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Michael Blumm

Lewis & Clark Law School, blumm@lclark.edu

Tim Wiggington

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THE OREGON & CALIFORNIA RAILROAD GRANT LANDS' SORDID PAST, CONTENTIOUS PRESENT, AND UNCERTAIN FUTURE: A CENTURY OF CONFLICT

MICHAEL C. BLUMM*

TIM WIGINGTON**

Abstract: This article examines the long, contentious history of the Oregon & California Land Grant that produced federal forest lands now managed by the Bureau of Land Management. It discusses how these lands reverted to the federal government following decades of corruption and scandal and analyzes the resulting congressionally created management structure that supported local county governments through the over-harvesting of lands for a half-century. The article proceeds to trace the fate of O&C lands through the “spotted owl wars” of the 1990s, the ensuing Northwest Forest Plan—which this Article explains in detail—the timber salvage rider of 1995, and the George W. Bush Administration’s unsuccessful attempts to change the compromise reached in the NWFP. The article then explains how decreases in timber harvesting and declines in federal payments have brought the counties reliant on these lands to the brink of insolvency and analyzes two current legislative proposals aimed at bolstering flagging economies through increased harvests on O&C lands. The article concludes by identifying significant economic and environmental flaws in both of these proposals and suggests several alternative revenue-producing options that could provide economic security and diversity to the counties without eviscerating the key environmental protections provided by the NWFP and other federal environmental protection statutes.

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. Thanks to Greg Block for helpful comments on a draft of this article.

** J.D. Lewis and Clark Law School, Special Assistant to the Managing Director at The Freshwater Trust.

An opinion poll during World War II showed that only half of the population had ever heard of the railroad land grants, and most of them thought the railroads had paid for the land. Since then, another half-century has passed, and the land grants have an even smaller place in our social memory. Without an awareness of the past, and an understanding of how it affects the present, we will continue to suffer the continuing impacts of the land grant legacy.

—George Draffan, 1998¹

INTRODUCTION

In the nineteenth century, the U.S. government granted railroad companies (and state governments for railroads) some 179 million acres of public land in return for building multiple railroads.² The government enlisted the recipient railroads in the effort to settle the West by calling upon them to sell the land to settlers and convey government lands to private owners as surrogates for the federal General Land Office (GLO).³ Among the largest of the railroad grants was an over 3.7 million acre grant to the Oregon & California Railroad (“O&C R.R.”) to build a line from Portland to San Francisco.⁴

Many of the railroad grant lands were later forfeited to the federal government.⁵ The grant conditions generally included a requirement to sell land to bona fide settlers and meet established construction schedules, both of which proved problematic.⁶ Between 1867 and 1890,

¹ GEORGE DRAFFAN, R.Rs. & CLEARCUTS CAMPAIGN, TAKING BACK OUR LAND: A HISTORY OF RAILROAD LAND GRANT REFORM 33 (1998) (footnote omitted), available at <http://www.landgrant.org/takingback.pdf>.

² *Id.* at 5–6 (nearly forty-nine million acres to states for railroads; 130.4 million acres directly to railroads); *id.* at 6 (claiming that “[t]he railroad land grants covered ten percent of the continental United States,” but 179 million acres is roughly 7.8 percent of the total 2.3 billion acres of land of the contiguous United States). The discrepancy is due to the fact that about twenty-five percent of the granted lands were never transferred to the railroads because of violations of grant conditions. *Id.* at 8.

³ *Id.* at 8–9. This was Alexander Hamilton’s prescription for settling the western lands: grant large tracts to those who held the Revolutionary War debt, which Hamilton consolidated in the federal government, allowing them to profit from frontier land sales to settlers when the land appreciated in value. See RON CHERNOW, ALEXANDER HAMILTON 299 (2004).

⁴ See Act of July 25, 1866, ch. 242, 14 Stat. 239, amended by Act of June 25, 1868, ch. 80, 15 Stat. 80, Act of Apr. 10, 1869, ch. 27, 16 Stat. 47, and Act of May 4, 1870, ch. 69, 16 Stat. 94; DRAFFAN, *supra* note 1, at 5; *infra* note 70 and accompanying text. George Draffan lists the Oregon and California grant as the eighth largest of the federal railroad grants. DRAFFAN, *supra* note 1, at 5.

⁵ DRAFFAN, *supra* note 1, at 11–19.

⁶ See *id.* at 4.

the railroads forfeited some thirty-five million acres.⁷ Often these forfeitures were due to clauses contained in post-1866 grants that called for maximum sale prices to “actual settlers” of \$2.50 per acre and a maximum sale of 160 acres.⁸ In 1890, Congress enacted the Railroad Land Grant Forfeiture Act,⁹ reclaiming another 5.6 million acres—only a fraction of the fifty million acres in granted lands the Populist Party sought to reacquire in 1892.¹⁰

Land fraud associated with public land grants became the subject of public trials in the early twentieth century, leading to over a hundred convictions, including a number of high government officials.¹¹ Following closely on the heels of the Oregon land fraud scandal, the federal government began to rein in the O&C R.R.’s illegal disposition of its grant land.¹² In 1908, the federal government sought to enforce the terms of the grant against the O&C R.R.—then owned by Southern Pacific Railroad—because only slightly more than fifteen percent of the sales made by the railroad actually complied with applicable acreage and price conditions.¹³ This enforcement led to the O&C R.R. revesting 2.9 million acres of valuable forestland to the federal government, a result confirmed by a Supreme Court decision in 1915.¹⁴ Managed today by the federal Bureau of Land Management (BLM), this revested land is now known as the Oregon and California lands (“O&C lands”) and has been the source of continuous controversy for at least the past quarter-century.¹⁵

⁷ See *id.* at 8; David Maldwyn Ellis et al., *Comments on “The Railroad Land Grant Legend in American History Texts,”* 32 MISS. VALLEY HIST. REV. 557, 558 (1946) (comment by David Maldwyn Ellis). By forfeiting the land grants, the railroad companies divested the land without compensation. See BLACK’S LAW DICTIONARY 722 (9th ed. 2010).

⁸ See, e.g., Act of Apr. 10, 1869, ch. 27, 16 Stat. 47; see also DRAFFAN, *supra* note 1, at 10.

⁹ Railroad Land Grant Forfeiture Act of 1890, ch. 1040, 26 Stat. 496 (codified at 43 U.S.C §§ 904–907 (2006)).

¹⁰ DRAFFAN, *supra* note 1, at 21. The Railroad Land Grant Forfeiture Act of 1890 reclaimed lands from eleven railroads, including two million acres from the Northern Pacific, over a million acres from the Southern Pacific, and over a half-million acres each from the Gulf Ship Island and the Mobil and Girard. *Id.* The House of Representatives passed Populist-sponsored bills in both 1892 and 1894, but the Senate blocked both, and the forfeiture movement died. See *id.*

¹¹ See *infra* notes 85–114 and accompanying text.

¹² See *infra* notes 115–133 and accompanying text.

¹³ See *United States v. Or. & Cal. R.R.*, (*O&C R.R. I*), 186 F. 861, 873–74 (C.C.D. Or. 1911); DRAFFAN, *supra* note 1, at 22 (noting that the railroad sold only 813,000 acres of its 3.7 million acre grant, of which just 127,000 acres were in parcels of 160 acres or fewer and sold at less than \$2.50 per acre).

¹⁴ *Or. & Cal. R.R. v. United States*, (*O&C R.R. II*), 238 U.S. 393, 409, 438–39 (1915).

¹⁵ See *infra* notes 158–206 and accompanying text (describing legal challenges beginning in the late 1980s, all the way through 2011); *infra* notes 207–361 and accompanying

Because Congress agreed to share timber sale revenues from the BLM lands with localities at a higher rate than adjacent forestlands managed by the U.S. Forest Service (USFS),¹⁶ county governments quickly became dependent on timber-sale receipts.¹⁷ This dependence led to apparent over-harvesting of the lands through the 1980s,¹⁸ when a lawsuit successfully alleged that BLM's environmental evaluation of its timber sales failed to satisfy the National Environmental Policy Act, and thus halted harvesting.¹⁹ Environmentalists also successfully sought protection of the northern spotted owl through the citizen petition process of the federal Endangered Species Act (ESA),²⁰ because federal timber sales were liquidating the late-successional (old-growth) forests that the northern spotted owl depended on for its habitat.²¹ Although the federal government initially denied protection for the northern spotted

text (describing the Northwest Forest Plan and the George W. Bush Administration's failed attempts to end it).

¹⁶ See *Relating to the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands Situated in the State of Oregon: Hearings on H.R. 5858 Before the H. Comm. on the Public Lands*, 75th Cong. 61–62, 73 (1937) (comments by Rep. James W. Mott, Member, H. Comm. on the Pub. Lands, Rep. Compton I. White, Member, H. Comm. on the Pub. Lands, Rufus G. Poole, Assistant Solicitor, Dep't of Interior) [hereinafter *Hearings on H.R. 5858*] (noting that the laws and regulations governing national forests managed by the USFS allocated a certain percentage of timber sales to counties, but that this amount was insufficient because it did not reimburse the counties for lost taxation revenues); *id.* at 99–103 (comments by L. F. Kneipp, Assistant Chief, U.S. Forest Serv.) (discussing the USFS counter-proposal to the then unenacted Oregon & California Lands Act of 1937 (OCLA), ch. 876, 50 Stat. 874, which would have terminated and liquidated the state and county interests in the O&C lands over the course of a nine-year period and placed the land into national forest status, as opposed to disbursing fifty percent of timber revenues to the counties in perpetuity).

¹⁷ See Paul G. Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739, 740–41 (1987). In 1984, for example, the Oregon and California counties received almost sixty-six million dollars in revenues under the OCLA. *Id.* at 741.

¹⁸ See *infra* notes 158–168 and accompanying text.

¹⁹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006); Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1461 (D. Or.), *aff'd*, 884 F.2d 1233 (9th Cir. 1989).

²⁰ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, 1533(b)(3)(A) (2006); N. Spotted Owl v. Hodel, 716 F. Supp. 479, 482 (W.D. Wash. 1988).

²¹ *Portland Audubon Soc'y*, 712 F. Supp. at 1485, 1488–89. “Late-successional” forests are areas where the primary goal is to maintain and increase old-growth forests. See J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424, 450 (2010). “Old-growth” forests are home to pristine, intact forest ecosystems that once harvested cannot be replaced. U.S. FOREST SERV. & BUREAU OF LAND MGMT., RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL 2 (1994) [hereinafter 1994 ROD], available at <http://www.blm.gov/or/plans/nwfpnepa/FSEIS-1994/newroda.pdf> (quoting President William J. Clinton).

owl under the ESA, a court overturned that decision,²² and the U.S. Fish and Wildlife Service (FWS) listed the northern spotted owl as a threatened species in 1990.²³ A subsequent attempt to exempt the spotted owl from the ESA also failed.²⁴

With the listing threatening to shut down timber harvests throughout the Pacific Northwest,²⁵ in 1993, the newly elected Clinton Administration convened a “Northwest Forest Conference.” The conference led to the creation of the 1994 Northwest Forest Plan (NWFP), an innovative ecosystem-management plan that promised to protect listed species while allowing for continued, but reduced, timber harvests.²⁶ Reflecting the controversial nature of the NWFP, Congress soon weighed in by enacting the Timber Salvage Rider in 1995, which grandfathered in several BLM timber sales from the NWFP.²⁷ This appropriations rider had significant on-the-ground effects causing environmental and human damage.²⁸

A half-decade later, Congress stepped in to provide relief to county governments affected by declining timber sale receipts by passing the Secure Rural Schools and Community Self-Determination Act of 2000

²² *Hodel*, 716 F. Supp. at 482. In 1987, the FWS decided not to list the spotted owl. Endangered and Threatened Wildlife and Plants; Finding on Northern Spotted Owl Petition, 52 Fed. Reg. 48,552 (Dec. 23, 1987) (codified at 50 C.F.R. pt. 17). Environmentalists challenged the FWS’s inaction, and a federal district court found the agency’s decision arbitrary and capricious. *Hodel*, 716 F. Supp. at 483.

²³ Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,189 (June 26, 1990) (codified at 50 C.F.R. pt. 17).

²⁴ See *infra* notes 193–194 and accompanying text.

²⁵ The listing of the spotted owl applied to all forestlands in the Northwest, not just the O&C lands. See *Seattle Audubon Soc’y v. Evans*, 771 F. Supp. 1081, 1084, 1096 (W.D. Wash.), *aff’d*, 952 F.2d 297 (9th Cir. 1991) (enjoining timber sales on USFS lands); see also *Portland Audubon Soc’y v. Lujan*, 795 F. Supp. 1489, 1510 (D. Or. 1992), *aff’d sub nom. Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) (enjoining timber sales by BLM that affected the spotted owls).

²⁶ See *infra* notes 228–254 and accompanying text. The NWFP provided salmon as well as owl protection. See STEVEN LEWIS YAFFEE, *THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR A NEW CENTURY* 141–43 (1994). The plan “anticipated” that 1.1 billion board feet of timber would be harvested, a decline of nearly seventy-five percent from the 1980s. 1994 ROD, *supra* note 21, fig.1.

²⁷ See Emergency Supplemental Appropriations for Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, §§ 2001–2002, 109 Stat. 194, 240–47.

²⁸ See Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 27 ENVTL. L. 1035, 1087–88 (1997). These hastily-planned, often below-cost sales resulted in increased landslides, threatened city drinking water supplies, and degraded fisheries. *Id.* at 1088.

(SRSA).²⁹ This program supplemented revenue already provided to the counties under the Payment In Lieu of Taxes Act (PILT).³⁰ In 2008, Congress reauthorized SRSA payments for four more years.³¹ The 2008 SRSA extension expired at the end of fiscal year (FY) 2011,³² and PILT funding was set to expire at the end of FY 2012.³³ In July 2012, however, Congress restored SRSA funding for FY 2012 and extended PILT funding through FY 2013.³⁴

Dissatisfied with the stringency of the NWFP, and with the end of congressional subsidies in sight, the George W. Bush Administration sought to increase timber harvests from the O&C lands through various attempts at revising the NWFP, but all proved to be unsuccessful.³⁵ The most notable of these efforts was the proposed Western Oregon Plan Revision (WOPR).³⁶ The Bush Administration did not complete the plan revision before leaving office, however, and the Obama Administration withdrew all WOPR proposals because it determined the proposals could not survive judicial review under the ESA.³⁷

²⁹ Pub. L. No. 106-393, § 2(a)(8), 114 Stat. 1607, 1608 (codified as amended at 16 U.S.C. §§ 7101–7153 (2006 & Supp. 2008)).

³⁰ Pub. L. No. 94-565, 90 Stat. 2262 (1976), *amended by* Pub. L. No. 103-397, 108 Stat. 4156 (1994) (codified at 31 U.S.C. §§ 6901–6907 (2006)).

³¹ *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 601, 122 Stat. 3765, 3896 (to be codified at 16 U.S.C. § 7111) (amending § 101(b) of The Secure Rural Schools and Community Self-Determination Act of 2000).

³² *See id.* The U.S. government fiscal year begins on October 1 and ends on September 30. *Fiscal Year*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/fiscal_year.htm (last visited Jan. 10, 2013).

³³ *See* Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 100111, 126 Stat. 405, 906 (2012) (to be codified at 31 U.S.C. § 6906) (noting extension from 2012 to 2013).

³⁴ Moving Ahead for Progress in the 21st Century Act § 100101(a) (revising SRSA sections 101, 102, 203, 207, 208, 304, and 402 to strike “2011” and insert in its place “2012”); *id.* § 100111 (revising 31 U.S.C. § 6906 to strike “2012” and insert “2013”).

³⁵ *See infra* notes 289–312 and accompanying text (discussing the failed attempt to delete the Survey & Management requirement in the NWFP); *infra* notes 313–335 and accompanying text (reviewing the failed attempt to delete the Aquatic Conservation Strategy in the NWFP); *infra* notes 336–361 and accompanying text (considering the failed attempt to create a new management plan for the O&C lands).

³⁶ *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 249 (D.D.C. 2011) *appeal dismissed*, No. 11-5137, 2011 WL 2618209 (D.C. Cir. June 24, 2011); *see also Withdrawn Records of Decision Archive*, BUREAU OF LAND MGMT., <http://www.blm.gov/or/plans/wopr/rod/index.php> (to view the respective plans, follow “Resource Management Plan” hyperlink in each district) (last visited Jan. 10, 2013).

³⁷ Memorandum from Acting Director, Land and Minerals Mgmt., U.S. Dep’t of the Interior, to the Acting Assistant Secretary, Bureau of Land Mgmt., U.S. Dep’t of the Interior 1 (July 16, 2009), [hereinafter WOPR Withdrawal Memo], *available at* http://pacific.rivers.org/files/wopr/exhibit%20A.pdf/at_download/file.

In 2012, the continued inability of the O&C lands to provide county revenues led to widespread reports that some of the Oregon and California counties (“O&C counties”) would become insolvent—notably Curry County along the southern Oregon coast.³⁸ This apparent crisis produced proposals in Congress to significantly revise federal land management in western Oregon.³⁹ The most prominent of these measures—a proposal co-sponsored by Representatives Peter DeFazio (D-Or.), Kurt Schrader (D-Or.), and Greg Walden (R-Or.)—would divide the O&C lands into a private timber trust and a public conservation zone.⁴⁰ If enacted, the plan would not only revolutionize federal timber harvests in western Oregon, but also public land law in general.

This Article investigates the long controversy over what are now the O&C lands. Part I explores the railroad grant itself and its aftermath, including the Oregon land fraud trials of the early twentieth century, the case that eventually led the U.S. Supreme Court to require the O&C lands to be revested, and the ensuing congressional reactions.⁴¹ Part II explains how the harvest practices of the O&C lands led to numerous lawsuits in the late 1980s and early 1990s.⁴² Part III examines the NFWP, designed to respond to that litigation, and the congressional response to the NFWP in the 1995 Timber Rider.⁴³ Part IV turns to the legal assault the Bush Administration mounted on the NFWP in the 2000s, its surprising legal ineffectiveness, and the Obama Administration’s unwillingness to pursue the Bush WOPR.⁴⁴ Part V briefly outlines concurrent county payment statutes, explaining how the drying up of those funds has pushed rural Oregon counties to the brink of insolvency.⁴⁵ Part VI assesses two congressional proposals for completely re-vamping O&C land administration and outlines several alternative revenue generating schemes.⁴⁶ The Article concludes that the long history of contentiousness over the O&C lands suggests that proposals to

³⁸ See, e.g., Eric Mortenson, *Rural Oregon Counties Scramble as Timber Payments Dry Up, While Critics Say It’s Time They Paid for Services*, OREGONIAN, Mar. 4, 2012 [hereinafter Mortenson, *Rural Oregon Counties Scramble*], http://www.oregonlive.com/environment/index.ssf/2012/03/oregon_timber_counties_scrambl.html. Curry County has among the lowest real estate taxes in the state.

³⁹ See *infra* notes 388–420 and accompanying text (detailing the two most prominent proposals).

⁴⁰ See *infra* notes 388–409 and accompanying text.

⁴¹ See *infra* notes 47–157 and accompanying text.

⁴² See *infra* notes 158–206 and accompanying text.

⁴³ See *infra* notes 207–284 and accompanying text.

⁴⁴ See *infra* notes 285–361 and accompanying text.

⁴⁵ See *infra* notes 362–375 and accompanying text.

⁴⁶ See *infra* notes 376–525 and accompanying text.

revolutionize O&C land management threaten the future of public land law by privatizing a resource the public has controlled, although not always well, since the founding of the nation.

I. BACKGROUND

The O&C lands have a long and checkered past, full of fraud, intrigue, and legal uncertainty. Because of this history, any solution to the issues currently facing the O&C lands must be informed by their history. The O&C land controversy began in the 1860s and has raged ever since.

A. *The O&C Land Grant*

As a part of its push to settle the West, Congress established a land grant in 1866 to connect Portland, Oregon to California by rail.⁴⁷ Congress also authorized the Oregon Legislature to determine the company that would build the line.⁴⁸ Congress anticipated that an Oregon railroad would build a line from Portland to the Oregon-California border, and a California railroad would build a line from the Central Valley north to the same state border.⁴⁹ Because railroad construction facilitated settlement, Congress granted the railroad companies the right to earn a land patent to every odd-numbered, alternate section of non-mineral public land within twenty miles on each side of the constructed railway line.⁵⁰ If the government had previously disposed of the railroad's land selections, the railroad could acquire "in lieu" land sections within ten miles of the original railway corridor.⁵¹ After obtaining land patents, the railroad company could sell the lands, but only to "bona fide and actual settlers under the pre-emption laws of the United States."⁵²

In the 1866 Act, Congress envisioned that the state would select the railroad companies within a year, and that construction of the line

⁴⁷ Act of July 25, 1866, ch. 242, § 1, 14 Stat. 239, 239; see Deborah Scott & Susan Jane M. Brown, *The Oregon and California Lands Act: Revisiting the Concept of "Dominant Use,"* 21 J. ENVTL. L. & LITIG. 259, 262-63 (2006).

⁴⁸ Act of July 25, 1866 § 1.

⁴⁹ *Id.*

⁵⁰ *Id.* §§ 2, 4 (providing that once the railroads reported to the federal government, and the government confirmed that twenty consecutive miles of line had been laid, the railroads received patents for the grant lands). A land patent is an official document granting public land to a private person. BLACK'S LAW DICTIONARY 1234 (9th ed. 2010).

⁵¹ Act of July 25, 1866 § 2.

⁵² *Id.*

would be complete by 1875.⁵³ Importantly, the Act specified that failure to follow the terms of the grant would result in reversion of all granted lands to the United States.⁵⁴

In October 1866, a Portland, Oregon-based company, the West Side Company, organized the Oregon Central Railroad Company.⁵⁵ Shortly thereafter, the Oregon Legislature designated the West Side Company as a beneficiary of the 1866 Act.⁵⁶ The West Side Company then filed for a patent with the U.S. Department of the Interior (“Interior”).⁵⁷ Although the West Side Company initially won the rights to build the railway, a group of California promoters organized the East Side Company in Salem, Oregon in 1867, challenging the validity of the West Side Company’s incorporation.⁵⁸ Due to this dispute between the two companies, Congress extended the deadlines established in the 1866 grant.⁵⁹

In 1868, as a result of a heated political battle, the Oregon Legislature reversed course and decided to award the rights to build the railway to the East Side Company.⁶⁰ The West Side Company lost its designation because of the legislature’s decision.⁶¹ Even with the state’s approval, however, the East Side Company could not file for a patent from Interior under the terms of the 1866 grant because the deadline to file had

⁵³ Act of July 25, 1866, ch. 242, § 6, 14 Stat. 239, 241.

⁵⁴ *Id.* § 8 (mandating that if the companies fail to “comply with the terms and conditions required . . . this act shall be null and void, and all the lands not conveyed by patent to said company or companies . . . shall revert to the United States”).

⁵⁵ *O&C R.R. I*, 186 F. at 868. The “West Side Company” was so named because it proposed to construct a railway from Portland to McMinnville on the west side of the Willamette River. *Id.*

⁵⁶ H.J. Res. 13, 4th Leg. Assemb., Reg. Sess. (Or. 1866).

⁵⁷ *See O&C R.R. I*, 186 F. at 868. Under the grant, the state-approved railroad company had to file its assent to the Act with Interior within one year of the act’s passage. Act of July 25, 1866 § 6.

⁵⁸ *O&C R.R. I*, 186 F. at 868; David Maldwyn Ellis, *The Oregon and California Railroad Land Grant, 1866–1945*, 39 PAC. NW. Q. 253, 255 (1948).

⁵⁹ *See* Act of June 25, 1868, ch. 80, 15 Stat. 80 (extending deadline to complete first twenty miles until late 1869, and extending the deadline for completion of the entire line until 1880).

⁶⁰ H.J. Res. 16, 5th Leg. Assemb., Reg. Sess. (Or. 1868); *see* STAFF OF S. COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., REP. ON THE DISPOSITION OF THE PUBLIC DOMAIN IN OREGON 38 (Comm. Print 1960) (Ph.D. dissertation of Jerry A. O’Callaghan, Stanford University, published in the committee print) [hereinafter O’Callaghan] (describing the political battle to obtain designation from the Oregon Legislature); Ellis, *supra* note 58, at 255.

⁶¹ O’Callaghan, *supra* note 60.

expired.⁶² In 1869, Congress amended the 1866 grant by extending the filing period until April 1870, thus resolving the East Side Company's problem.⁶³ Importantly, in the 1869 amendment, Congress also reaffirmed that the railroad company could sell its patented land only to actual settlers, in parcels no larger than one-quarter sections (160 acres), and for no more than \$2.50 per acre.⁶⁴

In 1870, the East Side Company organized into the O&C R.R. and finished consolidating the West Side Company's O&C-related holdings in 1874.⁶⁵ By 1873, the O&C R.R. had built 197 miles of railway, extending from Portland to Roseburg, Oregon.⁶⁶ From 1873 through the early 1880s, the O&C R.R. experienced financial difficulties, frequently halted construction, and even entered receivership after defaulting on bond repayments.⁶⁷ Finally, in 1887, Southern Pacific Railroad acquired the O&C R.R.⁶⁸ Construction of the line resumed that year and reached the California border by June 1888—nearly eight years after its slated completion date.⁶⁹

By the time the line became operational in 1888, the O&C R.R. had earned nearly 3,728,000 acres of land, even though it was techni-

⁶² *Id.* The state-designated railroad company had to file its assent with Interior by July 25, 1867, under the original terms of the 1866 Act. *See* Act of July 25, 1866, ch. 242, § 6, 14 Stat. 239, 241.

⁶³ Act of April 10, 1869, ch. 27, 16 Stat. 47. The East Side Company proceeded to make the proper filings in late 1869. *O&C R.R. I*, 186 F. at 869.

⁶⁴ 16 Stat. at 47. These provisions mirrored the Homestead Act of 1862. *See* ch. 75, § 1, 12 Stat. 392, 392 (repealed 1976). After the East Side Company filed its assent with Interior, the West Side Company ceased to be involved in the O&C railroad construction, although it did receive a later grant to build a railway from Portland to Astoria. Act of May 4, 1870, ch. 69, § 1, 16 Stat. 94, 94; O'Callaghan, *supra* note 60, at 39. The Act reiterated that the West Side Company could sell its patented lands to actual settlers only, in parcels no greater than 160 acres, for no more than \$2.50 per acre. Act of May 4, 1870 § 4. During the 1870s, the West Side Company built forty-seven miles of railway from Portland to McMinnville. *O&C R.R. I*, 186 F. at 871.

⁶⁵ *O&C R.R. I*, 186 F. at 869, 871; O'Callaghan, *supra* note 60, at 40.

⁶⁶ *O&C R.R. I*, 186 F. at 871.

