALLY LISTED ENDANGERED AND THREATENED SPECIES; SPECIES PROPOSED FOR FEDERAL LISTING; SPECIES THAT ARE CANDIDATES FOR FEDERAL LISTING ON NATIONAL FOREST SYSTEM LANDS 17-18 (2011). The USFS also manages some of the highest quality aquatic habitats in the U.S. For example, half of the habitat for federally protected freshwater fishes, mollusks, and amphibians is on national forests. U.S. FOREST SERVICE, RISE TO THE FUTURE: NATIONAL FISH AND AQUATIC STRATEGY (WASHINGTON, D.C.: U.S. DEPT. AGRICULTURE, 2017).

^[6]This section of the Article draws from a more comprehensive review focused on wildlife management on federal lands. See Martin Nie, Christopher Barns, Jonathan Haber, Julie Lurman Joly, Kenneth Pitt, and Sandra B. Zellmer, *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENVTL. L. 797 (2017).

[Page 12B-3]

This legal context provides the USFS some room to view: (1) wildlife conservation as a primary institutional purpose and goal of the agency, or (2) as a meddlesome obstacle to achieving "active forest management" and the delivery of "real" multiple uses like timber, livestock grazing, minerals, and energy development. This distinction is not always so stark but it does provide a sense of the two paths at the crossroads for the USFS. Part III briefly explores each direction, with a focus on how the agency implements the powerful wildlife provisions provided in the 2012 Planning Rule.

II. Legal Framework

Before proceeding, it is important to dispel the common myth that "the states manage wildlife and federal agencies only manage wildlife habitat." This mantra is commonly invoked by state *and* federal agencies and it is particularly pronounced in the context of national forest management. The mythmaking endures partly because of the USFS's traditional deference to the states in regulating hunting, fishing and trapping on national forests. But wildlife management goes well beyond setting harvest levels and methods. In any case, and as explained in a comprehensive review of fish and wildlife management authority on federal lands, "The mantra is wrong from a legal standpoint, limited from a biological one, and problematically simplifies the complexity of wildlife-habitat relationships."⁷ It also "invariably leads to fragmented approaches to wildlife conservation and unproductive battles over agency turf, and it often leads to an abdication of federal responsibility over wildlife."⁸

The laws reviewed below rest on the U.S. Constitution's Property Clause, which provides the USFS vast authority to manage its lands and the wildlife thereon. The Supreme Court has repeatedly observed that this power is "without limitations"⁹ and can extend to managing wildlife on federal lands. As stated in *Kleppe v. New Mexico* (1976), "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."¹⁰ Of course, the states also manage wildlife on federal lands, but as made clear in *Kleppe*, "those powers exist only 'in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution."¹¹

Three core statutes are reviewed below: the 1897 Organic Act, the Multiple Use Sustained Yield Act (MUSYA) of 1960, and the National Forest Management Act (NFMA) of 1976. Administrative discretion is a core theme running through the development and implementation of these laws. The storyline begins with the discretionary nature of the Organic Act, which is followed by Congress providing a mild course correction for the USFS in MUSYA, and then providing more prescription and enforceable mandates in NFMA.

Not reviewed here, but part of the administrative discretion narrative, are several other environmental and public land laws that intersect with national forest management. A progression of statutes--such as the Wilderness Act of 1964, the Wild and Scenic Rivers Act of

^[7]Nie et al., *supra* note 6, at 899.

^[8]*Id.*

^[9]*United States v. San Francisco*, [310 U.S. 16](#), [29](#) (1940)

^[10]*Id.*, at [426 U.S. 529](#), [541](#)

^[11]*Id.*, at [426 U.S. 529](#), [545](#)

[Page 12B-4]

1968, the National Environmental Policy Act of 1970, the Endangered Species Act of 1973, and several others--narrowed the USFS's scope of discretion over the years, both substantively and procedurally, with significant impacts for fish and wildlife management and habitat.

1. The 1897 Organic Act

The Forest Service's 1897 "Organic Act" authorizes the establishment of national forests. It states in part that "[n]o 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."¹² The law also authorizes the USFS to regulate "the occupancy and use" of the national forests and "to preserve the forests thereon from destruction."¹³

The Organic Act is silent on fish and wildlife management on National Forests. In an early wildlife decision, however, the Supreme Court found the USFS to have broad powers in protecting the national forests (in this case the Kaibab) from damage inflicted by deer in northern Arizona. The power of the U.S., said the Court, to "protect its lands and property does not admit of doubt, the game laws of any other statute of the state to the contrary notwithstanding."¹⁴

2. The Multiple Use Sustained Yield Act (1960)

In 1960, Congress passed the Multiple Use Sustained Yield Act (MUSYA).¹⁵ For the first time, it was statutorily recognized that the USFS had some responsibility to consider fish and wildlife values on the National Forests. MUSYA states in pertinent part: "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."¹⁶ This language does not require the USFS to conserve wildlife in any specific way, only to consider wildlife and fish in the context of multiple use decision making. As defined in the law, multiple use means:

The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be

^[12][16 U.S.C. § 475](#).

