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**THE CONTESTED USE OF
COLLABORATION &
LITIGATION IN NATIONAL
FOREST MANAGEMENT**

A BOLLE CENTER PERSPECTIVE PAPER

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The Bolle Center “perspectives” platform provides a space to take on some of the more challenging and controversial issues in federal lands and wildlife management. The Center believes that it is possible to thoughtfully discuss and debate important conservation issues in an intelligent, respectful, and engaging fashion.

This perspective paper focuses on the contested use of collaboration and litigation in national forest management. The latter is receiving substantial attention by members of Congress who take aim at “environmental obstructionists” who are purportedly abusing the legal system. Also arising are several recent cases where those using the courts have criticized the practice of collaboration in national forest management.

This paper goes beyond the clichés and soundbites to learn more about the views, issues and policy implications at the core of the debate. Much has been written about the collaborative turn in federal lands management, with the Bolle Center involved in multiple collaborative endeavors—both research-based and applied. But much less is known about a smaller, more embattled constituency that more frequently challenges the U.S. Forest Service in court. To better understand this perspective, we interviewed those individuals who use the courts relatively frequently in Region 1 of the National Forest System, which is an administrative unit facing a disproportionate amount of litigation.

Part I of the paper provides a primer on the use of collaboration and litigation in national forest management. Here, we review the emergence and increasing use of collaboration and review some of the claims and counterclaims regarding Forest Service litigation. The section closes by reviewing proposed legislation that would change the regulatory context and judicial review process in national forest management. In Part II, we describe some of the most prominent themes and issues emerging from our interviews. This includes criticism about collaboration (in principle and practice), views about environmental advocacy, the need to enforce the law, the National Environmental Policy Act (NEPA), and other views regarding forest health, science, and restoration. Part III finishes by placing collaboration and litigation in the context of national forest law. We then take issue with current congressional efforts to marginalize those groups and citizens using the courts to enforce the law. And finally, we explain the false choice between collaboration and litigation and explain why both are necessary components of modern national forest management.

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THE CONTESTED USE OF COLLABORATION AND LITIGATION IN NATIONAL FOREST MANAGEMENT

By

Martin Nie* & Peter Metcalf[†]

INTRODUCTION

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 (USFS). The role of litigation in national forest management is receiving considerable attention, with some members of 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 Bolle Center perspective paper is an effort to better understand the positions, issues, and policy implications at the core of the debate. While a lot has been written about the virtues and accomplishments of collaboration,² 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 this perspective, we interviewed seven individuals who often challenge Forest Service decisions in Montana and Idaho and/or are prominent critics of collaboration. Another two people were interviewed because of their recent criticism of collaboration and their experiences with it in two high profile cases. These nine confidential interviews were tape-recorded and transcribed into 180

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¹ Benjamin Hulac, “Forest Service Seeks Protection Against Lawsuits that Delay Management Policies,” *ClimateWire* (July 17, 2015)

² See notes accompanying Part I(A).

pages of single-spaced text. We also analyzed written materials from these and other individuals, such as legal complaints and amicus briefs focused on particular projects, submitted testimony, NEPA-related public comments, and various editorials and other publically 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 paper are obvious: only nine individuals were interviewed and the geographic focus is limited to Montana and Idaho (and to a small extent Wyoming and eastern Washington). Nonetheless, the individuals interviewed represent those groups who most frequently appeal, object or sue in Region 1 of the National Forest System—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 that are actively participating in collaborative groups and/or are proponents of the practice, nor did we speak with people 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 in Part II and our perspective is provided in Part III. Also briefly described are 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 that is discussed in Part III.

A qualifier is also in order at this point: our split, at the outset, between collaboration and litigation is grossly simplified. There are several groups involved in collaborative endeavors that also use the courts when deemed necessary to do so. Nonetheless, we structure the paper like this 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. In Part III, we explain why we view 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

³ Government Accountability Office, *Forest Service: Information on Appeals, Objections, and Litigation Involving Fuel Reduction Activities, Fiscal Years 2006 through 2008* (Washington, D.C.: Mar. 2010).

begins with the emergence of collaborative-based 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

Of course, 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,

⁴ Donald Snow, “Coming Home: An Introduction to Collaborative Conservation,” in Philip Brick, Donald Snow, and Sarah Van de Wetering, eds., *Across the Great Divide: Explorations in Collaborative Conservation and the American West* (Washington, D.C.: Island Press, 2001), pp. 1-11.

