

A R T I C L E S

National Forest Management: The Contested Use of Collaboration and Litigation

by Martin Nie and Peter Metcalf

Martin Nie is Director of the Bolle Center for People and Forests at the University of Montana. Peter Metcalf is a doctoral candidate at the University of Montana, College of Forestry and Conservation.

Summary

Litigation over national forest management has received substantial attention from members of Congress who claim that “environmental obstructionists” are abusing the legal system; conversely, litigants criticize the U.S. Forest Service’s practice of collaborative management as insufficiently protective, leaving courts as the best resort. The authors review the emergence and increasing use of collaboration and some of the claims and counterclaims regarding Forest Service litigation. Through interviews with litigants, they describe prominent themes and issues, including criticism of collaboration, views about environmental advocacy, the need to enforce the law, the National Environmental Policy Act, and litigants’ other views regarding forest health, science, and restoration. The authors take issue with current congressional efforts to marginalize advocacy groups and citizens who use courts to enforce the law, but they also reject the false choice between collaboration and litigation and explain why both are necessary components of modern national forest management.

Collaborate or litigate? This is the way in which political debate over national forest management is commonly framed. The storyline is simple: On one side are those interests willing to work with others to find common ground and agreements on the management of national forests, and on the other is a small, combative contingent of adversarial “environmental obstructionists” that serially sue the U.S. Forest Service. The role of litigation in national forest management is receiving considerable attention, with some members of the U.S. Congress particularly focused on the role it plays in impeding certain forest management actions. Those who more frequently sue the Forest Service are commonly portrayed as marginalized radicals or rogue activist groups who abuse the legal system and the procedural and analytical requirements imposed by environmental and public land laws.¹

This Article resulted from an effort to better understand the positions, issues, and policy implications at the core of the national forest management debate. While a lot has been written about the virtues and accomplishments of collaboration, much less is known about why some individuals are critical of the practice and how they view it in the context of environmental and federal lands law.

To better understand the critics’ perspective, we interviewed seven individuals who often challenge Forest Service decisions in Montana and Idaho and/or are prominent critics of collaboration. Two other people were interviewed because of their recent criticism of collaboration and their experiences with it in two high-profile cases. We also analyzed written materials from these and other individuals, such as legal complaints and amicus briefs focused on particular projects, submitted testimony, National Environmental Policy Act (NEPA)²-related public comments, and various editorials and other publicly available documents. Several common themes emerged from this body of information, providing a more comprehensive account of how these individuals view collaboration and litigation in national forest management.

The limitations of the Article are obvious: Only nine individuals were interviewed and the geographic focus is limited to Montana and Idaho (and to a small extent

Authors’ Note: We are indebted to the following people for their substantive reviews and thoughtful critiques of earlier drafts: Susan Jane M. Brown (Western Environmental Law Center), Tom Troxel (Intermountain Forest Association), Courtney Schultz (Colorado State University), and Peter Nelson (Defenders of Wildlife). Their willingness to review the manuscript in no way represents an endorsement of the views found herein. We also wish to thank those individuals whom we interviewed for this project.

1. Benjamin Hulac, *Forest Service Seeks Protection Against Lawsuits That Delay Management Policies*, ClimateWire, July 17, 2015.
2. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

Wyoming and eastern Washington). Nonetheless, the individuals interviewed represent groups who most frequently appeal, object, or sue in Region 1 of the National Forest System (NFS)—a part of the system receiving a disproportionate amount of legal challenge compared to other administrative regions.³

Another limitation is that we did not interview individuals in the region who are actively participating in collaborative groups and/or are proponents of the practice, nor did we speak with people who are using collaboration *and* the courts to engage in national forest management. Instead, we focus on a narrower constituency whose participation in national forest management is being widely criticized and is now the target of congressional efforts to reform national forest law.

I. Background

This section provides some background on the use of collaboration and litigation in national forest management so that readers can appreciate the context in which our questions were answered and our perspective is provided. We also briefly describe a few laws and regulations pertaining to collaboration that were referenced in our interviews. A concise review of these laws and regulations is helpful because they have been folded into the preexisting regulatory framework, creating a complicated legal regime.

A qualifier is also in order at the outset: Our division between collaboration and litigation is grossly simplified. There are several groups involved in collaborative endeavors that also use the courts when they deem it necessary to do so. Nonetheless, we structure our analysis in this way because of how the debate is so commonly portrayed. As shown below, a typical approach of those seeking national forest law reform is to juxtapose collaboration and litigation, with the latter viewed as an obstacle to sound and efficient forest management. After discussing our research, we explain why we view both collaboration and litigation as necessary parts of national forest governance.

A. Collaboration and National Forest Management

There are multiple ways that collaboration, in the context of natural resources management, has been defined and operationalized over the years. The story often begins with the emergence of collaborative watershed groups whose bottom-up approach to conflict resolution quickly spread to other areas of resource management, including federal lands. One common vision is that collaborative groups, or

“coalitions of the unlike,” try to find common ground in order to promote less adversarial, longer-lasting, and more integrated solutions to resources management.⁴ Myriad terms and definitions of collaboration exist, but most emphasize the importance of shared goals, multiparty participation, conflict resolution, compromise, deliberation, and the ability to tackle multiple integrated social-economic-environmental issues in a less adversarial forum.⁵

There were some political and tactical considerations by those groups going down the collaborative pathway. In the early 2000s, some environmental groups openly weighed the potential advantages and disadvantages of collaboration. A key principle, it was said, is that “under no circumstance should [collaborative groups] be used to authorize avoidance of or exceptions to environmental and public participation laws.”⁶ Instead, collaboration was viewed as a way to more effectively implement the existing baseline of environmental law and regulation. And “[e]nvironmental groups, and indeed other participants too, should insist on fair and effective application and enforcement of all laws and regulations as a pre-condition to participating in any sort of group process.”⁷

Apprehension aside, some environmental groups were also fatigued by the federal land battles of the past and looked for new ways of breaking old political logjams and stalemates. For example, some wilderness advocates, frustrated by inaction on the wilderness front, embraced collaboration as a politically feasible and strategic way in which to not only get wilderness designated, but to also deal with an array of other issues, from federal lands management outside of wilderness to rural economic development.⁸

The embrace of collaboration also received a fair bit of criticism in its formative stages, with some skeptics focused on how the practice could potentially undermine “the rule of environmental law” and possibly weaken the environmental movement, among other potential dangers of devolving public lands management.⁹ Many of these early

3. U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *FOREST SERVICE: INFORMATION ON APPEALS, OBJECTIONS, AND LITIGATION INVOLVING FUEL REDUCTION ACTIVITIES, FISCAL YEARS 2006 THROUGH 2008* (2010).

4. Donald Snow, *Coming Home: An Introduction to Collaborative Conservation*, in PHILIP BRICK ET AL. EDS., *ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST* 1-11 (2001).

5. See, e.g., JULIA WONDOLLECK & STEVEN YAFFEE, *MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT* (2000); BARBARA GRAY, *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* (1989); and Antony S. Cheng, *Build It and They Will Come? Mandating Collaboration in Public Lands Planning and Management*, 46 NAT. RESOURCES J. 841-58 (2006).

6. E. FRANKLIN DUKES & KAREN FIREHOCK, *COLLABORATION: A GUIDE FOR ENVIRONMENTAL ADVOCATES* 16 (2001).

7. *Id.*

8. See Martin Nie & Christopher Barns, *The Fiftieth Anniversary of the Wilderness Act: The Next Chapter in Wilderness Designation, Politics, and Management*, 5 ARIZ. J. ENVTL. L. & POL'Y 237-301 (2014) (discussing the significance of collaboration to contemporary wilderness politics).

9. Still the most complete and relevant analysis is DOUGLAS S. KENNEY, *ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS ACTIVE IN NATU-*

critiques and warnings, however, never anticipated the degree to which collaboration on national forests would take hold. Some 15 years later, there is abundant scholarship focused on the process of collaborative conservation and the benefits of collaborative governance. But there remains limited research focused on the environmental *outcomes* of collaboration.¹⁰

Relatively few studies focus on opposition to collaboration by actually assessing the experiences and viewpoints of those critical of the practice.¹¹ Most relevant to our inquiry is a 2013 study showing that environmental organizations likely to collaborate in national forest management tend to be larger, more professionalized, and represent multiple values; in contrast to groups litigating, which were found to be smaller, more amateur, and more likely to express a single environmental value. Organizational resources and capacity were found to be significant factors shaping the decision about whether to collaborate or sue. If trends in collaboration continue, says the author, “[W]e will see a marginalization of smaller, ideologically pure environmental groups [and] their values will not be included in decision making because they are unable or unwilling to collaborate. . . .”¹²

Collaboration has significantly impacted the politics and management of the national forests. Recall that one of the dominant criticisms of the Forest Service before the National Forest Management Act (NFMA)¹³ was enacted in 1976 was the lack of meaningful public participation in agency decisionmaking.¹⁴ Further, laws such as NEPA, the NFMA, and the Endangered Species Act (ESA)¹⁵ provided important leverage to conservation groups and gave them an empowered seat in collaborative processes.

