

Place-Based National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations

by Martin Nie

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Editor's Summary

Throughout the country, divergent interests are collaborating about how they would like particular national forests to be managed. Some of these initiatives are seeking place-based legislation as a way to secure such agreements, while others use an assortment of different approaches and memoranda of understanding. What is most remarkable about these initiatives is the similarities they share, from a widespread frustration with the status quo to the search for more certainty in forest management.

This Article analyzes “place-based,” or national forest-specific, legislation and the use of formalized agreements as a way to manage national forests. Unlike organic or umbrella legislation covering all national forests, place-based legislation codifies additional forest-specific prescriptions and management direction.

There is increasing political interest and controversy surrounding such legislation. As discussed below, the most prominent and wide-reaching examples are congressional bills introduced by Sens. Jon Tester (D-Mont.) and Ron Wyden (D-Or.) in the 111th Congress.¹ These bills have received widespread attention, much of it due to their provisions related to mandated timber harvests on selected forests in Montana and Oregon.² Throughout the West, divergent interests are negotiating how they would like particular forests to be managed. Many of these proposals include provisions related to protected lands, economic development, timber harvesting, forest restoration, and funding mechanisms, among others. But unlike more typical collaborative efforts, some groups are seeking codification of their agreements, while others have formalized their agreements by using memoranda of understanding (MOUs) with the U.S. Forest Service (USFS).

Place-based legislation is not without precedent.³ Site-specific legislation has been used on the national forests since at least 1904 with the Bull Run Trespass Act applicable to the Mount Hood National Forest.⁴ Other

Editors' Note: The Appendix to this Article, a comprehensive table of Place-Based National Forest Legislation and Agreements, is available online at http://www.elr.info/articles/vol41/Nie_appendix.pdf.

1. See Forest Jobs and Recreation Act of 2009, S. 1470, 111th Cong. (2009). For more about the bill, see Sen. Jon Tester, Legislation, <http://tester.senate.gov/Legislation/foresthomes.cfm> (last visited Jan. 21, 2011) and Oregon Eastside Forests Restoration, Old Growth Protection, and Jobs Act, S. 2895, 111th Cong. (2009).
2. See, e.g., Noelle Straub, *Sen. Tester's Plan for Wilderness, Logging Roils Big Sky Country*, N.Y. TIMES (Dec. 14, 2009); Leslie Kaufman, *Foes Unite to Support Bill on Old-Growth Forests*, N.Y. TIMES, (Dec. 17, 2009); Phil Taylor, *Revised Mont. Bill Cuts Logging Mandates, Stirring Anger Among Tester Allies*, LAND LETTER (July 10, 2010); and Jason Plautz, *Wyden's Ore. Management Bill Bows to General Applause*, LAND LETTER (Mar. 11, 2010).
3. See Martin Nie & Michael Fiebig, *Managing the National Forests Through Place-Based Legislation*, 37 ECOLOGY L.Q. 1 (2010) (situating the approach in its historical and governing context).
4. Presidential Proclamation No. 28, 27 Stat. 1027 (President Benjamin Harrison, 1892). Grazing and trespass were prevented by the Bull Run Trespass Act of 1904. 18 U.S.C. §1862 (1976). The area provides the city of Portland, Oregon, its main source of domestic water; and when USFS management of the area threatened this supply, Congress intervened with legislation. See Donald H. Blanchard, *Clearcutting the Bull Run Watershed: A Standard of Reasonableness in Forest Service Decision-Making*, 8 ENVTL. L. 569 (1977-1978) (reviewing the history preceding passage of the Bull Run Act). The Bull Run Act provides various types of watershed protections for the unit. Pub. L. No. 95-200, 91 Stat. 1425 (1977). Subsequent legislation has expanded the area and types of protection in response to USFS management, and it is currently managed in cooperation and partnership with the Portland Water Bureau. See Pub. L. No. 104-208, 110 Stat. 3009-541

place-based laws have been enacted thereafter, including the Alaska National Interest Lands Conservation Act (ANILCA) and the Tongass Timber Reform Act,⁵ the Herger-Feinstein Quincy Library Group Forest Recovery Act,⁶ and the Valles Caldera National Preserve and Trust created in 2000.⁷ Site-specific wilderness and protected areas legislation serve as other examples of how the approach has been used in the past.⁸ What is different about the new legislative proposals is the direction provided in how to manage lands *not* designated as wilderness or a special management area. The scope and specificity of management direction, unrelated to wilder-

ness or protected areas, is what is different and so significant about the new place-based proposals.

Place-based agreements are similar to proposed legislation insofar as they pertain to site-specific direction applying to one particular place or unit of the National Forest System (NFS). In the selected cases analyzed below, various groups found agreement on forest management issues and formalized such agreements by entering into MOUs with the USFS. These agreements share several common characteristics with pending place-based forest bills, and they offer an alternative to legislation.

The Article shows that there are four central provisions and defining characteristics of selected place-based bills and agreements: (1) frustration with the status quo and the desire for change; (2) the search for more certainty in forest management; (3) landscape-scale restoration and its relationship to rural communities; and (4) conflict resolution and the desire for more public participation in national forest management. Several cross-cutting issues are discussed in this context.

Also included within this framework are related policy recommendations for consideration by the USFS, lawmakers, and others. As explained shortly, many of the problems facing place-based initiatives are systemic in nature. They involve issues pertaining to public lands law and governance, the National Environmental Policy Act (NEPA),⁹ planning, funding, and an assortment of other challenges of national scale and significance. It is beyond the purview of the Article to offer recommendations on these matters. My recommendations are more modest. They focus on politically feasible policy changes and responses that can be made in the immediate future, while emphasizing a few preexisting mechanisms and frameworks that could be used to do so.

My analysis leads to the conclusion that the U.S. Congress and the USFS should oppose forest-specific (non-wilderness) legislation until a number of fundamental and systemic concerns are addressed, including how such laws would fit into the preexisting statutory framework and how they would be financed. Most of the challenges faced by the selected cases are systemic, not place-based. Questions presented by such things as landscape-level restoration and NEPA, stewardship contracting, and funding, among others, deserve a national-level response—not a series of ad hoc legislative remedies and site-specific exemptions.

This is not to say, however, that the status quo is sufficient, just that there are real dangers in codifying management, especially timber harvest mandates, on particular national forests. The approach practically begs for future congressional abuse. Nevertheless, the search for more certainty in forest management—however feasible—is understood and appreciated. But there are other ways of enhancing certainty besides legislating timber supply and other management prescriptions. First, there are stewardship contracts that can provide as much or more certainty

(1996) (prohibiting the cutting of trees in parts of the unit, with special exceptions); Pub. L. No. 107-30, 115 Stat. 210 (2001) (protecting the Little Sandy River as part of the Bull Run). See also H.R. 427, H.R. 434, and H.R. 451: Hearing Before the House Comm. on Resources, 107th Cong. (Apr. 25, 2001) (reviewing USFS management of the area and why permanent protection is desired by bill proponents).

5. ANILCA required the U.S. Congress to provide at least \$40,000,000 annually, so that the Tongass could meet its mandate of supplying at least 450 million board feet of timber for sale each year. Pub. L. No. 96-487, §705(d). ANILCA's controversial timber-supply mandate was replaced with language requiring the Tongass to seek to meet market demand for Tongass timber.

Subject to appropriations, other applicable law, and the requirements of [the NFMA], . . . the Secretary shall to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle.

Tongass Timber Reform Act, Pub. L. No. 101-626, §101 (1990) (amending 16 U.S.C. §539d(a)).

6. Pub. L. No. 105-277, div. A, §101(e), tit. IV, §401, 112 Stat. 2681-305 (105th Cong., 1998). See *infra* notes 53-60 and accompanying text.

7. Pub. L. No. 106-248; 114 Stat. 598; 16 U.S.C. §698v. In 2000, Congress acquired the privately owned Baca Ranch in northern New Mexico. Instead of simply buying the property and transferring its management to the USFS or the National Park Service, Congress found "an experimental management regime should be provided by the establishment of a Trust capable of using new methods of public land management that may prove cost-effective and environmentally sensitive." 16 U.S.C. §698v-2(a)(12). Congress directed the Trust to operate the holding as a working ranch, providing multiple use and sustained yield management. 16 U.S.C. §698v(b). A nine-member board of trustees, which includes a USFS official, manages the Preserve. This case is also significant because the law aims to pull the Valles Caldera out of the traditional federal lands funding stream by "allowing and providing for the ranch to eventually become financially self-sustaining." 16 U.S.C. §698v-2(a)(8).

8. While federal wilderness areas are generally managed in accordance with the Wilderness Act, place-specific wilderness laws typically contain an assortment of special management provisions and exemptions that are applicable to one unit. 16 U.S.C. §§1131-1136 (2006). Protected land laws provide additional examples of place-based, or unit-level legislation. Consider, for example, USFS-managed national monuments like Admiralty (Presidential Proclamation No. 4611, 43 Fed. Reg. 57009, 57131 (Dec. 1, 1978)), Giant Sequoia (Presidential Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 25, 2000)), and the Santa Rosa-San Jacinto Mountains (16 U.S.C. §431 (2006)). For a comprehensive listing of "special recreation and conservation overlays," see GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 946-47 (2007). Included in the listing for National Forest System lands are special management areas, e.g., Greer Spring, Missouri, 16 U.S.C. §539h (2006), recreation management areas, e.g., Fossil Ridge, Colorado, 16 U.S.C. §539i, protection areas, e.g., Bowen Gulch, Colorado, 16 U.S.C. §539j (2006), scenic areas, e.g., Columbia River Gorge, Oregon-Washington, 16 U.S.C. §§544-544m (2006), scenic research areas, e.g., Opal Creek, Oregon, 16 U.S.C. §545b (2006), national scenic areas, e.g., Mount Pleasant, Virginia, 16 U.S.C. §545 (2006), national forest scenic areas, e.g., Mono Basin, California, 16 U.S.C. §543 (2006), and national preserves, e.g., Valles Caldera, New Mexico, 16 U.S.C. §698h (2006).

9. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §2-209.

to the timber industry than a legislated timber-supply mandate. Though imperfect, stewardship contracts are preferable to the dangerous precedent of legislating timber supply on particular national forests. Congress and the USFS should consider a number of issues related to certainty upon the reauthorization of stewardship contracting authority in 2013.

There are also some preexisting models and frameworks that could be used in the future, instead of pursuing place-based forest legislation. The selected place-based agreements, such as that operating on the Colville National Forest, demonstrate viable alternatives to securing greater certainty than through a legislated timber-supply mandate. The Colville framework is exemplary and deserves study for possible replication or adaptation elsewhere.

The best way for Congress and the USFS to proceed with these place-based initiatives and their focus on restoration is to embrace a collaborative, competitive, and experimental approach. There are at least two exemplary processes and frameworks that should be fully supported, and possibly enlarged and replicated in the future: the Montana Forests Restoration Committee and the Collaborative Forest Landscape Restoration Act. These preexisting frameworks offer a possible substitute for place-based legislation.