⁶⁷ Scott & Brown, *supra* note 47, at 263–64. The O&C R.R. issued five million dollars in bonds in both 1881 and 1883 that allowed the railroad to resume construction of the line. *O&C R.R. I*, 186 F. at 871. The O&C R.R. used this money to extend the line to Ashland, Oregon by 1884. *Id.* However, the railroad defaulted on the payment of both bonds, and thus entered receivership in 1885. *Id.*

⁶⁸ *O&C R.R. I*, 186 F. at 872. In 1887, Southern Pacific negotiated a buy-out with the O&C R.R. and its bondholders. *Id.* The result of this contract was to merge the O&C R.R. into Southern Pacific. *Id.*

⁶⁹ *Id.* at 873; Act of June 25, 1868, ch. 80, 15 Stat. 80 (setting a completion date of July 1, 1880).

cally entitled to 4,220,000 acres.⁷⁰ Despite “owning” these vast tracts of land, the railroad had incentives not to patent its lands,⁷¹ and was otherwise largely unsuccessful in selling land to settlers in the 1870s and 1880s.⁷² As a result, by 1890, the O&C R.R., and its successor, Southern Pacific, had patented only 323,184 acres, leaving over three million acres of unpatented land.⁷³ Of the patented acreage, just three hundred thousand acres had been sold to settlers, as required by the terms of the grant, meaning that some twenty-three thousand acres had been sold to non-settlers.⁷⁴

By the mid-1890s, the perceived value of the O&C timberlands shifted dramatically. Around this time, the Great Lakes timber industry began to exhaust its supply of timber.⁷⁵ As a result, much of the nation’s timber industry moved from the Midwest to the Northwest.⁷⁶ Between 1893 and 1906, the O&C R.R. patented 2,450,000 acres of its grant.⁷⁷ By 1900, the 1866 grant lands had an estimated worth of \$30–\$50 million.⁷⁸ Because its grant land contained valuable timber, the railroad began selling off large swaths, often in blatant disregard of the grant’s

⁷⁰ United States v. Or. & Cal. R.R. (*O&C R.R. III*), 8 F.2d 645, 650, 660 (D. Or. 1925); see Scott & Brown, *supra* note 47, at 264. The disparity was a result of settlement pressures along the railway route. Ellis, *supra* note 58, at 254. In the alluvial lands of Oregon’s Willamette Valley, homesteaders had already preempted much of the available land. *Id.* Moreover, once the line route was announced, speculators rushed in to buy land. *Id.* This practice forced the O&C R.R. to select grant lands in the more distant indemnity zone. O’Callaghan, *supra* note 60, at 41. As a result, the railroad was not allotted its full entitlement. *Id.*

⁷¹ The O&C R.R. was slow to patent its grant lands because until a patent passed from the federal government to the railway, the O&C R.R. could avoid taxes and fees on the land. Ellis, *supra* note 58, at 260.

⁷² See O’Callaghan, *supra* note 60, at 41. From 1874 to 1881, the O&C R.R. was unsuccessful in its efforts to market and sell its lands to settlers. *Id.* at 40. This included failed marketing efforts in the eastern United States and Europe, where the land was offered at \$1.25 per acre. *Id.* At that time, the prevailing view was that these lands were of low value because they were located in rugged, mountainous, timber-covered terrain. *Id.* at 41. Since the original intention was to facilitate agricultural settlement, this understanding as to the character of the land did not help the O&C R.R. dispose of lands. See Ellis, *supra* note 58, at 260–61.

⁷³ O’Callaghan, *supra* note 60, at 41; Scott & Brown, *supra* note 47, at 264.

⁷⁴ O’Callaghan, *supra* note 60, at 41. These small parcels conformed to the acreage and “actual settler” provisions of the grant, although some parcels were sold for more than allowed. Ellis, *supra* note 58, at 260 (noting sales during this period at \$1.25 to \$7 per acre).

⁷⁵ Scott & Brown, *supra* note 47, at 264.

⁷⁶ See Ellis, *supra* note 58, at 261.

⁷⁷ *O&C R.R. I*, 186 F. at 873.

⁷⁸ O’Callaghan, *supra* note 60, at 41.

“actual settler,” acreage, and price provisions.⁷⁹ By 1903, the O&C R.R. and Southern Pacific had sold 5306 tracts, totaling approximately 820,000 acres.⁸⁰ These sales ranged from \$5 to \$40 per acre, and the railroad sold some 524,000 acres of the patented land in parcels greater than 160 acres, including several huge sales.⁸¹

In 1903, Southern Pacific withdrew all the O&C lands from sale in an effort to hold reserves until stumpage prices—“the value of standing timber”⁸²—rose even higher.⁸³ But in the early 1900s, Oregon was a hotbed for the anti-monopolistic Progressive movement, and the decision to withdraw the O&C lands gave Oregonians a negative perception of railroad companies and railroad grants.⁸⁴ The withdrawal would prove fateful for Southern Pacific and the O&C lands, especially as the Oregon land fraud scandals brought Oregon timberland disposition into the national spotlight.

B. *The Oregon Land Fraud Scandal and Changing Public Opinion*

The booming, illegal sales of O&C lands were a microcosm of the pervasive land fraud dynamics plaguing early twentieth-century Oregon. Beginning in 1902, the Theodore Roosevelt Administration began investigating widespread land fraud in Oregon and California,⁸⁵ principally under the Timber and Stone Act of 1878⁸⁶ and the Forest Management Act of 1897.⁸⁷ These investigations eventually led to the indictment of over one thousand people, including both of Oregon’s U.S. Senators, a U.S. Congressman, a U.S. District Attorney, a GLO Commissioner, several Oregon State Senators and Assistant Attorneys,

⁷⁹ *Id.* Under the federal grant, the O&C R.R. could sell its patented land only to actual settlers, in parcels no larger than one-quarter sections (160 acres) and for no more than \$2.50 per acre. Act of April 10, 1869, ch. 27, 16 Stat. 47.

⁸⁰ *O&C R.R. I*, 186 F. at 873.

⁸¹ *Id.* The O&C R.R. made a number of sales in excess of one thousand acres, including one of forty-five thousand acres. *Id.*

⁸² BLACK’S LAW DICTIONARY 1560 (9th ed. 2010).

⁸³ Ellis, *supra* note 58, at 261. The chief executive of Southern Pacific stated the company’s motives for the withdrawal: “[t]he agricultural land we will sell, but the timberland we will retain, because we must have ties and bridge timbers, and we must retain our timber for future supply . . .” *Id.*

⁸⁴ Scott & Brown, *supra* note 47, at 265 (noting that Oregonians already distrusted railroads for their tax avoidance techniques); Dodds, *supra* note 17, at 749.

⁸⁵ John Messing, *Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903–1910*, 35 PAC. HIST. REV. 35, 35, 37 (1966); see also S. REP. NO. 58-189, at v (1905) (asking the Public Lands Commission to recommend changes necessary to correct the land fraud).

⁸⁶ Ch. 151, 20 Stat. 89 (repealed 1955).

⁸⁷ Ch. 2, § 1, 30 Stat. 11, 36 (repealed 1905).

and countless other businessmen and officials in the state.⁸⁸ The scandal catalyzed a sea change in timberland disposition policies that would ultimately seal the fate of the O&C lands.

According to a U.S. Senate Report, the federal government observed an “unusual increase in the number of entries” under the Timber and Stone Act around the turn of the century.⁸⁹ Under the statute, an applicant applied to a local land office for a patent, alleging that the land was “chiefly valuable for its timber or stone.”⁹⁰ Assuming no one protested the claim, the claimant was eventually issued a patent, although not required to reside on or cultivate the land.⁹¹ Consequently, a speculator could enlist locals to apply for patents and agree to buy the land for more than \$2.50 per acre.⁹² Moreover, a well-placed bribe by a powerful politician could quickly expedite the process.⁹³

Many speculators also capitalized on the creation of new forest reserves.⁹⁴ Under the “in lieu” provision of the Forest Management Act, people who had previously settled or owned lands within these reserves obtained the option to keep their land—as an inholding—or to select an equal amount of land outside the reserve.⁹⁵ Speculators invested in lands near potential reserves and bribed officials to include those lands in the boundaries of the reserves.⁹⁶ This use of the “in lieu” provision was quite prevalent in Oregon, where President Roosevelt enlarged Oregon’s forest reserves to thirteen million acres in the early 1900s.⁹⁷

The land fraud scandal began to materialize in 1902 when a progressive advocate employed by the GLO received letters from a disgruntled former employee of a California-based land fraud ring.⁹⁸ Despite GLO Commissioner Binger Hermann’s attempts to sabotage the investigation, the GLO sent special agents to both California and Oregon to

⁸⁸ DRAFFAN, *supra* note 1, at 22.

⁸⁹ S. REP. NO. 58-189, at vi.

⁹⁰ Timber and Stone Act of 1878 §§ 1–2; *see also* S. REP. NO. 58-189, at vi (describing how speculators manipulated the Act).

⁹¹ S. REP. NO. 58-189, at v–vi.

⁹² *Id.* The Supreme Court was familiar with the scheme, even if it could not prove it. *See United States v. Budd*, 144 U.S. 154, 155–57, 161 (1892).

⁹³ Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Penmoyer Reconsidered*, 62 WASH. L. REV. 479, 489–90 (1987) (“With a few well placed bribes, the applications would be approved and the settlers would then transfer their deeds in exchange for a modest payoff.”).

⁹⁴ *See* Messing, *supra* note 85, at 37.

⁹⁵ Forest Management Act of 1897, ch. 2, § 1, 30 Stat. 11, 36 (repealed 1905).

⁹⁶ *See* Messing, *supra* note 85, at 37.

⁹⁷ *See* ELMO RICHARDSON, BLM’S BILLION-DOLLAR CHECKERBOARD: MANAGING THE O & C LANDS 10 (1980); Messing, *supra* note 85, at 37.

⁹⁸ *See* Messing, *supra* note 85, at 38–39.

investigate the allegations.⁹⁹ In Oregon, the agents discovered the so-called “11–7” and “24–1” land fraud schemes, headed by Steven Puter.¹⁰⁰ When Puter’s claims did not receive patents, he traveled to Washington, D.C. and bribed Oregon Senator John H. Mitchell to have Commissioner Hermann expedite the claims.¹⁰¹ Although Puter was indicted for fraud in both schemes in October 1903, Senator Mitchell and many other politicians might have avoided prosecution if not for the appointment of special prosecutor Francis J. Heney.¹⁰² After Heney arrived in Portland in 1903, he discovered that the U.S. Attorney for Oregon, John H. Hall—who was up for reappointment—intended to prosecute Puter for the weaker “24–1” claim, but not for the “11–7” claim.¹⁰³ When Heney changed course, Puter was convicted of fraud for the “11–7” claim.¹⁰⁴ After Senator Mitchell convinced Hall to drop charges against Puter’s co-conspirators while publicly castigating him, Puter turned on the Senator.¹⁰⁵ Implicated by a long paper trail, a jury convicted the Senator in July 1905, and he received a sentence of six months in jail

⁹⁹ See *id.* at 39–40.

¹⁰⁰ See *id.* at 40–42. The “11–7” tract was a remote piece of land located on Mt. Jefferson in the soon-to-be-incorporated Cascade Forest Reserve. *Id.* at 42. Puter and his cohorts convinced non-settlers to enter homestead claims, and then paid \$3800 for 12 claims. See Jerry A. O’Callaghan, *Senator Mitchell and the Oregon Land Frauds, 1905*, 21 PAC. HIST. REV. 255, 256 (1952). Puter then paid C.E. Loomis, an investigator in the Oregon City district land office, \$1000 to favorably investigate the claims. *Id.* at 257. Despite Loomis’s positive report, the GLO commissioned another investigator; Puter again paid this investigator \$500. See *id.* The “24–1” scheme essentially repeated the same process, although the ring used actual settlers. See Messing, *supra* note 85, at 43. Puter and his ring then paid \$100 each to the GLO Commissioner for the Eugene Land Office to expedite the claims. See *id.*

¹⁰¹ See O’Callaghan, *supra* note 100, at 257. Recognizing Senator Mitchell’s interest in women, Puter also brought along Emma Watson, the person to whom the “11–7” deed had been issued. See *id.*; see also Perdue, *supra* note 93, at 489 (describing Mitchell’s publicly-exposed affair with his second wife’s younger sister). Watson signed an affidavit claiming that she was a widow and that she would lose her investment if the claims were not expedited. See O’Callaghan, *supra* note 100, at 257. Although Mitchell initially rejected the offer, he finally relented, and spoke with Commissioner Hermann, who then promptly approved the patents. See *id.* at 257–58. With the patents approved, Puter returned to Oregon and sold the patents to Frederick Kribs for \$10,080. See *id.* at 258. Although Senator Mitchell denied the bribery allegations, records eventually surfaced that Kribs paid the Senator’s private law firm the amount alleged. See *id.* at 259.

¹⁰² See O’Callaghan, *supra* note 100, at 258. Heney received his appointment because he was not sympathetic to the local interests in the case. See *id.* President Roosevelt and Gifford Pinchot, the head of the United States Forest Service at the time, staunchly supported Heney. See DRAFFAN, *supra* note 1, at 22.

¹⁰³ See Messing, *supra* note 85, at 45. Hall likely felt pressure to acquiesce to the Oregon congressional delegation, as he needed their support in order to gain reappointment. *Id.*

¹⁰⁴ See *id.* at 49–50. Although prosecutors planned to prosecute the “24–1” count, the court stayed the case. *Id.* at 50.

¹⁰⁵ See *id.*; O’Callaghan, *supra* note 100, at 259.

and a fine of one thousand dollars.¹⁰⁶ By Heney's request, U.S. Attorney Hall was also dismissed immediately before the Mitchell indictment.¹⁰⁷ On the other hand, Commissioner Hermann, as a result of a conveniently timed earthquake in 1906, avoided conviction in this and other land fraud cases, and was in fact later elected to Congress.¹⁰⁸

Although the Mitchell trial was the most notable, a number of other Oregon land fraud scandals infiltrated all levels of Oregon government and business. A second major land fraud trial involved U.S. Representative John Williamson, his partner in a sheep grazing business, and a U.S. Lands Commissioner in the Prineville, Oregon district.¹⁰⁹ In order to maintain prime summer sheep grazing areas, Williamson and his partner bribed the Prineville commissioner to hire settlers, who would then enter fake claims under the Timber and Stone Act in the desired areas, and then ensure that the false claims were patented.¹¹⁰ The grand jury indicted the group in February 1905 and, after two hung juries, a third jury convicted Williamson and the Land Commissioner in October 1905, sentencing them to jail and imposing fines.¹¹¹

In a third major scheme, which led to indictments in February 1905, a number of state senators purchased lands in the hope that they would be included in proposed forest reserves, thus making the senators eligible to receive "in lieu" selections under the Forest Reserves Act.¹¹² A fourth trial involved a similar scheme involving a major Ore-

¹⁰⁶ See Messing, *supra* note 85, at 56; O'Callaghan, *supra* note 100, at 261.

¹⁰⁷ See O'Callaghan, *supra* note 100, at 259.

¹⁰⁸ In connection with the land fraud investigations, Hermann destroyed a number of key files before he was forced to resign as Land Commissioner. See Messing, *supra* note 85, at 40. Immediately thereafter, Hermann was elected as a U.S. Representative from Oregon. See O'Callaghan, *supra* note 100, at 261. Heney intended to prosecute Hermann for record destruction. See Messing, *supra* note 85, at 61–62. The trial was originally set for April 25, 1906. *Id.* at 59. However, when the San Francisco earthquake struck on April 18, 1906, Heney traveled to San Francisco in an effort to locate his three sisters who lived in the city. *Id.* After confirming the trial was to begin on June 11, 1906, Heney traveled to Arizona to complete some business. *Id.* Hermann's lawyers then convinced the court to commence the trial on June 7, 1906, making it impossible for Heney to try the case. *Id.* This resulted in Hermann avoiding trial until 1910. See *id.* at 61. Although he was finally tried in 1910, the jury was unable to reach a verdict. *Id.* at 62.

¹⁰⁹ See Messing, *supra* note 85, at 53.

¹¹⁰ See *id.*

¹¹¹ *Id.* at 57–58. Williamson and the Land Commissioner received jail sentences of ten months each and were ordered to pay five hundred dollars each. See *id.* at 58. Williamson's sheep herding partner was sentenced to five months in jail, and ordered to pay a one thousand dollar fine. *Id.*

¹¹² See *id.* at 53. State Senators George Sorenson, Willard Jones, H.A. Smith, and F.P. Mays all received indictments for their roles in this scheme. *Id.*

gon livestock company.¹¹³ In addition to permeating all levels of Oregon society, the Oregon land fraud scandals led to the repeal of the “in lieu” provision in the Forest Reservation Act and may have influenced the outcome of the 1912 Presidential election.¹¹⁴

C. *Litigation over the Reversion of the O&C Lands to the Federal Government*

The timber-related intrigue and the attention created by the Oregon land fraud scandals, Southern Pacific’s decision to remove the O&C lands from sale, and public concern over railroad monopolies, sparked interest in the O&C land grant.¹¹⁵ In 1904, during the heart of the land fraud trials, *The Oregonian* newspaper—a primary instigator in the anti-corporate, Progressive movement in Oregon—published notice of a “homestead” clause in the 1869 Coos Bay Wagon grant.¹¹⁶ Already angry about Southern Pacific’s withdrawal of land from sale, “land hungry,” anti-monopoly Oregonians began to attack the railroad.¹¹⁷ Noticing that the O&C grant was nearly identical to the Coos

¹¹³ See *id.* at 54 (describing case against Butte Creek Land, Livestock and Lumber Company). Heney did not prosecute any of the cases after the Williamson verdict, as he was called to Washington D.C. to prosecute California land fraud cases and a case against Commissioner Hermann for his role in destroying files. *Id.* at 58.

¹¹⁴ Congress repealed the “in lieu” provision in the Forest Management Act of 1897 in 1905. Act of Mar. 3, 1905, ch. 1495, 33 Stat. 1264 (repealing the “Forest Lieu Act,” Act of June 4, 1897, ch. 2, § 1, 30 Stat. 34). Shortly before leaving office, President William Howard Taft pardoned Oregon State Senator Willard Jones for his role in the Oregon land fraud scandal, and condemned Heney’s (and by implication, former President Roosevelt’s) methods. See WILLIAM R. HUNT, FRONT-PAGE DETECTIVE: WILLIAM J. BURNS AND THE DETECTIVE PROFESSION, 1880–1930, at 107 (1990); *Charges of Hon. Oscar E. Keller Against the Attorney General of the United States Before the H. Comm. on the Judiciary*, 67th Cong. 143 (1922) (statement of former President William Howard Taft). In the 1912 electoral cycle, although Theodore Roosevelt handily won the primaries, half of Oregon’s delegates voted for Taft at the Republican national convention. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 406 (Da Capo Press 1985) (1913). In dissecting his loss of the Republican nomination, Roosevelt noted that 146 former Oregon land fraud trial defendants, including Willard Jones, dominated the Oregon political machine. *Id.*

¹¹⁵ See Ellis, *supra* note 58, at 262; DRAFFAN, *supra* note 1, at 22.

¹¹⁶ See RICHARDSON, *supra* note 97; Ellis, *supra* note 58. The Act of March 3, 1869 granted lands to the state of Oregon for the construction of the Coos Bay wagon road, from Coos Bay, Oregon to Roseburg, Oregon. Ch. 150, § 1, 15 Stat. 340, 340. The state subsequently granted the Coos Bay Wagon Road Company all “lands, right of way privileges, and immunities” associated with the grant in exchange for the construction of the road. See *S. Or. Co. v. United States*, 241 F. 16, 17 (9th Cir. 1917). In 1917, ninety-six thousand acres of this land reverted to the federal government because the Wagon Company violated the homestead, price, size, and timber-cutting restriction terms of the grant. *Id.* at 17, 19–20, 24.

¹¹⁷ See Dodds, *supra* note 17, at 749.

Bay Wagon grant in these respects,¹¹⁸ the competing Booth-Kelley Lumber Company—in need of new timber supplies—pounced.¹¹⁹ Instead of paying market prices for Northwest timber, Booth-Kelley believed it could acquire timber for no more than \$2.50 per acre from the O&C lands.¹²⁰ But the anti-railroad, Progressive public sentiment of the time, together with the competitive advantage sought by Southern Pacific competitors, catalyzed the forfeiture movement.¹²¹

Once the issue gained momentum: Oregonians mobilized to “rescue the public interest” from the railroad monopoly.¹²² The issue became a hot-ticket item for Governor—and later U.S. Senator—George Chamberlain, the Oregon legislature, and the media.¹²³ In 1908, Congress got involved, directing the U.S. Attorney General (AG) to enforce the terms of the O&C grant.¹²⁴ Shortly thereafter, the AG filed suit, seeking forfeiture of all unsold O&C grant lands to the federal government.¹²⁵ In the alternative, the AG sought 1) appointment of a receiver to carry out the 1869 Act’s sale price, size, and actual settler conditions, or 2) sale of the remaining O&C grant lands in compliance with the Act.¹²⁶

In 1911, the Circuit Court for the District of Oregon held that the whole 1866 grant to the O&C R.R. was subject to forfeiture because it

¹¹⁸ Like the O&C grant, the Coos Bay Wagon grant required the company to sell land at up to \$2.50 per acre, in parcels less than 160 acres. See Act of Mar. 3, 1869 § 1. Although, the law required only that lands “shall be sold to any one person,” as opposed to “actual settlers only.” See *id.*

¹¹⁹ See Ellis, *supra* note 58, at 263.

¹²⁰ See *id.*

¹²¹ See *id.* at 263–64.

¹²² See RICHARDSON, *supra* note 97. *The Oregonian*’s well-timed publication in 1904, combined with Booth-Kelley’s economic motives, catalyzed a movement in Oregon to reclaim the O&C lands from the “tyranny of the railroad monopoly.” See *id.*

¹²³ See Ellis, *supra* note 58, at 263–64. Recognizing that public sentiment was against the railroads, Governor George Chamberlain quickly took up the forfeiture cause and argued that the lands should be sold to settlers under the homestead clause. See *id.* at 263. In early 1907, the Oregon Senate passed a joint resolution to the President and Congress, urging the federal government to make Southern Pacific Railroad forfeit the O&C lands. S.J. Memorial 3, 24th Leg. Assemb., Reg. Sess., 1907 OR. LAWS 516–17 (Or. 1907); O’Callaghan, *supra* note 60, at 43. In 1907, *The Oregonian* summed up public opinion regarding the O&C lands: “[t]he reign of broken pledges and greedy grab of nonresident landlords should end. Oregon aspires to a nobler destiny than striving for the pleasure and profit of these barons.” See O’Callaghan, *supra* note 60, at 43 (citing OREGONIAN, May 24, 1907).

¹²⁴ S.J. Res. 18, 60th Cong., 35 Stat. 571 (1908).

¹²⁵ *O&C R.R. I*, 186 F. at 865–66. In September of 1908, the AG filed suit against the O&C R.R. (owned by Southern Pacific), and 45 individual purchasers. See O’Callaghan, *supra* note 60, at 43.

¹²⁶ *O&C R.R. I*, 186 F. at 874–75; see April 10, 1869, ch. 27, 16 Stat. 47.

had not followed the “conditions subsequent” established in the 1869 Act when it sold tracts greater than 160 acres in size to non-settlers for more than \$2.50 per acre.¹²⁷ Southern Pacific appealed and stopped paying taxes to the counties.¹²⁸ These tax amounts were significant.¹²⁹ In 1912, Congress responded to public concerns about the effects of the lower court decision on O&C land purchasers by providing buyers an opportunity to obtain clear title to the lands they purchased from the O&C R.R. or its successor, Southern Pacific, prior to 1908.¹³⁰

In 1915, the Supreme Court decided the fate of the remaining unsold O&C grant lands. First, the court enjoined the railroad from further disposing of O&C lands or cutting any timber from them.¹³¹ The Court did not agree that violations of the 1869 Act conditions led to forfeiture, however, deciding that the grants contained enforceable covenants that when breached, led to injunctive relief, not forfeiture.¹³² Thus, instead of ruling that Southern Pacific forfeited the grant land, the Supreme Court in effect remanded the land disposition and compensation issues to Congress.¹³³

¹²⁷ *O&C R.R. I*, 186 F. at 921–22, 924, 933 (concluding that under the terms of the 1866 grant, as amended in 1869, the O&C R.R. was allowed to sell the land only to actual settlers, in parcels up to 160 acres, for up to \$2.50 per acre). “Conditions subsequent” are conditions, which if not followed, “entail a forfeiture of the lands granted for nonobservance of the condition.” *Id.* at 890.

¹²⁸ See Scott & Brown, *supra* note 47, at 266.

¹²⁹ See *Hearings on H.R. 5858*, *supra* note 16, at 141. Prior to 1916, the railroad companies paid the O&C counties around five hundred thousand dollars annually in land taxes. *Id.* (statement of Guy Cordon, representative for the O&C counties).

¹³⁰ See Forgiveness Act of 1912, ch. 311, § 4, 37 Stat. 320, 321. Under the Forgiveness Act, buyers sued by the government could agree to forfeit their purchased land to the government, with the stipulation that if the buyers then paid the federal government \$2.50 per acre for the previously forfeited lands, the government would then issue patents to those buyers for the lands. *Id.*; see also DRAFFAN, *supra* note 1, at 23.

¹³¹ *O&C R.R. II*, 238 U.S. at 438–39; see Ellis, *supra* note 58, at 267.

¹³² *O&C R.R. II*, 238 U.S. at 419, 431, 438; see RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 676, at 60-112 (rev. vol. 1992); Scott & Brown, *supra* note 47, at 266.

¹³³ *O&C R.R. II*, 238 U.S. at 438–39 (“[T]he lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should [be enjoined from any further disposition] . . . until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.”). In support of this conclusion, the Court noted that forfeiture would have led to a liquidation of the remaining unsold lands at \$2.50 per acre, thus benefiting speculators, not settlers. See *id.* at 438; Ellis, *supra* note 58, at 267.

D. Congressional Response to Management of the O&C Lands

As Congress deliberated on a solution, timberland speculators, including Steven Puter, again ran wild.¹³⁴ The Oregon public hoped that the land would be sold at the original grant price of \$2.50 per acre, while county governments championed a solution that would afford them much-needed tax relief.¹³⁵ The Chamberlain-Ferris Act of 1916 (“the 1916 Act”) was the first attempt at a resolution.¹³⁶ Under the 1916 Act, all unsold O&C lands as of July 1, 1913—2,891,000 acres—revested in the United States.¹³⁷ Southern Pacific received compensation under the Act.¹³⁸

Congress instructed Interior to categorize these lands as either “timberlands,” power sites, or agricultural lands.¹³⁹ If classified as timberlands, the GLO had discretion to sell the timber, although Congress instructed the agency to do so “as rapidly as reasonable prices [could] be secured” through a public bidding process.¹⁴⁰ Congress apportioned income generated from these sales in the following order: 1) Southern Pacific was to receive 4.1 million dollars for land the O&C R.R. earned from construction of the line;¹⁴¹ and 2) the U.S. Treasury was to be repaid the money it advanced to the O&C counties after Southern Pacific

¹³⁴ See Ellis, *supra* note 58, at 268–69. In 1916, speculators filed between fourteen thousand and fifteen thousand applications with the railroad company to buy land. *Id.* at 268. Among these speculators was Steven Puter, who reportedly earned one million dollars in fees while representing those trying to locate new claims. See *id.* at 269; O’Callaghan, *supra* note 60, at 45. In addition, squatters rushed to stake out claims, believing that this would somehow provide them priority. See O’Callaghan, *supra* note 60, at 45.

¹³⁵ See *id.*; Ellis, *supra* note 58, at 271. Prior to the 1911 district court’s decision ruling that the O&C R.R. forfeited its lands—which prompted the railroads to stop paying taxes—the counties assessed the O&C R.R. property taxes at rates higher than \$2.50 per acre. Ellis, *supra* note 58, at 271. After the railroads stopped paying taxes, the counties accumulated over 1.3 million dollars in tax arrears between 1913 and 1916. See 53 CONG. REC. 8593 (1916) (written statement of Rep. Willis Chatman Hawley).

¹³⁶ See ch. 137, 39 Stat. 218.

¹³⁷ *Id.* § 1; see O’Callaghan, *supra* note 60, at 46; Ellis, *supra* note 58, at 267.

¹³⁸ See *infra* note 141 and accompanying text (describing the amount received by Southern Pacific). Although Congress paid compensation, the Act was in effect a condemnation because it gave the railroad no other options.