Frustration arose, however, over the perceived adversarial character of these laws and processes. Collaboration was increasingly invoked to facilitate a more inclusive dia-

logue as part of a new focus on “ecosystem management” in the 1990s,¹⁶ and the two were linked together by the Forest Service’s Committee of Scientists in 1999, which recommended more ecosystem and collaborative-based approaches to forest planning.¹⁷

Congress entered the fray in 1998 by requiring the Forest Service to use a “multiparty monitoring and evaluation process” when using stewardship contracts.¹⁸ Under this authority, the Forest Service “may enter into stewardship contracting projects with private persons or other public or private entities to perform services to achieve land management goals for the national forests and the public lands that meet local and rural community needs.”¹⁹ In 2003, Congress required collaboratively written community wildfire protection plans as part of the Healthy Forests Restoration Act.²⁰ This law provides incentives for the writing of such plans while encouraging “public collaboration” in the preparation of authorized hazardous fuel reduction projects.²¹

Congress again endorsed more collaborative approaches to forest restoration in passing the Collaborative Forest Landscape Restoration Act (CFLRA) in 2009.²² The program developed under the statute, known as the CFLRP, funds landscape-level forest restoration projects that are screened and recommended by a federal advisory committee.²³ To be eligible, restoration projects must be at least 50,000 acres and be done at scales to improve wildfire management, reduce management costs, restore ecosystem functions, and facilitate the use of biomass and small-diameter trees. Such projects must comply with existing environmental laws and be developed and implemented through a collaborative process.

The CFLRP is particularly relevant to our study because one of the program’s first restoration projects, the Colt Summit Project in western Montana, received national attention due to its support and opposition by different conservation interests in the region.²⁴ Organizations such as the Wilderness Society, Montana Wilderness Association, and National Wildlife Federation were amici curiae in strong support of the collaborative project (among the 27 organizations and individuals filing a supportive friend-of-the-court brief explaining how the project is the result of a multiyear collaborative effort in the region). But Colt Summit was challenged by other conservation

RAL RESOURCES MANAGEMENT (2000). Two additional and often-referenced critiques of collaboration in the context of federal lands include George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOLOGY L.Q.* 602-10 (1998); and Michael McCloskey, *Local Communities and the Management of Public Forests*, 25 *ECOLOGY L.Q.* 624-29 (1999).

10. According to Craig Thomas and Tomas Koontz, “Much is already known about the inputs and processes that support, and the barriers that hinder, community-based partnerships. This literature is largely explanatory, rather than evaluative. It explains the antecedents to community-based partnerships, not what they produce.” See *Research Designs for Evaluating the Impact of Community-Based Management on Natural Resource Conservation*, 3 *J. NAT. RESOURCES POL’Y RES.* 100 (2011). See also JUDITH A. LAYZER, *NATURAL EXPERIMENTS: ECOSYSTEM-BASED MANAGEMENT AND THE ENVIRONMENT* 5 (2008) (finding that “the initiatives whose goals were set in collaboration with stakeholders have produced environmental policies and practices that are less likely to conserve and restore ecological health than those whose goals were set through conventional politics”).

11. See, e.g., Michael Hibbard & Jeremy Madsen, *Environmental Resistance to Place-Based Collaboration in the U.S. West*, 16 *SOC’Y & NAT. RESOURCES* 703-18 (2003).

12. Caitlin A. Burke, *Who Litigates and Who Collaborates? Evidence From Environmental Groups Influencing National Forest Management*, 2 *INT. GROUPS & ADVOC.* 179 (2013).

13. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

14. See, e.g., Arnold W. Bolle, *Public Participation and Environmental Quality*, 11 *NAT. RESOURCES J.*, 497-505 (1971).

15. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

16. Martin Nie, *Whatever Happened to Ecosystem Management and Federal Lands Planning?*, in KALYANI ROBBINS ED., *THE LAWS OF NATURE: REFLECTIONS ON THE EVOLUTION OF ECOSYSTEM MANAGEMENT LAW AND POLICY* 67-94 (2013).

17. U.S. DEPT’ OF AGRIC., COMMITTEE OF SCIENTISTS, *SUSTAINING THE PEOPLE’S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY* (1999).

18. Pub. L. No. 105-277, §347, 112 Stat. 2681, 298 (1998).

19. 16 U.S.C. §6591c(b).

20. *Id.* §6511(3).

21. Pub. L. No. 108-148, §104(f), 117 Stat. 1887, 1898.

22. Pub. L. No. 111-11, tit. IV, 123 Stat. 991 (2009).

23. For a useful history and discussion, see Courtney A. Schultz et al., *The Collaborative Forest Landscape Restoration Program: A History and Overview of the First Projects*, 110 *J. FORESTRY* 381-91 (2012).

24. See, e.g., Phil Taylor, *Judge’s Ruling Tests Early Success of Collaborative Restoration*, *Greenwire*, July 17, 2012.

groups—including Friends of the Wild Swan, Alliance for the Wild Rockies, Montana Ecosystem Defense Council, and the Native Ecosystems Council—as a violation of NEPA, the NFMA, and the ESA.²⁵ The project publicly portrayed the divide in the regional conservation community over the appropriate use of collaboration in national forest management.

The executive branch has also been supportive of more collaborative approaches to national forest management. Collaborative conservation was emphasized during President George W. Bush's tenure,²⁶ with some in his administration going so far as to suggest that collaboration is the future of conservation and national forest management.²⁷ Though dismissed by the courts, the 2005 and 2008 planning regulations promulgated under President Bush called for a “collaborative and participatory approach to land management planning.”²⁸

Another legacy of the Bush Administration was the attempt to replace the national-level 2001 roadless rule with a state-based petitioning framework.²⁹ Though this approach ran afoul of the courts, Idaho and Colorado were able to finalize state-based roadless rules, with some participants viewing these processes as epitomizing the benefits of collaborative-based solutions to national forest conflicts, and others seeing it as setting a dangerous precedent in federal lands management.³⁰

The focus on collaboration continues apace under the Barack Obama Administration. The 2012 NFMA rule-making process was initiated by proposing a rule in which collaboration and science were the two basic “anchor

points” of forest management.³¹ And with that vision, the 2012 NFMA regulations focus extensively on public participation in forest planning, with collaboration encouraged by the agency, and public participation required during plan development, revision, and amendment.

The 2012 rule states that the “[t]he responsible official shall engage the public . . . early and throughout the planning process . . . using collaborative processes where feasible and appropriate.”³² (As defined in the rule, collaboration is “a structured manner in which a collection of people with diverse interests share knowledge, ideas, and resources while working together in an inclusive and cooperative manner toward a common purpose.”³³) The agency is also using a collaborative national advisory committee to provide advice and recommendations on the implementation of the 2012 planning rule.³⁴

B. Litigation and National Forest Management

In February 2015, Sen. Jon Tester (D-Mont.) made headlines by stating to Montana Public Radio that, “Unfortunately, every logging sale in Montana right now is under litigation. Every one of them.” This statement had to be revised the next day, when the senator's office clarified that “[n]early half of the awarded timber volume in Fiscal Year 2014 is currently under litigation.”³⁵

The next month, Duane Vaagen, president of Vaagen Brothers Lumber of Colville, Washington (representing the American Forest Resource Council), made the following statement to the U.S. Senate Energy and Natural Resources Committee:

The reality is that activist litigators only directly challenge timber sales in a few portions of the National Forest System. Unfortunately, because of their aggressive tactics in areas like Montana, Oregon, Alaska, and parts of California, the agency has been forced to adapt to court-imposed analytic standards which drain resources, staff, and time from other forests which do not suffer frequent challenges. All current efforts to use collaboration as the “solution” leave this court-imposed framework in place, and those who vehemently oppose all forest management can tie up and delay timber sales without having to participate in collaborative processes. They suffer no consequences, while those who work in good faith see their time and energy squandered. This does not encourage wider adoption of collaborative models of management.³⁶

25. In this early and critical test of the CFLRP, U.S. District Judge Donald Molloy found that the environmental analysis for the Colt Summit Project was “by and large” adequate except for the agency's failure to properly analyze the project's cumulative effects on lynx, as required by NEPA. *Friends of Wild Swan v. U.S. Forest Serv.*, 875 F. Supp. 2d 1199 (D. Mont. 2012).

26. During the Bush Administration, collaboration was often contrasted to more regulatory and adversarial approaches to conservation. Irony notwithstanding, Executive Order No. 13352 (Aug. 26, 2005) aimed to facilitate the bottom-up use of “cooperative conservation” and a White House-sponsored conference on the matter convened in 2006. See, e.g., Lynn P. Scarlett, *A New Approach to Conservation: The Case of the Four Cs*, 17 NAT. RESOURCES & ENV'T 73-113 (2002).

