



Winter 2022

This Land Is Your Land: The Dark Canon of the United States Supreme Court in Natural Resources Law

Oliver A. Houck
Tulane University School of Law

Recommended Citation

Oliver A. Houck, *This Land Is Your Land: The Dark Canon of the United States Supreme Court in Natural Resources Law*, 62 NAT. RES. J. 1 (2022).

Available at: <https://digitalrepository.unm.edu/nrj/vol62/iss1/2>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

Oliver A. Houck^{*}

THIS LAND IS YOUR LAND: THE DARK CANON OF THE UNITED STATES SUPREME COURT IN NATURAL RESOURCES LAW

ABSTRACT

This article treats four Supreme Court opinions that have had a lasting impact, largely negative, on public lands and resources. They rest on highly selective statements of fact, and dubious use of precedent and statutory law. As a quartet they make the protection of natural resources extremely difficult, resources that by statute belong to us all.

The first case, Southern Utah Wilderness Association, opened up a designated Wilderness Area to off-road vehicle use, where these uses are explicitly prohibited by law. The second case, Ohio Forestry, made management plans of the United States Forest Service, covering over 180 million acres of spectacular beauty, effectively immune from judicial review . . . no matter how much these plans violated the mandates of the National Forest Management Act. The third case, Rapanos, effectively removed federal protections from large swaths of American wetlands, opening them up for development and pollution, no matter how willful or detrimental the action, and in this case no matter how criminal the actor. The last case, New Mexico v. United States, held that federal forests have no right to water even for their own survival, when forest reservation of water was essential to supply downstream users.

None of these cases made sense in law or in fact. Yet, emerging from reading them one is struck by how uncomprehending they are of the science of resource management, and often how biased these opinions were. In the final analysis, however, this is for the reader to say.

^{*} Professor of Law and David Boies Chair in Public Interest Law, Tulane University. The research assistance of Caelyn Radzunius (TLS '22)(SUWA), Julie Schwartzwald (TLS '21)(Rapanos), and Rosa Acheson (TLS 21)(New Mexico), is acknowledged with gratitude.

SOUTHERN UTAH WILDERNESS ALLIANCE: GOOD BYE WILDERNESS

“And into the forest I go, to lose my mind and find my soul.”

—John Muir¹

1. Beauty and the Beast

The environment of the world is managed in many ways by many countries, but the most protective and uniquely American is wilderness. Wilderness is defined by statute as a place “untrammeled by man, where man himself is a visitor who does not remain,” and this concept exists nowhere else in the world. The definition is part law and part poetry, and it is unsurprising that some think it lunacy to preserve a landscape simply for the purpose of going there to walk around. And yet, this is what great number of Americans do.

Where did this idea come from? Wilderness has many roots, starting with 19th century Europeans who had nothing remaining like it back home. Once in America they were drawn to spectacular panoramas painted by Frederick Remington and John Moran, the novels of Jack London, the poetry of Robert Service, the essays of John Muir, and the reports of eastern journalists, all of whom primed the pump for a wilderness system. Wilderness took root as a government policy in the early 1900s through the work of a young U.S. Forest Service employee, Aldo Leopold.² To Leopold, wilderness meant, first and foremost, the absence of motor vehicles.

In an essay called “The River of the Mother of God” he called out the “Great God Motor” and “that Frankenstein which our boosters have builded [sic], the ‘Good Roads Movement.’” He continued:

[O]f all the foolish roads the most pleasing (to motorists and boosters) is the one that “opens up” some last vestige of virgin wilderness. With the unholy zeal of fanatics we hunt them out and place them on his altar, while from the throats of a thousand luncheon clubs and Chambers of Commerce and Greater Gopher Prairie Associations rises the solemn chant: “There is No God but Gasoline and Motor is His Prophet.”³

Based on this ideology Leopold persuaded the Forest Service to designate a network of “roadless areas” where the god of gas and cars would not be seen or heard.⁴ These

1. GOODREADS, <https://www.goodreads.com/quotes/7796963-and-into-the-forest-i-go-to-lose-my-mind> (last visited July 22, 2021).

2. SUSAN L. FLADER, THINKING LIKE A MOUNTAIN ALDO LEOPOLD AND THE EVOLUTION OF AN ECOLOGICAL ATTITUDE TOWARD DEER, WOLVES AND FORESTS (1994).

3. PAUL SUTTER, DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT 78 (2002).

4. Aldo Leopold, *The Last Stand of Wilderness*, AMERICAN FORESTS AND FOREST LIFE, Winter 2014, <https://www.americanforests.org/magazine/aldo-leopold-the-last-stand-of-wilderness.html>.

were the first designated wilderness areas in the United States, half a century before the passage of the Wilderness Act of 1964.⁵

Until the early 1960s motorized intrusions into the woods remained limited to the roads passing through them. They had little effect on the life within. Within a short decade this would change dramatically. Motorbikes, snowmobiles, and other all-terrain vehicles (ORVs) could go wherever they wished, no matter how deep, steep, rocky, or vegetated the terrain, and, as Leopold foresaw, they were drawn to unspoiled places. They were not simply transportation to remote recreation grounds. They *were* the recreation themselves.⁶ Their sales boomed, and their uses formed lobbies funded, *inter alia* by Chevron, Exxon, Suzuki, Yamaha, Honda, Marathon Oil, and the American Petroleum Institute.⁷ They had but one objective: open federal lands to all off-road vehicles (ORVs) and keep them that way.

Unfortunately, ORVs could be heard for miles, left the odor of gasoline in winter valleys, and their treads chewed up streambeds, forest, hiking trails, dunes, tundra, swamps, and virtually everything else they touched.⁸ They were conquerors of the landscape, and their corporate sponsors and lobbyists had a powerful lock on federal decision making. At the time of the *Southern Utah Wilderness Alliance* (SUWA) lawsuit, an estimated 42 million Americans were driving all-terrain vehicles.⁹ The sales of new ORVs were approaching one million vehicles per year.¹⁰

Conflicts between wilderness and other forest uses were inevitable and led to a series of laws to reduce them. These laws would come to the Supreme Court in *SUWA*. Remarkably, the Court would find that none of them applied.

2. Four Laws

“I hope there is some way we could outlaw all off-road vehicles, including snowmobiles, motorcycles, etc., which are doing more damage to our forests and deserts than anything man has ever created.”

—U.S. Senator Barry Goldwater (Arizona), 1973¹¹

An executive order and three laws surfaced in the 1970s that would bear on the case to come. The Presidential Executive Order came first and was followed by a law that protected Wilderness Study Areas (WSAs) under the Federal Lands Protection and Management Act of 1976 (FLPMA). The next law required Land

5. See Wilderness Act of 1964, 16 U.S.C. Sec. 113 *et. seq.*

6. See Friends of the Earth and Wildlands Center for Preventing Roads, *TRAILS OF DESTRUCTION*, 19 (1998).

7. See Jerry Spangler, “Some Fear Utah Lands turning into ‘King’s Forest,’” *Desert News*, July 12, 1988 (listing corporate sponsors of ORV groups); see also *TRAILS OF DESTRUCTION*, *supra* note 6.

8. See George Wuerthner, *THRILCRAFT: THE ENVIRONMENTAL CONSEQUENCES OF MOTORIZED RECREATION* (2007) (text and graphic photos).

9. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 60 (2004).

10. *Id.*

11. DAVID SHERIDAN, *PRESIDENT’S COUNCIL ON ENVIRONMENTAL QUALITY, OFF-ROAD VEHICLES ON PUBLIC LAND*, 51 (1979).

Management Plans under FLPMA as well, and finally the National Environmental Policy Act of 1969 (NEPA) was also designed to soften human impacts on the environment. Each merits a closer look.

A. Executive Order 11644

In 1972, President Carter issued Executive Order 11644,¹² focused exclusively on off-road vehicles. Prompted by a report from the Council on Environmental Quality documenting the abuses of these vehicles, the Order required all federal agencies to designate areas where ORV use was either appropriate or inappropriate based on terrain, potential impacts, and the avoidance of user conflicts.¹³ Agencies were to close any area immediately if irreparable harm was imminent.¹⁴

Most federal agencies took the Executive Order to heart. Last in line, however, was the Bureau of Land Management (BLM) which managed over 247 million acres of public lands¹⁵ for grazing and mineral development and whose few employees had little appetite for confronting the ORV lobby.

Two lawsuits illustrate how far the Bureau's unwillingness to act went, even when ORV damage was overwhelming. *National Wildlife Federation v. Morton*¹⁶ examined the BLM's first attempt to skirt the Executive Order. Faced with the unwelcome task of closing some areas to ORV use, the Bureau instead declared all public lands under its jurisdiction to be open to these vehicles, unless and until it decided to close them.¹⁷ It took the district court only a few sentences to strike the Bureau's declaration as a "wholesale" dereliction of duty.¹⁸

The BLM showed the same lack of enthusiasm for resource protection in *Sierra Club v. Clark*, involving Dove Canyon within California's Desert Conservation Area.¹⁹ In the words of a reviewing court, Dove Canyon was a "priceless" natural area.²⁰ It was a highly unusual desert environment, a small stream surrounded by abundant vegetation and tall dunes sheltering rare birds and other wildlife.²¹ These same qualities made it attractive to visitors and highly vulnerable to ORV impacts. The vulnerability was not theoretical; ORV users had already torn up much of the terrain and held weekend rallies running from the dunes to the water.²²

The Desert Conservation Act spoke to the problem directly, requiring that whenever the Bureau determines that vehicle use "is causing or will cause"

12. Use of Off-Road Vehicles on the Public Lands, 37 Fed. Reg. 2877 (Feb. 8, 1972).

13. *Id.* at § 3(a) (zones), 3(c) (conflicts).

14. *Id.* at § 9.

15. See Bureau of Land Management, *Public Lands Statistics* (2014).

16. 393 F. Supp. 1286 (D.D.C. 1975).

17. *Id.*

18. *Id.* at 1292.

19. 756 F.2d. 686 (9th Cir. 1985).

20. *Id.* at 687.

21. *Id.* at 688 ("over 250 species of plants, 24 species of reptiles, and over 30 species of birds").

22. *Id.* at 688.

significant harm it “shall immediately” close the area.²³ True to form, however, BLM’s plan kept open the lion’s share of Dove Springs. Even though the Ninth Circuit Court of Appeals saw the situation for what it was—“the virtual sacrifice of a priceless area in order to accommodate a special recreational activity”²⁴—it could not pull the trigger and refused to enjoin the plan.

B. Wilderness Study Areas (WSA)

National Wilderness areas are designated by Congress,²⁵ with the acquiescence of the states in which they are found, as a matter of comity. Anticipating the potential for lag time between a proposal and Congressional action, FLPMA required the BLM to identify WSAs, pristine environments within its jurisdiction that were eligible for inclusion in the system.²⁶ Lest they be damaged in the interim, these areas were to be managed “so as not to impair the suitability . . . for preservation as wilderness.”²⁷ The standard for “impairment” was not ambiguous. While the notion of significant harm to the desert might have been debatable in *Sierra v. Clark*, there was little room for dispute about whether an area was trampled by the hand of man.

In *Norton v. Southern Utah Wilderness Alliance (SUWA)*, the Bureau had dutifully found two million acres to be eligible for wilderness protection, but the state of Utah disagreed.²⁸ Instead, several counties were busy bulldozing roads into potential wilderness areas precisely in order to “trammel” them, making them forever ineligible for federal protection.²⁹ This mindset was very much in the background when the *SUWA* case came on.

C. Land Use Plans

FLMPA was enacted in 1976 to bring order to the BLM which had virtually no mission other than to permit mining and let cattle run free.³⁰ The Act charged the BLM with preparing land use plans and implementing them accordingly.³¹ The plans were to comply with nine criteria³² and covered all activities within a BLM district, including recreational vehicles. The plans were proposed via notice and comment rulemaking. Pursuant to the Administrative Procedure Act (APA)³³ deviations from them would require new rulemaking. The land use plans were law. A Bureau plan,

23. *Id.* at 689-90.

24. *Id.* at 691.

25. 43 U.S.C. § 1782(b).

26. *Id.* at 1782(a).

27. *Id.* at 1782(c).

28. 542 U.S. 55 at 59.

29. See Larry Warren, *Utah counties bulldoze the BLM, Park Service*, HIGH COUNTRY NEWS, March 25, 2019 (“A flurry of bulldozing in three southern Utah counties has led to one arrest, federal lawsuits and miles of improved roadways through wilderness study areas and the Grand Staircase-Escalante National Monument”).

30. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579 90 Stat. 2743; 43 U.S.C. § 1701, *et seq.*

31. 43 U.S.C. § 1712(a) (planning), (e) (implementation).

32. 43 U.S.C. § 1712(c).

33. 5 U.S.C. § 553.

such as the one promulgated in *SUWA*, was as binding as if it had been enacted by Congress.

D. National Environmental Policy Act

NEPA³⁴ was enacted in 1969 with ambitious statutory goals to harmonize human's existence with nature.³⁵ The goals were to be achieved through an environmental impact statement process³⁶ reviewing courts enforced with rigor.³⁷ All agency plans, including the BLM, were subject to this requirement. Federal regulations under NEPA also required supplemental impact statements whenever an activity changed from what had been described in the statement, or when the surrounding circumstances changed.³⁸ If an agency said it would do A, and it did not do A, then a supplement was required.

In the *SUWA* litigation that followed, the Ninth Circuit had little difficulty understanding and applying the requirements of the four laws. Upon reaching the Supreme Court, however, Justice Scalia managed to avoid each of these mandates, even the most specific, with arguments that were both disingenuous and misleading.

3. *SUWA* goes to court.

“Factory Butte: A striking, menacing sandstone peak towering above that’s equal parts Mordor and the Moon”

—*Tourist information, Torrey Utah*³⁹

In a state famed for its geography, Factory Butte has been characterized as one of Utah's lesser-known gems.⁴⁰ Photographs of the area are stark and stunning.⁴¹ The largest of several flat-topped mesas topping at over 6,200 feet and, per the local tourist guide, it seems “deeply entrenched” in the ground, “like a very old rock stump.”⁴² The surrounding landscape is also otherworldly, like exploring “another planet, and for good reason.”⁴³ If you go, the guide predicts you’re likely to be the only one there.⁴⁴

Not exactly so. You were more likely to be surrounded by a swarm of off-road vehicles and all that comes with them. Factory Butte was one of the most popular ORV playgrounds in the region. According to Michael Swenson, who headed the Utah Shared Access Alliance, “[i]f there were ever a place for cross-

34. 42 U.S.C. § 4321.

35. *Id.* at 4331.

36. *Id.* at 4332(2)(C).

37. See *Calvert Cliffs’ Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971) (Section 102 duties “must be complied with to the fullest,” *id.* at 1115).

38. 40 C.F.R. § 1502.9.

39. “Factory Butte, Torrey Utah,” atlasobscura.com/places/factory-butte.

40. *Id.*

41. See <https://www.americansouthwest.net/utah/factory-butte/index.html>.

42. See *supra* note 39.

43. *Id.*

44. *Id.*

country motorized travel, Factory Butte is it.”⁴⁵ Perhaps its particular attraction to ORV users lay in the fact that Factory Butte was indeed remote, strange, and beautiful.⁴⁶

As early as 1982, BLM staff recognized that ORVs were causing “long-lasting and visible scars” on the Factory Butte landscape that was “highly-susceptible to erosion.”⁴⁷ Unfortunately, however, the Bureau’s 1982 land use plan left Factory Butte wide open to cross-country use. It remained open for more than decade, even after BLM recognized it as wilderness study use, prompting the litigation to come.

The Southern Utah Wilderness Alliance filed suit after the Bureau refused to: 1) protect Factory Butte as a potential wilderness; 2) honor a pledge in its Land Use Plan (LUP) to monitor and close Factory Butte if harm appeared; and 3) write a supplemental impact statement because continuing ORV damage was a significant new circumstance. These were SUWA’s reasons for bringing the suit and its causes of action.

The District Court rejected the claims.⁴⁸ The Wilderness Study Area claim failed because the BLM had taken some action to limit ORV use, and due to the Bureau’s “special expertise and judgement,” had discretion over what action to take.⁴⁹ This seemed particularly so where impairment was not “clear and certain.”⁵⁰ To the contrary, partial protection for a WSA is not all the statute requires, and SUWA’s allegations of harm were not rebutted.

