

THE
LEGAL
FRAMEWORK



FOR
COOPERATIVE
CONSERVATION

Public Policy Research Institute
The University of Montana
2006

*Foreword by the President's Council
on Environmental Quality*

COLLABORATIVE GOVERNANCE REPORT 1



The Legal Framework for Cooperative Conservation
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THE UNIVERSITY OF MONTANA



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P R E F A C E

The mission of the Public Policy Research Institute is to foster sustainable communities and landscapes through collaboration, consensus building, and conflict resolution. To help achieve this mission, the Institute produces *Collaborative Governance Reports* to build and share knowledge on alternative ways to prevent and resolve natural resources disputes. To ensure that the *Reports* are relevant, the Institute partners with appropriate organizations involved in formulating, administering, and otherwise influencing public policy.

The Legal Framework for Cooperative Conservation builds on the 2005 White House Conference on Cooperative Conservation, convened by the Council on Environmental Quality and co-hosted by the Departments of Agriculture, Commerce, Defense, Interior, and the Environmental Protection Agency. The conference was designed to facilitate the exchange of information and advice relating to cooperative conservation, as defined by Executive Order 13352 dated August 26, 2004, on Facilitation of Cooperative Conservation. According to this order, “cooperative conservation” means “actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among federal, state, local, and tribal governments; private for-profit and nonprofit institutions; other nongovernmental entities and individuals.”

The conference marks a significant milestone in the evolution of conservation policy and practice in the United States.

The Institute is pleased to produce this *Report* to further the conference purposes. This report examines the legal framework that enables and constrains cooperative conservation on federal public lands and resources. It is intended for anyone involved in cooperative conservation—professional managers, field staff, stakeholder groups, and interested citizens. This report does not represent official policy of the federal government, nor does it substitute for legal advice from agency counsel or private attorneys; however, it may point out situations in which such advice might be necessary.

Thanks to Bob Keiter, Betsy Rieke, and several anonymous people for reviewing earlier drafts of this report. Some of the original research completed for this report was conducted under a cooperative agreement with the U.S. Bureau of Land Management.

FOREWORD



CHAIRMAN

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

January 26, 2006

Dear Friends and Colleagues:

Thank you for your efforts to further the goals of cooperative conservation through the publication of this report.

In August of last year, the White House Conference on Cooperative Conservation assembled more than 1,000 leaders from across the nation to share knowledge and experience, identify innovative and effective approaches to expand local involvement, broaden cooperative conservation partnerships, and make citizen stewardship and collaborative decision-making the future of American conservation.

During this historic assembly, the first of its kind in 40 years, we heard many suggestions for changes in the rules, policies, regulations and laws. Analysis of the facilitated discussions held on August 30th documents those and is available on the web at <http://www.conservation.ceq.gov>.

President Bush's approach to cooperative conservation for the 21st century is rooted in the philosophy that the greatest results are achieved when the American people act as citizen stewards unleashing energy, ingenuity, and creativity to enhance partnerships, promote innovation and produce lasting results.

This report serves to stimulate the reflections and discussions that are necessary to advance cooperative conservation. I share appreciation with conservation leaders across the nation for the work of the University of Montana's Public Policy Research Institute in developing this legal framework report and for the noteworthy issues that it raises.

Thank you for your scholarly contributions to this historic endeavor.

Yours Sincerely,

A handwritten signature in black ink, appearing to read "James L. Connaughton". The signature is stylized with a large initial "J" and a long horizontal stroke.

James L. Connaughton

I N T R O D U C T I O N

Americans enjoy the great fortune of abundant public lands—national forests, national parks, wilderness areas, wildlife refuges, BLM lands, and wild and scenic rivers. These lands and the uses they support—timber harvests, water supply, wildlife habitat, recreation, and mineral extraction, as well as others—are managed by several federal resource agencies for the benefit of the public. Each public resource agency operates within the legal boundaries set by federal laws, court decisions, and the U.S. Constitution.