⁵ See e.g., Julia Wondolleck and Steven Yaffee, *Making Collaboration Work: Lessons from Innovation in Natural Resource Management* (Washington, D.C.: Island Press, 2000); Barbara Gray, *Collaborating: Finding Common Ground for Multiparty Problems* (San Francisco: Jossey-Bass, 1989); and Antony S. Cheng, “Build It and They Will Come? Mandating Collaboration in Public Lands Planning and Management,” *Natural Resources Journal* 46 (2006), pp. 841-858.

⁶ E. Franklin Dukes and Karen Firehock, *Collaboration: A Guide for Environmental Advocates* (Charlottesville Virginia: University of Virginia, The Wilderness Society, and National Audubon Society, 2001), p. 16.

⁷ *Id.*

⁸ See Martin Nie and Christopher Barns, “The Fiftieth Anniversary of the Wilderness Act: The Next Chapter in Wilderness Designation, Politics, and Management,” *Arizona Journal of Environmental Law and Policy* 5 (2014), pp. 237-301 (discussing the significance of collaboration to contemporary wilderness politics).

among other potential dangers of devolving public lands management.⁹ Many of these early critiques and warnings, however, never anticipated the degree to which collaboration would take hold on the national forests. Some fifteen 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 those 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) was enacted in 1976 was the lack of meaningful public participation in agency decision making.¹³ Furthermore, laws such as NEPA, NFMA, and the Endangered Species Act (ESA) provided important leverage to conservation groups and gave them an empowered seat in collaborative processes.

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 Natural Resources Management* (Boulder, CO: Natural Resources Law Center, 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,” *Ecology Law Quarterly* 25 (1998), pp. 602-610; and Michael McCloskey, “Local Communities and the Management of Public Forests,” *Ecology Law Quarterly*, 25 (1999), pp. 624-629.

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,” *Journal of Natural Resources Policy Research* 3, no. 2 (2011), p. 100. See also Judith A. Layzer, *Natural Experiments: Ecosystem-Based Management and the Environment* (Cambridge: MIT Press, 2008), p. 5 (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 and Jeremy Madsen, “Environmental Resistance to Place-Based Collaboration in the U.S. West,” *Society and Natural Resources*, 16 (2003), pp. 703-718.

¹² Caitlin A. Burke, “Who Litigates and Who Collaborates? Evidence from Environmental Groups Influencing National Forest Management,” *Interest Groups & Advocacy*, 2, no. 2 (2013), p. 179.

¹³ See e.g., Arnold W. Bolle, “Public Participation and Environmental Quality,” *Natural Resources Journal*, 11 (1971), pp. 497-505.

Frustration arose, however, over the perceived adversarial character of these laws and processes. Collaboration was increasingly invoked to facilitate a more inclusive dialogue as part of a new focus on “ecosystem management” in the 1990s,¹⁴ 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.¹⁵

Congress entered the fray in 1998 by requiring the Forest Service to use a “multiparty monitoring and evaluation process” when using stewardship contracts.¹⁶ 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.”¹⁷ Then, in 2003 Congress required collaboratively written community wildfire protection plans, as part of the Healthy Forests Restoration Act.¹⁸ This law provides incentives for the writing of such plans while encouraging “public collaboration” in the preparation of authorized hazardous fuel reduction projects.¹⁹

Congress again endorsed more collaborative approaches to forest restoration in passing the Collaborative Forest Landscape Restoration Act in 2009.²⁰ The program (known as CFLRP) funds landscape-level forest restoration projects that are screened and recommended by a Federal Advisory Committee.²¹ 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 to 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.

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 because of its support and opposition by different conservation interests in the region.²² Organizations such as The Wilderness Society, Montana Wilderness Association, and National Wildlife Federation were *Amici Curiae* in strong support of

¹⁴ 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* (Akron, OH: University of Akron Press, 2013), pp. 67-94.

¹⁵ Committee of Scientists, *Sustaining the People’s Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century* (Washington, D.C.: U.S. Dept. of Agriculture, 1999).

¹⁶ Pub L. No. 105-277, § 347, 112 Stat. 2681-298 (1998).

¹⁷ 16 U.S.C. § 6591c(b).

¹⁸ 16 U.S.C. §6511(3).

¹⁹ Pub. L. No. 108-148, §104(f).

²⁰ Pub. L. No. 111-11, tit. IV, 123 Stat. 991 (2009).

