

**Place-based Legislation as Method of Resolving Multiple-Use Conflicts on
National Forests**

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EXECUTIVE SUMMARY

There is increasing interest in resolving multiple use conflicts through place-based (national forest-specific) legislation. Most of these proposals combine wilderness designation, restoration objectives, economic development, and funding arrangements, among other provisions, in a conservation package to be considered by Congress. Interest in the place-based legislative approach is precipitated by numerous factors, including perceptions of agency gridlock, problems related to forest planning, unresolved roadless and wilderness issues, and the embrace of collaboration. Though the national forests have a more unified governing framework than other federal land systems, there are cases where the U.S. Forest Service is implementing place-based legislation. The Article reviews these cases, and then presents a short case study focused on the Beaverhead-Deerlodge Partnership proposal in Montana, a proposed bill being debated. A brief review of other place-based proposals in Montana, Idaho, and elsewhere is also provided.

We neither endorse nor oppose these proposals at this point. Instead, we ask the following questions that will hopefully help initiate a constructive dialog and analysis of place-based national forest legislation:

1. Would a proliferation of place-based forest laws disunify the relatively consistent mission and mandate of the USFS? If so, would such a transformation be positive or negative?
(pp. 27-31)
2. Can place-based legislation be an effective way of resolving long standing political conflicts over forest management? Could legislation help reduce appeals and litigation?
(pp. 27-31)

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** M.S. Environmental Studies, University of Montana. Missoula, MT. The authors wish to thank the members, supporters, and critics of the Beaverhead-Deerlodge Partnership who were interviewed for this Article. The U.S. Forest Service's Legislative Affairs Office was also helpful in our search for legislation and special designations used by Congress. We are also indebted to the following people for their reviews and critiques of earlier drafts: John Adams, Robert Keiter, Gregory Kennett, Mary Mitsos, and Courtney Schultz.

3. Are place-based laws likely to conflict with preexisting agency mandates, environmental laws, and planning requirements? (pp.27-31)
4. Can greater certainty and stability for the timber industry be achieved through legislation while balancing for other uses and environmental values? (pp.27-31)
5. Do place-based proposals unnecessarily complicate the politics of wilderness designation? Do they make more straightforward wilderness bills more difficult to pass? (pp.31-33)
6. Is the 2001 roadless rule best viewed as a temporary measure that precedes future wilderness negotiations or a policy endpoint? How urgent is the need to designate some inventoried roadless lands as federal wilderness? Does such urgency necessitate greater compromise? (pp.31-33)
7. What positive and negative precedent would be set if the BDP and other place-based bills become law? Might “bottom-up” approaches inform a more system wide reform of national forest management? Would place-based laws eventually be used as a way to undermine federal environmental laws? (pp.34-36)
8. What financial benefits, risks, and limitations are there in expanded use of stewardship contracting? Would a proliferation of place-based laws challenge the USFS from a budgetary standpoint? (pp.36-39)
9. Are there politically feasible alternatives to a dysfunctional status-quo and place-based national forest laws? (pp.39-43)

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INTRODUCTION

This Article analyzes the use of proposed national forest-specific legislation as a way of resolving multiple use conflicts. Unlike umbrella legislation covering all national forests, this bottom-up, piecemeal approach resolves conflicts at the unit-level via “place-based” (forest-specific) legislation.¹ This approach, though not without precedent, often combines federal wilderness designation with additional forest-specific prescriptions and management direction in a legislated package to be considered by lawmakers. Place-based laws are garnering new attention, particularly in Montana where the Beaverhead-Deerlodge Partnership (BDP) proposal is the most notable and controversial example.

We examine this approach to national forest conflict by first placing it in a larger political context. Several factors important to national forest management have created a highly uncertain and unstable environment that makes legislated solutions more attractive to some interests. Perhaps most important is a forest planning process that leaves most interest groups unsatisfied.

We next examine the place-based approach from a governance standpoint and review cases where similar unit-level laws have been used in the past. If replicated more broadly, the place-based approach could make the national forest system more like the national park and wildlife refuge systems, governed as they are by unit-specific enabling laws. Though more unified than these systems, the national forests already have a fair share of place-based laws, and we draw some lessons from these cases.

Part II then introduces our case study: the Beaverhead-Deerlodge Partnership proposal. The section explains the proposal’s formulation, its major provisions, and its evaluation by different interests. Personal interviews were conducted with Partnership members, critics, and others in order to better understand the BDP proposal and the context in which it is being offered.² The review is brief, and we use the case mostly as a jumping off point. The story is still unfolding at the time of this writing. But succeed or fail, the Partnership’s proposal raises several significant issues that are manifest in other places and venues. Questions pertaining to wilderness designation, forest restoration, the timber industry, forest planning, and agency funding, among others, deserve consideration in the context of the Beaverhead-Deerlodge and

¹ We use the popular but imprecise term “place-based” and the overly-bureaucratic term “unit-level” interchangeably in this Article. Both refer to laws that are specific to one particular federal land unit or national forest, in contrast to system wide laws and organic legislation.

² Thirteen in-depth interviews were conducted in 2008. Interviews were tape-recorded and transcribed. Participants were granted confidentiality, so their identities are not revealed. Questions pertaining to the BDP in particular, and place-based legislation in general, were asked of all participants.

beyond. Based on our research, and the interviews conducted for this Article, we suspect that similar place-based laws will be offered in the future, and we hope our analysis of this case will help guide debates elsewhere.

In Part III, we ask several questions that should be answered by those in support of and opposition to the BDP proposal and the “place-based” approach in general. Questions pertaining to governance, conflict resolution, wilderness designation, precedent, funding, and implementation are asked with the purpose of sharpening future debate. Though we are sometimes skeptical of the BDP proposal, we do not dismiss it outright. It is best viewed as a pro-active, constructive response to a dysfunctional status quo. But caution is in order because of the precedent that could be set by the BDP approach. We end the section by exploring alternative ways in which to experiment on the national forests.

I. BACKGROUND

A. Context

We begin by placing the case study in a very general political context. A few key factors are helpful in understanding the reasoning behind place-based national forest legislation and its evaluation by different interests. The broad picture painted here is supplemented with additional background and analysis in Parts II and III.

First, the obvious: there is a tremendous amount of political and legal conflict over national forest management. Several long-running conflicts mire the USFS in appeals and litigation and come from all sides of the political spectrum. A cumulative body of environmental law provides litigators numerous substantive and procedural tools that are regularly used to challenge agency decisions. The USFS argues that its multiple analytical obligations, along with a barrage of lawsuits, among other factors, amount to a “process predicament” resulting in “analysis paralysis.”³ A surprising number of interests express concern about the inability of the agency to get things done—though people differ about what causes the situation and what work needs doing exactly.⁴ A deep sense of frustration with the current state of national forest management was made explicit by most of those interviewed for this paper. The USFS,

³ U.S. FOREST SERV. THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT (WASH., D.C. 2002).

⁴ See e.g., *Management Challenges on Montana's National Forests, Oversight Field Hearing Before the Comm. on Resources*, 108th Cong. (2003) (containing several related complaints)

according to some interests, is a “paper tiger” which often can’t be relied upon to “get on the ground” and do needed work, even when that work has broad-based support. As shown below, this shared frustration helps explain the formation of the BDP and the key provisions of its proposal.

The agency’s broad statutory mandate helps explain why administrative rulemakings and forest planning processes are the dominant ways in which political choices have been made in the past. Until recently, national forest plans, written in accordance with the National Forest Management Act (NFMA), were viewed as the place where some important resource allocation decisions were made by the agency.⁵ It was in this planning venue that political interests and the agency negotiated the general direction of each national forest, including some details about how they would be managed over a ten-to-fifteen year timeframe, and with significant implications for potential inclusion in the National Wilderness Preservation System. Granted, there have always been questions about how prescriptive and binding planning documents are on the agency.⁶ Forest plans also have a history of not being fully funded by Congress. And because of this, they became viewed in some respects as more of a contingent wishlist than a secure commitment. Nonetheless, forest plans were typically viewed as important documents that guided and constrained subsequent agency actions while also holding the USFS accountable to some degree. Few were enamored with the process and its implementation, but participants generally understood its overall purpose and utility.

But the purpose of planning is no longer clear because of two significant Supreme Court decisions and subsequent planning regulations promulgated in 2005 and 2008. In *Ohio Forestry Association v. Sierra Club* (1998) the Supreme Court ruled that forest plans are generally not ripe for judicial review.⁷ Forest plans, said the Court, “[D]o not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil criminal liability; they create no legal

⁵ 16 U.S.C. §1600 (2000)

⁶ A lot of planning conflict and litigation concerns the degree of specificity required in plans and how and if this binds agencies. That is, whether plans provide nothing but “motherhood generalities” or instead meaningful “blueprints for future resource allocations and protection.” See George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. (1999), 307, 309. Coggins saw the potential problem early on: “[T]he greater danger is that the agency will promulgate plans so general as to be meaningless as limitations on or guidelines for subsequent management decisions.” *Id.* Commodity interests have also sought some certainty and guarantees in forest plans. See e.g., *Wind River Multiple-Use Advocates v. Espy*, 835 F. Supp. 1362 (D. Wyo. 1993) (finding that Resource Planning Act (RPA) “objectives” related to annual sale quantity (ASQ) are tentative and non-mandatory).

⁷ 523 U.S. 726 (1998)

rights or obligations.”⁸ With exceptions, such as an agency decision to allow some types of uses in a particular area, citizens cannot legally challenge the general direction set forth in a forest plan. Instead, ruled the Court, citizens have to wait until more site-specific projects implementing the plan are initiated by the agency.

The purpose of federal lands planning took a more serious blow from the Supreme Court in *Norton v. Southern Utah Wilderness Association* (SUWA) (2004).⁹ In this decision, the Court ruled that “a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them.”¹⁰ The case focused on the BLM’s contested management of off-road vehicles (ORV) in wilderness study areas in Utah. Congress directed the agency to prevent “impairment” of these areas until it makes a final decision about their wilderness status. SUWA argued that these areas were being impaired, despite promises made by the BLM in its land use plans for the area. The Court held that the BLM’s failure to act—to prevent impairment—was not a “discrete action” warranting judicial review. The agency, said the Court, has considerable discretion in choosing how to meet this legal requirement, despite what is stated in a land use plan.

The USFS enthusiastically embraced these two decisions and used them to partly justify its “paradigm shift” in land use planning.¹¹ The agency’s 2005/2008 planning regulations are based on the idea that plans are strategic and aspirational in nature and do not generally bind the agency to a future course of action.¹² Forest plans written in accordance with the 2008 regulations, then, are not decision-making documents per se but rather one tentative step in a more adaptive planning process. More generally, they should be viewed as an effort by the USFS to reclaim the administrative discretion it once enjoyed.

The USFS uses the *Ohio Forestry* and *SUWA* decisions to insulate from judicial challenge all sorts of agency actions.¹³ Take management of Wilderness Study Areas in Montana, for

⁸ *Id.*, at 733.

⁹ 542 U.S. 55 (2004).

¹⁰ *Id.*, at 71.

¹¹ 70 Fed. Reg. 1023 (Jan. 5, 2005).

¹² The 2008 planning regulations were necessitated by a decision holding the 2005 planning regulations in violation of the APA, NEPA, and ESA. *See Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007). The 2008 regulations are basically the same as the 2005 planning regulations, though this iteration went through the NEPA process. *Compare* 73 Fed. Reg. 21,468 (Apr. 21, 2008) *and* 70 Fed. Reg. 1023 (Jan. 5, 2005).

¹³ *See* Michael C. Blumm and Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL’Y F. 105 (2007) (reviewing SUWA’s effect on litigation in the federal courts)

instance.¹⁴ Following *SUWA*, the Supreme Court vacated¹⁵ an earlier Ninth Circuit decision¹⁶ holding that the USFS had a nondiscretionary duty to maintain the wilderness characteristics of these areas.¹⁷ But post-*SUWA*, there is now the question of how to hold the agency accountable for this congressional mandate.

Taken together, these judicial decisions and planning regulations have created a great deal of uncertainty among interests engaged in forest planning processes. As explained below, several actors want more certainty and predictability than offered in “strategic and aspirational” plans, even if these planning regulations survive judicial review. Since its inception, the USFS has fought for maximum levels of administrative discretion, and when it comes to planning, the courts appear willing to grant it. But as will be shown, such freedom comes with risks: in this case, the prospect of citizens looking to control the agency through legislative means.

Even more important to this story is the history of wilderness designation in Montana and recent trends in wilderness law. In many respects, the interest in place-based legislation represents a new chapter in wilderness politics and strategy. There are roughly 3.4 million acres of federally protected wilderness in Montana.¹⁸ But unlike most other Western states, Congress never passed a statewide Montana wilderness bill. In fact, 1983 marked the last time a wilderness area was designated in the state.¹⁹ The implication is that roughly 6.4 million acres of USFS inventoried roadless lands in Montana hang precariously in the balance and have been subjected to the roller coaster ride of the USFS’s roadless rule.²⁰

How to break this impasse divides wilderness advocates in the state, with some groups advancing “cleaner” large-scale wilderness proposals,²¹ and some groups supporting more targeted place-based bills containing wilderness protection *and* other provisions (as discussed in

¹⁴ Nearly a million acres of USFS inventoried roadless lands in Montana are congressionally designated wilderness study areas having various management prescriptions. *See* Montana Wilderness Study Act, Pub. L. No. 95-150 (1977).

¹⁵ *Veneman v. Mont. Wilderness Ass’n*, 542 U.S. 917 (2004)

¹⁶ *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 314 F. 3d 1146, 1151 (9th Cir. 2003)

¹⁷ This was followed by a negotiated settlement to a Montana Wilderness Association lawsuit in 2007. The settlement requires the BDNF to manage the Sapphire and West Pioneer WSAs in accordance with applicable laws and policies pending completion of site-specific travel management plans in 2009. USDA FOREST SERV., BEAVERHEAD-DEERLODGE NATIONAL FOREST: REVISED LAND AND RESOURCE MANAGEMENT PLAN, FINAL ENVIRONMENTAL IMPACT STATEMENT (2008), at 428. [hereinafter BDNF REVISED PLAN].