In the early days of public resource management, which coincided with the Progressive Era of the early 20th century, there was a general assumption that resource management decisions should be made by professionally trained managers operating outside the sphere of political and commercial interests. Accordingly, the laws governing their work offered few mandates and little detail.¹

Social and political changes beginning in the 1960s forced changes in this model, as more stakeholders and public advocacy groups demanded a role in public resource decisions and pressured Congress to enact stricter standards for resource management. New statutes enacted in the 1960s and 1970s, together with court decisions interpreting these laws, led to a virtual explosion of detailed mandates and policies that remain in place today. According to one former Forest Service Chief, “The combination of laws passed from 1870 to now is a sort of blob.”²

Increasingly, public resource managers seek alternatives to lengthy, conflict-filled public decision processes, looking instead to more collaborative processes involving stakeholders early in the process. Many innovative experiments in cooperative conservation have focused on public resource management, as recognized by agency guidance policies and Congressional statements of support.

“Cooperative conservation is common sense conservation by people from every walk of life. It is rooted in collaborative decision-making, shared governance, and bottom-up action.”

*Secretary of the Interior Gale Norton
August 29, 2005*

¹ See Matthew McKinney & William Harmon, *The Western Confluence: A Guide to Governing Natural Resources* (2004) for a detailed description of this legislative history.

² Jack Ward Thomas made this statement at a gathering of researchers and practitioners focused on the future of the Forest Service. See “The Lubrecht Conversations,” in *Chronicle of Community*, vol. 3, no. 1 (Autumn 1998).

At the same time, some resource managers fear the legal consequences of cooperative efforts that incorporate new tools for deliberation, collaboration, and multi-party dispute resolution into the traditional model of resource management. Although it is important to avoid an unwitting encounter with “the blob,” a basic understanding of the legal issues that may arise in cooperative conservation can provide a valuable roadmap to navigate around potential quagmires. Moreover, this knowledge may provide participants with the confidence that their work will be upheld if a legal challenge does arise.

This report is intended for anyone involved in cooperative conservation—professional managers, field staff, stakeholder groups, and interested citizens. It does not substitute for legal advice from agency counsel or private attorneys, but it may point out situations in which such advice might be necessary. We hope to allay basic concerns about whether cooperative conservation initiatives are appropriate in particular situations, as well as to provide a starting point for identifying critical procedural steps that must be taken to comply with the fundamental legal principles of public resource management law. At the end of the report we provide a list of resources for more detailed information.

A Selected Menu of Cooperative Conservation Tools¹

Open Government—legal requirement and social expectation for open, transparent, participatory government decision-making

Public Participation—strategies to inform and educate citizens, as well as to seek their input and advice

Deliberate Dialogue—innovative ways to foster informed feedback from citizens

Community Stewardship—people working together, sharing knowledge and resources, to achieve desired outcomes

Partnerships—an agreement between two or more people or organizations to work together and share resources to achieve common aims

Negotiated Rulemaking—bringing together agency representatives and other interested groups to negotiate the text of a proposed rule

Intergovernmental Coordination—policies and practices to foster coordination among federal, state, tribal, and local governments

Multi-party Dispute Resolution—negotiation, facilitation, mediation, and other strategies to resolve multi-party disputes

¹This is a selected menu of tools or processes to promote and support cooperative conservation. For a more complete list, as well as where to get more information on these and other tools, please see www.umtpri.org/menuofapproaches

FIRST PRINCIPLES

Many of the laws that Congress enacted in the 1960s and 1970s aimed at shedding more light on government decisions, opening them to public scrutiny and ensuring broader opportunities for public participation. *(See the sidebar below for some examples.)* At their core, these laws are meant to ensure that better decisions are made, with complete information and without hidden influences or agendas.

Thus, it is important to note at the outset that the many requirements for public participation and open meetings are not simply speed bumps on the road to efficient resource management decisions. They are, instead, reflections of the underlying “first principles” of public resource management. First, these resources belong to the public. Second, members of the public deserve to understand and have an opportunity to participate in decisions concerning their stewardship.

Unless there is a specific statutory exemption, every cooperative conservation initiative must comply with the mandates of these statutes. Sometimes, when applying certain cooperative conservation tools to the public resource realm, this means that some changes have to take place. For example, in an open government process, confidential negotiations may not be possible. But for the most part, cooperative conservation initiatives are fully consistent with the first principles of public resource management. Indeed, in many cases they offer the potential for more meaningful and lasting public participation than do traditional proceedings.