The District Court stumbled equally over the LUP which, although “not carried out to the letter,” was not a “complete failure” of compliance.⁵¹ Although the Southern Utah Wilderness Alliance had presented “significant evidence” of on-going ORV damage, the BLM had provided evidence that its steps were making at least some progress.⁵² As above, half a loaf was just fine.

As for the NEPA claim, the District Court relied on agency discretion to forego a supplemental environmental statement, although circumstances had changed considerably, for the worse, in the years since the first environmental statement was prepared.⁵³ Unfortunately, again, these were the very circumstances that *required* a supplement.⁵⁴

Case dismissed.

45. See Brian Maffly, “Off-roaders are revved up about Utah’s Factory Butte Reopening,” <https://www.sltrib.com/news/environment/2019/05/24/off-roaders-are-revved-up/>.

46. See *supra* notes 3, 6 and accompanying text.

47. See Brief for Petitioner, Nat. Res. Def. Council v. McCarthy, 993 F.3d 1243, 1247 (10th Cir. 2020) (No. 20-4064) (BLM staff report).

48. S. Utah Wilderness All. v. Babbitt, 2000 WL 33914094 (D. Utah Dec. 22, 2000), *rev’d sub nom.* S. Utah Wilderness All. v. Norton, 301 F.3d 1217 (10th Cir. 2002), *rev’d*, 542 U.S. 55 (2004), and *cert. granted, cause remanded sub nom.* Utah Shared Access All. v. S. Utah Wilderness All., 542 U.S. 917 (2004).

49. *Id.* at *3.

50. *Id.* at *4.

51. *Id.* at *6.

52. *Id.* at *5.

53. *Id.* at *9.

54. See 40 C.F.R. § 1502.9(d) (“shall” prepare supplement).

On appeal, the Ninth Circuit disagreed across the board.⁵⁵ On the WSA count it returned to basics: the BLM was to manage these areas in a manner not to impair their suitability for preservation as wilderness.⁵⁶ This duty was non-discretionary. Although the BLM had taken steps to limit ORV use in recent years, the statute was not satisfied by partial measures.⁵⁷ The APA, the reach of which extended beyond mandamus, required courts to compel actions that were not only “unlawfully withheld” but also “unreasonably delayed”⁵⁸ citing *Forest Guardians v. Babbitt*.⁵⁹ The Court compelled.

The Ninth Circuit then turned to the BLM’s LUP, which in pertinent part stated that, “[t]he area will be monitored and closed if warranted.”⁶⁰ Congress had mandated that public lands be managed in accordance with these plans, as did the BLM’s own regulations (“will adhere to the terms, conditions, and decisions of resource related plans”).⁶¹ The plan’s commitments to monitor and close land areas, if warranted, were binding in law. Accordingly, the Court concluded:

We hold that BLM did have a mandatory, nondiscretionary duty to comply with the Factory Butte LUP’s ORV-monitoring provision and the San Rafael LUP’s ORV-implementation provision. We reject BLM’s arguments that (1) LUP’s cannot impose mandatory, nondiscretionary duties, and/or (2) can only impose mandatory duties when an affirmative, future, and site-specific action occurs. And, for reasons previously discussed, we reject the suggestion that BLM’s efforts towards compliance, delayed for over a decade, preclude [APA] review.⁶²

Coming last to NEPA, the Ninth Circuit found a supplemental environmental impact statement necessary when circumstances had significantly changed, and in this case the increased ORV activity certainly qualified as a significant change.⁶³ The District Court had simply missed ball.

Stepping back, it is hard to avoid the conclusion that the BLM had backed down to the ORV lobby, once again.⁶⁴ Whether it would get away with it was now in the hands of the United States Supreme Court.

55. *S. Utah Wilderness All. v. Norton*, 301 F.3d 1217 (10th Cir. 2002), *rev’d*, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004), *and cert. granted, cause remanded sub nom. Utah Shared Access All. v. S. Utah Wilderness All.*, 542 U.S. 917, 124 S. Ct. 2870, 159 L. Ed. 2d 774 (2004).

56. *Id.* at 1225.

57. *Id.* at 1230-31.

58. *Id.* at 1226.

59. 174 F.3d 1178, 1187-8 (10th Cir. 1999).

60. *See S. Utah Wilderness All. v. Norton*, 301 F.3d at 1233.

61. *See* 43 U.S.C. § 1732 (FLPMA); 40 C.F.R. § 1601.0-5(c) (regulations).

62. 301 F.3d at 1236.

63. *Id.* at 1236-40.

64. This impression is reinforced by the fact that the Utah Shared Access Alliance, Blue Ribbon Coalition and the Motorcycle Tours intervened in support of the plan, see district court opinion *supra* at note 44. In addition the Department of Interior was led by Gail Norton, who had led the Mountain States Legal Foundation prior to her appointment: Mountain States was funded and by

4. The Supreme Court Strikes Out.

“ . . . for its one, two, three strikes you’re out at the old, ball game . . . ”

Justice Scalia took three swings at the law in *SUWA* and missed every time. Perhaps recognizing the challenge ahead, he began with a treatise on the APA which set the opinion off on the wrong foot, from which it never recovered.

SUWA’s lawsuit challenged the BLM’s failure to act on WSAs, LUPs, and NEPA.⁶⁵ As noted above, the APA required courts to compel actions that were “unlawfully withheld” or “unreasonably delayed.”⁶⁶ To Justice Scalia “unlawfully” meant legal action required within a fixed time, such as a regulation due in six months, citing the common law principle of mandamus which recognized *only* actions “unlawfully withheld.”⁶⁷ In so doing Justice Scalia took “unreasonably delayed” off the table. But he did not stop there.

The purpose of limiting judicial review, Justice Scalia continued, was to allow agencies to “work out compliance with the broad statutory mandate,” without “injecting the judge into day-by-day management.”⁶⁸ He offered, by way of example, mandates “to manage wild free-roaming horses and burros in a manner that is designed to achieve a thriving natural balance,” or to manage a park “to preserve knowledge and understanding of the history of jazz,”⁶⁹ which were hardly relevant to WSAs. There was a world of difference between a duty to not impair wilderness values, which fit the APA’s requirement for specificity like a glove,⁷⁰ and an exhortation to achieve a thriving natural balance or the history of jazz, which did not fit it at all. The first was enforceable. The exhortations were not.

By this point in the opinion the Justice had trashed half of the APA judicial review scheme, and then, by inapt analogy, declared the non-impairment duty unenforceable. In so doing he skirted the most clear-cut issue in the litigation—indeed the whole purpose of the litigation—the protection of wilderness.

Justice Scalia then turned to the BLM’s LUP,⁷¹ which in his view was not to be a plan at all but, rather, a “statement of priorities.”⁷² The Bureau was merely stating we might do this, we might do that. However, as seen above, FLPMA had intended a plan to be considerably more. Justice Scalia could not avoid accepting

development industries whom they represented in court. See Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1476-83 (1984).

65. Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004).

66. See discussion *supra* at n. 55.

67. 542 U.S. at 63. The Court overlooked that the APA had extended judicial review beyond actions “unlawfully withheld,” see discussion at 301 Fed. at 1226.

68. 542 U.S. at 66-67.

69. *Id.* at 67.

70. 5 U.S.C. § 701(a)(2) (review of all actions not “committed to agency discretion by law). Courts have consistently interpreted this phrase to mean those laws sufficiently specific to be enforceable, see *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), specificity is the key.

71. 542 U.S. at 71.

72. *Id.*

that the plan indeed *was* more and included commitments to protective actions. The Factory Butte area “*will* be monitored and closed if warranted,” and for San Rafael that “resource damage *will* be documented and recommendations made for corrective action.”⁷³ The English language could not make these commitments more plain.

Justice Scalia then went to explain that “will” did not mean will, any more than “plan” had meant plan.⁷⁴ That the Bureau stated that it “will take specific actions,” Scalia declared, is not “a binding commitment in terms of the plan.”⁷⁵ Who knew? The Justice then picked up on an argument raised in the government’s brief: that implementing the plan was subject to “budget constraints.”⁷⁶ Although the plan made no mention of this qualification, it “must be reasonably implied.”⁷⁷ He also noted that the BLM was developing more specific ORV plans, still in the works, which to him indicated compliance with their commitments, although they in no way met the plan’s stated obligations to monitor and close Factory Butte and San Rafael.⁷⁸ Once again, half a loaf was fine. Taken together, this discussion reads like a plea of guilty-with-excuses. As the poet Robert Service wrote over a century ago, “a promise made is a debt unpaid.”⁷⁹ Scalia left it unpaid.

The Court finally reached the NEPA issue in the case, the BLM’s failure to prepare a supplemental environmental impact statement required when circumstances had significantly changed.⁸⁰ As seen earlier, the district court had missed the ball on this issue, but the Ninth Circuit found the regulation was clear that a supplement was required. At which point, the Justice engaged in one last game of dodgeball.

Justice Scalia accepted SUWA’s argument that significant changes had happened since the first environmental statement, which would have been hard to deny.⁸¹ These changes, he went on, might call for a supplement, but the statute no longer applied. NEPA applied only to major federal actions, and once the plan was completed there was no federal action left on the table.⁸² NEPA was over. Catch-22!

One problem with this argument is that Scalia had earlier described BLM plans as an open-ended, iterative process. This so, then the major federal action was continuing and begged for a supplement. Either that, or it begged for a new plan which would require a new environmental statement altogether.⁸³

73. *Id.* at 68.

74. *Id.* at 69.

75. *Id.*

76. *Id.* at 71.

77. *Id.*

78. *Id.* at 70-71.

79. ROBERT W. SERVICE, SONGS OF A SOURDOUGH 57 (6th ed. 1907).

80. 542 U.S. at 72.

81. *Id.* at 73.

82. *Id.*

83. *Id.*

For the record, however, the Supreme Court had never decided in favor of NEPA since its advent in 1969.⁸⁴ Nor did Justice Scalia ever dissent from the opinions. No arguments by SUWA were going to change that.

5. Beyond SUWA

*‘When I use a word’, Humpty Dumpty said in a rather scornful tone,
‘it means just what I choose it to mean – neither more nor less.’*

—Humpty Dumpty, *Alice in Wonderland*⁸⁵

Perhaps the most striking aspect of Justice Scalia’s opinion its distortion of plain English. “Impair” did not mean impair, “plan” did not mean plan, “will” did not mean will, “require” did not mean require. For these and other reasons, *SUWA* is one of the most roundly criticized Supreme Court opinions in America. At least 17 law review articles have been written on it and over 200 more carry its name in the title, including “Off-roading without a Map,” “Supreme Court Eschews Agency’s failure to Protect Wilderness in Redrock Country,” and “the Supreme Court Rolls over the National Environmental Policy Act.”⁸⁶ These are not good grades.

Meanwhile—as with the implementation of NEPA itself—lower courts have picked up the slack and have rejected the highly permissive ORV plans of a number of federal agencies, and on a number of grounds. For example:

*Oregon Natural Desert Association v. Bureau of Land Management*⁸⁷ invalidated the BLM’s consideration of alternative ORV plans under NEPA. The Bureau had put forth seven alternatives, each opening more land to vehicle use than existed before. No alternative reduced them.

*Center for Biological Diversity v. Bureau of Land Management*⁸⁸ struck down a plan for the Algodones Dunes of the California Desert, most of it opened to unlimited ORV use. The plan would reopen four of five areas originally closed for the protection of an endangered plant species. Reopening these areas were projected to cause a fifty percent decline in the endangered plant species, a violation of both FLPMA and the Endangered Species Act.

*WildEarth Guardians v. Montana Snowmobile Association*⁸⁹ overruled a Forest Service plan for failure to consider its impacts on big game winter range habitat under NEPA, and for violating the impact minimization requirement of Executive Order 11644.

84. See Richard Lazarus, *The National Environmental Policy Act and the U.S. Supreme Court: a Reappraisal and a Peek Behind the Curtain*, 100 GEO. L.J. 1507 (2012) (describing, *inter alia*, 17 adverse opinions).

85. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* (HarperCollins 1800).

86. Email from Carla D. Pritchett, Research Librarian, Tulane Law School, to author (Sept. 16, 2020, 9:05 CDT) (on file with author).

87. *Oregon Nat’l Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114, (9th Cir. 2008).

88. *Ctr. for Biological Diversity v. Bureau of Land Mgt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006).

89. *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920 (9th Cir. 2015).

*Defenders of Wildlife v. Salazar*⁹⁰ found a National Park Service decision to open over 20 miles of ORV trails in Florida's Big Cypress National Preserve to have violated the breach of a previous settlement agreement under NEPA, the National Parks Act's protection mandate, the Executive Order's minimization mandate, and the Endangered Species Act.

*Defenders of Wildlife v. National Park Service*⁹¹ challenged Park Service planning allowing several thousand trucks, cars, and dune buggies unlimited access to the Cape Hatteras National Seashore. At stake were nesting habitats impacting over 30,000 migratory and endangered shorebirds, many of whose populations were already declining, in violation of the Migratory Bird Treaty Act and the Endangered Species Act. The case led to a consent decree, and to a countersuit by the Cape Hatteras Access Preservation Alliance, composed of vehicle owners. This suit led to another consent decree providing broad areas of protection and access limited in space and time.

*Southern Utah Wilderness Alliance v. Marcilyn Burke*⁹² invalidated BLM authorization of 4,300 miles of ORV use in a 2.1 million acre area located between two National Parks and one National Recreation Area, and included the Dirty Devil Canyon hideout for the infamous Butch Cassidy, and the Henry Mountains and Factory Butte last seen in *Norton v. Southern Utah Wilderness Alliance*. The violations included failure to mitigate vehicle impacts, and the removal of FLPMA protections from the Henry Mountains as an Area of Critical Environmental Concern, apparently "based on political reasons."

*Beaverhead County Commissioners v. U.S. Forest Service*⁹³ concerned a revised National Forest Plan that reduced ORV use due to resource and wildlife damage, and banned it in recommended wilderness areas. Although the reductions were minor in scope, approximately 10 percent of that previously allowed, user groups and the county sued under FLPMA and NEPA. The court found the plan reasonable and lawful.

Taken together, these cases indicate that the ORV versus Wilderness conflict continues, and that, despite the Supreme Court opinion in *SUWA*, there is abundant law to apply. While all agencies are involved, the one most prone to violate the law is, not surprisingly, the one with the least environmental history or statutory guidance, the Bureau of Land Management. This said, its mandates that it will not "impair" wilderness values, that it "will" monitor and protect, that it "shall" prepare a supplemental environmental statement are not ambiguous at all. Unless, of course, a Supreme Court Justice wants them to be. Which of course puts him in league with Humpty Dumpty.

90. *Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271 (M.D. Fla. 2012).

91. *Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271 (2012). *See also* Testimony of Derb Carter, Southern Environmental Law Center on behalf of the National Audubon Society, Defenders of Wildlife and the Wilderness Society before the National Parks Subcommittee of the Senate Committee on Energy and Natural Resources on off-road vehicle use in the Cape May National Seashore, North Carolina, July 30, 2008." Carter represented environmental organizations in this lawsuit up to and including the consent decree.

92. *S. Utah Wilderness All. v. Burke*, 981 F. Supp. 2d 1099 (D. Utah 2013).

93. *Beaverhead Cnty. Comm'rs v. U.S. Forest Serv.*, No. CV 10-68-BU-SEH (D. Mont. July 22, 2013) (ELR 20164).

OHIO FORESTRY: LOSING THE FORESTS FOR THE TREES

“The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers’ thinking and actions.”⁹⁴

—Senator Hubert Humphrey, 1976, on the *National Forest Management Act*

The Wayne National Forest of central Ohio was perhaps the least likely place in the country for a collision over forest planning. It was assembled in the 1930s from cut-over woodlots, abandoned mine sites and failing farmland, and remains fragmented by private lands even now.⁹⁵ One could walk across parts of it in a day. It was nonetheless the largest public forest, and the only national forest, in the state.⁹⁶ Featuring a canopy of second-growth hardwoods and slow-growing trees, it held only three percent of Ohio’s timber and produced less than one percent of its harvest.⁹⁷ On the other hand, it was an easy drive from Columbus and its potential for recreation, wildlife (even its own endangered species),⁹⁸ and perhaps even a moment of solitude, was significant. There were no lands of its size and diversity from Toledo, on Lake Erie, to the Kentucky border. Which is why the Sierra Club would sue.

Despite these attributes, in 1988, the U.S. Forest Service management plan for the Wayne Forest declared nearly three-quarters of it suitable for timbering, with some 80 percent by clear-cutting.⁹⁹ The practice was cheap and convenient. Even cheaper if the general public paid much of the tab. It could also be devastating to landscapes and watersheds, particularly those ill-suited for timbering at all.¹⁰⁰ This was at the heart of a federal law designed to curb it, and the litigation that followed.