¹⁸ Wilderness data available at <http://www.wilderness.net/index.cfm?fuse=NWPS> (last visited Oct. 7, 2008)

¹⁹ Pub. L. No. 98-140, 97 Stat. 901 (1983)

²⁰ Roadless rules and related court decisions available at <http://roadless.fs.fed.us/> (last visited Oct. 8, 2008). Map of inventoried roadless areas in Montana available at <http://roadless.fs.fed.us/states/mt/state3.shtml> (last visited Oct. 8, 2008).

²¹ *See e.g.*, the proposed Northern Rockies Ecosystem Protection Act (NREPA). H.R. 1975, 110th Cong. (2007).

Part II).²² Many agree, however, that there is some urgency to resolving the wilderness issue, mostly because of increasing motorized vehicle use.²³ Several conservationists in the state now believe that motorized use has eclipsed logging as the greatest threat to wilderness. Conservationists fear that these machines will increasingly intrude into potential wilderness areas and make their protection more difficult in the future because of associated impairments and purported evidence of “historic use.” The USFS often considers historic use of motorized recreation in making its wilderness recommendations. In its evaluation of wilderness suitability, the Beaverhead-Deerlodge National Forest (BDNF) states that “[m]otorized travel is the activity most likely to reduce Wilderness characteristics.”²⁴ Consider also the scope of the problem. For example, within Montana’s six million acres of USFS roadless areas, between three-to-four million permit some type of motorized use.²⁵ The USFS also permits motorized use within some areas recommended for wilderness.²⁶

Also pertinent to the case study and its public reception is the widespread embrace of collaborative conservation and trends in cooperative federalism and devolution. Readers should bear in mind just how pervasive is the language and application of more collaborative and decentralized approaches to natural resources management. Numerous stories could be told of former adversaries eschewing the courts and familiar venues of conflict resolution in favor of

²² For an analysis of this schism and its implications for wilderness see related essays by Bill Schneider, available at http://www.newwest.net/main/article/the_natural_allies_chronology/ (last visited Oct. 8, 2008).

²³ See Travel Management; Designated Routes and Areas for Motor Vehicle Use; Final Rule. 70 Fed. Reg. 68,264, 68,265 (showing increases in motorized vehicle use on national forests)

²⁴ BDNF REVISED PLAN, Vol. 2, at C-5. The BDNF’s revised plan fails to recommend a number of qualifying roadless areas with very high “wilderness capability” scores for wilderness designation, reasoning that the areas are politically contentious, used for motorized recreation, or possess resource extraction potential.

²⁵ See John C. Adams and Stephen F. McCool, *Finite Recreation Opportunities: The Forest Service, the Bureau of Land Management, and Off-Road Vehicle Management*, NATURAL RESOURCES J. (forthcoming 2009) (showing why ORV interests are now the most potent obstacle to wilderness designation). The result, say these authors, “is that agency allocations for roadless areas frequently determine future wilderness designation.” *Id.* Historic use arguments have also been used with some success to defeat various wilderness additions in Montana and Idaho. *Id.* And following the Supreme Court’s *SUWA* decision it is now more difficult to enforce the non-impairment of areas that are wilderness-eligible.

According to the USFS, there are lands within Inventoried Roadless Areas, recommended wilderness areas, and Montana Wilderness Study Areas where forest plans have not prohibited motorized wheeled cross-country travel yearlong. This amounts to roughly 3.4 million acres of IRAs, 169,000 acres of Forest Plan Recommended Wilderness Areas, and 430,000 acres of Montana Wilderness Study Areas. See USDA FOREST SERVICE & USDI BUREAU OF LAND MANAGEMENT, OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED PLAN AMENDMENT FOR MONTANA, NORTH DAKOTA, AND PORTIONS OF SOUTH DAKOTA, at 35, available at <http://www.fs.fed.us/r1/dakotaprairie/projects/ohv-tri-state-feis-1-01.pdf> (last visited Feb. 25, 2009).

²⁶ *Id.*

more cooperative, broad-based, and “win-win” solutions.²⁷ The national forests have provided fertile ground for this movement. Not only does the agency extol the advantages of collaboration and “pre-decisional dialogue,”²⁸ but so too have an assortment of respected conservation leaders voiced their support for working more collaboratively with the agency and commodity interests.²⁹ The BDP is often viewed and debated in this context, with some proponents of the proposal selling it as a collaborative model that finally resolves several conflicts, and detractors criticizing it as an exclusive group of narrow interests sacrificing the federal lands for more parochial concerns.

Closely aligned with the collaborative philosophy, the Bush Administration advanced, albeit selectively, a more decentralized approach to federal lands management, with state and local governments given a larger role to play.³⁰ There is no better example of this move towards cooperative federalism than the Administration’s approach to roadless area management. It replaced Clinton’s purported “top-down” and “one-size-fits-all” roadless rule³¹ with a state-petitioning process that allowed states to petition the federal government for how they would like roadless areas in their states managed.³² The 2005 rule emphasized the importance of the local: “Collaborating and cooperating with States on the long-term strategy for the management of [roadless areas] would allow for the recognition of local situations and resolution of unique

²⁷ For background and case studies in collaboration see the Red Lodge Clearinghouse, available at <http://www.redlodgclearinghouse.org> (last accessed Nov. 4, 2008).

²⁸ See e.g., Mark Rey, *A New Chapter in the History of American Conservation*, in CHALLENGES FACING THE U.S. FOREST SERVICE (ed., Daniel Kemmis, 2008), 22-25 (saying that a fortunate trend in collaborative conservation is evolving into a fourth chapter in the history of American conservation); and Dale Bosworth & Hutch Brown, *After the Timber Wars: Community-Based Stewardship*, J. FORESTRY (July/Aug. 2007), 271 (“The future of national forest management lies in Community-based stewardship”). A “collaborative and participatory approach to land management planning” is also required in the 2008 planning regulations. 73 Fed. Reg. 21,508 (Apr. 21, 2008).

²⁹ See e.g., Mitch Friedman, *A Marshall Plan for the U.S. Forest Service*, in CHALLENGES FACING THE U.S. FOREST SERVICE (ed., Daniel Kemmis, 2008), 26-29 (making the case for community-based collaborative restoration); Mitch Friedman, *The Forest Service is Dead; Long Live the Forest Service!* GRIST (Feb. 28, 2006), available at <http://www.grist.org/comments/soapbox/2006/02/28/friedman/index.html> (last visited Jan. 22, 2009); and Ray Vaughn, *A Modest Proposal for the U.S. Forest Service (Short Version)*, A White Paper published in *Management by Exclusion: The Forest Service Use of Categorical Exclusions from NEPA: Oversight Hearing Before House Comm. on Natural Resources* (110th Cong.), 86 (“The seemingly endless days of conflict and trench warfare among competing concerns wear down parties while the needs of the forests are sidelined”). See also conservation members of the Roadless Area Conservation National Advisory Committee, available at <http://www.roadless.fs.fed.us/documents/adv-comm/RACNAC-Bios.pdf> (last visited Feb. 9, 2009).

³⁰ Support for devolution was most apparent when state and local interests advocated commodity production on federal lands. See generally Robert B. Keiter, *Breaking Faith With Nature: The Bush Administration and Public Land Policy*, 27 J. LAND, RESOURCES, & ENVTL. L. 198, 249 (stating that for the Bush Administration “devolution represents a convenient means to an end and not a core principle”). See also Robert L. Fischman and Angela M. King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 129 (2007) (reviewing the prevalence of cooperative federal-state arrangements in public land law)

³¹ 66 Fed. Reg. 3,244 (Jan. 12, 2001).

³² 70 Fed. Reg. 25,654 (May 13, 2005).

resource management challenges within a specific State.”³³ Idaho took full advantage of this opportunity and submitted a petition, to be implemented by the USFS, directing how 9.3 million acres of inventoried roadless areas in Idaho are to be managed in the future.³⁴ Though several conservation groups supported the Idaho roadless rule, it was subsequently challenged in Court by an assortment of conservation groups who oppose the state petitions approach in general and the Idaho rule in particular.³⁵ As discussed below, place-based approaches, especially when they involve inventoried roadless areas protected under the 2001 rule, have deepened divisions in the conservation community.

The roadless story, and others like it, are important to our case study because they represent a noticeable shift in federal lands management. Political interests in Montana, like elsewhere, regularly view collaborative and decentralized strategies as viable options that can be pursued when deemed advantageous. And those most sympathetic to state and local interests have had a relatively friendly reception by the Executive Branch. The ultimate effect is that several political interests now advance conservation solutions that are ostensibly more grassroots, collaborative, and home-grown in nature.

B. Federal Lands Governance

This section reviews the place-based legislative approach to forest management from a governance perspective. It first briefly reviews how national forests are governed in contrast to the national parks and wildlife refuges. We do this because, in one way, the possible move towards national forest unit-level legislation is similar to national park and refuge enabling legislation. The section then complicates this simple comparison by reviewing examples of national forests already governed by place-specific legislation. This statutory review tells us that the proposed Beaverhead-Deerlodge bill, and other place-based legislative packages, are not altogether novel.

i. Organic and Enabling Legislation

Three laws are central to understanding national forest management: the 1897 Organic Act, the Multiple Use Sustained Yield Act of 1960, and the National Forest Management Act of

³³ 69 Fed. Reg. 42,638 (July 16, 2004).

³⁴ 73 Fed. Reg. 61,456 (Oct. 16, 2008).

³⁵ Complaint of Gerald Jayne, Greater Yellowstone Coalition, The Lands Council, Natural Resources Defense Council, Sierra Club, and The Wilderness Society; *Jayne v. Rey* (D. Id. 2009), Case 4:09-cv-00015-BLW.

1976.³⁶ These core laws are supplemented with dozens of others that are substantive and procedural in nature, such as NEPA and the ESA.³⁷ As in other federal land systems, national forest units may be encumbered with legal responsibilities that significantly differ from those of others. Some national forests, for example, have listed species, water rights compacts, tribal treaty obligations, and special planning prescriptions (e.g., Northwest Forest Plan) that necessitate very different types of management. But aside from these differences, there is thought to be a relative consistency in the system, so that national forests are all generally governed under the rubric of multiple use, sustained yield, and other vague principles. In most cases, differences in management stem from universal planning processes that are required of each forest, not from legislation.

The relatively unified national forest system is quite different from the national park and wildlife refuge systems. National parks are usually governed by two sets of law: the mandate found in the National Park Service Organic Act of 1916³⁸ and secondly, more site-specific enabling legislation controlling how one particular park unit is to be managed. So, for example, Glacier National Park is governed by the preservation/recreation mandate spelled out in the 1916 Organic Act and also more specific provisions found in its 1914 “establishment” legislation.³⁹ The 1872 enabling law establishing Yellowstone National Park provides an even better historical reference of place-based legislation.⁴⁰ These enabling acts are important because their place-specific purposes and mandates are often given priority by Congress, meaning that site-specific provisions trump those expressed in the more general Organic Act. Furthermore, enabling acts can be quite detailed in how Congress wants a particular park unit managed, thus limiting managerial discretion in many cases.⁴¹

National wildlife refuges are governed similarly in this regard.⁴² This system is characterized by a tiered-use framework in which a hierarchy of uses is used to make refuge management decisions. At the top of this hierarchy are the purposes for which an individual

³⁶ See respectively 16 U.S.C. §§ 473–482, 551 (2000); 16 U.S.C. § 528 (2000); and 16 U.S.C. §1600 (2000).

³⁷ See USDA FOREST SERV., SELECTED LAWS AFFECTING FOREST SERVICE ACTIVITIES (Apr. 2004) (providing an 810 page listing of these legal authorities).

³⁸ 16 U.S.C. §1 (2000).

³⁹ 16 U.S.C. §170 (2000).

⁴⁰ 16 U.S.C. §21 (2000).

⁴¹ Professor Robert Fischman has extensively analyzed the relationship between organic and establishment legislation in the context of national parks, and more extensively, the national wildlife refuge system. See Robert Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENVER U. L. REV. (1997): 779.

⁴² Pub. L. No. 105-57, 111 Stat. 1252, 16 U.S.C. 668dd (2000).

refuge was created. Like the national parks, national wildlife refuges often have dual purposes: those found in the 1997 Refuge Improvement Act (Organic Act) and more specific provisions found in refuge-level enabling acts.⁴³

ii. Examples of Place-based Legislation

At first blush, then, it appears simple: the national forest system is a unified and rather homogenous system governed by a core statutory framework. But upon closer inspection this simple comparison becomes more complicated. There are, in fact, some national forests and national forest areas that are currently governed by place-specific laws, and they offer some valuable lessons. Take, for example, Alaska's Tongass National Forest. It is governed by a complicated patchwork of national and Alaska-specific laws.⁴⁴ For years this National Forest, under the terms of the Alaska Lands Act, was provided forty million dollars annually in order to supply a congressionally mandated 450 million board feet of timber for sale each year, regardless of cost or market demand.⁴⁵ This mandated cut caused enormous environmental problems that were addressed by the Tongass Timber Reform Act (TTRA) of 1994.⁴⁶ The law designated parts of the Tongass as wilderness and codified a protective land use designation used in the Tongass Forest Plan.⁴⁷ The TTRA brought the Tongass closer-in-line with other national forests. But unlike other national forests, the TTRA mandates that the Tongass seek to meet market demand for timber.⁴⁸ This Tongass-specific provision has been endlessly debated and litigated, partly because it must be balanced with nation-wide environmental safeguards that were also secured by the TTRA.⁴⁹ In typical fashion, Congress added to the USFS's responsibilities with the TTRA with the expectation that the law would be seamlessly integrated with others. But the fit has not always been so snug.