Laws Expressing First Principles

Federal Advisory Committee Act (FACA) provides standards for the operation of groups that influence federal agency decisions. If an agency such as the Forest Service wants to convene an advisory committee to obtain consensus advice or recommendations, it must publish advance notice, maintain public records of the group’s meetings, and file a charter outlining the group’s purpose, membership, and work plan. Occasionally, collaborative groups operating in cooperation with public resource agencies are challenged for not complying with FACA. See the discussion of procedural requirements beginning on page 13.

Freedom of Information Act (FOIA) requires that agencies publish many of their documents in a form that is readily accessible to the public and provides the means by which citizens may obtain copies of documents. FOIA may arise in a cooperative conservation project when stakeholders request copies of documents that provide background information about public resource decision processes.

Administrative Procedures Act (APA) requires that federal agencies follow a public notice and comment procedure when developing or amending regulations, and provides a means by which affected parties may appeal agency decisions through administrative channels prior to seeking judicial review. Consensus-building tools have been applied in the development of regulations for years, and are just beginning to be used in the resolution of appeals. See the discussion below.

National Environmental Policy Act (NEPA) requires analysis and disclosure of the potential environmental impacts of major federal actions, providing opportunities for collaborative work with affected parties at many points from scoping through the detailed analysis. For specific, detailed recommendations for incorporating conflict resolution mechanisms into NEPA implementation, see the recently published report of the National Environmental Conflict Resolution Advisory Committee *(included in the on-line resources section at the end of this report)*.

“ G O F O R T H A N D C O O P E R A T E ”

Laws that Require Cooperative Conservation

Very few laws actually require federal agencies to initiate cooperative conservation partnerships, but some do carry such provisions. One example, the **Secure Rural Schools and Community Self Determination Act** of 2000 (“*County Payments Bill*”), requires the U.S. Forest Service to create resource advisory committees (RACs) to provide early and ongoing input from citizens, organizations, tribes, land management agencies, and other stakeholders.

In the few instances where mediation or dispute resolution and processes are required, Congress has limited their application to particular types of disputes:

■ The **Clean Air Act** requires the Environmental Protection Agency (EPA) to convene a dispute resolution process to deal with conflicts among tribes, states, and the EPA concerning nondegradation standards.

■ The **Clean Water Act** requires the EPA to “provide a mechanism for the resolution of any unreasonable consequences” arising from conflicting water quality standards on bodies of water shared by states and tribes.

■ The **Coastal Zone Management Act** requires the Secretary of the Interior to “seek to mediate the differences” between federal agencies and states over development, initial implementation, and administration of coastal management plans.

Such mandates are more common in state law, applying in family law, workers’ compensation, and other court-related contexts. Montana’s legislature, for example, has used its Negotiated Rulemaking Act to compel state agencies to engage in negotiated rulemaking procedures, but more typically the agencies prefer to rely on informal consultations to obtain input from interested parties.



Laws that Encourage Cooperative Conservation

In the past several decades, cooperative conservation tools have been increasingly used to address natural resources and environmental conflicts. In response, Congress and the President have issued statements explicitly supporting public agencies' use of such processes in many instances. In other cases, more broadly worded mandates for public participation and open government processes may fairly be interpreted as legal authorization for cooperative conservation.

Explicit support for cooperative conservation appears in the **Negotiated Rulemaking Act of 1989**, in which Congress sought to reduce the adversarial nature of federal rulemaking processes, encourage better communications between agencies and affected parties, and facilitate shared information, knowledge, expertise, and technical abilities. When parties help draft the rules that will affect them, they have a vested interest in the resulting regulations and are far less likely to resist enforcement or challenge the rule in court.

Similarly, the **Administrative Dispute Resolution Act of 1990** explicitly authorizes and encourages federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes. Federal agencies may use these tools in many settings, including formal and informal adjudications, rulemakings, enforcement actions, issuing/revoking licenses and permits, and litigation.