27. See, e.g., Mark Rey, *A New Chapter in the History of American Conservation*, in DANIEL KEMMIS ED., CHALLENGES FACING THE U.S. FOREST SERVICE: A CRITICAL REVIEW 22-25 (2008) (saying that a fortunate trend in collaborative conservation is evolving into a fourth chapter in the history of American conservation); Dale Bosworth & Hutch Brown, *After the Timber Wars: Community-Based Stewardship*, 105 J. FORESTRY 271 (2007) (saying that “[t]he future of national forest management lies in Community-based stewardship”).

28. See 73 Fed. Reg. 21468, 21508 (Apr. 21, 2008); 70 Fed. Reg. 1023 (Jan. 5, 2005); and *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007).

29. 69 Fed. Reg. 42636 (July 16, 2004).

30. The State Petitioning Rule was found in violation of the processes required by NEPA and the ESA. See *California v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009). Despite this setback, the state petitioning process proceeded under the Administrative Procedure Act (APA), at 5 U.S.C. §553(e). See 71 Fed. Reg. 58577 (Oct. 4, 2006). Ray Vaughan, a well-known former environmental lawyer and member of the Roadless Area Conservation National Advisory Committee, views the partnership among the committee, Forest Service, and state of Idaho as leading “to the most successful collaborative solution to a public lands management issue ever in our country's history.” Declaration of Ray Vaughan, *Jayne v. Sherman*, No. CV-09-015-BLW (D. Idaho July 23, 2010).

31. 76 Fed. Reg. 8480 (Feb. 14, 2011). See also comments of Tony Tooke, Director, U.S. Forest Serv. Ecosystem Management Coordination, U.S. Forest Serv. Science Forum (Mar. 29, 2011) (on file with author).

32. 36 C.F.R. §219.4(a).

33. *Id.* §219.19.

34. In full disclosure, the Article's co-author Martin Nie is a member of this federal advisory committee.

35. Glenn Kessler, *Montana Senator Twice Gets His Facts Wrong on Timber Sales and Litigation*, WASH. POST, Feb. 25, 2015.

36. *Improving Forest Health and Socioeconomic Opportunities on the Nation's Forest System, Hearing Before the S. Comm. on Energy & Natural Resources*, 114th Cong. (2015) (statement of Duane Vaagen, President, Vaagan Bros. Lumber).

Shortly thereafter, a May 2015 congressional oversight hearing on “Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests” began with a statement by Rep. Tom McClintock (R-Cal.), chairman of the U.S. House of Representatives Subcommittee on Federal Lands:

Between 1989 and 2008, 1,125 lawsuits were filed against the Forest Service. Many more have been filed since then and much more case law created. There is no doubt that litigation has had a profound impact on the Forest Service and subsequently the management and mismanagement of our national forests. Sadly, litigation has become a cottage industry for some extremist groups whose sole purpose is to litigate the Forest Service with little regard to the impact and destruction they are causing. . . . Responding to appeals, lawsuits or even the threat of frivolous lawsuits, Forest Service employees have reduced the size and scope of projects and tried to “bullet-proof” environmental documents required to implement forest management projects. The goal of the Forest Service then becomes not good forest management, but to prevent litigation or endless legal delays.³⁷

As is the case in most policy disputes, there is no agreed-upon definition of the “litigation problem” in forest management, nor is there agreement on how its impact should be measured and evaluated. Some of the confusion stems from different things being measured. For example, are we talking about timber sales or timber volume that is “under litigation”? (One big sale that is subject to litigation can change the numbers significantly.) As discussed below, some studies focus on the amount of timber that is “encumbered” by litigation, while others focus on how much timber is actually enjoined by the courts from logging. There are also issues of what time frames are being used to measure the amount of litigation and the geographic scope of analysis. Separating the use of administrative appeals and objections from litigation is also necessary, though the former is sometimes a precursor to the latter. And finally, a distinction must be made (but often is not) between litigation focused on timber sales and challenges to other forest management decisions, such as travel management, mining, and energy development.

A common criticism is that litigation is rampant and presents the primary obstacle to active forest management, particularly actions focused on restoration and fuels reduction. This critique emphasizes the number of lawsuits and the direct and indirect impacts they have on the Forest Service from an organizational and economic standpoint.³⁸

Litigation not only ties up those projects being challenged, but it also indirectly impacts agency behavior through a process of anticipated reaction. Some timber sales, for example, may never materialize because of the likelihood of litigation. Further, the Forest Service—anticipating the probability of legal challenge—will prolong and “bullet-proof” its NEPA analysis to withstand likely forthcoming judicial scrutiny.

This leads to the charge of “analysis paralysis” and the Forest Service’s “process predicament,” a popular framing that was introduced by the agency in 2002 and one that continues to be used.³⁹ According to former Forest Service Chief Dale N. Bosworth, the paralysis is due to out-of-date environmental laws and the case law built up around them:

While many environmental laws were originally passed for good reason at a time when more checks and balances were needed, the situation has dramatically changed. Now communities are coming together at unprecedented levels to find common ground and to address the increasing threats of insects, disease, invasive species and wild-fire. Unfortunately, the sheer multitude of laws, and their expansion by the courts have led to processes almost unintelligible to reasonable people. . . . All of us understand that significantly more restoration needs to occur through aggressive active management. We need to reevaluate and reduce excessive process requirements.⁴⁰

Collaboration is also part of this story. The question inevitably asked is why people should spend so much time finding agreement when others not participating in the processes will likely challenge the collaborative-based recommendations and subsequent decisions in court.

Litigation is also regularly blamed for the decline in timber harvesting levels on the national forests. Logging levels ramped up in the 1950s and reached a controversial zenith in the mid-1980s, with more than 12 billion board feet harvested in 1987 and 1988.⁴¹ In contrast, roughly 2.4 billion board feet were harvested in 2014, a figure similar to other recent years.⁴² Some people in the forest products industry view litigation as a primary reason that the Forest Service fails to offer a larger and more certain and predictable flow of timber. Industry and various collaborative groups commonly state that landscape-level forest restoration requires more timber harvesting by industry and that for the industry to survive, or to make the requisite capital investments (in, say, small-diameter processing equipment), it needs greater assurances about timber supply.⁴³

39. See U.S. FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT (2002).

40. *Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests, Oversight Hearing Before the H. Comm. on Natural Resources*, 114th Cong. (2015) (statement of Dale N. Bosworth, former Chief, U.S. Forest Service).

41. U.S. FOREST SERV., FY 1905-2014 NATIONAL SUMMARY CUT AND SOLD DATA AND GRAPHS, available at http://www.fs.fed.us/forestmanagement/documents/sold-harvest/documents/1905-2014_Natl_Summary_Graph.pdf.

42. *Id.*

43. See Martin Nie, *Place-Based National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations*, 41 ELR 10229 (Mar.

37. *Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests, Oversight Hearing Before the H. Comm. on Natural Resources*, 114th Cong. (2015) (statement of Rep. Tom McClintock, Chair, H. Subcomm. on Federal Lands).

38. See, e.g., TODD A. MORGAN & JOHN BALDRIDGE, UNDERSTANDING COSTS AND OTHER IMPACTS OF LITIGATION OF FOREST SERVICE PROJECTS: A REGION ONE CASE STUDY (2015) (examining costs and impacts related to litigation, such as Forest Service legal and administrative costs, loss of timber sale revenue, forgone or delayed work, and other Forest Service ripple effects).

Members of the current House Republican majority make an additional argument that the decline in harvest has led to an increase in wildfires. Often shown in this context is a graph depicting on one axis the amount of timber harvested on the national forests (going down), and on the other the amount of acreage that has been burned (going up). The takeaway is simple: “Since 1996, the average amount of timber harvested annually was between 1.5 and 3.3 billion board feet [and] the average annual amount of acres burned due to catastrophic wildfire was over six million acres per year.”⁴⁴ According to these members of Congress, litigation and “analysis paralysis” are at the root of the problem as they hinder the work of collaborative groups who seek to increase the scale of restoration logging to reduce wildfire risk.