The challenge of how to reconcile forest-specific provisions with existing laws and processes also characterizes another controversial place-based forest law, the Herger-Feinstein

⁴³ See the collective work of Robert Fischman, including *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* (2003).

⁴⁴ See generally Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385 (2006).

⁴⁵ Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487 §705(d).

⁴⁶ Pub. L. No. 101-626 (amending 16 U.S.C. §539d)

⁴⁷ The TTRA directs the Secretary to manage "in perpetuity" lands designated in Tongass Forest Plans as Land Use Designation II (LUD II). Pub. L. No. 101-626, §201. These congressionally protected "LUD II" lands are generally to be managed in a roadless state to retain their wildland character. See S. REP. NO. 101-261, at 15 (1990).

⁴⁸ Tongass Timber Reform Act, Pub. L. No. 101-626, §101 (1990) (amending 16 U.S.C. §539d(a))

⁴⁹ See *e.g.*, *Natural Res. Def. Council v. United States Forest Serv.*, 421 F. 3d 797 (9th Cir. 2005).

Quincy Library Group Forest Recovery Act.⁵⁰ The Quincy Group formed as a way to promote ecological sustainability and community stability in the Sierra Nevada of northern California. The group wrote a “community stability proposal” directing management of the Lassen, Plumas and part of the Tahoe National Forests. With the USFS unable or unwilling to adopt the proposal, the group took to Washington and succeeded with passage of the Herger-Feinstein Act. This law required the pilot project to be consistent with applicable federal laws but also provided place-specific direction regarding how these national forests must be managed in terms of timber targets, fire, roadless areas, and other issues.

Implementing this place-based law has proven problematic. This is mostly because of ongoing concerns about how to integrate the Herger-Feinstein Act into the larger Sierra Nevada Framework, a very politicized region-wide forest planning initiative. Important differences between the Herger-Feinstein Act and the Sierra Framework, from fire and fuels management to old growth preservation, set the stage for future conflict.⁵¹ And sure enough, when the 2001 Sierra Nevada Framework plan reduced the level of timber cutting allowed in Quincy area forests, the Quincy Group—once the poster-child of collaboration⁵²—took to the courts arguing that their law was being subordinated.⁵³ On the other hand, several projects initiated by the USFS that are designed to implement the Herger-Feinstein law have been administratively appealed and litigated by several environmental groups, thus frustrating the law’s implementation.⁵⁴ The question of how to fund Herger-Feinstein-related fuel reduction projects has also been addressed by the Ninth Circuit, and we pick up this relevant issue in Part III.

⁵⁰ Pub. L. No. 105-277, Div. A., §101(e) title IV, §401, 112 Stat. 2681-305 (105th Cong., 1998), codified at 16 U.S.C. §2104 note (2000).

⁵¹ See e.g., Dave Owen, *Prescriptive Laws, Uncertain Science and Political Stories: Forest Management in the Sierra Nevada*, 29 *ECOLOGY L. Q.* 747 (2002) (analyzing the problems created by the different management schemes for the same forests)

⁵² See Jane Braxton Little, *A Quiet Victory in Quincy*, *HIGH COUNTRY NEWS* (Nov. 9, 1998), available at <http://www.hcn.org/issues/142/4591> (last visited April 13, 2009)

⁵³ See Keiter, *Breaking Faith With Nature*, at 229-233 (reviewing this mismatch and the resulting litigation).

⁵⁴ See USDA FOREST SERV., STATUS REPORT TO CONGRESS FY 2006: HERGER FEINSTEIN QUINCY LIBRARY GROUP FOREST RECOVERY ACT PILOT PROJECT (2007), available at http://www.fs.fed.us/r5/hfqlg/monitoring/report_to_congress/2006/fy06_report_to_congress_web_final.pdf (last visited 1-16-09) (stating that fluctuating budgets, appeals and litigation have affected accomplishment targets); and Quincy Library Group, *Appeal and Litigation Summary*, available at <http://www.qlg.org/pub/act/appeals.htm> (last visited Jan. 16, 2009) (stating that “the NEPA activist’s strategy of filing appeals and law suits continues to prevent the strategic implementation of hazardous fuel reduction and forest restoration projects in the eight county area of the Herger Feinstein Quincy Library Group pilot project”).

A more ubiquitous way that Congress controls national forest management—unit-by-unit—is through the appropriations process.⁵⁵ This type of Congressional control is different than the place-based laws reviewed above. But here too, Congress mandates what a particular national forest must do or how to do it. Rather than through traditional legislative channels, Congress controls management through the appropriations process, often via policy rider.⁵⁶ Examples abound, perhaps most notably the infamous “salvage timber rider” that exempted several national forests in the Pacific Northwest from environmental review.⁵⁷ Such riders are often controversial because they make special provisions or exemptions for one national forest. When viewed in this light, place-based legislation is not nearly as uncommon as first assumed. Congress has regularly intervened in the management of national forests, it has just done so most often by using, and sometimes abusing, the appropriations process.

Protected land and wilderness laws provide additional examples of place-based, or unit-level legislation. Consider, for example, Forest Service-managed national monuments like Admiralty,⁵⁸ Giant Sequoia,⁵⁹ and the Santa Rosa-San Jacinto Mountains.⁶⁰ Like the laws described above, they have unique “place-based” governing authorities. So too do USFS-administered national recreation areas and other specially-designated landscapes.⁶¹ The oldest, perhaps, is the Bull Run Watershed Management Unit in the Mount Hood National Forest, in Oregon, which was reserved in 1892 and given further legislative protection in 1904.⁶² Watershed

⁵⁵ Laws notwithstanding, in many respects Congressional appropriations really determine how a particular national forest is managed. As former USFS Chief Jack Ward Thomas puts it, “Funding is the fuel that drives most land management activities.” Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 11 (1996).

⁵⁶ For a look at how the appropriations process was used to govern the Tongass National Forest see Nie, *Governing the Tongass*, at 445-449.

⁵⁷ Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, Pub. L. No. 104-19, §2001, 109 Stat. 194, 240-247 (1995)

⁵⁸ Presidential Proclamation No. 4611, 43 Fed. Reg. 57,009, 57,131 (Dec. 1, 1978).

⁵⁹ Presidential Proclamation No. 7295. 65 Fed. Reg. 24095 (Apr. 25, 2000).

⁶⁰ Pub. L. No., 106-351; 16 U.S.C. §431.

⁶¹ For a comprehensive listing of “special recreation and conservation overlays” see GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* (2007), at 946-947. Included in the listing for National Forest lands are special management areas (e.g., Greer Spring, Missouri, 16 U.S.C. 539h), recreation management areas (e.g., Fossil Ridge, Colorado, 16 U.S.C. 539i), protection areas (e.g., Bowen Gulch, Colorado, 16 U.S.C. 539j), scenic areas (e.g., Columbia River Gorge, Oregon-Washington, 16 U.S.C. 544-544m), scenic research areas (e.g., Opal Creek, Oregon, 16 U.S.C. 545b), national scenic areas (e.g., Mount Pleasant, Virginia, 16 U.S.C. 545), national forest scenic areas (e.g., Mono Basin, California, 16 U.S.C. 543), and national preserves (Valles Caldera, New Mexico, 16 U.S.C. 698v).

⁶² Presidential Proclamation No. 28, 27 Stat. 1027 (President Benjamin Harrison, 1892). Grazing and trespass was prevented by the Bull Run Trespass Act of 1904. 18 U.S.C. §1862 (1976). The area provides the city of Portland, Oregon its main source of domestic water; and when USFS management of the area threatened this supply, Congress intervened with legislation. See Donald H. Blanchard, *Clearcutting the Bull Run Watershed: A Standard of*

protection and restoration is also the goal of the Lake Tahoe Restoration Act of 2000, which enables the USFS to plan, implement, and pay for various restoration projects in the area.⁶³

More numerous are statewide or place-specific laws establishing a federal wilderness area. While federal wilderness areas are generally managed in accordance with the Wilderness Act (1964),⁶⁴ place-specific wilderness laws typically contain an assortment of special management provisions and exemptions that are applicable to one unit.⁶⁵ And once again, the USFS is responsible for managing one wilderness area differently than another. Some wilderness-eligible Forest Service land is also controlled by place-based laws directing interim management. Of particular relevance, take for example, the Montana Wilderness Study Act.⁶⁶ This law basically tells the USFS to manage selected inventoried roadless areas in a particular way until Congress decides their future one way or another.

Federal wilderness laws have also come bundled with complementary designations specifying how other lands must be managed in the future. All sorts of special designations have been used in the past, but each essentially removes a landscape from discretionary USFS management by directing the agency to manage it in a more particular fashion.⁶⁷ Alternative

Reasonableness in Forest Service Decision-Making, 8 ENVTL. L. 569 (1977-1978) (reviewing the history preceding passage of the Bull Run Act). The Bull Run Act (Pub. L. No. 95-200 (1977), 91 Stat. 1425. Codified at 16 U.S.C. 482b) provides various types of watershed protections for the unit. Subsequent legislation has expanded the area and types of protection in response to USFS management, and it is currently managed in cooperation and partnership with the Portland Water Bureau. See Pub. L. No. 104-208, 110 Stat. 3009-541 (1996), codified at 16 U.S.C. 482b (prohibiting the cutting of trees in parts of the unit with special exceptions); Pub. L. No. 107-30 (2001), 115 Stat. 210 (protecting the Little Sandy River as part of the Bull Run). See also H.R. 427, H.R. 434, and H.R. 451: *Hearing Before the House Comm. on Resources*, 107th Cong. (Apr. 25, 2001) (reviewing USFS management of the area and why permanent protection is desired by bill proponents).

⁶³ Pub. L. No. 106-506 (2000); 114 Stat. 2351. To this end, the law authorizes spending \$300 million over 10 years to restore Lake Tahoe, though Congress hasn't appropriated nearly that sum in subsequent years. The disparity between what was authorized and what is appropriated by Congress resulted in proposals to provide a more guaranteed stream of funding. See Allison A. Freeman, *Congress Looks to Guarantee Restoration Funds*, LAND LETTER (Sept. 4, 2003).

⁶⁴ Pub. L. No. 88-577 (1964); 16 U.S.C. §1131-36 (2006).

⁶⁵ See Ross W. Gorte, *Wilderness Laws: Prohibited and Permitted Uses* (Washington, DC: Congressional Research Service, 98-848 ENR, October 9, 1998); and Natural Resources Law Center, *Special Use Provisions in Wilderness Legislation* (Boulder, CO: 2004), available at

<http://www.colorado.edu/law/centers/nrlc/projects/wilderness/SpecialUseProvisions.pdf> (last visited Aug. 3, 2007). For a more critical examination see George Nickas and Kevin Proescholdt, *Keeping the Wild in Wilderness: Minimizing Non-Conforming Uses in the National Wilderness Preservation System* (Missoula, MT: Wilderness Watch, 2005), available at <http://www.wildernesswatch.org/pdf/Special%20Provisions.pdf> (last visited Aug. 3, 2007).

⁶⁶ Pub. L. No. 95-150 (1977).

⁶⁷ For extensive analysis of alternative designations see Natural Resources Law Center, *Protective Designations on Federal Lands: Case Studies of National Conservation Areas, National Monuments, National Parks, National Recreation Areas, and Wilderness Areas* (Boulder, CO: author, 2004), at 2, available at

<http://www.colorado.edu/law/centers/nrlc/projects/wilderness/OtherProtectiveDesignations.pdf> (last visited Aug. 19, 2007). The Center concludes that areas with various non-wilderness designations “were unquestionably better off than if they had been managed under the default principle of multiple use.” *Id.*, at 2. The move from a multiple use

designations have been made instead of wilderness, and in other cases, in addition to them as companion provisions. In Montana, for example, several wilderness bills have tried to secure wilderness designation for some lands, while simultaneously “holding” other lands for future designation possibilities, and yet others for special management.⁶⁸ The Lee Metcalf Wilderness and Management Act (1983) provides an example with its establishment of four wilderness units in addition to the Cabin Creek Special Management Area.⁶⁹ Such designations have been used to find political compromise for contested lands and to limit agency discretion in how non-wilderness lands are managed.

More recent wilderness legislation continues the tradition of political compromise. These laws, and some proposed bills, go beyond the “release” of selected roadless lands in exchange for wilderness designation.⁷⁰ Instead of simply releasing these lands to discretionary multiple use management, some laws (or “conservation packages”) provide more prescription in how non-wilderness lands must be managed by the agency in the future. In some cases the deal-making has become more complicated, with more actors seeking legislated assurances for how a public land unit will be managed, inside and outside of the federally designated wilderness.

The Steens Mountain Cooperative Management and Protection Area Act of 2000 provides an example.⁷¹ Among other provisions, this complex legislation designates about 175,000 acres of wilderness and a much larger “Cooperative Management and Protection Area.” The Act mandates how both areas are to be managed, while also creating an advisory council to oversee management and make recommendations to the BLM. Depending on one’s perspective, the Steens Act provides either a positive model of how legislative packages might be crafted in

mandate to a more dominate use mandate, says the Center, “can allow the managing agency to focus on the special resources of concern in the area.” *Id.*, at 16.

⁶⁸ Montana wilderness bills introduced in 1984, 1986, and 1987 included wilderness, national recreation, and special management area designations for selected lands. See S. 2850, 98th Cong., 2d Sess. (1984), S. 2790, 99th Cong., 2d Sess. (1986), and H.R. 2090, 100th Cong., 1st Sess. (1987); S. 1478, 100th Cong., 1st Sess (1987).

⁶⁹ Pub. L. No. 98-140, 97 Stat. 901. Subsequent management of the Cabin Creek Area has been controversial, with debate centered on how to meet the Act’s purpose of preserving the Area and its wildlife while providing compatible historic recreational (motorized) use. See Faye B. McKnight, *The Use of “Special Management Areas” as Alternatives to Wilderness Designations or Multiple Use Management of Federal Public Lands*, 8 PUB. LAND L. REV. 61 (1987) (using the Cabin Creek case to examine the strengths and weaknesses of alternative protected land designations).