In the most recent explicit statement of support for cooperative conservation, President Bush's **Executive Order 13352**, "Facilitation of Cooperative Conservation" (*Aug. 26, 2004*), directs agencies (*including Interior and Agriculture*) to implement environmental and natural resources laws to promote "collaborative activity among federal, state, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals."

A November 2005 Memorandum by the Office of Management and Budget and the President's Council on Environmental Quality further directs agencies to increase the effective use of environmental conflict resolution and build institutional capacity for collaborative problem solving.



Other laws implicitly provide the authority for a broad range of cooperative conservation techniques through their mandates of public participation and coordination among agencies (*see sidebar below*).

Additionally, many state and federal initiatives and policy statements have supported the use of cooperative conservation in public resource management. For example, in 1997 the Western Governors' Association passed "**Enlibra**," a policy resolution encouraging the use of consensus-building approaches to shape public policy and resolve public disputes. In 1998, the WGA endorsed the Enlibra principles for environmental policy in the West.

Laws that Require Public Participation and Interagency Coordination

- **Federal Land Policy & Management Act (FLPMA)** section 103(d) defines public involvement broadly as "the opportunity for participation by affected citizens in rule making, decision making, and planning with respect to the public lands, including public meetings or hearings . . . or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance."
- **National Forest Management Act of 1976 (NFMA)**: directs the Secretary of Agriculture to develop, maintain, and revise land and resource management plans with substantial public involvement and in coordination with the planning processes of state and local governments and other federal agencies.
- **National Park Service Organic Act of 1916**: grants the Secretary of the Interior broad authority to establish advisory committees and enter into cooperative agreements for research and training; numerous additional statutory provisions authorize the NPS to enter into partnerships with volunteers and other entities.
- **National Wildlife Refuge Administration Act of 1966**: mandates public participation in the preparation of refuge management plans, and requires the agency to coordinate its activities with adjacent landowners.
- **National Environmental Policy Act of 1969 (NEPA)**: requires cooperation between federal, state, and local governments, and other concerned private and public organizations "to use all practicable means and measures" to achieve national environmental goals.
- **Endangered Species Act of 1973 (ESA)**: authorizes the Secretary of the Interior to enter into cooperative agreements with states in order to conserve threatened and endangered species and directs federal agencies to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."

Many statements have arisen from federal agencies. The U.S. Forest Service adopted a policy statement encouraging the use of “**collaborative stewardship**” in 1997. In creating the **U.S. Institute for Environmental Conflict Resolution** in 1999, Congress sought to promote the use of negotiation and mediation to resolve environmental disputes involving one or more federal agencies. U.S. Interior Secretary Gale Norton announced a “**4 C’s**” policy in 2003: “communication, consultation, and cooperation, all in the service of conservation.” The U.S. Department of the Interior’s **Water 2025** initiative aims at removing institutional barriers to increase cooperation and collaboration among federal, state, tribal, and local agencies, and private organizations. The **Environmental Protection Agency** promotes the use of collaboration and consensus building through a number of programs: Center for Conflict Prevention and Resolution (resolving disputes over Superfund and enforcement issues using negotiation and mediation); Community-based Environmental Protection program (generating place-based solutions through collaborations with public and private stakeholders); and an agency-wide policy on public participation encouraging early, ongoing, and frequent opportunities for citizens to participate in environmental decisions.

No single statement of support for cooperative conservation will change a culture of conflict or alter the traditional politics of division among public resource users, but these statements and initiatives build on one another to provide a solid foundation for cooperative conservation. They establish legitimacy and credibility for the idea of collaboration and its role in governance; provide information and advice on various approaches; provide for education and training to build capacity among citizens and leaders; provide for staff to assess conflicts, design processes, and facilitate and mediate disputes; and foster the production of publications that raise awareness and understanding of how to incorporate cooperative conservation principles into resource management. Thus, even when they do not have legally enforceable “teeth,” such aspirational statements do have political and practical value.

Finally, in the most far-reaching examples of encouraging cooperative conservation, some public entities are designing **dispute resolution systems** to deal with the stream of public disputes rather than resolving ad hoc, individual disputes. In **Canada**, for example, the Alberta Environmental Appeal Board incorporated a mediation process into environmental appeals that now resolves approximately 75 percent of all appeals. In a few cases, states and local governments have incorporated ADR processes into their **land use** decision processes and **water rights** compact negotiation processes.