^[13]*Id.* See [16 U.S.C. § 551](#) ("The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of [section 471](#) of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."). See *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, [689 F.Supp.2d 891, 905](#) (D.D.C. 2010) (finding that USFS unlawfully delegated its Organic Act authority in allowing National Wild Turkey Federation to issue special use permits on forest lands).

^[14]*Hunt v. United States*, [278 U.S. 96, 100](#) (1928).

^[15][16 U.S.C. § 528](#).

^[16]*Id.* (emphasis mine)

[Page 12B-5]

used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with

consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.¹⁷

The definition of multiple use is a sort of Rorschach test of statutory construction. Like the famous optical illusion where a person either sees a younger or older-looking woman,¹⁸ multiple use is subject to differing professional and personal interpretations. But as the courts generally view it, the multiple use mandate "breathes discretion at every pore"¹⁹ and grants the USFS wide latitude in determining the proper mix of uses for National Forest lands.²⁰ In *Perkins v. Bergland*, the plaintiffs argued that the MUSYA contained standards that cabined the USFS's discretion over the proper number of grazing permits to protect the public land from damage. The Ninth Circuit disagreed:

These sections of MUSYA . . . contain the most general clauses and phrases. For example, the agency is "directed" in section 529 to administer the national forests "for multiple use and sustained yield of the several products and services obtained therefrom," with "due consideration (to) be given to the relative values of the various resources in particular areas." This language, partially defined in section 531 in such terms as "that (which) will best meet the needs of the American people" and "making the most judicious use of the land," can hardly be considered concrete limits upon agency discretion. Rather, it is language which "breathe(s) discretion at every pore" ... What appellants really seem to be saying when they rely on the multiple-use legislation is that they do not agree with the Secretary on how best to administer the forest land on which their cattle graze. While this disagreement is understandable, the courts are not at liberty to break the tie by choosing one theory of range management as superior to another.²¹

Since *Perkins v. Bergland*, the courts have consistently found that USFS has broad discretion under the multiple use framework.²² This includes *Wyoming v. U.S. Dept. of*

[17] [16 U.S.C. § 531\(a\)](#).

[18] See https://en.wikipedia.org/wiki/Ambiguous_image

[19] *Perkins v. Bergland*, [608 F.2d. 803](#) (9th Cir. 1979).

[20] *Wyoming v. U.S. Dept. of Agriculture*, [661 F.3d 1209](#), [1268-1269](#) (10th Cir. 2011), *cert. denied*, [133 S.Ct. 417](#) (2012).

[21] [608 F.2d. at 806](#).

[22] See e.g., *Griffin v. Yuetter*, [944 F.2d 908](#), [908](#) (9th Cir.1991) (unreported); *Big Hole Ranchers Assc. Inc. v. U.S. Forest Service*, [686 F.Supp. 256](#), [264](#) (D. Mon. 1988); *Wind River Multiple-Use Advocates v. Espy*, [835 F.Supp. 1362](#), [1372](#) (D. Wyo. 1993), *affirmed*, [85 F.3d 641](#) (10th Cir.1996); *Sierra Club v. Marita*, [845 F.Supp. 1317](#), [1328](#) (E.D. Wis. 1994); *Clinch Coal. v. Damon*, [316 F.Supp.2d 364](#), [378](#) (W.D. Va 2004); *Natural Res. Defense Council, Inc. v. U.S. Forest Serv.*, [634 F.Supp. 2d 1045](#), [1058](#) (E.D. Cal. 2007); *Cal. Forestry Assoc. v. Bosworth*, 2008 WL 4370074 (E.D. Cal., 2008); *Pacific Rivers Council v. U.S. Forest Serv.*, 2008 WL 4291209 (E.D. Cal. 2008); *People of Cal. ex rel. Lockyer v. U.S. Dept. of Agric.*, 2008 WL 3863479 (E.D. Cal.. 2008).

[Page 12B-6]

Agriculture,²³ where the Tenth Circuit upheld the 2001 Roadless Rule²⁴ over challenges that the Rule failed to satisfy the statutory multiple-use mandate because it precluded timber harvesting in certain areas. The court reaffirmed the MUSYA's discretionary nature and found that, while the Rule did not permit timber harvesting, it permitted other multiple uses, such as "outdoor recreation," "watershed," and "wildlife and fish purposes."²⁵

A relatively short and simple savings clause is also provided in the MUSYA: "Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests."²⁶ As the case with other public land savings clauses and

related litigation, some interests clutch onto this provision as purported proof that Congress reserved to the states their primary and absolute authority to manage fish and wildlife on national forest lands, in a way unfettered from federal intervention and the possibility of federal preemption. But that view is mistaken. As the courts make clear, wildlife savings clauses disclaim a federal intention to completely displace state laws related to wildlife, so long as the state law does not conflict or undermine federal prerogatives.²⁷