The “litigation as obstruction” narrative does not go unchallenged. First of all, the numbers and metrics are disputed. Senator Tester’s claim, for example, earned him a “Four Pinocchios” rating by the *Washington Post*, whose reporting found that out of 97 timber sales under contract in Montana’s national forests, 14 have active litigation (roughly 14%), with only four of the sales being enjoined by a court from any logging.⁴⁵ The fact check on Sen. Tester’s claim also concluded that roughly 10% of the board feet under contract in Montana (in 2014) is enjoined from any logging.⁴⁶ Further, the Forest Service’s Northern Region (Region 1) met its timber harvest goal in 2014 for the first time in over 14 years according to the agency, harvesting roughly 280 million board feet of timber.⁴⁷

Data provided to us by Region 1 includes information on 125 different timber sale projects awarded between June 2012 and June 2013. Twenty-four of the projects are listed as being subject to a complaint/litigation. Data also show that 39% and 54% of the region’s timber program volume in 2014 and 2013, respectively, were “encumbered” by litigation. (As the term is used by the Forest Service, encumbered does not mean that these projects are necessarily enjoined or that they are currently in litigation. According to the agency, the term is used to capture the extent to which administrative appeals and projects subject to litigation slow other projects moving through the process).⁴⁸

Another study done by the U.S. Government Accountability Office (GAO) shows that, in the context of fuels reduction, litigation is quite rare. Between fiscal years 2006 and 2008, 1,415 Forest Service decisions involved hazardous fuel reduction activities. Though many of these deci-

sions were subject to appeals and objections, only 29, or about 2%, were litigated.⁴⁹

The most comprehensive study of Forest Service litigation, measured between 1989 and 2008, shows that more than three-quarters of plaintiffs suing the agency sought less resource use.⁵⁰ Plaintiffs won roughly 27% and settled roughly 24% of these cases; the Forest Service won roughly 49%.⁵¹ Environmental plaintiffs have clearly been successful in the courts, notwithstanding the amount of deference afforded to agencies under the Administrative Procedure Act (APA).⁵²

C. Policy Implications

The debate over litigation has serious policy implications. Congress is currently focused on this issue, and there are multiple legislative remedies being proposed by the Republican majority in the House. Their exact shape and form is in flux, but some general ideas persist. One is altering the Equal Access to Justice Act (EAJA),⁵³ which some people believe provides an incentive to sue.⁵⁴ Under the EAJA, qualifying prevailing parties are able to recover their reasonable attorney fees and litigation costs unless the government can “substantially justify” its legal position.⁵⁵ This has become a favorite talking point for politicians and other critics who claim that some environmental groups abuse the law by filing frivolous and mostly procedure-based claims to recover these fees.⁵⁶

The charge of EAJA-based incentives to sue is not substantiated with evidence. Doing so would require investigating internal interest group behavior, including an assessment of what percentage of a group’s budget stems from EAJA funds.⁵⁷ The frivolous lawsuit argument is also

2011).

44. *Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests*, Hearing Before the H. Subcomm. on Federal Lands, 114th Cong. (2015), Hearing Mem. at 3.

45. Kessler, *supra* note 35.

46. *Id.*

47. Edward O’Brien, *USFS Northern Region Reaches Timber Harvest Goal*, MONT. PUB. RADIO, Oct. 16, 2014, available at <http://mtpr.org/post/usfs-northern-region-reaches-timber-harvest-goal>.

48. We remain unclear about how exactly the term is being used and measured in this context. The *Merriam-Webster Dictionary* defines “encumber” as “to cause problems or difficulties for (someone or something); to impede or hamper the function or activity of; and to burden with a legal claim.”

49. U.S. GAO, *FOREST SERVICE: INFORMATION ON APPEALS, OBJECTIONS, AND LITIGATION INVOLVING FUEL REDUCTION ACTIVITIES, FISCAL YEARS 2006 THROUGH 2008* (2010).

50. Amanda M.A. Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112 J. FORESTRY 32-40 (2014).

51. *Id.* at 35. See also Elise S. Jones & Cameron P. Taylor, *Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service*, 23 POL’Y STUD. J. 310-36 (1995) (presenting similar findings focused on an earlier time period).

52. The APA authorizes judicial review of agency actions that are challenged as being “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A).

53. 5 U.S.C. §504, 28 U.S.C. §2412.

54. Lawrence Hurley, *Study: Forest Service Paid \$6.1M in Group’s Legal Fees Over Six Years*, N.Y. TIMES, July 11, 2011.

55. 5 U.S.C. §504(a)(1); 28 U.S.C. §2412(d)(1)(A).

56. For a review of these arguments, related legislative proposals, and a counterargument and defense of the EAJA, see Brian Korpics et al., *Shifting the Debate: In Defense of the Equal Access to Justice Act*, 43 ELR 10985 (Nov. 2013).

57. One of the more litigious environmental groups, the Center for Biological Diversity, reports that it “receives only a tiny fraction—about one-half of 1 percent, on average—of its total annual income from attorney fees recovered through EAJA.” See Press Release, Center for Biological Diversity, Attorney Fees for Landmark Settlement to Save 757 Imperiled Plants and Animals: \$168.29 Per Species (June 14, 2012), http://www.biologicaldiversity.org/news/press_releases/2012/settlement-fees-06-14-2012.html. Note that we did not verify these numbers, but the point is that those advocating for EAJA reform have not verified the numbers either in the case of the Center for Biological Diversity or other environmental groups who allegedly have an EAJA-based incentive to sue.

off the mark, unless the term is being applied rhetorically rather than legally, as both the Federal Rules of Civil Procedure and the EAJA provide mechanisms to prevent frivolous claims from moving forward and being rewarded.⁵⁸

What about the claim that the EAJA leads to payments because of plaintiffs winning procedural lawsuits? This is a more complicated charge and we take up the issue below. For now, consider that analytical and procedural requirements are foundations of environmental and federal lands law. This is one reason why people arguing about the EAJA and incentives to sue seem to be talking past one another. Those critical of litigation see attorney fees going to environmental groups (or their attorneys) who win in the courts even if their victory was based on, say, a violation of NEPA procedures. But to others, this argument does not make sense because NEPA's analytical and procedural requirements were designed to effectuate the purposes of the law, which is to protect the environment.

As discussed below, other legislative responses include narrowing the number of Forest Service decisions that must be analyzed in a traditional NEPA environmental impact statement (EIS) and/or to categorically exclude certain actions from analysis in an environmental assessment (EA) or EIS pursuant to NEPA. The latter is designed to expedite project planning and it reduces opportunities for NEPA-centered litigation.⁵⁹

The option of analyzing fewer alternatives was used in the Healthy Forests Restoration Act (HFRA).⁶⁰ This law basically emphasizes hazardous fuels reduction and tries to ease the procedural burdens of getting projects done more quickly. To do so, the HFRA created new administrative and judicial review procedures and modified NEPA compliance requirements. Under the HFRA, agencies consider fewer EIS alternatives and their decisions are subject to a "predecisional administrative review process" (a process now applied to non-HFRA projects as well). Though admonishment mostly, the HFRA also encourages "expeditious completion of judicial review."⁶¹

In many respects, the HFRA set the stage for subsequent bills and legislation that were referenced during our interviews. One of these includes the forestry provisions found in the 2014 Farm Bill.⁶² Among other things,

the law authorizes expedited project planning within designated treatment areas for insect and disease infestation. The designation of these areas can begin with a request by the governor of the state in which they are found, and projects involving less than 3,000 acres can receive a categorical exclusion. More than 47 million acres in 37 states have been designated using this new authority,⁶³ with the final amount of acres to be treated in these areas yet to be determined.

Pending in Congress are several bills taking a much more aggressive deregulatory approach to forest management (and environmental law more generally).⁶⁴ Their status is ever-changing and their prospects uncertain, but they are premised on the belief that litigation and excessive environmental analysis, done pursuant to NEPA and the ESA, are at the core of a purported crisis in forest management and health. Unlike the CFLRP, which is designed to facilitate collaborative ecosystem restoration and reduce wildfire management costs and to do so within the existing statutory framework, these bills would change the basic legal framework of national forest management.

One bill, H.R. 1526, the Restoring Healthy Forests for Healthy Communities Act, would do so by mandating the designation of "forest reserve revenue areas" on national forests.⁶⁵ Once designated, the Forest Service would have a legally enforceable fiduciary responsibility to manage these areas to satisfy annual volume requirements, which would go to beneficiary counties. The bill, which passed the House in 2013, also restricts NEPA analysis by creating a categorical exclusion for some projects as large as 10,000 acres.⁶⁶ These provisions alone would make it more difficult to challenge the agency. But to make it even more difficult, the law includes a bond requirement in its judicial review section: "A plaintiff challenging a covered forest reserve project shall be required to post a bond or other security acceptable to the court for the reasonably estimated costs, expenses, and attorneys fees of the Secretary as defendant."⁶⁷

A similar bill that passed the House in 2015 is H.R. 2647, the Resilient Federal Forests Act of 2015.⁶⁸ It includes a broader suite of actions that are subject to NEPA's categorical exclusion provision, such as activities to address insect and disease infestation, hazardous fuels reduction, and projects that increase water yield. Collaboration is also invoked in the legislation. To take one example, the draft bill permits categorical exclusions up to 15,000 acres in

58. See Korpics et al., *supra* note 56, at 10991-92.

59. GAO found that between 2003 and 2005, 72% of vegetative management projects were approved using categorical exclusions. The size of projects approved using categorical exclusions is smaller than those projects approved using an EA or EIS. See U.S. GAO, VEGETATION MANAGEMENT PROJECTS APPROVED DURING CALENDAR YEARS 2003 THROUGH 2005 USING CATEGORICAL EXCLUSIONS (2007). A more recent GAO study found that from FY 2008 to FY 2012, the Forest Service reported that 78% of its 14,574 NEPA analyses were categorical exclusions, 20% were EAs, and 2% were EISs (the number of Forest Service categorical exclusions is likely underrepresented in these totals according to the GAO). See U.S. GAO, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 8, GAO-14-370 (2014).

60. 16 U.S.C. §§6501-6591.