⁷⁰ Wilderness politics often centers on the “release” of non-designated lands to multiple use management, and whether or not such lands might be considered for wilderness designation in subsequent forest plans. Conservationists favor a “soft release” whereby non-designated lands would get another look in future planning processes. Others prefer “hard release” language that permanently disqualifies an area from future wilderness consideration. See generally Ross W. Gorte, *Wilderness Legislation: History of Release Language, 1979-1992* (Wash., D.C.: Congressional Research Service, 93-280 ENR, March 1, 1993) (explaining the history, use and questionable relevance of release language in new wilderness legislation).

⁷¹ Pub. L. No. 106-399 (2000), 16 U.S.C. §460nnn-11 (2006).

the future or “a new breed of compromise” posing a serious threat to public lands management.⁷² The Steens Act also preceded a number of controversial omnibus wilderness laws⁷³ and proposed bills⁷⁴ that convey selected federal lands to private and state ownership in exchange for wilderness designation and other areas. These wilderness bills, rightly or wrongly, have influenced debate over the Beaverhead-Deerlodge Partnership Proposal (which does not include controversial land sales).

Another place-based law generating a lot of debate and scrutiny is the Valles Caldera National Preserve and Trust. Here, the USFS plays a smaller managerial role than in the examples referenced above. But the legislation illustrates how lawmakers are willing to reconsider how newly acquired lands might be managed. In 2000, Congress acquired the privately owned Baca Ranch in northern New Mexico. Instead of simply buying the property and transferring its management to the USFS or NPS, Congress found “an experimental management regime should be provided by the establishment of a Trust capable of using new methods of public land management that may prove cost-effective and environmentally sensitive.”⁷⁵ Congress directed the Trust to operate the holding as a working ranch, providing multiple use and sustained yield management. A nine-member board of trustees, which includes a USFS official, manages the Preserve. This case is also significant because the law aims to pull the Valles Caldera out of the traditional federal lands funding stream by “allowing and providing for the ranch to eventually become financially self-sustaining.”⁷⁶ As discussed below, the BDP, among other place-based efforts, are similarly proposing ways in which federal lands management can be funded without relying so much on the highly uncertain, and often inadequate, congressional appropriations process.

All of the cases referenced above demonstrate that there is some history of using place-based legislation in the national forest system, and this is most pronounced in the designation of

⁷² Janine Blaeloch and Katie Fite, *Quid Pro Quo Wilderness: A New Threat to Public Lands* (2005), at 1, available at <http://www.westernlands.org/quid-pro-quo.pdf> (last visited Feb. 25, 2009)

⁷³ See e.g., the Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282 (Nov. 6, 2002); 16 U.S.C. 460qqq; the Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424 (Nov. 30, 2004); 16 U.S.C. 1241; and the White Pine County Conservation, Recreation, and Development Act of 2006, Pub. L. No. 109-432 (Dec. 20, 2006), 16 U.S.C. 1241; and the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, Subtitle O (Washington County, Utah provision)

⁷⁴ See e.g., the Central Idaho Economic Development and Recreation Act, H.R. 222, 110th Cong. (2007)

⁷⁵ 16 U.S.C. 698v-2(a)(12)

⁷⁶ 16 U.S.C. 698v-2(a)(8). Of course, to “allow and provide” for financial self-sufficiency is different than requiring it and progress on this front has been mixed. See GOVERNMENT ACCOUNTABILITY OFFICE, VALLES CALDERA TRUST HAS MADE SOME PROGRESS, BUT NEEDS TO DO MORE TO MEET STATUTORY GOALS, GAO-06-98 (2005)

various wilderness and special management areas. The legislation comes in numerous guises, but each has the effect of mandating how one particular unit is to be managed, thus limiting the USFS's managerial discretion. All of the place-based proposals described below share some things in common with the place-based laws reviewed above, so the new proposals are not altogether unique. What is different about the new proposals is the direction provided in how to manage lands *not* designated as wilderness or a special management area. The scope and specificity of management direction, unrelated to wilderness, and in some cases across an entire national forest, is what is precedential and different about the new place-based proposals and why they are worth scrutinizing at this point.

Interest in the legislated approach to forest management is growing. Though different than the BDP in fundamental ways, several place-based initiatives are underway in Montana and Idaho. Take, for example, the Blackfoot-Clearwater Landscape Stewardship Project.⁷⁷ This legislative proposal is designed as a demonstration project that would secure a more permanent balance between wilderness, restoration, resource use, and recreation. The proposal currently includes wilderness designation, motorized recreation provisions, and a restoration pilot project. It also seeks authorizing appropriations of \$750,000 per year for ten years in order to accomplish the group's planning, management, restoration, and monitoring objectives. Also requested is congressional funding for a biomass facility for Pyramid Lumber, one of the key stakeholders of the group. Though legislation is sought, the pilot project's core provisions are consistent with the applicable Lolo National Forest Plan.

To the Northwest of the Blackfoot-Clearwater is the "Three Rivers Challenge."⁷⁸ It hopes to end the bitter timber wars that have characterized management of the Kootenai National Forest. To that end, a broad group of stakeholders are advocating passage of the "Three Rivers Challenge Cooperative Stewardship, Restoration and Conservation Act."⁷⁹ The bill's draft (discussion) version includes several provisions designed to protect and restore portions of the Kootenai, while "generating a more predictable flow of wood products for local

⁷⁷ Background and project description available at <http://www.blackfootclearwater.org/> (last visited Jan. 21, 2009)

⁷⁸ Background and proposal available at <http://www.threeriverschallenge.com/> (last visited Jan. 21, 2009). *See also* Rick Bass, *Yaak Forest Group Champions Sustainable Local Economy*, NEWWEST, available at http://www.newwest.net/topic/article/yaak_forest_group_champions_sustainable_local_economy/C41/L41/ (last visited Jan 21, 2009).

⁷⁹ Available at http://www.threeriverschallenge.com/3RC%20legislation_Nov%202008.pdf (last visited Jan. 21, 2009).

communities.”⁸⁰ Among these provisions include mandated restoration projects, broad stewardship contracting authority, wilderness designation, a special conflict resolution process, and the permanent establishment of some motorized and non-motorized areas on the forest, among other special designations.

A more nascent, but potentially larger, place-based effort exists in Idaho’s Clearwater Basin. With leadership provided by Idaho Senator Mike Crapo, several interests are negotiating management of the Clearwater and Nez Perce National Forests. At this point, the “Clearwater Basin Collaborative” is assessing the potential of resolving several issues via legislation, including drafting a comprehensive land use allocation bill and funding strategy.⁸¹ Like other place-based efforts, wilderness designation is being discussed along with restoration and economic development provisions. These examples, among others in Washington State⁸² and southeast Alaska,⁸³ demonstrate a growing interest in finding legislated solutions to national forest management.

PART II: THE BEAVERHEAD-DEERLODGE PARTNERSHIP PROPOSAL

The Beaverhead-Deerlodge National Forest (BDNF) covers 3.38 million acres in southwestern Montana.⁸⁴ Larger than Glacier and Yellowstone National Parks combined, it includes sixteen mountain ranges, 400 miles of the Continental Divide, and some of the best elk habitat in the state.⁸⁵ Resource allocation conflicts—with some interests wanting more commodity use and motorized access and others more preservation of the forest—are common on the BDNF, as they are elsewhere. Consider, for example, that one hundred-and-fifty two administrative appeals have been filed on the BDNF during the last decade, and that 25 lawsuits

⁸⁰ *Id.*

⁸¹ In the interest of full disclosure, Martin Nie is a Board member of the Great Burn Study Group that is represented on the Collaborative. Reports, timelines, and minutes of the Clearwater Basin Collaborative on file with Martin Nie.

⁸² See the Northeast Washington Forestry Coalition’s work on the Colville National Forest, available at <http://www.newforestrycoalition.org/> (last visited Jan. 21, 2009). This group seeks to resolve conflict by providing guidance and recommendations in how the Colville ought to be managed, but do so mostly through existing planning processes. At one point, however, the group sought “authorities to establish restoration and responsible forestry zones, designate new wilderness, and provide funding to pay for new recreation facilities including trails, community wildfire protection and forest restoration.” Northwest Washington Forest Coalition Blueprint for the Colville National Forest, Frequently Asked Questions (2008 version on file with authors).

⁸³ A working group of the “Tongass Futures Roundtable” introduced concept legislation for discussion in 2009. Among the draft provisions include the designation of conservation areas, a community stewardship forest, a federal working forest, and the transfer of selected federal lands to private ownership (draft on file with authors). For background on the Tongass Futures Roundtable see <http://www.tongassfutures.net/> (last visited Jan. 21, 2009).

⁸⁴ The Beaverhead and Deerlodge National Forests were merged into one administrative unit in 1996.

⁸⁵ *Examination of the Forest Plan Revision Process in Region 1, Hearing Before the S. Comm. on Appropriations*, 109th Cong. (Dec. 2, 2005) (statement of John Gatchell)

have been filed over the past two decades.⁸⁶ Most of these challenges have centered on timber-related projects, with a handful of conservation groups most responsible for making them.⁸⁷

Wilderness designation, and the lack thereof, is a major source of conflict on the BDNF. To date, the BDNF manages two federal wilderness areas, the Anaconda-Pintler and a portion of the Lee Metcalf, totaling 219,662 acres. Not presently included in the federal wilderness system are 1.8 million acres of inventoried roadless areas on the BDNF. The BDNF also manages two Wilderness Study Areas (WSAs) totaling 210,174 acres.⁸⁸ This designation was provided by Congress to maintain the wilderness characteristics of these areas until Congress determined their permanent status legislatively. USFS Management of WSAs in Montana has been controversial because the law, though designed to protect these places, did not prohibit the use of off-road vehicles in these areas. And off-road vehicle use obviously has the potential of diminishing those wilderness characteristics that Congress wanted to protect.⁸⁹

The state of Montana's timber industry is also pertinent to this case because the BDP seeks to provide it greater certainty and stability. A multitude of economic factors help explain why so many mills have closed in the state and why those remaining see the future with some trepidation.⁹⁰ International market trends, Canadian imports, prices, and housing starts are largely responsible for the industry's woes. Several timber mills in Montana, for example, received help from the Trade Adjustment Assistance Program, thus indicating that imports have seriously challenged several Montana mills.⁹¹ But the Partnership's timber industry interests also

⁸⁶ Information provided by Peter N. Zimmerman and Erik J. Tomasik, U.S. Forest Service, Northern Region, NEPA Appeals and Litigation. March, 2008 (on file with authors).

⁸⁷ These include the Native Ecosystems Council, the Ecology Center, and the Alliance for the Wild Rockies.

⁸⁸ BDNF REVISED PLAN, at 428.

⁸⁹ As the Montana District Court summarized the situation, "The controversy at hand questions what it means to 'maintain' these areas-in-limbo. Did Congress intend to keep the land and its use as it was in 1977? Or did Congress intend to preserve the potential of the land without major concern for its use while it was studied?" *Montana Wilderness Assoc. v. U.S. Forest Service*, 146 F. Supp. 2d. 1118, 1122 (2001).

⁹⁰ The factors most responsible for the industry's demise is a perennial debate in Montana. On one side are those quick to blame the USFS, mostly because of diminished supply. *See e.g.*, Charles E. Keegan and Todd A. Morgan, *Montana's Timber and Forest Products Industry Situation, 2004* (Report prepared for Montana's congressional delegation) (University of Montana, Bureau of Business and Economic Research, 2005), available at <http://www.bber.umt.edu/forest/pdf/conditions/MTsituation2004.pdf> (last visited Jan. 22, 2009). On the other side are those who see international market trends as being most significant. *See e.g.*, Bosworth & Brown, *After the Timber Wars*, at 272 (reviewing studies showing how highly productive plantation forests in the U.S. and abroad "have erased the postwar need for large-scale timber supplies from national forest land").

⁹¹ Imports of softwood timber from British Columbia have challenged several mills in Montana whom have subsequently applied for Trade Adjustment Assistance, as provided in the Trade Act of 1974. 19 U.S.C. §2273. A listing of petition determinations in Montana, which include several timber mills, available at http://www.doleta.gov/tradeact/taa/taa_search.cfm (search by state) (last visited Jan. 27, 2009). In its determination of eligibility, the Dept. of Labor found that in many of these cases an increased reliance on import purchases among the mills' declining customers and that such imports contributed significantly to decline in sales.

count access to federal timberlands as part of the equation. They partly blame appeals, litigation, and excessive analysis by the USFS as resulting in a diminished and always uncertain timber supply.⁹² For them, having more certain supply from the Beaverhead-Deerlodge will at least resolve one of the industry's problems.

Forest plans were completed for the BDNF in 1986 and 1987 (with separate plans written before the merger). As required by NFMA, the revision of these plans began in 2002, using the 1982 planning regulations. Before the BDP formed, its eventual members expressed frustration at what they considered to be a broken forest planning process. Conservationists and the timber industry asked for more assurances than provided by the agency in its revision of the forest plan. The BDNF, according to Sun Mountain Lumber Co., “[S]hould be providing sustainable and predictable levels of production and services.”⁹³ And according to the Montana Wilderness Association,

The forest plan is a contract between the people who own and those who manage our national forests, and this contract should provide clarity and certainty for all who have a stake in public lands...In Montana different people seek different commitments in the forest plan contract, whether it's small mills, snowmobilers, hunters, communities or conservationists. But we want tangible commitments. We want to know where we stand today and what will remain tomorrow.⁹⁴

It is during the plan revision period that the BDP formed and submitted a proposal to be considered by the USFS, even though the public comment period had ended. The Partnership consists of three conservation organizations (Montana Trout Unlimited, Montana Wilderness Association, National Wildlife Federation) and five timber companies (Pyramid Mountain Lumber, Roseburg Forest Products, RY Lumber, Smurfit-Stone Container, Sun Mountain Lumber). The Partnership's objective was to create a forest plan “that provides greater predictability, defuses conflict, and implements meaningful on-the-ground projects.”⁹⁵

With encouragement by the USFS's Region 1 Office, the Partnership submitted their forest planning proposal for consideration by the agency. The USFS did not, however, study the

⁹² See e.g., *Examination of the Forest Plan Revision Process in Region 1* (statements of Charles Keegan, Sherman Anderson, and Mike Hillis).