3. The National Forest Management Act (NFMA) (1976)

Born out of the timber clear-cutting controversies of the 1960s and 1970s, the NFMA was passed in order to better balance timber management, resource use and environmental protection. One important assessment of USFS management at the time, focused on the Bitterroot National Forest in Montana, critiqued the agency for its emphasis on big game and for treating other wildlife and non-timber multiple uses as afterthoughts.²⁸ And in another catalyzing case on the Monongahela in West Virginia, local hunters challenged the USFS's practice of clearcutting and its impacts to squirrel and turkey habitat.²⁹ Both cases set the stage for NFMA. And unlike the highly discretionary Organic Act and MUSYA, the NFMA provides substantive and procedural planning requirements, goals, and constraints on the agency, including obligations for conserving fish and wildlife.

The NFMA requires the writing of land and resource management plans (LRMPs or "forest plans") by every national forest and grassland in the NFS. Created is a three-tiered regulatory approach to planning.³⁰ At the highest level, national-level NFMA regulations govern

^[23]661 F.3d 1209, 1268-1269 (10th Cir. 2011), *cert. denied*, 133 S.Ct. 417 (2012). *Accord* American Whitewater v. Tidwell, 959 F.Supp. 2d 839, 863 (D.S.C. 2013), *affirmed*, 770 F.3d 1108 (4th Cir. 2014); *Ark Initiative v. Tidwell*, 816 F.3d 119, 128 (D.C. Cir. 2016).

^[24]Special Areas; Roadless Area Conservation Final Rule, 66 Fed. Reg. 3244 (2001).

^[25]661 F.3d at 1268-1269.

^[26]16 U.S.C. § 528.

^[27]For a review see Nie et al., *supra* note 6, at 837-838,

^[28]"A University View of the Forest Service," *Congressional Record* (Nov. 18, 1970) (the so-called "Bolle Report").

^[29]The case itself, however, focused on clearcutting and whether it was permitted under the 1897 Organic Act. The answer was no. See *West Virginia Division of the Izaak Walton League of America v. Butz*, 367 F. Supp. 422 (1973).

^[30]For a more elaborate explanation of this tiered approach, see *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961 (9th Cir. 2003).

[Page 12B-7]

the development and revision of second-tier forest plans. Forest plans typically make zoning and suitability decisions and limit and regulate various activities within a forest area, therefore acting as a gateway through which subsequent project-level proposals must pass.³¹ Forest plans also include long-term goals and desired conditions of the land and resources.³² Site-specific projects make up the third tier of planning. Any such proposed use of a national forest is subject to the requirement in NFMA that "[r]esource plans and permits, and other instruments for use and occupancy of National Forest System lands shall be consistent with" the applicable forest plan.³³

One of NFMA's most powerful provisions is its wildlife diversity mandate.³⁴ It requires that forest plans "provide for a 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."³⁵ According to Wilkinson and Anderson's authoritative history of NFMA's development, the diversity provision was

meant to require "Forest Service planners to treat the wildlife resource as a controlling, co-equal factor in forest management and, in particular, as a substantive limitation on timber production."³⁶

Regulations implementing NFMA address requirements for wildlife diversity in greater detail. Most "first-generation" forest plans were written pursuant to the 1982 NFMA regulations, and thus most of the wildlife diversity case law focuses on this particular approach to wildlife conservation. To some extent constraining the USFS's discretion to write its own NFMA regulations, section 6(h) of the statute required the appointment of a "committee of scientists" who were "not officers or employees of the Forest Service" to "provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted."

The Committee was fully aware of the politics and stakes involved in interpreting NFMA's diversity provision, as some interests wanted no references to "species" or "species abundance" in the definition of diversity.³⁷ But the Committee emphasized that "in assessing the diversity of plant and animal communities the Forest Service must deal with both numbers and kinds of species."³⁸ According to the Committee, "It is simply not possible to assess diversity without knowing what kinds of species compose the different communities in a region and the

^[31]Scott W. Hardt, *Federal Land-Use Planning and Its Impact on Resource Management Decisions*, 46B RMMLF-INST 4, 4-7 (1997).

^[32]See Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 *Envtl. Law.* 149, 153-55 (1996) (discussing the various planning processes under NFMA). See also *Ohio Forestry Assn. Inc. v. Sierra Club*, [523 U.S. 726](#) (1998) (describing the nature of forest plans).

^[33][16 U.S.C. § 1604\(i\)](#).

^[34]See generally Courtney A. Schultz et al., *Wildlife Conservation Planning Under the United States Forest Service's 2012 Planning Rule*, 77 *J. Wildlife Mgmt.* 428-44 (2013).

^[35][16 U.S.C. § 1604\(g\)\(3\)\(B\)](#).

^[36]Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* 296 (1987).