94. 122 Cong. Rec. 5619 (1976) (remarks of Senator Humphrey).

95. MICHAEL MANGUS & JENNIFER HERMAN, OHIO ENCYCLOPEDIA 570 (2008-2009 ed. 2008); *see also Wayne National Forest*, U.S. DEP’T OF AGRIC. <http://www.fs.fed.us/r9/wayne> (last visited Sept 30, 2021) (providing further information about the Forest).

96. *See Wayne National Forest*, U.S. DEP’T OF AGRIC. <http://www.fs.fed.us/r9/wayne> (last visited Sept 30, 2021).

97. DIV. OF FORESTRY, OHIO DEP’T. OF NAT. RES., OHIO: THE MANY SIDES OF THE FOREST ECONOMY 8 (2006).

98. *Wayne National Forest*, WIKITRAVEL, https://wikitravel.org/en/Wayne_National_Forest (last visited July 26, 2021) (the Forest hosts “more than 2,000 species of plants,” one of them endangered, the “running buffalo clover.”).

99. *Sierra Club v. Thomas*, 105 F.3d 248, 249 (6th Cir. 1997).

100. Critics of clearcutting abound, including the founding father and first Chief of the Forest Service, Gifford Pinchot, who came to view the practice as both unnecessary and unreasonably damaging to forest resources. *See* CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM 287, 358-9, 367-92 (2001). By then, however, it was too late to change the agency’s culture or the direction of the train.

The Sierra Club appealed the plan to the Forest Service Chief and, unsurprisingly, lost.¹⁰¹ It then appealed to a federal district court and lost again.¹⁰² It then appealed to the Sixth Circuit and won,¹⁰³ at which point, at the request of the Ohio timber industry, the Supreme Court granted *certiorari*.

In the decision that followed the Court managed to overlook what Congress had plainly intended and required of forest management plans, and the nature of the allegations at play. Instead, without considering the merits, the Court held the matter was not ripe for review.¹⁰⁴

1. The US Forest Service and the Long Road Toward Law

“The American has but one thought about a tree, and that is to cut it down”

—President Theodore Roosevelt

Federal forest management had been in turmoil from day one, indeed well before day one, when there was no such thing as management and the timber industry ran wild from the Appalachians to the Pacific. In the process, no fewer than seven towns and cities declared themselves to be “the lumber capitol of the world” and rightly so, until the lumber ran out.¹⁰⁵ One operator in West Virginia took down the largest stand of climax red spruce on Earth, some three billion board feet, in less than a decade.¹⁰⁶ He later boasted that “we didn’t leave a stick standing.”¹⁰⁷ By the mid 1800s federal land surveyors were urging the government to auction off the public forests remaining “while there was something of value left to sell.”¹⁰⁸ Timber ruled. Then came two unheralded presidents of the United States, followed by a heralded one, and everything changed.

In late 1891 the Secretary of Interior, with forest slaughter in mind, tucked a brief, undebated provision into a public lands appropriations bill authorizing the President to “set apart” public lands “wholly or in part covered by timber or undergrowth . . . whether of commercial value or not.”¹⁰⁹ Within a month President Harrison set apart 13 million acres.¹¹⁰ A few years later Grover Cleveland set aside

101. *Sierra Club v. Robertson*, 845 F. Supp. 485, 489 (S.D. Ohio 1994).

102. *Id.* at 503.

103. *Sierra Club*, 105 F.3d at 252.

104. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 739 (1998).

105. STUART L. UDALL, *THE QUIET CRISIS* 56 (1963). Udall served three terms in Congress as a representing Arizona, and then from 1961-1969 as Secretary of Interior. The history cited has become a classic in the field of natural resources.

106. Jack Waugh, *Lumbering Before Pinchot*, AMERICAN HERITAGE, at 91, 96 (Feb./Mar. 1991), <https://www.americanheritage.com/lumbering-pinchot>.

107. *Id.*

108. T. H. Watkins, *Father of the Forests*, AMERICAN HERITAGE, at 86, 90, (Feb./Mar. 1991), <https://www.americanheritage.com/father-forests> (detailing the history of Gifford Pinchot and the U.S. Forest Service).

109. Creative Act of 1891, Act of 1891, ch. 561, 26 Stat., 1995, 1103.

110. Udall, *supra* note 105 at 101.

double that amount, which also proved to be a prelude.¹¹¹ Enter Theodore Roosevelt, whose distaste for the timber industry,¹¹² brought him in open conflict with the resource barons of his day,¹¹³ and alliance with Gifford Pinchot, the first chief of the Forest Service, are things of legend.¹¹⁴ By the time these two men were done withdrawing lands under the 1891 Bill they had raised the federal inventory to 132 million acres, the base of the national forests today.¹¹⁵ Now, they needed a manager.

In 1897, Congress passed the Forest Organic Act authorizing the Department of Interior to regulate forest uses, a responsibility soon transferred to the Department of Agriculture . . . and under Pinchot's direction. Pinchot believed that "to grow trees as a crop was forestry."¹¹⁶ "Forestry," he assured Congress, "*was a paying proposition*"; "*we recommend no cutting that does not pay its way.*"¹¹⁷

The Forest Service developed into a high-morale outfit equally committed to sustained yield principles and a system of management that would frame the planning processes that followed.¹¹⁸ The hallmark of this planning was complete agency discretion. They were the experts. They knew trees. They made the tree decisions.¹¹⁹ Their sense of mission and institutional pride were symbolized by military style uniforms, campaign hats, the ever-wise Smokey Bear, appearances with Lassie on television, and the lantern-jawed, pipe-smoking, ever-kind ranger Mark Trail, projecting a lasting image of competence and rectitude.¹²⁰ This image, too, is at the base of what we have today, and helps explain the deference the Service has enjoyed in all circles, even as it was taken over by a much more aggressive and single-minded program: clear-cutting.

Clear-cutting as a harvest technique made its debut during World War II to support the war effort, and tripled annual production to over three billion board feet in three years.¹²¹ Driven by the post-war boom in housing and paper products, the cut topped 13 billion by 1970 and remained steady to the time of the Sierra Club

111. *Id.*

112. Watkins, *supra* note 108, at 91.

113. *The Life of Theodore Roosevelt*, NAT'L PARK SERV., <https://www.nps.gov/thri/Theodorerooseveltbio.htm> (last updated Oct. 9, 2014).

114. See Watkins, *supra* note 108; TIMOTHY EGAN, *THE BIG BURN: TEDDY ROOSEVELT AND THE FIRE THAT SAVED AMERICA* (2009) (describing Roosevelt, Pinchot and early U.S. Forest Service).

115. Udall, *supra* note 105, at 105.

116. CHARLES F WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 129 (1992).

117. Robert Wolf, *Promises to Keep*, *THE ENV'T F.*, 10 (1990) (emphasis supplied). Wolf was a lead negotiator and drafter of the subsequent National Forest Management Act of 1976. *Id.*

118. *Id.* at 19-29.

119. Pinchot set the mold by his own Alpha personality, and his almost immediate circumvention of the Organic Act's restrictions on timber harvesting ("dead, mature or large growth of trees"), releasing all timber "which can be cut safely and for which there is a need". *Id.* at 54 and n.272.

120. The Service's image also received a boost early on with its near-heroic efforts to curb the largest, multi-state fire in America, to the gratitude of local towns and the acclaim of the press. See TIMOTHY EGAN, *THE BIG BURN* (2009). It also gave the Service a secondary mission, the suppression of fire, that has had unfortunate consequences since. *Id.*

121. Wolf, *supra* note 117, at 10.

lawsuit.¹²² Private forests, taken together, were larger producers, but federal timber was less expensive and available, by statute, for the taking.

The economics were warped in its favor. Timber sales were highly subsidized by American taxpayers, its access roads, reforestation, and other costs were subsumed in the agency's annual budget.¹²³ Sale prices were based not at market rates but, rather, by cost-plus arrangements guaranteeing a 15 percent profit, which tended to disrupt private markets as well.¹²⁴ Like public utilities, private timber companies could not lose. Sale revenues, meanwhile, went directly into the Service's account, a financial incentive that made it, in the words of Ninth Circuit Judge Noonan: "a paid accomplice of the loggers."¹²⁵ Theirs was a marriage of convenience, and the spree was on. By the 1980s seven of ten forest regions were losing money on timber.¹²⁶ Over the next decade the program lost \$3.1 billion, more than \$10 billion today.¹²⁷ As the resource economist Randall O'Toole put the matter, "how could the Forest Service act so irresponsibly?" and then answered, "it gets paid to."¹²⁸

Two early attempts to check the parade were made in the 1960s with the Multiple Use Sustained Yield Act 1960 (MUSY)¹²⁹ and the grandly-named Forest Rangeland and Renewable Resources Planning Act of 1974 (RPA).¹³⁰ Neither worked. Although the MUSY Act required "balanced and diverse resource uses" that did not "necessarily provide the greatest economic return" and prohibited "permanent impairment" of the environment,¹³¹ reviewing courts essentially ignored it.¹³² One court approved the logging of 99.4 percent of viable timber on the Tongass National Forest of Alaska, more than 4,500,000 acres. The .06 percent reserved for

122. Wilkinson, *supra* note 117, at 340 n.23.

123. See Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 TUL. L. REV. 2279, 2294 n.84 (1996) (citing *Taxpayers Take a Beating in Forest Service Sales*, NRDC NEWSL. (Nat. Resources Def. Council, New York, N.Y.), 1976, at 3) (detailing federally assumed costs for *inter alia* planning, road access and restoration); Paul Roberts, *Zero Cut*, SEATTLE WEEKLY, Nov. 4, 1992, at 12. When these public expenditures were included for timber sales in 1997, total costs rose from \$15 million to \$88.6 million. See Curt Anderson, *Millions Lost in U.S. Timber Sales*, TIMES-PICAYUNE, May, 1998.

124. Roberts, *supra* note 123, at 28-29; Houck, *supra* note 123, at 2294 n.84.

125. *Sierra Club Legacy v. Rey*, 577 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring).

126. *New Forest Service Management Scheme Proposed by Conservation Advocates*, LAND LETTER (The Conservation Fund, Arlington, Va.), Aug. 15, 1985, at 3, tbl.3. The only Regions in the black were the Pacific Northwest, Southern (marginally), and California; Alaska, by contrast, was losing 99 cents on the dollar. *Id.*

127. Wolf, *supra* note 117, at 10; See also *Forest Service Loses \$88 Million*, WEEKLY WASTEBASKET, (Jun 22, 1998), <https://www.taxpayer.net/article/forest-service-loses-88-million/>.

128. See Roberts, *supra* note 123.

129. 16 U.S.C. §§ 528-31 (2021).

130. See 16 U.S.C.A §§ 1601-1614 (2018).

131. 16 U.S.C.A § 531(a) (2021).

132. See *Perkins v. Bergland*, 608 F.2d 803, 806-7 (9th Cir.1979) (Act's "so-called" standards "breathe discretion in every pore") (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

other uses was, apparently, “multiple” enough.¹³³ MUSY became notorious for its failure to offset or even mitigate commodity uses, it was simply out-gunned.¹³⁴

The RPA, for its part, was irrelevant almost by design. Its scheme called for national 50-year timber targets with revisions every few years, which Service regions were then required to meet.¹³⁵ Hauntingly similar to the Soviet Union’s production quotas of the same era. Far from checking clear-cutting, the RPA did exactly the opposite.

The story would end here, but for the unexpected decision of a federal court in 1973 concerning the Monongahela National Forest of West Virginia that stopped clear-cutting in its tracks.¹³⁶ The rampage here was particularly shocking.¹³⁷ Nothing was left alive. The language of the 1897 Organic Act, the Court discovered, spoke of harvesting “dead, matured or large growth of trees,” to be “marked and designated in advance,” and “cut and removed under supervision” of a Service employee.¹³⁸ These restrictions were the antithesis of clear-cutting, and of what had been going on uninterrupted for decades. For this reason alone, the industry could not believe the decision. It appealed, and to its great surprise it lost.¹³⁹ Worse yet, it lost again in Alaska where a federal court ruled the same way.¹⁴⁰ Suddenly, the default position on forest management had flipped. Clear-cutting was out . . . unless Congress acted. The industry and the Service had to come to table, but they came armed for bear.

2. The Law and the Service

After a year of intense bargaining, the National Forest Management Act of 1976 (NFMA) emerged.¹⁴¹ The debate featured a three-way mano-a-mano among timber interests (“clearcuts benefit us all”), the Service (“trust us, we are the

133. See *Sierra Club v. Hardin*, 325 F. Supp. 99, 122-128 (D. Alaska 1971).

134. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENV’T L. REV. 405, 406-8 (1994).

135. See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCE LAW* 658-60 (7th ed. 2014). RPA goals have, further, been found to be unenforceable. *Id.*

136. *W. Va. Div. of Izaak Walton League, Inc. v. Butz*, 367 F. Supp. 422 (N.D.W.Va.1973), *aff’d*, 522 F.2d 945 (4th Cir. 1975).

137. One public member of a state forest commission reported visiting the site of a clear-cut and seeing “hundreds” of other, unwanted tree species, some “rising to the heavens,” “girdled” by the loggers and left to die. Frederico Cheever, *Four Failed Forest Standards: What We Can Learn from the History of National Forest Management Act’s Substantive Timber Management Provisions*, 77 ORE. L. REV. 601, 626 (1998) [hereinafter *Cheever*] (citing testimony from United States Senate Hearings preceding the National Forest Management Act of 1976).

138. *Izaak Walton League*, 367 F. Supp. at 434, n.1. (quoting 16 U.S.C. § 476 (repealed 1976)) (“dead, mature or large growth” . . . “[s]uch timber, before being sold, shall be marked and designated, and cut and removed under the supervision” of a Department appointee).

139. See *supra* note 42.

140. *Zieske v. Butz*, 406 F. Supp. 258 (D. Alaska 1975) (finding that “[A] permanent injunction should issue barring the cutting of trees other than those which are large physiologically matured, or dead and requiring such trees to be individually marked prior to cutting.”).

141. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949; for the intensity see CHARLES F. WILKINSON AND H. MICHAEL ANDERSON, *LAND & RESOURCE PLANNING IN THE NATIONAL FORESTS* 40 (1987) (“a bitterly-contested referendum on Forest Service timber harvesting practices”); For a fuller legislative history see generally *id.*; See also *Cheever*, *supra* note 137, at 602.

experts”), and conservationists of all stripes (“trusting them is what got us here”). Several Senate leaders were central to the final bill, but one pole was represented by Senator Randolph of West Virginia, whose constituents wanted outright bans on clearcutting in areas like the Monongahela and a fixed-acreage ceiling on them everywhere.¹⁴² At the other pole was Senator Humphrey of Minnesota, a significant timber-producing state remained more under the spell of professional forestry and sought to leave these decisions to the experts under “prescriptions” assuring less production-oriented decisions in the future.¹⁴³

Given his options, the Service Chief, sitting in on the Senate negotiations, quickly agreed with Humphrey and had sufficient clout to minimize the proposed prescriptions, the Senators often asking him, “[c]an you live with that, Chief?” The deal done, Humphrey had no hesitation in announcing that “the soil, water, shrubs, fish and wildlife and the beauty of the forests” would become “integral” to resource thinking.¹⁴⁴ Sadly, he seems to have believed it. Those days, however, would take a long time to come. Longer still, following *Ohio Forestry*.

The new engine of NFMA was the management plan.¹⁴⁵ The Senate compromise dropped the proposed bans and fixed ceilings on clearcutting operations in favor of plans with strict planning standards designed to steer forest decisions away from clearcutting at all.¹⁴⁶ The Senate leadership still did not trust the Service, and intended this process to work.¹⁴⁷ Plans were to come at the beginning of forest decision making, subject to full APA rulemaking, and were in all senses final until formally amended. NFMA required the Service to insure that the plans would meet the standards, and that all following decisions would conform. They were law. They would not just guide Service actions. They were to control them.

Of the new NFMA standards, three were germane to the Wayne Forest litigation.