61. *Id.* §6516(b). We are aware of no research or case law demonstrating how the courts have read or used this provision and whether it has made a difference at all. We suspect it has not.

62. Pub. L. No. 113-79 (2014). For a review, see KATIE HOOVER, CONG. RESEARCH SERV., FORESTRY PROVISIONS IN THE 2014 FARM BILL (2014).

63. *Improving Forest Health and Socioeconomic Opportunities on the Nation's Forest System*, Hearing Before the S. Comm on Energy and Natural Resources, 114th Cong. (2015) (statement of Robert Bonnie, Under Secretary for Natural Resources and Environment, U.S. Dept of Agriculture).

64. See, e.g., Phil Taylor, *Dozens of Riders, But Will Any Become Law?*, ENV'T & ENERGY DAILY, July 23, 2015 (focusing on the fate of numerous environmental policy riders); Corbin Hiar, *To Block GOP Reform Bills, Boxer Threatens "Hand-to-Hand Combat"*, ENV'T & ENERGY DAILY, May 7, 2015 (focusing on recently proposed ESA reforms).

65. H.R. 1526, Restoring Healthy Forests for Healthy Communities Act (113th Cong.).

66. *Id.* §104(c)(6).

67. *Id.* §104(f)(2).

68. H.R. 2647 (114th Cong.).

size if “developed through a collaborative process.”⁶⁹ But as defined in the bill, a collaborative process is a relatively easy bar to clear, as it simply means the inclusion of “multiple interested persons representing diverse interests; and is transparent and nonexclusive” (or meets the requirements for a resource advisory committee).⁷⁰

A bond requirement for a legal challenge is also included in H.R. 2647. In this bill, plaintiffs challenging a “forest management activity” must post a bond or other security if the management activity being challenged is developed through a collaborative process or proposed by a resource advisory committee.⁷¹ In order to have the bond or other security returned, the plaintiffs must prevail on the merits “in every action brought by the plaintiff challenging a forest management activity.”⁷²

These bills would fundamentally alter the basic legal framework for national forest management and make it difficult for citizens to challenge the executive branch in court. They also show how Congress is wrestling with the litigation issue in forest management, from trying to immunize types of projects and decisions from environmental analysis to putting collaboratively endorsed activities into fast-track decisionmaking.

II. Common Themes and Issues

This section describes some of the more common themes and issues emerging from our confidential interviews. We heard a variety of opinions and the people we interviewed hardly speak with a unified voice, but significant patterns and similarities emerged from the interviews. Our open-ended discussions began with questions about the individual’s background in conservation and advocacy and their experiences with collaboration. We then asked questions about how these individuals view collaboration in the context of environmental and federal lands law, such as whether they view collaboration as supplementing the laws or as being in conflict with them.

We also asked questions about the role of collaboration in the environmental movement, such as why particular strategies are chosen, the decision to collaborate or to sue, and whether individuals view collaboration as a generally positive or negative development. Plenty of room was also provided so that interviewees could talk in a more open and less-directed fashion about collaboration and litigation.

A. Collaboration and Advocacy

All but one of our interviewees expressed deeply critical views of collaboration and how it has been used in national forest management. This criticism was based on numerous factors, including several negative personal experiences with collaboration. Those interviewed were often critical of

how collaboration has been practiced in the past, ranging from the way it was facilitated and structured to its perceived lack of transparency.

Critiques of collaboration were often made in contrast to the NEPA process, which several interviewees perceived to be a more rigorous, effective, and equitable approach to public participation. One common complaint we heard was the underrepresentation of conservation interests in many collaborative efforts—in other words, a perception that there is a “heavy skew of the membership of the group against conservation and in favor of the folks who are impacting the environment.” A related issue is what some consider to be an inappropriate and often dominant role played by the Forest Service in some collaborative processes.⁷³

Most interviewees echoed one of the primary concerns emphasized by critics of collaboration years ago: that collaboration is a venue in which industry will inevitably dominate. Those making a profit from federal lands, the argument goes, will dominate the processes because they have the organizational and financial capacity and resources to participate over the long haul.

That concern leads into another often-heard criticism that collaboration’s time-intensive nature effectively excludes the citizens who lack similar capacity to participate. In other words, not everyone has the ability to dedicate multiple days or nights to collaborative processes or attend multiple meetings that are often held at locations hours away. Individuals who are not being paid to collaborate are at an inherent disadvantage, according to several people interviewed.

We also heard a more philosophical critique of collaboration. Some of this criticism is well-known by now, such as the argument that collaboration, and devolution more generally, undermines the national interest in federal lands and that it sets up “two classes of citizens, those who are part of the process [and] those who aren’t,” even if the latter “participate fully in the NEPA process.” The person making this statement claimed that collaboration is “an abdication of congressional responsibility.” This argument was often made by early critics of collaboration, who, similar to the people we interviewed, argued that the approach provides strategic cover for risk-averse politicians and for solving lowest-common-denominator conservation problems.⁷⁴

A distinction between collaboration and environmental advocacy was made repeatedly in the interviews. Several people focused on how collaboration weeds out dissent and opposition and is “most conducive to defending the status quo.” There is clearly a divide in the region’s conservation community, and those we interviewed were often very critical of some of the larger environmental organizations in the region who collaborate frequently. Some suggested that the divisions in the conservation community

69. *Id.* §102(b)(2).

70. The bill borrows from the Healthy Forests Restoration Act’s definition, at 16 U.S.C. §6591b(b)(1)(C).

71. H.R. 2647, §302(a).

72. *Id.* §302(c).

73. For an analysis in the context of the CFLRP, see William Hale Butler, *Collaboration at Arm’s Length: Navigating Agency Engagement in Landscape-Scale Ecological Restoration Collaboratives*, 111 J. FORESTRY 395-403 (2013).

74. See Coggins, *supra* note 9.

are long-standing, but that the emergence of collaboration has deepened them.

Some of the criticism we heard focused on recent developments such as the Colt Summit Project discussed above and its political fallout, as conservation groups played out their differences in the courts and newspapers. But we also found that criticism went beyond particular projects and personal animosity. Several people focused on the professionalization of environmental groups and their financial obligations to foundations that prioritize collaborative approaches to federal lands. These groups, we heard repeatedly, made a choice to become politically connected players who spend too much time trying to get Democrats elected to Congress rather than advocating more strongly for federal lands and wildlife.

B. *Undermining the NEPA Process*

A dominant issue identified in the interviews is the impact that collaboration has on the NEPA process. A significant amount of respect was given to NEPA and how it can work in federal lands management. NEPA, it was said repeatedly, provides a fair playing field and allows for broad public participation. It is also a process in which scientific analysis—rather than politics—has a better chance of shaping final decisions and outcomes.

Several people contended that collaboration was undermining, subverting, or disempowering the more democratic NEPA process. A clear contrast was often made between an exclusive and self-selected set of paid interest groups participating in a collaborative versus a more broad-based and inclusive public participation process governed by NEPA. Several people were particularly concerned about collaborative groups having a disproportionate amount of influence with the Forest Service and believe that those groups have unfairly determined the trajectory of forest plans (under revision) and other projects before NEPA review begins in earnest.⁷⁵ Consider the following critique:

Indeed, the recent models and experiments in collaboration dealing with public land issues shows it to be undemocratic, controlled by local special interests, and in violation of NEPA. In essence, elite groups of local (or regional) people come together to make decisions, couched as recommendations with the support of Forest Service staff and resources unavailable to “ordinary citizens.” Since these recommendations precede NEPA analysis—and there is an implicit understanding the collaborative group’s rec-

ommendation will be implemented—the NEPA process is rendered a pro forma exercise, contrary to the law.

What some of these collaborative groups are purportedly doing, in other words, is undercutting and devaluing NEPA’s traditional scoping process. Similar concerns were also shared about the revision of the Nez Perce-Clearwater Forest Plan in Idaho, which is also being revised pursuant to the 2012 NFMA regulations.⁷⁶ These regulations have added a new twist to forest planning by opening up the planning process to public participation before NEPA’s scoping process begins. Some people are concerned that collaborative groups focused on these forest plans will have undue influence over the planning process and give it an internal momentum that will be difficult to correct once the wider public becomes involved during NEPA scoping.

C. *Enforcing the Law*

We went into this project with the belief that collaboration would be viewed differently depending on whether it is (a) viewed as a supplement to preexisting environmental laws and processes, or (b) viewed as replacing or undermining these laws and processes. We also suspected that we would find significant differences of opinion regarding how much decisionmaking space exists in the context of national forest management. In other words, we thought individuals and groups that are opposed to or critical of collaboration would view there to be little legal space in which collaborative groups operate, and this would explain why these actors sometimes believe collaborative groups undermine environmental law.