I. The Sample and Methods

Various place-based bills and agreements were first identified. These consisted of the following two proposed congressional bills, an established law, an unsponsored legislative proposal, two formalized agreements, and three additional initiatives at various stages of development:

1. S. 1470 Forest Jobs and Recreation Act (Beaverhead-Deerlodge, Kootenai, and Lolo National Forests; hereinafter Senator Tester and/or Montana Bill)
2. S. 2895 Oregon Eastside Forests Restoration, Old Growth Protection, and Jobs Act of 2009 (covering all National Forests in Oregon that are not covered by the Northwest Forest Plan; hereinafter Senator Wyden and/or Oregon Bill)
3. Pub. L. No. 111-11, Collaborative Forest Landscape Restoration Act (CFLRA)
4. Rocky Mountain Front Heritage Act (unsponsored legislative proposal) (Lewis & Clark National Forest, Montana)
5. Northeast Washington Forestry Coalition Blueprint (Colville National Forest)
6. Lakeview Stewardship Group (Fremont-Winema National Forest, Oregon)
7. Clearwater Basin Collaborative (Clearwater and Nez Perce National Forests, Idaho)

8. Arizona's Four Forests Restoration Initiative (Apache-Sitgreaves, Coconino, Kaibab, and Tonto National Forests)

9. Tongass Futures Roundtable (Tongass National Forest, Alaska)

These cases include two of the most controversial resource bills currently pending in Congress (S. 1470 and S. 2895) and two well-established MOUs. Also included is the proposed Rocky Mountain Front Heritage Act because it provides a specific legislative proposal focused on travel management and other resource management issues, like weeds. The CFLRA is included because it shares some similar goals and purposes as found in the aforementioned bills and MOUs, and because several initiatives are using funds already authorized in the law.¹⁰ Some proposals that are still in the drafting stage are also included in the sample, such as the Clearwater Basin Collaborative in Idaho, the Tongass Futures Roundtable in Alaska, and the Four Forests Restoration Initiative in Arizona. In these cases, no final agreements have been made thus far, but in some situations, there are preliminary areas of agreement that are of relevance. They are included in the analysis because of the number of forests and potential acreage involved.

Once this sample was chosen, case files on each initiative were created. A set of tables comparing key provisions of the selected place-based bills and agreements was then developed. The tables are included as an Appendix to the Article. Whenever possible, I tried to duplicate the language found in the bills, law, and agreements, though in some cases, I took liberties in rephrasing things to keep things short. In other cases, I use my own words to describe how key provisions are understood.

The background work was also supplemented with a number of semi-structured interviews and more informal discussions with various people involved in these initiatives.¹¹ Confidentiality was promised to these individuals, so their identities are not revealed. But much of the (unreferenced) information and analysis found below draws from these interviews and discussions.

10. Pub. L. No. 111-11, tit. IV, §4001 (2009).

11. Some of the information and analysis found herein also draws from a symposium focused on place-based laws and agreements, held in Missoula, Montana, on June 8-9, 2010. I co-organized and hosted this symposium with the National Forest Foundation. Representatives from 12 initiatives (including those referenced above, minus the Tongass Futures Roundtable and the Collaborative Forest Landscape Restoration Act) were given an opportunity to answer a predefined set of questions and others asked by conference attendees. More than 80 people attended the symposium and participated in four plenary and four breakout sessions that addressed particular topics of importance to the place-based approach to forest management. Background readings and documents related to the place-based cases are available online at <http://www.nationalforests.org/conserve/learning/symposium> (last visited Jan. 21, 2011).

II. Central Provisions and Defining Characteristics of Place-Based Bills and Agreements

A. Frustration With the Status Quo and the Desire for Change

The most obvious place to begin is by acknowledging the widespread sense of frustration with the status quo. While differences abound, all of these initiatives want to change *something* in national forest management. Though not universally agreed upon, there are multiple sources of frustration shared by members of these groups.

Planning: Some group representatives express frustration with forest planning processes. For some, the process takes too long, while for others, it does not provide enough certainty or predictability (as discussed below). Compounding things is the fact that forest planning rules have been in a perpetual state of regulatory and legal limbo.¹²

Funding: Funding for the USFS is another commonly identified source of frustration. All of the initiatives have taken shape in the shadow of a deeply problematic USFS budget that has been annually upended to pay for associated fire management costs. Since the 1990s, the average annual acreage burned by wildland fires has increased by roughly 70%.¹³ At the same time, the USFS' fire-related appropriations have more than doubled, representing about one-half of the agency's total annual appropriations.¹⁴ In order to pay for the costs associated with wildland fire suppression and management, the agency has regularly transferred funds from other USFS programs (sometimes called "fire borrowing").¹⁵

For Sens. Jon Tester (D-Mont.) and Ron Wyden (D-Or.), among other senators recently writing to President Barack Obama, money going to fire suppression is money not going to restoration and forest management:

When the Forest Service's general budget is reduced either by fighting wildfires or inflationary costs, other vital projects such as restoring watersheds, investing in infrastructure, and managing for ecosystem health are put on an indefinite hold. These programs are critical to protecting our communities,

adapting to climate change, maintaining our forest products infrastructure and improving ecosystem health.¹⁶

Similar complaints have been made by others, and they cross the political spectrum. For Russell Vaagen, Vice President of Vaagen Brothers Lumber Inc., and a member of the Northeast Washington Forestry Coalition active on the Colville National Forest, the USFS' fire budget "is now squeezing every other non-fire program" and this constitutes a "disaster of epic proportions."¹⁷ In representing Oregon Wild in favor of Senator Wyden's bill, Andy Kerr similarly acknowledges the challenges of securing adequate funding to implement S. 2895:

The best source of funds to pay down this ecological debt—by undertaking the necessary comprehensive forest and watershed restoration—is to reprogram current Forest Service annual appropriations that now go to a fire-industrial complex that wastes billions of dollars attempting to extinguish fires that cannot or should not be extinguished.¹⁸

This budgetary backdrop adds another dose of uncertainty and frustration into the mix. And this helps explain why so many initiatives are seeking more secure dollars from alternative funding sources. Senator Wyden, for example, authorizes \$50 million to carry out the purposes of his bill.¹⁹ Several initiatives are also competing for appropriations already authorized by the CFLRA (the program authorizes \$40 million per year for fiscal years (FY) 2009 to 2019 to be used to pay for up to 50% of selected restoration projects).²⁰ And nearly every initiative embraces the use of stewardship contracting authority as a way to pay for restoration and mitigate the problems associated with having to rely upon a highly uncertain congressional appropriations process (as discussed below).

Organizational Culture: Some of the dismay also revolves around the organizational culture of the USFS. This theme emerged—unprompted—in several discussions with place-based participants. Some people see the agency as a "paper tiger," one forced to do more planning and paperwork than active forest management and restoration. Others emphasize a perceived agency culture that is resistant to change and slow to embrace new ways of doing things. One person went so far as to compare the agency's troubles with the history of the U.S. auto industry. Whatever the reasons, frustration with the USFS partially explains why place-based initiatives are seeking legislation or formalized agreements, as both approaches ostensibly

12. See *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1089, 39 ELR 20145 (N.D. Cal. 2007), 73 Fed. Reg. 21468 (Apr. 21, 2008), and 70 Fed. Reg. 1023 (Jan. 5, 2005).

13. U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), *FOREST SERVICE: EMERGING ISSUES HIGHLIGHT THE NEED TO ADDRESS PERSISTENT MANAGEMENT CHALLENGES* (GAO-09-443T) (statement of Robin N. Nazzaro, Director, Natural Resources and Environment) 2 (2009).

14. *Id.* (stating that the USFS' wildland fire-related appropriations increased to almost \$2.2 billion in fiscal year (FY) 2007, representing over 40% of the agency's total appropriations).

15. See U.S. GAO, *WILDFIRE SUPPRESSION: FUNDING TRANSFERS CAUSE PROJECT CANCELLATIONS AND DELAYS, STRAINED RELATIONSHIPS, AND MANAGEMENT DISRUPTIONS* (GAO-04-612) 6 (2004) (finding that the USFS and the U.S. Department of the Interior transferred over \$2.7 billion from numerous programs to fund wildfire suppression from 1999-2003, with 80% being reimbursed).

16. Letter from U.S. Senators Tester, Wyden et al., to President Barack Obama (Dec. 8, 2009) (on file with author).

17. *Forest Restoration and Hazardous Fuels Reduction Efforts: Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong. (2007), at 51 [hereinafter *Forest Restoration and Hazardous Fuels Reduction Efforts Hearing*].

18. *Miscellaneous Public Lands and Forests Bills: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong. (2010) (statement of Andy Kerr), at 25.

19. S. 2895, §15, 111th Cong. (2009).

20. Pub. L. No. 111-11, tit. IV, §4003(f).

limit the agency's discretion and force it to do particular things in particular ways.

Turnover within the agency is another commonly identified source of aggravation. Several people articulated their displeasure with the agency's tradition of moving line officers from one national forest to another. Trust between partners and knowledge of a landscape takes time to develop, and many interests find it frustrating to have agency leadership shuffled around so often. This too helps explain why some groups want to codify or memorialize their agreements, as both approaches offer some insurance against future changes wrought by new personnel.

Small-Scale Restoration: Several people also expressed frustration with the USFS' small-bore approach to restoration. A common refrain, heard from conservationists and industry representatives, is that the agency manages and implements projects at too small a scale. This is probably due in part to the agency's fear of administrative appeals and litigation and perceptions of risk.²¹ These challenges are believed to be easier as the projects get larger in scope and scale. The irony here is that the USFS, in Pavlonian response to appeals and litigation, is now thinking at too small a scale according to various interests. Russell Hoefflich, Vice President and Oregon Director of the Nature Conservancy, played a consulting role in Senator Wyden's bill and summarized the situation like this:

Controversies surrounding forest management compel federal agencies to plan restoration projects at very small scales. To meet their action goals, federal agencies have to consider what is doable in addition to considering what is most important. As a result, they often propose relatively small and narrowly-focused management actions. On the other hand, ecosystems and the species they support interact in complex ways and at relatively large scales on the landscape. The magnitude of the forest health problem demands working at vastly larger scales if we are to get ahead of the problem.²²

Similar frustrations are shared by those helping craft Senator Tester's bill. Members of the Beaverhead-Deerlodge Partnership voice frustration with what they consider to be the extreme ends of the forest management debate and the chilling effect these groups have had on the agency. These representatives believe that the Beaverhead-Deerlodge National Forest (BDNF) is planning at such small scales because it is afraid of doing anything bigger due to the threat of litigation.

A disjointed project-by-project approach to forest restoration is insufficient according to many of these place-based initiatives. Instead, they want the USFS to be planning at much larger scales. Arizona's Four Forests Restoration

Initiative (4FRI) provides a case-in-point. The 4FRI Partnership marks the Rodeo-Chediski fire as an important turning point, with several interests recognizing that fires and other events of such magnitude necessitate a larger scale approach to planning. The 4FRI Partnership believes the agency should be planning at scales 20 to 30 times larger than is done now. In order to do landscape-scale restoration across roughly 2.4 million acres of ponderosa pine forests, the 4FRI anticipates that "the first large-scale planning area will cover ~750,000 acres, which will identify roughly ~300,000 acres for thinning over 10 years at a rate of up to 30,000 acres of treatment per year."²³

All of these factors help explain why some interests are now pursuing more place-based solutions to forest management. One timber industry representative, for example, says that the approach is preferable to waiting around for a more politically favorable Congress or executive in D.C. The problem, however, as will be shown below, is that many of the problems identified by these groups are systemic, not place-based. Forest planning, funding constraints, organizational culture, personnel turnover, a small-scale approach to restoration—these are national-level concerns with solutions that must go beyond any one particular national forest.

B. The Search for More Certainty in Forest Management

A defining characteristic of these initiatives is their shared goal of securing greater certainty and predictability in national forest management. This manifests itself in numerous ways. First, it explains why some groups have chosen to pursue national forest-specific legislation, and in other cases, why some groups have formalized their relationships with the USFS through MOUs and decision-making protocols.

Land Designations: Second, most initiatives reviewed are seeking more permanent types of land designations than that provided by forest planning processes or roadless rules that are viewed as being more tenuous. Consider the following examples:

- Senator Tester's S. 1470, the Forest Jobs and Recreation Act (FJRA): It seeks not only to designate wilderness and special management areas, but to also codify defined "stewardship areas" where timber harvesting and restoration goals are given priority.²⁴ (These stewardship areas are defined by making reference to the relevant forest plans and those areas designated as suitable for timber production.) Senator Tester's bill also provides greater certainty regarding management of off-road vehicles (ORVs). In some

21. See, e.g., Donald G. MacGregor & David N. Seescholtz, *Factors Influencing Line Officers' Decisions About National Environmental Policy Act Project Design and Development*. USDA, Pacific Northwest Research Station, Gen. Tech. Rep. PNW-GTR-766 (2008).