The first, Section 6(k), following an old Pinchot principle, created a front-end process to determine and eliminate certain forest areas from consideration for harvesting altogether.¹⁴⁸ “In *developing* land management plans,” it begins, “the Secretary shall identify lands within the management area which are *not suited* for timber production, considering *physical, economic and other pertinent factors* to the extent feasible, as determined by the Secretary.”¹⁴⁹ Only an “idiot forester,” it was explained, would take down these trees.¹⁵⁰

The legislative history of this provision shows the primary concern to have been economic, resolving the chronic below-cost sale problem and the ensuing

142. See WILKINSON & ANDERSON, *supra* note 141, at 40-42; see Wolf, *supra* note 117, at 10-12.

143. See WILKINSON & ANDERSON, *supra* note 141, at 69-70.

144. *Id.* at 70.

145. National Forest Management Act of 1976 §§ 6, 13.

146. WILKINSON & ANDERSON, *supra* note 141, at 70-71.

147. The legislative history is replete with remarks, save those of Humphrey, highly critical of the Service and demanding either bans or tight restrictions on clearcutting, see *Id.* at 41, 42; See also Wolf, *supra* note 118, at 11 (naming Senators Talmadge, Randolph, and Church as major players in this process).

148. National Forest Management Act of 1976, Pub. L. No. 94-588, § 6(K), 90 Stat. 2949.

149. *Id.* (emphasis added).

150. Wolf, *supra* note 117 (emphasis supplied).

deficit.¹⁵¹ It was to exclude even marginally-economical lands, “*where the costs of special measures to avoid environmental damage or assure regeneration were so high that the activity was imprudent and relatively uneconomic.*”¹⁵² Section 6(k) was not an absolute cost/benefit test, but as close as one might come to it.¹⁵³ Unequivocally, it was intended to come at the front end and focus on topography and costs, including those for mitigation and restoration.

Secondly, Section 6(g)(3)(F) established a double presumption against clear-cutting itself, and a protective shield. The Service would insure that clearcutting will be used *only* where: “it is determined to be the *optimum* method . . . to meet the objectives” of the management plan, and such cuts are *consistent with* “*the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of timber resources.*”¹⁵⁴

A third provision, Section 6(g)(3)(E), imposed specific requirements for *all* harvest methods with the same double burdens to, inter alia, ensure that timber will be harvested only where: “soil, slope, or other watershed conditions *will* not be irreversibly damaged,” and “there is *assurance* that such lands can be *adequately restocked within five years* after harvest.”¹⁵⁵ Clearly, the Congress meant business.

The Service ostensibly welcomed the Act, and then went about trying to ensure instead that it not get in the way. It began by describing its land management plans as “programmatic” with the specifics to come at the end of the process when particular tracts were put up for sale.¹⁵⁶ Plan provisions were said to “guide” future decisions, not actionable decisions themselves.¹⁵⁷ Under these interpretations, review of a plan’s methods and contents would be, by definition, premature. By no coincidence the Service would be taking the same position with respect to environmental impact statements, deferring their preparation to the time of particular sales when more specific information was known.¹⁵⁸ In both cases it was review-

151. See generally *id.*

152. See WILKINSON & ANDERSON, *supra* note 141, at 162, (quoting a Senate committee report interpreting the Church guidelines, which became the template for NFMA and Section 5(k) in particular).

153. See *id.* at 162-170 (describing a muddy resolution that included, at the suggestion of the Forest Chief, such non-monetary factors as wildlife habitat improvement); See Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 10 (1998) (opening the door in Ohio Forestry to claims that below-cost clear-cuts could be justified by “wildlife benefits” such as deer hunting).

154. National Forest Management Act of 1976, Pub. L. No. 94-588, § 6(g)(3)(F), 90 Stat. 2949 (emphasis added).

155. See National Forest Management Act of 1976 § 6(g)(3)(E) at 2954 (emphasis added); Sadly, this five-year requirement, the only fixed number in NFMA, became twisted out of meaning by subsequent Service policy, see Tuholske & Brennan, *infra* note 161 at 83-4.

156. See Brief for Federal Respondents, at 2, Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726 (1997) (No. 97-16), 1997 WL 7722731 (citing Service plans under 36 C.F.R. § 219.1(a) as providing “overall programmatic guidance”) (quoting the Service Chief “under established Forest Service Practices, including determinations on the appropriateness of even-age management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis”); *id.* at 8.

157. 36 C.F.R. § 219.1(b) (2012) (plans to “guide” management activities).

158. See The Planning Rule Proposal: Enviro Consider Litigation Against FS Planning Rule (unpublished land letter) (undated) (on file with author) (stating rules remove long-standing requirement for impact statements on forest plans); see also Nathaniel S. W. Lawrence, *A Forest*

avoidance, ostensibly for purposes of more informed decisions but not coincidentally with the equal effect of avoiding public inquiry into the most important decisions to be made—what, where, and how—and of loading subsequent decisions with the weight of the plan behind them and administrative steps towards the sales. Such a flaccid, rear-end role for plans was hardly what Congress had in mind. The Service had stood NFMA on its ear.

Well before the *Ohio Forestry* litigation was launched the Service had started manipulating each one of NFMA's curbs on clear-cutting, starting with the requirement that it be used only when "essential," reduced to "optimal," reduced again to "suitable."¹⁵⁹ At the same time up-front Section 6(k) unsuitability decisions became subsumed by the soil, slope, and restoration requirements of another section, reading much of Section 6(k) out of the statute.¹⁶⁰ Restoration itself would require only the theoretical possibility of success. So much for NFMA's requirement of "assurance." Its five year timeline, furthermore, would start tolling only after the final tree was felled.¹⁶¹ All of these maneuvers and more were challenged in a series of lawsuits, primarily by the Sierra Club, in which several courts simply deferred to the Service's expertise, which apparently included warping statutory requirements, while others peeked behind the curtain and saw the shenanigans at play.¹⁶² None of these decisions, however, treated the Section 6(k) unsuitability provision directly, and several rejected the postponement of judicial review until the too-late-to-make-a-difference time of a specific timber sale, one court reasoning, "[A] future challenge to a particular site-specific action would lose much force once the overall plan has been approved—especially if the challenge were premised on the view that the overall plan grew out of erroneous assumptions."¹⁶³

Then came the Wayne Forest plan.

3. The Lawsuit and the Decisions Below

The Sierra Club's complaint laid out the relevant facts succinctly. The Wayne Forest lands were "characterized by narrow ridge tops, steep slopes and narrow valleys," making much of it unsuitable for logging and, in particular, clear-cutting.¹⁶⁴ Beyond the land-stripping impacts of this method of logging, it also required access roads for heavy machinery, in this case some 15 miles of new roads a year, for the next decade.¹⁶⁵ The forest itself comprised "24 percent of public land

of Objections: The Effort to Drop NEPA Review for National Forest Management Act Plans, 39 ENV. L. REP. 10651 (2009).

159. See generally Cheever, *supra* note 137 (discussing in full these and related issues); see also generally Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND & RES. L. REV. 53 (1994) [hereinafter Tuholske & Brennan].

160. See generally Tuholske & Brennan, *supra* note 159.

161. *Id.*

162. *Id.*

163. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir 1992); see also Tuholske & Brennan, *supra* note 159, at 116-17 (discussing similar holdings).

164. See Complaint for Declaratory and Injunctive Relief at 14, *Sierra Club v. Robertson*, 845 F. Supp. 485 (S.D. Ohio 1994) No. C2-92-249.

165. *Id.* at 19.

with wildlife value in the entire state.”¹⁶⁶ They were, further, “a substantial portion of the state’s old growth inventory”¹⁶⁷ which provided habitat for “numerous plant and animal species” rare in southeastern Ohio,¹⁶⁸ and for equally rare low-impact recreation as well.¹⁶⁹ The plan itself admitted that there was, “a low probability of experiencing isolation from the sights and sounds of people, independence, closeness to nature, and tranquility.”¹⁷⁰ By contrast, cut-over landscapes and species favoring them were ample in the region, principally white-tailed deer that were a major feature of the plan.

As for economics, the Wayne Forest had been losing money on timber sales for years. From 1987 to 1990 (projected), its revenues were sequentially 67 percent of costs in 1987, 72 percent in 1988, 78 percent, in 1989, and 74 percent in 1990.¹⁷¹ The American public, not the timber companies, picked up the rest, in effect subsidizing a practice that NFMA sought to curb, apparently in order to increase game species favored by hunters.¹⁷²

The Sierra Club alleged several violations of law, beginning with the determination that clear-cutting was the optimal method of timbering in the Wayne Forest, notwithstanding NFMA’s legislative history and anti-clearcutting presumptions. It also claimed that the plan’s admittedly below-cost sales violated the “unsuitability” provision of Section 6(k) on its face,¹⁷³ and by opening up areas that could theoretically be restored by mitigation or technological measures, without stating what those measures were or what their costs would be.¹⁷⁴ It lastly claimed that clear-cutting on this landscape could not help but violate the “irreversible” harm and “restoration” standards of Section 6(g)(3)(e). In sum, the plan’s economic, optimal method, and impact determinations were based on faulty policy, and areas that should not have been made available for clearcutting were given the green light instead. To the Sierra Club, the time for challenging a plan so flawed in its methods and conclusions was now, before the train left the station. Noteworthy, in light of the Supreme Court opinion to come, both courts below found these challenges ripe for review.

The district court went straight to the merits, accepting the Services characterization of forest plans as merely “programmatic guidance” that allowed deferral of key NFMA decisions to a later date.¹⁷⁵ On the issue of optimality for clear-cutting, intended to be a specific check on clear-cutting, the court found the

166. *Id.* at 15.

167. *Id.* at 16.

168. *Id.* at 27.

169. *Id.* at 33; *see also* Brief for Respondents at 1, *Ohio Forestry Ass’n, Inc. v. Sierra Club*, No. 97-16 (6th Cir. Jan. 16, 1998), 1998 WL 35182 (*citing* “undervalued wilderness recreation,” and the “ability to enjoy undisturbed back country recreation”).

170. *See* Brief of Respondents, *supra* note 169 at 10 (quoting Wayne Forest Plan); *see also id.* at 9.

171. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 164, at 22.

172. *See* Brief for Respondents, *supra* note 168, at 10 (“the plan . . . calls for such logging as a way to generate additional foraging habitat for game species and thereby promote hunting.”) (citation omitted).

173. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 164, at 23.

174. *See* *Sierra Club v. Robertson*, 845 F. Supp. 485, 495 (S.D. Ohio 1994).

175. *Id.* at 491 (“programmatic in nature . . . Implementation . . . occurs at a second stage when individual site-specific projects are proposed and assessed.”).

Service governed by multiple-use principles that allowed it to choose whatever kind of forest it wanted, open patches and fast regrowth in this case, and then the preferred and most efficient way to provide it,¹⁷⁶ all of which made clear-cuts inevitable. Optimal turned out to be the best way to do whatever the Service decided to do.

As for the need to avoid serious environmental harm, the court embraced the Service's favorable view of clearcutting that it, "*imitates nature*,"¹⁷⁷ "*greatly increases wildlife capacity*,"¹⁷⁸ and keeps "*impacts on soil and water within fully acceptable limits*."¹⁷⁹ It further embraced the Service's grim view of mature tree stands as, "*a dark, high canopy forest in which only shade tolerant species can survive*," and in which, "*valuable hardwood timber rots on the stump or on the ground*."¹⁸⁰ Who could want that? Congress must have been wrong about clearcutting after all.

Turning to Section 6(k)'s restrictions, the court found no need to identify what mitigation or restoration measures would apply, much less be proven, much less priced in determining what lands should be excluding from harvest.¹⁸¹ So much for the economic history of this provision, and its text. The forest management plan, NFMA's intended vehicle for change, was returned to the days of discretion.

Case closed.

The Sixth Circuit saw a quite different picture. It addressed ripeness directly, finding that forest plans, "represent specific and final decisions."¹⁸² If challenges to them could be made "only at the time of site-specific" projects, it continued, the plan itself might "forever escape review."¹⁸³ Reaching the merits, the Court found the Wayne Forest plan "improperly predisposed" towards clearcutting.¹⁸⁴ The Service's high praise for clear-cutting that buttressed its optimum finding was seriously flawed as a factual matter,¹⁸⁵ and flouted NFMA's presumptions that clearcutting be used "only in exceptional cases" and where consistent with environmental protection.¹⁸⁶ A plan that opened most of the Wayne

176. *Id.* at 490-92. ("The selection of the appropriate system and harvest method depends on the judgment of the forest planner, taking into consideration . . . the goals of the forest plan"); *Id.* at 490.

177. *Id.* at 492-93 ("this harvesting method [clearcutting] does, in fact, imitate nature. Natural clearcutting occurs as a result of wildfire, wind, insects and disease.") (emphasis added).

178. *Id.* at 493 (emphasis added).

179. *Id.* at 491 (emphasis added) (quoting unrelated study in FEIS that "research has repeatedly shown the effect of clearcutting on soil and water quality is normally within fully acceptable limits"). Who knew?

180. *Id.* at 493 (emphasis added).

181. *See id.* at 495-99, inter alia finding that since forest plans were governed by multiple use, adding unquantified wildlife benefits to (considerably) below-cost sales was appropriate, and that the technology and its costs to ensure against irreversible damage to soils or watershed conditions under § 6(g)(3)(F) were irrelevant to the 6(k) decision because they had not been determined yet. So much for the intended "weeding out" purpose of § 6(k).

182. *Sierra Club v. Thomas*, 105 F.3d 248 at 250.

183. *Id.*

184. *Id.* at 251.

185. *See id.* at 250-251 (findings on recreation and diversity).

186. *Id.* at 251.

National Forest to timber harvest, and 80 percent of that to clear-cutting, was upside down. Case remanded.

4. The Supreme Court Takes a Pass

The Supreme Court took yet a different tack. It began by describing NFMA as a multiple-use statute and its management plans as “guides”¹⁸⁷ and “decision tools”¹⁸⁸ citing neither the statute nor its legislative history but rather the Service’s own, patently self-serving, regulations.¹⁸⁹ It quoted likewise from Service administrative rulings that declared forest plans to be “programmatic in nature,” as if they added credibility. This said, the Court did recognize the Sierra complaint as challenging the policies behind basic issues of the Wayne Forest plan,¹⁹⁰ opening areas for clear-cutting that were neither optimal, suitable, nor restorable, but then killed the chance to prove it. Instead, the justices found the matter not ripe for review, relying in part on the fact, (of all things), that Congress had not provided for citizen suits.¹⁹¹

Case dismissed.

The concept of ripeness is judge-made. It is said to prevent courts from entangling themselves in abstract disagreements over administrative policies, and to protect agencies from judicial interference until a decision has been felt in a concrete way.¹⁹² Just what was “abstract” and “interference” remained to be seen. For this purpose the Court identified three inquiries whether the: 1) delay would “cause hardship” to plaintiffs; 2) review at this juncture would “inappropriately interfere” with agency decision making; and 3) delay, in turn, would produce additional facts to aid courts in ruling on the merits.¹⁹³ All of which were by this time hornbook law. Unfortunately, there was less law here than met the eye.

Something like the doctrine of standing, ripeness has been described as an “enigma of administrative law.”¹⁹⁴ As Yale Professor Brian Murchison writes: “appellate panels ‘divide passionately over whether cases are ripe,’ lawyers ‘uneasily distinguish ripeness from other threshold issues,’ and students ‘puzzle over’ its impact on the ‘accountability of public officials.’”¹⁹⁵ The subjectivity of its factors have proven to be “more of a riddle than a guide, a vocabulary instead of a charter.”¹⁹⁶ Worse, Murchison continues, while purporting to, “forego ‘complicated legal distinctions’ divorced from reality,” it, “often produces judicial opinions whose

187. 523 U.S. at 729.

188. *Id.* at 737.

189. *See id.* at 735.

190. *Id.* at 731 (“erroneous analysis”).

191. *See id.* at 737.

192. *Id.* at 732-33 (citing *Abbot Laboratories v. Garner*, 387 U.S. 136, 148-149 (1967) (finding regulation ripe for review)).

193. *Id.* at 733.

194. Brian C. Murchison, *On Ripeness and “Pragmatism” in Administrative Law*, 41 ADMIN. L. REV. 159 (1989); For the Supreme Court’s equally muddled test for standing, *see Massachusetts v. EPA*, 549 U.S. 497 (2007), a 5-4 decision in which the two opinions disagreed over the application of every factor of the test.

195. Murchison, *supra* note 194, at 159.

196. *Id.* at 160.

connection to reality is at best unclear.”¹⁹⁷ When it came to this connection no better example might be found than the disposition, without trial, of *Ohio Forestry*. The Court never saw the reality of forest planning at all.

