



Administrative Conference of the United States

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**STAKEHOLDER COLLABORATIONS FOR  
MANAGING LAND AND NATURAL  
RESOURCES**

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## EXECUTIVE SUMMARY

The United States owns nearly one-third of the land within its boundaries.<sup>1</sup> Thirteen federal agencies<sup>2</sup> manage public lands and natural resources.<sup>3</sup> Agency employees interact daily with diverse stakeholders that hold varied perspectives on how public resources should be managed. Some conflicts result in litigation, in which a disappointed stakeholder ask a court to overturn a decision reached by an agency.<sup>4</sup> Other conflicts erupt into protests that capture national attention, as with the militia takeover of the Malheur National Wildlife Refuge in Hammond, Oregon,<sup>5</sup> or the Standing Rock Sioux protest of the Dakota Access Pipeline.<sup>6</sup> Internal and external stakeholders have long pressured agencies to identify more effective techniques for managing inevitable conflicts, so that resource management problems do not devolve into litigation or violent protests. Collaboration—stakeholders working with one another to develop management recommendations, in partnership with agencies—has emerged as a leading tool. Although ubiquitous in practice, collaboration is undertheorized, with limited longitudinal analysis of current practices.

This Reports identifies, defines, and evaluates *stakeholder collaborations*—longstanding working groups comprised of diverse stakeholders committed to providing input on the evolving management challenges surrounding the use of public land and natural resources. Landowners, industrial land users, nongovernmental organizations, state and tribal neighbors, hunters, conservationists, and others form collaborations as a structural vehicle for coming together to discuss issues related to particular land or resources. The collaboration develops rules and norms for internal governance, such monthly meetings and how internal disputes will be resolved. Over time, the collaboration identifies specific areas of concern, shares

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<sup>1</sup> CAROL HARDY VINCENT, LAURA A. HANSON, AND CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 3* (2017).

<sup>2</sup> For a listing of agencies, see *infra* Figure 3.

<sup>3</sup> “Natural resources” include things that run with the land, such as oil and gas reserves or waterways. Over time, the definition expanded to include conservation and recreation. See 42 U.S.C.S. § 9601(16) (2017).

<sup>4</sup> *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 319 (D.C. Cir. 1988). See Thomas C. Brown, George L. Peterson, & Bruce E. Tonn, *The Values Jury to Aid Natural Resource Decisions*, 71.2 LAND ECONOMICS 250-260 (1995).

<sup>5</sup> Kirk Johnson, *Trial to Begin in Standoff at Oregon Wildlife Refuge*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/us/oregon-malheur-wildlife-refuge-bundy.html?mcubz=3.11>; John M. Broder, *Geography Is Dividing Democrats Over Energy*, N.Y. TIMES (Jan. 27, 2009), <http://www.nytimes.com/2009/01/27/science/earth/27coal.html>.

<sup>6</sup> Juliet Eilperin, *Standing Rock Sioux Want ‘No Forcible Removal’ of Protesters from Dakota Access Pipeline Site*, WASH. POST (Feb. 5, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2017/02/05/standing-rock-sioux-want-no-forcible-removal-of-protesters-from-dakota-access-pipeline-site/?utm\\_term=.889d525da096](https://www.washingtonpost.com/news/energy-environment/wp/2017/02/05/standing-rock-sioux-want-no-forcible-removal-of-protesters-from-dakota-access-pipeline-site/?utm_term=.889d525da096).

perspectives, creates reports, and hashes out recommendations on how the relevant management agency should approach a particular problem.

Agencies work closely with collaborations but are *not* themselves members of the collaboration.<sup>7</sup> Instead, agencies play a supportive role, such as initiating the formation of a collaboration, providing meeting space, assigning personnel to act as liaisons between the collaboration and agency, sharing information, and generating funding. Agencies also informally share a portion of their decision-making authority with collaborations when they engage stakeholders in meetings and working groups to reach mutually-agreeable decisions. The agency is legally required, however, to retain the sole decision-making authority over decisions, even when made in consultation with collaborative groups. Decision-making is an iterative process, unfolding over decades and repeating in response to ever-changing natural conditions. Stakeholder collaborations may serve in a consultative role over many years or for just a few months. They often work with agencies to achieve multiple objectives and, throughout it all, strive to build trust and maintain positive, working relationships.