22. *Forest Restoration and Hazardous Fuels Reduction Efforts Hearing*, *supra* note 17, at 62.

23. The 4 Forest Restoration Initiative: Promoting Ecological Restoration, Wildfire Risk Reduction, and Sustainable Wood Products Industries, a Proposal for Funding Under the Collaborative Forest Landscape Restoration Program 3 (on file with author).

24. S. 1470, §101(11), 111th Cong. (2009).

places, access is permanently restricted, and in others, long-term access is guaranteed.²⁵

- The proposed Rocky Mountain Front Heritage Act: It would designate ~218,327 acres as the “Rocky Mountain Front Conservation Management Area” with a set of customized purposes and restrictions. Chief among these are restrictions placed on motorized usage, as the proposed bill uses an existing travel management plan to limit future use (“The use of motorized vehicles in the Conservation Management Area shall be permitted only on existing roads, trails, and areas designated for use by such vehicles as of the date of enactment of this Act.”).²⁶
- The Northeast Washington Forestry Coalition Blueprint: It divides the Colville National Forest into three management zones: responsible management areas; restoration areas; and wilderness areas (as discussed below).²⁷

Conflict Resolution: Third, these groups hope to take some intractable issues off the table with some finality. Finding permanent protections for inventoried roadless areas is the most common example. But in some cases, this applies to old growth as well. Senator Wyden’s bill (S. 2895) is most direct in this regard, as it prohibits the cutting of live trees exceeding 21 inches in diameter (with some exceptions).²⁸ Old growth is also addressed in the Colville and Fremont-Winema MOUs, as both seek to protect and restore old forests. And in Arizona, debate over a 16-inch diameter cap is front-and-center in the 4FRI. (At this point, the group has agreed to a “large tree retention strategy” that is not based on a strict diameter cap).

What the USFS can learn from the legislative and non-legislative cases is that an increasing number of interests are no longer willing to wait for various issues like roadless to resolve themselves through ongoing litigation or rulemakings. Instead of reengaging in these tired conflicts, several initiatives have simply decided to offer blanket protections for these values, so that they can focus on less-contested places and issues.

More Certain Timber Supply: Fourth, several of these initiatives are seeking ways to generate a more certain and predictable flow of timber. The most controversial example is provided by Senator Tester’s FJRA. The bill requires the USFS to mechanically treat timber on a minimum of 70,000 acres on the Beaverhead-Deerlodge and 30,000 acres on the Kootenai over the next 10 years.²⁹

This provision is contentious for several reasons. First, the USFS, as represented by the Undersecretary of Agriculture believes that these levels of mechanical treatment “are likely unachievable and perhaps unsustainable.”³⁰ He says that “[t]he levels of mechanical treatment called for in the bill far exceed historic treatment levels on these forests, and would require an enormous shift in resources from other forests in Montana and other states to accomplish the treatment levels specified in the bill.”³¹ Secondly, even if the treatment levels were lower, several people are concerned about setting additional precedent in this regard, and what timber supply mandates might look like in other places if such requirements are now politically acceptable.³²

Senator Wyden’s Eastside Oregon Bill also seeks “to create an immediate, predictable, and increased timber flow to support locally based restoration economies.”³³ To kick-start this goal, Senator Wyden’s bill requires interim mechanical treatments that produce an average of 100,000 acres per year for three years.³⁴ Senator Wyden’s bill is different than Senator Tester’s, in that mechanical treatments are to “emphasize saw timber as a byproduct.”³⁵

The two MOUs also share the goal of creating more certainty for the timber industry, but they go about things a bit differently. On the Colville, for example, the Coalition’s designation of a responsible management area, along with its MOU, provides a more predictable land base from which timber may be harvested. The Lakeview Federal Sustained Yield Unit also “promote[s] the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supplies of timber.”³⁶ The Unit does so through its MOU with the USFS, as it commits the Fremont-Winema “to the extent permitted by and consistent with all applicable laws and land use plans, [to] offer a minimum of 3,000 treatment acres per year” outside the Stewardship Unit, and a minimum of 3,000 acres per year within it.³⁷

Securing a more predictable flow of timber is often explained by making linkages between local economies, sawmills, and forest restoration goals. Several of these

25. S. 1470, tit. II, 111th Cong. (2009).

26. See §3 of the revised but not introduced Rocky Mountain Front Heritage Act of 2010, available at http://www.savethefront.org/assets/docs/FrontHeritageAct_proposed.pdf (last visited Jan. 21, 2011).

27. For background and map of zones, see <http://www.newforestrycoalition.org/blueprintSummary.htm> (last visited Jan. 21, 2011).

28. S. 2895, §4(b), 111th Cong. (2009).

29. S. 1470, §102, 111th Cong. (2009).

30. *Public Lands and Forests Legislation: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong. (2009) (statement of Harris Sherman), at 19.

31. *Id.* The USFS’ position on Senator Tester’s bill changed course in October, 2010. Secretary of Agriculture Tom Vilsack stated that the mechanical treatment mandates on the Beaverhead-Deerlodge and Kootenai National Forests “are ambitious, but sustainable and achievable.” Letter to Senator Jon Tester, from Secretary of Agriculture Thomas J. Vilsack (Oct. 11, 2010) (letter on file with author). See also Phil Taylor, *Tester Bill “Ambitious, but Sustainable,” Vilsack Says*, LAND LETTER (Oct. 21, 2010).

32. For a discussion of this issue with examples, see Nie & Fiebig, *supra* note 3, at 38-40.

33. S. 2895, §2(2), 111th Cong. (2009).

34. *Id.* §9.

35. *Id.*

36. 16 U.S.C. §583; see also 36 C.F.R. §223.117.

37. Memorandum of Understanding Between Lake County Resources Initiative, Lake County, Town of Lakeview, City of Paisley, Marubeni Sustainable Energy, Inc., The Collins Companies, Oregon Dept. of Forestry, USDA Forest Service-Fremont-Winema National Forests, and Bureau of Land Management-Lakeview District, USFS No. 2008 MU11060200-001 (2008), at 4 (on file with author).

initiatives define the problem similarly: landscape-level forest restoration requires the harvesting of small-diameter trees, and that means the necessity of some sustainably scaled, locally rooted forest products industry. And for that industry to survive, or to make the requisite capital investments (in, say, small-diameter processing equipment), it needs greater assurances about timber supply.

Stewardship Contracting: Also relevant to this theme is a widespread embrace of stewardship contracting.³⁸ Among other things, these contracts allow the exchange of goods for services.³⁹ In other words, the commodities produced through a contract, like timber, are exchanged for requested restoration services, like decommissioning roads or replacing culverts. Stewardship contracting allows a national forest to retain the receipts generated by selling timber for use in future stewardship projects. This provision is attractive to several interests, because stewardship receipts do not have to return to the U.S. Treasury's general fund as required of timber sales. For these reasons, in most of the initiatives examined, stewardship contracting is a central part of the restoration strategies. The tool is seen by some people as a means to secure more predictable dollars for restoration work, money that stays on a particular national forest and is not sent back to Washington, D.C., and thus not as subject to the highly uncertain congressional appropriations process.⁴⁰

I. Political Debate About Uncertainty and National Forest Management

The search for greater certainty in national forest management has a long pedigree and has been often debated in the context of "community stability."⁴¹ It is also per-

vasive in the field of natural resources policy. In some cases, additional certainty and predictability is in fact provided to resource users and industry in various forms. Consider, for example, the use of habitat conservation planning and the no-surprises policy in the management of endangered and threatened species,⁴² long-term leases, and property rights created in federal lands mining,⁴³ concession contracts in the National Parks,⁴⁴ and the contested definition of "grazing preferences" in federal range law.⁴⁵ These and other examples demonstrate that place-based initiatives are following a well-worn path in their pursuit of more certainty and predictability in federal lands management.

The counterarguments are also well-rehearsed. Certainty through national forest management is a shibboleth to some, and unlikely to be achieved according to a former USFS chief,⁴⁶ among other skeptics who question the assumptions on which the concept is based.⁴⁷ There are simply too many external and uncontrollable impediments to achieving this objective, including fluctuating housing starts, cheap Canadian imports, vacillating court decisions, swings in agency budgets, and so on.

And then there is the problem of how to balance such an objective with other environmental values and legal responsibilities. The few place-specific laws that include language about economic stability or a mandated timber supply, such as the Oregon and California (O&C)

38. Pub. L. No. 105-277, §347, 112 Stat. 2681-298 (1998). This authority was initially implemented on a pilot basis, but Congress extended and expanded the authority in 2003. Pub. L. No. 108-7, div. F, tit. III, §323, 117 Stat. 11, 275 (2003). For more background, see Stewardship End Result Contracting, 68 Fed. Reg. 38285, 38286 (June 27, 2003).

39. 16 U.S.C. §2104.

40. Stewardship contracting allows a national forest to retain the receipts generated by selling timber for use in future stewardship projects. 16 U.S.C. §2104(d) note (2006).

41. See, e.g., Con H. Schallau & Richard M. Alston, *The Commitment to Community Stability: A Policy or Shibboleth*, 17 ENVTL. L. 429 (1987). They note that "[p]ublic land legislation contains a general theme of concern for the economic stability of communities. However, there is little explicit statutory direction on how large a role community stability concerns should play in Forest Service decisions." *Id.* at 460. They go on to say that "[c]onfusion about community stability stems from the fact that although Congress frequently reaffirms its desire to achieve community stability, it has not provided any operational guidelines for doing so." *Id.* at 479. See also REPORT OF THE SOCIETY OF AMERICAN FORESTERS NATIONAL TASK FORCE ON COMMUNITY STABILITY (1989) (on file with author) (noting that "the agency's community stability policy is permissive rather than prescriptive"), at 13; James P. Perry, *Community Stability: Is There a Statutory Solution?*, in *Community Stability in Forest-Based Economics*, Proceedings of a Conference in Portland, Oregon, Nov. 16-18, 1987 (Dennis C. Le Master & John H. Beuter, eds.) (noting that "Congress has not, in any legislation which applies generally to all National Forest System lands, provided any direction that requires the agencies to meet a community stability requirement"), at 32; and Sarah F. Bates, *Public Lands Communities: In Search of a Community*

of Values, 14 PUB. LAND. L. REV. 81 (1993) (tracing the concept's lineage and debate).

The short-lived Sustained Yield Forest Management Act of 1944, 58 Stat. 132 (1944), provided the most explicit statutory recognition of community stability. The Act established sustained yield forest management units and aimed to "promote the stability of forest industries, of employment, of communities and taxable forest wealth, through continuous supply of timber." *Id.* Termination of the program began in 1953.

42. See, e.g., Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859, 8860 (Feb. 23, 1998) (proposing a way to provide property owners "economic and regulatory certainty regarding the overall cost of species conservation and mitigation").

43. See, e.g., General Mining Law of 1872, 30 U.S.C. §§21 et seq. (creating a form of property rights after the discovery of a valuable mineral deposit); and the Mineral Leasing Act of 1920, 30 U.S.C. §§181-287.

44. See National Park Service Concessions Management Act of 1998, 16 U.S.C. §§5951-5983.

45. The Federal Land Policy Management Act (FLPMA) provides various protections to ranchers when grazing permits are cancelled, including two-year prior notification and reasonable compensation for adjusted values. See 43 U.S.C. §1752(g). Certainty has also been central in the debate over grazing preferences and its relationship to base property and a specified quantity of forage. Current regulations define preference as

the total number of animal unit months on public lands apportioned and attached to base property owned and controlled by a permittee, lessee, or an applicant for a permit or lease . . . [g]razing preference holders have a superior or priority position against others for the purpose of receiving a grazing permit or lease.

43 C.F.R. §4100.-0-5.

46. For former USFS Chief Jack Ward Thomas: "Given the myriad of interacting variables, it is time for concerned citizens and leaders to accept the reality that the dream of a stable timber supply from public lands is an illusion." Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts From the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 14 (1996).