⁹³ *Id.* (statement of Sherman Anderson)

⁹⁴ *Id.* (statement of John Gatchell)

⁹⁵ PARTNERSHIP STRATEGY FOR THE BEAVERHEAD-DEERLODGE NATIONAL FOREST (Missoula, MT: Ecosystem Research Group, Apr. 14, 2006) [hereinafter PARTNERSHIP STRATEGY].

proposal as a separate planning alternative. Instead, the USFS added an “alternative 6” to the BDNF’s Revised Draft Plan to partly respond to the Partnership’s proposal. Even though this alternative was chosen by the USFS, the Partnership decided that its interests were not adequately addressed in the forest plan. So in February, 2007 the Partnership released draft legislation to implement their strategy. The “Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007” (hereinafter BDP proposed bill) has gone through various iterations and continues to be a work in progress. But its core philosophy and approach remain unchanged, and the Partnership is currently lobbying Montana’s Congressional delegation for the bill’s passage.

There are four central provisions of the proposal that we wish to emphasize. First are the proposal’s wilderness designations. It seeks to designate roughly 569,542 acres as federal wilderness in 16 areas across the BDNF. Most of these areas were included in previous (unsuccessful) wilderness bills and have been the source of much controversy. The Partnership’s wilderness recommendations are considerably higher than those made by the BDNF, which recommended 329,000 acres in its forest plan revision.⁹⁶ The wilderness component is central to the Partnership’s strategy and bill for a couple of reasons. First it is what brought and kept conservation interests at the negotiating table. And second, federal wilderness designation requires an Act of Congress, meaning that legislating part of the Partnership’s proposal was unavoidable.

The wilderness provision is controversial. The designations are opposed by an assortment of motorized vehicle groups, a mountain biker organization, and some adjacent counties and commodity interests because of lost access.⁹⁷ Criticism has also come from some environmental interests who believe that too many inventoried roadless areas (IRAs) and WSAs are being sacrificed and instead deserve wilderness protection. These interests question why participating environmental groups would be willing to release more than 200,000 acres of roadless lands, some for possible timber management. Also questioned is the decision to sacrifice portions of two WSAs that already have some legal protection.⁹⁸ The quality of the

⁹⁶ BDNF REVISED PLAN, at 283.

⁹⁷ See e.g., John C. Russell, *A Social Analysis to Finalize the Beaverhead-Deerlodge National Forest Plan*, Prepared for the Beaverhead-Deerlodge National Forest by Adams-Russell Consulting (Dec. 9, 2006) (on file with authors) (analyzing the mixed reactions to the BDP proposal)

⁹⁸ See Bill Schneider, *The Beaverhead-Deerlodge Partnership: Right Idea, Wrong Bill*, NEWWEST (Nov. 28, 2008), available at http://www.newwest.net/topic/article/the_beverhead_deerlodge_partnership_right_idea_wrong_bill/C41/L41/

lands being released is also a concern to critics. They emphasize that most of the wilderness designations made in the BDP proposal are in sub/alpine areas that receive relatively few threats compared to the more ecologically-significant lower-lands being released to timber management.⁹⁹

The second central provision of the Partnership's proposal aims "to produce a diverse forest with far fewer roads while also generating a more predictable flow of wood products for local communities."¹⁰⁰ To this end the Partnership initially supported designating approximately 713,000 acres as "suitable for timber production" under stewardship contracts.¹⁰¹ These important designations are made in forest plans, in accordance with NFMA, and act as a gateway through which subsequent projects must pass.¹⁰² A timber project, for example, could not generally take place in an area unless it was "zoned" as suitable for timber harvesting. But instead of leaving such determinations to the BDNF, the Partnership's (most recent October 2007) draft bill designates "stewardship areas" that include "eligible lands" where "landscape scale restoration projects *shall* be implemented" (emphasis ours). Approximately 2,272,000 acres of the 3.35 million acre forest would be designated as "stewardship areas."

The BDP proposed bill includes language stipulating that "the Secretary shall mechanically treat timber that yields value for meeting the restoration goals of this Act," on a minimum of 70,000 acres of eligible land within 10 years of the Act's passage. This provision is among the most controversial because critics see it as a legislated and unsustainable mandate to cut timber for the benefit of local mills. After all, the BDNF's plan revision only designated 299,000 acres as suitable for timber production.¹⁰³ Supporters, however, believe that the stewardship areas/eligible lands provision offers a reasonable way to provide some long-term stability and predictability to an industry that is needed if forest restoration is to be accomplished in the future. They emphasize that the bill does not mandate so many board feet to be cut per year, but simply designates those lands that are *eligible* for harvesting in the future—all while complying with existing laws and new legislated standards.

(last visited Jan. 26, 2009) (questioning the decision to sacrifice portions of the West Pioneers and Sapphire Wilderness Study Areas in order to reach compromise).

⁹⁹ See e.g., George Wuerthner, *The Problems with the Beaverhead Deerlodge Partnership* (Nov. 20, 2007), available at <http://www.bhdlpartnership.org/PDFs/Critics-Wuerthner-Document-11-20-07.pdf> (last visited Jan. 22, 2009).

¹⁰⁰ PARTNERSHIP STRATEGY, at 5.

¹⁰¹ *Id.*, at 1.

¹⁰² 16 U.S.C. §1604(k) (2000).

¹⁰³ BDNF REVISED PLAN, at 443. This does not include the 1,614,000 acres designated as unsuitable lands but where timber harvest is allowed in order to meet other resource objectives. *Id.*, at 444.

Forest restoration is the third key part of the Partnership strategy. The partners are unified in their belief that the BDNF requires forest restoration through active forest management. For them, simply designating wilderness, much of which is high alpine “rocks and ice” country, is not sufficient. They have instead adopted a more landscape-level approach prioritizing a number of specific restoration objectives. These objectives include the removal of some permanent roads, restoring more natural patterns on the forest, modifying fuels along the forest periphery, reducing threats from fire and insects by modifying tree age class diversity, and improving aquatic habitats, among others.

Key to the Partnership’s restoration strategy is to “retain timber management as a viable management tool.”¹⁰⁴ The Partnership contends that many problems on the BDNF will not self-correct, but will require large-scale and multi-faceted restoration projects. To accomplish this, “landscape scale restoration projects,” which could be up to 50,000 acres in size, are mandated in the draft legislation. The bill requires implementation of at least one landscape-scale restoration project annually on eligible lands, while providing a very specific set of priorities and restoration requirements (e.g., road density standards, vegetative management prescriptions, new access roads shall be temporary, etc.).

Stewardship contracting is the fourth provision we wish to emphasize, as it would primarily be used to achieve the Partnership’s restoration objectives. In 1998 Congress extended the authority of the USFS to use stewardship contracting to achieve various land management goals such as restoring forest and rangeland health and water quality, improving fish and wildlife habitat, and reducing hazardous fuels, among other things.¹⁰⁵ The contracts allow the exchange of goods for services. In other words, the commodities produced through a contract, like timber, are exchanged for requested restoration services, like decommissioning roads or replacing culverts. Stewardship contracting allows a national forest to retain the receipts generated by selling timber for use in future stewardship projects. This provision is attractive to the Partnership because stewardship receipts do not have to return to the Department of Treasury’s general fund as required of timber sales.

The stewardship contracting approach to forest restoration is increasingly being used by the USFS (and Bureau of Land Management),¹⁰⁶ and the tool squares perfectly with the Partnership’s philosophy and objectives. The Partnership has little faith that restoration needs on

¹⁰⁴ PARTNERSHIP STRATEGY, at 12.

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

¹⁰⁶ See GAO, STEWARDSHIP CONTRACTING 2008, at 10.

the BDNF will be adequately funded through the normal appropriations process anytime soon, so it sees stewardship contracting as the best vehicle to accomplish its fuel reduction and restoration objectives. Proponents of stewardship contracting emphasize the tool's ability to foster collaboration, provide a more steady supply of timber, and to get work accomplished more effectively and efficiently "on-the-ground." Stewardship contracting, says the Partnership, "[W]ill help ensure that local communities benefit economically from restored landscapes and a dependable timber supply."¹⁰⁷ As discussed below, the Partnership's emphasis on stewardship contracting is also controversial, and some say not feasible, on the lodgepole pine-dominant BDNF.

The Partnership's proposal and draft legislation was received with considerable controversy. We analyze some of the specific arguments in Part III, but for now, readers ought to appreciate one important aspect of the debate. Much of it, for example, focuses on process and the degree of collaboration used to write the Partnership's proposal. Supporters emphasize its collaborative nature, while opponents focus on the narrow range of interests represented by the Partnership, and the way in which it was proposed to the USFS and then to lawmakers. Recall, for example, that the BDP proposal was submitted after the public comment period for planning had closed. Furthermore, some prominent interests are not part of the Partnership, including some litigious motorized recreation and environmental groups. Not at the table, for example, are those environmental groups that most often sue the BDNF.

III. QUESTIONS & ANALYSIS

The Beaverhead-Deerlodge Partnership (BDP) Proposal is one of several cases in which divergent interests are negotiating management of national forests and seeking codification of the resulting agreements. Given the current state of national forest management (as outlined in Part I), we believe that more place-based bills will be offered in the future. This section asks several questions that should be answered by those in favor and opposition to the BDP case and similar place-based initiatives. The questions, stated generally, are as follows:

1. Would a proliferation of place-based forest laws disunify the relatively consistent mission and mandate of the USFS? If so, would such a transformation be positive or negative?

¹⁰⁷ PARTNERSHIP STRATEGY, at 5.

2. Can place-based legislation be an effective way of resolving long standing political conflicts over forest management? Could legislation help reduce appeals and litigation?
3. Are place-based laws likely to conflict with preexisting agency mandates, environmental laws, and planning requirements?
4. Can greater certainty and stability for the timber industry be achieved through legislation while balancing for other uses and environmental values?
5. Do place-based proposals unnecessarily complicate the politics of wilderness designation? Do they make more straightforward wilderness bills more difficult to pass?
6. Is the 2001 roadless rule best viewed as a temporary measure that precedes future wilderness negotiations or a policy endpoint? How urgent is the need to designate some inventoried roadless lands as federal wilderness? Does such urgency necessitate greater compromise?
7. What positive and negative precedent would be set if the BDP and other place-based bills become law? Might “bottom-up” approaches inform a more system wide reform of national forest management? Would place-based laws eventually be used as a way to undermine federal environmental laws?
8. What financial benefits, risks, and limitations are there in expanded use of stewardship contracting? Would a proliferation of place-based laws challenge the USFS from a budgetary standpoint?
9. Are there politically feasible alternatives to a dysfunctional status-quo and place-based national forest laws?

Answers to these subjective questions will undoubtedly be nuanced, contingent, and value-laden. We hope that such questions will help frame future debate over place-based legislation and perhaps help us avoid potential pitfalls and unintended consequences. In the balance of this section we will address these questions and draw some of our own conclusions, some of them critical of the BDP proposed bill, others critical of a dysfunctional status quo. But the primary point of this section is to initiate dialogue and pose some questions that we believe have not been sufficiently considered.

A. Governance and Conflict Resolution (Questions 1-4)

Our first set of questions focus on governance and the ability of place-based laws to resolve conflict and deliver on promises made in legislation. If replicated more broadly, the place-based approach to forest management could further disaggregate the national forest system. Law-by-law, the national forests would start to resemble the national park and wildlife refuge systems. A relatively consistent mission and mandate applicable to all national forests would be replaced by more site-specific prescriptive laws detailing how particular units must be managed. There is nothing inherently wrong with this, but such a transformation should be recognized for what it is, and only be done after full-consideration. Part of that discussion should also include the question of whether place-based approaches make larger ecosystem and landscape-level planning more difficult. As evident in the Quincy/Sierra Framework case and others, there is a tension between finding localized solutions to national forest management and the need to sometimes plan and manage at larger landscape, and even regional, scales.¹⁰⁸

In theory, the place-based legislated approach might help resolve several enduring political conflicts, like roadless area management. Such issues could be dealt with squarely in legislation, rather than pushing them into alternative forums of conflict resolution, like interminable planning and rulemaking processes. In some respects, it is useful to analyze the BDP and other place-based proposals as a continuation of the multiple versus dominant use debate. Since the 1960s, calls have been made to replace the multiple use paradigm with some sort of dominant use arrangement, such as legislatively zoning some lands for protection and others for commodity production.¹⁰⁹ But unlike some of the top-down reform proposals of the past, the place-based approach seeks to do the same thing from the bottom-up. Both approaches seek to do via legislation what has historically been done via forest planning.

But place-based laws might also present the same sorts of challenges that face the national parks and wildlife refuges, such as how to simultaneously meet (and pay for) mandates expressed in organic and enabling legislation.¹¹⁰ And while a forest-specific law might resolve some conflicts, it could also reduce the agency's ability to adapt to future circumstances. Ever-

¹⁰⁸ For in-depth treatment of this paradox see the collective work of Robert Keiter, including *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS* (2003).

¹⁰⁹ See e.g., PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND* (1970), at 3, 48 (recommending a dominant use approach to public lands management). See also the collective work of Marion Clawson, including *The Concept of Multiple Use*, 8 ENVTL. L. 281 (1978); and *FORESTS FOR WHOM & FOR WHAT?* (1975)

¹¹⁰ See Fischman, *The Problem of Statutory Detail* (analyzing the problems associated with the trend of increased congressional involvement in national park management).

present in forest management is the tension between prescriptive law and agency discretion. The BDP bill, among other place-based proposals, could swing the pendulum too far by making adaptation more of an afterthought than a central governing principle. The BDP case therefore presents a paradox of sorts. On the one hand, the Partnership seeks to provide greater certainty and stability in forest management. On the other hand is the popular embrace of adaptive management and the principles on which it is based.¹¹¹ The question that emerges, then, is how the BDP bill, and similar initiatives, will ensure sufficient room to adapt to new problems and changed circumstances.