Starting with the hardship question, the Court found that the plan did not create “legal harm.”¹⁹⁸ It did not grant or withhold any legal power. No one, by virtue of the plan alone, could start cutting trees, but of course at that point ripeness is beyond obvious. What is more germane to this case—and to a wider range of arbitrary decisions that act in similarly irreversible ways—is a possibility the Court would then accept, without enthusiasm, in theory but fail to apply.

Instead, in its next breath the Court found the plan did not inflict significant practical harm either. To be sure, it admitted, it would be easier and cheaper for Sierra to sue now, rather than pursue, “many challenges to each site specific logging decision,” but such harm was insufficient.¹⁹⁹ The ripeness doctrine itself, the Court reasoned, presupposes such “inconveniences,” citing *Lujan v. National Wildlife Federation* which did not rule on ripeness at all.²⁰⁰ Besides, it opined, if Sierra successfully challenged one sale, it could also raise the same plan failure in a challenge to another sale, if imminent, and receive its day in court.²⁰¹

The shortcomings of this analysis leap from the page: Let us count the ways:

(1) The first was to ignore the effect of a plan that, even called a program, does far more than guide the next steps. As a legal matter it *controls* them,²⁰² including here areas of a forest, allegedly improperly, declared optimal for clear-cutting, and more importantly those *not* declared unsuitable for economic, physical and other reasons. These are a highly-structured form of zoning decisions, and public challenges to them, similarly, need not wait for the bulldozer.

(2) Along the way the Court finessed the reason NFMA required unsuitability and optimality determinations to be made at the *beginning* of the planning process, in the development of the plans. If they were not made at this point, and made correctly, these areas would be put at increasing risk. Congress knew this, hence the timing of the requirement. Apparently, the Court knew better.

(3) It also ignored the most practical fact that plan approval generates its own momentum both within industry and the ranger district. The parties are now good-to-go with meetings, surveying, mapping, site analysis, harvest estimates, pricing, scheduling, all of these done with the expectation, indeed the confidence,

197. *Id.* at 162. Murchison’s description of the ripeness doctrine and its virtual incoherence in practice are echoed by leading scholars and judges in Administrative Law cited throughout his article.

198. *Id.* at 733-734. The use of “legal harm” as a ripeness test in *Ohio Forestry* has been challenged in Kristin N. Reyna, *Ohio Forestry Association v. Sierra Club: The Supreme Court Reexamines Ripeness in the Context of Judicial Review of Agency Action*, 12 TUL. ENV’T L.J. 249, 260 (1998) (arguing that requiring legal “sanctions” was inconsistent with the actual holdings of *Abbot Labs* and other cases the *Ohio Forestry* Court relied on, *id.* at 261, and that since their time both reviewing courts and scholars had since expanded the concept considerably, starting with, *see* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395, 398 (1965)). While accepting this expansion in theory the Court apparently overlooked the reason behind it: greater accountability for government conduct. *See* discussion *supra* notes, at 103.

199. *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998).

200. *Id.* at 735; *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 879 (1990).

201. *Id.* at 734.

202. *See* 16 U.S.C. § 1604(i); *See also* 36 C.F.R. § 219.10(e) (2016).

that they will lead to a sale. Why else do them? As one forest plan challenger has noted:

[T]he agency has . . . spent hundreds of millions of dollars and countless employee hours on this planning effort. Planning participants, Forest Service employees, and taxpayers alike must be quite chagrined to learn that . . . the Forest Service views forest plans as having an ‘extremely conjectural’ influence over subsequent management activities.²⁰³

On the basis of human nature alone it would be more than simply difficult for anyone to then pull the plug because of a process defect months, if not years before. It would not happen.

(4) The Court’s suggested option, further, of challenging a particular sale at the end of the process and raising within it defects in the plan, was a chimera, and the Service told it so. In any such appeal the question will be conformity with either the plan or the specifics of Section 6 (g)(3).²⁰⁴ The Service had already said this in other litigation, arguing in that at sale-time its planning decisions were beyond judicial review.²⁰⁵ The Solicitor General said the same in *Ohio Forestry*: “It’s hard to imagine,” he told the Justices, “a site-specific activity that would present a suitable vehicle for the court to review the whole plan.”²⁰⁶ Indeed, he continued, even if a court were to open the plan itself at this late point to examine a suitability determination for a single tract, its ruling would not necessarily implicate other sales, or parties, at all.²⁰⁷ When it came to challenging the contents of a plan, one was always too early until it was too late. Unless Forest Plans were entirely above the law, the “practical” harm for ripeness was now.

(5) The Court’s reliance on *Lujan* to support this approach was likewise misplaced. That case involved standing to challenge to more than 1,200 federal actions on 450 million acres of public lands, in eleven western states, under several statutes and regulations.²⁰⁸ There was no plan, nor a formal program. The actions in *Lujan* were ripe, they were specific and happening; the question was whether the plaintiffs had proven injury. In *Ohio Forestry* there was but a single forest, a single law, and a single plan, derived in full APA formality, controlling, final until amended, and with but two legal issues. The Court’s rejection was not based on standing at all.

203. See Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223, 254 (1996) (citing a reply brief in *Resources Ltd. v. Robertson*, 8 F.3d 1394 (9th Cir.1994)).

204. See Paul A. Garrahan, *Failing to See the Forest for the Trees: Standing to Challenge National Forest Management Plans*, 16 VA. ENV’T L.J. 145, 191 (“[A] court would treat the plan at [the site specific level] as a *fait accompli* . . .”).

205. See *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 n.17 (9th Cir 1992) (in this case a ripeness defense was rejected).

206. Transcript of Oral Argument at 13-14, *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998) (No. 97-16), 1998 WL 96282 at *13.

207. *Id.* at 12 (if a challenge to a particular project successfully impugns the plan, then that would be “preclusive in subsequent litigation *between the same parties*” (emphasis added)).

208. See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 879 (1990).

(6) The Court's reliance on the absence of a citizen suit provision to buttress its decision is a yet weaker reed. For one, this absence would invalidate challenges to individual projects as well. It also ignored the APA's grant of review in *all* cases except where "precluded by statute," or under statutes so vague as to provide no "law to apply."²⁰⁹ Neither applies here. NFMA's requirements are not wishful thinking. They are as specific as Congress could write without banning clearcutting and like practices altogether, which it abandoned only *because* of the requirements for forest plans.

(7) The Court's suggestion that environmental impact review would provide relief is weaker still. In drafting NFMA, Congress (unwisely) left the timing of an EIS to the Service's discretion, which the Service has relied on to avoid review of its forest plans as well.²¹⁰ In addition, through other rulings the Court had eliminated any substantive requirement from NEPA, reducing it to process; even if an impact statement were done on a plan it could impose no limits nor change in behavior.²¹¹ NFMA of course could, and was intended to, or else virtually the same Congress would not have bothered to enact it.

(8) The Court's failure to appreciate, finally, that neither the Sierra Club nor any other non-profit organization had the wherewithal to challenge every questionable sale and then appeal it through the court system is simply not of this world. Again, this was not a matter of "ease" or "convenience"—it was simply not possible.

The Court's treatment of the second ripeness factor, hindering agency decision making, is similarly dubious. An agency needed the flexibility to adjust, it reasoned, to "correct its own mistakes and apply its expertise."²¹² In this case there is no reason to expect that the Service would "correct" its approach without public pressure. It hadn't corrected these policies from the day it birthed them,²¹³ and the prospects it would going forward under any Administration were slim. Prior to this litigation the agency was under the supervision of the former general counsel of a large timber corporation that depended on clearcutting federal lands and who complained openly about NFMA limitations, and this pattern has since continued.²¹⁴ Lastly, with plan decisions postponed to the time of timber sales corrections of any

209. 5 U.S.C. § 701(a); *see also* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), *abr. by* *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

210. National Forest Management Act of 1976, Pub. L. No. 94-588, § 6(g)(1), 90 Stat. 2949 (1976).

211. *See Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332 (agency can kill all the deer).

212. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) (quoting *F.T.C. v. Standard Oil Co.*, 449 U.S. 232 (1980)).

213. *See* discussion at *supra* notes 63-67.

214. *See Nomination of John Crowell to be Assistant Secretary of Agriculture*, LEAGUE OF CONSERVATION VOTERS: NATIONAL ENVIRONMENTAL SCORECARD, <https://scorecard.lcv.org/roll-call-vote/1981-120-nomination-john-crowell-be-assistant-secretary-agriculture> (The Assistant Secretary, former General Counsel to Louisiana Pacific, now with jurisdiction Forest Service resource management and environmental protection had led efforts to "thwart measures to protect federal forests" such as "limits on the size of clearcuts," and the use of "buffer zones along streams." He was also found to be significantly involved in unlawful price-fixing for his corporation's subsidiary in Alaska. A few years later he was succeeded by Mark Rey, former Vice President and chief lobbyist of the American Pulp and Paper Association).

significance would require more rulemaking, which is in the interest of no one involved.

An unasked question at the bottom of this hindering-the-agency inquiry was whether plan challenges could not in fact *assist* the Service in making corrections before they were set in stone. To which one might wonder: what else would?

The third ripeness factor, possible benefit from “further information” is simply treated as a given.²¹⁵ Quite erroneously, as well. At issue here were the Services policies for key determinations that had long been set in stone, and had been raised and litigated in a specific context below, twice. If the Supreme Court wanted yet more information, it could be obtained in short order via a one-paragraph remand. There was no further information to be found.

In all, the Court’s opinion may be one of the most intellectually unsatisfying it has rendered in recent years. Virtually nothing supported its ripeness analysis. Offering several rationales for a decision is often a sign that no single one is convincing, and here the Court offered no fewer than eight, each weaker than the one before. The issues in the case were a horizon away from abstract disagreements over administrative policies; they had a strong factual base and the on-the-ground consequences of a final agency action. As for “interference,” it seems clear that courts would benefit more from resolving these issues now than by postponing them until further commitments had been made to implement them, rendering fair adjudication that much less possible. Indeed, ripeness seems to have been an exit of convenience, for reasons that may be better explained by Smokey Bear than anything else that comes to mind.²¹⁶

5. Fallout

One is struck by the fact that the opinion was unanimous, particularly considering the incredulity members of the Court expressed during oral argument over the position the government was taking. That, per the Solicitor General, review of a NFMA forest plan would “never” be appropriate . . . really?²¹⁷ And that, in the same colloquy, if plaintiffs, “had to do what you claim they should do [pursue separate appeals on individual sales] they’re going to have to file something like 40 lawsuits and that would not conserve judicial resources.”²¹⁸ Excellent questions, for which the government had no useful response. The justices plainly saw the problem they were creating, a *de facto* immunity for forest planning, but then created it anyway. In so doing they removed the most important decisions of a major public agency from judicial review.

One is also struck by the Court’s refusal to cite, or even allude to, the substantial body of judicial precedent on this issue, which saw circuit courts divided

215. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 736 (1998).

216. Why the Court would exempt forest plans on these grounds and not those of other agencies is open to speculation, but it but it could relate to the high regard the Service has enjoyed since the days of Gifford Pinchot and the success of its image, men in green whom we can trust. *See text supra* at notes 26-28.

217. *See Oral Argument, supra* note 206 at 14 (“Question [from the Court]: Do you concede that there has to be some mechanism for reviewing the whole plan? [Answer]: No.”); *See also* colloquy, *supra* at notes 113-114.

218. *See Oral Argument, supra* note 206 at 12.

but the more persuasive of them of based on the language, history, and purposes of the Act.²¹⁹ The Court's further dicta on when a plan might just *be* reviewable has led to uncertainty of its own, and to yet more unbalanced results.²²⁰ By its reasoning, if a forest plan provides protections from logging they can be challenged at once,²²¹ but if it opens areas to logging, no matter how large, how sensitive, how faultily determined, and how irrevocable in practice, effective challenges to this decision would never come.²²² Something is wrong with this picture.

At day's end, the Supreme Court had returned the Forest Service to the days of discretion that had prompted the enactment of NFMA in the first place. A statute designed to shore up the weakness of "multiple use" management wound up succumbing to it instead. The opinion was greeted by a chorus of jeers in academia and beyond, but of course to little avail.²²³ In practice, Forest management plans still prioritize clear-cutting and other "even age" practices, and environmentalists struggle to redress, piece by piece, the decisions that govern them.²²⁴ It is hardly an efficient process, but the Service evidently prefers multiple firefights over specific timber sales to fewer that challenge what matters. It is not the only federal agency to do so, and with the identical consequences: more paperwork but very few changes in behavior.²²⁵ This approach is neither effective, consistent with NFMA, nor fair to the public affected by it. Then again, neither was the decision in *Ohio Forestry*. This case was ripe for review.²²⁶

-
219. *Compare* Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992), with *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995), and of course the case at hand (6th Cir. 1997), and *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994); *Wilderness Society v. Alcock*, 83 F.3d 386 (11th Cir. 1996). See also Cheever, *supra* note 137.
 220. See Trent Baker, *Judicial Enforcement of Forest Plans in the Wake of Ohio Forestry*, 21 PUB. LAND & RES. L. REV. 81, at 91-105 (2000) (discussing subsequent district and circuit court cases).
 221. *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 9 (2000).
 222. See *Mumma*, 956 F.2d 1508 at 1516, and *Marita*, 46 F.3d 606 at 614; see also Eacata Desire Gregory, *No Time is the Right Time: The Supreme Court's Use of Ripeness to Block Judicial Review of Forest Plans for Environmental Plaintiffs in Ohio Forestry Ass'n v. Sierra Club*, 75 CHI-KENT L. REV. 613 (2000). Many of these are cited in the article, and some mince no words.
 223. Many of these articles are cited in this piece, and some mince no words.
 224. See Mathew Shaffer, *A Review of Appeals and Litigation Over Timber Sales Between 1999 and 2008 on the Lolo National Forest*, U. MONT., 2009, at ii (27% of the 157 timber sales were appealed or litigated, representing 55% of the timber volume involved); See also Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians, et al. v. Weber*, on file with author, (regarding logging on the Flathead National Forest); *Enviros would halt Tongass timber sales*, 44 Pub. Lands News 12 (May 17, 2019).
 225. The Federal Highway Administration, similarly, has successfully argued that Regional Development Plans funded by the agency selecting transit needs, modes, and corridors (right down to street crossings and transit stops) are premature for environmental impact review, deferring it to later approval of individual projects. See *Atlanta Coalition v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979). Not surprisingly both the Forest Service and the Federal Highway Administration have topped the charts for federal EIS's for decades; See EPA, EISS BY YEAR FOR SELECTED AGENCIES, 1992-1996, (EPA Office of Federal Activities, 1996), on file with author (2014 rankings were similar but are no longer on the EPA website). These are self-inflicted wounds. Both agencies apparently prefer this burden, however, to that of opening their most meaningful decisions to environmental review.
 226. The Wayne Forest litigation arose in the context of resurging public concern over clearcutting, similar to that which had inspired NFMA. As one law review article noted, "By the late 1980's,

RAPANOS: WASTING WETLANDS

“Even setting aside the plurality’s dramatic departure from our reasoning and holding in Riverside Bayview, it’s creative opinion [in the case at hand] is utterly unpersuasive. The plurality imposes two novel conditions on the exercise of the Corp’s jurisdiction that can only muddy the jurisdictional waters.”

—Justice Stevens, dissenting in *Rapanos v. the United States*²²⁷

1. Prologue

The “creative” opinion that Justice Stevens alludes to above muddled the waters badly, and they remain muddled to this day. This is mainly due to the idiosyncrasies of the plurality opinion’s author, Justice Antonin Scalia, and his approach to the case.