What we found is something a little more nuanced. Yes, most of those interviewed referenced foundational laws such as NEPA and the ESA and believe that collaboration usually cuts against them. But more important is their understanding that laws such as the ESA are designed to be used and enforced by citizens. Many of these laws, such as the ESA and NFMA’s wildlife diversity provision, represent values and choices that were made by Congress, and they are not self-implementing. To work, it was said, they must be enforced:

One of the reasons we litigate is that it is the only way that fish and wildlife have a voice. If you look at NEPA, NFMA, the ESA, almost any of these laws, they require the use of the best available science or something along those lines. The only place you can enforce that is in a court of law. That’s the only place that fish and wildlife or water quality or these other—I hate to call them resources, but these other entities have a voice. They don’t get to come to the collaborative table.

A baffling issue for some interviewees was why their litigation gets so much more attention rather than what they perceive as the unlawful actions of the Forest Service. Why all the appeals, objections, and litigation, we

75. A related legal argument was also made at the project level in the Colt Summit case. The plaintiffs alleged that the Forest Service predetermined the outcome of the EA so that it would ensure a finding of no significant impact (FONSI). Courts forbid agencies from making “an irreversible and irretrievable commitment of resources” prior to completing the requisite NEPA analysis. In the Colt Summit case, the court found no such predetermination, stating that “[w]orking toward a specific goal [avoiding significant environmental impact] is not the same as predetermining a particular outcome.” *Friends of Wild Swan v. U.S. Forest Serv.*, 875 F. Supp. 2d 1199 (D. Mont. 2012).

76. 36 C.F.R. pt. 219.

asked? Because the agency repeatedly fails to follow the law and its own regulations and planning standards, they answered. What came out in the discussion is a deep and widely shared mistrust of the Forest Service. Some of the people interviewed focused on the perceived institutional pathologies of the agency, rooted in the economic incentives of most bureaucracies, but others focused on more personal accounts of the Forest Service saying one thing on paper and doing another on the ground. Given this level of mistrust, the courts are seen as the logical venue for conflict resolution.

We asked these individuals if they were concerned whether their continued use of litigation could possibly weaken public support for conservation or fuel legislative efforts to reform various environmental laws. The interviewees were all very familiar with this argument, and most of them resented its assumptions and the people who most often make it. Here is a typical response:

That sort of attitude is symptomatic of people who don't really want to work hard to pursue the ideals that those laws were instituted to protect in the first place. We can't use the Endangered Species Act to protect endangered species? Really? We can't use the National Forest Management Act to actualize the reforms of national forest management abuse that was the whole idea by the passage of that act?

In a similar vein, others asked: Why have these laws on the books if they are not going to be followed or enforced? Others recalled the history of this argument, such as the ESA being labeled a glass hammer, a reference to the law's legal prowess and political vulnerability.

The people we spoke with were very clear about their environmental vision and the role that litigation has played in protecting the region's wildlands and wildlife. The case was made that several roadless lands remain roadless, and potentially eligible for wilderness designation, because of the tactics and advocacy of groups willing to go to court. These places, said one person, exist today not because of collaboration, "but because of people who have fought tooth and nail for every acre."

Interviewees were clear about what they want, such as passage of the Northern Rockies Ecosystem Protection Act⁷⁷ or the congressional designation of every single acre of recommended wilderness in the country, among other goals. Compared to other groups, these individuals are more singularly focused on protecting wildlands for wildlife and want to do so at a scale that other conservation groups think is politically unfeasible. A goal, then, is to protect these lands, using the courts as necessary, until a more favorable political climate allows more permanent protection.

D. Science, Forest Health, and Restoration

Sharing a common purpose is a foundational principle of collaboration. In the context of forest management, many

collaborative groups focus broadly on forest restoration as a core purpose holding groups together. Many also share a desire to increase the scale at which restoration is planned and implemented.⁷⁸ But most people we interviewed did not share the belief that our national forests must be logged in order to be healthy. Most people we spoke with were extremely skeptical or downright opposed to the language and politics of the forest health and restoration agenda and the guiding assumptions on which it is based.

Many people view this framing of forest management as a legacy of President George W. Bush, and one that is often used to simply "get out the cut" and justify old-fashioned timber sales with the new language of restoration. "If you're the Forest Service, restoration means logging," said one person, "The forest has too many trees, and to restore it we need to take some trees away." Another said plainly that "restoration logging is just the same logging they've been doing for 80 years."

Some of the concern is due to the scale of the perceived problem. The Forest Service estimates that between 65 million acres of the NFS are at high or very high risk of catastrophic wildfire and that anywhere between 65-82 million acres of NFS lands are in need of restoration (with roughly 12.5 million acres requiring mechanical treatment).⁷⁹ Again, there is a legacy of mistrust here. What concerned some people interviewed was not just the accuracy of these numbers, nor the amount of land potentially involved, but the assumptions on which the restoration agenda is based and how easily it can be politically appropriated.

Another commonly heard theme was the desire to decouple timber sales from ecological restoration projects. For many individuals, the lumping together of logging and restoration is a core problem that can unnecessarily lead to litigation and impede genuine restoration work. Said one individual:

I would collaborate in a heartbeat over, let's reduce the number of roads and increase the water quality for native trout. Why can't we collaborate on that, without coupling it with timber? What the collaborators have done, effectively, is to prevent decoupling of environmentally good, sound restoration from destruction. If you can decouple, I can participate, because then we have shared goals.

Such an approach, it was suggested, could simplify the situation so that fights over logging can be just that, fights over logging—and not logging as a pretense or price to be paid for restoration.

Some of the skepticism and mistrust of "forest health and restoration" comes from fundamentally different views of how to manage our national forests or whether our forests need active management at all. Some individuals made clear that litigation can help protect the lands until logging is ended in national forests. But while some people interviewed were clearly uncomfortable with any commercial

78. See, e.g., Nie, *supra* note 43.

79. U.S. FOREST SERV., INCREASING THE PACE OF RESTORATION AND JOB CREATION ON OUR NATIONAL FORESTS 4 (2012).

77. H.R. 1187 (113th Cong.).

logging on federal lands, others do not go so far, and told us how many projects, especially those that are within the wildland urban interface, go uncontested.

More often discussed in our interviews was the alleged lack of science used by collaborative groups who start from the premise that logging must be done in the name of forest health and restoration. Some individuals focused intensely on scientific studies questioning the wisdom of treating some forest types to control wildfire or beetle infestation.⁸⁰ Many of these discussions, especially the impact of logging on fish and wildlife, were framed in terms of best available science. For example, one individual said that if he could change anything about collaboration, he would have it be more deeply rooted in science and the law. That, he said, should be the parameters of collaboration, and within those stricter parameters, collaborative groups could assess what leeway they might have to meet their different social concerns.

III. Perspective

In this section, we provide some additional context and thoughts that we hope will foster a more constructive and critical dialogue about the use of collaboration and litigation in national forest management. No easy solutions are offered, nor do we use this space to critique all the perspectives of those collaborating or those people we interviewed. This is also not the place to provide a systematic analysis of national forest management. Our objectives are more modest.

We first place collaboration and litigation in the context of federal lands law. Doing so helps readers appreciate the perspectives and frustrations of both sides. Next, we take issue with current congressional efforts to marginalize the groups and citizens who use the courts to enforce the law. Finally, we explain why we view collaboration and litigation as necessary parts of modern national forest management.

A. Litigation, Collaboration, and National Forest Law

In some respects, the debate over collaboration and litigation is a byproduct of national forest law. For starters, consider the Multiple Use Sustained Yield Act (MUSYA) of 1960.⁸¹ The law makes clear that “it is the policy of Con-

gress that the national forests are established and shall be administered for outdoor recreation, range, *timber*, watershed, and wildlife and fish purposes.”⁸² The MUSYA, however, grants the Forest Service a great deal of discretion in finding a balance among these uses, and there is nothing in the law that can generally be used to compel the agency to do something, such as offer more timber sales.

In contrast to the MUSYA are laws such as the NFMA and the ESA, which are more prescriptive and legally enforceable. The NFMA, for example, requires that projects be in compliance with forest plans, and that forests “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives,” among other procedural and substantive mandates.⁸³ These laws, including NEPA, are often used to challenge the Forest Service.⁸⁴

This legal context, along with more recent laws discussed above, help explain some of the frustrations of those collaborating and suing—and those doing both. It is clear, for example, that timber harvesting is a sanctioned use of national forests and has been so since the system’s establishment. This explains why some critics feel that people who are litigating are obstructing the lawful implementation of multiple use.

Congress has also enacted laws requiring collaboration, such as it did in passing the CFLRA. These laws, however, are constrained by the more enforceable provisions—substantive and procedural—provided in NEPA, the NFMA, and the ESA. These laws constrain the practice of multiple use and in many respects make wildlife a coequal factor in national forest management.⁸⁵ The bottom line is that multiple tensions are built into national forest law, and persons collaborating and litigating both have a lawful basis for doing so.