²¹ For a useful history and discussion see Courtney A. Schultz, Theresa Jedd, and Ryan D. Beam, “The Collaborative Forest Landscape Restoration Program: A History and Overview of the First Projects,” *Journal of Forestry* 110, no. 7 (2012), pp. 381-391.

²² See e.g., Phil Taylor, “Judges Ruling Tests Early Success of Collaborative Restoration,” *Greenwire* (July 17, 2012).

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 multi-year collaborative effort in the region). But Colt Summit was legally challenged by other conservation 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, NFMA, and the ESA.²³ This 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,²⁴ with some in his administration going so far as to suggest that collaboration is the future of conservation and national forest management.²⁵ 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.”²⁶

Another legacy of the Bush Administration was the attempt to replace the national-level 2001 roadless rule with a state-based petitioning framework.²⁷ 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.²⁸

²³ In this early and critical test of the CFLRP, Judge 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 the Wild Swan et al. v. U.S. Forest Service*, 875 F. Supp. 2d 1199 (D. Mont. 2012).

²⁴ During the Bush Administration, collaboration was often contrasted to more regulatory and adversarial approaches to conservation. Irony notwithstanding, Executive Order 13,352 (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,” *Natural Resources and Environment*, 17 (2002), pp. 73-113.

²⁵ *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* (Missoula, MT: O’Connor Center for the Rocky Mountain West, University of Montana, 2008), pp. 22-25 (saying that a fortunate trend in collaborative conservation is evolving into a fourth chapter in the history of American conservation); Dale Bosworth and Hutch Brown, “After the Timber Wars: Community-Based Stewardship,” *Journal of Forestry*, 105 (2007), p. 271 (saying that “[t]he future of national forest management lies in Community-based stewardship”).

²⁶ *See* 73 Fed. Reg. 21,468, 21,508 (Apr. 21, 2008); 70 Fed. Reg. 1023 (Jan. 5, 2005); and *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007)

²⁷ 69 Fed. Reg. 42636 (July 16, 2004)

²⁸ The State Petitioning Rule was found in violation of the processes required by NEPA and the ESA. *See California v. U.S. Dept. Agriculture*, 575 F. 3d 999 (9th Cir. 2009). Despite this setback, the state petitioning process proceeded under the Administrative Procedures Act, at 5 U.S.C. §553(e). *See* 71 Fed. Reg. 58,577 (Oct. 4, 2006). Ray Vaughan, a well-known former environmental lawyer and member of the Roadless Area Conservation National Advisory Committee, views the partnership between 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*, Case No. CV-09-015-BLW (2010).

The focus on collaboration continues apace under the Obama Administration. The 2012 NFMA rulemaking process was initiated by proposing a rule in which collaboration and science were the two basic “anchor points” of forest management.²⁹ 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.”³⁰ (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.”)³¹ The agency is also using a collaborative national advisory committee to provide advice and recommendations on the implementation of the 2012 planning rule.³²

B. Litigation and National Forest Management

In February 2015, Montana Senator Jon Tester 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.”³³

The next month, Duane Vaagen, President of Vaagen Brothers Lumber of Colville, Washington (and representing the American Forest Resource Council) made the following statement to the 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

²⁹ 76 Fed. Reg. 8480 (Feb. 14, 2011). *See also* comments of Tony Tooke, Forest Service Director of Ecosystem Management Coordination, U.S. Forest Service Science Forum, Washington, D.C. March 29, 2011 (on file with author).

³⁰ 36 C.F.R. 219.4(a).

³¹ 36 C.F.R. 219.19.

³² In full disclosure, Martin Nie is a member of this federal advisory committee.

³³ Glenn Kessler, “Montana Senator Twice Gets His Facts Wrong on Timber Sales and Litigation,” *Washington Post* (Feb. 25, 2015)

squandered. This does not encourage wider adoption of collaborative models of management.³⁴

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 Republican Tom McClintock, Chairman of the House 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.³⁵

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. Then there are 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 isn’t) 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

³⁴ *Hearing on Improving Forest Health and Socioeconomic Opportunities on the Nation’s Forest System*, U.S. Senate Committee on Energy and Natural Resources, Mar. 24, 2015 (statement of Duane Vaagan)

³⁵ *Oversight Hearing on Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests*, U.S. House of Representatives, Committee on Natural Resources, May 14, 2015 (Statement of Chairman Tom McClintock)

economic standpoint.³⁶ So, for example, 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. Furthermore, 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.³⁷ According to former Forest Service Chief Dale 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 wildfire. 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.³⁸

