

Resource Managers and the Courts: A Decision-making Process Designed to Achieve Public Confidence

By Harry R. Bader

To the overworked natural resource manager on public lands it may often seem as though courts take a special delight in crafting anxieties that would render even Dante speechless. However, courts do not actively seek to entangle their own limited resources in the highly technical and specialized field of resource management.

The judiciary usually becomes involved because an error within the decision-making process has been detected by an aggrieved interest group. With standing in hand, the group may then seize this transgression in the hope of eventually forcing a substantive result through the procedural door.

The purpose of this comment is to acquaint the natural resource manager, whether s/he be associated with NPS, USFS, BLM, or the USFWS, with some of the fundamental principles guiding judicial review of agency decisions. Armed with this knowledge, our nation's natural resource stewards can create better decision-making processes, which reduce exposure to unwanted judicial intervention.

Bureaucratic agencies, it is no revelation, are beheld with a certain degree of suspicion. Their broad grants of authority, coupled with their insulation from the traditional avenues of democratic process, create an operational milieu where discretion may be motivated by the vicissitudes of bias or favoritism toward particular special interests.

Juxtaposed with this suspicion however, is the recognition that administrative agencies have institutional strengths that demand deference. Agencies are uniquely suited to handle complex problems because of their specialized personnel and the expertise that accrues from repeated exposure to certain types of issues.

There are many kinds of agency conduct which demand various levels of judicial scrutiny to insure fairness and accuracy. The Administrative Procedure Act and the judiciary distinguish between formal and informal activities, and between decisions premised upon findings of law or fact. (5 U.S.C. pp 551-706). The majority of natural resource decisions by agency field managers consist of informal discretionary actions based upon a finding of fact taken in the regular course of their normal duties.

These are the decisions that lead to a particular forest tract being harvested or a specific access road being constructed; these are the decisions that generate alternatives in plans and impact statements, or decree whether certain conduct may harm an endangered species. Sometimes the decisions may be as simple as deciding where to place a new public access cabin or trail. Such decisions confront resource managers every week, and these same decisions serve as the basis for innumerable lawsuits, which lead to costly delays, stifled initiative, and personnel demoralization. This comment addresses these informal discretionary decisions and the proper process for generating them.

Because the Administrative Procedure Act provides only a dim beacon for guidance, the courts have crafted innovative techniques for reviewing agency conduct. The techniques are diverse and go by many names, but are often referred to collectively as "the hard look doctrine." (Sunstein, "Deregulation and the Hard Look Doctrine," 1983 S.Ct. Review 177).

In reviewing agency conduct, the goal of the judi-

cary is to establish a decision-making process that assures a reasoned decision which can stand up to public and scientific scrutiny. (Ethyl Corp. v. EPA 541 F.2d 1, 66, 1976). Therefore, a judge will overturn an agency decision only if it is arbitrary, capricious, or an abuse of discretion. (Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council 435 U.S. 519, 545-546 and 548, 1978, and Citizens to Preserve Overton Park v. Volpe 28 L.Ed 136, 153, 1971).

Because the focus is procedural, it is possible for a decision to be invalidated, no matter how scientifically correct under the circumstances. On the other hand, if a resource manager follows the demands of Hard Look doctrine, the decision will be accepted, even if the court disagrees with the substantive outcome. The only role for a court is to ensure that the agency has taken a hard look at the salient facts: it cannot interject itself within the area of discretion as to which action should be taken. (Kleppe v. Sierra Club 427 U.S. 390 at 410, 1976). For example, alternative selection from a properly prepared environmental impact statement cannot be dictated by a judge. That substantive decision resides within the scope of the agency's discretion. The judicial role rests solely upon determining whether the EIS is a full disclosure document, generated in good faith after a detailed inquiry. This type of review is purely procedural.

Judicial review is intended to build confidence in the legitimacy of government authority by insuring an honest and earnest process. Review "underlines the court's rigorous insistence on the need for articulated rationale and reflective findings rather than whim, misplaced zeal, or improper influence. (Greater Boston Television Corp. v. FCC 44 F.2d 841, 851-852, 1970).

In order to realize legitimacy, judicial review makes four principal demands. (Sunstein, "Deregulation and the Hard Look Doctrine," 1983 S.Ct. Review 177, 181-182). Agencies must (1) offer detailed explanations for their decisions, (2) justify any departures from past decisions under similar circumstances, (3) consider a set of alternatives before making decisions, and (4) involve the public whose interests are affected wherever appropriate.

The following checklist, addressing concerns in the first three components, is derived from various requirements articulated from 23 federal cases, most involving natural resource issues.* The 12 elements contained here should be considered as essential steps for a legitimate decision building process and adhered to in every decision regarding resource management, whether or not one expects controversy. All 12 elements focus upon the concept of full disclosure and reasoned inquiry as a means to facilitate public understanding and acceptance of agency logic and considerations.