Viewed this way, the debate over collaboration and litigation is but another chapter in the long-running saga over national forest management. GAO got it right when it provided an in-depth analysis of Forest Service decisionmaking in 1997. GAO determined that many management problems are rooted in disagreement over the agency’s mission, mandate, and long-term strategic goals. GAO returned time and again to this central issue, finding that the multiple laws governing the agency have not been “harmonized” and that “[w]ithout agreement on the

80. Though not interviewed as part of this project, the writing of George Wuerthner is representative of this view. *See, e.g.,* Beetle Outbreaks Do Not Increase Fires, Wildlife News (blog), July 27, 2015, <http://www.thewildlifeneeds.com/2015/07/27/beetle-outbreaks-do-not-increase-fires/> (providing a discussion and list of scientific references questioning the assumption that logging beetle-killed trees will reduce future fires). *See also* Diana L. Six et al., *Management for Mountain Pine Beetle Outbreak Suppression: Does Relevant Science Support Current Policy?*, 5 *FORESTS* 103-33 (2014); Tania Schoennagel & Cara R. Nelson, *Restoration Relevance of Recent National Fire Plan Treatments in Forests of the Western United States*, 9 *FRONTIERS ECOLOGY & ENV'T* 271-77 (2011); Chad T. Hanson & Dominick A. DellaSala, *More Logging Won't Stop Wildfires*, N.Y. TIMES, July 23, 2015; and Geoinstitute, Open Letter to Members of Congress From 250 Scientists Concerned About Post-Fire Logging (2013), available at http://www.geoinstitute.org/images/stories/pdfs/Publications/Fire/Scientist_Letter_Postfire_2013.pdf.

81. 16 U.S.C. §§528-531.

82. 16 U.S.C. §528 (emphasis added). *See also* Organic Administration Act of 1897, ch. 2, 30 Stat. 11, 34-36 (codified as amended at 16 U.S.C. §475) (“No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”).

83. 16 U.S.C. §1604(g)(3)(B).

84. Robert W. Malmshiemer et al., *National Forest Litigation in the U.S. Court of Appeals*, 102 J. FORESTRY 20-25 (2004).

85. The NFMA’s legislative history shows that its diversity provision was meant to require “Forest Service planners to treat the wildlife resource as a controlling, co-equal factor in forest management and, in particular, as a substantive limitation on timber production.” CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 296 (1987).

Forest Service's mission priorities, GAO sees distrust and gridlock prevailing in any effort to streamline the agency's statutory framework."⁸⁶

Chances are good that conflicts over national forest management will intensify in the future due to the increasing ecological value of national forests. As private lands continue to be developed and fragmented, relatively intact federal lands will become increasingly valuable and more hotly contested. This compensation principle will be more evident in years to come.

Forest Service research paints the picture in multiple contexts and future scenarios. It reviews, for example, development trends on nonfederal lands and how they threaten the integrity of natural ecosystems.⁸⁷ Those we spoke with emphasized the ecological value of federal lands and often placed them in this larger context, to show why their protection is more important today than ever before. Much of their litigation, moreover, focuses on fish and wildlife, and the national forests are critically important to the conservation of many species, including those protected by the ESA. The Forest Service provides this background:

The 193 million acres of the National Forest System support much of North America's wildlife heritage, including: habitat for 430 federally listed threatened and endangered species, six proposed species, and 60 candidate species, with over 16 million acres and 22,000 miles of streams designated as critical habitat for endangered species; approximately 80% of the elk, mountain goat, and bighorn sheep habitat in the lower 48 States; nearly 28 million acres of wild turkey habitat; approximately 70% of the Nation's remaining old growth forests; over 5 million acres of waterfowl habitat; habitat for more than 250 species of migratory birds; habitat for more than 3,500 rare species; some of the best remaining habitat for grizzly bear, lynx, and many reptile, amphibian and rare plant species; over two million acres of lake and reservoir habitat; and over two hundred thousand miles of fish-bearing streams and rivers.⁸⁸

Numbers like these help explain the values and motivations of those who frequently challenge the Forest Service and the use of collaboration. In our view, time would be better spent discussing how these numbers and values intersect with forest management and collaboration than

by focusing on "environmental obstructionism" and purported incentives to sue the Forest Service.

B. Enforcing Environmental Law

There is a difference between using the courts to enforce the law and using the courts to do nothing but delay action and tie agencies into knots. The facts of each case are determinative. Obstruction is the wrong word for those cases in which litigation is used to enforce the wildlife provisions of the NFMA,⁸⁹ the analytical requirements of NEPA,⁹⁰ or the primary purpose of the ESA, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."⁹¹ In moving forward, we hope the debate advances beyond superficial labels such as "environmental obstructionist," which is similar to calling people in the timber industry "forest destructionists." Both labels are wrong on so many levels, and they distract us from the more important decisions and choices that must be made in national forest law and management.

Litigation plays a particularly significant role when it comes to incorporating biodiversity conservation into the multiple use mission of the Forest Service. Wildlife conservation is a focal point of Forest Service litigation. Without citizen enforcement of the laws most important to biodiversity, it is likely that wildlife conservation will take a back seat to the more measurable and immediate multiple use objectives that are promoted within the agency and by Congress.⁹² The implementation of environmental law can languish because of competing agency priorities, interest group politics, congressional appropriations, and other pressures faced by federal land agencies. This is why it is so important to have clear and binding environmental provisions that can be enforced by outside parties.

Citizen enforcement is a keystone principle of environmental law, and we are opposed to efforts to make access to the judicial system more difficult for any political interest, not just environmental interests. Litigation should be used most judiciously and we would like to see the NEPA process and the courts move at a faster pace. To that end, we would like more research and discussion focused on the

86. U.S. GAO, *FOREST SERVICE DECISION-MAKING: A FRAMEWORK FOR IMPROVING PERFORMANCE* 6, 12, GAO/RCED 97-71 (1997). There are fundamental disagreements, says GAO, inside and outside the Forest Service, "over which uses to emphasize under the agency's broad multiple-use and sustained-yield mandate and how best to ensure the long-term sustainability of these uses." *Id.* at 8.

87. U.S. FOREST SERV., *FUTURE OF AMERICA'S FORESTS AND RANGELANDS: FOREST SERVICE 2010 RESOURCES PLANNING ACT ASSESSMENT*, Gen. Tech. Rep. WO-87 (2012). Included in the assessment is a review of how development pressure on nonpublic lands is affecting "the ability of those public lands to sustain important ecosystem services and biodiversity." *Id.* at 11.

88. U.S. FOREST SERV., *BIOLOGICAL ASSESSMENT OF THE USDA NATIONAL FOREST SYSTEM LAND MANAGEMENT PLANNING RULE FOR FEDERALLY LISTED ENDANGERED AND THREATENED SPECIES; SPECIES PROPOSED FOR FEDERAL LISTING; SPECIES THAT ARE CANDIDATES FOR FEDERAL LISTING ON NATIONAL FOREST SYSTEM LANDS* 17-18 (2011).

89. The 2012 NFMA planning regulations require that multiple use (including timber harvesting and management) must meet the wildlife diversity requirements found in 36 C.F.R. §219.9. The 2012 regulations also seek to "keep common native species common" and to write forest plans that "contribute to the recovery of threatened and endangered species." See 36 C.F.R. §219.9 and 77 Fed. Reg. 21174 (Apr. 9, 2012).

90. See, e.g., 40 C.F.R. §1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.").

91. 16 U.S.C. §1531(b).

92. See, e.g., Eric Biber, *Too Many Things to Do: How to Deal With the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1-63 (2009) (reviewing literature in political science and economics focused on how agencies implement multiple tasks given to them by Congress and concluding that "agencies are most likely to underperform on 'secondary goals' that both interfere with the completion of what are perceived to be the agency's primary goals, and are not easily measured or monitored by outside parties"). *Id.* at 4. For a discussion in the context of national forests, see Courtney A. Schultz et al., *Wildlife Conservation Planning Under the United States Forest Service's 2012 Planning Rule*, 77 J. WILDLIFE MGMT. 428-44 (2013).

root causes for delay in the NEPA process (including financial and organizational factors) and the prospects for more expedited judicial review, with special attention on the U.S. Court of Appeals for the Ninth Circuit, where most national forest appellate cases are heard and backlogged.⁹³

We are not suggesting that the status quo is ideal. But some of the remedies being proposed by Congress, such as the “collaborative project litigation requirements” of H.R. 2647, the Resilient Federal Forests Act of 2015, are radical departures from existing law and would make it more difficult for the public to participate in decisionmaking and hold the Forest Service accountable for its actions.⁹⁴

C. *Litigate or Collaborate: A False Choice*

Unlike most of the individuals interviewed for this project, we view collaboration as a positive development, especially when practiced in a framework such as the CFLRP, which includes predetermined rules and legal sideboards, national-level oversight, and monitoring requirements.⁹⁵ Our interviews help us better understand why some individuals choose not to participate in collaborative processes. We respect that choice, whether it is made because of a group’s limited capacity or because of more deeply rooted ideological reasons.

What must be acknowledged, however, is that groups unwilling or unable to participate run the risk of becoming politically obsolete. As the saying goes, “If you’re not at the table, you’re on the menu.” Instead of completely abandoning collaboration in principle, our hope is that people who are critical of these processes will join them in order to fix what they perceive as being wrong with them.