Justice Scalia had a penchant for men who openly flouted environmental laws, even when committing crimes in the process. He made them heroes. One of his favorites was a man named David Lucas, a real estate developer sitting on two-million-dollar beach front properties in South Carolina. The properties were so vulnerable to storms that the state required new buildings to be set back behind the high storm line.²²⁸ Lucas, well aware of these risks, sued the state for taking his property. Justice Scalia portrayed him as an unfortunate victim of an over-reaching government standing up against tyranny for all Americans, which was how Lucas portrayed himself in his book, *LUCAS AND THE GREEN MACHINE*.²²⁹ It was about

the Forest Service was driving on its rims, battered and lackluster. Trust in the agency’s leadership had all but dissolved.” Frederico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L. Q.* 1, 21-23 (1996). After the Regional Supervisor announced that the Wayne plan would be revised “to bring its vegetation management projections into conformity with what has happened on the ground,” followed by a more forthright directive from the Chief himself “to limit clearcutting,” and a yet more specific string of legislative appropriations riders restricted the practice to 25 percent of previous levels. Respondent’s Brief, *supra* note 171, at 14. The promised revised plan, however, adopted in 2006, was largely the same meal warmed over. Of the Wayne Forest’s 238 thousand acres of woodlands more than two-thirds were declared suitable for timbering, for which clearcutting was overwhelmingly the instrument of choice; alternative methods that left more trees standing, it explained, would produce less in board feet and pulp. UNITED STATES FOREST SERVICE, WAYNE NATIONAL FOREST LAND AND RESOURCES MANAGEMENT PLAN (2006) at 36 (rationale for clearcutting) and Appendix B at B-1 (harvest data). Forest road building was to increase as well, up to 180 miles in the next decade, in an already heavily-roaded forest. While the plan offered numerical data on revenues and benefits, it offered no information on costs, nor were any areas identified as “unsuitable” because of costs. Doubtless, below-cost sales remained the order of the day. There are recent signs of change, however, the 2018 plan offers limited timber sales converting “softwood plantations” to an original hardwood canopy. WAYNE STATE FOREST PLAN 2018, (last visited Aug. 11, 2021), <https://www.fs.fed.us/sopa/components/reports/sopa-110914-2019-04.html>. If this policy holds, then for this one small forest in a landscape of “even age management,” Senator Humphrey’s optimism over NFMA may at last find a home.

227. *Rapanos v. United States*, 547 U.S. 715, 800 (Stevens J. dissenting, 2006).

228. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

229. DAVID LUCAS, *LUCAS VS. THE GREEN MACHINE* (1995).

more than money. It was about, in Lucas' words, "the ancient struggle to secure property rights for all men."²³⁰

David Lucas was piker, however, in comparison to John Rapanos who would defy administrative orders, court orders, and criminal conviction. Justice Scalia, writing for a four-member plurality, elided over all of Rapanos' behaviors in a single, brief paragraph:

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. 339 F.3d 447, 449 (CA6 2003) (*Rapanos I*). Regulators had informed Mr. Rapanos that his saturated fields were "waters of the United States," 33 U.S.C. § 1362(7), that could not be filled without a permit. Twelve years of criminal and civil litigation ensued.²³¹

That is all Scalia saw, or at least was willing to describe. Big government was squashing the American Dream again and Rapanos was its latest victim. Fortunately, as several other opinions would point out, there was much more to the story. If Rapanos was victimized it was by his own insistence that he was above the law. Far from bullying Rapanos, the government had been cutting him slack for nearly a decade in hopes of bringing him around.

2. Meet Mr. Rapanos

John Rapanos was a businessman and landowner in eastern Michigan. In 1988 he purchased an option agreement with a shopping mall developer for a heavily forested property that he intended to clear beforehand to increase its value.²³² Rapanos and his attorney submitted a development plan to the Michigan Department of Natural Resources (DNR), which told him that the land held wetlands and that a permit was required to proceed.²³³ A few months later DNR officials toured the site to verify the wetlands and discovered that Rapanos had already begun "scalping" the vegetation with bulldozers and other heavy equipment.²³⁴ Despite this provocation, however, they simply advised him to get the wetlands mapped so he could apply for a permit to fill them in.

He then hired a wetlands consultant, Dr. Glenn Goff, to prepare the wetland delineation. Unfortunately for John Rapanos, Dr. Goff took his obligation seriously and spent weeks gathering information and preparing a report showing that the site contained approximately 50 acres under federal jurisdiction.²³⁵ Rapanos exploded. He refused to pay and threatened to "destroy" Dr. Goff unless he eradicated all traces

230. *Id.* at 160.

231. 547 U.S. at 720–21.

232. *Id.* at 729.

233. *United States v. Rapanos*, 115 F.3d 367, 368 (6th Cir. 1997).

234. *Id.*

235. *Id.*

of the report.²³⁶ In the meantime, he went forward with his land clearing full bore.²³⁷ Justice Scalia's hero was presenting him with what in the trade are called "bad facts." They would only get worse.

Over the summer, after witnessing further wetland destruction on the site, the DNR issued a cease-and-desist order. Rapanos ignored it, later explaining that he would not commit "Nazi atrocities" if the government told him to.²³⁸ Rapanos later paid for a billboard suggesting the regulators were Nazi's themselves.²³⁹ In August, five DNR officials met Rapanos at his boundary to determine the extent of the damage and were refused entry.²⁴⁰ A week later they attempted to meet with him at his corporate headquarters, but were denied entry again.²⁴¹ Finally, in November they executed a search warrant and estimated that Rapanos had expended \$350,000 in unsanctioned land-clearing and draining the site. Little forest and few wetlands remained.²⁴² He had also spent over half a million dollars to fill in another 32 acres of wetlands on two other properties.²⁴³

In February 1993, Midland County Circuit Judge Thomas Beale ruled that Rapanos had violated county zoning ordinances more than 1,200 times and owed \$330,000 in fines.²⁴⁴ Heroic to end, Rapanos responded by calling the Circuit Court chambers with threats to spread false allegations that Judge Beal was involved in drug trafficking and money laundering if the fines were not rescinded.²⁴⁵ He even took out billboards again, this time criticizing Judge Beale.²⁴⁶

Meanwhile, in 1991 the state had asked the federal Environmental Protection Agency to intervene and require Rapanos to comply.²⁴⁷ The facts established at trial that, inter alia, both Rapanos and his attorney had lied about their response to the cease-and-desist order.²⁴⁸ Rapanos was charged with violating the Clean Water Act for discharging dredge and fill without a permit, giving rise to the case at hand.

3. Section 404 and Wetlands: A Question of Jurisdiction

In 1972, after nearly three decades of failing state efforts at water pollution control, Congress enacted a law that placed it, instead, in the hands of a single federal

236. 547 U.S. at 763 (Kennedy, J., concurring).

237. 115 F.3d at 369.

238. Felicity Barringer, *Michigan Landowner Who Filled Wetlands Faces Prison*, N.Y. TIMES, May 18, 2004.

239. Hugh McDiamid, Jr., *Case Pits Your Property Rights vs. Environment*, DETROIT FREE PRESS, Feb. 17, 2006 at A.1.

240. Rapanos, 115 F.3d. at 369.

241. A. J. Evenson, *Saginaw – Man Avoids Prison*, LANSING STATE JOURNAL, June 6, 1995.

242. *Id.*; Salzburg Road Site (photograph), on file with author.

243. *Id.*

244. Clark Hughes, *John A. Rapanos who vowed "Fight to the Death" against EPA, Dies at 80*, MLIVE (posted Feb. 11, 2016, and updated Jan. 29, 2019).

245. *Id.*

246. *Id.*

247. *United States v. Rapanos*, 339 F.3d. 447 (6th Cir. 2003).

248. John Clemens, *Water-Sharing Compact Dissolves*, 23 WATER LOG at 10, 2003.

agency, the newly minted Environmental Protection Agency (EPA).²⁴⁹ The Clean Water Act (CWA) sought to eliminate water pollution by a date certain, and its primary mechanism was to be increasingly rigorous discharge permits.²⁵⁰

Congress also recognized that dredging and filling was a serious water pollution problem, but could not agree on the appropriate agency to regulate it.²⁵¹ To Senate sponsors of the CWA, EPA was the logical choice because it was uniquely charged with carrying out and enforcing provisions of the Act.²⁵² There was, however, another candidate agency. For 150 years the Army Corps of Engineers had exercised exclusive jurisdiction over *all* activities in navigable waters.²⁵³ Southern representatives in the House, who benefitted greatly from Corps dams, levees and navigation canals that sent money back home, saw EPA control over this activity as a real and present danger.²⁵⁴

After over a year of negotiating, Congress split the baby. Section 404 of the CWA prescribed an elaborate *pas de deux* in which the Corps would issue dredge and fill permits,²⁵⁵ but under regulations promulgated by the EPA,²⁵⁶ and with provision for an EPA veto for activities it found to be unreasonably damaging.²⁵⁷ This was of course a recipe for conflict between an old and venerable agency dedicated by statute to dredging and filling on a grand scale, and a new and untried agency dedicated to cleaning up pollution. Little wonder then that conflict followed, and it first concerned a very basic question: the extent of the waters covered by this new law.

To the Corps, from the outset and years beyond, the fewer waters the better. It meant less attention to the unpleasant task of issuing dredge and fill permits and less interference with its own programs. The EPA wanted the maximum waters possible to fall under the CWA; this was the best way to eliminate pollution. Each agency had “law” on its side. The CWA referred to “navigable waters”²⁵⁸ which had a traditional meaning (score one for the Corps), but the legislative history made clear that “navigable” was to be interpreted in a new way, one that embraced all waters within the reach of the Constitution (score one for the EPA).²⁵⁹

The case for including all waters to the fullest extent possible, however small, however far upstream, was quite strong. The bogs, seeps, sloughs, intermittent creeks, marshes, bottomlands, wet meadows, potholes, and playa lakes are the primary pollution prevention systems of the nation’s waters and the primary

249. 33 U.S.C. § 1251(d).

250. 33 U.S.C. §§ 1331, 1314(b).

251. See STAFF OF S. COMM. ON PUB. WORKS, 23d Cong. 1st Sess., A LEGISLATIVE HISTORY: REFORM OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 23 (Comm. Print 1973).

252. *Id.* (Senior Senators Baker and Muskie were prominent in this discussion, and adamant about a strong EPA role, *id.*).

253. See Act of May 12, 1933, ch. 25, title II, § 36, 48 Stat. 49 (repealed 1947).

254. STAFF OF S. COMM ON PUB. WORKS, 23d Cong., *supra* note 251.

255. See 33 U.S.C. § 1344(a).

256. *Id.* at § 1344(b).

257. *Id.* at § 1344(c).

258. 33 U.S.C. § 1344(a).

259. See Conference Report, S. Rep. No. 1236, 92d Cong, 2d Sess. 144 (1972) (“waters of the United States” intended to give the term “navigable waters,” the “broadest possible Constitutional interpretation.”).

determinants of their water quality. When left in place, these wetlands are natural, self-renewing, least-cost, water treatment machines, sources for water treatment, spinoffs of man-made waste treatment plants. The value of the services natural waters provide in terms of pollution reduction reaches the multi-billions per year.²⁶⁰ A 1993 report found that the loss of fifty percent of these upstream filters would increase treatment costs to \$75 billion for one pollutant, nitrogen, alone.²⁶¹ The loss of these systems from even remote sources has contributed to massive “dead zones” of anoxic water in the Gulf of Mexico, Lake Erie and the Chesapeake Bay.²⁶²

The measures proposed to redress then rely primarily on wetlands to absorb and treat the runoff, and to curb flooding and its sediment pollution. Congress knew all this. Water runs downstream, and protecting wetlands was a way to keep it clean.

The jurisdiction over waters issue came to a head early on in *NRDC v. Calloway*.²⁶³ Emphasizing the importance of upstream wetlands in achieving the CWA’s ambitious water quality goals, the D.C. District Court held that Congress intended federal permitting to the “maximum extent possible under the Commerce Clause of the Constitution.”²⁶⁴ Per *NRDC v. Calloway*, and the language of Congress itself, “navigable waters” were not tied to “traditional tests of navigability.” The Corps was to publish within 40 days regulations clearly recognizing the “full regulatory mandate of the Water Act.”²⁶⁵

The Corps complied with the order, establishing three phases for its implementation.²⁶⁶ The first covered traditional navigable waters and adjacent wetlands; the second primary tributaries and natural lakes greater than five acres and their adjacent wetlands; the third went further upstream to the headwaters themselves, including streams flowing less than five cubic feet per second. This done, the Engineers went to war.

The Corps issued a press release stating that federal permits could be required for “a farmer wanting to plow a field,” or a mountaineer “wanting to protect his land against stream erosion,” even a house wife throwing out the dirty dishwater.²⁶⁷ Congress took up the charge, one Representative complaining of “a very complicated permit process” for ordinary forestry and agriculture.²⁶⁸ The House of Representatives passed a bill reverting § 404 jurisdiction to traditional navigable waters, period, despite opponents’ arguments that this would leave “98 percent of all stream miles and 80 percent of wetlands unprotected by federal controls.”²⁶⁹ The

260. See WORLD WILDLIFE FUND, STATEWIDE WETLAND STRATEGIES, A GUIDE TO PROTECTING AND MANAGING THE RESOURCES, at 5 (1992) (estimating functional values in sewage treatment alone at from \$1-6 billion).

261. WORLD WILDLIFE FUND, *supra* note 260.

262. See Oliver A Houck, *Cooperative Federalism, Nutrients and the Clean Water Act: Three Cases Revisited*, ENV’T LAW. REP., May (2014) (discussing *inter alia* dead zones in Florida, the Mississippi Gulf Coast and the Chesapeake Bay).

263. Nat. Resources Def. Council, Inc. v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), *rev’d in part*, 524 F.2d 79 (2d Cir. 1975).

264. Nat. Resources Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

265. 40 Fed. Reg. 31,319 (1975).

266. *Id.*

267. See Corps Press release cited in 123 Cong. Rec. 10, 427-38 (1977) (describing Corps blowback.).

268. See 123 Cong. Rec. 10,415 (statement of Representative Kemp).

269. *Id.* at 1270 (statement of Representative Lehman)

House of Representatives tried again, twice, to reject the *Calloway* decision, but failed.²⁷⁰

Ultimately, cooler heads in the Senate prevailed. Congress retained the extensive jurisdiction asserted in the *Calloway* decision. Instead, it provided exemptions for normal agricultural and silvicultural practices and even a process for delegation of the program to qualified states,²⁷¹ an offer accepted by only two states, one subsequently withdrawing.²⁷² The low acceptance rate is understandable. As anyone involved in administering these programs knows, wetland permitting is a tough, often nasty, business. All the more surprising is that the Army Corps and EPA, so long at war over wetland permitting, would reach an accord on the jurisdictional reach of § 404 reflected in the regulations in this case. If an agency committed to development is allied with one committed to environmental protection, that is a good indication that the regulations were in balance.

One would think that at this point, after so much attention, the war over § 404 jurisdiction would be over . . . but one would be wrong. There was simply too much money to be made by too many parties from dredging and filling in the waters of the United States. And there were some individuals who would not believe in the law, or obey it, no matter how explicitly the law was explained to them, and how much leeway they would be given to comply. Mr. Rapanos was one of them.

4. *Rapanos*: The Plurality Opinion

Justice Scalia's empathy for scoundrels was matched only by his antipathy to environmental laws intended to restrict them. This antipathy was manifest in Scalia's *Rapanos* plurality opinion, that took a simple, clearly-stated command (wetland permitting) and its widespread acceptance by all parties affected, and inserted two "novel" limitations that badly crippled the Clean Water Act and the achievement of its goals.

Scalia began by emphasizing the burden placed on Mr. Rapanos, permit delays averaging 788 days and costing up to \$271,000 per permit, plus the costs of mitigation . . . as if the destruction of wetland values should be free.²⁷³ As any significant builder knows, even at the local level permits are slow and expensive, particularly if, as in this case, fiercely contested by permitting agencies. In this process, the Corps as permitting agency was acting as an "enlightened despot," apparently out of control.²⁷⁴ Justice Scalia's emotional fidelity to Mr. Rapanos could not be more apparent.

270. *Id.* (statement of Representative Edgar).

271. 33 U.S.C. § 1344(f) (agriculture and silviculture); § 1344(g) (state assumption).

272. *See Forty Years After the Clean Water Act: Is it Time for the States to implement Section 404 Permitting?: Hearing before the Subcomm. On Water Res. And Env't of H. Comm. on Transp. and Infrastructure*, 112th Cong. 106 (2012) (The two states accepting jurisdiction were Michigan and New Jersey. A few years later Michigan dropped out).

273. *Rapanos v. United States*, 547 U.S. 721, 721.

274. *Id.*

Equally apparent was Scalia's description of the waters at issue, which were "swampy lands"²⁷⁵ and endless stretches of "ephemeral waters" in "mudflats and dry arroyos." In Scalia's view, they were not waters at all.²⁷⁶

His view of the *connections* of these waters to navigable waters was equally skeptical; many were also "ephemeral," "impermanent," not aquatic connections at all.²⁷⁷ These conclusions led Justice Scalia to invent two legal requirements for wetlands protected by Section 404. One, the *wetland itself* had to be permanent.²⁷⁸ Second: the *connection* to a navigable body of water had to be permanent as well.²⁷⁹ Without both present, there was no Federal jurisdiction at all. Mr. Rapanos was free to destroy any wetland he wanted, however valuable. Justice Scalia, allegedly a strict constructionist, was legislating here, making it up as he went along.²⁸⁰

Several other aspects of the remarkable plurality opinion bear mention. The first was that Mr. Rapanos could have avoided this conflict altogether simply by providing mitigation, requested by federal and state agencies to replace the loss of public values, a commonly-accepted practice across a range of environmental programs.²⁸¹ He would get his permit at a bargain rate (mitigation rarely covers all environmental losses), allowing him to go forward on the cheap.²⁸² This was John Rapanos' easy way out.