Checklist for Decision-Makers

1. The goals and objectives to be achieved by the decision must first be identified.
2. The agency's general policy mandates, prior decisions, and predispositions, as they relate to the matter at hand, must be explained.
3. The facts that are considered in resolving the problem, and why they are relevant to the problem, must be expressed.
4. The criteria used for decision-making and their relative weights must be articulated and justified.
5. Analysis techniques and methods must be explained.

6. All pertinent assumptions and areas of uncertainty (or where information is incomplete) must be disclosed.

7. The agency must articulate a rational connection between the facts found and the choice made.

8. The decision-maker must demonstrate that the choice selected will achieve the goals and objectives previously stipulated (Efficacy).

9. The decision-maker must show that the choice selected is the best possible solution available from a set of viable options (Supremacy).

10. The agency must demonstrate, when competing user groups are involved, that it has made a good faith effort to distribute equitably the benefits and burdens accruing from its decision.

11. The solution must encompass an internal system of self evaluation and review so that the decision can be modified as circumstances dictate.

12. If the decision marks a change from prior agency conduct in similar situations, a reasoned analysis indicating what factors brought about the change, and why, must be provided.

The 12 elements that comprise this checklist facilitate legitimacy concerns because the elements tend to (1) eliminate ambiguity and vagueness, inconsistency, and the cursory statements that can mask favoritism and bias, and (2) reinforce a good faith effort to ascertain truth, achieve accuracy, and find the most effective answer to a problem. Legitimacy concerns are extremely important because decisions that affect resource allocations such as timber, water, wildlife, minerals, open space, and recreation management go straight to the heart of "personhood values."

"Personhood" Values

Human beings are cognizing and goal-directed organisms. Attempts at needs satisfaction involve the ordering of one's own personal environment in an effort to maximize creative options and freedom of choice. These options and choices create the opportunities for self-development (personhood). To achieve this goal, an individual needs some control over personal activities-- the assurance that environmental conditions are stable enough to allow a person to make plans, investments, and commitments. In short, people must be able to rely on the assumption that society and government will respect these expectations.

A chosen lifestyle can provide a unique sense of personal fulfillment. Offer a farmer, a miner, a fisherman or a lumberjack work on an assembly line for a higher wage and many would reject the offer. Opportunities for recreation, such as hiking, camping, and wildlife viewing, also are essential to the human soul and contribute to the creation of individual identity.

Thus, expectations based upon personhood values give rise to a moral claim stronger than other expectations. A resource management decision that tends to trample upon personhood expectations must be especially carefully arrived at. Any perception that such decisions are cavalierly made, carelessly reasoned, or subject to favoritism and bias, calls into question the legitimacy of government authority. When an agency frustrates personhood values, the process that developed the course of action in question must be beyond reproach--open, broad-searching, rational, and consistent. Nothing less must be tolerated; the social stakes are too great.

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Because of the high social costs involved in frustrated public expectations, courts review agency decisions to insure that agencies conduct themselves professionally, fairly, and with impeccable integrity. The checklist contained in this comment may lead to better decisions, which pre-empt the opportunity for judicial review. It is designed to win acceptance and respect from those whom resource decisions impact.

"When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the process..."

Ethyl Corp. v. EPA
541 F. 2d 1. 67 (1976).

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*National Audubon Soc. v. Hester 801 F.2d 405 and 627 F.Supp. 1419 (1986); Sierra Club v. Clark 755 F.2d 608 (1985); Friends of Endangered Species v. Jantzen 760 F.2d 976 (1985); Village of False Pass v. Clark 733 F.2d 605 (1984); Sierra Club v. Clark 577 F. Supp. 783 (1984); Baltimore Gas & Electric v. NRDC 462 U.S. 87 (1983); Motor Vehicle Mfr. Assoc. v. State Farm Mutual 103 S. Ct. 2856 (1983); Humane Society v. Watt 551 F. Supp. 710 (1982); Cabinet Mts. Wilderness v. Peterson 685 F. 2d 678 (1982); Cayman Turtle Farm v. Andrus 478 F. Supp. 125 (1979); Vermont Yankee Nuclear Power Corp. v. NRDC 435 U.S. 519 (1978); Connor v. Andrus 453 F. Supp. 1037 (1978); Palila v. Hawaii Dept. of Land and Natural Resources 471 F. Supp. 985 (1979); Environmental Defense Fund v. Borm 458 F. Supp. 650 (1978); Local 777 of the Democratic Union v. NLRB 603 F.2d 862 (1978); Defenders of Wildlife v. Andrus 428 F.Supp. 167 (1977); Ethyl Corp. v. EPA 541 F. 2d 1 (1976); U.S. v. Aegheny-Ludlow Steel 406 U.S. 742 (1972); Environmental Defense Fund v. Ruckelshaus 439 F. 2d 584 (1971); Citizens to Preserve Overton Park v. Volpe 28 L.Ed. 2d 136 (1971); Greater Boston Television Corp. v. FCC 444 F 2d 841 (1970).