^[37]44 *Fed. Reg.* 53967, 53975 (Sept. 17, 1979).

^[38]*Id.*

[Page 12B-8]

numbers of each that are present for the simple reason that kinds and numbers are the biological ways that diversity is measured."³⁹

This history is illuminating because the 1982 regulations ended up requiring that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native species in the plan area."⁴⁰ While this language emphasized management of habitat, the regulation also established a minimum population threshold, at least in concept, by defining "viable population" as "one which has the estimated number and distribution of individuals to insure its continued existence is well distributed in the planning area."⁴¹ As discussed below, the viability requirement, albeit in different form, was carried into the 2012 Planning Rule.

NFMA's diversity mandate is an enforceable and substantive requirement for the USFS and it serves as an important constraint on management activities. That said, NFMA's diversity provision "does not provide much guidance as to its execution," and the courts have granted the USFS considerable discretion in choosing the management methods used to ensure diversity,⁴² as long as those methods reasonably assure viable populations of a species.⁴³ In one prominent case, for example, the court refused to require that the USFS use the science of conservation biology to

develop forest plans impacting wildlife diversity on two national forests in Wisconsin.⁴⁴ And in other cases, courts deferred to the agency's controversial practice of monitoring habitat and using that information as a surrogate or proxy for wildlife diversity (and the population trends of agency-selected "management indicator species").⁴⁵

a. Wildlife and the 2012 Planning Rule

In 2012, the Obama Administration finalized a new set of regulations to guide forest plan revision and amendments,⁴⁶ after several aborted attempts to create new forest planning requirements in 2000, 2005, and 2008.⁴⁷ These new regulations are markedly different than prior iterations. In addition to traditional themes of multiple use and sustainability, the Rule boldly embraces "ecological integrity" as a key organizing principle, the best available scientific information in planning, monitoring and adaptive management, collaboration and public

[39] *Id.*

[40] [36 C.F.R. § 219.19](#) (1982)

[41] *Id.*

[42] *Sierra Club v. Marita*, [46 F. 3d 606](#), [615](#) (1995)

[43] See e.g., *Idaho Sporting Congress v. Rittenhouse*, [305 F. 3d 957](#) (9th Cir. 2002).

[44] *Sierra Club v. Marita*, [46 F. 3d 606](#), [615](#) (1995)

[45] See e.g., *Inland Empire Public Lands Council v. U.S. Forest Service*, [88 F. 3d 754](#) (1996) and *Lands Council v. McNair*, [537 F. 3d 981](#) (2008) (deferring to the USFS "as to what evidence is, or is not, necessary to support wildlife viability analysis."). *Id.*, at 992; and *Sierra Club v. Glickman*, [974 F. Supp. 905](#), [936-37](#) (E.D. Texas. 1997).

[46] [77 Fed. Reg. 21162](#) (April 9, 2012) (codified at 36 C.F.R. Part 219 (2012))

[47] See *Citizens for Better Forestry v. U.S. Dep't of Agric.*, [481 F.Supp2d 1059](#) (N.D. Cal. 2007).

[Page 12B-9]

engagement, and wildlife conservation. This section selectively reviews some of the most important wildlife provisions found in the 2012 Planning Rule.

No issue was as hotly contested during the formation of the 2012 Rule than how it would meet NFMA's wildlife diversity requirement and what would become of the 1982 viability standard. The Bush Administration eliminated the provision altogether with the 2008 planning rule, which did not require plans "insure" viability or even provide a "high likelihood" of viability. Offered instead was a more discretionary framework emphasizing "appropriate ecological conditions." Predictably, this approach was opposed by conservation interests and the 2008 Rule was vacated by a federal court for procedural violations of the APA, NEPA, and ESA.⁴⁸

A central political tension evident in the development of the 2012 planning rule was how to balance two values: (1) the need for strong, clear enforceable language pertaining to wildlife that can be used by outside interests to hold the agency accountable for its actions, and (2) the need for some discretion and flexibility by the USFS in order to make what are often highly complex and case-specific decisions about wildlife and other competing demands.

So useful in court was the old 1982 viability regulation that some conservation interests were reluctant to let it go and try something different, especially if it was discretionary in nature and vaguely-defined. Some industry, trade and motorized recreational interests were likewise concerned, but for the opposite reason. Their fear, as argued unsuccessfully in court in opposition to the new regulations, was that the Rule's specific and enforceable wildlife provisions would

unlawfully prioritize wildlife diversity in contravention of what they consider to be the more output-driven and commodity-oriented multiple-use mandate provided to the USFS in the Organic Act and MUSYA.⁴⁹

The new diversity provision serves as a significant constraint on forest management, because other parts of the Rule -- such as those focused on multiple use and timber -- must meet the new diversity requirements.⁵⁰ The general framework of the 2012 Rule adopts an

^[48]Citizens for Better Forestry v. U.S. Dep't of Agric., [481 F.Supp2d 1059](#) (N.D. Cal. 2007).