The second was the absolute absence of any reference to wetland values that had prompted Congress to pass this special provision of the CWA. Among them were flood protection, water quality protection, and fish and wildlife values.²⁸³ Nor did the plurality opinion say a word, not even a recognition that these values would be largely destroyed by dredge and fill upstream. Rather, anomalously, Justice Scalia opined, that the impacts were basically "local."²⁸⁴ Any high school student in a science class could rebut him on this point, rather soundly.

275. *Id.* at 722 ("including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning.").

276. *Id.* at 724, 733.

277. *Id.*

278. *Id.* at 739.

279. *Id.*

280. The *Rapanos* case also included a co-petitioner referred to as "the Carabells." *Id.* at 727. The facts and law treated in the *Carabells* petition were highly similar to those in *Rapanos*, to the point the Court's discussion of their petition was highly truncated, and supported by the same, inventive reasoning of Justice Scalia in *Rapanos* itself. Indeed, the name *Rapanos* is the only one that appears in the official print of the case.

281. See Memorandum of Agreement Between the Department of Defense and the Environmental Protection Agency, "Determination of Mitigation under the Clean Water Act § 404(b)(1) Guidelines," (1990), <https://www.epa.gov/cwa-404/memorandum-agreement-regarding-mitigation-under-cwa-section-404b1-guidelines-text>.

282. See Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences and Remedies*, 58 TUL. L. REV. 3, 135 (1983).

283. See Oliver A. Houck and Michael Rolland, "Federalism in the Wetlands: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States," 54 MD. L. REV. 1242, 1244-1253 (2012) (describing and quantifying wetland values in flood protection, water quality, fish and wildlife, and recreation).

284. 547 U.S. at 744, 745 (dredge and fill does not "normally wash downstream").

A third is that neither of the two previous Court cases cited by the plurality in support of these conclusions supported them at all. *Riverside Bayview Homes*²⁸⁵ actually stretched Corps jurisdiction to include waters where connection to navigable waters had been totally blocked by a berm. The *SWANCC* decision dealt with waters that were in themselves wetlands, but rejected regulations finding them “navigable” based on the presence of migratory birds.²⁸⁶ Neither citation would survive a sub-and-cite scrubbing by a responsible law journal.

A fourth anomaly was the plurality’s wistful fealty to the old Corps “navigability” definition that excluded most wetlands in America.²⁸⁷ Acknowledging, as federal courts had since *Calloway*, that Congress intended wider jurisdiction, the plurality opinion seemed intent on limiting this expansion, hence its addition of two new tests.

A fifth was Justice Scalia’s allusion to state law as the appropriate venue for making such “land use” decisions as those in *Rapanos*.²⁸⁸ Of course, however, Section 404 permitting was a “water” use decision and no more an intrusion on state’s rights than were federal air quality or hazardous waste facility permitting.²⁸⁹ Each had large “land use” consequences, and each imposed a kind of zoning. On this issue Justice Scalia’s law clerks let him down, or he ignored them.

A final, noteworthy aspect of this opinion is its disregard for its own cardinal rules for statutory interpretation and regulatory changes. Under *Chevron*,²⁹⁰ an agency seeking to change its interpretation of law had the burden of showing its new policy was justified, with adequate reasons. Justice Scalia himself changed the Section 404 regulations, with no more allusion to *Chevron* than that the flippant statement that the new policy was “impermissible” as written.²⁹¹ No reasons for disregarding *Chevron* were offered, beyond a “burden” on developers and the scope of the jurisdiction claimed. For its part, the APA²⁹² required a full notice-and-comment process for the promulgation of all federal regulatory actions . . . which was circumvented here because Scalia promulgated the new regulations himself. Rather convenient.

In sum, all of this is to say that Justice Scalia’s opinion for himself and three other Justices was a shoddy affair. It was replete with factual inaccuracies, exaggerations, misuse of precedent, and reliance on argument that cut exactly the other way.²⁹³ The great anomaly of the case is that five Justices of the High Court had exactly the same views regarding Justice Scalia’s opinion, and expressed them openly.

So how did the plurality prevail?

285. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

286. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

287. 547 U.S. at 723.

288. *Id.* at 737.

289. *See* Resources Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6922, 6924 (permitting standards for hazardous waste generators and operators of disposal facilities).

290. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

291. 547 U.S. at 739.

292. 5 U.S.C. §§ 551, 552 (1946).

293. 547 U.S. at 759-88 (Justice Kennedy, concurring).

Sensing perhaps that Scalia's opinion was threadbare, Chief Justice Roberts, one of the four-member plurality, also wrote separately to point out that, following *Riverside Bayview Homes* and *SWANCC*, the Corps and EPA had an opportunity to revise its § 404 regulations, and did not do so. This was a cheap shot at the agencies. Given the fact that *Riverside* cut in favor of the regulations and that *SWANCC* was limited to a fact pattern that had nothing to do with *Rapanos*, there was no reason for the agencies to change the status quo.

Roberts' opinion was also a cheap shot because, in Justice Kennedy's opinion it: "neglect[ed] to mention . . . that almost all of the 43 states to submit comments opposed any narrowing of the Corps' jurisdiction – as did roughly 99% of the . . . other comment submitters."²⁹⁴

So much for federalism. The republican plurality was ruling *against* the states.

5. *Rapanos*: The Concurring Opinion

The most surprising aspect of Justice Kennedy's concurrence is that he agrees with the four dissenters on every point of fact and law. He called out Justice Scalia's plurality opinion for imposing new and innovative limits on § 404 without supporting facts or convincing reasons.²⁹⁵ He rejected Justice Scalia's use of *Riverside* and *SWANCC* when the first undercut his own opinion and the second dealt with a different issue inapposite to *Rapanos*.²⁹⁶

Kennedy went on to chide the plurality for asserting that the impacts of dredge and fill were local, when in fact changes in Minnesota were felt as far downstream as the Gulf of Mexico . . . where the impacts have caused considerable damage.²⁹⁷ He further deplored the misuse of *Chevron*, and the failure to provide adequate reasoning for changing the regulation interpretation under the APA.²⁹⁸

Had he stopped here—and he should have—he would have made the fifth vote to uphold the regulations in *Rapanos*. His vote would have affirmed the conviction of John Rapanos for his crimes. But he didn't. Instead, playing a role he developed on the Court as a compromising mediator, and perhaps unwilling to directly antagonize his Republican colleagues on the bench (Supreme Court environmental cases are almost always Republican v. Democrat),²⁹⁹ he developed a new test for the reach of § 404 jurisdiction: Significant Nexus.³⁰⁰ Wetlands would have to have a "significant nexus" to a navigable water in order to be within § 404 jurisdiction.³⁰¹

294. 547 U.S. 715, 777 (Justice Kennedy, Concurring).

295. 547 U.S. at 768.

296. *Id.* at 767.

297. *Id.* at 765 ("increased risk of erosion and degradation").

298. *Id.* at 766.

299. See Oliver A. Houck, *Arbitrary and Capricious: The Dark Canon of the United States Supreme Court in Environmental Law*, 33 GEORGETOWN ENV. L.J. 1 at n. 92 (describing the near-unanimous rejection of environmental cases by Republican members of the Court).

300. 547 U.S. at 784.

301. *Id.*

Sensing perhaps that his test solved nothing because the significance would be up to the beholder, he turned to the Corps to develop new regulations that would point the way. These new regulations, duly promulgated under Justice Kennedy's directive and tracking closely his critique of the plurality opinion, would become final, and then, under the Trump administration, the Corps' first choice of regulations to be undone. Once again wetland jurisdiction would go back to the test advocated by Justice Scalia: navigability. And of course this, too, would go to court.

6. *Rapanos*: The Dissents

Writing for three colleagues, (as had Justice Scalia), Justice Stevens concurred in all the criticisms of the plurality opinion identified by Justice Kennedy. More than Kennedy, he deplored the regulations that had been upheld by the courts for decades.³⁰² He disagreed, however, with Kennedy's surprise offer of a new "significant nexus" test for Section 404 jurisdiction. The test was far too soft, and far too flexible, to provide clear guidance to the agencies. It would create "additional work" for the agencies, while developers "wishing to fill wetlands adjacent to ephemeral or intermittent" tributaries of navigable waters will have "no way of knowing" whether they need to get § 404 permits or not.³⁰³ Justice Kennedy meant well with his "significant nexus," test but he had created a mess going forward.

Justice Breyer, signing onto the Stevens opinion, had one additional point to offer. His test for Section 404 jurisdiction was elegantly simple. Reject the plurality as too narrow. Reject Kennedy's concurrence as too soft. And strengthen Stevens' dissent with a single addition. The administrative powers of the Corps of Engineers should remain "untouched" by any of the opinions.³⁰⁴ The agency could "write regulations" defining the term, something "it had not yet done."³⁰⁵ Congress intended that for the "complex technical judgements that lie at the heart of the present cases," the Corps of Engineers "should receive full deference."³⁰⁶ Which Justice Scalia, of course, did not provide.

302. *Id.* at 787-88 (Stevens, J., dissenting).

303. *Id.* at 809.

304. *Id.* at 811 (Breyer, J., dissenting).

305. *Id.*

306. *Id.* at 811-12.

7. In the Wake of Rapanos: Chaos

“Much ink has been spilled by lower courts attempting to interpret the 4-1-4 Rapanos decision.”

—Wade Foster, *“Parsing Rapanos”*³⁰⁷

The Supreme Court could not have created more confusion over the extent of § 404 jurisdiction had that been its intention all along. Splits, and subsets of splits, soon developed at the district and appellate court levels over what the case meant, what test would be used, and how this test would be applied. As could have been anticipated, the *Rapanos* result was a muddle.

The first court to consider the question determined that the case provided no “clear direction or binding precedent.”³⁰⁸ Another district court judge asked to apply *Rapanos* requested that the matter be sent to another colleague because he was “so perplexed by the way the law” had been interpreted since the High Court’s opinion.³⁰⁹ The Sixth Circuit Court of Appeals stated that the *Rapanos* opinion “has indeed satisfied any ‘bafflement’ requirement.”³¹⁰ In sum, wherever *Rapanos* raised its head, chaos reigned.

Much of the chaos arose because there was no majority opinion. Instead, there was a four-justice plurality. Justice Kennedy’s concurring opinion disagreed with everything in the plurality opinion. This so, where did the “law of the case” lie? Adding to the chaos, there were three different approaches in law to resolve the question, each providing either a different result or a different reason for the result.

In *Marks v. United States*³¹¹ the High Court wrote that when its opinions were “fragmented” and no single rationale “enjoys” the agreement of five members, the holding may be viewed that agreed to on the “narrowest grounds.” Unfortunately, when it came to *Rapanos* this guidance was useless. As discussed above, Justice Kennedy’s concurrence did not agree with the plurality on anything, neither the facts, nor the law. As one court observed, “[F]or some issues, asking which of two opinions is narrower is akin to asking ‘[w]hich is taller, left or right?’³¹² So it was here. All of which put those having to deal with the issue back at square one.

The *Rapanos* opinion, like some malignant Rubik’s Cube, left an intractable problem in its wake. It would now be up to the Executive Branch to resolve it.

8. The Regulation Wars

The Obama Administration’s 2015 rule was one of the most detailed of any federal environmental rule. Promulgated jointly by the EPA and the Army Corps, it cited abundant science on the importance of upstream wetlands, however

307. Wade Foster, Comment, *Parsing Rapanos*, VIRGINIA ENV. L.J., (2018).

308. *Id.*

309. *United States v. Robison*, 521 F. Supp. 2d 1247, 1248 (N.D. Ala. 2007) (Mem).

310. *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009).

311. *Id.*

312. *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015) (another opinion wrestling with the application of *Marks*).

“ephemeral” or “unconnected” to navigable waters, to achieving the pollution control objectives of the Clean Water Act.³¹³ The Federal Register notice adopting the final rule ran seventy-five pages of three-column, small font size, describing the rationale for the rule, the consideration of alternative rules, and the scientific support for this particular selection.³¹⁴ Under the rule, only the smallest, most isolated waters would be exempt from § 404 jurisdiction, with a strong burden of proof on those claiming the exemption.

The Trump Administration’s plan that followed had a “particularly tortured procedural history.”³¹⁵ It sought to repeal the Obama 2015 Rule first, and then replace it.³¹⁶ When it became clear that repealing this rule would require, *inter alia*, notice and comment rulemaking and a compelling rationale, the Trump Administration tried simply to postpone the repeal’s effective date until the end of the President’s term in office, 2020.³¹⁷ For this reason the team gave up on the repeal idea, and the focused exclusively on a replacement rule.³¹⁸ Anomalously, by not repealing the 2015 Rule it remained in effect in twenty-two states by court order³¹⁹ exactly what the Trump administration was trying to avoid.

9. *Rapanos*: Reflections

Perhaps no Supreme Court opinion in recent times has received the degree of attention from other courts, Congress,³²⁰ and academics³²¹ than *Rapanos*. Their response is largely negative. Even development-oriented commentators who like Justice Scalia’s result agree that the opinion itself is a mess.³²²

The mess continues to this day. It will be up to the Congress, the Biden Administration, or the High Court itself to come up with a clear, workable rule that accomplishes the water pollution goals of the Clean Water Act.

In the meantime, *Rapanos* has turned out to be a very bad gift that just kept on giving.

313. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053 (June 29, 2015).

314. *Id.*

315. MARK DAVIS & KRISTEN HILFERTY, WATERS OF THE UNITED STATES: COMMENTS TO THE 2019 CLEAN WATER RULE PROPOSAL 2 (2019).

316. *Id.*

317. *Id.*

318. *Id.*

319. For the critical, almost disbelieving responses of lower courts *see* cases cited in *supra* notes 309, 310, and 312.

320. *See Interpreting the Rapanos/Carabell Supreme Court Decision: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the Comm. on Env’t and Pub. Works*, 109th Cong. (2006).

321. *See* Foster, *supra* note 307, and Davis and Hilferty, *supra* note 315.

322. *See* Reed Hopper, *Running Down the Controlling Opinion in Rapanos v. United States*, PACIFIC LEGAL FOUNDATION (June 12, 2017) <https://pacificlegal.org/running-controlling-opinion-rapanos-v-united-states/> (Pacific Legal was the first and remains the most active business-sponsored public interest law firm in the United States); Oliver A Houck, *With Charity for All*, 93 YALE L.J. 1415, 1460-1473 (1984).

MIMBRES RIVER: DO FORESTS NEED WATER?

“They thought the forests ate the water!”

—James W. Moorman, Assistant Attorney General for Natural Resources and the Environment, 1978³²³

1. The Gila Forest

The Gila National Forest has become an icon of its own in federal land management, if for no reason other than by carrying the legacy of Aldo Leopold. In 1909, a young Leopold launched his career with the U.S. Forest Service in New Mexico shooting wolves and cougars to mollify local ranchers.³²⁴ He became quite good at it. A few years later he had an epiphany, however, standing by the still-warm body of a dying wolf and witnessing “a fierce green fire dying in her eyes.”³²⁵ It prompted him to develop a new approach to wildlife management in which predators were accorded their due.³²⁶ This led next to the conclusion that undeveloped parts of nature deserved their due as well,³²⁷ and he went to work to make that happen.

Aldo Leopold finally accomplished his goal. Congress enacted the Wilderness Act in 1964.³²⁸ He retired to a farm in Wisconsin and developed a yet broader ethic for the diversity of all landscapes, great and small.³²⁹ His maxim to “save every cog and wheel is the first precaution of intelligent tinkering”³³⁰ became the basis for the Endangered Species Act³³¹ and the still-evolving concept of biodiversity.³³² Throughout his writings and advocacy, Leopold’s intellectual growth was remembered in many ways. Perhaps the one he appreciated the most lies in the Gila National Forest of southern New Mexico, the landscape where he had begun his career.