OVERCOMING “FACA-PHOBIA”

Some laws impose strict procedural requirements that may limit cooperative conservation initiatives. It is important to keep in mind that these procedural requirements are aimed at maintaining the first principles of public participation and open government. Though they appear to place roadblocks on the path to cooperative conservation, in most cases these procedural statutes are in fact consistent with creative approaches to involving the public and stakeholders in public resource management.

While numerous statutes govern the processes by which public agencies do their work, the best-known source of confusion for collaborative groups is the **Federal Advisory Committee Act (FACA)**. A 1995 federal ecosystem management report noted that “many federal agency personnel believe that [FACA] restricts virtually all contacts with nonfederal entities, and are fearful that any such contacts will subject them to legal action.”³

Are such fears justified? The simple answer is...sometimes. Understanding when FACA applies and what is required when it does may alleviate unwarranted “FACA-phobia.”⁴

As described briefly above, FACA aims to ensure that agency officials make policy decisions in open, deliberative processes rather than behind closed doors with undue influence by select stakeholders. In a few high-profile cases (*see examples on next page*), agency officials have been called to task for failing to comply with FACA. Even when these groups operated openly and with considerable public participation, their failure to obtain the necessary FACA charter or publish meeting notices as required by the statute doomed their work product to legal challenge. (*See the list of resources at the end of this report for sources of information on all of FACA’s requirements.*)



³ Rebecca J. Long & Thomas C. Beierle, *The Federal Advisory Committee Act and Public Participation in Environmental Policy* 11 (Resources for the Future Discussion Paper 99-17, Jan. 1999).

⁴ Thomas Brendler, “The Federal Advisory Committee Act: What You Need to Know,” *Chronicle of Community*, vol. 1, no. 1, pp. 44-47 (Autumn 1996).

Several resources are available to determine whether FACA applies to any particular cooperative conservation initiative. The short version is that any time a federal agency intends to establish, control, or manage a group that gives consensus advice and has at least one member who is not a governmental employee, the agency must comply with FACA's procedural requirements. In some cases, chartering an advisory committee is the best approach for a collaborative group. A formally chartered committee assures its members that their advice will be aired in a structured, open, public process. A federal agency wishing to maintain control over the process or product of a group's deliberations may wisely choose to charter an advisory committee and proceed under FACA's constraints.

On the other hand, the chartering process is time-consuming and may restrict the scope of a collaborative group's deliberations. Several options allow groups to operate without going through the process of obtaining a FACA charter. The group may organize as a **subcommittee of an existing federal advisory committee** (such as a *Resource Advisory Committee convened by the U.S. Bureau of Land Management*). Or the group may be composed of only **government employees** (federal, state, tribal, and local), thus exempting it from FACA's procedural requirements.⁵ Another option is that the federal agency officials can simply **participate as group members** in a collaborative group, rather than seeking to control or manage the group's activities. Or the group can organize around a goal of **information sharing** rather than developing policy recommendations.

In short, anyone organizing a collaborative group that includes federal resource managers must pay attention to the Federal Advisory Committee Act. Disgruntled stakeholders who do not feel welcome in the process may well threaten a FACA lawsuit. Nonetheless, an examination of FACA's specific requirements and federal courts' interpretations provide reassurance that the law allows a wide range of cooperative conservation initiatives. Agency officials should never use FACA as a shield to avoid meeting with stakeholders or participating in collaborative processes.

⁵ Unfunded Mandates Act of 1995.

How to Violate FACA Three Stories and a Couple of Lessons

1 President Clinton assembled the **Forest Ecosystem Management Assessment Team (FEMAT)** to identify forest management alternatives in response to disputes in the Pacific Northwest. FEMAT's "Alternative 9" was the basis for the President's Forest Plan for a Sustainable Economy and a Sustainable Environment, adopted in 1994, and was chosen as the preferred alternative in an environmental impact statement prepared by the Forest Service. A federal appeals court ruled that this group was an advisory committee that violated FACA, but it did not prevent the government from relying on the group's recommendations in developing forest plan revisions.

