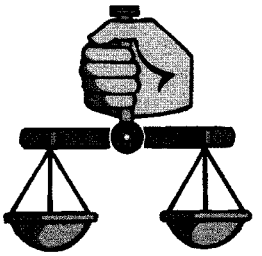
JUNK OR SCIENCE IN THE COURT SYSTEM:



You may be surprised!

by W. Alan Schroeder

Not so long ago, a land manager was reviewing the resumes of a number of prospective candidates to employ as a range conservationist. After narrowing the candidates down to three, the land manager decided to interview all three so as to make the final selection for the job.

At the designated date and time, the first candidate came in for the interview. This candidate was a recent graduate from a University with dual degrees in range and wildlife management. The land manager told this candidate that he had just one question, what is the average utilization of two grass species if one was grazed to 20% and the other was grazed to 40%. The candidate immediately said 30%. The land manager thanked and excused the candidate and said that someone would let him know if he got the job.

The second candidate then came in. This candidate was also a recent graduate of a University, but this candidate had a degree in range management and a minor in statistics. The land manager told this candidate the same thing, stating that he had just one question: What is the average utilization of two grass species if one was grazed to 20% and the other was grazed to 40%. This candidate, feeling very confident with his minor in statistics, said 30%. The land manager thanked and excused the candidate and said that someone would let him know if he got the job.

The third and final candidate then came into the interview room. This candidate was also a recent graduate of a University, but only had a degree in range management. The land manager then told this candidate the same as the other two, stating that he had just one question: What is the average utilization of two grass species if one was grazed to 20% and the other was grazed to 40%. This candidate, feeling kind of strange, got up from his seat, shut the curtains, sat back down in the chair, leaned slowly forward towards the land manager and said, what do you want the answer to be?

Friends, fellow members of the Society of Range Management, and guests, this story I have shared with you is what I believe is at the heart of this symposium, and that is, What do you want the answer to be, or maybe more fairly stated, what should the answer really be?

Whether you are a rancher dependent upon public or private land use, or you are a land manager with a Federal or State land management agency, or you are involved in the academic community, you presumably collect data according to a method, and then presumably evaluate that data according to a method to answer questions. These answers are often of significant importance, because they often impact the livestock you are managing, the land you are managing, or the students you are teaching. But as many of us will agree, the key to sound decision-making is the method chosen to drive the answer.

In my experience dealing with public land resource issues, I have seen a number of methods applied to drive answers to a variety of questions. To name just a few, I have seen the manipulation of utilization to determine grazing capacity. I have seen the use of fence line contrasts to assess range condition. I have seen the application of riparian stubble height to assess water quality or riparian condition.....I ask you, are these methods all junk or all science.

A few presenters this morning and a few other individuals not here today have suggested reliance upon the court system to determine whether a particular method is junk or science. However, I ask you, should we look to the court system to make these determinations? In other words, as in my story, should we defer to others, like the court system, to tell us what the answer should really be?

Recently, I spent an afternoon at a seminar here in Boise which intended to discuss the concept of proper functioning condition or PFC as related to riparian areas. The seminar was instructed by a number of individuals who were reputed to be experts on the concept of PFC. However, I was greatly surprised at the end of that seminar when one of the instructors concluded his remarks by saying that these PFC assessments were found lawful by a Federal District Court. After hearing this, I distinctly remember looking around the room and seeing a number of individuals who I considered well qualified in the field of range management. However, none of these individuals said anything about the concluding remark by the instructor. I therefore asked myself, has the field of range management deferred to the court system to be the gate-keeper of whether PFC is junk or science, and for that matter, has the field of range management deferred to the court system to be the gate-keeper as to whether any other method in range management is junk or science? The silence from the audience at the PFC seminar I attended appeared to suggest the answer is "yes".

To pacify those PFC advocates here today, it is not my intent to discuss whether PFC is junk or science. Instead, it is my intent to share with you different standards from which the court system weighs evidence to make a decision. These different standards will show you that the court system may or may not ever truly weigh whether a particular method applied by a land manager is really junk or science.