The Aldo Leopold Wilderness Area in the Gila Forest preserves over 200,000 acres of mountains, rivers, and desert that became America’s first de facto wilderness decades before the concept was formally enacted as law.³³³

The Gila also carries the legacies of the Mogollon people who left their relics, petroglyphs, and other remains along the Mimbres River and high on cliff

323. Interview with James R. Moorman, Assistant Attorney General for Natural Resources and Environment, U.S. Dep’t of Just., in Washington D. C. (Jan. 20, 2017).

324. See FLADER, *supra* note 2.

325. Aldo Leopold, *Thinking Like a Mountain*, 14 EPA J. 2 (1988).

326. See FLADER, *supra* note 2; see also ALDO LEOPOLD, GAME MANAGEMENT (1933).

327. *Id.*

328. 16 U.S.C. § 1131.

329. ALDO LEOPOLD, SAND COUNTY ALMANAC SKETCHES HERE AND THERE (1949).

330. *Id.* at 101.

331. 16 U.S.C. § 1531.

332. See EDWARD O. WILSON, THE DIVERSITY OF LIFE (1992).

333. See U.S.D.A. FS, *Aldo Leopold Wilderness*, <https://www.fs.usda.gov/recarea/gila/recarea/?recid=4826>. See also text at note 6 *supra* (describing early management of the forest as wilderness under Leopold’s initiative).

faces that rose to 10,000 feet in the air.³³⁴ The Gila mountain ranges cradle more than 1,000 miles of streams that are critical for aquatic life and groundwater discharge throughout the region.³³⁵ They feed into the Mimbres river as well, that supplies ranchers and farmers hundreds of miles downstream.

It was for these reasons, and against these demands, that the Forest Service would choose the Gila to establish the National Forests' own lawful right to water. The resulting lawsuit would eventually reach the United States Supreme Court which, in a badly divided opinion, managed to misconstrue both the nature of water in the forests and the applicable law.

2. Western Water and the Federal Reserved Rights Doctrine

A stark contrast in water quantity existed between the American East and the West. Water was abundant in the East and easy to share, but across the Mississippi, water was so scarce that sharing meant no one got enough. Eastern water law relied on its abundance, and led to the Riparian doctrine whose basic principle was sharing the resource.³³⁶ Western water was scarce and gave rise to the Prior Appropriation Doctrine based on use rather than sharing.³³⁷ Water was owned, not just used, divided up according to the date it was first claimed.³³⁸ One got as much as one needed, for as much time as was needed, even if it was needed miles from the river itself. Indeed, the only way one lost a water right was by not using it.³³⁹ To the Western mind, not using was waste. As the story goes:

Two farm families in New Mexico drove miles to picnic on a river one day . . . While the ladies were spreading the blanket and opening the food basket the two men "sauntered over to the riverbank, where they stood watching the sparkling river drift by. One farmer let out a long, knowing sigh, turned to the other, and said, 'Isn't it a shame to see all that water go to waste?'"³⁴⁰

At the end of a treatise containing this tale the author concludes that the basic question today is "what is waste, and what is wonder."³⁴¹ Of course, however, Prior Appropriation Doctrine had that already figured out. First to claim took all they could swallow, leaving everyone else behind. There was a catch, however.

334. See National Park Service, *Gila Cliff Dwellings*, <https://www.nps.gov/gicl/index.htm> (July 9, 2021).

335. See U.S.D.A. FS, PRELIMINARY DRAFT MANAGEMENT PLAN FOR THE GILA NATIONAL Forest 5 (March 2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd573667.pdf.

336. Christopher H. Meyer, *Western Water and Wildlife: The New Frontier*, in AUDUBON WILDLIFE REPORT 1989/1990, (William J. Chandler, 1989).

337. *Id.* at 61. The general notion was "[f]irst in time is first in right." It meant that those who put the water to use had priority to continue using it over those who came later."

338. See also *Arizona v. California*, 373 U.S. 546, 555 (1963) ("Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time.")

339. See Meyer, *supra* note 336. See also BARTON H. THOMPSON, JR. ET AL., *LEGAL CONTROL OF WATER RESOURCES CASES AND MATERIALS* 170 (West Academic Publishing, 5th ed. 2012).

340. See Meyer, *supra* note 336.

341. *Id.*

The federal government had reserved parts of the western water domain for specific public purposes, and in many cases those purposes could only be met by direct access. For this reason, the Supreme Court created a competing system, the Federal Reserved Water Doctrine, back-dating the claims for these areas to the time when they were first established.³⁴² The Supreme Court announced this doctrine in favor of Native American Reservations in *Winters v. United States*³⁴³ (1908) and *Arizona v. California*³⁴⁴ (1963). The Court extended this doctrine to a National Monument established to shelter the endangered Devils' Hole pupfish in *Cappaert v. United States* (1976).³⁴⁵ Although there were long lines of individuals who had lodged their water claims beforehand, they found themselves trumped by the federal doctrine.

Needless to say, this court-made doctrine was not welcomed by states whose absolute authority over a critical resource was subverted, or to ranches, farms, and towns whose previous water rights could be trimmed without notice. Such would be the case for the Gila National Forest, where the Forest Service filed its claim on the Mimbres River in 1970, very far behind current users.³⁴⁶ Under the Federal Reserved Water Rights Doctrine, however, the Forest Service's claim to water for forest purposes would supersede.

The legal question in *New Mexico v. United States*, then, was whether the purposes for which the Gila National Forest was created, like those of the Native American reservations and the Cappaert National Monument, assumed the use of water.

3. The National Forests and Water

The Forest Service's relationship with water goes back to well before there was a Forest Service. In 1876 Representative Fort of Illinois introduced a bill to protect forests adjacent to navigable waters.³⁴⁷ That same year Commissioner Williamson of the US General Lands Office reported to Congress:

The mountain streams, whose steady flow is important . . . are fed by the melting snows. The steadiness of the flow of these streams . . . is in great measure due to the rapid melting of the winter's accumulation is prevented by the dense shade of the forests. This removed, destructive floods in the season of returning warmth, to be followed later by scarcity, become the rule.³⁴⁸

Several years later, the fate of the forests in the balance, Congressman McRae concurred:

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and the melting snow, so that they will

342. *United States v. New Mexico*, 438 U.S. 696, 711-13 (1978).

343. 207 U.S. 564, 576 (1908); *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

344. 373 U.S. 546, 600 (1963).

345. 426 U.S. 128, 136 (1976).

346. See Meyer, *supra* note 336.

347. Charles F. Wilkerson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1,15 (1985).

348. See *id.* at 202-03 (alteration omitted) (quoting ANNUAL REPORT OF THE COMM'R OF THE GENERAL LAND OFFICE, H.R. Exec. Doc. No. 1 pt. 5, 44th Cong., 1st Sess., 11 (1875)).

not rush to the streams in torrents in the spring and early summer. We all know that in well-timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows, and less low water.³⁴⁹

Following these statements, in 1894 Congress enacted legislation with the purpose of securing favorable flows within the forests, setting up the more comprehensive Organic Act in 1897 under which the Service had operated for more than a century.³⁵⁰ The Act stated: “No national forest shall be established, except to improve and protect the forest *within* the boundaries, *or* for the purpose of securing favorable conditions of water flows, *and* to furnish a continuous supply of timber for the use and necessities of citizens in the United States.”³⁵¹

Several conclusions emerge from this language. The first is that the word “or” is disjunctive: Congress separated one thing from another. The second is that the protections mentioned in the first phrase were “within” forest boundaries, the forest itself. Congress intended to protect the forests as natural condition, not a bathtub. The “improve and protect” mandate came first in the statute, and became the priority mission of the new Service. Water supply and timber came in second and third. To omit the first mission would be to amend the statute substantially.

Another conclusion is that, when it came to “securing favorable flows,” the most unfavorable would be no flow at all. Allowing appropriators to locate their points of diversion upstream, or even within a forest would render the forests unable to fulfil either their “improve and protect” mission or “a continuous supply of timber.” That could hardly be the condition Congress had in mind.

A corollary to these conclusions is the recognition that forests do not consume water in the traditional Prior Appropriation way. They accumulate, store, and filter it, then release it in a way that not only sends a reliable flow downstream but of a quality that ranchers, towns and farmers can readily use.³⁵² It is a win-win for both sides. The notion that the National Forests “eat” the water has no basis in science at all.

With these understandings, it is time to turn to the appropriation the Gila Forest was claiming in this case, its treatment by New Mexico, and finally to its treatment by the Supreme Court.

4. The Water Claim: A Modest Proposal

In 1970 New Mexico launched an adjudication of water rights to the Mimbres River, during which the Forest Service claimed six cubic feet per second for recreational uses (i.e., fishing, hiking and camping) and minimum instream flows.³⁵³ None of these activities consumed water. The Service also claimed additional water for the Ranger station and roads. Aside from these latter uses—

349. Act of Oct. 1 1890, Sec 2, 26 Stat. 651; 30 CONG. REC. H13, 966 (1897) (statement of Rep. Thomas C. McRae).

350. 16 U.S.C. § 475.

351. *Id.*

352. See U.S. v. Jesse, 744 P.2d 491, 500-501 (Colo. 1987) (quoting McRae, *supra* note 357, at 966).

353. United States v. New Mexico, 438 U.S. 696, 706-07 (1978).

inevitable were one to manage a forest at all—the water of the Gila was to flow to downstream users.

The state district court referred the matter to a Special Master, whose report supported the Service's claim.³⁵⁴ The Special Master concluded that the amount requested, a total of 15.7 acre feet per year, would not interfere with upstream appropriators or downstream users.³⁵⁵ By contrast, government statistics showed that national forests were supplying more than 200 million acre feet per year to other claimants.³⁵⁶ The Gila Forest's claim was, literally, a drop in the bucket. For New Mexico, however, it was one drop too many. It contested the Report.

The district court did not contradict the Special Master's report, but found instead that the Service had no lawful claim to the water at all.³⁵⁷ The instream values and recreational uses not being within "the purposes for which the Gila forest lands were or could have been withdrawn from the public domain."³⁵⁸ The United States appealed to the Supreme Court of New Mexico which, again accepted the facts but found no basis for the water claims in law.³⁵⁹ Although very much part of the Gila's history, they were "secondary uses" and not "purposes" of the 1897 Organic Act, which, unfortunately, was clearly an erroneous conclusion that ignored the first part of the statute.

The remaining question was whether the U.S. Supreme Court would see the light.

5. United States v. New Mexico³⁶⁰

Justice Rehnquist came from Arizona, a yet more arid state than New Mexico, whose ranching and agriculture industries were even more dependent on water from the National Forests. This was the life he knew. Writing for a 5-4 majority, he concluded that the forests had no rights to water other than for supplying these two industries. In so doing he managed to misconstrue both the relevant facts and the law.

Justice Rehnquist had a particular tendency for cherry-picking both the facts and the law in cases before him, a tendency so notable that Justice Brennan advised his clerks to "look for the trick." Rehnquist, he continued "often twisted the meaning of prior cases, or badly ignored them when they supported the other side" in anything he wrote.³⁶¹ Justice Stevens, for his part, took Rehnquist drafts home and "read over

354. *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615, 616 (N.M. 1977).

355. *See New Mexico*, 438 U.S. at 703-04.

356. *See id.* at 703; *see also* Brief for Petitioner at 4, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510), 1978 WL 206869, at *4.

357. *See Pet'r Br.*, 1978 WL 206869, at *5.

358. *See Reply Brief for Petitioner at 2, New Mexico*, 438 U.S. 696 (1978) (No. 77-510), 1978 WL 206871, at *2.

359. *See Pet'r Br.*, 1978 WL 206869, at *6.

360. 438 U.S. 696 (1978).

361. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 384 (1979); *see also id.* at 405 ("Rehnquist, Brennan explained, often twisted the meaning of prior cases, or baldly ignored them when they supported the other side."); *id.* at 408 ("When [Justice] Stevens received a copy of Rehnquist's draft, he took it home with him and went over it carefully. Rarely, in five years on the appeals court, had he seen such a misuse of precedents. Rehnquist

them carefully.” Rarely, in five years on the appeals court, he said, “had he seen such a misuse of precedents. Rehnquist ‘can’t do this’, he told the clerk the next morning.”

In this case finding the trick was not difficult at all. He began with an assertion of fact that was plainly wrong:

When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress, and must be weighed in determining what, if any, water Congress reserved for use in the national forests.³⁶²

Where Justice Rehnquist got these statements is a mystery. As seen earlier, forests store water, they conserve it, they do not remove gallon-per-gallons of it, they do not reduce it at all. As for the “attention of Congress,” the assertion was likewise misleading. The ineludible fact was that Congress could stop federal reserved water rights any time it wished, either in a particular forest or the entire doctrine. It had never done so. Nonetheless with these assertions, more politician than judge, he had hung a big warning sign for downstream industries: “Beware of the Federal Government Taking Your Water.”

Justice Rehnquist did no better with the law. Like the courts below, he asserted that Congress had passed the Organic Act for “only two purposes.”³⁶³ Unfortunately for the Justice, the Congress had listed three: (1) “to improve and protect the forest,” or (2) “for favorable conditions of water flows,” and (3) to furnish a continuous supply of timber.”³⁶⁴ In Rehnquist-land, the first simply disappeared. The Justice defended this deviation from the statute by amending it himself in a footnote to read “improve and protect the forest within the boundaries,” or in other words only for water supply and timber.³⁶⁵ Any law student in America would pick up on this sleight of hand.

The Justice’s “in other words” erased “improve and protect” from the statute. By hook or by crook, he was going to affirm the two purposes he agreed with. The time-honored principle of giving each part of statute independent meaning went out the window. The part that he’d removed had been important to Congress. It was also important to Forest health going forward.

Writing for four Court members in dissent, Justice Powell picked up on Rehnquist’s distortion of the 1897 Act.³⁶⁶ He began with the historic importance of forests as natural ecosystems, the part Justice Rehnquist did not mention at all. “From the earliest time in English law,” Powell wrote, “the forest has included the creatures that live there” and “the understanding that the forest includes its wildlife has

‘can’t do this’, he told a clerk the next morning.”). But of course, Rehnquist did, and usually prevailed.

362. 438 U.S. at 705.

363. *Id.* at 707.

364. 16 U.S.C. § 475.

365. 438 U.S. 696, 719, n. 14. at .

366. *Id.* at 718 (5-4 decision) (Powell, J., dissenting).

remained in the American mind.”³⁶⁷ As Powell had earlier explained during oral argument in *Tennessee Valley v. Hill*³⁶⁸ he was a fisherman, he’d spent time in the woods. “I do not agree . . .” he wrote:

. . . that the forests which Congress intended to “improve and protect” are the still, silent, lifeless places envisioned by the Court. In my view, the forests consists of the birds, animals, and fish — the wildlife — that inhabit them, as well as the trees, shrubs, and grasses. I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.³⁶⁹

True to this vision, he would not adopt the government’s case fully. The Forest Service’s first duty was to the natural environment which granted, did not include recreation or other uses. It did include, however, the water necessary to sustain the forest itself in a natural state. His was a reasonable compromise, and one that did virtually no injury to downstream appropriators. Insofar as the majority rejected it, Powell concluded, the “Congress is maligned and the nation is the poorer.”³⁷⁰

All in all, this was not a good day for natural resource management, nor a proud one for the United States Supreme Court.

REFLECTIONS

There is no easy explanation for the Supreme Court’s treatment of cases rising from federal resource management statutes. Where agencies have acted to abuse their statutes (*SUWA, Ohio Forestry*) the Court has given them free rein, on the most slender of rationales. Where, on the other hand, agencies have acted in good faith to protect resources that Congress intended them to protect (*Rapanos, New Mexico*), they have been reversed, again on rationales that simply seem confected to fit the occasion.

One would think that the High Court Justices—who have had little personal or professional experience with public lands resource issues—would be more deferential to trial and appellate courts that, indeed, *do* have this experience. To say nothing of decisions made by professional federal managers.

As seen in this article, however, the evidence is otherwise. The one thing that these four cases have in common is—whether dealing with off-road vehicles, timber harvesting, wetland protection, or water use—is that industry wins. Woody Guthrie’s famous ode to the public landscape of America, “This Land is Your Land, This Land is My Land” seems, in some quarters, to be increasingly naïve.

367. *Id.* at 721 (citing T. MANWOOD, A TREATISE AND DISCOURSE ON THE LAWS OF THE FOREST (1598), and Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976)).

368. Transcript of Oral Argument at 43, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

369. 438 U.S. at 719.

370. *Id.* at 724.