2 Congress appropriated funds in FY 1993 to allow the Forest Service to finance an independent study of Sierra Nevada old-growth forests and ecosystems. The Forest Service appointed federal, state, and private experts to the **Sierra Nevada Ecosystem Project**, and received its report in 1996. Upon review, a federal court found the SNEP to be an advisory committee because the group was formed to provide advice for the agency, not just Congress. Importantly, the court did not throw out the group's work product because: (1) repeating the study would be costly and duplicative; (2) some of the team's meetings were open to the public; and (3) there would be further opportunities to provide input in forest plan revision.

3 Several federal agencies formed the **Southern Everglades Restoration Alliance** in the mid-1990s to provide advice in implementing federal restoration activities. Members included federal, state, and other agency members (*apparently including some nongovernmental consultants*); federal agencies funded the group and set its agenda. A federal court ruled that the group was established by federal agencies to obtain advice, and failed to comply with FACA.

Key lessons from challenged groups:

- FACA most likely applies when a federal agency itself convenes the group to obtain recommendations; and
- Complying with FACA's spirit (*first principles of public participation and open government*) may lessen the penalty for FACA violation.

CONSTITUTIONAL ISSUES

In some cases, opportunities to develop new cooperative conservation partnerships are hampered by legal constraints arising from the U.S. Constitution. Stated simply, the federal government can share some of its authority over public resources, but not too much.

One of the core principles of the U.S. Constitution is the **separation of powers**. At the core of this separation is the need for representative democracy and accountability. The three branches of governmental powers are legislative (*enacting and revising federal statutes*); executive (*applying the statutes through administrative activities*); and judicial (*interpreting the statutes when challenged, and determining their consistency with the U.S. Constitution*).

Congress, which holds the legislative power, may **delegate** (*share*) the authority to fill in the details of open-ended statutes, so long as it provides an “intelligible principle” upon which to act. Such delegation is commonly made to federal agencies in the executive branch, as most federal statutes lack detailed instructions for implementation.

Agencies have a great deal of latitude in interpreting broad statutory mandates, as expressed in agency-generated rules and regulations. For example, the Federal Land Policy & Management Act contains a broad delegation of power to the BLM, authorizing the Secretary of the Interior to “enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands.” Similarly, the Multiple Use-Sustained Yield Act authorizes the Secretary of Agriculture “to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons” for such purposes as forest protection and coordinated management.

Importantly, agencies may not “**subdelegate**” this authority to outside parties. See the next page for an example of the violation of this principle, as well as a couple of examples of permissible arrangements for shared management authority. These examples offer a few key lessons for delegated agency authority. Most importantly, a federal agency may not fully shift its administrative responsibilities to third parties, but always must retain final decision-making authority over the public resources that are its responsibility. Further, any management sharing must be consistent with the governing statute and must ensure that there are no conflicts of interest among participants.

Avoiding the “Subdelegation” Trap— One Failure, Two Success Stories

Niobrara Scenic River Advisory Council: Congress authorized and the National Park Service (NPS) established a local council to manage a designated Wild & Scenic River corridor, giving the private group full authority to make decisions. The agency had just one seat on the 11-member council. In *NPCA v. Stanton*, the judge ruled that the council’s powers went beyond the scope of authority Congress gave the NPS in designating the river and authorizing a cooperative management approach. The only recourse available to NPS if it was unhappy with the council was to terminate its cooperative agreement altogether. The court also noted that the council was not a federal entity, and thus was not obligated to comply with important federal laws guaranteeing first principles of public participation and open government. Today, the council continues in its advisory role, but NPS retains final decision-making authority.

Columbia River Gorge Commission: This partnership includes federal government agencies, states, and local governments in a designated National Scenic Area. The commission prepares resource inventories and other studies, conducts land use planning and zoning, and determines consistency of proposed land uses (*federal, state, and local*) with its zoning. The arrangement withstood constitutional challenge in *Columbia River Gorge United v. Yeutter*.