¹³⁹ Chamberlain-Ferris Act of 1916 § 2. The statute defined “[t]imberlands” as lands with three hundred thousand or more board feet of timber per forty acres. *Id.*

¹⁴⁰ *Id.* § 4. The GLO did have the right to reject bids it deemed insufficient, but the 1916 Act set no minimum price. *Id.*

¹⁴¹ The O&C R.R. earned 3,728,000 acres of land from construction. See *supra* note 70 and accompanying text. Multiplied by \$2.50 per acre, this amounted to \$9.32 million. At the time of the reversion, the O&C R.R. and Southern Pacific had earned \$5.24 million from land sales, timber, and interest. *O&C R.R. III*, 8 F.2d at 660 (providing a full accounting). The \$4.1 million received by Southern Pacific reflected this balance. *Id.*

stopped paying property taxes on the O&C lands in 1911.¹⁴² The 1916 Act required distribution of the remainder to the Oregon public school fund, to the O&C counties (in lieu of taxes), Federal Reclamation Fund, and U.S. Treasury general fund.¹⁴³ The 1916 Act did not work as Congress intended, however.

The woefully underfunded and undermanned GLO, responsible for administering the 1916 Act, had few resources to facilitate and administrate timber sales.¹⁴⁴ Moreover, much of the O&C timber was not cheaply or easily accessible, especially when compared to other sources of Northwest timber.¹⁴⁵ As a result, few sales occurred, and most O&C counties received no payments in lieu of taxes between 1916 and 1926¹⁴⁶ when Congress again intervened, enacting the Stanfield Act.¹⁴⁷ Under this statute, Interior was to pay the O&C counties \$7.135 million from future timber sales—an amount equal to what they would have earned from railroad taxes between 1916 and 1926, if the O&C lands had not reverted to the United States.¹⁴⁸ But like the 1916 Act, the Stanfield Act proved unsuccessful in solving the counties' financial problems. Between 1926 and 1937, the O&C counties received \$3.86 million in lieu of taxes, and the government owed them another \$2 million.¹⁴⁹ By 1937, the Stanfield Act's O&C Fund disbursed \$18 million to Southern Pacific, the U.S. Treasury, and the O&C counties, but timber sales from the O&C lands had raised only \$8.3 million in revenue for the fund.¹⁵⁰

In an effort to provide a permanent fix, Congress enacted the Oregon & California Lands Act of 1937 (OCLA).¹⁵¹ OCLA declared that all O&C timberlands:

¹⁴² Chamberlain-Ferris Act of 1916, ch. 137, §§ 9–10, 39 Stat. 218, 221–22. From 1913 to 1915, the U.S. Treasury lent over 1.5 million dollars to the counties to cover taxes owed to them on the O&C lands. Ellis, *supra* note 58, at 272.

¹⁴³ Chamberlain-Ferris Act of 1916 § 10. The Act earmarked 25% for the Oregon public school fund, 25% for the counties (for schools, roads, and transportation infrastructure), 40% for the Federal Reclamation Fund, and the last 10% to the U.S. Treasury. *Id.*

¹⁴⁴ See Scott & Brown, *supra* note 47, at 267 (describing the resources available to the GLO as it attempted to facilitate sales under the 1916 Act).

¹⁴⁵ See *Hearings on H.R. 5858*, *supra* note 16, at 141–42 (statement of Guy Cordon, Representative for the O&C counties).

¹⁴⁶ Ellis, *supra* note 58, at 275; Scott & Brown, *supra* note 47, at 267.

¹⁴⁷ Stanfield Act of 1926, ch. 897, § 1, 44 Stat. 915, 915–16.

¹⁴⁸ *Id.* §§ 1, 4; see Ellis, *supra* note 58, at 275.

¹⁴⁹ See Ellis, *supra* note 58, at 275.

¹⁵⁰ See *id.*

¹⁵¹ Ch. 876, 50 Stat. 874 (codified at 43 U.S.C. §§ 1181a–1181j (2006)).

[S]hall be managed [by the GLO] . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.¹⁵²

The OCLA stated that until the GLO set the annual sustained yield capacity for the O&C lands, no more than five hundred million board feet of timber was to be cut.¹⁵³ Once the GLO set the annual sustained yield, however, Congress directed the agency to make annual timber sales of “not less than one-half billion feet board measure, or not less than the annual sustained yield capacity [once set] . . . or so much thereof as can be sold at reasonable prices on a normal market.”¹⁵⁴ The OCLA also authorized the GLO to subdivide the land into sustained yield forest units.¹⁵⁵ Congress directed the agency to distribute revenue produced from O&C land sales according to the following formula: 50% to the O&C counties; 25% to the federal treasury for payments in lieu of taxes that had been advanced to the counties—until the debt was extinguished—and then to the counties; and 25% for administrative expenses.¹⁵⁶ Congress later amended the formula twice; by 1981, the O&C counties and the U.S. Treasury were each entitled to 50% of timber receipts.¹⁵⁷

Beginning with the contentious battle as to who would build the line, through the railroad’s sale of lands in violation of the original

¹⁵² 43 U.S.C § 1181(a). In 1937, the O&C lands contained forty-six billion board feet of timber, or three percent of the nation’s total timber supply. S. REP. No. 75-1231, at 2 (1937). Despite protests from the USFS that it was better suited to manage the land, Congress kept Interior—and its subdivision, the GLO—as the land manager. See Scott & Brown, *supra* note 47, at 276–77.

¹⁵³ See 43 U.S.C § 1181a. The provision did not specifically state that the GLO (through Interior) was the agency responsible for setting the annual sustained yield, but that is easily implied from the provision. See *id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 1181f(a)–(c).

¹⁵⁷ After the GLO fully reimbursed the U.S. Treasury in 1952, Congress amended this formula by reserving up to one-third of the counties’ share for county road and capital maintenance programs on the O&C lands. See Act of July 31, 1953, ch. 298, § 1, 67 Stat. 261, 263; see also BUREAU OF LAND MGMT., FY 2005 BUDGET JUSTIFICATIONS, at VIII-2 (2005), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Business_and_Fiscal_Resources/justification.Par.1963.File.dat/2005Justification.pdf. Congress further amended the formula in 1981 to split the revenue evenly. See Scott & Brown, *supra* note 47, at 278.

grant, the O&C lands engendered continuous controversy. The lands became part of a nationwide movement to eliminate fraudulent land disposition practices and may have influenced the outcome of the 1912 presidential election. In the mid-1910s, at the direction of the U.S. Supreme Court, the lands reverted in the government. Thereafter, Congress and the courts attempted to shape a management regime that would repay the federal government for its tax relief, support the timber-reliant local communities, and produce a sufficient supply of timber. As a result of these efforts, culminating in the enactment of the OCLA in 1937, O&C land management was relatively non-contentious for nearly fifty years. That would all change, however, in the late 1980s.

II. BLM MANAGEMENT OF THE O&C LANDS AND INCREASING MANAGEMENT CONTROVERSY

From 1937 until the late 1980s, the General Land Office (GLO) (now the Bureau of Land Management (BLM))¹⁵⁸ managed the reverted lands in Oregon and California (“O&C lands”) with a great deal of unchallenged administrative discretion.¹⁵⁹ Although the Oregon & California Lands Act of 1937 (OCLA) articulated “multiple use” and sustained yield themes,¹⁶⁰ BLM consistently contended that the OCLA, in fact, established a “dominant use” regime that elevated timber production above all other values.¹⁶¹ Consistent with this policy, the BLM managed the O&C lands for nearly a half-century, with the goal of maximizing timber harvests.¹⁶² Many Oregonians favored this policy because timber harvesting produced considerable revenue for the eighteen Oregon and California counties (“O&C counties”) in western

¹⁵⁸ Reorganization Plan No. 3 of 1946 created the BLM, and it inherited the responsibilities of the GLO—including land management authority over the reverted railroad grant lands. See JAMES MUHN & HANSON R. STUART, *OPPORTUNITY AND CHALLENGE: THE STORY OF BLM* 54 (1988).

¹⁵⁹ See Michael C. Blumm & Jonathan Lovvorn, *The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions*, 32 *LAND & WATER L. REV.* 353, 363 (1997); Dodds, *supra* note 17, at 756–61.

¹⁶⁰ See Dodds, *supra* note 17, at 755 (claiming that the OCLA was the first federal law to require multiple-use management of federal public lands).

¹⁶¹ See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 *HARV. ENVTL. L. REV.* 405, 424 (1994) (noting that the OCLA produced “a de facto ratification of dominant use principles”). As viewed by the House of Representatives, the OCLA “establishe[d] a vast, self-sustaining timber reservoir for the future. . . .” H.R. REP. NO. 75-1119, at 4 (1937).

¹⁶² Dodds, *supra* note 17, at 756–61.

Oregon.¹⁶³ In fact, one commentator suggested that the significance of OCLA revenues played a large role in preventing Oregon from enacting a sales tax.¹⁶⁴ Beginning in the late 1980s, however, a number of people began to question whether the BLM was complying with environmental directives in the Federal Land Policy and Management Act (FLPMA),¹⁶⁵ National Environmental Policy Act (NEPA),¹⁶⁶ and the Endangered Species Act (ESA).¹⁶⁷

Under FLPMA—governing management of all the BLM’s public lands—the BLM must manage all public domain lands “on the basis of multiple use and sustained yield unless otherwise specified by law.”¹⁶⁸ A savings clause in FLPMA, however, may exempt the O&C lands from its coverage:

Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937, and May 24, 1939, insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Act shall prevail.¹⁶⁹

From 1977 to 1981, the Solicitor of the Department of the Interior (“Interior”) issued several opinions concluding that the OCLA was a “dominant use” statute, and that FLPMA’s “multiple-use” mandate conflicted with the OCLA, and thus did not apply to the O&C lands.¹⁷⁰ Two Ninth Circuit decisions in the 1970s and 1980s also assumed that the OCLA established a timber-dominant scheme for the O&C lands.¹⁷¹

¹⁶³ See *id.* at 740–41. In 1984, for example, the O&C counties received almost sixty-six million dollars in revenues under the OCLA. *Id.* at 741.

¹⁶⁴ See *id.* at 741.

¹⁶⁵ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006).

¹⁶⁶ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

¹⁶⁷ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

¹⁶⁸ 43 U.S.C. § 1701(a)(7).

¹⁶⁹ Federal Land Policy and Management Act of 1976, § 701(b), Pub. L. No. 94–579, 90 Stat. 2743, 2786 (uncodified) (citations omitted).

¹⁷⁰ U.S. DEP’T OF THE INTERIOR, SOLICITOR’S OPINION: REVIEW OF BLM POLICY STATEMENT FOR MULTIPLE USE MANAGEMENT OF THE OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD REVESTED LANDS (O & C LANDS) 94–95 (1981) (citing and confirming previous Solicitor memoranda from 1977 and 1979 that found the OCLA was a “dominant use” statute that might conflict with FLPMA’s broader management mandate); see Blumm & Lovvorn, *supra* note 159, at 365–66; Dodds, *supra* note 17, at 756–59.

¹⁷¹ See *O’Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987) (noting—in a personal injury action caused by the collapse of one of BLM’s roads—that the OCLA “make[s] it clear that the primary use of the revested lands is for timber production”); *Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir. 1979) (noting in passing—in a dispute concerning Interior’s

Nonetheless, environmental groups in the late 1980s and early 1990s continued to argue for the applicability of FLPMA to the O&C lands, as well as the interaction of the OCLA with NEPA and the ESA.

A. *Headwaters v. Bureau of Land Management—An Early Victory for Dominant Use Management*

In 1989, Headwaters, Inc. was the first to challenge a BLM timber sale on O&C lands. The environmental group asserted that the BLM had not fulfilled its NEPA obligation on the sale and claimed that FLPMA's multiple-use mandate applied to the O&C lands.¹⁷² The U.S. District Court for the District of Oregon rejected both of these claims.¹⁷³ Appealing to the Ninth Circuit, Headwaters argued that the BLM violated NEPA by not drafting an Environmental Impact Statement (EIS) on the timber sale in 1986.¹⁷⁴ BLM had prepared an EIS on the land management plan Jackson and Klamath Sustained Yield Unit in 1979 and wrote an environmental assessment (EA), resulting in a finding of no significant impact for the timber sale in 1986. But Headwaters argued that the BLM had not adhered to the requirements of NEPA because it had not performed a site-specific EIS on the land sale.¹⁷⁵ Although Headwaters raised various environmental concerns, including new evidence establishing the presence of ESA-listed (as of June 1990) spotted owls in the sale area, the Ninth Circuit rejected all six of Headwaters' NEPA claims.¹⁷⁶

obligation to disburse disputed O&C funds—that the OCLA “provided that most of the O & C lands would henceforth be managed for sustained-yield timber production”).

¹⁷² *Headwaters, Inc. v. Bureau of Land Mgmt.*, 19 *Envtl. L. Rep.* (Envtl. Law Inst.) 21,159, 21,160 (D. Or. May 23, 1989), *aff'd*, 914 F.2d 1174 (9th Cir. 1990) (challenging the Wilcox Peak timber sale in southern Oregon).

¹⁷³ *Id.* at 21,162 (rejecting the NEPA claim); *id.* at 21,164 (rejecting the FLPMA claim).

¹⁷⁴ *Headwaters, Inc.*, 914 F.2d at 1176.

¹⁷⁵ *Id.* Under NEPA, an agency must prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006); *see also* 40 C.F.R. § 1508.11 (2011). If the agency finds that the action will not create a significant impact to the environment, it need only perform a less rigorous EA. *See id.* § 1508.13; *see also id.* § 1508.9 (describing EAs).

¹⁷⁶ First, the court determined that new information on spotted owl habitat at the site did not trigger the need for an EIS. *Headwaters, Inc.*, 914 F.2d at 1177–78. Next, river sedimentation caused by the timber harvest at the site did not trigger the need for a site-specific EIS. *Id.* at 1178. Third, timber harvesting's effects on fire hazards did not trigger the need to perform a site-specific EIS. *Id.* at 1179. Fourth, new information regarding the site did not make the EA outdated. *Id.* Fifth, the BLM had considered a sufficient range of alternatives to the logging proposal. *Id.* at 1180–81. NEPA requires a federal agency to provide a “detailed statement . . . on . . . alternatives to the proposed action . . . [and to] study, develop, and describe appropriate alternatives.” 42 U.S.C. § 4332(2)(C), (E). Finally, the court held that the

The second main issue in the case was whether the multiple-use management mandate in FLMPA applied to the O&C lands. Relying on dicta in prior cases, the district court ruled that the O&C lands were dominant-use lands, and therefore FLPMA's mandate did not apply.¹⁷⁷ Headwaters argued on appeal that the OCLA's directive to manage the O&C lands for "permanent forest production" included both timber production and non-timber values like wildlife conservation.¹⁷⁸ The Ninth Circuit rejected this argument on the assumption that if "forest production" included non-timber habitat values, the sustained timber yield command in the OCLA would not be fulfilled.¹⁷⁹ Consequently, the court equated "forest production" with "timber production" and held that other non-timber values were not on par with timber production.¹⁸⁰ Further, in analyzing the OCLA's legislative history, the Ninth Circuit found "no indication that Congress intended 'forest' to mean anything beyond the aggregation of timber resources."¹⁸¹ The court, however, identified no evidence that "forest" actually meant "timber."¹⁸² Moreover, this interpretation conflicted with the plain text of the OCLA, which lists five co-equal values to be managed for sustained yield.¹⁸³ Finally, the court did not address the context in which the

site-specific EA adequately considered cumulative impacts from the construction of logging roads. *Headwaters, Inc.*, 914 F.2d at 1181. "Cumulative impacts" are the collective impacts of all "past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. The U.S. Fish and Wildlife Service added the northern spotted owl to the Endangered Species List on June 26, 1990. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114, 26,189 (June 26, 1990).

¹⁷⁷ See *Headwaters, Inc.*, 19 Env'tl. L. Rep. (Env'tl. Law Inst.) at 21,164 (citing *O'Neal*, 814 F.2d at 1287) ("The weight of authority on the issue suggests that [the O&C] lands are to be managed with timber production as the dominant use . . .").

¹⁷⁸ *Headwaters, Inc.*, 914 F.2d at 1183 (emphasis added) (relying on language in 43 U.S.C. § 1181(a) (2006)).

¹⁷⁹ *Id.*; see 43 U.S.C. § 1181a (requiring that "timber . . . shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield").

¹⁸⁰ *Headwaters, Inc.*, 914 F.2d at 1184 ("Congress intended to use 'forest production' and 'timber production' synonymously. Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old-growth forest is a goal on a par with timber production, or indeed that it is a goal of the O & C Act at all. The BLM did not err in construing the O & C Act as establishing timber production as the dominant use.").

¹⁸¹ *Id.* at 1183 (concluding that the purpose of the OCLA was to provide a stable funding source for the counties and to prevent timber clearcut harvesting without replanting).

¹⁸² See Blumm & Lovorn, *supra* note 159, at 370.

¹⁸³ Under OCLA, all O&C timberlands "shall be managed [by the GLO] . . . for permanent forest production, [in conformance with the principle of] sustained yield for the purpose of providing [1] a permanent source of timber supply, [2] protecting watersheds, [3] regulating stream flow, and [4] contributing to the economic stability of local communities and industries, and [5] providing recreational facilities." 43 U.S.C. § 1181a; see Scott & Brown, *supra* note 47, at 299–300.

OCLA arose.¹⁸⁴ Although the BLM prevailed in *Headwaters*, subsequent cases would soon greatly curtail the agency's power to manage the O&C lands so one-dimensionally.

B. Portland Audubon Society v. Lujan and Seattle Audubon Society v. Lyons: *The End of Unfettered BLM Management Discretion on the O&C Lands*

In 1987, Portland Audubon Society and other groups mounted another challenge to the BLM's timber management program on the O&C lands, alleging that the agency was in violation of several statutes including NEPA and the OCLA.¹⁸⁵ Congressional appropriations riders with provisions that temporarily exempted timber harvests in the Northwest from judicial review delayed the litigation.¹⁸⁶ Although the district court agreed that the BLM violated NEPA in 1989 by refusing to supplement the previous EISs in light of the newly discovered information on spotted owls, it ruled that the 1987 and 1988 appropriation riders precluded any corrective action.¹⁸⁷

However, in 1991, a federal court in Washington state enjoined logging in all suitable spotted owl habitats on U.S. Forest Service (USFS) lands.¹⁸⁸ Once the congressional riders expired in 1992, the Oregon district court held that the BLM had also violated NEPA by not preparing a supplemental EIS (SEIS) in light of new information regarding spotted owl habitats.¹⁸⁹ In so ruling, the court rejected the BLM's argument that it could not comply with NEPA because doing so would be inconsistent with the OCLA's provision requiring the agency

¹⁸⁴ See Scott & Brown, *supra* note 47, at 301 (noting that Congress enacted the 1937 OCLA while the nation was still reeling from the Dust Bowl, and fearful of a timber drought).

¹⁸⁵ Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1492 (D. Or. 1992), *aff'd sub nom.* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

¹⁸⁶ Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989) ("Congress hereby determines . . . that management of [the O&C lands] . . . is adequate . . ."); Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 100-446, § 314, 102 Stat. 1774, 1825-26 (1988). Although the Ninth Circuit Court of Appeals initially held that these riders were unconstitutional, the Supreme Court reversed and upheld the riders. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1317 (1990), *rev'd*, 503 U.S. 429 (1992). See generally Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 WASH. U. J. URB. & CONTEMP. L. 35 (1993).

¹⁸⁷ Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1485, 1488-89 (D. Or.), *aff'd*, 884 F.2d 1233 (9th Cir. 1989).

¹⁸⁸ Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991) (enjoining violations of the National Forest Management Act, 16 U.S.C. §§ 1600-1671 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974))).

¹⁸⁹ *Portland Audubon Soc'y*, 795 F. Supp. at 1497, 1510-11.

to annually sell at least five hundred million board feet (MMBF) of timber.¹⁹⁰ The district court also decided that nothing in the OCLA authorized the BLM to exempt the O&C lands from NEPA.¹⁹¹ The court therefore enjoined the BLM from logging in “suitable” spotted owl habitats, or making timber sales that “may affect” the spotted owl.¹⁹²

The BLM initially obtained a limited “God Squad” exemption from section 7 of the ESA for thirteen of forty-four timber sales in Oregon one month before the district court issued its holding.¹⁹³ The Clinton Administration, however, ultimately withdrew the exemption request after environmentalists convinced a court that the George H.W. Bush Administration might have exerted undue influence on the God Squad.¹⁹⁴ Shortly after the Clinton Administration withdrew the God Squad exemption request, the Ninth Circuit affirmed the district court decision in *Portland Audubon Society*, rejecting the BLM’s argument that *Headwaters* removed any obligation the agency had to supplement EISs.¹⁹⁵ The Ninth Circuit distinguished *Headwaters*—in which the court held that a timber sale did not need a site-specific EIS because the site had already been examined in a programmatic EIS—from a situation

¹⁹⁰ *Id.* at 1505–07 (“There is not an irreconcilable conflict in the attempt of the BLM to comply with both NEPA and the [OCLA].”).

¹⁹¹ *Id.* at 1506. The court concluded that in setting annual timber harvest levels under section 1181a of the O&C Act, “the BLM must comply with all applicable laws, including NEPA.” *Id.*

¹⁹² *Id.* at 1509–10. The injunction was to remain in effect until the BLM submitted a SEIS examining how logging would affect the spotted owls. *Id.* at 1510–11.

¹⁹³ See John Lowe Weston, *The Endangered Species Committee and the Northern Spotted Owl: Did the “God Squad” Play God?*, 7 ADMIN. L.J. AM. U. 779, 808 (1993). The Endangered Species Committee, or “God Squad,” is an executive-level committee authorized to grant exemptions for federal agency actions that would otherwise violate the ESA. 16 U.S.C. § 1536(e)–(n) (2006).

¹⁹⁴ Immediately before the district court issued its decision, the BLM formed a committee to address alternative solutions to the spotted owl issue. See Weston, *supra* note 193, at 805–06. This committee proposed a draft alternative plan that would have allowed the agency to offer timber sales on forty-four tracts of BLM forestland in Oregon protected by the judicial injunctions. See *id.* at 805–08. The BLM apparently knew this new plan would not satisfy the ESA, and so it petitioned for an exemption from section 7. *Id.* at 806–08. The God Squad ultimately exempted thirteen sales from the ESA in 1992. Decision, 57 Fed. Reg. 23,405, 23,405 (June 3, 1992). Shortly thereafter, however, the Ninth Circuit held that the George H.W. Bush Administration may have improperly influenced the God Squad through ex parte communications, and remanded the original exemption decision to the God Squad. *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1538, 1550 (9th Cir. 1993). The newly elected Clinton Administration then decided to withdraw the exemption request altogether. John W. Steiger, *The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs*, 21 ECOLOGY L.Q. 243, 259 n.83 (1994).

¹⁹⁵ See *Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993).

in which the BLM failed to supplement the programmatic EIS governing the region's timber management plans.¹⁹⁶ Thus, the BLM could no longer claim that the OCLA exempted it from complying with NEPA or other environmental statutes like the ESA.¹⁹⁷

A year later, in *Seattle Audubon Society v. Lyons*,¹⁹⁸ a federal judge in Washington upheld the 1994 Northwest Forest Plan (NWFP), expanding on *Portland Audubon Society* and other pertinent cases.¹⁹⁹ The district court held that the ESA requires all agencies, including the BLM, to ensure that all of their activities are not likely to "jeopardize" ESA-listed species or cause the destruction or modification of their critical habitat.²⁰⁰ The court also explicitly recognized that the BLM must "fulfill conservation duties imposed by other statutes," such as NEPA and the ESA, in managing the O&C lands.²⁰¹ In contrast to *Headwaters*, the district court also concluded that the OCLA required the BLM to manage the O&C lands for all of the values listed in the statute, not just timber production.²⁰²

The 1995 Timber Salvage Rider temporarily authorized a number of federal timber sales in contravention of these decisions.²⁰³ Once the rider expired in late 1996, however, these important rulings took full

¹⁹⁶ *Id.* ("Here, however, plaintiffs are challenging the Secretary's decision not to supplement the EISs underlying the timber management plans that control myriad land use decisions with new information relating to the possible extinction of a species through the systematic implementation of the BLM's timber-sale program throughout its lands.")

¹⁹⁷ Blumm & Lovvorn, *supra* note 159, at 373-74.

¹⁹⁸ See 871 F. Supp. 1291, 1299-1300 (W.D. Wash. 1994), *aff'd sub nom.* *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

¹⁹⁹ See, e.g., *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473, 1483-84 (W.D. Wash. 1992), *aff'd sub nom.* *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993) (holding that the USFS' SEIS on their guidelines for the management of spotted owl habitat violated NEPA); *Lane Cnty. Audubon Soc'y v. Jamison*, No. 91-6123-JO, 1991 WL 354885 (D. Or. Sept. 11, 1991), *aff'd in part and remanded in part*, 958 F.2d 290 (9th Cir. 1992) (holding the BLM violated section 7 of the ESA by failing to consult with the FWS regarding its logging strategy); see also *infra* notes 208-284 and accompanying text (discussing the Northwest Forest Plan).

²⁰⁰ *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. at 1314 (citing 16 U.S.C. § 1536(a)(2) (2006)).

²⁰¹ *Id.* (citing *Portland Audubon Soc'y*, 795 F. Supp. at 1500-02, 1505-07). Presumably, this holding extends to other federal environmental statutes. See Blumm & Lovvorn, *supra* note 159, at 376-77.

²⁰² See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. at 1314 (citing 43 U.S.C. § 1181a (2006)) ("Management under [the OCLA] must look not only to annual timber production but also to protecting watersheds, contributing to economic stability, and providing recreational facilities.")

²⁰³ See *infra* notes 265-284 and accompanying text (discussing timber salvage rider in detail); see also ROSS W. GORTE, CONG. RESEARCH SERV., 96-569 ENR, THE SALVAGE TIMBER SALE RIDER: OVERVIEW AND POLICY ISSUES (1996), available at <http://www.cniec.org/nle/crsreports/forests/for-17.cfm>.

effect.²⁰⁴ Recent case law has affirmed the notion that the BLM's NEPA and ESA obligations are not subservient to the OCLA, even if greater timber sales would yield economic benefits in conformance with the OCLA.²⁰⁵ As a result of these cases, the NWFP essentially superseded the OCLA as the primary management directive for the O&C lands.²⁰⁶

III. THE NORTHWEST FOREST PLAN AND THE BACKLASH AGAINST THE PLAN

In 1993, responding to the timber-harvesting injunctions issued in *Portland Audubon Society v. Lujan* and *Seattle Audubon Society v. Lyons*, high-level members of the newly elected Clinton administration—including President Clinton, Vice President Al Gore, and three cabinet-level federal secretaries—convened a nationally-televised Northwest Forest Conference to resolve the spotted owl controversy.²⁰⁷ Noticeably absent from the conference were the chief of the U.S. Forest Service (USFS), the director of the Bureau of Land Management (BLM), and Oregon's congressional delegation.²⁰⁸ As the conference continued, its scope broadened beyond resolution of the spotted owl controversy to include salmon protection issues and forest management reform.²⁰⁹ At the close of the conference, President Clinton stated that any management changes necessary to address the economic needs of timber communities and protect long-term forest health would be based on sound science, provide sustainable and predictable timber harvests,

²⁰⁴ The powers created by the rider expired on December 31, 1996. Emergency Supplemental Appropriations for Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occured at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19 § 2001(j), 109 Stat. 194, 246.

²⁰⁵ See, e.g., *Klamath Siskiyou Wildlands Ctr. v. Boody*, No. 03-3124-CO, 2004 WL 1146538, at *8 (D. Or. May 18, 2004) (finding that the “public’s interest in ensuring that resources are not irretrievably committed without observance of required [NEPA] procedures” outweighs the economic benefits from the sale of O&C land timber).

²⁰⁶ Blumm & Lovorn, *supra* note 159, at 377.

²⁰⁷ ROSS W. GORTE, CONG. RESEARCH SERV., 93-664 ENR, THE CLINTON ADMINISTRATION'S FOREST PLAN FOR THE PACIFIC NORTHWEST (1993), available at <http://cnie.org/NLE/CRSreports/forests/for-3.cfm>; YAFFEE, *supra* note 26; Michael C. Blumm, *The Amphibious Salmon: The Evolution of Ecosystem Management in the Columbia River Basin*, 24 *ECOLOGICAL L.Q.* 653, 669 (1997) [hereinafter Blumm, *The Amphibious Salmon*].