^[49]Statement of Points and Authorities in Supp. Of Plts' Mot. For Sum. Jmt., Federal Forest Resource Coalition et al, v. Vilsack, Civil No. 1:12-cv-01333-KBJ (Jun. 5, 2013) ("Thus, multiple-use objectives and outputs can and will be sacrificed to achieve viable populations and to restore rare plant and animal communities. Thus, by turning NFMA's diversity provision on its head and elevating diversity and viability above multiple uses, the diversity regulation contravenes NFMA 1604(g)(3)(B) and is unlawful"), at 28. The district court eventually dismissed the industry plaintiffs' lawsuit, holding that the plaintiffs failed to demonstrate that they had standing to bring their suit because they could not demonstrate that the 2012 Rule caused the plaintiffs immediate and particularized harm that could be remedied by the Court. Instead, the court indicated that the plaintiffs would have to wait until new forest plans were revised under the Rule to show how the Rule harmed their interests. Fed. Forest Res. Coal. v. Vilsack, [100 F. Supp. 3d 21](#) (D.D.C. 2015).

^[50]See e.g., [36 C.F.R. § 219.10](#) ("While meeting the requirements of [§§219.8](#) [sustainability] and [§§219.8](#) [diversity of plant and animal communities], the plan must provide for ecosystem services and multiple uses...").

[Page 12B-10]

ecosystem and species-specific approach to providing diversity and the persistence of native species in the plan area: the so-called "course-filter/fine-filter" approach. In practice, this means that a forest plan will include plan components for the ecosystem characteristics needed for diversity (course filter) and if those are insufficient, the plan will provide more specific plan components for individual species (fine filter).

Plan components are at the heart of forest planning. They consist of (1) desired conditions; (2) objectives; (3) standards; (4) guidelines; and (5) suitability of lands (required for timber production, optional for other multiple uses or activities). When properly integrated, these components establish the vision of a plan, set forth the strategy to achieve it, and provide the constraints of subsequent management. They are also important from a legal standpoint because the 2012 Rule makes all components enforceable: "every project and activity must be consistent with the applicable plan components."⁵¹ In practice, however, enforceability will hinge on the specific language used in writing them, an issue picked up again below.

Forest plans must include plan components "to maintain or restore the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area [and] "to maintain or restore their structure, function, composition, and connectivity."⁵² The latter is defined as "landscape linkages" which include "the daily and seasonal movements of animals within home ranges; the dispersal and genetic interchange between populations; and the long distance range shifts of species, such as in response to climate change."⁵³

Plan components can be specifically written to ensure the conservation of a species, such as providing an enforceable and nondiscretionary standard to protect nest cavity trees during prescribed burns for the protection of red-cockaded woodpeckers or a standard for the size and placement of culverts for fish passage.

The 2012 Rule requires that plan components "maintain a viable population of each species of conservation concern [SCC] in the plan area."⁵⁴ The Rule defines a SCC as:

[A] species, other than federally recognized threatened, endangered, proposed, or candidate species, that is known to occur in the plan area and for which the regional forester has

determined that the best available scientific information indicates substantial concern about the species' capability to persist over the long-term in the plan area."⁵⁵

^[51][36 C.F.R. § 219.15\(d\)](#)

^[52][36 C.F.R. § 219.9.](#)

^[53][36 C.F.R. § 219.19](#)

^[54][36 C.F.R. § 219.9\(b\)\(2\)](#)

^[55][36 C.F.R. § 219.9\(c\)](#). A "viable population," is "(a) population of a species that continues to persist over the long term with sufficient distribution to be resilient and adaptable to stressors and likely future environments." [36 C.F.R. § 219.19](#) (2016). Like the 1982 Rule, the 2012 Planning Rule thus establishes population levels for at-risk species as a goal, which is to be achieved by providing ecological conditions and regulating human uses.

[Page 12B-11]

There is much to parse here. What species, for example, are "known to occur" in the plan area and what constitutes "substantial concern" about the species "capability to persist?" These are particularly science-based determinations and will be filtered through the Rule's new provision requiring the USFS to "use the best available scientific information [BASI] to inform the planning process."⁵⁶ Unclear at the moment is whether or not the new BASI provision will change the typical discretion granted to the agency by the courts. What will more likely change, at the margins, is how the USFS documents its consideration of best available science in selecting and maintaining viable populations of SCCs.