Community Sand Flats Team: This cooperative agreement between the U.S. Bureau of Land Management (*BLM*) and Grand County (*Utah*) allows a local management team to collect and allocate recreation fees, manage visitors, and conduct education and revegetation activities in a popular mountain-biking area. Although the county is a managing partner, the BLM retains final decision-making authority and liability for activities in the recreation area.

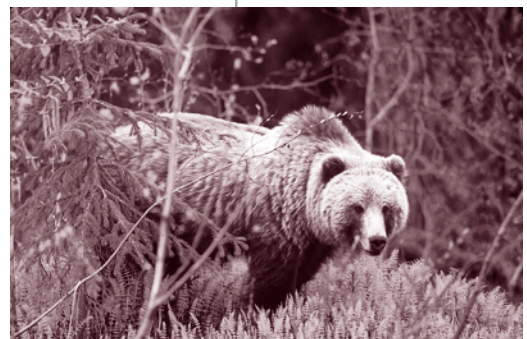


Another Approach to Cooperative Conservation— Delegating Authority to New Entities

Alternatively, Congress may more freely delegate powers to newly created entities to achieve specific management objectives. In doing so, Congress must specify the general policies under which the group operates and the restrictions limiting the group's authority. The two recently created entities described below operate under powers directly delegated by Congress.

The **Presidio Trust** was created in 1996 by a congressional act as a wholly owned government corporation, composed of the Secretary of the Interior (*or designee*) and seven Presidential appointees. Congress authorized the Presidio Trust to manage lands formerly part of an Army base in San Francisco, with a statutory mandate to become financially independent within 15 years. Lands will be disposed of if this goal is not met. The Secretary of the Interior continues to manage adjacent National Park Service lands (*Golden Gate National Recreation Area*), but has no oversight over the lands managed by the Trust.

Congress created the **Valles Caldera Trust** in 2000 as a wholly owned government corporation, composed of two federal representatives and seven Presidential appointees. The Trust is authorized to provide management and administrative services for Valles Caldera National Preserve (*Baca Ranch*) in New Mexico; establish policies; receive, collect, and spend funds; and cooperate with federal, state, tribal, and local government units. If the Trust does not achieve its goals in 20 years, the lands will revert to the U.S. Forest Service. The Secretary of Agriculture's oversight authority is specifically limited. For example, the Secretary may conduct an assessment of the Trust's management and recommend that Congress terminate it under limited circumstances, and may suspend any Trustee decision found inconsistent with the purposes for which the preserve was established.



JUDICIAL AND ADMINISTRATIVE APPEALS

Alternative dispute resolution is common practice in many legal arenas today, and is similarly being applied in both administrative and judicial appeals involving public resources.

Administrative appeals occur when affected parties challenge a regulatory or other administrative action to the next level of agency authority. Congress enacted the **Administrative Procedures Act** in 1946 to spell out the basic requirements of agency appeals procedures. Various procedures are available to resolve appeals prior to formal adjudication.

For example, pursuant to Congress' directive in the **Appeals Reform Act (ARA)**, in 1993 the Forest Service adopted procedures by which members of the public may comment on and challenge a wide variety of proposed agency actions. The ARA specifically directs Forest Service employees to "offer to meet with each individual who files an appeal . . . and attempt to dispose of the appeal."

Within the BLM, appeals proceed through the Office of Hearings and Appeals and the Interior Board of Land Appeals. BLM recently announced a new pilot program to encourage alternative dispute resolution in its IBLA appeals. Participation is voluntary, but an administrative law judge may order parties to discuss possibility of negotiation.

Judicial appeals occur when an affected party alleges that the agency violated its statutory obligations. Affected parties may claim that the agency failed to comply with procedural mandates (*such as FACA*) or acted beyond its statutory authority. The **Civil Justice Reform Act** of 1990 requires that federal courts include ADR procedures in their case management. This may include mediation, arbitration, mini-trials, and neutral evaluation. The **Alternative Dispute Resolution Act** of 1998 requires federal courts to authorize ADR in all civil actions, and to promote the use of ADR. In one recent high-profile lawsuit in Montana, the federal judge ordered the parties into mediation and demanded that top-level agency officials (*including the Undersecretary of Agriculture*) be present for the two-day marathon session.⁶

In most cases, parties to litigation end up settling their cases prior to trial. Under the constraints of litigation, the negotiations tend to be closed to all but the parties to the legal action. If the parties represent a broad spectrum of interests—which they often do—then the requirement of public participation is partially satisfied. But the negotiations are not open to the public, and thus this example of a cooperative action (*negotiated settlement*) is not entirely consistent with the first principles described earlier in this report.