²⁰⁸ See YAFFEE, *supra* note 26; Jack Ward Thomas et al., *The Northwest Forest Plan: Origins, Components, Implementation Experience, and Suggestions for Change*, 20 *CONSERVATION BIOLOGY* 277, 278 (2006), available at <http://www.courses.washington.edu/esrm315/pdfs/NWFP.pdf>.

²⁰⁹ YAFFEE, *supra* note 26, at 142–43.

and end government gridlock.²¹⁰ The President also created three inter-agency working groups, tasking them with crafting an “ecosystem management” solution for the Northwest forests.²¹¹

The most notable of these groups was Forest Ecosystem Management Assessment Team (FEMAT).²¹² Although originally meant to be comprised of fifteen people, FEMAT quickly ballooned to a coalition of over one hundred scientists.²¹³ FEMAT’s goal was to develop a set of management options that would comply with federal environmental laws, promote biological diversity, and produce a sufficient amount of timber.²¹⁴ Specifically, FEMAT aimed to maintain and restore habitat conditions for the northern spotted owl, the marbled murrelet, and salmon stocks by establishing a “connected, interactive old-growth forest ecosystem.”²¹⁵ In short, FEMAT’s mission was to view the Northwest forest system through a landscape ecosystem management lens as a complex, fragile, interrelated, and dynamic system that would be managed in its entirety to protect the forests and its species.²¹⁶

After months of work, FEMAT produced ten options for managing federal forestland in western Washington, western Oregon and northern California.²¹⁷ In developing these options, FEMAT studied their effects on over one thousand species of plants and animals.²¹⁸ At the high end, Option 7 predicted 1.8 billion board feet of annual timber harvest, while at the low end, Option 1 anticipated an annual harvest of only 0.1 billion board feet.²¹⁹ Ultimately, FEMAT recommended Option 9, which allowed for adaptive management and thinning of young

²¹⁰ FOREST ECOSYSTEM MGMT. ASSESSMENT TEAM, FOREST ECOSYSTEM MANAGEMENT: AN ECOLOGICAL, ECONOMIC, AND SOCIAL ASSESSMENT 3–4 (1993), available at http://www.blm.gov/or/plans/nwfpnepa/FEMAT-1993/1993_%20FEMAT-ExecSum.pdf.

²¹¹ See *id.*; John Mumma & Paul Grigsby, *A Vision for Yellowstone’s Forests*, 15 PUB. LAND L. REV. 11, 37 (1994).

²¹² See *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291, 1303 (W.D. Wash. 1994), *aff’d sub nom. Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996); Cameron B. Alston, Note, Oregon Natural Resources Council Action v. United States Forest Service, 27 ECOLOGY L.Q. 727, 732–33 (2000).

²¹³ KATHIE DURBIN, TREE HUGGERS: VICTORY, DEFEAT & RENEWAL IN THE NORTHWEST ANCIENT FOREST CAMPAIGN 202 (1996).

²¹⁴ FOREST ECOSYSTEM MGMT. ASSESSMENT TEAM, *supra* note 210, at 4–5.

²¹⁵ See Thomas et al., *supra* note 208, at 280–81.

²¹⁶ See Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 299, 302 (1994); Thomas et al., *supra* note 208, at 278; Alston, *supra* note 212, at 732.

²¹⁷ *Nw. Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175, 1182 (W.D. Wash. 2005); 1994 ROD, *supra* note 21, at 17–24; Thomas et al., *supra* note 208, at 281.

²¹⁸ See Thomas et al., *supra* note 208, at 281.

²¹⁹ 1994 ROD, *supra* note 21, at fig. ROD-1.

monocultural stands in old-growth areas when those activities would enhance old-growth conditions.²²⁰ Option 9 also enlarged buffers for intermittent streams and created reserves around existing owl habitat in so-called “matrix” areas that allowed timber harvests.²²¹

Option 9 predicted that up to 1.1 billion board feet of timber could be harvested; nearly seventy-five percent less than the annual harvest between 1980 and 1989.²²² In April 1994, after the Department of the Interior (“Interior”) and the U.S. Department of Agriculture completed a supplemental environmental impact statement (SEIS), the USFS and BLM formally endorsed Option 9 as the best alternative for meeting President Clinton’s goals.²²³ The selection formed a regional forest management plan and amended the land planning documents for two USFS regions, nineteen national forests, and seven BLM districts within the range of the northern spotted owl.²²⁴ Covering 24.5 million acres of federal forestland in the Northwest,²²⁵ the Northwest Forest Plan (NWFP) was “the first systematic, broad-scale attempt by any administration to apply an ecosystem approach to resolve a natural resource management issue.”²²⁶ Importantly, under the NWFP, the primary goal for managing federal forests in the Northwest shifted from production of a sustained yield of timber to conserving biodiversity and species.²²⁷

A. *The NWFP: Land Classifications and Protective Measures*

The 1994 Record of Decision (ROD) creating the NWFP consisted of extensive standards, guidelines, and land allocations meant to

²²⁰ *Id.* at 28.

²²¹ See Thomas et al., *supra* note 208, at 281. BLM defined “matrix” areas as those federal lands within the range of the Northern Spotted Owl but outside the six, specifically-defined areas in the Record of Decision. 1994 ROD, *supra* note 21, at 7.

²²² 1994 ROD, *supra* note 21, at fig.ROD-1.

²²³ *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1303–04; see 1994 ROD, *supra* note 21, at 26 (“[W]e adopt the alternative that will both maintain the late-successional and old-growth forest ecosystem and provide a predictable and sustainable supply of timber, recreational opportunities, and other resources at the highest level possible. Alternative 9, as slightly modified herein, best meets these criteria.”).

²²⁴ *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1237 (W.D. Wash. 2009); *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1182; *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1303–04.

²²⁵ *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1182; 1994 ROD, *supra* note 21.

²²⁶ JAMES PIPKIN, THE NORTHWEST FOREST PLAN REVISITED 2 (1998), available at http://www.reo.gov/library/reports/NFP_revisited.htm (emphasis added); see 1994 ROD, *supra* note 21, at 1 (“[The NWFP] represents the first time that two of the largest federal land management agencies, the Bureau of Land Management and the Forest Service, have developed and adopted a common management approach to the lands they administer throughout an entire ecological region.”).

²²⁷ See Thomas et al., *supra* note 208.

achieve President Clinton's multi-faceted management goals.²²⁸ The NWFP created three primary categories of land: reserves, "matrix" lands, and adaptive management areas (AMA).²²⁹ As a threshold matter, the NWFP recognized nearly 8.8 million acres within the management area that Congress and the agencies had already reserved from timber harvests.²³⁰ The NWFP then set aside an additional 7.4 million acres of the area as "late successional reserves" (LSR) to protect and enhance old-growth forest conditions.²³¹ Within LSRs, forests more than 80 years old cannot be clearcut unless doing so will create beneficial old-growth conditions.²³²

The NWFP also established 2.63 million acres of "riparian reserves."²³³ Riparian reserves protect aquatic systems and the species dependent on them, enhance habitat for species transitioning between riparian and upslope areas, improve travel corridors, and enhance the overall connectivity of late-successional forest habitat.²³⁴ Next, the NWFP created four million acres of "matrix" lands where most timber harvest activities would take place.²³⁵ Finally, the NWFP created 1.5 million acres of AMAs where land managers may explore alternative management techniques.²³⁶ Of the total plan area, approximately 77% of the land is in reserves, 16% is in matrix lands, and 6% is in AMAs.²³⁷

In addition to zoning the land into these categories, the NWFP added important mitigation requirements to "increase protection of habitat for species whose habitat assessments were relatively low under

²²⁸ See Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 470-71 (1997).

²²⁹ See 1994 ROD, *supra* note 21, at 2, 6-7; Zellmer, *supra* note 228. For an instructive visual map demarcating these land classifications within the NWFP boundaries, see Thomas et al., *supra* note 208, at 282.

²³⁰ The NWFP recognized 7.3 million acres of national parks and monuments, wilderness areas, wild and scenic rivers, national wildlife refuges, Department of Defense lands, and other lands with congressional designations that prohibited timber harvests within the area of the plan. 1994 ROD, *supra* note 21, at 6. In addition, the NWFP incorporated almost 1.48 million acres of existing administratively-designated recreational and visual areas, back country, and other areas not scheduled for timber harvest. *Id.* at 7.

²³¹ *Id.* at 6, 8.

²³² *Id.* at 8.

²³³ *Id.* at 7.

²³⁴ *Id.*

²³⁵ *Id.* at 6.

²³⁶ 1994 ROD, *supra* note 21 at 6. Only modest amounts of experimentation have occurred on AMAs, and so this category of land will not be discussed in detail. See Thomas et al., *supra* note 208, at 283.

²³⁷ 1994 ROD, *supra* note 21, at 2.

[Option 9 of the FEMAT report].”²³⁸ The first of these measures is known as “Survey & Manage” (S&M). Under S&M, the primary mitigation measures are: “(1) manage known sites of rare organisms; (2) survey [sites on the ground] for the presence of rare organisms prior to conducting ground-disturbing activities; (3) conduct surveys to identify locations and habitats of rare species; and (4) conduct landscape-level regional surveys for rare species.”²³⁹ As originally promulgated, the S&M measures applied to over four hundred species of rare amphibians, bryophytes, lichens, mollusks, vascular plants, fungi, and arthropods that could be studied only on-the-ground.²⁴⁰ Although the agencies updated and streamlined the S&M requirements, in 2001, the revisions retained these key components.²⁴¹ The requirements to survey and manage indicator species go well beyond protections under the Endangered Species Act (ESA).²⁴² Largely due to the S&M requirements, the amount of timber available for commercial harvest plummeted from 4.5 billion board feet per year in the late 1980s to approximately 0.96 billion board feet per year in the 2000s.²⁴³

The second major mitigation measure in the NWFP is the Aquatic Conservation Strategy (ACS). The ACS calls for the restoration of “ecological health of watersheds and aquatic ecosystems contained within them on all public lands,” and provides nine objectives for restoring and maintaining functioning aquatic habitats.²⁴⁴ The ACS has four

²³⁸ U.S. FOREST SERV. & BUREAU OF LAND MGMT., VOL. II, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL, at B-143 (1994), [hereinafter 1994 FSEIS], available at <http://www.blm.gov/or/plans/nwfpnepa/FSEIS-1994/FSEIS-1994-II.pdf>.

²³⁹ 1994 ROD, *supra* note 21, at 11; *see also* 1994 FSEIS, *supra* note 238, at B-143 to B-144 (describing standards in detail).

²⁴⁰ *See* 1994 FSEIS, *supra* note 238, at B-150 to B-162 (listing species).

²⁴¹ U.S. FOREST SERV. & BUREAU OF LAND MGMT., RECORD OF DECISION AND STANDARDS AND GUIDELINES FOR AMENDMENTS TO THE SURVEY AND MANAGE, PROTECTION BUFFER, AND OTHER MITIGATION MEASURES STANDARDS AND GUIDELINES 6–7 (2001), [hereinafter 2001 S&M ROD], available at <http://www.reo.gov/s-m2006/2001/RODjan01.pdf>.

²⁴² *See* Susan Jane M. Brown, Note, “The Forest Must Come First:” Gifford Pinchot’s Conservation Ethic and the Gifford Pinchot National Forest—the Ideal and the Reality, 11 FORDHAM ENVTL. L. REV. 137, 193–96 (1999). *Compare* 1994 FSEIS, *supra* note 238, at B-150 to B-162, with 50 C.F.R. §§ 17.11–12 (2011) (ESA-listed endangered and threatened animals and plants).

²⁴³ *See Conservation Nw.*, 674 F. Supp. 2d at 1238–39 (noting the effects of the NWFP on Northwest timber harvests in a case challenging the legality of changes to the S&M requirements).

²⁴⁴ 1994 FSEIS, *supra* note 238, at B-81. In managing land within the NWFP boundaries, decision-makers are to maintain and restore (1) watershed features on which aquatic species depend, (2) habitat “connectivity within and between watersheds,” (3) “physical

main components: riparian reserves, designated “key watersheds,” a watershed analysis, and a watershed restoration program.²⁴⁵ First, in designated riparian reserves, most timber harvesting, road building, grazing, mining, and off-road vehicle usage is restricted within one hundred to three hundred feet of a riparian area, which includes the body of water itself and may include adjacent vegetation, the one hundred year floodplain, and landslide prone areas.²⁴⁶

Second, under the ACS, designated key watersheds aim to provide high quality refuge habitat for at-risk aquatic species.²⁴⁷ Key watersheds are either “Tier 1”—if they directly provide habitat for at-risk species—or “Tier 2”—if they do not provide habitat but do enhance water quality to the benefit of those species.²⁴⁸ In key watersheds, no new roads may be built in “inventoried roadless areas,” and no net increase of roads may occur in roaded areas.²⁴⁹

Third, under the ACS, a watershed analysis must precede all non-categorically excluded management activities within key watersheds, inventoried roadless areas in non-key watersheds, and riparian re-

integrity of the aquatic system,” (4) water quality necessary for “healthy riparian, aquatic, and wetland ecosystems,” (5) historical sediment regimes under which species evolved, (6) “in-stream flows” necessary for “riparian, aquatic, and wetland habitats,” (7) “timing, variability, and duration of floodplain inundation and water table elevation in meadows and wetlands,” (8) “species composition and structural diversity of plant communities in riparian areas and wetlands,” and (9) “habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.” *Id.* at B-82 to B-83.

²⁴⁵ 1994 ROD, *supra* note 21, at 9–10; *see also* Pac. Coast Fed’n of Fishermen’s Ass’n v. Nat’l Marine Fisheries Serv., 265 F.3d 1028, 1032 (9th Cir. 2001).

²⁴⁶ *See* 1994 ROD, *supra* note 21, at 9; 1994 FSEIS, *supra* note 238, at B-16 to B-17, B-85 tbl.B6-1.

²⁴⁷ 1994 FSEIS, *supra* note 238, at B-91.

²⁴⁸ *Id.* The NWFP designated 8.1 million acres as Tier 1 watersheds, one million acres as Tier 2 watersheds, and 15.3 million acres as non-key watersheds. 1994 ROD, *supra* note 21, at 10.

²⁴⁹ 1994 FSEIS, *supra* note 238, at B-92; *see* Blumm, *The Amphibious Salmon*, *supra* note 207, at 670 (inventoried roadless areas are areas determined by the USFS to not have roads, but that have not received congressional wilderness area designation); *see* Christopher Cumings, Comment, *Judicial Iron Triangles: The Roadless Rule to Nowhere—and What Can Be Done to Free the Forest Service’s Rulemaking Process*, 61 OKLA. L. REV. 801, 805–06 (2008) (describing how these “roadless” areas came to be inventoried). These areas are also protected by the USFS’s “roadless rule.” *See* Wyoming v. U.S. Dep’t of Agric., 661 F.3d 1209, 1272 (10th Cir. 2011) (determining that the Wyoming district court’s nationwide injunction of the roadless rule was an abuse of judicial discretion); California v. U.S. Dep’t of Agric., 575 F.3d 999, 1020 (9th Cir. 2009) (reinstating the original “roadless rule,” which had been repealed and replaced by the Bush Administration).

serves.²⁵⁰ A watershed analysis is a “systematic procedure” meant to “characterize the aquatic, riparian, and terrestrial features within a watershed.”²⁵¹ The information gained from this analysis forms the basis of an assessment of current watershed conditions; it can also refine appropriate riparian reserve boundaries, plan for likely future conditions and restoration needs, and develop monitoring evaluation programs for the watershed.²⁵² Importantly, a watershed analysis is not a decision document, but instead is scientifically-based guidance meant to bridge site-specific plans and broad regional National Environmental Policy Act (NEPA) analyses.²⁵³ Consequently, watershed analysis is a critical part of implementing the ACS and NWFP in general.²⁵⁴

B. *Backlash Against the NWFP: Challenges in the Courts and a Congressional Circumvention of the Plan*

Almost immediately after the NWFP became effective, it came under attack. First, the implementing agencies, unaccustomed to having their discretion curtailed, pushed back against the plan.²⁵⁵ Moreover, a timber industry group challenged the FEMAT working group for allegedly violating the Federal Advisory Committee Act (FACA).²⁵⁶ Although a district court agreed that FEMAT violated FACA, it refused to enjoin the government from using and relying on the FEMAT report.²⁵⁷ The plan itself was challenged by both environmentalists—who argued that the plan did not adequately protect old-growth dependant species—and the timber industry—which argued that it was too restrictive on timber harvesting.²⁵⁸ In *Seattle Audubon Society v. Lyons*, these challenges were consolidated in the Western District of Washington.²⁵⁹

²⁵⁰ 1994 ROD, *supra* note 21, at 10; 1994 FSEIS, *supra* note 238, at B-93. Some actions that require ACSs are categorically excluded from NEPA compliance requirements. *See* 40 C.F.R. § 1508.4 (2012) (defining categorical exclusions).

²⁵¹ 1994 ROD, *supra* note 21, at 10.

²⁵² 1994 FSEIS, *supra* note 238, at B-94 to B-95.

²⁵³ *Id.* at B-93; *see* Blumm, *The Amphibious Salmon*, *supra* note 207, at 670.

²⁵⁴ *See* 1994 FSEIS, *supra* note 238, at B-93.

²⁵⁵ *See* Lauren M. Rule, Note, *Enforcing Ecosystem Management Under the Northwest Forest Plan: The Judicial Role*, 12 FORDHAM ENVTL. L. REV. 211, 215–16 (2000) (noting that the implementing agencies resisted strict adherence to the NWFP in its early years, instead trying to change the plan’s standards to increase their discretion).

²⁵⁶ *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1010 (D.D.C. 1994) (citing 5 U.S.C. App. 2 (1994)).

²⁵⁷ *Id.* at 1015; *see News from the Circuits: FACA Violation Justifies an Injunction Against Any Publication or Use of Report*, ADMIN. & REG. L. NEWS, Fall 1994, at 6.

²⁵⁸ *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1300, 1312. In addition to the actions consolidated into the Western District of Washington, industry groups also challenged the

In 1994, the court upheld the challenged NWFP, noting that the late-successional and riparian reserves were important aspects of the plan.²⁶⁰ The court concluded that “any more logging sales than the plan contemplates would probably violate the laws.”²⁶¹ The court also stated that “[w]hether the plan and its implementation will remain legal will depend on future events and conditions.”²⁶² In recognizing a “massive” effort of the USFS and BLM “to meet the legal and scientific needs of forest management,” the court determined that the NWFP provided just enough environmental protection to comply with federal statutes such as the ESA and NEPA.²⁶³ This decision proved dispositive in eliminating the remaining legal challenges to the NWFP.²⁶⁴

Congress, however, quickly went on the offensive, attaching a timber salvage rider (“1995 rider”)²⁶⁵ to an emergency appropriations act that also provided relief for the victims of the 1995 Oklahoma City bombing.²⁶⁶ The 1995 rider included three provisions aimed at increas-

NWFP in a number of other courts around the country. *See, e.g.*, *Nw. Forest Res. Council v. Dombeck*, No. 94-1031-TPJ (D.D.C.) (complaint filed May 11, 1994) (challenging the NWFP itself); *Nw. Forest Res. Council v. Thomas*, No. 94-1032-TPJ (D.D.C.) (complaint filed May 11, 1994) (challenging the application of the NWFP to USFS lands in Oregon and Washington); *Association of O & C Counties v. Babbitt*, Civ. No. 94-1044 (D.D.C. June 30, 1994) (order).

²⁵⁹ *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1300. First, the District Court for the District of Columbia transferred *Northwest Forest Resources Council v. Thomas*, to the Western District of Washington and stayed *Northwest Forest Resources Council v. Dombeck*. *Nw. Forest Res. Council v. Dombeck*, 107 F.3d 897, 899–900 (D.C. Cir. 1997). The plaintiffs voluntarily dismissed the *Thomas* case without prejudice; however, defendants cross-claimed and the district court ruled on motions for summary judgment. *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1300.

²⁶⁰ *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1300, 1314.

²⁶¹ *Id.* at 1300, 1314.

²⁶² *Id.* at 1300.

²⁶³ *Id.* at 1300, 1303.

²⁶⁴ The court’s validation of the NWFP in *Seattle Audubon Society v. Lyons* ultimately resulted in the dismissal of the remaining case challenging the NWFP—*Northwest Forest Resources Council v. Dombeck*. In *Seattle Audubon Society v. Lyons*, the court issued a declaratory judgment against the Northwest Forest Resource Council (NFRC) on nine of the original eleven claims, declaring the NWFP valid as against those claims. *See* 871 F. Supp. at 1325. The U.S. District Court for the District of Columbia barred NFRC’s remaining claims in *Dombeck* based on stare decisis. *Nw. Forest Res. Council v. Dombeck*, 107 F.3d at 900 (explaining the district court’s decision). Although the D.C. Circuit concluded that the remaining claims in *Dombeck* were not actually barred by stare decisis, on remand the district court determined that NFRC’s remaining claims were barred by res judicata and the “doctrine of virtual representations.” *Am. Forest Res. Council v. Shea*, 172 F. Supp. 2d 24, 27–28 (D.D.C. 2001).

²⁶⁵ Emergency Supplemental Appropriations for Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, §§ 2001–2002, 109 Stat. 194, 240–47.

²⁶⁶ Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 643 (2006).

ing salvage logging in the Northwest: (1) calling the federal land managers to rely on preexisting environmental review documents; (2) restricting the scope and timing of judicial review; and (3) giving timber contracts priority.²⁶⁷ In addition to allowing for salvage harvest, the rider directed the USFS and BLM to expedite “Option 9” sales under the NWFP “notwithstanding any other law” and did not include any documentation or review requirements.²⁶⁸ The timber industry successfully argued that the rider precluded all judicial review of Option 9 sales.²⁶⁹ The 1995 rider also permitted completion of all timber harvest contracts originally offered—but not completed—or unawarded under section 318 of an appropriations rider from 1989 (“1989 rider”).²⁷⁰

In addition, the timber industry sought to compel the completion of all timber sales offered prior to the 1995 rider’s enactment on all public lands within the geographic scope of section 318 of the 1989 rider.²⁷¹ The District Court for the District of Oregon and the Ninth Circuit agreed with the timber industry’s interpretation of the 1995

²⁶⁷ § 2001(b)–(f), 109 Stat. at 241–45.

²⁶⁸ *Id.* § 2001(d), 109 Stat. at 244. “Option 9” sales were those sales originating in the adoption of the NWFP (which was the ninth harvest mix option proposed by FEMAT). *See* Goldman & Boyles, *supra* note 28, at 1050, 1075–76; *supra* notes 220–224 and accompanying text (describing Option 9). Congress eliminated administrative appeals of these sales and insulated them from court challenges. § 2001(e), (i), 109 Stat. at 244, 245–46.

²⁶⁹ *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 796–97 (9th Cir. 1996) (finding that because the 1995 rider eliminated all possible federal environmental claims, there was no freestanding “arbitrary and capricious” cause of action).

²⁷⁰ § 2001(k), 109 Stat. at 246 (“[T]he Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745).”). Section 318 of Public Law 101-121, an Interior appropriations rider, exempted timber sales in thirteen Oregon and Washington national forests from judicial review and stringent environmental compliance and required the USFS and BLM to meet timber sales quotas in FY 1989 and FY 1990. *See* Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, § 318(a)(1)–(2), Pub. L. No. 101-121, 103 Stat. 701, 745 (1989) (setting harvest quotas); *id.* § 318(b)(6)(A), 103 Stat. at 747 (“Congress hereby determines and directs that management of areas . . . on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements The guidelines [in this rider] shall not be subject to judicial review”); *see also* *Nw. Forest Res. Council v. Glickman*, No. 95-6244 1995 U.S. Dist. LEXIS 13300, at *2–7 (D. Or. Sept. 13, 1995), *aff’d*, 82 F.3d 825, 828 (9th Cir. 1996) (describing interaction of the two laws). Many of these authorized sales, however, were never offered, awarded, or executed due to concerns about their impacts on listed species. *See, e.g.*, *Lone Rock Timber Co. v. U.S. Dep’t of Interior*, 842 F. Supp. 433, 440–41 (D. Or. 1994); *see also* Goldman & Boyles, *supra* note 28, at 1075–76; Zellmer, *supra* note 228, at 469.

²⁷¹ *See* Goldman & Boyles, *supra* note 28, at 1070; Zellmer, *supra* note 228, at 472.

rider's effect on section 318, ordering the USFS and BLM to complete all pending timber sales in western Oregon and Washington.²⁷² Thus, the Ninth Circuit concluded that the 1995 rider resurrected all uncompleted section 318 sales offered between October 1, 1989—the date section 318 went into effect—and July 27, 1995—the date of the 1995 rider.²⁷³ Finally, the 1995 rider directed the agencies to log old-growth forests, even if doing so conflicted with environmental laws—unless listed species were “known to be nesting” in the area.²⁷⁴

As a result of these rulings, the USFS and BLM completed a number of hastily planned sales.²⁷⁵ Although it is unclear how much timber the agencies actually sold under the 1995 rider, the Ninth Circuit's decisions in *Northwest Forest Resource Council v. Glickman* authorized the USFS and BLM to complete sixty-two additional section 318 sales, totaling 230 million board feet (MMBF) of timber.²⁷⁶ Moreover, the Ninth Circuit's unwillingness to review the legality of Option 9 sales and the old-growth timber sale authorization in section 2001(k) of the 1995 rider also led to more sales.²⁷⁷ Although the Clinton Administration tried to stall some section 2001(k) sales with a creative interpretation of the “known to be nesting” language,²⁷⁸ the 1995 rider ultimately enabled a number of section 318, Option 9, and section 2001(k) sales, including some that harvested healthy trees under the “salvage” provi-

²⁷² See *Nw. Forest Res. Council v. Glickman*, 82 F.3d at 829, 835–36; see also *Nw. Forest Res. Council v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1165 (9th Cir. 1996) (noting that the 1995 rider effectively resurrected previously cancelled timber sales).

²⁷³ *Nw. Forest Res. Council v. Glickman*, 82 F.3d at 831, 839; see § 318, 103 Stat. at 745.

²⁷⁴ Emergency Supplemental Appropriations for Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, § 2001(k)(1)–(2), 109 Stat. 240, 246. This provision to log old-growth forests included one exception: no sales could go forward “if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.” *Id.* § 2001(k)(2), 109 Stat. at 246.

²⁷⁵ See Goldman & Boyles, *supra* note 28, at 1056–59; Zellmer, *supra* note 228, at 472–73.

²⁷⁶ Zellmer, *supra* note 228, at 472–73; see *Nw. Forest Res. Council v. Glickman*, 97 F.3d 1161, 1165 (9th Cir. 1996).

²⁷⁷ See *Or. Natural Res. Council v. Thomas*, 92 F.3d at 796; Goldman & Boyles, *supra* note 28, at 1079.