This Report employs a definition of stakeholder collaborations that has emerged from review of qualitative data and primary documents:

**A stakeholder collaboration is a group of people with strong interests in, yet differing views on, the proper management of a particular, localized group of lands or resources, committed in writing to working together to create mutually-agreeable recommendations for managing the resource across changing conditions an ongoing basis.**

This definition does not come from scholarly literature, but instead reflects the perspectives of agency employees and stakeholders actively participating in collaborations.<sup>8</sup>

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<sup>7</sup> One agency respondent raised the important point that this definition excludes forms of collaboration such as regional planning bodies, in which various government entities collaborated to explore options and share information. Although such a body would be outside the definition of stakeholder collaborations as defined in this Report, as it includes on government stakeholders, *inter-government collaborations* undoubtedly exist among federal, tribal, state, and local governments, and play an important role in managing a variety of resources.

<sup>8</sup> This Report does, however, situate stakeholder collaborations in the relevant legal, public policy, and natural resources literatures, including collaborative adaptive management, network governance, and polycentric governance. For this discussion, see *infra* Part I.C. For a typography of collaborations in the context of natural resources, then differentiates stakeholder collaborations from other forms of collaborative governance (such as listening sessions), see *infra* Part I.D.

Congress has passed hundreds of laws requiring agencies to collaborate with stakeholders to manage resources ranging from wildlife to waterways. Although the content of the laws varies considerably, the fundamental requirement that an agency must consult with an external group is consistent across statute. The result has been multiple, overlapping collaborations that span the entire United States, a complicated network of thousands of nested, inter-connected governance regimes.<sup>9</sup> At the same time, the Federal Advisory Committee Act,<sup>10</sup> a law imposing requirements on agencies' interactions with non-agency parties, remains on the books<sup>11</sup> and creates tension between laws requiring collaboration and FACA's certification requirement—a tension that some stakeholders and agency officials find troubling.<sup>12</sup> This Report is the first to survey the proliferation of these laws.<sup>13</sup>

In addition to statutory requirements, the last several Presidents have issued Executive Orders requiring agencies to adopt collaborative approaches.<sup>14</sup> Similarly, Secretarial Orders have established specific collaborations, and agencies have promulgated numerous regulations concerning collaboration.<sup>15</sup> Agency policy documents provide guidance on how agency should interact with collaborative groups.<sup>16</sup> Private governance, internal to the collaboration, also plays a crucial—although virtually unstudied—role.<sup>17</sup>

It is difficult to empirically assess both the beneficial and the harmful potential of collaborations, either for an individual project or in the aggregate. Qualitative analysis, however, yields three rough categories of benefits, as identified by agency officials working with well-functioning collaborations. *First*, agencies

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<sup>9</sup> See *infra* Figure 3 and associated text (displaying maps of three different regional collaborations operating under various agencies, with different boundaries).

<sup>10</sup> Pub. L. 92–463, 86 Stat. 770, *reprinted in* 5 U.S.C.S. app. § 3(2) (2017).

<sup>11</sup> That helps avoid confusion as to roles. See *Natural Resources Defense Council v. Johnson*, 488 F.3d 1002 (D.C. Cir. 2007) (holding that an environmental organization was not required to file formal request with EPA under the Freedom of Information Act to have standing to maintain action for alleged violations of FACA alleging that EPA violated 5 USCS app. 2 § 3(2) by its establishment and utilization of advisory committee); *Manshardt v. Fed. Judicial Qualifications Comm.*, 408 F.3d 1154 (9th Cir. 2005) (holding that a committee formed to recommend nominees for certain federal appointments was not advisory committee within scope of FACA as it was not established by statute, agency, or President; moreover, it was not utilized by President for purposes of FACA, particularly since its recommendations were not solicited by President).

<sup>12</sup> See *infra* Part III.A.1.

<sup>13</sup> See *infra* Appendix I (statutes); Appendix II (regulations).

<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> See *infra* Part II.C.

<sup>16</sup> *Id.*

<sup>17</sup> This Report focuses on solely on agency interaction with collaborations, but flags the internal governance of the collaborations as vital, but virtually unstudied, aspect of the broader project of understanding the legal landscape surrounding stakeholder collaborations. See *infra* Part II.D.

reach substantively better decisions because of the diverse viewpoints generated through the collaborative process.<sup>18</sup> *Second*, decisions that result from collaborations have greater social acceptance; opponents are less likely to sue.<sup>19</sup> *Third*, agencies benefit when stakeholders use their internal resources to support the achievement of shared objectives.<sup>20</sup>

Conversely, interviewees identified three points of concern, which agencies should be mindful of when engaging with collaborations. *First*, agencies are legally required to retain final decision-making authority and should continually assess the extent to which their incorporation of input from the collaboration is consistent with FACA.<sup>21</sup> *Second*, collaborations may disadvantage lower socioeconomic status stakeholders who lack the resources necessary to engage in collaboration, thereby allowing those with time and money to have a disproportionate influence over land and resources.<sup>22</sup> *Third*, there is a paucity of empirical data supporting the claim that collaborations work, on either an absolute or relative basis.<sup>23</sup> These considerations form the foundation of a corresponding set of best practices for agencies engaging with collaborations.