Our review of other place-based national forest laws should temper excitement about their potential for conflict resolution. At this point, for example, the Valles Caldera Act has not resolved very basic multiple user conflicts that are in some ways embedded into the legislation itself.¹¹² Instead, the resolution of such conflicts is simply the responsibility of the Trust, not a federal land agency. Core differences of opinion remain about what uses should be prioritized by the Trust, how to apply NEPA, and the well-worn question of how to balance resource use with environmental protection.¹¹³

Unit-specific laws like the Tongass Timber Reform Act and the Herger-Feinstein Act have engendered more conflict than consensus. Part of this is due to the contested statutory language in each Act (e.g., what constitutes “market demand”), and part is due to how such laws fit into the preexisting legal/planning framework. Recall, for example, the ongoing problem of how to reconcile differences between the Herger-Feinstein law and the Sierra Framework plan, all while complying with NEPA, NFMA, and the ESA. The USFS has been forced to walk this minefield with legal grenades thrown from all directions. When the USFS tries to implement the

¹¹¹ Long favored by scholars and scientists, the rhetoric of adaptive management is now embraced by the USFS, on paper at least. See e.g., 73 Fed Reg. 21,468 (Apr. 21, 2008) (stating that land management plans are strategic in nature and “one stage in an adaptive cycle of planning”). Monitoring is a key part of any adaptive approach to forest management. Until monitoring becomes required and funded, we are suspicious of agency promises of adaptive management. See generally Thomas H. DeLuca, Gregory H. Aplet, and Bo Wilmer, *The Unknown Trajectory of Forest Restoration: A Call for Ecosystem Monitoring* (The Wilderness Society, Science & Policy Brief: Dec. 2008) (“Federal land management has generally exhibited a chronic omission of feedbacks in dictating future management approaches”). *Id.*, at 5; and GOVT. ACCOUNTABILITY OFFICE, WILDLAND FIRE REHABILITATION AND RESTORATION: FOREST SERVICE AND BLM COULD BENEFIT FROM IMPROVED INFORMATION ON STATUS OF NEEDED WORK (GAO-06-670) (reviewing the lack of monitoring in fire rehabilitation and restoration projects).

¹¹² 16 U.S.C. §698v-3 (establishing a multiple use sustained yield purpose of the Preserve)

¹¹³ See April Reese, *Cash-Strapped Valles Caldera Preserve Seeks New Revenue Amid Calls for Federal Takeover*, LAND LETTER (Mar. 19, 2009); April Reese, *Program in Valles Caldera National Preserve Comes Under Fire*, LAND LETTER (Dec. 8, 2005); and April Reese, *Valles Caldera “Experiment” Lacking in Public Input, Critics Say*, LAND LETTER (Dec. 14, 2006).

Sierra Framework and its interpretation of NEPA, NFMA, and the ESA, it gets sued by the Quincy Library Group for subordinating the Herger-Feinstein law; and when the agency tries to implement the Herger-Feinstein law, its gets challenged by environmental groups for not complying with NEPA, NFMA, and the ESA.¹¹⁴ Where the chips ultimately fall is still uncertain, but it is safe to say at this point that the Herger-Feinstein Act did not resolve core conflicts about managing the Sierra Nevada.

Each place-based law will inevitably be tested by litigants and parsed by the Courts. The potential for legal challenge becomes even more pronounced when preexisting environmental laws are safeguarded in place-based legislation. Consider, for example, the proposed BDP bill in its current form. It includes enforceable mandates that are simply added to preexisting environmental laws and processes. But what happens if the BDNF decides, after conducting its NEPA analysis, that such mandates cannot be reconciled with its other legal responsibilities?

Of particular concern to us are some of the expectations expressed in the BDP proposal. First is the expectation that the legislation will help the BDNF cut through its “process predicament.” Without additional funding that could expedite the environmental review process we fail to see how additional legislation will help matters. When it comes to meeting its NEPA obligations, the USFS needs more funding, leadership, and institutional support, not more law. We also fear the inevitable backlash that will result if the BDP’s timber targets are not met on time because of the agency’s NEPA requirements.

Even less realistic is the BDP’s belief that greater certainty and stability for the timber industry can be achieved through legislation. This pursuit is a dominant theme in natural resources policy and its application to forest management has been debated *ad nauseum*.¹¹⁵ It is a

¹¹⁴ See e.g., *Earth Island Institute v. U.S. Forest Serv.*, 351 F. 3d 1291 (9th Cir. 2003) (finding a post-fire logging project in violation of NEPA and NFMA); *Environmental Protection Information Center v. U.S. Forest Serv.*, 451 F. 3d 1005 (9th Cir. 2006) (rejecting NEPA, NFMA, and ESA claims against a fuel reduction project); *Sierra Nevada Forest Protection Campaign v. U.S. Forest Serv.*, 2005 WL 1366507 (E.D. Cal.), *aff’d* 166 Fed. Appx. 923, 2006 WL 148966 (9th Cir.) (rejecting a NEPA cumulative effects challenge to a fuel reduction project); and *Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 WL 2583036 (E.D. Cal.) (finding NEPA and NFMA violations related to the protection of the California Spotted Owl). See also Keiter, *Breaking Faith With Nature*, at 229-233 (analyzing these cases and others)

¹¹⁵ See e.g., Con H. Schallau and Richard M. Alston, *The Commitment to Community Stability: A Policy or Shibboleth*, 17 ENVTL. L. 429 (1987). They note that “[p]ublic land legislation contains a general theme of concern for the economic stability of communities. However, there is little explicit statutory direction on how large a role community stability concerns should play in Forest Service decisions.” *Id.* at 460. They go on to say that “[c]onfusion about community stability stems from the fact that although Congress frequently reaffirms its desire to achieve community stability, it has not provided any operational guidelines for doing so.” *Id.* at 479. See also *Report of the Society of American Foresters National Task Force on Community Stability* (1989) (on file with author) (noting that “the agency’s community stability policy is permissive rather than prescriptive.”), at 13; James P. Perry, *Community Stability:*

shibboleth to some, and unlikely to be achieved according to a former USFS Chief,¹¹⁶ among other skeptics who question the assumptions on which the concept is based.¹¹⁷ There are simply too many external and uncontrollable impediments to achieving this objective: including fluctuating housing starts, cheap Canadian imports, vacillating court decisions, swings in agency budgets, and so on. And then there is the problem of how to balance such an objective with other environmental values and legal responsibilities. The few place-specific laws that include language about economic stability, such as the O&C Lands Act¹¹⁸ and those governing the Tongass,¹¹⁹ have clashed with other environmental statutes and planning requirements. Unless

Is There a Statutory Solution? in Community Stability in Forest-Based Economics, Proceedings of a Conference in Portland, Oregon, November 16-18, 1987 (Dennis C. Le Master & John H. Beuter, eds.) (noting that “Congress has not, in any legislation which applies generally to all National Forest System lands, provided any direction that requires the agencies to meet a community stability requirement.”), at 32; and Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND. L. REV. 81 (1993) (tracing the concept’s lineage and debate).

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

¹¹⁶ For former USFS Chief Jack Ward Thomas, “Given the myriad of interacting variables, it is time for concerned citizens and leaders to accept the reality that the dream of a stable timber supply from public lands is an illusion.” Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 14 (1996).

¹¹⁷ See e.g., SAMUEL T. DANA & SALLY FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* (2d ed. 1980), 332.

¹¹⁸ Consider, for example, conflict over BLM management of O & C Lands, governed under the Oregon and California Lands Act of 1937, 43 U.S.C. §1181j (2006). Unlike other federal land laws and regulations, the O&C Act includes specific but contested language pertaining to community stability. Classified lands shall be:

managed...for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. 43 U.S.C. §1181a.

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

Whether or not the O&C Act is a multiple or dominant use statute has received a lot of debate. The Courts have also wrestled with the Act’s provisions and how they were meant to be prioritized. Though timber shall be supplied, O&C lands are also subject to NEPA, the ESA, and other environmental statutes; thus setting up multiple conflicts over their management. See e.g., *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F. 2d 1174 (9th Cir. 1990) (interpreting the O&C Act as a dominant use statute that limits the ability of the BLM to manage for non-timber purposes). But see Deborah Scott and Susan Jane M. Brown, *The Oregon and California Lands Act: Revisiting the Concept of “Dominant Use,”* 21 J. ENVTL. L. & LITIG. 259 (2006) (challenging the dominant use interpretation of the O&C Act and putting forth a broader conception of community stability)

¹¹⁹ ANILCA required Congress to provide at least \$40,000,000 annually so that the Tongass could meet its mandate of supplying at least 450 million board feet of timber for sale each year. Pub. L. No. 96-487 §705(d). This timber supply mandate ran roughshod over other values and legal obligations. See Nie, *Governing the Tongass*, at 400-403. As

Congress clearly prioritizes one value over the other, and we doubt it will, some tensions or conflicts will persist.

This is not to say, of course, that local mills and rural communities deserve little consideration. They deserve more, and carefully-screened restoration-based programs, and tools like stewardship contracting, should be used in this regard.¹²⁰ Even more important would be a serious federal investment in forest restoration that could be strategically targeted to benefit rural communities and local contractors.¹²¹ The BDP is to be admired for its focus on sustainable forests *and* communities, and for understanding the benefits of having a functional timber industry in the state. But we are skeptical that the BDP bill, and place-based legislation in general, is the best way to secure these values. It is, in short, the wrong tool for the right job.

B. Wilderness Politics (Questions 5-6)

There exists in wilderness politics a tension between idealism and pragmatism.¹²² This tension is evident in the Wilderness Act and subsequent wilderness laws, for each are generally the product of negotiation and compromise. This framework, though simplified, is particularly helpful to understanding debate over the BDP proposal. On one side are those idealists who view the proposal as part of a dangerous trend whereby wilderness designation is exchanged for some type of economic development. This model, they say, is different than that practiced in the past because of the scope of concessions made in the legislation. Critics fear that it creates a precedent and expectation that future wilderness bills must be packaged with economic development provisions if they are to be politically feasible.¹²³ Wilderness idealists allege that the

discussed above, ANILCA's controversial timber supply mandate was replaced with language requiring the Tongass to seek to meet market demand for Tongass timber.

¹²⁰ See, for example, the collaborative approach used by the Montana Forest Restoration Committee to screen and implement restoration projects, available at <http://www.montanarestoration.org/> (last visited Jan. 28, 2009)

¹²¹ Related ideas and proposals have become more detailed because of the 2009 federal economic stimulus package. The Montana Forest Restoration Committee reckons that \$100 million of forest restoration projects are "shovel ready" in Montana. See also Sustainable Northwest, Rural Green Economy Initiative, available at <http://www.sustainablenorthwest.org/quick-links/resources/economic-stimulus-1/RuralGreenEconomyInitiative.pdf> (last visited Jan. 28, 2009) (showing linkages between forest restoration and community development).

¹²² See John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1 (2005) (placing wilderness politics and strategy in this context).

¹²³ Chairman of the House Committee on Natural Resources, Rep. Nick Rahall (D. WV), called for cleaner wilderness legislation in 2005: "Wilderness designations should not be the result of a quid pro quo. They should rise or fall on their own merits... We all understand that compromise is part of the legislative process, yet at the same time, I would submit that wilderness is not for sale. Simply put, I believe we should not seek the lowest common denominator when it comes to wilderness and saddle a wilderness designation with exceptions, exclusions and

pragmatists are now too eager to compromise and make concessions to protect too small of areas as wilderness. Instead, idealists prefer to hold out for something better, such as a “cleaner” and more inclusive region-wide or statewide wilderness bill.

Of course, pragmatists see things differently. Wilderness has always been about compromise, they insist, and concessions have to be made to move the agenda forward.¹²⁴ Montana’s political context is also important in this regard. The state’s “wilderness drought” will continue unless Montana’s Congressional delegation says otherwise, and parts of the delegation support negotiated “home-grown” initiatives, though what this means exactly is far from clear.¹²⁵ The pragmatists believe that place-based approaches reduce the exposure and risks inherent in wilderness politics. After all, the wilderness proposals, and negotiated details, are brought forth from the bottom-up, thus perhaps making wilderness a safer political issue.

The foregoing lead to some questions. First, what might the BDP bill, and place-based legislation in general, mean for future wilderness designation? Will economic development provisions, as those provided in the BDP bill and other recent wilderness laws, become de facto requirements? And does the place-based approach make more difficult the possibility of passing a larger and simpler wilderness law in the future?¹²⁶ At the time of this writing, we suspect the answer to be somewhere in the middle. Recent wilderness laws and proposals include those with economic development provisions and more straightforward traditional approaches.¹²⁷ In any event, these questions deserve consideration because of the precedent that could be established. And the importance of precedent is made clear by the special provisions that are often replicated

exemptions.” Greg Stahl, *CIEDRA Begins Legislative Journey*, IDAHO MOUNTAIN EXPRESS, Oct. 28, 2005, available at <http://www.mtexpress.com/index2.php?ID=2005106024> (last visited Feb. 10, 2009)

¹²⁴ See e.g., DOUG SCOTT, *THE ENDURING WILDERNESS* (2004) (reviewing the compromises and accommodations that helped secure passage of the Wilderness Act and subsequent wilderness laws).

¹²⁵ Montana Representative Denny Rehberg is willing to discuss wilderness but strongly believes that “the only way any piece of legislation is going to be successful is through a consensus-building process that starts at the local level.” And a spokesperson for Montana Senator Max Baucus said that any wilderness proposal must “have the support of the local community, boost economic development and jobs, and be a local initiative that includes input from all the interested parties.” Rob Chaney, *Wilderness Proposals, Debates Cropping Up*, MISSOULIAN (Feb. 23, 2009), at A1, A7.