²⁷⁸ § 2001(k)(2), 109 Stat. at 246. Although the Clinton Administration ultimately did not prevail on the issue, it argued that if a listed bird had flown through a forest unit, that was sufficient proof that it was occupying the stand. *Nw. Forest Res. Council v. Glickman*, No. 95-6244-HO, at *3–7, *21 (D. Or. Jan. 19, 1996); Disposal of National Forest System Timber, 61 Fed. Reg. 14,618, 14,619–20 (Apr. 3, 1996) (noting the court rejected the government's interpretation of the § 2001(k)(2) “known to be nesting” requirement); see also Slade Gordon & Julie Kays, *Legislative History of the Timber and Salvage Amendments Enacted in the 104th Congress: A Small Victory for Timber Communities in the Pacific Northwest*, 26 ENVTL. L. 641, 645 (1996).

sion.²⁷⁹ Many of these sales were also below-cost and made in defiance of existing forest plans.²⁸⁰ Ultimately, these sales resulted in significant on-the-ground effects, including increased landslides, unsafe city drinking water supplies, degraded fisheries, and new ESA species listings.²⁸¹

However, once the 1995 rider expired, environmentalists again began to use the NWFP to challenge timber sales in the late 1990s. For example, in *Oregon Natural Resources Council Action v. U.S. Forest Service*, the District Court for the Western District of Washington enjoined one hundred MMBF of timber sales because the agencies failed to meet their S&M requirements prior to undertaking ground-disturbing actions.²⁸² In so ruling, the court emphasized the importance of adhering to the S&M requirements.²⁸³ Thus, by the end of the 1990s and the close of the Clinton Administration, the force and effect of the NWFP was becoming clear. The plan had passed muster in the courts and survived the 1995 rider. The courts even recognized the substantive teeth contained in the NWFP's provisions.²⁸⁴ This success, however, quickly drew the attention of the incoming Bush Administration.

IV. THE BUSH ADMINISTRATION'S FAILED ATTEMPTS TO AMEND THE NORTHWEST FOREST PLAN

For the next eight years, the Bush Administration repeatedly tried to weaken the Northwest Forest Plan (NWFP). The administration attempted to eliminate the Survey & Manage ("S&M") requirements²⁸⁵ and to delete and amend key aspects of the Aquatic Conservation Strategy (ACS).²⁸⁶ Ultimately, however, these efforts failed to survive judicial review under the National Environmental Policy Act (NEPA), Adminis-

²⁷⁹ See Goldman & Boyles, *supra* note 28, at 1056. Under the 1995 rider, "salvage" was broadly defined to include trees "imminently susceptible" to fire and insect attack—thus providing the agencies with a great deal of discretion. § 2001(a)(3), 109 Stat. at 241.

²⁸⁰ See Goldman & Boyles, *supra* note 28, at 1058–59.

²⁸¹ See *id.* at 1068, 1087–88.

²⁸² 59 F. Supp. 2d 1085, 1093 (W.D. Wash. 1999); Alston, *supra* note 212, at 728.

²⁸³ *Or. Natural Res. Council Action*, 59 F. Supp. 2d at 1093. The court noted: "[f]ar from being minor or technical violations, widespread exemptions from the survey requirements would undermine the management strategy on which the ROD depends." *Id.* The purpose of the S&M requirements is "to identify and locate species . . . before logging starts." *Id.* Under exemptions, "plants and animals listed in the ROD will face a potentially fatal loss of protection." *Id.*

²⁸⁴ See *id.* (enjoining federal timber sales that failed to perform adequate pre-sale surveys).

²⁸⁵ See *infra* notes 289–312 and accompanying text.

²⁸⁶ See *infra* notes 313–335 and accompanying text.

trative Procedure Act (APA), and Endangered Species Act (ESA).²⁸⁷ Consequently, after a decade of court challenges, the protections offered by the NWFP remain intact, largely because of the strong, persuasive, and scientifically justified positions articulated by the Clinton Administration in the original NWFP documents.²⁸⁸

A. Failed Attempts to Eliminate the S&M Requirement

After a few years of implementing the NWFP, the U.S. Forest Service (USFS) and Bureau of Land Management (BLM) claimed that the S&M requirements were presenting “unanticipated difficulties in land management”²⁸⁹ because the requirements “were not clear, efficient, or practicable.”²⁹⁰ Thus, in 2000, the agencies undertook a full study of the S&M requirements and determined that these difficulties left them “unable to fully meet the original purpose and need of the [NWFP].”²⁹¹ In 2001, the agencies responded by streamlining the S&M standards, while at the same time maintaining the key tenets of the S&M requirements from the original 1994 Record of Decision (ROD) that implemented the NWFP.²⁹² Immediately thereafter, timber and environ-

²⁸⁷ See, e.g., *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1248–49 (W.D. Wash. 2009) (finding a violation of NEPA); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv. (PCFFA III)*, 482 F. Supp. 2d 1248, 1254–55 (W.D. Wash. 2007) (finding violations of NEPA, the APA, and the ESA); *Nw. Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175, 1192–93 (W.D. Wash. 2005) (finding a violation of NEPA).

²⁸⁸ See, e.g., *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1192 (“[T]he FEMAT team’s and the Agencies’ respective analysis in 1994 was thorough.”). The Clinton Administration’s diligence in creating detailed findings has protected other environmental achievements from attack. For example, President Clinton proclaimed Giant Sequoia National Monument using his authority under the Antiquities Act of 1906. Proclamation No. 7295, 3 C.F.R. § 60 (2001). Tulare County challenged the monument as too big. *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002). The court rejected this contention, noting “the complaint fails to identify the improperly designated lands with sufficient particularity to state a claim.” *Id.*; see also Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 507–14 (2003) (describing President Clinton’s aggressive use of the Antiquities Act to create a number of new national monuments).

²⁸⁹ *Conservation Nw.*, 674 F. Supp. 2d at 1239.

²⁹⁰ BUREAU OF LAND MGMT. & U.S. FOREST SERV., I FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT TO REMOVE OR MODIFY THE SURVEY AND MANAGE MITIGATION MEASURE STANDARDS AND GUIDELINES 17 (2004), [hereinafter 2004 FSEIS], available at <http://www.blm.gov/or/plans/nwfpnepa/FSEIS-2004/SM-Vol1.pdf>.

²⁹¹ BUREAU OF LAND MGMT. & U.S. FOREST SERV., I FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR AMENDMENT TO THE SURVEY & MANAGE, PROTECTION BUFFER, AND OTHER MITIGATION MEASURES STANDARDS AND GUIDELINES 9 (2000), available at <http://www.blm.gov/or/plans/nwfpnepa/FSEIS-2000/FSEIS-Vol-1.pdf>. The NWFP’s initial purpose, as originally stated in 1994, was to respond to the need for forest habitat and forest products. *Id.*

²⁹² 2001 S&M ROD, *supra* note 241.

mental groups challenged the revised S&M ROD.²⁹³ The new Bush Administration settled with the timber companies, agreeing to consider completely eliminating the S&M requirement in a new supplemental environmental impact statement (SEIS).²⁹⁴

In 2002, the Bush Administration proposed to remove the S&M requirements from the NWFP.²⁹⁵ Then, in January 2004, the BLM and USFS released a final SEIS on the issue that recommended eliminating the S&M requirements.²⁹⁶ In March 2004, the BLM and USFS formally eliminated the S&M standard,²⁹⁷ which environmentalists promptly challenged as a violation of NEPA and the APA.²⁹⁸ Ultimately, the environmentalists prevailed on three of their six NEPA challenges to the 2004 ROD that eliminated the S&M requirement in *Northwest Ecosystem Alliance v. Rey*.²⁹⁹

²⁹³ *Douglas Timber Operators v. Rey*, No. 01-6378-AA (D. Or. 2001) (timber operator challenge); *Nw. Ecosystem Alliance v. Rey*, 380 F. Supp. 2d at 1183 (environmentalist challenge).

²⁹⁴ *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1183 (citing *Douglas Timber Operators*, No. 01-6378-AA); see Laura Hartt, *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service and Other Efforts to Undermine Critical Habitat Designation Essential for Species Recovery*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 799, 847 (2004). The environmental groups dismissed their suit pending the completion of the new SEIS. *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1183.

²⁹⁵ National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl; Western Oregon and Washington, and Northwestern California; Removal of Survey and Manage Mitigation Measure Standards and Guidelines, 67 Fed. Reg. 64,601, 64,601 (Oct. 21, 2002).

²⁹⁶ 2004 FSEIS, *supra* note 290, at 15; To Remove or Modify the Survey and Manage Mitigation Measure Standards and Guidelines, 69 Fed. Reg. 3316, 3316 (Jan. 23, 2004). The environmental impact statement (EIS) analyzed three alternatives: 1) retain the S&M standard (the no-action alternative); 2) eliminate the S&M standard; or 3) retain the S&M standard but with less protective modifications. 2004 FSEIS, *supra* note 290, at 15. The third option proposed removing provisions for uncommon species, elimination of the pre-disturbance survey requirement for young forest stands, and changes to the review process for exempting known sites from management. *Id.* Elimination of the S&M requirement was the preferred alternative. *Id.* at 11.

²⁹⁷ BUREAU OF LAND MGMT. & U.S. FOREST SERV., RECORD OF DECISION TO REMOVE OR MODIFY THE SURVEY AND MANAGE MITIGATION MEASURE STANDARDS AND GUIDELINES IN FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL 7 (2004), available at http://www.blm.gov/or/plans/nwfpnepa/FSEIS-2004/ROD/SM_ROD-2004FSEIS.pdf.

²⁹⁸ *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1184 (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002)). In determining whether an agency acted "arbitrarily and capriciously" under the APA, courts consider whether "the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)) (internal quotation marks omitted).

²⁹⁹ 380 F. Supp. 2d at 1197-98. The plaintiffs asserted that the agencies violated NEPA for the following reasons:

In response to *Northwest Ecosystem Alliance*, the agencies prepared a draft SEIS in July 2006.³⁰⁰ Also in 2006, the BLM lost another S&M case in which the Ninth Circuit ruled that the agency's decision to downgrade the red tree vole's designation under the S&M requirement violated both NEPA and the Federal Land Policy Management Act (FLPMA).³⁰¹ In 2007, the agencies issued a SEIS revising the 2004 SEIS,³⁰² once again attempting to remove the S&M requirements from the NWFP.³⁰³ The agencies claimed that this decision reduced the cost, time, and effort required to conserve rare species, and provided "new information" and "additional background material" as compared to the

1) the purpose and need statement in the 2004 SEIS is unreasonably narrow because it failed to analyze whether the existing Survey and Manage standard is effective, 2) the 2004 SEIS failed to consider in detail a reasonable alternative that Plaintiffs had proposed, 3) the environmental effects analysis is illegallly predicated on uncertain possible events, namely that the 152 eligible species will be included in the Agencies' SSS Programs, 4) the Agencies' assumption that the Survey and Manage species will be adequately protected by the Reserve system is false and misleading, 5) the disclosures in the 2004 SEIS related to fire are false and misleading, and 6) the cost rationale in the 2004 SEIS is subterfuge and the figures inflated.

Id. at 1185. First, the court determined that the agencies failed to consider in the 2004 SEIS what would happen if the USFS and BLM exercised their discretion so that the species previously covered by S&M standards were not included in or later removed from the agencies' alternative administration protection programs. *Id.* at 1190. Second, the court concluded that the agencies failed to evaluate how most species protected by late-successional reserves would be otherwise protected if the agencies eliminated the S&M requirement. *Id.* at 1190. After noting that the analysis underlying the 1994 NWFP was "thorough" and that the S&M standard was necessary to satisfy the plan's "foundational objectives," the court observed that the 2000 environmental impact statement (EIS) concluded that "new information . . . would warrant a more fundamental shift." *Id.* at 1192 (internal quotation marks omitted). The court concluded that the USFS and BLM "failed to provide a thorough analysis of [the decision to eliminate the S&M standard] to permit the public and the decisionmakers to make a reasonably informed decision." *Id.* at 1192-93. Before the agencies could eliminate the S&M, they had a NEPA obligation "to disclose and explain on what basis they deemed the standard necessary before but assume it is not now." *Id.* at 1193; *see also* *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). Because they did not provide this reasoned explanation, the 2004 EIS did not provide enough analysis to make a reasonably informed decision. *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1193. The court therefore concluded that the agencies had not complied with their NEPA obligations in issuing the 2004 EIS. *Id.* at 1181.

³⁰⁰ *Conservation Nw.*, 674 F. Supp. 2d at 1240.

³⁰¹ *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562-63 (9th Cir. 2006).

³⁰² *Conservation Nw.*, 674 F. Supp. 2d at 1240.

³⁰³ *Id.*; BUREAU OF LAND MGMT., RECORD OF DECISION TO REMOVE THE SURVEY AND MANAGE MITIGATION MEASURE STANDARDS AND GUIDELINES FROM BUREAU OF LAND MANAGEMENT RESOURCE MANAGEMENT PLANS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL 12 (2007), available at http://www.reo.gov/s-m2006/2007/BLM_Record_of_Decision.pdf.

2004 SEIS.³⁰⁴ Environmental groups promptly challenged the 2007 SEIS.³⁰⁵

The district court reviewed the 2007 SEIS and accompanying ROD to ensure that the agencies took a “hard look” at the pertinent factors and thoroughly evaluated the proposal’s environmental consequences.³⁰⁶ The court reiterated that in order to eliminate the S&M requirements in compliance with NEPA, the agencies had to discuss in detail why they no longer thought the standard necessary.³⁰⁷ Although the agencies claimed that five categories of new information demonstrated “fundamentally different” forest conditions compared to those existing in 1994 when they first approved the NWFP, the court disagreed and concluded that “all of [this information] say[s] that [S&M] is working.”³⁰⁸

Although employing a “cabined standard of review,” the court nonetheless proceeded to determine that the agencies’ methods leading to the elimination of the S&M requirement was “flawed enough to be a violation of NEPA.”³⁰⁹ The court emphasized that the agencies’ decision would adversely affect S&M-dependent species without sufficient justification.³¹⁰ In July 2011, the parties reached a settlement concerning the S&M requirements³¹¹ in which the Obama Administration set aside the 2007 attempt to remove the S&M requirement and reinstated the S&M requirements from the 2001 ROD.³¹² Thus, after a dec-

³⁰⁴ BUREAU OF LAND MGMT., *supra* note 303, at 5–8. The agencies also claimed that the 2007 final SEIS addressed all of the salient points raised in *Douglas Timber Operators v. Rey*, *Nw. Forest Alliance*, and *Klamath Siskiyou Wildlands Ctr. v. Boody*. *Id.*

³⁰⁵ *Conservation Nw.*, 674 F. Supp. 2d at 1240–41.

³⁰⁶ *Id.* at 1241 (citing *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998)).

³⁰⁷ *Id.* at 1247 (citing *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1192).

³⁰⁸ *Id.* at 1248. Independent reviews of the NWFP reached similar conclusions. *See* Thomas et al., *supra* note 208, at 283–84. In fact, after ten years of implementation, the NWFP achieved more old-growth forest conditions than projected, improved watershed conditions, and resulted in smaller-than-projected timber harvests. *See id.*

³⁰⁹ *Conservation Nw.*, 674 F. Supp. 2d at 1249.

³¹⁰ *Id.* (“The Agencies cannot abandon fifty or more species whose viability may still be dependent on the continued implementation of Survey and Manage . . . [especially since t]here is not enough new information disclosed that would ensure the public that elimination of Survey and Manage is warranted.”).

³¹¹ U.S. FOREST SERV. & BUREAU OF LAND MGMT., 2011 SETTLEMENT AGREEMENT IN LITIGATION OVER THE SURVEY AND MANAGE MITIGATION MEASURE IN *CONSERVATION NORTHWEST ET AL. V. SHERMAN ET AL.*, CASE No. 08-1067-JCC (W.D. WASH) (2011), *available at* <http://www.blm.gov/or/eoia/fy2011/im/p/im-or-2011-063.pdf>.

³¹² *Id.* at 1. The settlement also acknowledged existing exemptions, updated the 2001 S&M species list, established a transition period for application of the species list, and established new exemption categories. *Id.*

ade of attempts to undercut the S&M requirement, the NWFP stood on the same ground as it had when the Bush Administration took office.

B. Failed Attempts to Undermine the ACS Requirements

In addition to failing to eliminate the S&M requirements from the NWFP due to non-compliance with NEPA and the APA, the Clinton and the Bush Administrations were also unsuccessful in their attempts to amend the plan's ACS requirements. In 1997, the National Marine Fisheries Service (NMFS) issued a programmatic biological opinion ("BiOp") under the ESA.³¹³ The BiOp concluded that USFS and BLM logging operations in watersheds within the NWFP were unlikely to jeopardize species listed under the ESA if logging operations were consistent with ACS objectives.³¹⁴ Commercial fishermen challenged this BiOp in 1998, and the U.S. District Court for the Western District of Washington concluded that "[b]efore a project can proceed, the USFS and BLM must find that their actions either meet, or do not prevent attainment of, the ACS objectives."³¹⁵ In response, the NMFS assessed ACS consistency at the watershed level over a long-term period.³¹⁶

In 1999, a group of commercial fishermen and environmental organizations challenged four NMFS BiOps for the Umpqua River watershed in Oregon, asserting that twenty-four sales in the basin were inconsistent with the ACS because they would harm ESA-listed fish species.³¹⁷ Although the district court upheld the agency's programmatic BiOp, it concluded that the agency failed to ensure the timber sales complied with the ACS on a site-specific or project level.³¹⁸ The court

³¹³ NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT SECTION 7 CONFERENCE OPINION ON CONTINUED IMPLEMENTATION OF U.S. FOREST SERVICE LAND AND RESOURCE MANAGEMENT PLANS AND BUREAU OF LAND MANAGEMENT RESOURCE MANAGEMENT PLANS, CONSULTATION NUMBER [711] (1997).

³¹⁴ *Id.* at 23–24; see *PCFFA III*, 482 F. Supp. 2d at 1257.

³¹⁵ *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv. (PCFFA I)*, No. C97-775R, 1998 WL 1988556, at *1, *12 (W.D. Wash. May 29, 1998).

³¹⁶ *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv. (PCFFA II)*, 71 F. Supp. 2d 1063 (W.D. Wash. 1999), *aff'd in part, vacated in part*, 253 F.3d 1137 (9th Cir. 2001), *amended and superseded on denial of reh'g*, 265 F.3d 1028.

³¹⁷ See *id.* at 1065.

³¹⁸ *Id.* at 1073. Around the same time, a similar situation unfolded in Oregon. In 2000, the U.S. Fish and Wildlife Service (FWS) issued a BiOp, concluding that USFS and BLM logging operations would not likely cause jeopardy to listed bull trout. *Cascadia Wildlands Project v. U.S. Fish & Wildlife Serv.*, 219 F. Supp. 2d 1142, 1145 (D. Or. 2002). Environmentalists challenged this BiOp. *Id.* The District Court of Oregon issued a preliminary injunction on the BiOp, concluding that there were "serious questions" as to whether the FWS' determinations were arbitrary and capricious. *Id.* at 1149–50. In response, the FWS subsequently withdrew the questionable BiOps. *PCFFA III*, 482 F. Supp. 2d at 1259.

emphasized that the NMFS acted arbitrarily and capriciously by assessing ACS compliance only at a watershed level and failing to consider the short-term degradation that timber harvesting could have on these aquatic areas.³¹⁹

On appeal, the Ninth Circuit emphasized the relative difference in scale between watersheds and project areas.³²⁰ The court upheld the district court's decision, commenting that "it does not follow that the NMFS is free to ignore site degradations because they are too small to affect the accomplishment of that goal at the watershed scale," and that the NMFS had not provided sufficient support for limiting the review to the watershed scale alone.³²¹ Thus, the proper measure of compliance with the ACS occurs at "both the watershed and project levels."³²²

The Ninth Circuit also addressed whether it was appropriate for the NMFS to consider consistency with the ACS over a period of ten to twenty years.³²³ The court emphasized that such a long time period ignores the short and sensitive life cycle of salmon.³²⁴ In addition, the court rejected the NMFS's claim that tree re-growth would offset these effects.³²⁵ Consequently, the Ninth Circuit upheld the district court, concluding that the NMFS could not support its decision to analyze effects over a longer time period.³²⁶

Despite the clarity of these judicial decisions, the USFS and BLM began amending the ACS requirements in 2002 in response to the demands of the timber industry.³²⁷ Then, in 2003, the USFS and BLM proposed to amend and delete key language from the ACS objectives.³²⁸ In 2004, the agencies adopted this proposal,³²⁹ which fishermen

³¹⁹ *PCFFA II*, 71 F. Supp. 2d at 1073.

³²⁰ *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d at 1035. The largest watershed at issue in the sales was 350 square miles, whereas most sales encompass only a few acres. *Id.*

³²¹ *Id.* at 1035–36.

³²² *Id.* at 1036.

³²³ *Id.* at 1037.

³²⁴ *Id.* ("This generous time frame ignores the life cycle and migration cycle of anadromous fish. In ten years, a badly degraded habitat will likely result in the total extinction of the [species in that stream].").

³²⁵ *Id.* at 1037–38.

³²⁶ *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d at 1038.

³²⁷ *PCFFA III*, 482 F. Supp. 2d at 1259–60.

³²⁸ U.S. FOREST SERV. & BUREAU OF LAND MGMT., DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT: CLARIFICATION OF LANGUAGE IN THE 1994 RECORD OF DECISION FOR THE NORTHWEST FOREST PLAN; NATIONAL FORESTS AND BUREAU OF LAND MANAGEMENT DISTRICTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL 15–19 (2003), available for download at <http://ir.library.oregonstate.edu/xmlui/handle/1957/12160>; see *PCFFA III*, 482 F. Supp. 2d at 1260.

and environmentalists promptly challenged.³³⁰ Echoing the judicial sentiment expressed in the S&M context,³³¹ the district court again emphasized that where an agency decided to adopt a standard and then proposes a different standard, it has a NEPA obligation to explain why the previously necessary standard is no longer needed.³³² The court noted that the 2003 environmental impact statement (EIS) performed by the agencies “wholly fail[ed] to meet the standards for adequate disclosure and discussion of dissenting scientific opinions.”³³³ The court then proceeded to set aside the ACS amendments promulgated by the agencies.³³⁴ In response, the USFS and BLM recognized that compliance with the ACS required adherence to the nine values outlined in the original ACS standard.³³⁵

C. The Western Oregon Plan Revisions: Its Birth, Death, and Living-Dead Status

In late 2008, after years of frustration in its efforts to revise the NWFP, the Bush Administration’s Department of the Interior (“Interior”) adopted six revised resource management plans (RMPs)—known collectively as the Western Oregon Plan Revisions (WOPR)—to address 2.5 million acres of BLM forestland in western Oregon.³³⁶ These plans mostly covered revested lands from the Oregon & California Land Grant (“O&C lands”).³³⁷ The RODs approving the WOPR would have increased timber harvest in these six districts to a combined 502 million board feet (MMBF)—up from approximately 200 MMBF allowed un-

³²⁹ See *PCFFA III*, 482 F. Supp. 2d at 1260–61.

³³⁰ See *id.* at 1256.

³³¹ See *supra* notes 295–310 and accompanying text.

³³² *PCFFA III*, 482 F. Supp. 2d at 1252 (citing *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1192).

³³³ *Id.* at 1254.

³³⁴ *Id.* at 1255 (citing the Administrative Procedure Act, 5 U.S.C. § 706 (2006), the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2006), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006)). The court also set aside a FWS and NMFS 2004 BiOp on the 2004 ACS Amendments, and a BLM and USFS final SEIS on the 2004 ACS Amendments. *Id.*

³³⁵ U.S. FOREST SERV. & BUREAU OF LAND MGMT., COMPLIANCE WITH THE AQUATIC CONSERVATION STRATEGY 1–2 (2007), available at <http://www.blm.gov/or/efoia/fy2007/im/p/im-or-2007-060.pdf>; see *supra* note 244 and accompanying text (outlining nine ACS standards).

³³⁶ *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 249 (D.D.C. 2011) appeal dismissed, No. 11-5137, 2011 WL 2618209 (D.C. Cir. June 24, 2011); see also *Withdrawn Records of Decision Archive*, *supra* note 36.

³³⁷ WOPR Withdrawal Memo, *supra* note 37.

der previous RMPs.³³⁸ At the time the agencies introduced the WOPR, the O&C lands produced only an average of 140 MMBF of timber per year.³³⁹ Thus, the WOPR would have essentially authorized a quadrupling of timber harvesting in the O&C lands.

The BLM justified the WOPR on the ground that the agency failed to achieve harvest levels under existing resource management plans.³⁴⁰ Citing *Headwaters, Inc. v. Bureau of Land Management*, the BLM claimed that increasing harvest levels on the O&C lands would be consistent with the dominant use, timber-centric management mandate of the Oregon & California Lands Act of 1937.³⁴¹ Under the WOPR, the BLM excluded thinning and treatment only within sixty feet of perennial and fish-bearing streams, and within thirty-five feet of intermittent streams, thus undercutting the extensive riparian buffers provided for in the NWFP.³⁴² Moreover, the WOPR redefined the boundaries of several late-successional reserves and allowed salvage logging in late-successional management areas where the NWFP previously limited logging.³⁴³

After the environmental review process, the BLM concluded that the revisions to the RMPs contained in the WOPR would “have no ef-

³³⁸ *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 249; see BUREAU OF LAND MGMT., I FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE REVISION OF THE RESOURCE MANAGEMENT PLANS OF THE WESTERN OREGON BUREAU OF LAND MANAGEMENT, at ch. 1-4 (2008), [hereinafter 2008 WOPR FEIS], available at http://www.blm.gov/or/plans/wopr/final_eis/index.php (follow “Volume I” hyperlink to download this portion of the final EIS).

³³⁹ See Eric Mortenson, *Logging Reversal Deepens State’s Rift*, OREGONIAN, July 6, 2011, at C3 [hereinafter Mortenson, *Logging Reversal*].

³⁴⁰ 2008 WOPR FEIS, *supra* note 338, at ch. 1-3.

³⁴¹ *Id.* at Summary-2 n.1, Summary-3 (citing *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174 (9th Cir. 1990), discussed *supra* notes 177–184 and accompanying text).

³⁴² See *id.* at ch. 2-24. The NWFP provided extensive riparian protections, including stream buffers ranging from one hundred to three hundred feet. See 1994 ROD, *supra* note 21, at 9–10.

³⁴³ 2008 WOPR FEIS, *supra* note 338, at 2-24, 2-32. One management objective of late successional reserves under the WOPR was to “[r]ecover economic value from timber harvested after a stand-replacement disturbance, such as a fire, windstorm, disease, or insect infestation.” *Id.* at 2-28. Although the 1994 EIS underlying the NWFP did not preclude salvage logging in late-successional forests, it also did not include salvage logging as an appropriate response, and instead described how dead trees benefit ecosystem recovery following a disturbance. 1994 FSEIS, *supra* note 238, at B-49 to B-50 (“The surviving trees are important elements of the new stand . . . providing structural diversity and a potential source of additional large snags during the development of new stands. Furthermore, trees injured by disturbance may develop cavities, deformed crowns, and limbs that are habitat components for a variety of wildlife species.”).

fect to listed species or critical habitat.”³⁴⁴ The EIS also explained that the WOPR revisions were not self-executing and “[did] not authorize any on-the-ground action As such, further Federal decision-making [wa]s required before the BLM . . . c[ould] conduct ground-disturbing activit[ies].”³⁴⁵ Thus, because the agencies determined there would be “no impact” on ESA-listed species, BLM did not initiate an ESA section 7 consultation with the U.S. Fish and Wildlife Service to identify how the WOPR could affect listed species under the ESA.³⁴⁶

In October 2008, timber operators challenged BLM’s failure to initiate ESA section 7 consultation for the WOPR as a violation of a 2003 settlement agreement between the parties.³⁴⁷ Although the district court in Washington D.C. did not require the BLM to complete ESA consultation, in July 2009, the Acting Assistant Secretary of Interior issued a two-page memorandum to the Acting Director of BLM withdrawing the WOPR RODs “[b]ecause BLM’s ‘no effect’ determination was legal error.”³⁴⁸ This withdrawal was effective immediately.³⁴⁹ Envi-

³⁴⁴ See, e.g., BUREAU OF LAND MGMT., RECORD OF DECISION AND RESOURCE MANAGEMENT PLAN: COOS BAY DISTRICT 9 (2008), available at <http://www.blm.gov/or/plans/wopr/rod/index.php> (follow “Coos Bay Record of Decision” Hyperlink.); see also *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 249; Letter from Edward W. Shepard, State Dir. Or./Wash., Bureau of Land Mgmt., to Ren Lohofener, Reg’l Dir., U.S. Fish & Wildlife Serv. 2 (Oct. 6, 2008) (on file with author).