An agency deciding whether to initiate a collaboration should consider some preliminary best practices. The agency should begin by asking whether there is a problem that matters deeply to a recognizable group of people and whether it is possible for engagement to generate mutually-agreeable solutions.<sup>24</sup> For instance, it is futile to start a collaboration if the agency is not committed to sharing decision-making space with stakeholders.<sup>25</sup> Situations in which there is both top-down and bottom-up support for collaborations within an agency provide the best likelihood of creating a successful collaboration.<sup>26</sup> Given the availability of other strategies that can incorporate collaborative governance but do not require a full-fledged stakeholder collaboration, agencies should also seek the least formal mechanism for achieving the desired goal.<sup>27</sup>

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<sup>18</sup> See *infra* Part III.A.1(a).

<sup>19</sup> See *infra* Part III.A.1(b).

<sup>20</sup> See *infra* Part III.A.1(c).

<sup>21</sup> See *infra* Part III.A.2(a).

<sup>22</sup> See *infra* Part III.A.2(b).

<sup>23</sup> See *infra* Part III.A.2(c).

<sup>24</sup> See *infra* Part III.B.1(a).

<sup>25</sup> See *infra* Part III.B.1(b).

<sup>26</sup> See *infra* Part III.B.1(c).

<sup>27</sup> *Id.*

Agencies participating in establishing a new collaboration should then determine whether FACA applies<sup>28</sup> and which laws or regulations will govern the collaboration.<sup>29</sup> From there, experienced, on-the-ground agency employees should identify potential stakeholders.<sup>30</sup> Employees should seek feedback on the potential interest of stakeholders to participate in a collaboration, then invite potential members of the group to meet with one another as they consider whether to join the group.<sup>31</sup> Different forms of invitation may work best for different stakeholders; it is vital that invitations are mindful of the constraints on participation faced by some groups, particularly those of lower socioeconomic status.<sup>32</sup> After bringing the group together, the agency should provide information about the agency's role and then step back to encourage the collaboration to create its own structure and ground rules.<sup>33</sup> The agency can, however, guide the collaborative towards properly-sized tasks, taking into account the maturity and trust of relationships within the group.<sup>34</sup>

Agencies and collaborations should regularly assess the group's success along a variety of dimensions, including substance and process.<sup>35</sup> Although the agency cannot control the collaboration, it may provide funding for facilitators to guide the collaboration in assessing the relevant metrics for success and future objectives.

## INTRODUCTION

This Report undertakes the following four tasks, each with respect to stakeholder collaborations: (1) defining the term; (2) surveying the legal landscape; (3) assessing harms and benefits; and (4) recommending best practices. This report flags but does not address several topics worthy of further research. Most notably, this Report does not empirically analyze whether collaborations work well, either absolute terms or relative to other methods of conflict resolution. It also flags, but does address, the importance of future study on the private governance systems that rule collaborations. Further, this Report does not engage with the democratic questions surrounding the extent to which collaborations do—or should—displace other administrative tools for resource management. I predict that this question that will become increasingly urgent as collaborations' influence increases; indeed, this

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<sup>28</sup> For a flow chart that can be used to analyze the applicability of FACA to a particular collaboration, see Part III.B.2, Figure 5.

<sup>29</sup> A survey of laws governing collaboration are available in Appendix I; relevant regulations are contained in Appendix II.

<sup>30</sup> See *infra* Part III.B.2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See *infra* Part III.B.

will likely become a central question for courts considering environmental, public lands and natural resources issues. Although this Report does not directly address these issues, it provides a foundation for doing so, by synthesizing the practices of collaboration across federal agencies.

Part I defines stakeholder collaborations and situates the term within administrative law and public administration literatures. It explains why landscapes are uniquely suited to collaborative governance, then defines “stakeholder” and “collaboration.” Despite extensive studies of stakeholder collaboration *within* agencies, there is relatively limited information on best practices *across* agencies. This Reports seeks to fill that void through a longitudinal analysis of land and resource management agencies’ experiences and practices. This Part concludes by distinguishing stakeholder collaborations from other types of collaborative governance tools.

Part II surveys the legal landscape of stakeholder collaboration. A novel review reveals that Congress has enacted over one hundred statutes directing agencies to collaborate.<sup>36</sup> The sheer volume of existing law anticipating collaboration is striking. Statutory mandates vary widely along dimensions of timing, scope, and formality. This part also provides an overview of the bipartisan nature of collaborative governance for public lands and natural resources, demonstrated by the fact that Presidents Clinton, Bush, Obama and Trump have all issued orders directing agencies to collaborate. Finally, Part II provides an overview of the extensive regulations governing collaborative practices, and identifies other sources of governance that influence collaboration.