Provided in the Rule is also is an exception clause; diversity is to be provided "within Forest Service authority and consistent with the inherent capability of the plan area."⁵⁷ As discussed below, this language can be interpreted very differently, but as the USFS views it, it simply acknowledges the limitations of a national forest unit to conserving wildlife in a larger international and interjurisdictional context, such as the impact of dams on salmon or the challenge of maintaining a viable population of American Pika or wolverine given current and projected changes to climate.⁵⁸

Adaptive management (and the role of monitoring in this approach) is an anchor point of the 2012 Rule. In this context, the Rule creates a new category of "focal species," whose status must be monitored in order to assess the ecological conditions necessary for wildlife diversity.⁵⁹ Focal species "would be commonly selected on the basis of their functional role in ecosystems" and their status "permits inference to the integrity of the larger ecological system to which it belongs and provides meaningful information regarding the effectiveness of the plan in maintaining or restoring the ecological conditions to maintain the diversity of plant and animal communities in the plan area."⁶⁰ Unlike the previous use of "management indicator species" under the 1982 regulations, focal species are not monitored to make inferences about the viability of other species, but chosen "because they are believed to be indicative of key characteristics of ecological integrity and are responsive to ecological conditions in a way that can inform plan decisions."⁶¹

One of the most important provisions of the 2012 Rule is its affirmative obligation that forest plans "provide the ecological conditions necessary to: contribute to the recovery of federally listed threatened or endangered species."⁶² This requirement is provided to further the purposes of §7(a)(1) of the ESA, which is the statute's mandate that federal agencies "utilize their authorities in furtherance of the purposes of this Act by carrying out program for the conservation of endangered species and threatened species."⁶³ Put simply, this means that forest plans could constitute a recovery-based conservation program as envisioned by the ESA.

^[56][36 C.F.R. § 219.3](#)

[\[57\]36 C.F.R. § 219.9.](#)

[\[58\]FSH 1909.12, 23.13c.](#)

[\[59\]36 C.F.R. § 219.12\(5\)\(iii\)](#)

[\[60\]36 C.F.R. § 219.9](#)

[\[61\]FSH 1909.12, 32.13c.](#)

[\[62\]36 C.F.R. § 219.9\(b\)\(1\).](#)

[\[63\]16 U.S.C. § 1536\(a\)\(1\)](#)

[Page 12B-12]

Part III: Discussion: Wildlife Diversity as Goal or Obstacle

The laws and regulations reviewed in Part II provides the USFS a mandate to conserve wildlife diversity on NFS lands, but also some discretion and flexibility in how to achieve it. How the agency implements the 2012 Planning Rule will tell us what to expect in the future. At the time of this writing, three forest plans--the Francis Marion in South Carolina, the Flathead in Western Montana, and the El Yunque in Puerto Rico--have been revised pursuant to the 2012 Rule and several other forests are at various stages of plan development.

Wildlife played a significant role in the development of two plans completed so far, with the Francis Marion providing habitat to ESA-listed species like the red-cockaded woodpecker; and the Flathead harboring "one of the most intact assemblages of medium to large carnivores in the contiguous United States."⁶⁴ Conservation interests used the 2012's Rule's new objection process to strengthen the protections afforded to wildlife on the Francis Marion and the Flathead is headed to court in the near future, with claims that the plan is detrimental to native wildlife species including grizzly bears, wolverine, Canada lynx and bull trout and their associated habitats.

In the planning queue is the revision of the Northwest Forest Plan, bringing us full circle and providing a symbolic point to consider the future of the NFS and the wildlife dependent upon it. Will wildlife diversity be viewed as a goal or obstacle by the USFS? Discussed below are a few brief cues and examples of what each institutional posture might look like in practice, beginning with wildlife conservation as a first order goal and priority for the USFS.

A. Wildlife as Goal and Priority

This scenario begins with the USFS fully embracing its authority and obligations to conserve fish and wildlife on NFS lands. Instead of a problematic deference to the states, the USFS would view state and tribal governments and other interests as collaborative partners in meeting its national statutory mandate, which includes the conservation of fish and wildlife. The agency would build on and celebrate the actions it routinely takes to conserve and restore fish and wildlife habitat,⁶⁵ and own the fact that NFS lands will become increasingly crucial to biodiversity as more non-federal lands become developed in the future.⁶⁶

^[64]U.S. Forest Service, Flathead National Forest Land Management Plan (Washington, D.C.: USDA, 2018), at 8.

^[65]See e.g., a special issue devoted to the USFS's accomplishments and new strategy for fish and aquatic stewardship in the journal FISHERIES (43, No. 9., Sept. 2018).

^[66]This is a fact already recognized by the agency and its scientists in other contexts. See e.g., U.S. Forest Serv., Future of America's Forests and Rangelands: Forest Service 2010 Resources Planning Act Assessment 11 (2012) (reviewing how development pressure on nonpublic lands is affecting "the ability of those public lands to sustain important ecosystem services and biodiversity"). See also Brett B. Roper et al., *Conservation of Aquatic Biodiversity in the Context of Multiple-Use Management on National Forest System Lands*, 43, No. 9 FISHERIES 396, 397 (Sept. 2018) ("These public lands will

play an increasingly important role in maintaining aquatic biodiversity given the accelerating development of privately owned rural lands.”)