³⁴⁵ BUREAU OF LAND MGMT., *supra* note 344; see also 2008 WOPR FEIS, *supra* note 338, at ch. 1-19 to 1-20 (“[N]o specific on-the-ground activity would actually be proposed in the revised RMPs . . .”).

³⁴⁶ *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 249. When a federal agency, such as BLM “authorize[s], fund[s], or carrie[s] out” any agency action, it must consult with the FWS to insure that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. § 1536(a)(2) (2006).

³⁴⁷ *Am. Forest Res. Council v. Caswell*, 631 F. Supp. 2d 30, 31 (D.D.C. 2008); *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 249 (discussing *Am. Forest Res. Council v. Caswell* by the name of *Am. Forest Res. Council v. Abbey*). In 2003, timber companies voluntarily dismissed a suit against the BLM contingent on BLM’s agreement to revise the RMPs by the end of 2008. *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 249. In 2008, the timber companies alleged that BLM’s failure to initiate consultation violated the agency’s obligation of good faith and fair dealing underlying the 2003 settlement agreement. *Am. Forest Res. Council*, 631 F. Supp. 2d at 31. The timber operators likely wanted the BLM to consult (and issue a finding of no significant impact), so that they could resume harvesting. Three other cases dealt with BLM’s failure to consult. See *Or. Wild v. Shepard*, No. 3:09-00060 (D. Or. resolved by stipulated order Oct. 15, 2009); *Forest Serv. Emp. for Envtl. Ethics v. U.S. Fish & Wildlife Serv.*, No. 6:09-06019 (D. Or. dismissed Sept. 21, 2009); *Pac. Rivers Council v. Shepard*, No. 3:09-00058 (D. Or. dismissed Sept. 1, 2009); see also Memorandum Opinion at 22 n.1, *Douglas Timber Operators, Inc. v. Salazar*, Civ. No. 09-1704-JDB (D.D.C. Dec. 23, 2011) (describing the three cases regarding failure to consult).

³⁴⁸ WOPR Withdrawal Memo, *supra* note 37, at 1–2.

ronmentalists, who believed that the Bush Administration had been “trying to cut corners scientifically and legally” in avoiding ESA section 7 consultation, heralded the decision to withdraw the WOPR.³⁵⁰ Timber industry advocates, however, decried the decision claiming that it was “outrageous” for BLM to withdraw “five years of the best planning and science,” leaving BLM without “clear direction going forward.”³⁵¹

In *Douglas Timber Operators, Inc. v. Salazar*, timber companies and related associations challenged the Interior Secretary’s 2009 administrative withdrawal of the WOPR, claiming that the agency’s failure to follow FLPMA’s public notice provision violated the APA.³⁵² In March 2011, the district court in Washington D.C. struck down the Obama Administration’s administrative withdrawal, determining that Interior had no inherent authority to withdraw RMPs under FLPMA without complying with the Act’s formal notice and comment requirements.³⁵³ The district court noted that even if the BLM had authority to withdraw RMPs, the agency’s failure to provide a public participation period prior to withdrawing the plan was inconsistent with FLPMA.³⁵⁴ Thus, the court concluded that the Secretary’s failure to comply with FLPMA’s procedures was arbitrary and capricious under the APA.³⁵⁵

Although the district court found the 2009 withdrawal arbitrary and capricious, it remanded the decision to Interior to “shed additional light” on the agency’s rationale for withdrawing the WOPR.³⁵⁶ Far from reinstating the WOPR, this order merely required that the BLM allow public participation prior to withdrawing the plan.³⁵⁷ This December 23, 2011 decision briefly awakened the WOPR from the dead.³⁵⁸ After the court reinstated the WOPR, environmental groups renewed their

³⁴⁹ *Id.* at 2. Interior did not, however, provide a formal notice and comment period prior to withdrawing the WOPR. *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 250.

³⁵⁰ See Mortenson, *Logging Reversal*, *supra* note 339 (quoting conservation groups).

³⁵¹ See *id.* (quoting timber industry groups).

³⁵² 774 F. Supp. 2d at 251; see 43 U.S.C. § 1712(f) (2006).

³⁵³ *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 257–59. Under FLPMA, the BLM “shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and when appropriate, revise [RMPs].” 43 U.S.C. § 1712(a) (2006). The statute is silent as to “withdrawal.” See *id.*

³⁵⁴ See *Douglas Timber Operators, Inc.*, 774 F. Supp. 2d at 259–60.

³⁵⁵ *Id.* (citing 5 U.S.C. § 706(2) (2006)).

³⁵⁶ *Id.* at 261.

³⁵⁷ See Chandra LeGue, *Judge: WOPR Withdrawal Needs New Process*, OREGON WILD (Mar. 31, 2011, 3:41 PM), <http://www.oregonwild.org/about/blog/wopr-redux>.

³⁵⁸ See *Zombie WOPR Still Alive*, KLAMATH-SISKIYOU WILDLANDS CENTER, <http://kswild.org/get-involved/ActionAlerts/zombie-wopr-still-alive> (last visited Jan. 10, 2013).

challenges to it.³⁵⁹ Although the WOPR remained among the living dead for another year, environmental groups finally succeeded in having the WOPR RODs and RMPs vacated in May 2012.³⁶⁰ The western Oregon BLM districts have reinstated the 1995 ROD and RMP as the official land use plan of record.³⁶¹

V. THE SECURE RURAL SCHOOL ACT & PAYMENTS IN LIEU OF TAXES: PROPPING UP COUNTY GOVERNMENTS WITH FEDERAL CASH

Since the late 1980s and 1990s, Congress has authorized a variety of payment programs to help the Oregon and California counties (“O&C counties”) cope with the financial uncertainty caused by the spotted owl dispute and the resulting decrease in timber harvest revenues.³⁶² Initially, Congress provided funds to the affected counties under the generic Payment In Lieu of Taxes Act (PILT), first authorized in 1976.³⁶³ Under PILT, the O&C counties receive payments per acre of land managed by either the Bureau of Land Management (BLM) or U.S. Forest Service (USFS) to compensate them for revenues lost due to the tax-exempt status of federal lands; however, this payment is reduced for counties that receive money through timber revenue sharing programs.³⁶⁴ In fiscal year (FY) 2011, Oregon counties received over thirteen million dollars in PILT funding.³⁶⁵ Congress scheduled fund-

³⁵⁹ See Plaintiffs’ Memorandum in Support of Mot. for Partial Summary Judgment at 2 *Pac. Rivers Council v. Shepard*, No. 3:11-00442 (D. Or. May 16, 2012) (filed June 3, 2011).

³⁶⁰ Final Judgment, *Pac. Rivers Council*, No. 03:11-00442 (D. Or. May 16, 2012) (vacating the 2008 RODs and RMPs for western Oregon BLM districts and reinstating the BLM’s 1995 RODs and RMP); see also *BLM Western Oregon Plan Decisions Withdrawn*, BUREAU OF LAND MGMT., <http://www.blm.gov/or/plans/wopr/index.php> (last visited Jan. 10, 2013).

³⁶¹ Final Judgment, *supra* note 360, at 2; BUREAU OF LAND MGMT., *supra* note 360.

³⁶² See BUREAU OF LAND MGMT. OVERVIEW OF THE OREGON AND CALIFORNIA LANDS ACT OF 1937, at 2, available at <http://www.blm.gov/or/rac/files/Oregon%20Flyer.pdf>. Congress responded by establishing a funding floor above which counties would receive money annually. *Id.*

³⁶³ Pub. L. No. 94-565, 90 Stat. 2262 (1976), amended by Pub. L. No. 103-397, 108 Stat. 4156 (1994) (codified as amended at 31 U.S.C. §§ 6901–6907 (2006)).

³⁶⁴ *Id.* §§ 6901(1)–(2), 6902(a)(1), 6903, 6904; see also GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND MANAGEMENT AND RESOURCES LAW 159* (6th ed. 2007). The revenue counties receive under other revenue sharing programs such as the Secure Rural Schools and Community Self-Determination Act of 2000 (SRSA) reduces PILT payments. 31 U.S.C. § 6903(b)(1); 43 C.F.R. § 44.23(a) (2011); see 31 U.S.C. § 6903(a)(1)(C) (the SRSA is a “payment law” that reduces PILT disbursements).

³⁶⁵ *Payments in Lieu of Taxes: County Payments*, U.S. DEP’T OF THE INTERIOR, <http://www.doi.gov/pilt/county-payments.cfm> (search “Select State” for “Oregon” and search “Select Year” for “2011”; then follow “Search” hyperlink) (last visited Jan. 10, 2013).

ing for the PILT program to expire at the end of the FY 2012.³⁶⁶ In July 2012, however, Congress extended PILT through FY 2013.³⁶⁷

Recognizing that timber sales—and thus county revenues—had been greatly curtailed since implementation of the Northwest Forest Plan (NWFP), Congress passed the Secure Rural Schools and Community Self-Determination Act of 2000 (SRSA).³⁶⁸ The SRSA provided rural counties—mostly in areas subject to the NWFP—with payments and established resource advisory committees (RAC) that organized projects at the local level.³⁶⁹ Two factors determined the amount of the payments: a base payment that considered historical timber receipts and USFS and BLM land acreage within a county, and an income adjustment for that county.³⁷⁰ Rural counties viewed the SRSA as an imperative, since they could not “generate this type of revenue at the local level [with their] small population and limited tax base.”³⁷¹ In 2008, Congress passed an emergency, short-term reauthorization of the SRSA.³⁷² Although Congress averted a funding disaster for rural counties in 2008, the reauthorization appropriated money only for FY 2008 to FY 2011.³⁷³ The reauthorization provided the counties with a declining amount of funding during each year of the appropriation.³⁷⁴ Congress chose not to reauthorize the SRSA in 2011, but in July 2012, restored SRSA funding for FY 2012.³⁷⁵

³⁶⁶ 31 U.S.C. § 6906 (2006).

³⁶⁷ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 100111 (noting extension from 2012 to 2013).

³⁶⁸ Pub. L. 106-393, § 2(a)(8)–(10), 114 Stat. 1607, 1608–09 (codified as amended at 16 U.S.C. §§ 7101–7153 (2006 & Supp. 2008)).

³⁶⁹ *Id.* § 101 (determining payment amount for eligible counties); *id.* § 203 (describing RACs).

³⁷⁰ See U.S. FOREST SERV., TITLE I- SECURE PAYMENTS FOR STATES AND COUNTIES CONTAINING FEDERAL LAND: CALCULATING PAYMENTS (2012), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5253425.pdf.

³⁷¹ See Nigel D. Graham, *Advocacy Groups Plead with Congress to Reauthorize the Secure Rural Schools and Community Self-Determination Act*, 13 PUB. INT. L. REP. 194, 198 (2008) (quoting Jim French, Vice President of the National Forest County Schools Coalition).

³⁷² Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 601(a), 122 Stat. 3765, 3896 (amending 16 U.S.C. § 7101 (2006)).

³⁷³ *Id.* (amending 16 U.S.C. § 7111(a) (2006)).

³⁷⁴ *Id.* (amending 16 U.S.C. § 7102(11)(A)–(B) (2006)).

³⁷⁵ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 100101(a) (striking “2011” in sections 101, 102, 203, 207, 208, 304, and 402 and inserting “2012” in its place).

VI. CONGRESSIONAL RESPONSES TO THE O&C COUNTY FUNDING DEFICIENCIES

The Oregon and California counties (“O&C counties”) no longer derive significant revenues from the Oregon & California Lands Act of 1937 (OCLA) due both to the environmental restrictions of the Northwest Forest Plan (NWFP) and the unlikely prospects of the Western Oregon Plan Revisions.³⁷⁶ Therefore, Congress’ decision not to approve long-term funding for the Payment In Lieu of Taxes Act (PILT) and Secure Rural Schools and Community Self-Determination Act of 2000 (SRSA) has created desperation among several of the O&C counties.³⁷⁷ The O&C counties estimate that they need 110 million dollars annually to sustain county services.³⁷⁸ Recently, the sense of urgency has intensified, as several counties have faced the prospect of insolvency and the loss of critical public services, including jail closures and sheriff layoffs.³⁷⁹ Responding to the dire economic situation of the O&C counties, members of Congress have offered two separate solutions.

Under the first proposal—sponsored by Oregon Representatives DeFazio, Schrader and Walden—the lands from the Oregon & California Land Grant (“O&C lands”) would be split into a timber zone man-

³⁷⁶ See *supra* notes 285–361 and accompanying text.

³⁷⁷ Indicative of its dire economic situation, Curry County announced (and then rescinded) plans to develop a coast-side golf course in an effort to avoid insolvency. Lori Tobias, *Curry County Pulls the Plug on Plan to Build Golf Course in Floras Lake Area*, OREGONIAN, Sept. 28, 2011, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/09/curry_county_pulls_the_plug_on.html; Lori Tobias, *Curry County Officials Hope to Tee Off with Golf Course Plan, but Others Think They Are Out of Bounds*, OREGONIAN, Aug. 28, 2011, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/08/post_41.html. More recently, Curry County proposed a new sales tax to infuse county coffers. See Mortenson, *Rural Oregon Counties Scramble*, *supra* note 38. For example, the Lane County Sheriff recently indicated that he would have to close half of local jail beds and lay off three-quarters of patrol staff if the county does not receive extra funding by the summer. Charles Pope, *Obama’s Budget Adds Funding for Counties*, OREGONIAN, Feb. 14, 2012, 2012 WLNR 3224454 [hereinafter Pope, *Obama’s Budget Adds Funding for Counties*]. For a graphical representation of the counties’ funding predicament, see Eric Mortenson, *Loss of Federal Forest Payments Has Oregon Counties Looking for Revenue While Having Millions That Can’t Be Tapped*, OREGONIAN, Jan. 21, 2012 [hereinafter Mortenson, *Loss of Federal Forest Payments*], http://www.oregonlive.com/environment/index.ssf/2012/01/loss_of_federal_forest_payment.html.

³⁷⁸ See Eric Mortenson & Charles Pope, *Forest Plan Would Share Cost*, OREGONIAN, Feb. 2, 2012, at C1.

³⁷⁹ *Oregon Senate Urges Continued Federal Aid for Timber Counties*, ARGUS OBSERVER (Or.), May 19, 2011, http://www.argusobserver.com/news/oregon-senate-urges-continued-federal-aid-for-timber-counties/article_ea09bc5c-463d-5716-ab2f-a74317304756.html; Eric Mortenson, *Because of Tax Levy Defeat, Josephine County will Release Prisoners and Cut Its Sheriff’s Department*, OREGONIAN, May 16, 2012, http://www.oregonlive.com/environment/index.ssf/2012/05/because_of_tax_levy_defeat_jos.html.

aged by a private trust and a conservation zone managed by the U.S. Forest Service (USFS).³⁸⁰ Under the second proposal, a partisan group of legislators proposed a new county payments program and extension of PILT for five more years.³⁸¹ Both solutions are inadequate. The former would not sufficiently protect the environment, would undermine the integrity of the NWFP, and would base economic recovery on outdated industrial forestry assumptions. The latter proposal fails to grasp the changed nature of the forestry economy in the Northwest and punts on developing a viable long-term solution that both addresses the O&C counties' funding issues and respects environmental values.

Any viable, long-term solution to county funding problems must fall outside the timber-centric worldview that has pervaded for over 150 years. We suggest a solution based on a combination of payments for ecosystem services like watershed protection and recreation;³⁸² local sales tax initiatives similar to those in existence in two other Oregon towns;³⁸³ higher state taxation of log exports;³⁸⁴ increased county property tax rates;³⁸⁵ possible federal management consolidation of the O&C lands;³⁸⁶ and direction of federal payments to the most needy counties.³⁸⁷ Future SRSA and PILT reauthorization should be conditioned on implementing some or all of these alternative revenue generation initiatives. This broad-based revenue solution could finally attain budget security for the O&C counties, while at the same time preserving the unique natural resources of the O&C lands.

A. *The Trust Proposal: Divide and Privatize*

In December 2011, Oregon Representatives DeFazio, Walden, and Schrader introduced their solution for breaking management gridlock on the O&C lands, creating jobs, and fixing the county budget issues.³⁸⁸

³⁸⁰ See *infra* notes 388–409 and accompanying text.

³⁸¹ See *infra* notes 410–420 and accompanying text.

³⁸² See *infra* notes 479–495 and accompanying text.

³⁸³ See *infra* notes 496–505 and accompanying text.

³⁸⁴ See *infra* notes 506–512 and accompanying text.

³⁸⁵ See *infra* notes 513–516 and accompanying text.

³⁸⁶ See *infra* notes 517–521 and accompanying text.

³⁸⁷ See *infra* notes 522–525 and accompanying text.

³⁸⁸ See Greg Walden, Peter DeFazio & Kurt Schrader, *Oregon's Forested Communities: Congressmen Offer Bipartisan Solution to Fiscal Crisis*, OREGONIAN, Dec. 17, 2011, http://www.oregonlive.com/opinion/index.ssf/2011/12/oregons_forested_communities_c.html.

In February 2012, the representatives unveiled their proposal, the O&C Trust, Conservation, and Jobs Act (OCTA).³⁸⁹

In order to avoid further mill closures, job outsourcing, and county budgetary collapse, the Oregon representatives proposed dividing the O&C lands into timber and conservation trusts, with the timber tracts managed in trust for the O&C counties, and the conservation tracts protected from harvesting.³⁹⁰ The “timber trust”—1.479 million acres of land, with an average stand age less than 125 years—would be managed for timber harvesting.³⁹¹ Although technically, the federal government would hold title to the lands, this timber trust land would be managed by a private board of trustees.³⁹² This board of trustees would be bound by a fiduciary duty to produce “maximum sustained revenues in perpetuity for the O&C [] counties.”³⁹³ In order to fulfill its fiduciary duty to maximize revenues, the board of trustees could authorize clearcutting of a substantial amount of timber-trust lands.³⁹⁴ Commentators project that the OCTA would triple the amount of timber logged from O&C lands.³⁹⁵ Further, the lands in this “timber trust” appear exempt from the NWFP.³⁹⁶

In addition to creating the timber trust, the OCTA would transfer jurisdiction over all O&C lands not placed in the timber trust—ap-

³⁸⁹ H.R. __, 112th Cong. (2012) (discussion draft), *available at* http://www.defazio.house.gov/images/stories/OCTCA_FINAL_02-16-2012.pdf. The bill was apparently never formally introduced in the 112th Congress, although the draft bill was widely circulated.

³⁹⁰ *See id.*; *see also* ERIK FERNANDEZ, OREGON WILD, CLEAR-CUTTING WESTERN OREGON I (2012), *available at* http://www.oregonwild.org/oregon_forests/old_growth_protection/west_side-forests/western-oregon-s-patchwork-public-lands/LoggingMandateMap2.21.12.pdf (mapping out the respective trusts).

³⁹¹ H.R. __ §§ 211(c)(1), 211(d)(1), 214.

³⁹² *Id.* § 212(a)(1)-(3). The trust would assume authority over the road system covering the trust land. *Id.* § 212(c). The United States would, however, retain title to subsurface minerals under the trust lands. *Id.* § 212(b)(1).

³⁹³ *Id.* § 211(b).

³⁹⁴ *See* RANDI SPIVAK, GEOS INSTIT., SUMMARY ANALYSIS AND CRITIQUE OF THE O&C TRUST, CONSERVATION, AND JOBS ACT I (2012), *available at* http://www.oregonwild.org/oregon_forests/old_growth_protection/westside-forests/western-oregon-s-patchwork-public-lands/Geos%20Institute%20Summary%20of%20O-C%20Trust%2C%20Conservation%20-%20Jobs%20Act.pdf; Saul Hubbard, *Lawmakers Unveil Forest Plan*, REGISTER-GUARD (Or.), Feb. 17, 2012, *available at* <http://projects.registerguard.com/web/updates/2762552455/logging-defazio-oregon-federal-lands.html.csp>.

³⁹⁵ *See* SPIVAK, *supra* note 394. In a report reviewed by other groups, Spivak noted that 510 million board feet (MMBF) would be logged each year—up from 186 MMBF per year currently. *Id.* This increase is the equivalent of thirty-three square miles of new clearcuts. *Id.*

³⁹⁶ *See* H.R. __, 112th Cong. § 232(b) (2012) (discussion draft) (specifying that conservation trust lands would be subject to the NWFP after making no similar mention in subtitle A of the bill).

proximately 824,000 acres—to the USFS.³⁹⁷ The lands in this “conservation trust” would remain subject to the NWFP, with a focus on protecting old-growth forests.³⁹⁸ The OCTA also would designate approximately 89,000 acres of new wilderness areas³⁹⁹ and 128 miles of new wild and scenic river corridors.⁴⁰⁰

In promoting the bill, the Oregon representatives claimed that without a new program for supporting rural Oregon counties, the O&C counties—already facing “depression-like unemployment”—would lose between three thousand and four thousand jobs.⁴⁰¹ Further, Oregon business sales would drop by around \$350 million, which would also result in the loss of another \$230 million in indirect economic activity within the state.⁴⁰² The representatives claim that their plan would provide western Oregon with a “predictable level of revenues in perpetuity” and would create twelve thousand new jobs.⁴⁰³ Moreover, the representatives maintain that the OCTA proposal is the best that conservation interests can hope for, claiming that they will never be able to defend old-growth protections against the current Congress and U.S. Supreme Court.⁴⁰⁴ Representative DeFazio recently predicted that if Congress does not act, county governments around the state would topple like dominoes all the way up to Multnomah County—home of Portland.⁴⁰⁵ Representative Schrader also pitched the proposal as a way to break through the “old timber wars” paradigm.⁴⁰⁶

In response, some commentators criticized the OCTA as catering to short-term political expediency over finding a sustainable, long-term

³⁹⁷ *Id.* § 231; see SPIVAK, *supra* note 394.

³⁹⁸ H.R. __ § 232(b).

³⁹⁹ *Id.* §§ 501(a), 502; Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2006); see SPIVAK, *supra* note 394.

⁴⁰⁰ H.R. __ §§ 511–514; Wild and Scenic Rivers Act, 16 U.S.C. § 1274(a) (2006); see SPIVAK, *supra* note 394. The bill would also provide additional protections for Rogue River tributaries. H.R. __ § 515.

⁴⁰¹ Walden, DeFazio & Schrader, *supra* note 388.

⁴⁰² Dawn Marie Gaid, *Changing Federal County Payments and Rural Oregon Counties: Analysis of Policy Impacts and Responses from Loss of Secure Rural Schools Funding in Selected Oregon Counties* 27 (Or. State Univ. Rural Studies Program, Working Paper No. 09-04, 2009), available at <http://ruralstudies.oregonstate.edu/sites/default/files/pub/pdf/RSP09-04.pdf>; Walden, DeFazio & Schrader, *supra* note 388.

⁴⁰³ See Walden, DeFazio & Schrader, *supra* note 388.

⁴⁰⁴ See Eric Mortenson, *DeFazio Touts Logging Plan to Help Finance Oregon Timber Counties*, OREGONIAN, Mar. 11, 2012, available at http://www.oregonlive.com/environment/index.ssf/2012/03/defazio_touts_idea_to_help_cou.html.

⁴⁰⁵ *Id.*

⁴⁰⁶ See Hubbard, *supra* note 394.

solution.⁴⁰⁷ But *The Oregonian* editorial staff endorsed the plan, arguing that the proposal would “fulfill the historical economic commitment to Oregon” by providing more logs, more jobs and more revenues to the counties, characterizing the DeFazio proposal as moderate and balanced, and emphasizing that sustainable harvests can co-exist with environmental protections strong enough to appease environmental concerns.⁴⁰⁸ At the close of its 2012 session, the Oregon Assembly passed a joint memorial urging the President and Congress to allow the O&C counties to exercise full management authority over federal O&C lands within their county borders by passing the OCTA.⁴⁰⁹

B. *The County Payments Proposal: A Return to a Bygone Era*

The Obama Administration’s fiscal year (FY) 2013 budget proposed to fund the nationwide Secure Rural Schools and Community Self-Determination Act of 2000 (SRSA) timber payment program with 270 million dollars.⁴¹⁰ This amount, however, was far from the 260 million dollars Oregon alone received at the height of the program in the early 2000s.⁴¹¹ After the President released the FY 2013 budget, Repre-

⁴⁰⁷ See, e.g., *id.* (quoting Sean Stevens, spokesperson for Oregon Wild: “We’re seeing how people in positions of power are between a rock and a hard place They know how unpopular (raising taxes) is, so they’ll throw a proposal out there . . . and when it fails, they can pin it on the environmentalists.”); Steve Pedery, Editorial, *County Timber Payments: Put Public Lands Ahead of Politics*, OREGONIAN, Jan. 28, 2012, at B9, available at http://www.oregonlive.com/opinion/index.ssf/2012/01/county_timber_payments_put_pub.html.

⁴⁰⁸ See Editorial Board, *A Promising O&C Forest Plan*, OREGONIAN, Feb. 20, 2012, at B4, available at http://www.oregonlive.com/opinion/index.ssf/2012/02/a_promising_oc_forest_plan.html; Editorial Board, *Down the Center Path on Federal Forests*, OREGONIAN, Dec. 29, 2011, at C4, available at http://www.oregonlive.com/opinion/index.ssf/2011/12/down_the_center_path_on_federa.html.

⁴⁰⁹ S.J. Memorial 201, 76th Leg. Assemb., Reg. Sess. (Or. 2012).

⁴¹⁰ See U.S. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2013 BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013, at 226 tbl.S-9 (2012), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/budget.pdf>; Eric Mortenson, *Curry County Considering a Sales Tax*, OREGONIAN, Feb. 17, 2012, at A1 [hereinafter Mortenson, *Curry County*]; Pope, *Obama’s Budget Adds Funding for Counties*, *supra* note 377. The Obama Administration’s proposed budget also called for four additional years of federal funding of the SRSA, with the amount paid declining by ten percent each year. Pope, *supra* note 377. Importantly, the county payments money would be mandatory spending, and thus very difficult to reverse once approved. *Id.*

⁴¹¹ See *USDA Forest Service Payment to States Fiscal 2001*, U.S. DEP’T OF AGRIC. (2001), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5341321.pdf (noting that in FY 2001, Oregon received 154 million dollars for USFS lands under the SRSA); *FY2001 O&C Payments to Counties*, U.S. BUREAU OF LAND MGMT. (2001), available at http://www.blm.gov/or/files/County_official_2002_payments.pdf (noting that in FY 2001, Oregon received 109 million dollars for BLM land under the SRSA).

sentative Doc Hastings (R-Wash.) introduced the Federal Forests County Revenue, Schools, and Jobs Act of 2012 (“Hastings bill”) to replace the county payments program.⁴¹² The sponsors claimed this bill would create jobs and stimulate the economy by setting new minimum harvest levels and revenue targets for the Bureau of Land Management (BLM) and USFS.⁴¹³ In particular, the Hastings bill would require that federal lands generate at least sixty percent of the income generated from the National Forest System between 1980 and 2000.⁴¹⁴ This money would be deposited into a trust account to provide O&C counties with funding for schools, roads, and services.⁴¹⁵ The bill would require minimum timber harvest levels equivalent to half the average amount harvested from federal forests between 1980 and 2000 and extend PILT payments until 2017.⁴¹⁶

Although the Hastings bill initially moved quickly through the U.S. House of Representatives, it has stalled in the Senate.⁴¹⁷ Representatives Walden, DeFazio, and Schrader did not endorse the Hastings bill, but focused their attention on integrating the OCTA and Hastings proposals.⁴¹⁸ A primary concern is that replacing SRSA funding under the Hastings bill would require increased logging by at least 400% over current levels, increased timber prices of 400%, and augmented federal land management budgets by 300%.⁴¹⁹ Moreover, all timber harvests authorized by the Hastings bill would be presumed compliant with federal environmental laws such as the National Environmental Policy Act

⁴¹² H.R. 4019, 112th Cong. (2012).