Collaboration is also part of this story. The question inevitably being asked is why people should spend so much time finding agreement when those not participating in these 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 1988.³⁹ In contrast, roughly 2.4 billion board feet were harvested in 2014, a figure similar to other recent years.⁴⁰

³⁶ See e.g., Todd A. Morgan and John Baldrige, *Understanding Costs and Other Impacts of Litigation of Forest Service Projects: A Region One Case Study* (Report Prepared for U.S. Forest Service, Northern Region and Montana Forest Products Retention Roundtable), May, 2015 (examining costs and impacts related to litigation, such as USFS legal and administrative costs, loss of timber sale revenue, foregone or delayed work, and other USFS ripple effects).

³⁷ See USDA Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management* (2002).

³⁸ *Oversight Hearing on Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests*, U.S. House of Representatives, Committee on Natural Resources, May 14, 2015 (Statement of Dale N. Bosworth)

³⁹ USDA Forest Service, *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.

⁴⁰ *Id.*

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 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.⁴¹

Members of the 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.”⁴² 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 percent), with only four of the sales being enjoined by a court from any logging.⁴³ The fact check on Tester’s claim also concluded that roughly 10 percent of the board feet under contract in Montana (in 2014) is enjoined from any logging.⁴⁴ Furthermore, 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.⁴⁵

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 these projects are listed as being subject to a complaint/litigation. Data also show that 39 and 54 percent 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 are currently subject to litigation. (According to the agency, the term is used to capture the extent to which

⁴¹ See Martin Nie, “National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations,” *Environmental Law Reporter* 41 (2011), pp. 10229-10246.

⁴² Subcommittee on Federal Lands, U.S. House of Representatives, *Hearing Memo on Litigation and Increased Planning’s Impact on Our Nation’s Overgrown, Fire-Prone National Forests*, (May 14, 2015), p. 3.

⁴³ Glenn Kessler, “Montana Senator Twice Gets His Facts Wrong on Timber Sales and Litigation,” *Washington Post* (Feb. 25, 2015).

⁴⁴ *Id.*

⁴⁵ Edward O’Brien, “USFS Northern Region Reaches Timber Harvest Goal,” *Montana Public Radio* (Oct. 16, 2014), available at <http://mtpr.org/post/usfs-northern-region-reaches-timber-harvest-goal>.

administrative appeals and projects subject to litigation slow other projects moving through the process).⁴⁶

Another study done by the 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 decisions were subject to appeals and objections, only 29 or about two percent of these decisions were litigated.⁴⁷

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.⁴⁸ Plaintiffs won roughly 27 percent and settled roughly 24 percent of these cases (with the Forest Service winning roughly 49 percent).⁴⁹ Environmental plaintiffs have clearly been successful in the courts, notwithstanding the amount of deference afforded to agencies under the Administrative Procedures Act.⁵⁰

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), which some people believe provides an incentive to sue.⁵¹ Under EAJA, qualifying prevailing parties are able to recover their reasonable attorney fees and litigation costs unless the government can “substantially justify” its legal position.⁵² 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 procedural-based lawsuits to recover these fees.⁵³

⁴⁶ We remain unclear about how exactly the term is being used and measured in this context. Merriam-Webster 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.”

⁴⁷ Government Accountability Office, *Forest Service: Information on Appeals, Objections, and Litigation Involving Fuel Reduction Activities, Fiscal Years 2006 through 2008* (Mar. 2010).

⁴⁸ Amanda M.A. Miner, Robert W. Malmshemer, and Denise M. Keele, “Twenty Years of Forest Service Land Management Litigation,” *Journal of Forestry*, 112, no. 1 (Jan. 2014), pp. 32-40.

⁴⁹ *Id.*, at 35. See also Elise S. Jones and Cameron P. Taylor, “Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service,” *Policy Studies Journal* 23, no. 2 (1995), pp. 310-336 (presenting similar findings focused on an earlier time period)

⁵⁰ The APA authorizes judicial review of agency actions that are challenged as being “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. §706(2)(A).

⁵¹ Lawrence Hurley, “Study: Forest Service Paid \$6.1M in Groups Legal Fees Over Six Years,” *New York Times* (July 11, 2011).

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

⁵³ For a review of these arguments, related legislative proposals, and a counterargument and defense of the EAJA see Brian Korpics, Jay Austin, and Bruce Myers, “Shifting the Debate: In Defense of the Equal Access to Justice Act,” *Environmental Law Reporter*, 43 (2013), pp. 10985-10999.