47. See, e.g., SAMUEL T. DANA & SALLY FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* 332 (2d ed. 1980).

Lands Act,⁴⁸ the “Northwest Timber Compromise,”⁴⁹ the Herger-Feinstein Quincy Library Group Forest Recovery Act,⁵⁰ and those governing the Tongass National Forest,⁵¹ have clashed with other environmental statutes and planning requirements and caused considerable controversy and litigation.

The bills and agreements reviewed here complicate the traditional debate about uncertainty. In many cases, conservationists are seeking the same sort of certainty as pursued by industry. This is most clearly demonstrated by the pursuit of legislated land designations. But it is also evident in the sequencing of propositions that hold that we need a more certain supply of timber for a functioning timber industry that is required to achieve various restoration goals.

48. Consider, for example, conflict over Bureau of Land Management (BLM) management of O&C lands, governed under the Oregon and California Lands Act of 1937, 43 U.S.C. §1181j (2006). Unlike other federal land laws and regulations, the O&C Act includes specific but contested language pertaining to community stability. Classified lands shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] 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. 43 U.S.C. §1181a.

Once sustained yield is determined, the Act also requires timber from O&C lands to be sold annually at “not less than one-half billion board measure, or not less than the annual sustained yield capacity when the same has been determined and declared . . . or so much thereof as can be sold at reasonable prices on a normal market.” 43 U.S.C. §1181a. Associated regulations state that sustained yield units contain enough land to “provide, insofar as practicable, a permanent source of raw materials to support local communities and industries, giving due consideration to established forest products operations.” 43 C.F.R. §5040.1 (2006).

Whether or not the O&C Act is a multiple or dominant-use statute has received a lot of debate. The courts have also wrestled with the Act’s provisions and how they were meant to be prioritized. Though timber shall be supplied, O&C lands are also subject to NEPA and other environmental statutes; thus setting up multiple conflicts over their management. See, e.g., *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174 (9th Cir. 1990) (interpreting the O&C Act as a dominant-use statute that limits the ability of BLM to manage for non-timber purposes). But 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 (2006) (challenging the dominant-use interpretation of the O&C Act and putting forth a broader conception of community stability).

49. See Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, §318, 103 Stat. 701, 745-750 (1989). Among its other controversial provisions, this law required an aggregate timber-sale level of 7.7 billion board feet (bbf) of net merchantable timber from the national forests of Oregon and Washington for FY 1989 and 1990; and required BLM to meet an aggregate timber-sale level of 1.9 bbf in 1989 and 1990 from its districts in western Oregon. For background, see *Seattle Audubon Society v. Robertson*, 914 F.2d 1311, 21 ELR 20019 (1990).

50. See *infra* notes 53-60.

51. See *supra* notes 5 and accompanying text. See also Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 400-03 (2006).

2. Legislation and Uncertainty: The Herger-Feinstein Quincy Library Group Forest Recovery Act

Legislation, by itself, provides no guarantee that the purposes of S. 1470 and S. 2895 will be achieved. Their implementation will be subject to legal challenge, appropriations, funding constraints, economic trends and global commodity markets, and an assortment of other factors that cannot be easily legislated away. The same goes for formalized agreements, though some of them more clearly recognize the uncertainties and contingencies involved in their endeavors.⁵²

All of these initiatives would be well-served to consider the failures to implement another place-based forest law, the Herger-Feinstein Quincy Library Group Forest Recovery Act.⁵³ The Quincy Group formed as a way to promote ecological sustainability and community stability in the Sierra Nevada of northern California. The group wrote a “community stability proposal” directing management of the Lassen, Plumas, and part of the Tahoe National Forests. With the USFS unable or unwilling to adopt the proposal, the group took to Washington and succeeded with passage of the Herger-Feinstein Act. This law required the pilot project to be consistent with applicable federal laws, but also provided place-specific direction regarding how these national forests must be managed in terms of acreage-treatment mandates,⁵⁴ fire, roadless areas, and other issues.

The Quincy legislation proved to be a harbinger of things to come, as more groups seek to codify their place-specific solutions to forest management. But the primary lesson to be learned from the Quincy case is that a place-based forest law, when simply placed into the preexisting statutory framework, provides little certainty or conflict resolution. A more likely scenario involves increased confusion and litigation, as the agency struggles to implement an uncoordinated patchwork of laws.

By most measures, the Herger-Feinstein law has not worked out as intended. This is mostly because of ongoing concerns about how to integrate the Herger-Feinstein Act into the larger Sierra Nevada Framework, a very politicized nationwide forest planning initiative.

52. For example, the Northeast Washington Forestry Coalition contracted with Headwaters Economics for a study of the economic impact of the Coalition’s “Blueprint” for National Forest Management. One key point of the report is “that what happens on National Forests is subject to a variety of factors that are outside the control of the local economy.” Headwaters Economics, *Timber Restoration Forestry and Wilderness in Northeast Washington: The Economic Impact of Northeast Washington Forestry Coalition’s “Blueprint” for National Forest Management*, 37 (June, 2007). The report also concludes that the Coalition’s forestry and restoration agreement will increase timber harvest on National Forest lands, but that “an increase in timber supply on its own will not necessarily create additional employment or better wages” and that “[t]he key to success will be to create value-added opportunities that turn logs into finished products and sell for a premium.” *Id.* at 1.

53. Pub. L. No. 105-277, div. A, §101(e), tit. IV, §401, 112 Stat. 2681-305 (1998) (codified at 16 U.S.C. §2104 (2006)).

54. For example, the Act required fuel-break construction on not less than 40,000, but not more than 60,000, acres per year. Pub. L. No. 105-277, div. A, §101(e), tit. IV, §401(d).

Important differences between the Herger-Feinstein Act and the Sierra Nevada Framework, from fire and fuels management to old growth preservation, set the stage for future conflict.⁵⁵ And sure enough, when the 2001 Sierra Nevada Framework plan reduced the level of timber cutting allowed in Quincy area forests, the Quincy Group—once the poster-child of collaboration⁵⁶—took to the courts, arguing that their law was being subordinated.⁵⁷ On the other hand, several projects initiated by the USFS that are designed to implement the Herger-Feinstein law have been administratively appealed and litigated by several environmental groups, thus frustrating the law's implementation.⁵⁸

The problem, put simply, is how to reconcile differences between the Herger-Feinstein law and the Sierra Nevada Framework plan, all while complying with NEPA, the National Forest Management Act (NFMA), and the Endangered Species Act (ESA).⁵⁹ The USFS has been forced to walk this minefield with legal grenades thrown from all directions. When the USFS tries to implement the Sierra Nevada Framework and its interpretation of NEPA, the NFMA, and the the ESA, it gets sued by the Quincy Library Group for subordinating the Herger-Feinstein law; and when the agency tries to implement the Herger-Feinstein law, it gets challenged by environmental groups for not complying with NEPA, the NFMA, and the ESA.⁶⁰ Where the chips ultimately fall is still uncertain, but it is safe to say at this point that the Herger-Feinstein Act did not resolve core conflicts about managing the Sierra Nevada.

3. Certainty Through Stewardship Contracting

A key question, then, is how to promote such certainty, when desirable, without the dangerous practice of legislating a timber-supply mandate. The treatment mandates are very likely the poison pills that may prevent enactment of S. 1470 and S. 2895. One possible approach to this problem may lie in the reauthorization of stewardship contracting authority, set to expire in 2013.

To begin with, most of the cases reviewed here rely extensively on stewardship contracts. It is the primary way in which these initiatives will implement their work. And stewardship contracts, like timber-sale contracts, and other contracts used by federal agencies, can provide more meaningful certainty to the timber industry than a legislated assurance of timber supply. After all, a timber mill can take a contract to the bank.

Like other private rights in public resources, contract rights are a form of property, and government is held liable when they are breached.⁶¹ USFS regulations require “reasonable compensation” to the private party when a contract is cancelled.⁶² And like timber-sale contracts, stewardship contracts set forth specific terms and provisions of work. The White Mountain stewardship contract in Arizona, the nation's largest, provides an example, as it plans to treat 150,000 acres of federal forests over 10 years. To do so, the contract provides a “minimum guarantee” clause, committing the agency to fund treatments on at least 5,000 acres annually.⁶³ (The USFS has offered ~7,500 acres per year over the last five years.)⁶⁴

Congress and the USFS should consider a number of issues related to certainty upon the reauthorization of stewardship contracting authority. Consider, for example, three possible changes that might address some concerns held by industry, counties, and conservationists.

Cancellation Ceiling: First, is the problem of a contract's cancellation ceiling. This is the amount of money government will pay the contractor if it cancels the contract. This is important because contractors face some risk and uncertainty when entering into a long-term contract, due

55. See, e.g., Dave Owen, *Prescriptive Laws, Uncertain Science, and Political Stories: Forest Management in the Sierra Nevada*, 29 *ECOLOGY L.Q.* 747 (2002) (analyzing the problems created by the different management schemes for the same forests).

56. See Jane Braxton Little, *A Quiet Victory in Quincy*, *HIGH COUNTRY NEWS*, Nov. 9, 1998.

57. See ROBERT B. KEITER, *BREAKING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS* 229-33 (2003) (reviewing this mismatch and the resulting litigation).

58. See USDA FOREST SERV., *STATUS REPORT TO CONGRESS FY 2006: HERGER-FEINSTEIN QUINCY LIBRARY GROUP FOREST RECOVERY ACT PILOT PROJECT* (2007), available at http://www.fs.fed.us/r5/hfqlg/monitoring/report_to_congress/2006/fy06_report_to_congress_web_final.pdf (stating that fluctuating budgets, appeals, and litigation have affected accomplishment targets); and Quincy Library Group, *Appeal and Litigation Summary*, available at <http://www.qlg.org/pub/act/appeals.htm> (stating that “the NEPA activist's strategy of filing appeals and law suits continues to prevent the strategic implementation of hazardous fuel-reduction and forest restoration projects in the eight-county area of the Herger-Feinstein Quincy Library Group pilot project”).

59. See, respectively, 42 U.S.C. §4331 (2000), 16 U.S.C. §1600 (2000), 16 U.S.C. §1531 (2000).

60. See, e.g., *Earth Island Institute v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003) (finding a post-fire logging project in violation of NEPA and the NFMA); *Environmental Protection Information Center v. U.S. Forest Serv.*, 451 F.3d 1005 (9th Cir. 2006) (rejecting NEPA, NFMA, and ESA claims against a fuel-reduction project); *Sierra Nevada Forest Protection Campaign v. U.S. Forest Serv.*, 2005 WL 1366507 (E.D. Cal.), *aff'd*, 166 Fed. Appx. 923, 2006 WL 148966 (9th Cir. 2005) (rejecting a NEPA cumulative effects challenge to a fuel-reduction project); and *Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 WL 2583036 (E.D. Cal. 2006) (finding NEPA and NFMA violations related to the protection of the California spotted owl). See also KEITER, *supra* note 57, at 229-33 (analyzing these cases and others).

61. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 (1977) (“Contract rights are a form of property and as such may be taken . . . provided that just compensation is paid”); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (“[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment”). But see *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (1978) (“interference with . . . contractual rights generally gives rise to a breach claim not a taking claim”). For more in-depth analysis of private rights on federal lands, with differences between contract liability and takings, see GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 328-67 (6th ed. 2007). See also U.S. GAO, *TIMBER MANAGEMENT: FOREST SERVICE HAS CONSIDERABLE LIABILITY FOR SUSPENDED OR CANCELLED TIMBER SALES CONTRACTS*, GAO-01-184R (Nov. 29, 2000).

62. 36 C.F.R. §223.40.

63. USDA, *Forest Service, Apache-Sitgreaves National Forest, White Mountain Stewardship Project*, RFP R3-01-04-10 (Mar. 4, 2004), §B.1 (contract on file with author).