¹²⁶ For a discussion of this issue by wilderness champion and former Montana Representative Pat Williams, see Bill Schneider, *Pat Williams on Wilderness and the Beaverhead-Deerlodge Partnership*, NEWWEST (Dec. 13, 2008) available at http://www.newwest.net/topic/article/pat_williams_on_willerness_the_beverhead_deerlodge_partnership/C41/L41/ (last visited Feb. 9, 2009) (recommending a larger and more inclusive Montana wilderness bill than provided in the singular BDP bill).

¹²⁷ The Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, includes several straightforward traditional wilderness designations.

in wilderness laws. Once used, provisions related to such matters as water rights and buffer areas are regularly stamped onto future wilderness bills as a matter of course.¹²⁸

Debate over the BDP foreshadows future conflicts about roadless area management. Some conservation interests oppose the BDP approach because it fails to protect all roadless areas in the BDNF or does not designate enough of them as federal wilderness. Some groups are willing to gamble that roadless areas on the BDNF will be permanently protected once the roadless rule litigation runs its course. Why sacrifice an acre, in other words, if this administrative protection is forthcoming. On the other hand are those who view the roadless rule as a more temporary stop-gap measure designed to keep the roadless pieces in place until their permanent status can be decided through legislation. After all, the 2001 and 2005 roadless rules do not usurp Congress's prerogative to designate wilderness or to release roadless lands to multiple use management.

Also important to consider are the differences between a federal wilderness and a USFS-managed roadless area. Perhaps most important is that the 2001 roadless rule does not prohibit motorized recreation on roadless lands. Calling the 59 million acres protected under the 2001 rule "de facto wilderness" is simply wrong because federal wilderness law clearly prohibits motorized recreation and the 2001 rule does not. Motorized recreation is the wildcard in this story. Its usage in roadless areas could be prohibited by travel management plans. But more plausible is that the USFS will allow some use in roadless areas and such use will hamper future efforts at designating areas as wilderness. There is some urgency to designating areas as federal wilderness because of growing threats posed by motorized recreation. This reality forces critics of the BDP and other wilderness proposals to answer how they propose to address this situation. What happens, for example, to roadless lands that are not soon protected as wilderness? Will increasing motorized use in these areas, by design or default, make the question of future wilderness designation moot? Choosing to wait for a more inclusive and pure wilderness law is perfectly understandable. But holding-out comes with the significant risk that some roadless lands will be even more contested by motorized recreationists in the future.

¹²⁸ See NRLC, *Special Use Provisions in Wilderness Legislation* (documenting special use provisions and precedents in wilderness law).

C. Precedent (Question 7)

What type of precedent would be set if the proposed BDP bill, and similar place-based initiatives, become law? On the one hand, some applicable lessons might be learned from this case and applied elsewhere. All sorts of ways in which to reform national forest management have been proposed in the past,¹²⁹ and most of those proposals focus on systemic measures imposed on all national forests from the top-down.¹³⁰ Rarer are proposals seeking to learn lessons from the bottom-up, and the BDP offers opportunity in this regard. A surprising number of Partnership participants and critics express concern about the general state of national forest management and its legal/planning framework. Change must happen, they insist, but why not start thinking at the forest-level as opposed to the system-wide level when it comes to reform? Perhaps the BDP and similar initiatives can inform a more system-wide inquiry about national forest law and what can be done about it.

A dangerous precedent could also be set by the BDP legislation. For it to become law, at least part of Montana's Congressional delegation would most likely have to support it. If this support is achieved, the bill's chances of success are greatly improved, as Congress has a history of deference when it comes to wilderness politics. But there is also an expectation that such deference will be shown to other state congressional delegations. So, for example, if Idaho's delegation defers to Montana's in passing the BDP bill, we should expect that Montana's delegation will play by the same rules. There are exceptions to this reciprocity of course, due to differences in context and a bill's substance. Nonetheless, this is generally the way in which the game is played. And it is for this reason why we urge caution in proceeding with the place-based approach to national forest management. If the recent spate of place-based bills become law, there will certainly be more offered in the future. And if history offers any indication, some of those proposals will be even more controversial than the BDP.

For a recent example, consider the Clearwater Basin Project Bill considered in 2004. This "charter forest" and pilot-project would have governed parts of the Clearwater and Nez Perce

¹²⁹ See e.g., MARTIN NIE, THE GOVERNANCE OF WESTERN PUBLIC LANDS: MAPPING ITS PRESENT AND FUTURE (2008) (evaluating various options in public lands law reform); and Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127 (2005) (analyzing several reform proposals, including place-based and "hybrid" models).

¹³⁰ See e.g., Elizabeth Beaver, et al., *Seeing the Forest Service for the Trees: A Survey of Proposals for Changing National Forest Policy* (Boulder, CO: Natural Resources Law Center, 2000).

National Forests in Idaho.¹³¹ It contained several contested provisions that environmental interests believed set a dangerous precedent for how *National* Forests ought to be managed.¹³² Among these was a provision giving an “advisory” group (consisting of Idaho residents only) an undue amount of power to set forest priorities, schedules, and agendas.¹³³ The bill also imposed deadlines for required environmental analyses. And if such requirements were not performed in time, their lack of completion could not be used as a basis for challenging related projects.¹³⁴ For these and other reasons, the Idaho bill was defeated, but the political dynamics could be different in the future if place-based enabling legislation becomes more widely used in neighboring states.

Potential for abuse is even more acute if individual forest bills contain special privileges and exemptions that are not available elsewhere. Consider, for example, the case of the Black Hills National Forest. Former South Dakota Senator Tom Daschle used the appropriations process to codify a negotiated settlement regarding future management of part of the Black Hills National Forest.¹³⁵ The most controversial part of the deal exempted some fuel reduction projects from NEPA analysis, lawsuits, and administrative appeals.¹³⁶ This special treatment quickly became political fodder as several other members of Congress asked why Senator Daschle and the Black Hills should get exemptions not offered elsewhere. This outcry was then followed by several copycat legislative proposals seeking the same exemptions for other national forests.¹³⁷ The lesson from this case, and others like it, is that subsequent efforts in codifying place-based agreements could have a dangerous snowball effect.

As discussed above, the BDP bill has its share of controversial provisions. The process used to craft the proposal has also drawn fire, from perceptions of exclusivity to its consideration by the USFS post-public comment period. On a more general level are those concerned about giving priority and a privileged voice to self-selected interests in managing national forests. And then there is the question of what types of pork will inevitably be stuffed into future proposals. Future place-based bills will be scrutinized to some degree and may pass or fail on their merits

¹³¹ Other controversial pilot projects were advanced in Idaho by a Federal Lands Task Force that sought increased active management of the National Forests. See Federal Lands Task Force Working Group, *Breaking the Gridlock: Federal Land Pilot Projects in Idaho* (A Report to the Idaho State Board of Land Commissioners, 2000).

¹³² *Clearwater Basin Project Act; Arapaho and Roosevelt National Forests Land Exchange Act; and Highlands Conservation Act: Hearing Before the Senate Comm. on Energy and Natural Resources*, 108th Cong. (Mar. 24, 2004).

¹³³ S.433, §3 (108th Cong.)

¹³⁴ S.433, §4(f)(3) (108th Cong.).

¹³⁵ Pub. L. No. 107-206, §706 (2002).

¹³⁶ Pub. L. No. 107-206, §706(j).

¹³⁷ This coalition represented members from almost every Western state. See April Reese, *Daschle Fuels Exemption Fires up Western Republicans*, LAND LETTER (Aug. 1, 2002); and Brian Stempeck, *Western Senators Pledge to Expedite Fuels Treatment Projects*, GREENWIRE (Aug. 2, 2002)

alone. But at this point it is worth considering how we might ensure that positive precedent is set and that future proposals are environmentally sound and in the public interest.

D. Funding and Implementation (Question 8)

As discussed above, the BDP would be primarily implemented and paid for by using stewardship contracting authority. For good reason, the Partnership wants to free the BDNF from the highly uncertain congressional appropriations process, a process that chronically underfunds the USFS and its needed restoration work. If lawmakers continue to under invest in our federal lands and the agencies responsible for managing them, we will undoubtedly see increased use of stewardship contracting and other questionable ways in which national forests try to become more financially self-sustaining (e.g., user fees). If used appropriately, stewardship contracting could help achieve some core BDP objectives and help stretch scarce dollars. But we have questions about its viability as a primary implementation strategy and raise concerns about its potential abuse and related consequences.

The BDNF is a lodgepole pine-dominant forest and some people are skeptical that there is enough economic value in such forests to make stewardship contracting viable on such a massive scale.¹³⁸ Economically valuable trees, in other words, need to be harvested in order to pay for associated restoration projects. If timber value is overestimated, or markets for small diameter timber do not materialize or cannot be sustained, restoration projects will not be financed. No one can be certain about what the timber market will bear in the next few years, so this is speculation mostly. The point is that some risks and uncertainties of the proposal cannot be legislated away.

If enacted, the BDP bill would make stewardship contracting more of a program than a tool, as it would be associated with “official accomplishment targets,” and it was not designed for such a responsibility.¹³⁹ If overused, stewardship contracting has the potential of creating problematic incentives. As explained above, its authority allows a national forest to retain receipts for use on other stewardship projects. The requirement to use stewardship monies on

¹³⁸ Lodgepole pine accounts for 46 percent of the forested area, 1.26 million acres of the BDNF. BDNF REVISED PLAN, at 452.

¹³⁹ Though used in a different context, the GAO makes a distinction between tools and programs. *See* GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL LAND MANAGEMENT: USE OF STEWARDSHIP CONTRACTING IS INCREASING, BUT AGENCIES COULD BENEFIT FROM BETTER DATA AND CONTRACTING SERVICE, GAO-09-23 (Nov. 2008), at 10. [Hereinafter GAO, STEWARDSHIP CONTRACTING 2008]

future stewardship projects distinguishes it from other USFS accounts and slush funds that have caused considerable controversy and recent judicial rebuke.¹⁴⁰ Nonetheless, there is a potential for creating a dangerous dependency on stewardship sales. Generating a new stream of revenue for the USFS was not the primary objective of the Stewardship Contracting law.¹⁴¹ And with diminished budgets, USFS officials may reasonably wish to sell the largest and most economically valuable trees as part of a stewardship contract, so that more dollars can be used to accomplish broadly defined restoration goals.¹⁴²

The greater danger here is that the USFS will begin to view this contracting approach—and selling more or bigger trees to do more fuel reduction work—as its only option. This was recently the case in a Herger-Feinstein Act-related project in California. In this case, the USFS only analyzed this financing option in its NEPA process, essentially treating the arrangement as the only way the agency can do restoration work.¹⁴³ But the state of California questioned this assumption, and the Ninth Circuit found the agency’s view too limited and in violation of NEPA.¹⁴⁴ Alternative ways to fund fire reduction objectives were not analyzed by the agency, such as requesting a special appropriation from Congress, altering the Service’s fuel treatment program, or re-prioritizing other funding. It is hard not to sympathize with the agency in this regard. Perhaps it is simply adjusting to its new political reality, and trying to use whatever tools it can to get work done. But the public, and its interest groups, should not acquiesce so easily and let Congress off the hook. As the Ninth Circuit asks, if fuel reduction work is of the first importance, and “[i]f the USFS does not have enough, why should not Congress be asked to give

¹⁴⁰ Take, for example, the K-V Trust Fund (established by the Knutson-Vandenberg Act of 1930 (16 U.S.C. §§576-576b)). It helps pay for reforestation costs and some overhead expenses and has been criticized for creating incentives to offer uneconomical timber sales. More recent criticism has been directed at the agency’s Salvage Sale Fund (created by NFMA, 16 U.S.C. §472a(h)(2000)) which allows the USFS to retain money from salvage sales, and to spend it with some discretion, rather than return it to the Federal Treasury. The Ninth Circuit noted the agency’s “substantial financial interest” in harvesting timber as part of this program while questioning the agency’s decision making in post-fire logging analyses and disputes. *See Earth Island v. U.S. Forest Service (Earth Island II)*, 442 F.3d at 1147 (9th Cir. 2006); and *Earth Island v. Forest Service (Earth Island I)*, 351 F. 3d 1291 (9th Cir. 2003).

¹⁴¹ Interim guidelines for stewardship contracting made clear that “[d]eriving revenue from the sale of any by-products or other materials designated for removal from these stewardship projects will be a secondary objective to the restoration goals.” *Stewardship End Result Contracting*, 68 Fed. Reg. 38,285, 38,286 (June 27, 2003).

¹⁴² How retained receipts are spent by the USFS is unknown because the agency doesn’t track subsequent expenditures. GAO, *STEWARDSHIP CONTRACTING* 2008, at 20.

¹⁴³ NEPA requires agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed plan that has significant environmental effects. 40 C.F.R. §1502.14(a) (2000).

¹⁴⁴ *Ctr. for Biological Diversity v. Rey*, 526 F. 3d 1228 (9th Cir. 2008). In a concurring opinion, Judge Noonan continues to explore possible conflicts of interest apparent in the USFS’s approach to funding fuel reduction objectives. 526 F. 3d 1233.

it more?”¹⁴⁵ In our view, stewardship contracting, among other tools used to promote financial self-sufficiency, does not absolve Congress of its duty to fund the USFS at responsible levels.