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.⁵⁴ The frivolous lawsuit argument is also off-the-mark, unless the term is being applied rhetorically rather than legally, as both the Federal Rules of Civil Procedure Act and EAJA provide mechanisms to prevent frivolous claims from moving forward and being rewarded.⁵⁵

What about the claim that EAJA leads to payments because of plaintiffs winning procedural-based lawsuits? This is a more complicated charge and we take up the issue again in Part III. But for now consider that analytical and procedural requirements are foundations of environmental and federal lands law. This is one reason why those arguing about EAJA and incentives to sue seem to talk past one another. Those critical of litigation see attorney fees going back to environmental groups (or their attorneys) who win in the courts, even if their victory was based, on say, a violation of NEPA. 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.

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 actions that must be analyzed in an environmental assessment or environmental impact statement pursuant to NEPA. The latter is designed to expedite project planning and it reduces opportunities for NEPA-centered litigation.⁵⁶

The option of analyzing fewer alternatives was used in the Healthy Forests Restoration Act (HFRA).⁵⁷ This law basically emphasizes hazardous fuels reduction and tries to ease the procedural burdens of getting projects done more quickly. To do so, HFRA created new administrative and judicial review procedures and

⁵⁴ One of the more litigious environmental groups, the Center for Biological Diversity, reports that it “receives only a tiny fraction—about half of 1 percent, on average—of its total annual income from attorney fees recovered through EAJA. *See* Center for Biological Diversity, “Attorney Fees for Landmark Settlement to Save 757 Imperiled Plants and Animals: \$168.29 per Species,” available at 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 haven’t done so either, in the case of CBD or other environmental groups who allegedly have an EAJA-based incentive to sue.

⁵⁵ *See* Korpics et al., “Shifting the Debate,” pp. 10991-10992.

⁵⁶ The Government Accountability Office found that between 2003 and 2005, 72 percent 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* GAO, *Vegetation Management Projects Approved During Calendar Years 2003 through 2005 Using Categorical Exclusions* (June 28, 2007). A more recent GAO study found that from FY 2008 to FY 2012, the Forest Service reported that 78 percent of its 14,574 NEPA analyses were categorical exclusions, 20 percent were EAs, and 2 percent were EISs (the number of USFS categorical exclusions is likely underrepresented in these totals). *See* Government Accountability Office, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, GAO-14-370 (Apr. 2014), p. 8.

⁵⁷ 16 U.S.C. §§ 6501-6591.

modified NEPA compliance requirements. Under 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, HFRA also encourages “expeditious completion of judicial review.”⁵⁸

In many respects, 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.⁵⁹ 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,⁶⁰ 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).⁶¹ 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 CFLRP, which is designed to facilitate collaborative-based ecosystem restoration and reduce wildfire management costs, and do so within the existing statutory framework, these bills would change the basic legal framework of national forest management.

One bill, the Restoring Healthy Forests for Healthy Communities Act, would do so by mandating the designation of “Forest Reserve Revenue Areas” on national forests.⁶² 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.⁶³ 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

⁵⁸ 16 U.S.C. §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.

⁵⁹ Public Law No. 113-79 (2014). For a review see Katie Hoover, *Forestry Provisions in the 2014 Farm Bill* (Washington, D.C.: Congressional Research Service, 2014).

⁶⁰ Statement of Under Secretary Robert Bonnie, U.S. Dept. of Agriculture, Before the Energy and Natural Resources Committee, U.S. Senate (Mar. 24, 2015).

⁶¹ See e.g., Phil Taylor, “Dozens of Riders, But Will Any Become Law?” *Environment and 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,’” *Environment and Energy Daily* (May 7, 2015) (focusing on recently proposed ESA reforms).

⁶² H.R. 1526, Restoring Healthy Forests for Healthy Communities Act (113th Congress).

⁶³ H.R. 1526, 104(c)(6).

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.”⁶⁴

A similar bill passing the House in 2015 is H.R. 2647, the Resilient Federal Forests Act of 2015.⁶⁵ 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 size if “developed through a collaborative process.”⁶⁶ 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.⁶⁷ Also included in this bill is a bond requirement for legal challenge. In this case, 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.⁶⁸ And in order to have the bond or other security returned, plaintiffs must prevail on the merits “in every action brought by the plaintiff challenging a forest management activity.”⁶⁹

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 on fast-track decision making.