64. Responses to Questions for the Record, U.S. Dept. of Agriculture, President's Proposed Forest Service Budget for Fiscal Year 2011, Senate Energy and Natural Resources Committee, Feb. 24, 2010 (on file with author).

to possible budgetary shortfalls or other factors. As the U.S. Government Accountability Office (GAO) summarizes: “Without some additional protection against risk, contractors may be reluctant to make sizable investments in equipment or infrastructure for fear that the government will cancel the contract, thus making the investment unprofitable.”⁶⁵

Federal acquisition regulations generally require that “should an agency include a cancellation ceiling in a contract, the agency must obligate the entire amount of the ceiling at the inception of the contract.”⁶⁶ Depending on the context, with the problem more acute when significant industry investment is necessary, this obligation can run into the millions of dollars, vastly exceeding the resources of the agency unit that is responsible for providing the ceiling. This is a problem with several possible legislative remedies, from the pooling of resources to waiving the up-front obligation of funds until the date on which a contract is possibly cancelled.⁶⁷

County Payments: Reauthorization also provides an opportunity to address the issue of how stewardship contracting figures into the calculation of timber receipts and associated county payments. Several county commissioners have expressed concerns about expanding the use of stewardship contracts, because such projects are not factored into the calculation of some Secure Rural Schools Act payment formulas.⁶⁸ Regardless of how counties receive such payments, several are concerned about stewardship contracting’s effect on county revenues, now or in the future.⁶⁹ Given the focus on rural communities and economic development in the selected place-based initiatives, it makes sense to revisit this issue during reauthorization.⁷⁰

Sequential Contracting: Another possible change that may alleviate some concerns about stewardship contracting is to consider a reciprocal or staged contracting approach, whereby future timber projects cannot proceed until certain restoration goals are met; and once met, future timber is released in a sort of tit-for-tat sequence. This approach could be mandated or encouraged via statutory or regu-

latory change. Such an approach may assuage fears that timber treatments will be prioritized over restoration goals in some places, such as those forests covered under Senator Tester’s bill. In Montana, at least, there is some historical baggage associated with deals involving increased logging for promised restoration, with the latter never being accomplished despite assurances to the contrary.⁷¹ So, if industry is to possibly acquire a more certain supply of timber, such assurances should be also extended to the linked restoration work.

Limitations of Stewardship Contracting: Possible changes such as these hold the potential of providing some additional certainty through an existing contract mechanism, without the need for a controversial legislated timber mandate. But stewardship contracting is no panacea. And place-based groups should recognize its limitations.

First, is to acknowledge its timber-oriented approach to restoration. Notwithstanding its other authorities, the goods-for-services provision is most often used, meaning that stewardship contracting is perceived and used mostly as a funding mechanism and vegetation management tool.⁷² Depending on the type of contract used, restoration is paid for by harvesting timber. Economically valuable trees, in other words, need to be harvested in order to pay for associated restoration projects. If timber value is overestimated, or markets for small-diameter timber do not materialize or cannot be sustained, restoration projects will not be financed. Unless, that is, they are supplemented with additional appropriated dollars.

Arizona’s White Mountain Stewardship Contract is again demonstrative. For all of the certainty it has provided since its inception, the contract has had other consequences as well. The GAO reports that this very large stewardship project has incurred greater costs than expected and that such costs have “taken a substantial toll on the forest’s other programs,” including range, wildlife, hazardous fuels, and vegetation and watershed management.⁷³ Furthermore, some other fuel-reduction projects were not being completed, because their funding sources were being “monopolized” by the White Mountain Stewardship project.⁷⁴ Other national forests in the region also paid a price to service the terms of this contract, and “[a]s the region has redirected funds toward the White Mountain project, these other forests have become resentful of the disproportionate amount of funding the project has received.”⁷⁵

65. U.S. GAO, PUB. NO. GAO-09-23, FEDERAL LAND MANAGEMENT: USE OF STEWARDSHIP CONTRACTING IS INCREASING, BUT AGENCIES COULD BENEFIT FROM BETTER DATA AND CONTRACTING STRATEGIES 46 (2008) [hereinafter U.S. GAO, STEWARDSHIP CONTRACTING].

66. *Id.*

67. This is part of a solution proposed by Sens. Mark Udall (D-Colo.) and Jim Risch (R-Idaho) in the proposed National Forest Insect and Disease Emergency Act of 2009, S. 2798, §7. See also the proposal by Sen. Jon Kyl (R-Ariz.) to provide alternatives to the USFS in complying with the Federal Property and Administrative Services Act, S. 2442 (110th Cong.).

68. The Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393 (2000).

69. See U.S. GAO, STEWARDSHIP CONTRACTING, *supra* note 65, at 43; and PINCHOT INSTITUTE FOR CONSERVATION, THE ROLE OF COMMUNITIES IN STEWARDSHIP CONTRACTING: A PROGRAMMATIC REVIEW OF FOREST SERVICE PROJECTS 32 (Jan. 2010).

70. See, e.g., COUNTY PAYMENTS, JOBS, AND FOREST HEALTH: IDEAS FOR REFORMING THE SECURE RURAL SCHOOLS AND COMMUNITY SELF-DETERMINATION ACT (SRS) AND PAYMENT IN LIEU OF TAXES (PILT) (Bozeman, Mont.: Headwaters Economics, 2010), available online at www.Headwaterseconomics.org/countypayments.

71. For a related discussion, see letter from Jim Miller, President, Friends of the Bitterroot, to Senator Jon Tester, Oct. 1, 2009 (discussing recent examples where promised restoration work was never implemented on the Bitterroot National Forest) (on file with author).

72. PINCHOT INSTITUTE FOR CONSERVATION, THE ROLE OF COMMUNITIES IN STEWARDSHIP CONTRACTING: A PROGRAMMATIC REVIEW OF FOREST SERVICE PROJECTS 34 (Jan. 2010). The Pinchot Institute found in its programmatic review that almost 60% of agency personnel view and use stewardship contracting “primarily as a goods-for-services funding mechanism.” *Id.* at 3. It also reports that 67% of projects using stewardship contracts were focused on fuels and fire-risk reduction. *Id.* at 23.

73. U.S. GAO, STEWARDSHIP CONTRACTING, *supra* note 65, at 49.

74. *Id.* at 50.

75. *Id.*

The White Mountain case is significant, because it shows the promise and limitations of stewardship contracting. While it has provided industry more certainty, the contract is not self-financing, nor was it intended to be. (The average annual cost to the USFS for implementing the contract is \$5.15 million.)⁷⁶ And the Apache-Sitgreaves National Forest considers the biggest challenge of the contract to be the funding of the related task orders each year, as it would be able to treat more acres with more funds.⁷⁷

The type of landscape-scale restoration envisioned by the selected place-based initiatives will undoubtedly require additional congressional appropriations. Without them, and with the agency contractually obligated, there is a risk that other national forests and programs will have to pay to service the terms of a long-term contract.

NEPA, Appeals, and Litigation: Stewardship contracts are also not immune from NEPA, appeals, and litigation. Concerning NEPA, the smaller and more straightforward the project, the quicker is the analysis and turnaround. I found no macro-level studies, by the agency or others, that focus particularly on NEPA's application to stewardship contracts. But the Pinchot Institute reports: "NEPA planning does not take more or less time for a stewardship contract than non-[stewardship contract] projects. Nor is there evidence to suggest that [stewardship contracts] receive more or fewer appeals than regular projects."⁷⁸

It takes the USFS about three years to complete an environmental impact statement (EIS).⁷⁹ The White Mountain project also went through the NEPA process, but some of its associated work was already NEPA pre-approved at the time the contract was signed (with 70,000 acres available for treatment in 2004).⁸⁰ For the other acres, the agency's estimated time line for stewardship contracting is as follows: typically one year for scoping; two-to-three years for NEPA analysis; one year for sale preparation; and one year for contract solicitation, negotiation, and award.⁸¹ Of course, this time line is site-specific; and the length of the process will vary greatly, depending on such factors as size and complexity of the project and the amount of collaboration that went into it. Collaboration and bottom-up support is key here, as several respondents focused on how collaboration can facilitate the planning process, from

scoping to giving the agency a sense of where there is common agreement.

Appeals and litigation have also been brought against projects being implemented and financed through stewardship contracts. Such projects must conform to environmental laws and processes, so it is unsurprising that some have run afoul of the courts.⁸² Out of a total of 218 decisions using stewardship contracting from 2006-2008, 55 were appealed (33%), and five litigated (2%). (Note that decisions were being appealed and litigated in these cases, not the use of stewardship contracts per se.)⁸³

The fact that stewardship contracts are subject to funding, NEPA, appeal, and litigation issues should not discourage their consideration as a substitute for a legislated timber-supply mandate. After all, the Senator Tester and Senator Wyden bills are subject to the same challenges. Unless a place-based bill is exempted from environmental and administrative laws, like the controversial 1995 Salvage Rider,⁸⁴ and somehow comes bundled with a secure pot of money, it will have to run the same course as stewardship contracts. The difference is that government is held liable for cancelling a contract.

Incentives: Though a contract can provide more certainty than authorizing legislation, a question that lingers is how to forge the writing of a multi-year, landscape-level stewardship contract by the USFS. How, in other words, might the agency be coaxed into action? The White Mountain contract was borne out of a long-running collaborative effort and was signed against the backdrop of the Rodeo-Chediski fire, an event that fundamentally changed the political calculus of the region.⁸⁵ Some USFS officials I spoke with about stewardship contracting were clear that contracts the size of the White Mountain must be collaborative and emerge from the bottom-up.⁸⁶ And when

76. Responses to Questions for the Record, U.S. Dept. of Agriculture. President's Proposed Forest Service Budget for Fiscal Year 2011, Senate Energy and Natural Resources Committee, Feb. 24, 2010, at 13 (on file with author).

77. See USFS, *White Mountain Stewardship Project*, <http://www.fs.fed.us/r3/asnf/stewardship> (last visited Jan. 22, 2011).

78. Pinchot Institute for Conservation, *Stewardship Contracting: A Summary of Lessons Learned From the Pilot Experience*, Policy Report 01-06 (no date provided), at 13.

79. USDA Forest Service, Region 3, Ecosystem Analysis and Planning Staff training packet, *A Dynamic NEPA Team Leader Tool: How to Use 24* (June 2007).

80. Responses to Questions for the Record, U.S. Dept. of Agriculture. President's Proposed Forest Service Budget for Fiscal Year 2011, Senate Energy and Natural Resources Committee, Feb. 24, 2010, at 13 (on file with author).

81. *Id.* at 13-14.

82. More surprising, perhaps, is a U.S. Court of Appeals for the Ninth Circuit decision that required the USFS to analyze in its NEPA process ways to possibly fund fuel-reduction efforts that went beyond the use of stewardship contracting. *Ctr. for Biological Diversity v. Rey*, 526 F.3d 1228, 38 ELR 20115 (9th Cir. 2008). In this Herger-Feinstein Act-related project in California, the USFS only analyzed the stewardship contracting (goods-for-services option) in its NEPA analysis of possible fire-reduction projects, essentially treating the arrangement as the only way the agency could do restoration work. But the state of California questioned this assumption, and the Ninth Circuit found the agency's view too limited and in violation of NEPA. Alternative ways to fund fire-reduction objectives were not analyzed by the agency, such as requesting a special appropriation from Congress, altering the USFS' fuel treatment program, or reprioritizing other funding.

83. U.S. GAO, GAO-10-337, *FOREST SERVICE: INFORMATION ON APPEALS, OBJECTIONS, AND LITIGATION INVOLVING FUEL REDUCTION ACTIVITIES, FISCAL YEARS 2006 THROUGH 2008* 24-25 (Mar. 2010).

84. The "salvage rider" opened up timber sales throughout Washington State and Oregon, restricted judicial review, and bypassed the Northwest Forest Plan along with applicable environmental laws. Pub. L. No. 104-19, §2001, 109 Stat. 194 (1995).

85. See JESSE ABRAMS & SAM BURNS, *CASE STUDY OF A COMMUNITY STEWARDSHIP SUCCESS: THE WHITE MOUNTAIN STEWARDSHIP CONTRACT* (Northern Arizona Univ., Ecological Restoration Inst., 2007).