⁶ This litigation arose from environmental groups' challenges to expedited salvage logging following the 2000 Bitterroot National Forest fires. For a full description of the case and the negotiation, see McKinney & Harmon, note 1.

OPENING DOORS, REMOVING BARRIERS

Using the Law to Encourage Cooperative Conservation

This report illustrates the various ways in which federal laws enable and constrain innovative cooperative conservation initiatives. In some cases, agency officials are reading the procedural limitations too narrowly, and missing opportunities for cooperative conservation. This is understandable, based on past litigation experience, but may not be consistent with the actual language of the law and likely outcome of litigation. Agencies need to provide better support through training, networking, and consistent guidance.

In other cases, the procedural requirements are overly restrictive, and could be improved to encourage cooperative conservation. For example, the Federal Advisory Committee Act could be amended to specify more clearly when the statute applies, provide specific exemptions where appropriate, and streamline the chartering process.

In all cases, early awareness and accurate understanding of legal issues at the outset will help ensure smoother, more successful cooperative conservation.



SELECTED RESOURCES

CASES CITED

California Forestry Ass'n v. U.S. Forest Service, 102 F.3d 609 (D.C. Cir. 1996) (Sierra Nevada Ecosystem Project).

Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992).

National Parks & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7 (D.D.C.. 1999) (Niobrara Scenic River Advisory Council).

Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009 (D.D.C. 1994) (FEMAT).

REGULATIONS AND AGENCY GUIDANCE MATERIALS

Office of Management and Budget and President's Council on Environmental Quality, Memorandum (November 2005).

U.S. Bureau of Land Management Land-Use Planning Handbook, H-1601-1 (updated March 11, 2005) (describes legal authorities for public involvement and collaborative work; Appendix B outlines FACA considerations).

U.S. Bureau of Land Management FACA Guidebook: U.S. Bureau of Land Management National Policy for the Federal Advising Committee Act (BLM/WO/GI-05/007+1614, May 2003).

U.S. General Services Administration, Federal Advisory Committee Management, Final Rule, 66 Fed. Reg. 37728 (July 19, 2001) (detailed guidance for determining when FACA applies, as well as the procedural requirements for chartered advisory committees).

BOOKS, REPORTS, AND ARTICLES

Allyson Barker, et al., "The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis," 23 *Journal of Land, Resources & Environmental Law* 67 (2003) (the most complete treatment of legal issues arising in collaborative initiatives currently published).

Lauri Diana Boxer-Macomber, *Too Much Sun? Emerging Challenges Presented by California and Federal Open Meeting Legislation to Public Policy Consensus-Building Processes* (Center for Collaborative Policy, Sep. 2003).

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ON-LINE RESOURCES

Deliberate Democracy:

<http://www.deliberate-democracy.net/>

International Association for Public Participation:

<http://iap2.org>

National Coalition for Dialogue and Deliberation:

<http://www.thataway.org>

Legal Issues in Collaborative Processes (*focused on FACA*):

<http://www.snre.umich.edu/emi/pubs/cmp.htm>

Partnerships Beyond Public Lands—Compliance issues (*information on FACA and NEPA, with a toolkit and links to resources*):

http://nps/sonoran.org/tk_compliance_issues.html

Red Lodge Clearinghouse (*examples of collaborative groups, statutory summaries, links to resources*):

<http://www.redlodgclearinghouse.org>

Report of the National Environmental Conflict Resolution Advisory Committee, published in April, 2005 (*with links to NEPA resources*):

<http://www.ecr.gov/necrac/reports.htm>

Transboundary Collaboration in Ecosystem Management: Integrating Lessons from Experience, a Master's Thesis project published in April, 2001:

<http://www.snre.umich.edu/ecomgt//pubs/transboundary.htm>

U.S. Institute for Environmental Conflict Resolution:

<http://www.ecr.gov>



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