II. THE INTERVIEWS

This section describes some of the more common themes and issues emerging from our interviews. Of course, 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 people view collaboration in the context of environmental and federal lands law, such as whether they view collaboration as supplementing these laws or as being in conflict with them. Questions were also asked about the role of collaboration in the

⁶⁴ H.R. 1526, 104(f)(2).

⁶⁵ H.R. 2647 (114th Cong.).

⁶⁶ H.R. 2647, §102(b)(2).

⁶⁷ The bill borrows from the Healthy Forests Restoration Act’s definition, at 16 U.S.C. §6591b(b)(1)(C).

⁶⁸ H.R. 2647, §302(a).

⁶⁹ H.R. 2647, §302(c).

environmental movement, such as why particular strategies are chosen, such as the decision to collaborate or sue, and whether individuals view collaboration as a generally positive or negative development. Plenty of room was also provided so that people 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 is 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, from the way it was facilitated and structured to a perceived lack of transparency.

Critiques of collaboration were often made in contrast to the NEPA process, which they perceive to be a more rigorous, effective, and equitable approach to public participation. One common complaint heard was the under-representation 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.⁷⁰

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 these processes because they have the organizational and financial capacity and resources to participate over the long haul.

This leads to another often-heard criticism that collaboration’s time-intensive nature effectively excludes those 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 hours away. Individuals 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,” an

⁷⁰ 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,” *Journal of Forestry* 111, no. 6 (2013), pp. 395-403.

argument that 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.⁷¹

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 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 and its political fallout, as conservation groups played out their differences in the courts and newspapers. But we also found that the criticism goes beyond particular projects and some 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 NEPA

A dominant issue identified in the interviews is the impact 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 made the case that collaboration is “undermining,” “subverting,” and “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 that they have unfairly determined the trajectory of forest plans (under revision) and other projects before NEPA begins in earnest.⁷² Consider the following critique:

⁷¹ See Coggins, “Regulating Federal Natural Resources: A Summary Case against Devolved Collaboration.”

⁷² A related legal argument was also made at the project level in the Colt Summit case. Plaintiffs alleged that the USFS predetermined the outcome of the Environmental Assessment so that it would

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 recommendation 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. 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 “decision making space” exists in the context of national forest management. In other words, we thought individuals and groups that are opposed 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:

ensure a Finding of No Significant Impact (FONSI). The courts forbid agencies from making an “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 the Wild Swan v. U.S. Forest Service*, 875 F. Supp. 2d 1199 (2012).

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.

What is so baffling to some of those people interviewed is why their litigation gets so much attention rather than the unlawful actions of the Forest Service. Why all the appeals, objections and litigation we asked? Because the agency repeatedly fails to follow the law and their own regulations and planning standards, they answered. What comes out in this discussion is a deep and widely shared mistrust of the Forest Service. Some of those 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. Those interviewed were all very familiar with this argument and most resented its assumptions and those 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 if they are not going to be followed or enforced. And others recalled the history of this argument, such as the ESA being labeled a “glass hammer,” referring 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, “[B]ut because of people who have fought tooth and nail for every acre.”

Those interviewed were clear about what they want, such as passage of the Northern Rockies Ecosystem Protection Act⁷³ 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. And 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.⁷⁴ 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 “forest health and restoration” and the guiding assumptions on which the agenda 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 sell 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 National Forest System 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).⁷⁵ Again, there is a legacy of mistrust here. What concerns some people interviewed is 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 of logging and restoration is a core problem that can unnecessarily lead to litigation and impede genuine restoration work. Said one individual:

⁷³ H.R. 1187 (113th Cong.).

⁷⁴ See e.g., Nie, “Place-Based National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations.”

⁷⁵ U.S. Forest Service, *Increasing the Pace of Restoration and Job Creation on Our National Forests* (Feb. 2012), p. 4.

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 if our forests need active management at all. Some individuals made clear that litigation can help protect these lands until logging is ended on national forests. But while some people interviewed were clearly uncomfortable with any commercial logging on federal lands, others don't 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.⁷⁶ 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. This, he said, should be the parameters of collaboration, and within these stricter parameters, collaborative groups could assess what leeway they might have to meet their different social concerns.