[Page 12B-13]

The "wildlife as goal" posture also includes the USFS viewing the 2012 Planning Rule as a robust and science-driven framework for the conservation of biological diversity on NFS lands. The Rule's wildlife provisions, as reviewed above, could be used by the USFS to more efficiently and strategically plan for the diversity and viability of wildlife and to effectuate the more pro-active recovery-based conservation and planning envisioned by the ESA. The Rule provides the authority and tools necessary "to keep common native species common" and to "contribute to the recovery of threatened and endangered species."⁶⁷

The 2012 Rule's requirement that forest plans "contribute to the recovery of threatened and endangered species" exemplifies the "wildlife diversity as goal" paradigm of management.⁶⁸ This pro-active and affirmative mandate goes beyond the more limited and traditional approach of providing a minimum viable population of a species, which is an innately risky approach to management. Instead, it puts into practice the ESA's conservation command: To use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided...are no longer necessary"⁶⁹ and for federal agencies to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species."⁷⁰ In this scenario, the USFS would view this provision as a way to more efficiently implement projects that are tiered to a forest plan, with the assumption that a forest plan contributing to species recovery would also be less likely to result in project-level ESA jeopardy determinations for those species.

One telltale sign of whether wildlife is viewed by a national forest as a goal or obstacle will be found in the plan components of a forest plan. If wildlife is indeed a goal, plan components will be written specifically for wildlife and they will be unambiguous, enforceable, and measurable.⁷¹ SCCs would be identified early enough in the process to meaningfully inform the development of these components. For example, a "wildlife-forward" forest plan would include specific desired conditions and other plan components and apply them to particular management areas that would be designated with the purpose of ensuring wildlife connectivity.⁷²

A more species-specific example is provided by the restoration of beavers, what should be the official mascot of the 2012 Planning Rule. Beavers are an ideal focal species to monitor because of their role in maintaining and restoring ecological integrity and increasing resiliency to climate change, two foundational principles of the 2012 Rule. To make the Rule work for beavers and the ecosystems they engineer, a forest plan would include specific plan components

^[67][77 Fed. Reg. 21162](#), 21212 (Apr. 9, 2012)

^[68][36 C.F.R. § 219.9\(b\)\(1\)](#).

^[69][16 U.S.C. § 1532\(3\)](#)

^[70][16 U.S.C. § 1536\(a\)\(1\)](#).

^[71]See generally Martin Nie & Emily Schembra, *The Important Role of Standards in National Forest Planning, Law, and Management*, 44 ENVTL. L. REP. 10281 (2014)

^[72]See Jonathan Haber and Peter Nelson, *Planning for Connectivity: A Guide to Connecting and Conserving Wildlife Within and Beyond America's National Forests* (2015), at <https://defenders.org/sites/default/files/publications/planning-for-connectivity.pdf>.

[Page 12B-14]

designed to maintain or enhance beaver complexes to support aquatic habitat quality and resiliency, or to encourage beavers to recolonize new areas and high priority watersheds.⁷³

Providing wildlife-focused and specific plan components will also provide for a decision-based monitoring strategy and a degree of regulatory certainty and accountability. In those cases with a higher degree of scientific uncertainty about a species, a component will be written in a way that ties future management and decision making to what is learned from monitoring. And in this scenario, the entire process would be open to ensure constructive public engagement and the leveraging of outside scientific expertise.⁷⁴

B. Wildlife as Obstacle

The wildlife as obstacle pathway is characterized by the USFS viewing wildlife diversity as an impediment to providing more output-oriented and commodity-based multiple uses. The scenario begins with the agency first protesting that it has any wildlife obligations at all, other than providing habitat for the discretionary "wildlife purposes" set forth in MUSYA. The myth and mantra that "states manage wildlife, the USFS manages habitat" is the first line of defense used by the agency in this scenario.

When forced by outside interests and the courts to no longer acquiesce to the states, the agency's next move would be to exploit its administrative power to do nothing--to not act on behalf of wildlife. The agency might reluctantly concede that it has the authority to take action to protect wildlife on NFS lands, but the action is discretionary and cannot be compelled using administrative law.⁷⁵ In this scenario, actions taken by the USFS impacting wildlife will be framed as discretionary, meaning that they are not "discrete agency action[s] that it is *required* to take."⁷⁶

This scenario would also include the vaguest and most unenforceable promises by the agency to monitor wildlife in an unaccountable version of adaptive management. But instead of using monitoring information as a way to learn and make better decisions regarding wildlife, assurances to monitor and "wait and see" will be used to argue that the agency action is not final and thus not reviewable under the Administrative Procedure Act.⁷⁷

Another example has the USFS most narrowly applying the 2012 Rule's wildlife provisions to see how much discretion will be afforded by the courts in reviewing the agency's implementation of the Rule. Here, the plan revision process becomes an opportunity for the unit to unburden itself from previously made conservation commitments to protect species. In their

^[73] See Sandra Zellmer, *Sarah Bates, and Jonah Brown, Restoring Beavers to Enhance Ecological Integrity in National Forest Planning*, 33 NATURAL RESOURCES & ENVIRONMENT 43 (2019).