86. The Apache-Sitgreaves National Forest states that "[p]rior to committing to a long-term contract, you must determine that you have community support and acceptance for the treatments. This may take collaboration and education for a year or more prior to advertising a contract to help ensure that appeals and negative reactions will not derail the project." See USFS,

considering the Southwest, other research suggests a correlation between collaboration and the size of a contract, e.g., duration, acreage, and tasks.⁸⁷

Another option is for the Washington and regional offices of the USFS to encourage the use of stewardship contracting through budgetary or other channels. The agency already appears headed in this direction, with recent pronouncements that it will “greatly expand the use of the stewardship contracting authority to meet restoration objectives and build in longer term contracting certainty for communities and the private sector to invest in the kind of forest restoration infrastructure we will need to achieve these objectives.”⁸⁸ The USFS appears ready to deemphasize traditional timber-sale contracts unless they are “above-cost.” If not profitable, stewardship contracts may become the default contract used to accomplish multiple management objectives.

Encouragement may also come via the agency’s new Integrated Resource Restoration program in Priority Watersheds and Job Stabilization, with \$50 million proposed for FY 2011. One objective of the program is to offer roughly 20 10-year stewardship contracts in targeted areas by the end of FY 2011.⁸⁹

An agency-initiated emphasis on stewardship contracting, even with some congressional prodding, is preferable to one imposed by legislation or other means. A legislated provision that so many acres be placed under stewardship contract is subject to the same sort of problems as the codified timber supply mandate—just more smoke and mirrors.

4. Alternative Approaches to Certainty

The selected place-based agreements demonstrate more politically viable alternatives to securing greater certainty of timber supply than through a legislated mandate. Instead of codifying treatment mandates from the top-down, these agreements started at smaller scales and progressed outwards. In doing so, they have established a track record of accomplishments. On the Colville National Forest, for example, the Northeast Washington Forestry Coalition has successfully collaborated on 22 projects, with increased annual harvest volume going from 18 to 61 million board feet of timber (mmbf), without an appeal or lawsuit along the way.⁹⁰

The Colville case is also informative because of its approach to certainty via land designations. Instead of seeking a legislated timber supply or treatment mandate, the Coalition has secured greater certainty through its three-pronged land-designation strategy; providing its

members a more secure base of land on which to make decisions pertaining to protection, restoration, and active forest management.

5. Forest Planning and Certainty

The place-based cases also present an opportunity to reconsider forest planning and how it relates to the certainty issue. First, consider that several of the selected cases took form during the writing and litigating of the 2005–2008 planning regulations that maximized agency discretion.⁹¹ Those regulations were generally based on the idea that plans are “strategic and aspirational” in nature and do not generally bind the agency to a future course of action. These regulations created a great deal of uncertainty among the various interests engaged in forest planning.

A frustration with forest planning processes (under the 1982 regulations) was one factor driving the Beaverhead-Deerlodge Partnership (BDP), whose proposal eventually got rolled into Senator Tester’s bill. Before the BDP formed, its eventual members expressed frustration at what they considered to be a broken forest planning process. Conservationists and the timber industry asked for more assurances than provided by the agency in its revision of the forest plan. The Beaverhead-Deerlodge National Forest (BDNF), according to the Sun Mountain Lumber Co.: “[S]hould be providing sustainable and predictable levels of production and services.”⁹² And according to the Montana Wilderness Association:

The forest plan is a contract between the people who own and those who manage our national forests, and this contract should provide clarity and certainty for all who have a stake in public lands . . . In Montana different people seek different commitments in the forest plan contract, whether it’s small mills, snowmobilers, hunters, communities or conservationists. But we want tangible commitments. We want to know where we stand today and what will remain tomorrow.⁹³

Several actors want more certainty and predictability than “strategic and aspirational” plans can offer. Since its

91. The 2008 planning regulations were necessitated by a decision holding the 2005 planning regulations in violation of the Administrative Procedure Act, NEPA, and the Endangered Species Act, 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18. *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007); compare 73 Fed. Reg. 21468 (Apr. 21, 2008), with 70 Fed. Reg. 1023 (Jan. 5, 2005) (describing more adaptive and less prescriptive approaches to planning).

The USFS has also used two Supreme Court decisions to insulate itself from judicial challenge to all sorts of agency actions. See *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 28 ELR 21119 (1998) and *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 34 ELR 20034 (2004). For a full discussion of these cases and their impact on planning and place-based legislation, see Nie & Fiebig, *supra* note 3, at 6-7. See also Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL’Y F. 105 (2007) (reviewing the Southern Utah Wilderness Alliance’s effect on litigation in the federal courts).

92. *Examination of the Forest Plan Revision Process in Region 1, Hearing Before the S. Comm. on Appropriations*, 109th Cong. (2005) (statement of Sherman Anderson).

93. *Id.* (statement of John Gatchell).

White Mountain Stewardship Project, <http://www.fs.fed.us/r3/asnf/stewardship> (last visited Jan. 22, 2011).

87. Pinchot Institute for Conservation, *The Role of Communities in Stewardship Contracting: A Programmatic Review of Forest Service Projects* 29 (Jan. 2010).

88. *Forest Service Budget: Senate Hearing Before the Comm. on Energy and Natural Resources*, 111th Cong. (statement of Tim Tidwell, Chief of USFS), at 4.

89. *Id.* at 4-5.

90. See NORTHEAST WASHINGTON FORESTRY COALITION, FACT SHEET, available at <http://www.newforestrycoalition.org/PDFs/NEWFC%20Fact%20Sheet.pdf>.

inception, the USFS has fought for maximum levels of administrative discretion, and when it comes to planning, the courts appear willing to grant it. But such freedom comes with risks: in this case, the prospect of citizens looking to control the agency through legislative means.

Most initiatives are also seeking more permanent types of land designations than that provided by forest planning processes or roadless rules that are viewed as being more tenuous. Though differences exist, several groups are making rather straightforward designations, like those areas most suitable for wilderness or special management, more active management in roaded-front-country areas, and those areas prioritized for restoration. As the USFS moves forward with its new (2011) planning regulations,⁹⁴ it should consider how relevant these initiatives find the zoning of national forests into basic management areas, including those areas in need of restoration.

C. Landscape-Scale Restoration and Its Relationship to Rural Communities

Definitions and Disagreements: Nearly every place-based initiative examined focuses on the need for “landscape-scale” restoration. From a collaboration standpoint, restoration is a common zone of agreement among several of these groups. The scale is sometimes defined by reference to (sub)watersheds or acreage, e.g., 25,000 to 50,000 acres, for which restoration projects should be planned and implemented.

Though the term “landscape-scale” is now fashionable, it is often used with some imprecision. (Just how, for example, does this differ from yesterday’s focus on ecosystem management?) These cases give the term additional meaning, by occasionally making reference to other ownerships and by focusing on restoration goals that are transboundary in nature, e.g., water flow, wildlife, natural disturbances, etc.

Almost every initiative reviewed focuses, to some extent, on fuel reduction and thinning work. But most adopt a more ecologically centered definition of restoration than has sometimes been used by lawmakers and the agency in the past. To be sure, all identify a clear need to mechanically treat some forests in order to reduce risks associated with uncharacteristic wildfire effects. But some initiatives go beyond this limited view and focus on additional restoration needs, such as habitat improvement, water quality, management of exotics, and road decommissioning.

Notwithstanding these more holistic approaches, most of the selected bills and agreements rely heavily upon stewardship contracting, a relatively timber-centric approach to restoration (as explained above). This concerns some critics of these initiatives who question the scientific underpinnings and underlying motivations of the restoration agenda, be it agency- or stakeholder-driven. Caution is particularly in order when the Undersecretary of Agriculture

states that 110 million acres of national forest lands are in need of restoration (out of 193 million acres of NFS land).⁹⁵

Political agreement about forest restoration also breaks down when the place in question is not predominated by dry-site forests of ponderosa pine. There is some concurrence, even among conservation interests, that forest restoration is necessary in places where historically low-severity fire regimes have turned into high-severity or mixed-severity regimes.⁹⁶ This explains why, for example, there is such a widespread consensus around the need to treat Arizona’s ponderosa pine forests, or the dry forests in eastern Washington—and why some traditionally litigious groups like the Center for Biological Diversity and the Lands Council are on board.

But such consensus is absent in places consisting of mid-and-higher elevation forests of mixed-to-high-severity fire regimes.⁹⁷ This helps explain some of the controversy surrounding Senator Tester’s bill, as the BDNF consists mostly of lodgepole pine,⁹⁸ a forest type subject to stand-replacing fires. And there is certainly no scientific or political agreement that restoration treatments on these forests make ecological sense.⁹⁹ So, opponents of the bill have a hard time swallowing the need for forest restoration on the BDNF, even if sweetened with additional restoration promises and wilderness protection measures.

Sideboards: Sideboards for restoration are also provided in most of these initiatives. This most often takes the form of prohibitions on new road-building and road-density standards. These groups have also worked hard to identify areas in which restoration projects should be prioritized

94. National Forest System Land Management Planning, 74 Fed. Reg. 67165 (Dec. 18, 2009).

95. Comments made by Undersecretary of Agriculture Harris Sherman, at the U.S. Forest Service Science Forum, Washington, D.C., Mar. 29, 2010.

96. See, e.g., *Forest Restoration and Hazardous Fuels Reduction Efforts Hearing*, supra note 17, at 28, 60 (statement of Russell Hoeflich of The Nature Conservancy); *Collaborative Ecological Restoration, Hearing on S. 2593 Before the S. Comm. on Energy and Natural Resources*, 110th Cong. (2008), at 29 (statement of Nathaniel Lawrence of the Natural Resources Defense Council); RICK BROWN & GREGORY APLET, *RESTORING FORESTS AND REDUCING FIRE DANGER IN THE INTERMOUNTAIN WEST WITH THINNING AND FIRE* (The Wilderness Society, 2010).

97. See, e.g., MICHELE R. CRIST, *RESTORATION OF LOW-ELEVATION DRY FORESTS OF THE NORTHERN ROCKY MOUNTAINS: A HOLISTIC APPROACH* (2009).

98. Lodgepole pine accounts for 46% of the forested area, or 1.26 million acres, of the Beaverhead-Deerlodge National Forest. U.S. FOREST SERV., *BEAVERHEAD-DEERLODGE NATIONAL FOREST: LAND AND RESOURCE MANAGEMENT PLAN, CORRECTED FINAL ENVIRONMENTAL IMPACT STATEMENT 452* (2008).

99. For reflective comments and cited scientific literature focused on restoration and fire regimes, see *Collaborative Ecological Restoration, Hearing on S. 2593 Before the S. Comm. on Energy and Natural Resources*, 110th Cong. (2008), at 29. Included as an exhibit is a letter from a group of scientists to President George W. Bush that cautions against a thinning-based approach to restoration in some western forest types:

Indeed, many forests in the West do not require any treatment. These are forests that for thousands of years have burned at long intervals and only under drought conditions, and have been altered only minimally by 20th century fire suppression. These forests are still ‘healthy’ and thinning would only disturb them, not ‘restore’ them. In short, the variation among our forested landscapes is much too great for one treatment to be appropriate everywhere.

Id. at 35. See also MERRILL R. KAUFMAN ET AL., *THE STATUS OF OUR SCIENTIFIC UNDERSTANDING OF LODGEPOLE PINE AND MOUNTAIN PINE BEETLES—A FOCUS ON FOREST ECOLOGY AND FIRE BEHAVIOR* (Arlington, Va.: The Nature Conservancy, Tech. Rpt. No. 2008-2: 2008).

and areas that should be more or less left alone in some protected (roadless) status.