⁴¹³ See Press Release, Natural Res. Comm., U.S. House of Representatives, Committee Passes Secure Rural Schools, PILT Legislation to Create Jobs, Stimulate Rural Economies & Restore Forest Health (Feb. 16, 2012), available at <http://naturalresources.house.gov/UploadedFiles/02.16.12-CommitteePassesSRS.pdf>.

⁴¹⁴ H.R. 4019 § 101(1); see also Charles Pope, *House to See County Payments Bill*, OREGONIAN, Feb. 16, 2012, 2012 WLNR 3468920.

⁴¹⁵ See H.R. 4019 § 102.

⁴¹⁶ *Id.* §§ 101(8), 201.

⁴¹⁷ *H.R. 4019: Federal Forests County Revenue, Schools, and Jobs Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr4019> (last visited Jan. 10, 2013) (noting that the bill was introduced on February 14, 2012, and was then referred to committee on February 16, 2012).

⁴¹⁸ See Hubbard, *supra* note 394 (noting that DeFazio called the Hastings bill “quite controversial” because it would require suspending most environmental laws in order to increase logging); Charles Pope, *County Timber Payments Plan Moving Fast in U.S. House, Generating Conflict and Worry*, OREGONIAN, Feb. 15, 2012, http://www.oregonlive.com/politics/index.ssf/2012/02/house_committee_to_consider_co.html (updated Apr. 19, 2012); see Pope, *Obama’s Budget Adds Funding for Counties*, *supra* note 377.

⁴¹⁹ See *Clear-Cut Solution to County Funding?*, OREGON WILD, http://www.oregonwild.org/oregon_forests/old_growth_protection/westside-forests/western-oregon-s-patchwork-public-lands/clear-cut-solution-to-county-funding (last visited Jan. 10, 2013).

(NEPA), the Endangered Species Act (ESA), and National Forest Management Act (NMFA), and would not be subject to judicial review.⁴²⁰

C. *The Inadequacy of the Trust and County Payment Bills*

Although the Hastings bill is not as extreme as the 1995 timber salvage rider,⁴²¹ it includes similar provisions—such as precluding judicial review and declaring all sales compliant with existing federal environmental laws⁴²²—and promises to raise timber harvests in the region to a level not seen since the 1980s. The OCTA “trust” proposal does create a conservation trust and some new wilderness and wild and scenic river protections.⁴²³ Beyond these fairly limited designations, however, the proposal eliminates NWFP protections on the nearly two-thirds of the O&C lands outside conservation trust lands subject to increased logging. Both proposals suffer from critical environmental and economic flaws.

First, the OCTA proposal’s assumption that the Oregon Forest Practices Act (FPA)⁴²⁴ will provide sufficient protection to the O&C lands is flawed.⁴²⁵ Second, both proposals fail to consider adverse water quality impacts.⁴²⁶ Third, given the changed Northwest timber landscape, the claimed economic benefits are likely greatly overstated.⁴²⁷ Fourth, the affected forests may not have the timber volume necessary to support the funding the counties seek.⁴²⁸ Fifth, landscape-level ecosystems need room for change, so statutorily carving up land into timber and non-timber areas leaves insufficient space for dynamic changes and responses to ecological shocks like fire or insect kill.⁴²⁹ These flaws are significant, and should give politicians pause before pushing through such a short-term fix.

⁴²⁰ H.R. 4019, 112th Cong. § 105(d)(4), (e) (2012). A proposed project would require an environmental report, although the requirements are vague and a carve-out is made for projects in response to a catastrophic event. *See id.* § 105(d)(2)(C).

⁴²¹ *See* Emergency Supplemental Appropriations for Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194; H.R. 4019; *supra* notes 265–281 and accompanying text.

⁴²² *See supra* notes 267–268 and accompanying text.

⁴²³ H.R. ___, 112th Cong. §§ 501–515 (2012) (discussion draft).

⁴²⁴ OR. REV. STAT. §§ 527.610–.992 (2011).

⁴²⁵ *See infra* notes 430–442 and accompanying text.

⁴²⁶ *See infra* notes 443–449 and accompanying text.

⁴²⁷ *See infra* notes 450–464 and accompanying text.

⁴²⁸ *See infra* notes 465–470 and accompanying text.

⁴²⁹ *See infra* note 471 and accompanying text in subsection.

1. The Inadequate Protection Provided by the Oregon FPA

If Congress were to enact either the OCTA or the Hastings bill, the O&C lands would no longer be subject to most federal environmental protections, including those afforded by NEPA and the ESA.⁴³⁰ Thus, under the OCTA proposal, the Oregon FPA would offer protection only for land included in the “timber trusts.”⁴³¹ The Hastings bill does not even consider this dynamic. In promoting the OCTA, the Oregon delegation assumed that the Oregon FPA would be sufficient to protect the spotted owl and salmon.⁴³² Because 1.9 million acres of O&C lands currently support strong salmon populations and are home to nearly sixty species of concern and nearly thirty percent of the listed marbled murrelet’s critical habitat in western Oregon,⁴³³ this is a critical assumption.

Unfortunately, the assumption is incorrect. For example, Oregon law permits 120-acre clearcuts and allows operators to harvest forests in a way that creates habitat fragmentation.⁴³⁴ In state forests, the Oregon FPA protects only thirty percent of land from clearcuts.⁴³⁵ Moreover, in

⁴³⁰ H.R. __, 112th Cong. § 212(a)(2) (2012) (discussion draft); H.R. 4019, 112th Cong., § 105(d)(4), (e) (2012) (deeming existing documents sufficient). The OCTA proposal does, however, require the board of trustees to comply with the Clean Water Act with respect to timber road run-off. H.R. __ § 212(c)(3).

⁴³¹ See H.R. __ § 212(a)(2).

⁴³² See *id.* § 214(j) (noting that so long as the board of trustees manages the timber trust in compliance with the Oregon FPA, its actions shall be considered compliant with the ESA).

⁴³³ THE NATURE CONSERVANCY & WILD SALMON CTR., ATLAS OF CONSERVATION VALUES ON BUREAU OF LAND MANAGEMENT HOLDINGS IN WESTERN OREGON 5–7, 23 map 13 (2012), available at http://oc.oregonexplorer.info/ExternalContent/spatial_data_download/tmc/W_OR_BLM_Atlas_full_print_version.pdf. The O&C lands contain over fourteen thousand miles of salmon-bearing river miles. *Id.* at 5.

⁴³⁴ OR. REV. STAT. § 527.740(1)–(2) (2011); OR. ADMIN. R. 629-630-0100(1) (2012) (noting that operators are given the discretion to choose the method by which to harvest forests); see Edward J. Heisel, Comment, *Biodiversity and Federal Land Ownership: Mapping A Strategy for the Future*, 25 *ECOLOGY L.Q.* 229, 244 (1998) (“Clearcutting of [Northwest old-growth] forests has severely compromised their biological integrity, resulting in the direct loss of biodiversity through habitat fragmentation . . .”).

⁴³⁵ See OR. DEP’T OF FORESTRY (ODF), NORTHWEST OREGON STATE FOREST MANAGEMENT PLAN REVISED PLAN APRIL 2010 S-17, 4-11 (2010), available at http://www.oregon.gov/ODF/STATE_FORESTS/docs/management/nwfmnp/NWFMP_Revised_April_2010.pdf. Only 15% of forests covered by OR. REV. STAT. § 530 must achieve “layered” forest stand structure, and only 15% must achieve old-growth forest stand structure—the rest need only reach “regeneration” (15%), “closed single canopy” (5%), and/or “understory” (30%) stand structures. See *id.* Although 70% of OR. REV. STAT. § 530 land is theoretically open to clearcutting, the actual percent of land open to clearcutting varies by timber district due to terrain (i.e., steep slopes, rocks, stream buffers, wetlands), a lack of road access, and/or varied growing conditions. See *id.* at 2-77, 4-19 to 4-20, 4-74.

most situations under the state statute, operators must provide riparian buffers up to only twenty feet wide.⁴³⁶ By contrast, the NWFP prevents harvesting within one hundred and three hundred feet of riparian areas, as well as within the one hundred-year floodplain and in landslide-prone areas.⁴³⁷ Further, the NWFP imposes on-the-ground surveys of plants and animals prior to harvesting a parcel.⁴³⁸ Finally, the NWFP requires watershed analysis to assess current watershed conditions.⁴³⁹ The Oregon FPA provides none of these protections. Numerous studies have detailed the insufficiency of the Oregon FPA to protect salmon.⁴⁴⁰ In fact, in terms of protecting habitat for ESA-listed species, the Oregon Board of Forestry has acknowledged that “compliance with the Oregon Forest Practices Act requirements does not ensure compliance with the federal ESA.”⁴⁴¹

Paradoxically, although *The Oregonian* endorsed the OCTA proposal and credited its reliance on the Oregon FPA as a sufficient environmental protection for the O&C lands, the newspaper also decried the management of state forests under the Oregon FPA as grossly inadequate from an environmental perspective.⁴⁴² This internal conflict

⁴³⁶ OR. ADMIN. R. 629-635-0310(1)(a); 629-640-0200(6) (2012) (affording small domestic use, non-fish streams only twenty feet riparian management areas, and ten feet riparian buffers on non-merchantable timber). All other small streams that do not have domestic or fish use classifications only receive water quality protection and receive no riparian management area. *Id.* at 629-640-0100(2)(a)–(c), 629-640-0200(2)(a)–(c) (requiring that for fish streams, domestic streams, and large and medium unclassified streams, operators only retain understory vegetation within ten feet of a stream, trees within twenty feet of a stream, and all trees leaning over a channel).

⁴³⁷ See 1994 ROD, *supra* note 21, at 9; 1994 FSEIS, *supra* note 238, at B-16, B-85 tbl.B6-1.

⁴³⁸ See 1994 ROD, *supra* note 21, at 11; 1994 FSEIS, *supra* note 238, at B-143 to B-162 (describing standards in detail).

⁴³⁹ See 1994 ROD, *supra* note 21, at 10; 1994 FSEIS, *supra* note 238, at B-94 to B-95.

⁴⁴⁰ See, e.g., INDEP. MULTIDISCIPLINARY SCI. TEAM, RECOVERY OF WILD SALMONIDS IN WESTERN OREGON FORESTS: OREGON FOREST PRACTICES ACT RULES AND THE MEASURES IN THE OREGON PLAN FOR SALMON AND WATERSHEDS 34 (1999), available at <http://www.fsl.orst.edu/imst/reports/1999-1.pdf>; NAT'L MARINE FISHERIES SERV., A Draft Proposal Concerning Oregon Forest Practices I (1998), available at http://www.coastrange.org/documents/NMFS_FP_pdf.pdf; NAT'L MARINE FISHERIES SERV., POSITION PAPER ON THE OREGON FOREST PRACTICES ACT (1996), available at http://www.umpqua-watersheds.org/archive/local/nmfs_on_ofpa.html.

⁴⁴¹ OR. FOREST RES. INSTIT., OREGON FOREST PROTECTION LAWS 38 (2d ed. 2011), available at http://www.forestresourceinstitute.com/images/ill_man_chap_2.pdf.

⁴⁴² Compare Craig Patterson, Editorial, *The Mismanagement of State Forests*, OREGONIAN, Jan. 14, 2012, http://www.oregonlive.com/opinion/index.ssf/2012/01/adaptive_management_or_managem.html (“[T]he State lands [are] exempt from the reality and [s]cience that affects public lands”), with Editorial Board, *A Promising O&C Forest Plan*, *supra* note 408 (“If the[] [state Forest Practices Act standards] are solid enough to govern the private working

among *The Oregonian* editorial staff is indicative of a need to dig deeper to find a solution that adequately balances the counties' economic interests and forthrightly addresses the environmental realities that would result from executing the OCTA proposal. Simply relying on the Oregon FPA as an environmental backstop seems wholly inadequate.

2. Neglecting the Effect of Increased Timber Harvesting on Oregon's Already Violated Water Quality Standards

High river temperatures currently cause the most violations of Oregon's water quality standards and are Oregon's most widespread pollution problem.⁴⁴³ Recently, the District Court for the District of Oregon concluded that the EPA failed to adequately review implementation of Oregon's water quality standards for stream temperatures when reviewing the effects of logging, farming, and cattle grazing.⁴⁴⁴ State law considers pollution sources from logging, agriculture, and grazing to be in compliance with water quality standards if certain mandatory management practices are fulfilled.⁴⁴⁵ A central flaw in this assumption, according to the court, is the fact that logging, grazing, and agriculture can raise water temperatures through reduced stream-side vegetation, thus reducing shade, and adding sediment to the water, making streams shallower and less reflective of sunlight.⁴⁴⁶

forests of Western Oregon, shouldn't they be sufficient for what the DeFazio bill envisions as public working forests?").

⁴⁴³ See Scott Learn, *Judge Says Oregon's River Temperature Standards Need More Scrutiny*, OREGONIAN, Feb. 28, 2012, 2012 WLNR 4410304 (citing Nina Bell, executive director of Northwest Environmental Advocates); Nina Bell, Editorial, *Risks to Salmon, Steelhead, Trout: Oregon Fails to Protect Fish from Warming Streams*, OREGONIAN, Mar. 7, 2012, 2012 WLNR 4996167. See generally Craig N. Johnston, *Salmon and Water Temperature: Taking Endangered Species Seriously in Establishing Water Quality Standards*, 33 ENVTL. L. 151 (2003).

⁴⁴⁴ Opinion and Order at 13, 15, *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, No. 3:05-cv-01876-AC (D. Or. Feb. 28, 2012) ("Given that many temperature impaired waters in Oregon are impaired in whole or in part by nonpoint sources of pollution, the challenged provisions could present a considerable obstacle to the attainment of water quality standards[.] . . . The EPA cannot choose to review and approve water quality standards while ignoring separate provisions which have the potential to cripple the application of those standards."); see Learn, *supra* note 443.

⁴⁴⁵ Opinion and Order, *supra* note 444, at 12–13. This is the situation under the Oregon FPA. OR. ADMIN. R. 340-041-0028(12)(e) (2012) (determining that forest operations that comply with best management practices already required under the FPA are "deemed in compliance" with temperature standards). Similar standards exist in the agricultural and grazing context. See, e.g., OR. ADMIN. R. 340-041-0004(4)(a), (b) (2012); OR. ADMIN. R. 340-041-0028(12)(g) (2012).

⁴⁴⁶ See Learn, *supra* note 443 (describing the motive underlying the suit).

The district court ruled that the EPA's approval of Oregon's automatic upward adjustment of stream temperature requirements did not protect salmon and steelhead⁴⁴⁷ and required the National Marine Fisheries Service and the U.S. Fish and Wildlife Service to revise their programmatic biological opinion ("BiOp") concerning the effect of Oregon's water quality standards on ESA-listed fish.⁴⁴⁸ Thus, even without significant increases in timber harvesting, the state is not adequately protecting water quality or providing sufficient stream protection for salmon and steelhead. Since 2.3 million people live within ten miles of the O&C lands, and seventy-five percent of O&C lands are within Oregon Department of Environmental Quality designated surface water protection areas,⁴⁴⁹ the quality of water flowing from the O&C lands matters for many Oregonians. With the large increases in timber harvesting proposed in the Hastings and OCTA bills, these water quality concerns would only become more pronounced.

3. The Mythical Link Between Increased Harvesting and Economic and Employment Increases

Another critical flaw in both the OCTA and Hastings bill proposals is the assumption that increased harvesting can solve the counties' funding problems. Based on estimates from Headwaters Economics, an independent research group, logging would need to increase ten-fold to raise the money necessary to support O&C county governments.⁴⁵⁰ Although both proposals claim that increased harvesting will add jobs and improve local economic conditions, changed market dynamics raise questions about whether there is market demand for an increased supply of Oregon timber and whether logging would provide sufficient economic benefits for the O&C counties.

⁴⁴⁷ Opinion and Order, *supra* note 444, at 24, 26–27 (granting summary judgment to the plaintiff). The regulation provides that where the Oregon Department of Environmental Quality (DEQ) determines that "the natural thermal potential of all or a portion of a water body exceeds the biologically-based [numeric] criteria . . . , the natural thermal potential temperatures supersede the biologically-based [numeric] criteria, and are deemed to be the applicable temperature criteria for that water body." OR. ADMIN. R. 340-041-0028(8) (2012). Although the regulation calls for sixty-four degrees Fahrenheit for the protection of salmon and steelhead, DEQ regularly allowed temperatures up to ninety degrees Fahrenheit to pass muster under this provision. See Bell, *supra* note 443.

⁴⁴⁸ Opinion and Order, *supra* note 444, at 36–42.

⁴⁴⁹ See THE NATURE CONSERVANCY & WILD SALMON CTR., *supra* note 433, at 8.

⁴⁵⁰ *About Us*, HEADWATERS ECONOMICS, <http://www.headwaterseconomics.org/about; Clear-Cut Solution to County Funding?>, *supra* note 419. Likewise, government management costs under this scenario would likely increase seventeen-fold. *Id.*

Once robust, demand for Oregon Douglas fir timber has diminished.⁴⁵¹ Since promulgation of the NWFP, many sub-equatorial nations have developed highly productive, short-rotation, low-cost timber.⁴⁵² Soon, timber imports will fulfill a significant portion of American demand.⁴⁵³ Further, since timber stumpage prices are linked to housing starts,⁴⁵⁴ as housing starts decline, so does the demand for timber.⁴⁵⁵ Because the recent economic recession produced a sharp decline in housing starts,⁴⁵⁶ Oregon timber prices are depressed.⁴⁵⁷ As a result of these new market dynamics, Oregon timber is less competitive in the global marketplace.⁴⁵⁸

Moreover, in the past, the Oregon timber industry developed a competitive advantage because a cluster of nearby businesses arose to support the forest products industry.⁴⁵⁹ At the heart of this economic web were the milling and forest product companies, with equipment manufacturers, distributors, and business services providing support.⁴⁶⁰ Prior to the NWFP, most of this support infrastructure was located in

⁴⁵¹ Jerry F. Franklin & K. Norman Johnson, *Forests Face New Threat: Global Market Changes*, ISSUES IN SCI. & TECH., Summer 2004, at 41.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ See OR. DEP'T OF FORESTRY, AN EVALUATION OF THE ACHIEVEMENT OF ALL NINE PERFORMANCE MEASURES FOR TWO MANAGEMENT APPROACHES ON THE TILLAMOOK AND CLATSOP STATE FORESTS 3 fig.1 (2009), available at http://www.oregon.gov/ODF/BOARD/docs/June_3_2009/3_Att_1.pdf.

⁴⁵⁵ For example, in the early 1980s, the housing market declined precipitously, and housing starts sank from over two million per year to 1.07 million per year. Daniel Jack Chasan, *A Trust for All the People: Rethinking the Management of Washington's State Forests*, 24 SEATTLE U. L. REV. 1, 10 (2000). By 1982, Washington timber that had sold for \$337 per thousand board feet (MBF) in 1980 fell to \$175/MBF. *Id.*

⁴⁵⁶ In 2005, private housing starts in the United States reached a peak of 2.07 million per year. UNITED STATES CENSUS BUREAU, NEW PRIVATELY OWNED HOUSING UNITS STARTED: ANNUAL DATA 1 (2012), available at http://www.census.gov/construction/nrc/historical_data/ (follow "XLS" hyperlink at intersection between "All data" column and "Started" row). In 2007, housing starts numbered around 1.355 million. *Id.* As of 2011, annual housing starts had fallen to 608,800. *Id.*

⁴⁵⁷ The average stumpage price for timber in Oregon was \$348/MBF in FY 2007. COUNCIL OF FOREST TRUST LAND CNTYS., STATE FORESTER'S ANNUAL REPORT FOR THE ASSOCIATION OF OREGON COUNTIES 9 tbl.5 (2009). In 2009, average stumpage prices had dropped to \$211/MBF. *Id.* Prices climbed moderately in FY 2010 as OR. REV. STAT. § 530 land timber sold for an average of \$257/MBF. COUNCIL OF FOREST TRUST LAND CNTYS., STATE FORESTER'S ANNUAL REPORT FOR THE ASSOCIATION OF OREGON COUNTIES 12 tbl.5 (2010).

⁴⁵⁸ See Franklin & Johnson, *supra* note 451.

⁴⁵⁹ E.D. HOOVE & CO., OREGON FOREST CLUSTER ANALYSIS, at i (2005) (prepared for the Oregon Forest Resources Institute), available at <http://library.state.or.us/repository/2007/200708241527075/index.pdf>.

⁴⁶⁰ *Id.* at 6-7.

Oregon communities close to the forests, thus providing a number of localized “timber” jobs beyond just harvesting.⁴⁶¹ Now, many of these formerly clustered customers and suppliers are no longer in Oregon.⁴⁶² In connection with the lessened demand for Oregon timber, this altered market structure makes it even more difficult for Oregon timber and forest products to compete.⁴⁶³

As a result of these changed dynamics, Congress should consider whether a solution to county funding problems that is based on increased timber harvesting is even economically possible in this very different global timber marketplace. Otherwise, the proposals may provide only a false hope to the struggling counties, while simultaneously destroying valuable forest lands.⁴⁶⁴

4. Enough O&C Timber To Sustain Increased Logging?

It is possible that logging the O&C lands simply cannot provide enough timber volume to sustain the counties, because nearly one-third of the O&C lands are classified as not part of the harvest base for purposes of allowable sale quantity,⁴⁶⁵ and much of the old growth has been logged.⁴⁶⁶ According to the estimates of an experienced BLM timber surveyor, when logging ground to a halt as a result of the spotted owl injunctions in the early 1990s, only five percent of the O&C lands still contained old growth.⁴⁶⁷ A recent study found that forty-six percent of the timber stands on O&C lands are less than seventy-five years old.⁴⁶⁸ Knowing the timber volume available on the O&C lands is critical because although an old-growth tree may contain thousands of board-feet of lumber, a forty- or fifty-year-old tree may only have a few hundred board-feet.⁴⁶⁹

⁴⁶¹ See *id.* at i, 88.

⁴⁶² *Id.* at 7.

⁴⁶³ See Franklin & Johnson, *supra* note 451, at 41, 44 (“The United States will likely become a minor player in the global production of common wood-based products, including lumber, pulp, and paper.”).

⁴⁶⁴ See Bill Hall & Pete Sorenson, Editorial, *Don't Sacrifice Forests to Solve Financial Crisis*, OREGONIAN, Feb. 28, 2012, 2012 WLNR 4343089.

⁴⁶⁵ THE NATURE CONSERVANCY & WILD SALMON CTR., *supra* note 433, at 4.

⁴⁶⁶ See Steve Holmes, Editorial, *Logging Bill Fails to See Forest Through the Trees*, REGISTER-GUARD (Or.), Mar. 15, 2012, available at <http://projects.registerguard.com/web/opinion/27764259-47/lands-public-counties-plan-timber.html.csp>.

⁴⁶⁷ *Id.*

⁴⁶⁸ THE NATURE CONSERVANCY & WILD SALMON CTR., *supra* note 433, at 25 map 15.

⁴⁶⁹ See Holmes, *supra* note 466.

The checkerboard layout of USFS and BLM land also makes large-scale harvesting difficult—especially since over sixty percent of the O&C land parcels are less than 320 acres—and increased harvesting on the O&C lands could result in decreased harvests from adjacent USFS lands due to species and watershed impacts throughout the ecosystem.⁴⁷⁰ As a result of these dynamics, the claimed economic benefits linked to increased O&C land harvests could be offset significantly. Thus, before making an “all-in” bet on timber under the OCTA or Hastings bill proposals, knowing the actual physical state of the O&C forests seems imperative.

5. Statutory Divisions of Land: Ecologically Inappropriate on the Landscape Level

Landscape-level ecosystems are complex mosaics in need of the flexibility to adjust to disturbances and changes. Consequently, statutorily restricting particular parcels of land to timber and non-timber uses—as suggested in the OCTA proposal⁴⁷¹—does not ensure landscape-level environmental protection if non-timber areas suffer from fire, insect-kill, or other forest disturbances. Any viable future solution must create ecological buffers that account for future forest changes and should not impose inflexible, non-ecological statutory constraints on land uses.

D. *Mixed Sources of County Funding, Including New Ecosystem Service Markets*

The potential environmental consequences associated with the OCTA and Hastings bill proposals seem ominous. Further, the economic assumptions underlying the proposals may be wildly inaccurate. Although increases in ecologically-sensitive logging⁴⁷² and short-term

⁴⁷⁰ See THE NATURE CONSERVANCY & WILD SALMON CTR., *supra* note 433, at 4. Because the O&C lands are adjacent to USFS lands in this checkerboard, and because timber sales from USFS lands would still be subject to NEPA’s “cumulative impacts,” NEPA’s “indirect effects” analysis, and NFMA’s species diversity requirements, it is possible that increased logging of the O&C lands could adversely affect species and watersheds throughout the contiguous ecosystem, so that future USFS sales might not meet environmental standards. See 16 U.S.C. § 1604(g)(3)(B) (2006) (NFMA authority for diversity); 36 C.F.R. § 219.9 (2012); 40 C.F.R. §§ 1508.7, .8 (2011) (NEPA regulations).

⁴⁷¹ H.R. __, 112th Cong. (2012) (discussion draft).

⁴⁷² Increasing harvests beyond current NWFP levels will not likely withstand judicial review of compliance with environmental laws. See *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291, 1300 (W.D. Wash. 1994), *aff’d sub nom.* *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (“[A]ny more logging sales than the plan contemplates would

reauthorization of county funding programs like the SRSA and PILT could be a part of the solution, large-scale liquidation and privatization of the forests is not the long-term answer.⁴⁷³ The current congressional proposals ignore many environmental and economic issues.

In response to the 2012 congressional proposals, a coalition of Oregon environmental groups offered a counter-proposal aimed at “sharing responsibility” for solving the O&C counties’ budget crisis.⁴⁷⁴ This counter-proposal suggested a combination of increased local property taxes, increased state export taxes on logs, and federal management consolidation to eliminate redundancy.⁴⁷⁵ These groups claimed that each of these actions could raise approximately one-third of the estimated 110 million dollar annual county funding shortfall.⁴⁷⁶ Despite the Oregon congressional delegation’s quick dismissal of the environmental counter-proposal in light of the counties’ and state’s current economic situation,⁴⁷⁷ the environmentalists’ notion of shared responsibility, and several of their funding sources, should form the basis of a more comprehensive proposal.

We believe that a long-term answer lies in a diversified funding solution that helps the O&C counties develop more sustainable revenue sources without sacrificing the NWFP, other federal protections, or Oregon’s already-compromised water quality. Such a solution would continue county payments, but tie those payments to a requirement to establish ecosystem service programs. Examples of potentially feasible ecosystem service programs include watershed protection, recreation,

probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions.”). If the agencies increase harvest volumes under the existing plan, they will likely need a congressional declaration that the increases are compliant with environmental laws.

⁴⁷³ See Hall & Sorenson, *supra* note 464 (“The loss of these federal funds leaves [the O&C counties] in a bind. But proposals to link county funding to expanded logging on federal public lands have significant problems.”). The authors of this opinion piece—two O&C county commissioners—suggest that forest thinning modeled on the Siuslaw National Forest could be one way to achieve higher harvest levels without compromising environmental values. *Id.*

⁴⁷⁴ See RANDI SPIVAK, GEOS INSTIT. ET AL., SHARED RESPONSIBILITY: THE CONSERVATION COMMUNITY’S RECOMMENDATIONS TO EQUITABLY RESOLVE THE O&C COUNTY FUNDING CONTROVERSY 2 (2012), available at http://www.oregonwild.org/oregon_forests/old_growth_protection/westside-forests/western-oregon-s-patchwork-public-lands/GEOS_Shared_Responsibility%20Download%20version.pdf; Hall & Sorenson, *supra* note 464; see also Chandra LeGue, *A Bad Deal for Oregon’s Forests and Counties*, OREGON WILD (Dec. 19, 2011, 2:22 PM), <http://www.oregonwild.org/about/blog/a-bad-deal-for-oregon-s-forests-and-counties>.