^[74] NATIONAL ADVISORY COMMITTEE FOR IMPLEMENTATION OF THE NATIONAL FOREST SYSTEM LAND MANAGEMENT PLANNING RULE, FINAL RECOMMENDATIONS TO THE SECRETARY OF AGRICULTURE AND THE CHIEF OF THE FOREST SERVICE (Feb. 3, 2018), at 44.

^[75] 5 U.S.C. § 706(1)

^[76] *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)

^[77] 5 U.S.C. § 704. See e.g., *Utah Native Plant Society v. U.S. Forest Serv.*, No. 17-4047 (10th Cir. 2019)

[Page 12B-15]

stead will be the vaguest and most aspirational of plan components, all used in order to maximize the unit's discretion and flexibility and to make it harder to challenge the plan and related-projects in court. For example, enforceable standards that once held the agency accountable would transform into vague desired condition statements, and the "shalls" in a plan regarding wildlife conservation would get replaced by "may consider" and "should monitor."

This posture would also include the most permissive interpretation of the wildlife provisions found in the 2012 Rule, such as in identifying and conserving species of conservation concern. In this case, a national forest exploits what would be considered discretionary language in the definition of a SCC, such as whether the species "is *known to occur* in the plan area" or whether there is "*substantial concern* about the species' capability to persist over the long-term in the plan area."⁷⁸ Similarly, a forest would consider most species' needs as "beyond the authority of the Forest Service or not within the inherent capability of the plan area..."⁷⁹ Instead of viewing this provision as a reasonable exception, or to view the national forests as a way to compensate for degraded habitat on non-USFS lands, the agency would use it as a way to opt-out whenever possible.

In sum, this scenario follows the trajectory established by the USFS after the 1982 NFMA regulations were promulgated. It is to prioritize administrative discretion and a time-tested way to retain it through judicial review is by framing most wildlife diversity issues as disagreements over scientific methodology and not as substantive policy choices that must be made at the plan and project levels.⁸⁰

Instead of embracing and putting into action all the new strategic tools provided by the 2012 Rule--such as using management area designations to promote wildlife connectivity or using forest plans to promote species recovery--national forests in this scenario will simply do what they have done in the past regarding planning. Units will adhere to old ways of developing forest plans under the 1982 regulations.⁸¹ Part of this posture would also include the agency postponing hard decisions that must be made about wildlife in a forest plan--the big picture landscape-level look--and instead defer them to project-level analysis--another entrenched tendency to plan now, only to plan again later and punt to the project level. And once at the project level, there will be a very good chance that no NEPA-effects analysis for wildlife will be done at all.⁸²

Part IV: Conclusion

The "wildlife as obstacle" pathway sketched above is exaggerated. There are also more than two paths that could be taken by the agency in the future, all of them contingent on congressional funding and executive-branch priorities. But the scenarios help illustrate the enduring theme of USFS discretion and how it will impact the future of fish and wildlife on NFS

^[78][36 C.F.R. 219.9\(c\)](#).

^[79][36 C.F.R. § 219.9\(b\)\(2\)](#)

^[80]See Greg D. Corbin, *The United States Forest Service's Response to Biodiversity Science*, 29 ENVTL. L. 377, 400 (1992).

^[81]See NATIONAL ADVISORY COMMITTEE FOR IMPLEMENTATION OF THE NATIONAL FOREST SYSTEM LAND MANAGEMENT PLANNING RULE, at 34.

^[82]Proposed Rule, National Environmental Policy Act (NEPA Compliance), [84 Fed. Reg. 27544](#) (June 13, 2019).

[Page 12B-16]

lands. The USFS is not a free agent and the pathway it chooses will depend on the pathway Americans choose for Congress and the President in the future. And there is little doubt that the judiciary will play a significant role in interpreting wildlife diversity again, but this time in the context of the 2012 Planning Rule and the projects tiered to it.

To provide wildlife diversity is not the USFS's only obligation and there is no avoiding the tensions and trade-offs that must be made by the agency in administering its multiple use mandate. For better or worse, the primary way in which these multiple use decisions get made, and their impacts to wildlife evaluated, is through a forest planning process. National forests throughout the country

are now at this crucial juncture and are revising their forest plans using a fundamentally different planning rule, one that takes a more strategic and pro-active approach to wildlife conservation. The shape and direction of those plans, and how closely they align with the letter and spirit of the 2012 Planning Rule, will provide important cues to assess the pathway chosen by the USFS, more than twenty-five years after the Northern Spotted Owl forced upon the agency a different way of doing things.

The views expressed in this paper are solely those of the author (or authors).

Please cite as: Martin Nie, "Wildlife Diversity and National Forest Management A Goal or Obstacle for the U.S. Forest Service?" *Endangered Species and Other Wildlife* 12B-1 (Rocky Mt. Min. L. Fdn. 2019).