Landscape-Scale Economics: Many of these initiatives also adopt a landscape-level view of restoration because of economics and agency budgets. Almost all make linkages between restoration and the timber industry, operating on the principal that a viable wood products industry is necessary for the attainment and financing of various restoration goals. This explains why most of them rely so heavily upon stewardship contracting authority. Some are also premised on the economic use of restoration byproducts. Take, for example, the interest in biomass and small-wood utilization: in the CFLRA, “landscape-scale” is defined by accessibility to wood products infrastructure that is at an appropriate scale to use woody biomass.¹⁰⁰

The Management Imperative: A management imperative is also embedded within these legislative and non-legislative initiatives. At some level, each is operating on the assumption that restoration and wildlands protection requires expedited action, either political or managerial. For these groups, the conservation status quo is insufficient.

The bills offered by Senators Tester and Wyden are particularly illustrative in this regard. For the conservation interests backing Senator Tester’s bill, there is some urgency in acquiring wilderness and special management designations for inventoried roadless lands because of motorized recreation use. For them, the status quo will lead to more motorized incursions into roadless areas, establishing “historic use” and diminishing “wilderness character,” and thus making wilderness designation more politically difficult in the future.¹⁰¹

Those helping formulate Senator Wyden’s bill similarly believe that there is an imperative to proactively manage and restore the dry forests of Eastern Oregon. Much of the congressional testimony on S. 2895 emphasizes this point. Forestry Professors Norman Johnson and Jerry Franklin begin their case for active restoration by dividing federal forests into dry and moist types. “Generally, it is not necessary to conduct silvicultural treatments to maintain existing old-growth forests on Moist Forest sites.”¹⁰² But their diagnosis is different on dry forests and they insist that “eastside federal forests in Oregon face a bleak future without swift action.”¹⁰³ These forests have been greatly simplified during the last century, due to such things as fire suppression, grazing, logging, and the establishment of plantations. Because of this: “We will lose many of these forests to catastrophic disturbance events unless we undertake aggressive active management programs.”¹⁰⁴

Arizona’s 4FRI adopts a similar posture. One initial MOU between Arizona Forest Restoration Products, Inc., the Center for Biological Diversity, and the Grand Canyon Trust declares “an urgent need to restore ponderosa pine forest ecosystems” and “the historic consensus for landscape-scale restoration in northern Arizona forms a mandate for ambitious action.”¹⁰⁵ As in Oregon, the 4FRI partners share the belief that corrective actions are necessary to reestablish self-regulating natural processes and to conserve biodiversity on these dry forest types.

The perceived imperative to act more swiftly also helps explain why the Senator Tester and Senator Wyden bills seek to change the way in which outside parties may challenge associated restoration projects and decisions.¹⁰⁶ Following the lead of the Healthy Forests Restoration Act, both bills include a similar “balance of harm provision”: “The Court reviewing the project shall balance the impact to the ecosystem likely affected by the project of: the short and long-term effects of undertaking the agency action; against the short and long-term effects of not undertaking the agency action.”¹⁰⁷ More controversial is Senator Wyden’s proposal to disallow administrative appeals during an interim transition period.¹⁰⁸ These and other proposed changes are explained by making reference to the need to act in a more expedited fashion.

I. The Need for Experimentation, Collaboration, and Competition

The focus on landscape-scale restoration by these place-based initiatives is similar, in some respects, with the USFS’ new emphasis on restoration.¹⁰⁹ There is a general convergence here. The difference, perhaps, is in the degree of specificity provided by the place-based bills and agreements. Some initiatives have taken the politically malleable term “restoration” and given it meaning from the bottom-up, with more clearly defined objectives and parameters. But the restoration agenda must not go unquestioned. Part of its popularity is due to the fact that it is open to multiple political interpretations. But this lack of clarity and a common definition can also be problematic, from a political and managerial standpoint.¹¹⁰

105. Memorandum of Understanding Between Arizona Forest Restoration Products, Inc., the Center for Biological Diversity, and the Grand Canyon Trust, to Work Cooperatively to Restore Degraded Ponderosa Pine Ecosystems in Northern Arizona (Apr. 2009), at 9 (on file with author).

106. S. 2895, §11(e), 111th Cong. (2009). Senator Tester proposed adding a “balance of harms” provision to S. 1470, 111th Cong. (2009), in Feb. 2010, <http://tester.senate.gov/Legislation/forestchangestimber.cfm> (last visited Jan. 22, 2011).

107. Pub. L. No. 108-148, §106(c)(3).

108. S. 2895, §9(b), 111th Cong. (2009).

109. See, e.g., National Forest System Land Management Planning, 74 Fed. Reg. 67165 (Dec. 18, 2009); Chapter 2020 of Forest Service Manual, Ecological Restoration and Resilience (Interim Directive No. 2020-2010; Mar. 3, 2010); Remarks of Secretary Tom Vilsack, Aug. 14, 2009, Seattle, Wash., <http://www.fs.fed.us/video/tidwell/vilsack.pdf> (last visited Jan. 23, 2011).

110. See Evan Hjerpe et al., *Socioeconomic Barriers and the Role of Biomass Utilization in Southwestern Ponderosa Pine Restoration*, 27 *ECOLOGICAL RESTORATION* 169-77 (2009) (reviewing the lack of a common definition of forest restoration in the Southwest and its political implications).

100. Pub. L. No. 111-11, tit. IV, §4003(b).

101. See Nie & Fiebig, *supra* note 17, at 7-8.

102. *Miscellaneous Public Lands and Forests Bills: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong. (2010) (statement of K. Norman Johnson and Jerry F. Franklin), at 36.

103. *Id.* at 2.

104. *Id.*

The best way for the agency to proceed with place-based initiatives and their focus on restoration is to embrace a collaborative, competitive, and experimental approach. Given the pace at which place-based legislative proposals are being developed or considered, it is important for the USFS to offer an immediate and politically feasible option in their stead. I thus offer some possible alternatives for consideration. These should be considered in addition to the “blueprint” and framework currently being used on the Colville National Forest and initiated by the Northeast Washington Forestry Coalition (as discussed above).

Collaboratively Written Restoration Principles: Montana’s Forest Restoration Committee (MFRC) is an exemplar in terms of how collaboration can facilitate restoration. This broad, stakeholder-based group agreed to a number of restoration principles that “articulate a collective vision of ecologically appropriate, scientifically supported forest restoration.”¹¹¹ These principles serve as guidelines for project development and “represent the ‘zone of agreement’ where controversy, delays, appeals, and litigation are significantly reduced.”¹¹² Individual restoration committees have been formed on the Lolo, Bitterroot, and Helena National Forests and they apply the restoration principles to individual projects. This inclusive process has produced a foundation upon which future restoration work will proceed, with support from the agency and some conservation groups whom oppose the Senator Tester bill. This includes support by the Wild West Institute, a group that is actively opposed to S. 1470. In contrast to the Beaverhead-Deerlodge Partnership, Wild West’s Executive Director, Matthew Koehler, considers the MFRC an “open, inclusive, transparent collaborative process,” with “solid restoration and fuel reduction projects . . . moving forward as a result.”¹¹³

Collaborative Forest Landscape Restoration Act: Another exemplary framework is provided by the CFLRA, as reviewed in the Appendix. The CFLRA has yet to be fully implemented, and its long-term appropriations are far from certain, so it is premature to declare complete success. But the Act’s framework and general approach to restoration is commendable.

The program selects and funds carefully screened landscape-level forest restoration projects.¹¹⁴ Such projects must comply with existing environmental laws and be developed and implemented through a collaborative process.¹¹⁵ Up to 10 proposals can be funded per year (with only two proposals in any one region of the National Forest System), and

each project is evaluated based on several criteria.¹¹⁶ The program authorizes \$40,000,000 per year (FY 2009-2019) to be used to pay for up to 50% of selected restoration projects.¹¹⁷ Once chosen, these projects must incorporate the best available science, be monitored by multiple parties, and submit reports to selected congressional committees.¹¹⁸

The CFLRA has received broad-based support, from environmental groups to the forest products industry.¹¹⁹ It is also a program that has the potential of providing greater certainty to the timber industry. Says Christopher West, Vice President of the American Forest Resource Council: “The [CFLRA] will help improve numerous forest values, but more importantly it will also provide the certainty and predictability of opportunities that forest products and biomass energy businesses need . . . [It] would help provide some of the certainty upon which industry entrepreneurs can take to their bankers and investors.”¹²⁰ Many goals and objectives of the CFLRA are similar to the reviewed place-based bills and agreements, including long-term and landscape-level restoration, rural economic development and stability, collaboration, and more secure funding.¹²¹ Several place-based initiatives submitted proposals for CFLRA funding; thus demonstrating some overlap (among the 10 chosen in 2010 are included the Clearwater Basin Collaborative and the 4FRI).

The CFLRA approach to restoration is preferable to place-based legislation for several reasons. First, selected proposals are subject to predetermined rules and national-level oversight. It is also a more cautious and experimental approach to restoration, one that requires a careful vetting and required monitoring. This is particularly important when we consider all of the uncertainty about forest restoration, ecological and economic.

The Act’s competitive process for selecting proposals is also commendable. Not only must the proposals hue to the Act’s stated criteria, but they are also subject to filtering by the USFS regional offices and the Advisory Committee. This structure will help ensure that politically and scientifically indefensible proposals do not get very far in the process. It is also clear that restoration, on the scale envisioned by the CFLRA and other initiatives, will require a financial investment by Congress. In most places, a simple stewardship contract exchange of timber goods-for-restoration services will not get the job done. This means that additional funding is necessary, and competition provides a more equitable way to prioritize projects and limited dollars.

Consideration should be given to expanding the CFLRA program, in terms of proposals chosen and dollars appropriated. Like stewardship contracting, it presents a preexisting mechanism and politically feasible option to place-based legislation. Better yet would be another experi-

111. MFRC, RESTORING MONTANA’S NATIONAL FOREST LANDS: GUIDING PRINCIPLES AND RECOMMENDED IMPLEMENTATION 3 (2007) (on file with author). MFRC Restoration Principles are available at <http://www.montanarestoration.org/principles-menu>.

112. *Id.*

113. *Public Lands and Forests Legislation: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong. (2009) (statement of Matthew Koehler), at 51.

114. Pub. L. No. 111-11, tit. IV, §4001.

115. *Id.* §4003(b).

116. *Id.*

117. *Id.* §4003(f).

118. *Id.* §4003(g), (h).

119. See, e.g., *Collaborative Ecological Restoration, Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong. (2008).

120. *Id.* at 26.

121. Pub. L. No. 111-11, tit. IV, §4001.

mental restoration framework that has less emphasis on timber and fuel treatments, and more on watersheds. This could potentially be advanced by using the agency's new integrated resource restoration program in Priority Watersheds and Job Stabilization (with \$50 million proposed in FY 2011). But as currently conceived, this program also has a timber-centric emphasis, with results focused on such things as biomass, the signing of 20 10-year stewardship contracts, and a "steady supply of forest products."¹²² Agriculture Secretary Tom Vilsack says that restoration is the USFS' vision of the future, and that "[r]estoration means managing forest lands first and foremost to protect our water resources . . ." If so, a competitive, experimental framework that is watershed-based appears compatible with where the agency wants to go.

D. *Conflict Resolution and the Desire for More Public Participation in National Forest Management*

Another common characteristic shared by these initiatives is their desire for more collaborative decisionmaking with the USFS in a more formalized fashion. To begin, the bills and agreements are themselves the product of some type and degree of collaboration, coalition-building, and/or negotiation. Some groups have been more inclusive than others. But all have attempted to build bridges among some traditional adversaries. And there is a widespread desire to be continuously engaged in forest management decisions, not just during the limited time frames offered by rulemaking, NEPA, and the forest planning process.

Restoration: As discussed already, the need for restoration is a commonly identified area of agreement amongst most of the cases analyzed. And some people believe that restoration necessitates a conservation strategy that is less adversarial and litigious and more collaborative in nature. Litigation, after all, is mostly a defensive strategy—excellent at stopping things from happening and even catalyzing and leveraging other actions. But restoration, say some people, requires a more collaborative approach, because some actions will require the USFS to go above and beyond what the law requires.