To explain, let me set forth for you a hypothetical:

A land manager collects over a series of years utilization on an area of land using the key forage plant method. The land

manager then evaluates that information using the utilization-actual use method to determine the grazing capacity upon the same area of land. The land manager finds from applying these two methods that the grazing capacity could be increased 20%. Based upon these findings, the land manager decided to graze 20% more livestock the next year. However, prior to turning out the additional 20%, a complaint is filed to stop implementation of the increase. The complaining party alleges that the key forage plant method was incapable of reliability determining the utilization. The complaining party contends that the land manager should not graze 20% more livestock.

Now under this hypothetical, I ask you, who wins and who loses?

Some of you may be saying to yourself, the land manager wins because he collected and evaluated the information according to scientific methods. However, others, like the third candidate in my story, may say, it depends. The third candidate in my story may say it depends upon the number of the utilization transects the land manager completed; it depends on whether the transects were representative of the area of land monitored; it depends on whether the land manager obtained an adequate number of hits along the transect; and, it depends upon what or who calibrated the eye of the land manager before he collected the data, and the list may go on. However, I tell you, that who likely wins or loses may well depend upon the particular venue of the complaint, because the particular venue determines the type of standard to be applied in reviewing the method employed by the land manager.

Let me explain. I will explain by applying this hypothetical to three different standards which arise in three different court room type venues:

The first standard is the "arbitrary and capricious" standard[1]. This standard arises in the Judicial Review of an informal administrative appeal process like that of the Forest Service or the U.S. Fish and Wildlife Service. In this type of informal appeal process, the land manager in my hypothetical is not subject to the direct examination under oath of his expertise or of the manner in which he collected or evaluated the utilization information. Instead, this land manager will have to load into the written record generally what he did to increase the permitted use, but the written record is all that is involved. The complaining party may also load into the written record the various failures of the land manager in collecting and evaluating the data, but also the written record is all that is involved. Once the written record is developed, the superior of the land manager reviews this written record, and without the application of any evidentiary standards, and without the application of any review standards, the superior affirms or reverses the decision of the land manager.[2] Ultimately, and potentially, this written record is reviewed by a Federal Judge upon judicial review. However, this judicial review does not involve a trial, but simply a review of the written record to determine whether a rational basis exists to support the decision of the land manager.

The second standard is the "substantial evidence" standard.[3] This standard arises in the Judicial Review of a formal administrative appeal process like that of the Bureau of Land Management. In this type of formal appeal process, the land manager in my hypothetical is subject to the direct and cross examination under oath of his expertise, as well as the manner in which he collected or evaluated the utilization information. Although the land manager will likely have documented in his decision or in his supporting evaluation generally what he did to increase the permitted use, this formal administrative process permits the land manager a full opportunity to go into detail as to his expertise and as to the manner he collected the utilization information. The complaining party will also have the same opportunity through his witnesses. Once the testimony and trial is concluded, an Administrative Law Judge reviews the record and after applying some limited evidentiary standards and after applying specific review standards, the ALJ affirms or reverses the decision of the land manager[4]. Ultimately, and potentially, this decision by the ALJ is reviewed by a Federal Judge upon judicial review. However, the judicial review does not involve another trial, but simply a review of the written record to determine whether substantial evidence exists to support the decision of the ALJ.

The third standard is the "preponderance of evidence" standard. This standard arises in a complaint between two parties, and potentially involving a Federal Land Management Agency in Federal District Court. In this type of formal adjudicative process, the land manager in my hypothetical is subject to not only a trial, but also to potentially preliminary motions as to methods applied to collect utilization data. These preliminary motions are based upon recent decisions by the highest court in the United States, the Supreme Court.