⁴⁷⁵ See SPIVAK ET AL., *supra* note 474, at 2.

⁴⁷⁶ *Id.*; see Mortenson & Pope, *supra* note 378.

⁴⁷⁷ Mortenson & Pope, *supra* note 378.

and aesthetics. Increased county-wide sales taxes would be an important revenue supplement, as would an increased state log export tax. Moreover, the O&C counties are currently property tax havens,⁴⁷⁸ and so we suggest raising county property tax rates to closer to the statewide average. Future SRSA appropriations should be conditioned on implementing some or all of the above-mentioned alternative revenue generating initiatives. Further, we think that the USFS and BLM should investigate potential cost savings associated with consolidated management authority over the O&C lands and adjacent national forest lands. Finally, if SRSA and PILT funds are reauthorized as part of a long-term fix, we suggest altering the award formula so the counties with the most need—and not the most acreage or historic harvesting levels—receive the most money.

1. Generating Revenue from Forest Ecosystem Service Values

The O&C lands provide a host of values not currently sold in the marketplace. Ecosystem service schemes monetize the otherwise “free” service values that healthy, functioning ecosystems provide to humans.⁴⁷⁹ By monetizing the non-economic values provided by the O&C lands, and then selling these service values, the O&C counties might be able to generate significant new revenues without having to increase timber harvests.

Forest ecosystems typically provide four types of benefits: commodities, improved environmental conditions, cultural services, and supporting services that make these other values possible.⁴⁸⁰ Commodities include fisheries, wood, and fresh water.⁴⁸¹ Forests also supply flood control, water purification, and carbon sequestration benefits for humans.⁴⁸² Forests provide cultural services such as education, recreation, and aesthetics.⁴⁸³ Finally, supportive services include nutrient cycling

⁴⁷⁸ GOVERNOR’S TASK FORCE ON FED. FOREST PAYMENTS AND CNTY. SERVS., FINAL REPORT 39 (2009), available at http://archivedwebsites.sos.state.or.us/Governor_Kulongoski_2011/governor.oregon.gov/Gov/docs/toffp/final_report_020309_am_nobkkmk.pdf.

⁴⁷⁹ See Janet Neuman, *Thinking Inside the Box: Looking for Ecosystem Services Within a Forested Watershed*, 22 J. LAND USE & ENVTL. L. 173, 188–89 (2007).

⁴⁸⁰ See J.B. Ruhl, *Ecosystem Services and the Clean Water Act: Strategies for Fitting New Science into Old Law*, 40 ENVTL. L. 1381, 1382 (2010).

⁴⁸¹ See Neuman, *supra* note 479, at 189.

⁴⁸² See Ruhl, *supra* note 480; Laurie A. Wayburn & Anton A. Chiono, *The Role of Federal Policy in Establishing Ecosystem Service Markets*, 20 DUKE ENVTL. L. & POL’Y F. 385, 387 (2010) (“In the United States, natural systems currently offset nearly one-fifth of total [carbon] emissions, largely via forest sequestration.”).

⁴⁸³ Ruhl, *supra* note 480.

and soil formation, which enables the other services to occur.⁴⁸⁴ Some of these services are more easily monetized than others.

Watershed-based markets close to urban centers are likely the most implementable ecosystem service from the O&C lands because they can take advantage of existing compliance mechanisms and broadly distribute investment charges among a denser, more populous area.⁴⁸⁵ Healthy forest watersheds are essential to water users.⁴⁸⁶ Increased timber harvesting leads to increased sediment runoff and decreased water quality, which can increase water filtration plant operational costs, cause plant shutdowns, generally interfere with the operation of such systems, and cause ecological problems.⁴⁸⁷ Avoiding the sedimentation and water supply issues associated with a degraded watershed thus is of great value to municipalities, especially those within the states' designated surface water protection areas.⁴⁸⁸ Among many success stories, the city of Portland has benefited economically from enhanced watershed protection,⁴⁸⁹ and the federal government has recently partnered

⁴⁸⁴ See *id.*; Wayburn & Chiono, *supra* note 482, at 388 (discussing need for “investment in the natural infrastructure that provides the basic ‘factory’ for producing these ecosystem services”).

⁴⁸⁵ See Jonathan Z. Cannon, Commentary, *Sustainable Watersheds*, 107 MICH. L. REV. FIRST IMPRESSIONS 74, 77–78 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/cannon.pdf> (noting advantage when utilizing existing compliance mechanisms); Philip Womble & Martin Doyle, *The Geography of Trading Ecosystem Services: A Case Study of Wetland and Stream Compensatory Mitigation Markets*, 36 HARV. ENVTL. L. REV. 229, 244 (2012) (emphasizing increased ecosystem service values if closer to urban areas).

⁴⁸⁶ Travis Greenwalt & Deborah McGrath, *Protecting the City's Water: Designing A Payment for Ecosystem Services Program*, NAT. RESOURCES & ENV'T, Summer 2009, at 9, 9 (2009) (“[F]low regulation; filtration; flood control; and protection against runoff, erosion, and sedimentation are critically important . . .”).

⁴⁸⁷ See OR. DEP'T OF ENVTL. QUALITY, TURBIDITY ANALYSIS FOR OREGON PUBLIC WATER SYSTEMS 1, 37–38, 40 (2010), available at <http://www.deq.state.or.us/wq/dwp/docs/TurbidityAnalysisOregonPWS201006.pdf>; J.B. Ruhl & James Salzman, *The Law and Policy Beginnings of Ecosystem Services*, 22 J. LAND USE & ENVTL. L. 157, 157 (2007) (“[D]evelopment in forested watersheds has degraded the service of water purification.”).

⁴⁸⁸ See OR. DEP'T OF ENVTL. QUALITY, DRINKING WATER SOURCE AREAS FOR OREGON PUBLIC WATER SYSTEMS—SURFACE WATER (2012), available at <http://www.deq.state.or.us/wq/dwp/results.htm> (under “Maps,” follow PDF hyperlink for “Surface Water Drinking Water Source Areas in Oregon”) (last updated Nov. 28, 2012).

⁴⁸⁹ See Keith H. Hirokawa, *Sustaining Ecosystem Services Through Local Environmental Law*, 28 PACE ENVTL. L. REV. 760, 790–91 (2011) (“In many cases, such as the protection of the Bull Run watershed by Portland, Oregon, evidence of the substantial economic value of local ecosystem services compels local governments to engage in ecosystem investments.”). The city of Portland spends nearly one million dollars per year to protect the Bull Run watershed (home to Portland's water supply). DOUGLAS J. KRIEGER, *THE ECONOMIC VALUE OF FOREST ECOSYSTEM SERVICES: A REVIEW* 10 (2001). The alternative is often much more expensive. For example, each year Salem, Oregon spends 3.2 million dollars to operate water treatment facilities. *Id.* at 12.

with the city of Denver, Colorado to protect key forested headwaters, distributing these costs among municipal water users.⁴⁹⁰

In addition, since healthy watersheds foster stream temperatures compliant with Clean Water Act (CWA) standards,⁴⁹¹ the O&C counties could potentially sell temperature credits to larger government units whose water discharges exceed CWA limits.⁴⁹² Although forest ecosystems provide recreational, aesthetic, and carbon sequestration values, the federally-owned O&C lands would be ineligible for carbon sequestration credits under the new California cap-and-trade regulations,⁴⁹³ and opportunities to monetize recreation and aesthetic values may be difficult because of the lack of large iconic natural attractions in the O&C lands. Thus, focusing on watersheds provides an opportunity to structure programs that address water quality and drinking water concerns, CWA compliance, and fish protection.

⁴⁹⁰ Concerned about possible catastrophic effects on water supply from fire, Denver Water—the supplier of water to 1.3 million people in the metro area—recently signed a thirty-three million dollar cost-sharing agreement with the USFS for watershed restoration. See Neil LaRubbio, *Communities Help Pay for Ecosystem Services Provided by Forests*, HIGH COUNTRY NEWS, Feb. 20, 2012, available at <http://www.hcn.org/issues/44.3/communities-help-pay-for-ecosystem-services-provided-by-forests>. To pay for this restoration work, residential water users in Denver will pay an extra twenty-seven dollars over the course of the next five years. *Id.* A number of other communities around the world have successfully implemented a distributed watershed protection surcharge. See Tim Wigington, Comment, *Wading Out of the Tilla-muck: Reducing Timber Harvests in the Tillamook and Clatsop State Forests, and Protecting Rural Timber Economies Through Ecosystem Service Programs*, 42 ENVTL. L. 1275, 1326–28 (2012).

⁴⁹¹ Healthy forests shade rivers, thus reducing water temperature, and helping communities comply with total maximum daily load (TMDL) limits set by states under the Clean Water Act. See 33 U.S.C. § 1313(d)(1)(C)–(D) (2006) (requiring states to set pollutant- and temperature-based TMDLs for impaired water bodies); e.g., OR. DEP'T ENVTL. QUALITY, WILLAMETTE BASIN TOTAL MAXIMUM DAILY LOAD (TMDL), at C-14 (2006), available at <http://www.deq.state.or.us/wq/tmdls/docs/willamettebasin/willamette/appxctemp.pdf>. Oregon has established temperature load capacity in TMDLs for some rivers basins, which are then relied upon to set temperature-based permit limits for municipal wastewater treatment facilities that discharge hot water into rivers. See, e.g., Alan Horton & Marley Gaddis, *Pace & Scale: How Environmental Markets Could Change Conservation for Good*, FRESHWATER, Fall 2011, at 12, 16 (noting the TMDL set for the Rogue River, and the temperature limits set on Ashland and Medford's wastewater treatment discharges).

⁴⁹² See Horton & Gaddis, *supra* note 291 (describing a scheme whereby the city of Medford contracted with The Freshwater Trust to meet its permit obligation; The Freshwater Trust then contracted with riparian landowners in the river basin who leased their land for river-side shade restoration. Once the restoration work is complete, The Freshwater Trust will sell “temperature reduction credits” to the city, which the city can then use to offset water discharges from the point source).

⁴⁹³ See AIR RES. BD., CAL. ENVTL. PROT. AGENCY, COMPLIANCE OFFSET PROTOCOL U.S. FOREST PROJECTS § 3.6, at 17 (2011), available at <http://www.arb.ca.gov/regact/2010/capandtrade10/copusforest.pdf> (eligible projects are only those “on private land, or on state or municipal public land”).

Successfully implementing a system of ecosystem service payments will require a shift in thinking and forceful leadership by the state and federal governments.⁴⁹⁴ To encourage this leadership, Congress should condition county payment appropriations on the development of these types of programs. For one, the PILT program reduces payments by the amount a local government receives from other revenue programs, such as the SRSA.⁴⁹⁵ Congress should specifically exempt funding received from ecosystem-service programs from the payment reduction provision in PILT. Congress should also provide an incentive to the counties to develop ecosystem service programs by increasing PILT and SRSA disbursements to reward counties implementing these types of programs on a specified percentage of eligible acreage within their jurisdictions.

2. Countywide Sales Tax Measures and Capturing Out-of-Town Revenue

Because the O&C counties house such large swaths of federal land and local government units cannot impose property taxes on federal land, the counties are at a revenue disadvantage.⁴⁹⁶ To make up for this disadvantage, Congress compensated counties under programs such as the OCLA, SRSA, and PILT. When implemented, these county payments provided a large portion of the O&C counties' revenues each year.⁴⁹⁷ As these funds have dried up, the O&C counties must rethink their long-held position on sales taxes.⁴⁹⁸

Among Oregon counties, Curry County on the southern Oregon coast is the most affected by the O&C funding crisis. Although the county has considered declaring bankruptcy, disappearing, or merging with other counties, the first two proposals have been deemed legally

⁴⁹⁴ See Wayburn & Chiono, *supra* note 482, at 385–86 (“[W]hile voluntary markets for ecosystem services currently exist in the United States, these are unlikely to produce an efficient level of the ecosystem service due to insufficient demand and the persistence of free-ridership problems. Government regulation will be necessary to complement these market approaches, establishing compliance markets that induce demand for ecosystem service proxies, set standards, and foreclose on free-ridership. Many ecosystem services are difficult or costly to measure directly, thus the government also must establish rigorous standards and guidelines to ensure the veracity of the proxies used.”).

⁴⁹⁵ 31 U.S.C. § 6903(b) (2006); 43 C.F.R. § 44.23(a) (2011); *see* 31 U.S.C. § 6903(a)(1)(C).

⁴⁹⁶ See COGGINS ET AL., *supra* note 364, at 158–59 (noting that the OCLA was enacted because federal property is immunized from state tax laws).

⁴⁹⁷ For example, in Curry County, timber payments from these federal programs made up 65% of the county's operating budget and 60% of its road budget. Eric Mortenson, *Crack in the Sales Tax Taboo?*, OREGONIAN, Mar. 5, 2012, at A1.

⁴⁹⁸ *Id.* (discussing meal taxation schemes in Ashland and Yachtas, Oregon).

impossible, and the third too difficult.⁴⁹⁹ Although the county commissioners originally planned to place a general sales tax on its May 2012 ballot, the county decided against the move and appears not to have pressed the matter further.⁵⁰⁰ As originally proposed, the county would have levied a three percent tax on the sale of all non-exempted goods in the county.⁵⁰¹ The tax aimed to capture non-local, tourist revenue.⁵⁰² This county-wide sales tax would be the first in the state, although the Oregon cities of Ashland and Yachats impose a sales tax on prepared food and beverages.⁵⁰³ The tax could raise an estimated 7.9 million dollars annually.⁵⁰⁴ Imposition of similar taxes by each of the O&C counties would solve a significant portion of their revenue problems. To motivate the counties to pursue this strategy, Congress should make any future long-term reauthorization of SRSA and PILT money contingent on the counties establishing sales taxes and, as discussed below,⁵⁰⁵ raising property taxes to certain minimum levels.

⁴⁹⁹ *Id.*; see April Baer, 'Grim Decision' Facing Curry County Commissioners, OPB NEWS, Apr. 12, 2012, <http://news.opb.org/article/grim-decision-facing-curry-county-commissioners/> (last updated July 17, 2012) (noting that the Oregon Constitution does not allow counties to go bankrupt).

⁵⁰⁰ CURRY COUNTY, DRAFT CURRY COUNTY SALES TAX, AS OF SECOND READING (Mar. 15, 2012), available at http://www.co.curry.or.us/commissioners/2012_03_15%20Draft%20Curry%20County%20Sales%20Tax_Second%20Reading.pdf; Eric Mortenson, *Curry County Holds Off on Sales Tax Vote*, OREGONIAN, Mar. 17, 2012, http://www.oregonlive.com/environment/index.ssf/2012/03/curry_county_holds_off_on_sale.html.

⁵⁰¹ CURRY COUNTY, DRAFT CURRY COUNTY SALES TAX, AS OF SECOND READING § 2(A)–(B).

⁵⁰² See *id.* § 4 (exempting multiple items, including prescription medication; medical items; groceries; utilities; property sales, leases or rentals; vehicles; construction materials; manufacturing, timber, agricultural, and commercial fishing machinery and equipment; and boats and personal watercraft).

⁵⁰³ The city of Ashland imposes a five percent voter-approved tax on food and beverage purchases until 2030. CITY OF ASHLAND MUNICIPAL CODE § 4.34 (2012), available at <http://ashland.or.us/Code.asp?CodeID=2219>; see *Food & Beverage Tax*, CITY OF ASHLAND, <http://ashland.or.us/Page.asp?NavID=9180> (last visited Jan. 10, 2013). The City of Yachats also imposes a five percent food and beverages tax. CITY OF YACHATS MUNICIPAL CODE § 3.12.020 (2012), available at <http://www.yachatsdocuments.info/library/Download.aspx?docid=2246>. From FY 2008–2009, until FY 2010–2011, the tax in Yachats raised over \$210,000 per year. CITY OF YACHATS, 2011–2012 ADOPTED BUDGET 20 (2012), available at <http://www.ci.yachats.or.us/Budget%202011-2012/Budget%202011-2012%20Adopted.pdf>.

⁵⁰⁴ Mortenson, *Curry County*, *supra* note 410.

⁵⁰⁵ See *infra* notes 513–516 and accompanying text.

3. Increasing the State Log Export Tax Rate

Oregon imposes only a minimal tax on forestry exports.⁵⁰⁶ As a result of this low tax and flagging demand in the United States, West Coast log exporters now send \$900 million in raw logs overseas—twenty-two times more than just four years ago.⁵⁰⁷ The OCTA proposal would address this problem by forbidding the exportation of logs from the private timber trust.⁵⁰⁸ The environmentalist counter-proposal suggested increasing the forest products harvest tax assessed to private forest owners from \$3.25 per 1000 board feet to around \$9.21 per 1000 board feet.⁵⁰⁹

Ultimately, any solution must recognize that exporting logs also results in the export of jobs associated with milling, forests products, and the supporting cluster businesses from Oregon communities, even domestically to different regions of the country.⁵¹⁰ Any solution to the O&C counties' economic situation must attempt to prevent the Northwest from becoming a timber colony.⁵¹¹ Therefore, we suggest that the state raise the state export tax on private lands—as in the environmentalist counter-proposal—and impose a severance tax on lumber harvested from both the O&C and national forest lands in Oregon.⁵¹² This money could be invested in localized milling and thinning projects, thus creating local jobs.

⁵⁰⁶ See OR. REV. STAT. §§ 321.005–.185 (2011).

⁵⁰⁷ See John Kitzhaber, *Governor Kitzhaber Testimony Before the Board of Forestry*, OREGON.GOV (Nov. 3, 2011) http://cms.oregon.gov/gov/media_room/pages/speeches2011/testimony_boardofforestry_110311.aspx.

⁵⁰⁸ H.R. __, 112th Cong. § 214(e) (2012) (discussion draft); SPIVAK, *supra* note 394, at 3.

⁵⁰⁹ SPIVAK ET AL., *supra* note 474, at 5. From 2004 to 2012, the average Forest Products Harvest Tax (FPHT) was \$3.25/MBF. See *Forest Products Harvest Tax*, OREGON.GOV, http://www.oregon.gov/DOR/TIMBER/2003_fpht.shtml (last visited Jan. 10, 2013). The average amount of timber harvested between 2004 and 2010 in Oregon was 3.77 billion board feet. SPIVAK ET AL., *supra* note 474, at 5. To raise \$37 million annually (as proposed), the FPHT would need to be raised to \$9.21/MBF. *Id.*

⁵¹⁰ See Kitzhaber, *supra* note 507. Roughly, for each MMBF of timber milled domestically, there are five jobs. SPIVAK, GEOS INSTIT., *supra* note 474, at 8. In contrast, for each MMBF of timber harvested, there is only one export job. *Id.*

⁵¹¹ See Kitzhaber, *supra* note 507. (“This amounts to nothing more than exporting our natural capital and our jobs. We are at risk of becoming a timber colony for Asia . . .”).

⁵¹² See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 613–624 (1981) (upholding the application of Montana’s maximum thirty percent severance tax on lessees of federal coal in the state, noting that “there can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity.”).

4. Increasing County Property Taxes

Curry County has the state's second lowest property tax—at sixty cents per \$1000 of assessed value, as compared to the statewide average of \$2.80 per \$1000 of assessed value, and \$4.34 per \$1000 of assessed value in Portland's Multnomah County.⁵¹³ Homeowners in Portland pay over seven times more in property tax, even though the median home value in the two counties is very close, and both are well above the national average.⁵¹⁴ The environmentalist counter-proposal suggested increasing property taxes in each of the affected counties to a level near the current statewide average.⁵¹⁵ This seems reasonable, although there is significant resistance from local residents: Curry County voters soundly defeated a 2010 measure to increase property taxes, and Josephine County defeated a \$12 million per year law enforcement tax levy proposal in May 2012, forcing the county to release 75 prisoners and lay off 70 people in the county sheriff's office.⁵¹⁶

5. Consolidating the O&C Lands into the National Forest System

To achieve further savings, BLM could transfer ownership of the O&C lands to the USFS to avoid management redundancy.⁵¹⁷ Officials have contemplated this proposal since the enactment of the OCLA in 1937.⁵¹⁸ The OCTA proposal promoted by the Oregon representatives suggests consolidation of the non-timber trust land into the USFS as well.⁵¹⁹ Although opponents challenged the assumptions underlying their conclusion, the environmentalist counter-proposal argued that the federal government could save up to 113 million dollars per year as

⁵¹³ GOVERNOR'S TASK FORCE ON FED. FOREST PAYMENTS AND CNTY. SERVS., *supra* note 478, at 43, 44 tbl.5.

⁵¹⁴ The median home value in Curry County is nearly \$267,000, whereas the median home value in Multnomah County is \$281,000. *State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/41000.html> (last visited Jan. 10, 2013) (select a county in the pull down box at the top of the screen for county-specific data). The national median home value is only \$188,000. *Id.*

⁵¹⁵ See SPIVAK ET AL., *supra* note 474, at 6–7.

⁵¹⁶ See *Josephine County Votes No on Law Enforcement Levy*, OREGONIAN, May 16, 2012, available at http://www.oregonlive.com/politics/index.ssf/2012/05/josephine_county_votes_no_on_l.html; Mortenson, *Loss of Federal Forest Payments*, *supra* note 377; Mortenson & Pope, *supra* note 378.

⁵¹⁷ SPIVAK ET AL., *supra* note 474.

⁵¹⁸ See *Hearings on H.R. 5858*, *supra* note 16, at 14–15 (exchange between Mr. White and Mr. Poole regarding consolidated management of the O&C lands).

⁵¹⁹ See H.R. ___, 112th Cong. § 231 (2012) (discussion draft).

a result of consolidation,⁵²⁰ savings that could be channeled to the O&C counties as additional payments in lieu of taxes. Although management streamlining could save money, consolidation could also result in lost jobs among BLM staffers, thus undercutting any potential employment increases gained elsewhere.⁵²¹ Consequently, more study is needed before relying on consolidation.

6. Reauthorizing SRSA and PILT Payments to Support Counties with the Most Need

Eighteen Oregon counties receive federal money under the SRSA for O&C lands.⁵²² Not all of these counties are equally in need of this subsidy, however. Isolated, non-populous counties along the Oregon coast and southwest Oregon have fewer opportunities for economic growth and diversification than do other counties receiving SRSA funds.⁵²³ For several of these counties, federal payments constitute up to twenty-five percent of annual county budgets.⁵²⁴ For others, like Multnomah and Washington Counties—home to the Portland metropolitan area—the payments are much less significant with respect to the counties' ability to provide services. Thus, if Congress reauthorizes SRSA and PILT funding for the long-term, the funds should be prioritized for those counties that may not be able to survive economically without federal assistance. The funds should be diverted away from places like Multnomah and Washington Counties, which received nearly 1.9 million dollars in SRSA payments in 2001 at the height of the program.⁵²⁵

CONCLUSION

From their nineteenth century inception to the present, the lands from the Oregon and California Land Grant ("O&C lands") have been

⁵²⁰ SPIVAK ET AL., *supra* note 474, at 4. The proponents of the environmental counter-proposal based this estimate on statistics showing that the BLM spends over four times as much to manage an acre of land than does the USFS. *Id.* Opponents to the environmentalist proposal challenged their assertion, claiming that the difference is more likely two-to-one. Mortenson & Pope, *supra* note 378 (quoting Douglas County Commissioner Doug Robertson).

⁵²¹ See Holmes, *supra* note 466.

⁵²² See *FY2001 O&C Payments to Counties*, *supra* note 411.

⁵²³ See HEADWATERS ECONOMICS, COUNTY PAYMENTS, JOBS, AND FOREST HEALTH: IDEAS FOR REFORMING THE SECURE RURAL SCHOOLS AND COMMUNITY SELF-DETERMINATION ACT (SRS) AND PAYMENTS IN LIEU OF TAXES (PILT) 34–36 (2010), available at http://headwaterseconomics.org/wphw/wp-content/uploads/Reform_County_Payments_WhitePaper_LowRes.pdf.

⁵²⁴ *Id.* at 18 fig.3.

⁵²⁵ See *FY2001 O&C Payments to Counties*, *supra* note 411.

fraught with controversy. Beginning with the railroad grant in 1866, through the Oregon land fraud scandal of the early 1900s and the revesting of the remaining unsold lands to the federal government in 1916, through the spotted owl controversy of the late 1980s and early 1990s, the subsequent NWFP and the ensuing 1995 timber salvage rider, and the George W. Bush Administration's unsuccessful attempts to weaken the plan in the 2000s, the O&C lands have been rife with strife and disputes. Today, history has once again repeated itself, as the O&C lands are at the center of a major county funding crisis that threatens to unravel a quarter-century of environmental progress. The Oregon and California counties ("O&C counties")—long reliant on timber harvest revenue from the O&C lands—now face serious fiscal crises as a result of diminished timber harvests and sharply curtailed federal funding. In response to these crises, federal legislators have proposed to privatize the O&C lands into large-scale timber plantations (the O&C Trust, Conservation, and Jobs Act "trust" proposal), and to increase harvesting to unsustainable levels in order to increase county revenues (Representative Hastings' Federal Forests County Revenue, Schools, and Jobs Act of 2012).

Both proposals suffer from serious environmental and economic flaws. First, both rely on the grossly inadequate Oregon Forest Practices Act to protect the forested ecosystems, exempting the land from federal environmental protections. Second, both proposals fail to assess adverse water quality effects connected to increased harvesting, despite Oregon's already compromised water quality status. Third, given the changed Northwest timber landscape, the purported employment and economic benefits of both proposals are quite overblown. Fourth, the O&C lands may simply not have enough timber to sustain the proposed harvest levels. Finally, statutory restrictions on land uses are inappropriate for dynamic, changing forest landscapes. These deficiencies suggest that Congress should pursue neither proposal.

We instead suggest an approach that both upholds the integrity of the hard-fought, time-tested Northwest Forest Plan and provides the O&C counties with long-term fiscal and economic security. We recognize that the O&C counties need additional revenue to support their local governments and economies, but this funding increase should not be achieved by sacrificing environmental protections or ignoring the irreplaceable natural values provided by the O&C lands. Moreover, it is hardly clear that privatization and/or liquidation of the forests would provide the counties the long-term economic security that they desire.

Any viable solution must provide long-term economic growth and security for the O&C counties, protect environmental values, and fairly

distribute the burdens of achieving these twin goals among the various stakeholders. The current congressional proposals assume that these principles cannot coexist, but we suggest that with the right combination of policies, environmental integrity, and economic growth, they can coexist and thrive.

The first step toward achieving this outcome is to monetize the robust ecosystem services provided by the O&C lands. Healthy forested watersheds provide cleaner, cooler, and less-sedimented drinking water, as well as improved salmon and aquatic habitat. Capturing and monetizing these values could provide the O&C counties with a consistent source of revenue without liquidating the forest. In addition, the counties could capture out-of-town and tourist revenues through properly structured sales taxes. Further, the O&C counties could generate more revenue if they raised property taxes to a level in line with the state median. Future long-term reauthorization of funding from the Payment In Lieu of Taxes Act (PILT) and the Secure Rural Schools and Community Self-Determination Act (SRSA) should be conditioned on the counties achieving some or all of these initiatives. The state could also supplement these revenues with an increased log export tax to provide an incentive for logging companies to mill timber in rural Oregon. Moreover, the federal government should consider the cost savings associated with consolidating some or all of the O&C lands into national forests. Finally, Congress should restructure the SRSA and PILT revenue distribution formulas to support the neediest counties. Although there is no single silver bullet, these suggestions would spread burdens more broadly among stakeholders, while protecting the O&C lands' unique environmental and cultural legacy.

In contrast to their contentious past and present, the pursuit of such an environmentally-sensitive and economically-sound strategy may provide the O&C lands, and those dependent on them, something entirely new: long-term, sustainable peace.