⁷⁶ 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,” *The Wildlife News* (blog), July 27, 2015, available at <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, Eric Biber, and Elisabeth Long, “Management for Mountain Pine Beetle Outbreak Suppression: Does Relevant Science Support Current Policy?” *Forests* 5 (2014), pp. 103-133; Tania Schoennagel and Cara R. Nelson, “Restoration Relevance of Recent National Fire Plan Treatments in Forests of the Western United States,” *Frontiers in Ecology and the Environment* 9, no. 5 (2011), pp. 271-277; Chad T. Hanson and Dominick A. DellaSala, “More Logging Won't Stop Wildfires,” *New York Times* (July 23, 2015); and an “Open Letter to Members of Congress from 250 Scientists Concerned About Post-Fire Logging,” (Oct. 30, 2013), available at http://www.geosinstitute.org/images/stories/pdfs/Publications/Fire/Scientist_Letter_Postfire_2013.pdf.

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 of 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 those groups and citizens using 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. The law makes clear that “it is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, *timber*, watershed, and wildlife and fish purposes” (emphasis ours).⁷⁷ MUSYA, however, grants the Forest Service a great deal of discretion in finding a balance amongst 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 MUSYA are laws such as NFMA and the ESA, which are more prescriptive and legally enforceable. NFMA, for example, requires projects to 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.⁷⁸ These laws, including NEPA, are often used to challenge the Forest Service.⁷⁹

This legal context, along with more recent laws discussed in Part I(A), 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 it has been so since the system’s establishment. This explains why some critics

⁷⁷ 16 U.S.C. §528. *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...”).

⁷⁸ 16 U.S.C. §1604(g)(3)(B).

⁷⁹ R.W. Malmshemer, D.M. Keele, and D.W., Floyd, “National Forest Litigation in the U.S. Court of Appeals,” *Journal of Forestry* 102, no. 2 (2004), pp. 20-25.

feel that those people 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, NFMA and the ESA. These laws constrain the practice of multiple use and in many respects make wildlife a “co-equal” factor in national forest management.⁸⁰ The bottom line is that multiple tensions are built into national forest law and those collaborating and litigating have a lawful basis of doing so.

Viewed this way, the debate over collaboration and litigation is but another chapter in the long-running saga over national forest management. The Government Accountability Office (GAO) got it right when it provided an in-depth analysis of Forest Service decision making in 1997. It determined that many management problems are rooted in disagreement over the agency’s mission, mandate, and long-term strategic goals. The GAO returns 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 Forest Service’s mission priorities, GAO sees distrust and gridlock prevailing in any effort to streamline the agency’s statutory framework.”⁸¹

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 this picture in multiple contexts and future scenarios. It reviews, for example, development trends on non-federal lands and how they threaten the integrity of natural ecosystems.⁸² 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

⁸⁰ 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 and H. Michael Anderson, *Land and Resource Planning in the National Forests* (Washington, D.C.: Island Press, 1987), p. 296.

⁸¹ General Accounting Office, *Forest Service Decision-Making: A Framework for Improving Performance*, GAO/RCED 97-71 (Apr. 1997), p. 6 and 12. There are fundamental disagreements, says the GAO, inside and outside the agency, “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.

⁸² USDA Forest Service, *Future of America’s Forests and Rangelands: Forest Service 2010 Resources Planning Act Assessment*. Gen. Tech. Rep. WO-87 (Aug. 2012). Included in the assessment is a review of how development pressure on non-public lands is affecting “the ability of those public lands to sustain important ecosystem services and biodiversity.” p. 11.

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.⁸³

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.

2. 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 NFMA,⁸⁴ the analytical requirements of NEPA,⁸⁵ 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.”⁸⁶ In moving forward, we hope the debate moves beyond superficial labels like “environmental obstructionist,” which is similar to calling those people in the timber industry “forest destructionists.” Both labels are

⁸³ USDA Forest Service, *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*. Submitted to U.S. Fish and Wildlife Service and National Marine Fisheries Service (Oct. 4, 2011), pp. 17-18.

⁸⁴ 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. 21,174 (Apr. 9, 2012).

⁸⁵ *See e.g.*, 40 C.F.R. 1500.1(b) (“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA”).

⁸⁶ 16 U.S.C. §1531(b).

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 those 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.⁸⁷ 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 making access to the judicial system more difficult for any political interest, not just environmental interests. Of course, litigation should be used most judiciously and we would like to see NEPA and the courts move at a faster pace. To that end, we would like more research and discussion focused on the 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 Ninth Circuit Court of Appeals, where most national forest appellate cases are heard and backlogged.⁸⁸

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 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 decision making and to hold the Forest Service accountable for its actions.⁸⁹

⁸⁷ See e.g., Eric Biber, “Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies,” *Harvard Environmental Law Review* 33 (2009), pp. 1-63 (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”), p. 4. For a discussion in the context of the national forests see Courtney A. Schultz, et al., “Wildlife Conservation Planning Under the United States Forest Service’s 2012 Planning Rule,” *Journal of Wildlife Management* 77, no. 3 (2013), pp. 428-444.