Ensuring Collaboration: More formal or "institutionalized" collaboration is also sought by many of these initiatives. This explains the use of the MOUs, as both documents explain the purposes and processes to be used in making decisions on these forests. Take, for example, the MOU in effect on the Colville National Forest. It uses a protocol defining four levels of support for agency projects, each with accompanying commitments by Coalition members. These range from "consensus without reservation,"

meaning no members will appeal or litigate the project or support outside challenges; to "majority vote disapproval," in which the Coalition will recommend that the Colville drop the proposal or risk appeal and litigation.¹²³

Other groups, such as the Lakeview Stewardship in Oregon, also emphasize the importance of playing a more proactive role in forest management. Instead of reacting to USFS-written strategies, NEPA alternatives, and timber sales, the group wants to assist in their initial design and formation.

Advisory Committees: The place-based bills try to institutionalize collaboration by creating various resource advisory committees. These committees have particular compositional requirements, such as to include various interests and perspectives, and they are given varying amounts of advisory powers and responsibilities. These responsibilities run the gamut, from helping plan restoration projects to multiparty monitoring. For example, Senator Tester's bill requires the establishment of resource advisory committees that shall then establish another advisory committee to assist "in determining the location for, completing the design of, and implementing each landscape-scale restoration project."¹²⁴

Institutionalizing collaboration in this way could have several possible consequences, positive and negative. On the one hand, it will provide some additional structure for participation—giving representative interests a better sense of their roles and advisory powers—and a guaranteed seat at the table. On the other hand, there is a fear that more formalized approaches will further bog down the agency in yet more process and procedure (and possible delays due to the Federal Advisory Committee Act), and possibly turn more organic forms of collaboration into more formulaic bureaucratic structures.¹²⁵

Collaboration and Controversy: Much of the debate about place-based approaches to forest management centers around collaboration and federal versus local control of federal lands. The importance of collaboration emerged as a dominant theme at the place-based laws and agreements workshop. To some extent, collaboration and conflict resolution has become the overarching narrative used by place-

123. See Memorandum of Understanding Between USDA Forest Service, Colville National Forest and the Northeast Washington Forestry Coalition (FS Agreement No. 05-MU-1106100-018) (on file with author). For more on the MOU and protocol, see Northeast Washington Forestry Coalition, <http://www.newforestrycoalition.org/> (last visited Jan. 23, 2011).

124. S. 1470, §103(b), 111th Cong. (2009).

125. See, e.g., testimony of Undersecretary Harris Sherman on Senator Wyden's bill:

The provisions in the bill that provide for recognition of collaborative groups are much more formal than necessary to ensure collaboration on restoration projects. Collaboration can and has been achieved without formal recognition; I am cautious about adding more process to our already rigorous public engagement process. Further, it is not clear whether these groups would be subject to the Federal Advisory Committee Act.

Miscellaneous Public Lands and Forests Bills: Hearing Before the Senate Comm. on Energy and Natural Resources, 111th Cong. (2010), at 8.

122. *Forest Service Budget: Senate Hearing Before the Comm. on Energy and Natural Resources*, 111th Cong. (statement of Tim Tidwell, Chief of USFS), 4-5. See also U.S. FOREST SERVICE, FISCAL YEAR 2011 PRESIDENT'S BUDGET IN BRIEF (2010).

based initiatives when telling their stories through the media,¹²⁶ at congressional hearings¹²⁷ and on YouTube.¹²⁸

But some critics of these bills and agreements see things differently. For some, these processes are exclusive and nontransparent; more akin to self-selected interest group negotiation than a multistakeholder-driven collaborative process. Some critics are also concerned about devolving federal lands management to state and local-based interests. This is not only a question of what interests were able to formulate the proposals and draft preliminary legislation, but also in how that proposed legislation is to be implemented.

Consider, for instance, Senator Tester's bill, which includes a new disposition of appeal rule, so that those appealing a project have to meet with a USFS official "in the vicinity of the land affected by the decision."¹²⁹ And Senator Wyden's bill establishes a standard for recognizing collaborative groups: that they "must be comprised of citizens of the State who represent various interests of the State."¹³⁰ For critics, these and other examples represent a dangerous slippage to devolution.

Thus, much of the debate about the place-based approach has a familiarity to it; another recalibration of federal and local power over federal forest management. This is not, nor has it ever been, an either-or issue, as federal lands law is very much characterized by the messiness of "cooperative federalism."¹³¹ One could make a case, in fact, that federal lands and forest law will look more like environmental law in the future, with more local implementation of federal laws with clearly defined sideboards. The more constructive question is how to safeguard the national interest in federal lands while harnessing the innovation and problem-solving capabilities evident at the grassroots.

Who Is Included? Who Cares? The reviewed cases also demonstrate the potential costs and risks of excluding some interests from negotiations. At some point, a political choice must be made about whom to include in the process. Consider two examples. First, the Tongass Futures Roundtable, a group that is by most measures a relatively inclusive bunch, with 36 members currently at the table. This inclusivity, however, might explain their overall lack of progress in solving various problems on the Tongass. More common ground could be found by the group if it were to simply lop off the more extreme ends. But those

groups getting the axe could then use their own weapons to thwart the collaborative agreement at a later stage.

At the other end of the spectrum is the Beaverhead-Deerlodge Partnership, now part of Senator Tester's bill. This group consisted of three conservation groups and five wood products companies who wrote a legislative proposal in relatively short order. The problem, though, is that the Beaverhead-Deerlodge Partnership does not include two of the more litigious groups in the region, the Alliance for the Wild Rockies and the WildWest Institute.¹³² Both of these groups are vehemently opposed to S. 1470 and may appeal and/or litigate projects that stem from the legislation.

Contrast the Montana situation to that on the Colville. There, another powerful and court-savvy environmental interest, the Lands Council, is a core member of the North-east Washington Forestry Coalition. That group's buy-in to the Coalition's MOU and decisionmaking protocol help explain why associated projects have not been challenged in so long. A similar dynamic is playing out in Arizona, where the Center for Biological Diversity and Grand Canyon Trust are partners in the 4FRI.

Pay now or pay later may be the appropriate lesson to draw from these cases. Finding agreement among a smaller and more like-minded group is obviously easier than the converse. Note, for example, that the selected place-based initiatives are generally devoid of motorized recreational interests. This is not to say that their interests have been altogether ignored, but most of the initiatives are primarily comprised of conservation and timber interests. But exclusion comes with some risks. All of the cases reviewed here are subject to the full suite of environmental laws and processes. And this means that those groups not included at the formation stage can challenge projects during implementation.

III. Conclusion

The place-based initiatives reviewed here can no longer be considered isolated cases or anomalies. Stepping back, it is clear that they collectively represent a significant shift in thinking about national forest management. In some respects, they are filling a policy vacuum—addressing difficult issues that have gone unresolved by Congress and the USFS.

These cases are worth paying attention to for several reasons. To start with, there are millions of national forest lands in the mix. Second, they offer the agency an opportunity to learn and apply lessons from the bottom-up. As discussed above, several of these initiatives share a number of common characteristics. Though differences exist, their commonalities are most remarkable: lots of shared concerns, goals, approaches, and obstacles. The USFS would be well-served to study these cases and consider how they

126. See, e.g., Ray Ring, *Taking Control of the Machine*, HIGH COUNTRY NEWS, July 20, 2009.

127. See, e.g., *Public Lands and Forests Legislation: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong. (2009), at 59 (statement of Tim Baker, Montana Wilderness Association).

128. See, e.g., *Cultivating Common Ground*, <http://www.youtube.com/watch?v=6cFSzpEKqTg> (last visited Jan. 28, 2011) (the story of the Lakeview Stewardship Group) and *From Controversy to Common Ground: The Colville National Forest Story*, <http://www.youtube.com/watch?v=pjH4FAGJaYg&feature=related> (last visited Jan. 28, 2011).

129. S. 1470, §102(b)(5), 111th Cong. (2009).

130. S. 2895, §3(2), 111th Cong. (2009).

131. See, e.g., Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179 (2005).

132. U.S. GAO, GAO-10-337, *FOREST SERVICE: INFORMATION ON APPEALS, OBJECTIONS, AND LITIGATION INVOLVING FUEL REDUCTION ACTIVITIES, FISCAL YEARS 2006 THROUGH 2008* 19, 51-52 (Mar. 2010) (listing number of appeals and filed lawsuits by both groups).

have approached shared problems. Unlike administrative appeals and litigation that tells the agency what it should *not* be doing, these initiatives showcase more positive, concrete examples from which to learn and apply lessons.

Take, for example, the agency's new emphasis on forest restoration. Before proceeding with related regulations and policies, the USFS should learn how these groups have negotiated the assumptions, definitions, and sideboards for restoration work. Another opportunity is present in the revising of forest planning regulations. It is clear that these initiatives are looking for more secure commitments by the agency than offered in forest plans that are mostly "strategic and aspirational." Many of these groups are drawing lines on maps and trying to provide increased certainty in the form of a stabilized land base, with zones identifying areas in need of wilderness or roadless protection, restoration, and more active timber management.

Of course, there is a very good chance that the bills introduced by Senators Tester and Wyden will not be enacted into law; and some of the other initiatives may ultimately fail to be implemented. But succeed or not, these place-based initiatives may likely be a catalyst for change.

But opportunities aside, there are significant problems to the place-based legislative approach to national forest management. To begin with, the historical record of place-based forest law does not lend confidence to the approach in principle. By most accounts, cases like the Herger-Feinstein Quincy Library Act have engendered more conflict and problems than the legislation has resolved. This is mostly because these site-specific laws must somehow be paid for and then reconciled with the cumulative body of environmental laws that govern the national forests.

These problems are not insurmountable, but Congress and the USFS should oppose forest-specific legislation until a number of more fundamental and systematic concerns are addressed. Most important are the questions of how these laws would fit into the preexisting statutory/planning framework and how they would be financed.

If replicated more broadly, place-based legislation would disunify the National Forest System and create a number of problematic precedents. Chief among these are legislated timber treatment mandates that would set the stage for future congressional abuse. If enacted into law, these mandates would also have the unintended consequence of jeopardizing fragile agreements and negotiations going on elsewhere; as some timber interests would certainly use this precedent as new leverage in their bargaining positions. As one congressional staffer involved in a place-based negotiation says, if Senator Tester's timber-supply mandate gets through the gate, then he expects a similar sort of demand being made by the timber interests at his table.

Most of the challenges faced by the initiatives reviewed here are systemic, not place-based. Questions presented by such things as landscape-level restoration and NEPA, stewardship contracting, and funding, among others, deserve a national-level response—not a series of ad hoc remedies and site-specific exemptions.

Thankfully, there is an alternative to choosing either the status quo or the place-based law approach. The formalized agreements between collaborative groups and the USFS make clear that there are less controversial and more politically feasible ways of achieving similar goals and objectives. Efforts on the Colville National Forest are particularly instructive. Though not without its challenges, the Northeast Washington Forestry Coalition has managed to achieve its goals and resolve conflicts without resorting to legislation. If the Coalition comes to agreement on wilderness designation, legislation will be sought, but the Coalition's approach to restoration and timber supply will likely stay within the parameters of its innovative decision-making framework. Increased certainty will be achieved through collaboration and a more stabilized land base.

Long-term stewardship contracts provide another way of achieving greater certainty in forest management, and they should be pursued, when appropriate, as a substitute for legislated timber-supply mandates. Yet, stewardship contracts are no panacea, and they do not absolve Congress of its responsibility to fund restoration work, forest- and watershed-based. Stewardship contracting authority is set to expire in 2013, and its reauthorization provides an excellent opportunity for lawmakers and the agency to consider how the tool might be sharpened in the future.

In addition to the framework being used in northeast Washington, the best way for the agency to proceed with these place-based initiatives and their focus on restoration is to embrace a collaborative, competitive, and experimental approach. There are at least two exemplary processes and frameworks that should be fully supported, possibly enlarged, and/or adapted and replicated in the future: the Montana Forests Restoration Committee and the CFLRA. The former has the potential of finding collaborative solutions to forest restoration problems, while the latter provides a collaborative, competitive, and experimental framework with built-in safeguards.