In 1993 and in 1999, the Supreme Court decided Daubert v. Merrell Dow Pharmaceuticals, Inc.[5] and Kumho Tire Co. v. Carmichael[6]. In these two cases, the Supreme Court concluded that the trial courts must act as gate-keepers to the introduction of both scientific and unscientific testimony. Simply put, the Supreme Court in Daubert and Kumho Tire held that the trial courts must make certain judgments about the quality of the expert witness and about the quality of the methods employed by the expert witness in making his opinion, BEFORE the opinion would be admitted into evidence.

This change by the Supreme Court was fundamental, especially as it may be applied to our hypothetical. For example, a Daubert type preliminary hearing would likely test the land manager on the following questions:

First, what is the relevant body of knowledge which governs the collection of utilization?

Second, what is the land manager's credentials within that relevant body of knowledge?

[1]Section 706(2)(A) of Administrative Procedure Act.

[2]36 CFR 251.99(a) and (b) (7/1/99 Edition).

[3]Section 706(2)(E) of Administrative Procedure Act.

[4]43 CFR 4.478 (10/1/98 Ed); Ralph and Beverly Eason v. Bureau of Land Management, 127 IBLA 259 (1993).

[5]509 U.S. 579 (1993).

[6]119 S.Ct. 1167 (1999).

Third, what are the acceptable methods prescribed by that body of knowledge?

And, finally, has the land manager correctly applied the prescribed methodology?

It is expected that the answers to these questions would decide whether the opinion of the land manager would even be admitted at time of trial, which is quite different and distinct from the Forest Service venue and BLM venue I discussed with you earlier.

Moreover, the answers to these questions are only the first step. If the Federal Judge allows the land manager to testify as to his opinion, that does not necessarily mean that his opinion will control. The Federal Judge would still apply the preponderance of evidence standard to all the evidence introduced at time of trial to determine whether it is more likely than not that 20% more livestock should be grazed.

I expect that what is apparent from my explanation of these three different standards is that the ultimate answer of who wins and who loses in our hypothetical may very well depend upon the venue the matter is litigated. The three different venues I discussed with you, the Forest Service venue, the BLM venue, the Federal District Court venue, provide very different and distinct evidentiary standards and review standards as to not only the proffering of evidence, but the review of the evidence. And, I expect that what is even more apparent is that it is probable that none of these three venues ever really get to the root of the question, which is, what should the answer really be?

By asking this question again, it is obvious that I have taken you full circle to where I began this presentation. I brought you full circle to make the point that I personally believe it was not appropriate for the instructor of the PFC seminar I mentioned earlier to suggest a method, like PFC, is reliable simply based upon a Federal District Court decision. Instead, I personally believe that the answer to the question—what should the answer really be—is right before all of us.

The standards of conduct for SRM members who provide public service, states that land managers have "an obligation to advance the science and art of range management, uphold its high standards, and to conform to the principles of acceptable professional conduct". These standards of conduct include a number of other elements which relate to and go well beyond those standards applied in the Forest Service venue and the BLM venue, and even in the Federal District Court venue. It should, therefore, not be the court system that ultimately acts as the gate-keeper of junk and science in the field of range management, but the application of the standards of conduct of SRM which should act as the gate-keeper of junk and science in range management.

I appreciate that this statement may be met with certain frustration by some land managers who continue to wish to rely upon the court system to justify methods. And right or wrong, the reality is that the court system will continue to be used to litigate methods. However, I hope that my few comments here this morning will instill two things. First, that informed land managers should not look to the court system to justify their methods, and second, that informed land managers, whether in the Land Management Agencies, in the Universities, or in the field, should only apply methods to decision-making processes that only conform to high standards. I wish you all the very best in your conformance to the highest of standards, and thank you.[7]

[7]This presentation by W. Alan Schroeder is made for educational purposes only for SRM.

W. Alan Schroeder, Esq. of Schroeder & Lezamiz Law Offices, LLP in Boise, Idaho Presented at the Society of Range Management 53rd Annual Meeting in Boise, Idaho on February 15, 2000, at a symposium entitled "Science: Perspectives for Natural Resource Managers".