One of the most prominent themes found in our interviews was the claim that collaboration undermines the NEPA framework, by giving privileged status to self-selected collaborators and by narrowing and predetermining agency decisionmaking. Unlike those who view collaboration as a way to more effectively and efficiently implement preexisting laws and regulations, many people we spoke with believe that collaboration weakens and undermines the legal framework and the accountability it provides.

Our view on the matter is that collaboration can be legitimately done within the NEPA framework.⁹⁶ If done

with care, collaboration can help achieve two of NEPA’s core goals: to promote meaningful public participation and to better inform government decisions.⁹⁷ A particular benefit of a broad-based collaborative group is the ability to find the so-called common zone of agreement, as doing so can help the Forest Service to better understand how to avoid proposals that are likely to trigger controversy and dissent.⁹⁸ All the better if a collaborative group can shape a proposal so that negative environmental effects are avoided in the first place. As we see it, NEPA is not undermined if collaboration can make a *proposal* more acceptable to a broad range of interests. That, to us, is the best way to facilitate implementation of NEPA.⁹⁹

That said, the use of collaboration, by itself, in no way justifies a more limited NEPA analysis or the law’s exemption altogether. While we believe collaboration has an important role to play in national forest management, it should not be used to justify the narrowing of other important forms of public participation. NEPA’s scoping process, NFMA’s objection process, and the use of litigation are all important forms of public participation in public lands management.

Unfortunately, some proposed legislation exploits the use of collaboration as a way to deregulate national forest management and to circumvent the NEPA process so that a broad range of forest management activities are subject to NEPA categorical exclusions if they are developed through a collaborative process. Recall, for example, our discussion of H.R. 2647 (the proposed Resilient Federal Forests Act of 2015), which requires plaintiffs challenging a forest management activity to post a bond or other security if the project was developed through a collaborative process. This approach is the very definition of collaboration being used to undermine the rule of law. To be legitimate, collaboration must be used as a way to more effectively and

agencies and those who will bear the environmental, social, and economic impacts of their decisions”).

97. CEQ, *COLLABORATION IN NEPA: A HANDBOOK FOR NEPA PRACTITIONERS* 35 (2007).

98. When it comes to the subject of public participation and NEPA in the academic literature, a long-time criticism has been that agencies have not used public participation at earlier and more formative stages of agency decision-making and that the public is often forced to react to agency “purpose and need” statements that do not have widespread public support. See, e.g., Ann Steinemann, *Improving Alternatives for Environmental Impact Assessment*, 21 ENVTL. IMPACT ASSESSMENT REV. 3-21 (2001).

99. According to one survey of experts focused on NEPA and infrastructure development, many delays in the NEPA process “can be attributed to a lack of communication and consensus in the pre-NEPA planning stage, administrative process bottlenecks, project management failings, or a lack of capacity among the agencies involved in the process.” Also relevant to national forest management is the experts’ position on the “misdirected response to the threat of litigation” by agencies. The experts consulted for the study observed that

excess documentation of every possible environmental impact, however remote, is not an effective strategy for discouraging or fighting lawsuits. Motivated opponents will sue, no matter the length and exhaustiveness of the environmental documentation [i.e., bullet-proofing]. A more effective strategy would be to compile a thorough administrative record, which documents key decisions in the EIS process and why the decisions were made.

REGIONAL PLAN ASS’N, *GETTING INFRASTRUCTURE GOING: EXPEDITING THE ENVIRONMENTAL REVIEW PROCESS* (2012), available at <http://www.rpa.org/library/pdf/RPA-Getting-Infrastructure-Going.pdf>.

93. A backlog of federal caseloads is certainly due in part to the number of vacancies on U.S. federal courts. For statistics, visit the U.S. Courts website, <http://www.uscourts.gov/> (see sections on statistics and judicial emergencies).

94. While supported in the name of forest health and restoration, this bill would impede judicial review for a much broader class of “forest management activities.” See H.R. 2647, §302(2)(6) (defining “forest management activity” as “a project or activity carried out by the Secretary concerned on National Forest System lands or public lands in concert with the forest plan covering the lands”).

95. See Nie, *supra* note 43, at 10242-44 (explaining why the CFLRP and other programs are preferable to place-based forest management legislation).

96. See, e.g., COUNCIL ON ENVTL. QUALITY (CEQ), *THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS* 7 (1997) (discussing the view by the study’s participants that “NEPA’s most enduring legacy is as a framework for collaboration between federal

efficiently implement our body of environmental laws, not as a way to evade them.

IV. Conclusion

In 2012, a number of groups representing the timber industry, motorized users, grazing interests, and other trade associations sued the Forest Service and challenged the agency's 2012 NFMA planning regulations.¹⁰⁰ At the heart of the complaint in *Federal Forest Resource Coalition v. Vilsack* is the contention that the 2012 planning rule unlawfully privileges environmental values—such as ecological sustainability, ecosystem services, and wildlife diversity—over other multiple uses such as logging, grazing, and recreation. To raise such values over other multiple use objectives, the plaintiffs argued, violates the agency's 1897 Organic Administration Act and the MUSYA and the NFMA.¹⁰¹ In 2015, nearly three years after the complaint was filed, the U.S. District Court for the District of Columbia dismissed the case on standing and ripeness grounds, finding that the plaintiffs lacked standing to challenge the rule and that the dispute was not yet ripe for adjudication.¹⁰²

The case is instructive because it so clearly demonstrates some of the competing interests and visions regarding national forests. While the 2012 rule was challenged by industry and trade groups, previous planning rules in 2005 and 2008 were challenged by conservation interests for being in violation of NEPA and the ESA.¹⁰³ Another planning rule proposed in 2000 was challenged by both industry and environmental organizations.¹⁰⁴ And so it goes. Though collaborative efforts have uncovered some common ground in how various interests want national forests managed, significant disagreements remain about how to balance their uses and values and how to harmonize the multiple laws governing them.

Our assessment of litigation would be different if we found groups repeatedly abusing the courts to advance objectives that don't have a basis in federal lands law. But as discussed above, that is not the case. The current framing and narrative used to marginalize “environmental obstructionists” or “rogue activist groups” abusing the legal system is inaccurate and incomplete. Mischaracterization like this distracts us from having a more productive and substantive inquiry into the issues and different visions that are truly at the core of the debate.

National forest management is increasingly complicated and its politics even more so. The old battle lines between timber and environmental interests have morphed into more nuanced and complicated debates over restoration forestry, with competing views of forest health. As discussed above, some interests are questioning whether the environmental laws and processes governing national forests have become obstacles to implementing the “social consensus” around forest restoration. Most proposed remedies to this problem include restricting to various degrees the application of NEPA and judicial review.

We respectfully disagree with this diagnosis and remedy. Our view is that the core environmental laws governing national forests are more necessary and important today than ever before. And collaboration is no substitute for accountability. In many situations, collaboration can help steer restoration to appropriate places and contexts. But collaboration is not enough. Also necessary is the scrutiny, scientific analysis, and the wider opportunities for public participation afforded by the NEPA process. The judiciary must hold agencies accountable for their actions, and citizens—from those being represented by the Federal Forest Resource Coalition to the Friends of the Wild Swan—should not be impeded from using the courts as a way to enforce the law and to participate in the management of public lands.

100. *Federal Forest Res. Coal. v. Vilsack*, No. 1:12-cv-01333-KBJ (D.D.C. filed Aug. 13, 2012). The plaintiffs included the Federal Forest Resource Coalition, American Forest Resource Council, BlueRibbon Coalition, California Association of 4 Wheel Drive Clubs, Public Lands Council, National Cattlemen's Beef Association, American Sheep Industry Association, Alaska Forest Association, Resource Development Council for Alaska, Minnesota Forest Industries, Minnesota Timber Producers Association, California Forestry Association, and Montana Wood Products Association.

101. The plaintiffs also challenged the planning rule's requirement for responsible Forest Service officials to “use the best available scientific information to inform the planning process.” 36 C.F.R. §219.3. This provision, according to the complaint, “gives ‘scientists’ improper influence on natural resource management decisions, and skews multiple-use management by improperly elevating scientific information as the center-piece of forest management.” Complaint at 20, *Federal Forest Res. Coal. v. Vilsack*, No. 1:12-cv-01333-KBJ (D.D.C. filed Aug. 13, 2012).

102. *Federal Forest Res. Coal. v. Vilsack*, No. 12-1333 (KBJ), 45 ELR 20083 (D.D.C. filed Apr. 28, 2015).

103. The 2008 planning regulations were necessitated by a decision holding the 2005 planning regulations in violation of the APA, NEPA, and the ESA. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007). For a summary, see *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 968, 39 ELR 20145 (N.D. Cal. 2009).

104. See *Citizens for Better Forestry v. U.S. Forest Serv.*, 341 F.3d 961 (9th Cir. 2003); and *American Forest & Paper Ass'n v. Veneman*, No. 1:01-cv-00871-K (D.D.C. filed Apr. 23, 2001).