There is also some risk when entering into long-term multi-year stewardship contracts. These contracts are important to creating some certainty of timber supply, as desired by the BDP, and to the possible development of markets for small-diameter timber. The long-term approach is logical on many levels because it facilitates industry investment and allows the agency to take a more landscape-level view of forest restoration. But circumstances change, and what may be cost effective one year may be different the next. Take, for example, the case of the “White Mountain Project” in Arizona. The Government Accountability Office (GAO) reports that this very large stewardship project has incurred greater costs than expected and that such costs have “taken a substantial toll on the forest’s other programs,” including range, wildlife, hazardous fuels, and vegetation and watershed management.¹⁴⁶ Furthermore, some other fuel reduction projects were not being completed because their funding sources were being “monopolized” by the White Mountain Stewardship Project.¹⁴⁷ Other national forests in the region also paid a price to service the terms of this contract, and “[a]s the region has redirected funds toward the White Mountain project, these other forests have become resentful of the disproportionate amount of funding the project has received.”¹⁴⁸

We also question how future place-based laws might be funded in the future. Generally speaking, USFS budgets are programmatically-aligned, not place/forest-centric. This means that money for programs on the national forests are based on a limited set of resource-specific line-items that get “stovepiped” from the Washington Office to the individual national forests. This approach has been criticized because of the integrated (ecosystem-based) nature of forest management, and because some prioritized activities (e.g., restoration) do not have their own line-items. All sorts of recommendations have been made in the past about how to fix USFS budgetary problems, including the possibility of a “place-based budgeting” structure.¹⁴⁹ From a budgetary perspective, the place-based approach could also move the national forests closer to

¹⁴⁵ *Id.*, at 10.

¹⁴⁶ GAO 2008, at 49.

¹⁴⁷ *Id.*, at 50.

¹⁴⁸ *Id.*

¹⁴⁹ See V. Alaric Sample & Terence J. Tipple, *Improving Performance and Accountability at the Forest Service: Overcoming the Politics of the Budgetary Process and Improving Budget Execution*, Discussion Paper 99-01 (Wash. D.C.: Pinchot Institute for Conservation, 1999) (draft report on file with authors) (exploring the possibility of replacing the fragmented programmatically-based budget structure of the USFS with one based on budget line items representing national forests).

that of the national parks, where state congressional delegations treat parks like their own fiefdoms, exercising inordinate control over a unit via committee and purse strings.¹⁵⁰

Place-based legislation—and its typical mix of wilderness, restoration, and economic development—bring to the fore several budget-related questions. How, for example, will budgets be distributed by the Washington and Regional Offices if an increasing number of national forests have their own legal mandates and costly responsibilities? Might funding for the BDP be taken from other national forests in the region? Will more senior congressional delegations be more successful in securing funding for place-based laws in their states? Will it create a system of “haves” and “have nots” in the national forest system? Do we want Congressional appropriations committees determining forest-by-forest budgets? And perhaps most important, would these budgetary situations benefit the national forest system as a whole? Such questions should be addressed before the place-based approach becomes replicated more broadly.

E. Alternatives (Question 9)

If not this, then what? That compelling question was asked by several supporters of the BDP bill interviewed for this Article. The point is well-taken, as it is difficult to defend the status quo when it comes to forest management. The Partnership took the bold and pro-active step of putting its vision of successful forest management into action. Critics of the BDP are therefore obliged to provide their vision of success and a feasible alternative to the status quo. In this spirit, we offer some ideas and options that might be considered as either a substitute or supplement to place-based legislation. They are mostly conceptual, but all put a premium on caution, experimentation, and scale.

The BDP is essentially an experiment in forest management with some inherent risks. One way of ensuring that future proposals are procedurally and substantively sound is to begin a more deliberate and organized period of experimentation. Instead of having to consider a flurry of place-based bills on an ad-hoc basis, Congress could pass an umbrella statute authorizing experiments in national forest management, without the need for multiple forest-specific laws. This umbrella legislation would provide the legal parameters necessary to ensure that proposals are in the national interest and are not a backdoor way of undermining environmental

¹⁵⁰ For related analyses see Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, at 803-806; and Robert Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127 (2005), at 1127, 1209.

regulations. Congress could also provide some general objectives and necessary components if proposals are to move forward, such as requiring that all proposals have a mandatory monitoring program in place.

Two general frameworks should be considered in this context. (We are interested in them mostly because of their design, and not necessarily because of their substance). The first is provided by the Collaborative Forest Landscape Restoration Program, established in 2009.¹⁵¹ The Program selects and funds carefully screened landscape-level forest restoration projects. Such projects must be in accord with existing environmental laws and be developed and implemented through a collaborative process. Up to ten proposals can be funded per year (with only two proposals in any one region of the national forest System), and each project is evaluated based on several criteria. The program authorizes \$40,000,000 per year (FY 2009-2019) to be used to pay up to 50 percent of selected restoration projects. Once chosen, these projects must incorporate best available science, be monitored by multiple parties, and submit reports to selected congressional committees. The Program has received broad-based support, from environmental groups to the forest products industry.¹⁵² Many of the Program's goals and objectives are similar to those advocated by the BDP, including long-term and landscape-level restoration, rural economic development and stability, collaboration, and more secure funding. But unlike the place-based bills reviewed above, the Program's demonstration projects are subject to predetermined rules and national-level oversight.

The "Region 7" proposal provides another relevant example of how future experimentation could be organized.¹⁵³ If enacted by Congress, a virtual region of the USFS would be created in order to house innovative approaches and different models of forest management. (Region 7 of the USFS was split into Regions 8 and 9 and thus basically disappeared). After receiving congressional authorization to experiment, different trials would be selected in order to try new things and foster learning. Experiments, trials, and pilot projects could flow from the bottom-up and be housed within this region. Details notwithstanding,

¹⁵¹ The Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, Title IV.

¹⁵² See e.g., *Collaborative Ecological Restoration, Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong. (2008)

¹⁵³ See *Community-Based Land Management and Charter Forests, Hearing Before the House Comm. on Resources*, 107th Cong. (2002), at 7-11 (statement of former Congressman Pat Williams) (providing an outline of the Region 7 proposal); and Daniel Kemmis, *Region 7: An Innovative Approach to Planning on or Near Public Lands*, LAND USE L. & ZONING DIGEST (2003), at 3.

Region 7's general framework—authorizing and facilitating experimentation based on pre-established guidelines and sideboards—deserves congressional consideration.

Proposals offered in this context could still have a wilderness component, but the wilderness bills would be considered separately by Congress. Such a process would not preclude future negotiated deals that mixed wilderness designation with some type of economic and restoration component. It would simply isolate the wilderness legislation for congressional consideration, and then place some of the more experimental provisions under some other legal authority and structured system. If done in this fashion, wilderness legislation would be more straightforward in the future, and there would still be a system designed to house alternative approaches to national forest management. This design does not provide the level of certainty and stability sought by some interests, but as discussed above, we doubt that place-based laws can meet this objective anyway.

New approaches to forest planning could also be tested within an experimental framework. As discussed earlier, widespread dissatisfaction with forest planning processes partially explains the growing interest in place-based legislation.¹⁵⁴ BDP participants seem satisfied with neither the 1982 or 2005/08 planning regulations. In the search for binding commitments and greater predictability stakeholders now look to Congress rather than a hobbled USFS. But like it or not, some type of forest planning is here to stay. Instead of abandoning the 1982 or 2000 planning regulations in favor of an untested “paradigm shift” in planning (the 2005/08 regulations), why not instead try a series of planning experiments on a smaller scale? All of these would be housed within an experimental framework with oversight and sideboards.

A broader-gauged approach is for Congress to revisit forest planning law. The place-based proposals reviewed in this Article show that stakeholders are trying to achieve greater certainty, among other objectives, via place-based legislation and that this is partly because of problems related to NFMA and its interpretation by the Courts and implementation by the USFS. Hence, if so few people seem satisfied with forest planning, then why not make singular changes to NFMA, rather than pass a series of place-based laws? After all, Congress could make

¹⁵⁴ Still relevant is the critique that NFMA's forest planning mandate was a “solution to a non-existent problem.” Former Forestry Professor and Dean Richard Behan argues that the Bitterroot and Monongahela controversies—two cases that catalyzed passage of NFMA—were essentially place-based conflicts that had little to do with planning. These conflicts, he says, could have been solved without elaborate and questionable planning requirements. See Richard W. Behan, *The RPA/NFMA: Solution to a Nonexistent Problem*, 88 J. FORESTRY 20 (1990). For an elaboration see RICHARD BEHAN, *PLUNDERED PROMISE: CAPITALISM, POLITICS, AND THE FATE OF THE FEDERAL LANDS* (2001).

the Court's decisions in *Ohio Forestry* and *SUWA* irrelevant if it wanted to. Instead of focusing on symptoms related to a perceived broken planning process, this approach digs deeper to make root-level changes to forest planning law.

More particular to the BDP, and an altogether different option, is going smaller in scale. Instead of trying such a novel approach on one of the nation's largest national forests, why not try something smaller first? It would certainly be possible to carve out some space on the BDNF, even at the district level, and try some of the things proposed by the Partnership. Such an approach would not be landscape-scale, but neither would it be so scary to so many different interests. And if it worked as envisioned at this smaller scale, it would be easier to jump to something larger in the future. The question, then, is why not try something smaller first, monitor the results of the carefully screened experiment, and proceed from there?

Though it didn't work out in the BDP case for various reasons, another option is to embed place-based proposals into the forest planning process for agency consideration. Ideally such proposals could be analyzed by the USFS in a NEPA-based planning model. But that is now problematic because of agency planning regulations (currently being challenged in Court) that no longer utilize NEPA at the general planning stage. In any case, this approach has been used in the past in other contexts. Take, for example, the proposed reintroduction of grizzly bears into the Selway Bitterroots of Montana and Idaho. The U.S. Fish and Wildlife Service chose a collaboratively written preferred alternative giving a citizen management committee some implementation authority.¹⁵⁵ The proposal was never implemented, but many interests still embrace a process that merged collaboration into the more formalized NEPA process.

There is also some history of groups submitting their own forest planning alternatives for agency consideration, though these efforts are not always collaborative or detailed in nature. As discussed above, some interests believe that forest planning processes are more of a problem than a solution and that legislation offers more permanent resolution of issues. Critics would also remind us of the tenuous nature of commitments made in forest plans and that this option still gives the USFS final decision making authority. This is true, but it is also worthwhile to consider how we might combine the best of place-based legislation with the security, rigor, transparency, and public process required of NEPA. Most of the place-based proposals reviewed

¹⁵⁵ U.S. FISH AND WILDLIFE SERV., GRIZZLY BEAR RECOVERY IN THE BITTERROOT ECOSYSTEM: FINAL ENVIRONMENTAL IMPACT STATEMENT (Wash., D.C.: Dept. of Interior, 2000), at 2-11, 2-17.

above will still require NEPA analysis, but only for projects that implement their proposed legislation. This option differs in that it requires the proposal itself to be subject to NEPA.

CONCLUSION

There is increasing interest in place-based legislative approaches to national forest management. There are several places in the Northwest where divergent interests are negotiating how they would like a particular national forest to be managed. Most of the proposals include provisions related to wilderness designation, economic development, forest restoration, and funding, among others. But unlike more typical collaborative efforts, these groups are seeking codification of their agreements. These place-based/unit-level (national forest-specific) bills deserve serious attention and debate, from the perspective of public land law reform and conflict resolution. The Beaverhead Deerlodge Partnership is especially relevant to this inquiry, and we use this case to examine some broader issues surrounding the place-based approach to national forest management.

Our analysis shows that several factors precipitate interest in place-based legislation. A highly unstable and uncertain political environment best characterizes contemporary national forest management. Political interests are frustrated for different reasons, but all want more certainty and predictability than offered by the USFS. Perceptions of agency gridlock are widespread. The agency's planning process, management of roadless areas and motorized recreation, and funding problems, among other troubles, leave many interests deeply unsatisfied. The status quo is no longer tenable according to several of those participating in these initiatives. These interests want more durable solutions that simultaneously deal with wilderness, restoration, and struggling timber mills. Place-based laws are being sought in this context. Their proponents hope that such laws can finally resolve several longstanding conflicts while advancing a more constructive vision of conservation and community.

There is some history of using place-based legislation in federal lands management. Unit-specific enabling laws characterize management of the national parks and wildlife refuges. These systems are generally governed under the terms of their establishment acts and broader organic legislation. Unlike these systems, the national forests are managed under a more uniform set of laws, from the 1897 Organic Act to NFMA. But our review shows that place-based laws have also been applied to the national forests on occasion. Such laws come in a variety of forms, from

legislated protected land use designations to more complex laws like the Tongass Timber Reform Act and the Herger-Feinstein (Quincy Library) Act.

Some criticism leveled at the BDP and other place-based bills is unwarranted. First of all, there is nothing inherently wrong about seeking legislated solutions to forest management. Political choices about resource allocation are entirely appropriate for Congressional consideration. All of the initiatives discussed here are admirable in their efforts to secure broader-based solutions and conservation strategies that advance wilderness, restoration, and a sustainable timber industry. Pass or not, these place-based proposals also advance our thinking about national forest reform—from the bottom up. If lawmakers do ever revisit NFMA they should first study how place-based groups have approached things. We also applaud these initiatives for confronting some of the most controversial issues in forest management in a straightforward fashion.

While we are not opposed to place-based legislation in principle, we hope the aforementioned questions will be answered before the approach is adopted more broadly. Of particular concern to us is the precedent that could be set by these bills. If history is any guide, passage of place-based laws will generate wider interest in the approach, and future bills may not be carefully balanced and constructed. We would like to see greater assurances that future bills don't become used as a backdoor way of undermining federal environmental law and devolving federal lands to self-selected stakeholders. The question of how these initiatives will fit into the larger legal structure also deserves more scrutiny. Simply adding another mandate for the USFS to implement, while retaining NEPA and other legal responsibilities could simply increase frustration with the agency. How these initiatives will be paid for is also a concern. Stewardship contracting was never designed to serve as the primary funding stream for the USFS, and it should not be treated as such. And though each place-based proposal may make financial sense when viewed in isolation, what effect would a proliferation of place-based laws have on the USFS budget in general?

The intent of this Article is to provide a preliminary assessment of place-based legislation and to ask questions that will help guide future debate. We have certainly asked more questions than provided answers and we plan on addressing some of the issues raised here in future work.