⁸⁸ A backlog of federal caseloads is certainly due in part to the number of vacancies on U.S. federal courts. For statistics see United States Courts, available at <http://www.uscourts.gov/> (see sections on statistics and judicial emergencies)

⁸⁹ 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.” 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.”)

3. Litigate or Collaborate: A False Choice

Unlike most of those 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.⁹⁰ 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 those 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 those critical of these processes join them in order to fix what they perceive as being wrong with them, as we discuss in Part II(D).

One of the most prominent themes found in our interviews was the case that collaboration undermines NEPA, by giving privileged status to self-selected collaborators and by narrowing and predetermining agency decision making. Unlike those people 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 this legal framework and the accountability it provides.

Our view on this matter is that collaboration can be legitimately done within the NEPA framework.⁹¹ 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.⁹² 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 better understand how it can avoid proposals that are likely to trigger controversy and dissent.⁹³ 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

⁹⁰ See Nie, “Place-Based National Forest Legislation and Agreements,” p. 10242-10244 (explaining why the CFLRP and other programs are preferable than place-based forest management legislation).

⁹¹ See e.g., Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years* (1997) (discussing the view by the study's participants that “NEPA's most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions”), p. 7.

⁹² Council on Environmental Quality, *Collaboration in NEPA: A Handbook for NEPA Practitioners* (2007), p. 35.

⁹³ 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,” *Environmental Impact Assessment Review* 21 (2001), pp. 3-21.

to a broad range of interests. That, to us, is the best way to facilitate implementation of NEPA.⁹⁴

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’s categorical exclusion if they are developed through a collaborative process. Recall, for example, H.R. 2647 (the Resilient Federal Forests Act of 2015), which requires those plaintiffs challenging a forest management activity post a bond or other security if the project was developed through a collaborative process. This approach, and others like it, 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 efficiently implement our body of environmental laws, not as a way to evade them.

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.⁹⁵ At the heart of the plaintiffs’ complaint 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, they argued, violates the

⁹⁴ 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 Association, *Getting Infrastructure Going: Expediting the Environmental Review Process* (2012), available at <http://www.rpa.org/library/pdf/RPA-Getting-Infrastructure-Going.pdf>.

⁹⁵ Federal Forest Resource Coalition, et al. v. Vilsack, Case 1:12-cv-01333-KBJ (Filed Aug 13, 2012). The parties include 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 the Montana Wood Products Association.

agency’s 1897 Organic Act, MUSYA, and NFMA.⁹⁶ Nearly three years after this complaint was filed, the D.C. District Court dismissed the case on grounds of standing and ripeness; finding that the plaintiffs lacked standing to challenge the rule and that the dispute is not yet ripe for adjudication.⁹⁷

This case is instructive because it so clearly demonstrates some of the competing interests and visions regarding the 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.⁹⁸ Another planning rule proposed in 2000 was challenged by industry *and* environmental organizations.⁹⁹ 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 this 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 in Part I(B), some interests are questioning whether the environmental laws and processes governing the 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 the national forests are more necessary and important

⁹⁶ Plaintiffs also challenged the Rule’s requirement for responsible USFS 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...” Federal Forest Resource Coalition, et al. v. Vilsack, Case 1:12-cv-01333-KBJ (Filed Aug 13, 2012), p. 20.

⁹⁷ Federal Forest Resource Coalition, et al. v. Vilsack, Civil Action No. 12-1333 (KBJ) (D.D.C. Filed Apr. 28, 2015).

⁹⁸ The 2008 planning regulations were necessitated by a decision holding the 2005 planning regulations in violation of the APA, NEPA, and ESA. *Citizens for Better Forestry v. U.S. Dep’t Agric.*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007). For a summary *see* *Citizens for Better Forestry v. U.S. Dep’t Agric.*, 632 F. Supp. 968 (N.D. Cal. 2009).

⁹⁹ *See* *Citizens for Better Forestry v. U.S. Forest Service*, 341 F. 3d 961 (9th Cir. 2003) and *American Forest and Paper Association v. Veneman*, No. 1:01-cv-00871-K (D.D.C. filed Apr. 23, 2001).

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 NEPA. And 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.