Part III examines the potential benefits and downsides of collaborations, as explained by stakeholders and agency employees. Part A suggests that collaborations can help agencies produce better-informed decisions, which are more likely to be supported by the public, but may come at the cost of losing some stakeholders who lack the resources to participate in collaborations. Part B translates these concerns into concrete recommendations for agencies at all points along the collaboration spectrum, from considering whether to start a stakeholder collaboration, to managing and assessing an existing collaboration. This Part draws heavily from the experiences, including difficult lessons learned, by the interviewees in this project.

Part IV concludes the Report by considering the future of collaboration. It suggests that a standard metric for assessment of collaborations is sorely needed along several dimensions, including relative effectiveness, inclusion, and the content of private governance. Part IV further considers the key challenges to

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<sup>36</sup> See *infra* Appendix I.



agencies' collaborative practices, and identifies ways in which agencies can protect against legal challenges that may arise. Finally, the report concludes by considering other areas of the administrative state that can benefit from the lessons learned from collaboration. For instance, disaster management—a topic with numerous parallels and connections to natural resources—is a natural extension for stakeholder collaborations.

Much of this Report implicitly draws from two novel case studies of stakeholder collaborations. I developed these case studies from a series of interviews with agency officials and other stakeholders.<sup>37</sup> This Report also draws from primary documents from stakeholder collaborations, including guidance memoranda, reviews, and management plans. The first case study, contained in Appendix III, studies the Western Arctic Caribou Herd Working Group, a twenty-year-old collaboration devoted to managing a caribou herd with a range extending across approximately one-third of the Alaska. Tracing the history and development of the group over time provides insight into a long-standing organization that has sustained several resource shocks. The second case study, contained in Appendix IV, explores the Four Forest Research Initiative (“The 4FRI”) in Northern Arizona. Among other points, this case study highlights the various metrics upon which success can be measured, the distinction between compromise and unanimity, and the extent to which agencies must invest at both an institutional and employee level to maintain productive relationships with collaborators.

These case studies highlight previously unrecognized challenges to collaboration and the unexpected ways in which agencies are using collaborations. Key points from each case study are incorporated throughout the Report. Readers interested in a more detailed institutional account of two collaborations, including a more robust view of the dynamics, challenges, and lessons learned, should begin by reading Appendix III and IV.

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<sup>37</sup> The interview protocol is contained in Appendix V.

## I. AN OVERVIEW OF STAKEHOLDER COLLABORATIONS

There are myriad competing definitions of collaboration, collaborative governance, and stakeholder collaborations.<sup>38</sup> In this Report, I use the words and experiences of interviewees to define *stakeholder collaborations* as: a group of people with strong interests in, yet differing views on, the proper management of a particular, localized group of lands or resources, committed in writing to working together to create mutually-agreeable recommendations for managing the resource across changing conditions on an ongoing basis.<sup>39</sup> The goal of collaborations is for adversaries—even potential litigants—to gather around a table to discover mutually-agreeable solutions. This Report focuses upon stakeholder collaborations that interact with—or are created for the purpose of informing—the use of public lands and resources in concert with agencies.<sup>40</sup>

To resolve some of the potential confusion that may arise when considering the various manifestations of collaborations, I have created a typology of collaborative governance tools, such as regional councils and listening sessions, and illustrate how they differ from stakeholder collaborations. For further insights, I also turned to the broader pool of literature on public private interactions within Administrative Law, which highlights why stakeholder collaborations are a distinct, albeit frequently related, phenomena.

### A. The Distinctive Challenge of Managing Landscapes

All landowners must collaborate, to some degree, with their neighbors, or risk costly litigation. The government, when acting in a land management capacity, is no different. As a result, collaborations play a role in governing virtually all

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<sup>38</sup> Nearly everyone interviewed for this project could identify examples of specific collaborations, but noted that it was an active struggle to categorize other, less-obvious examples of agencies working with non-agency actors on a defined objective. This confusion is consistent with broader lack of scholarly consensus in creating typologies of collaborations. See Richard D. Margerum, *A Typology of Collaboration Efforts in Environmental Management*, 41 ENVTL. MGMT. 487 (2008).

<sup>39</sup> A defining feature stakeholder collaborations is that they are centered upon managing the land and resources in a defined geographic space. Other scholars have correctly noted, however, that the human-natural interaction cannot be limited to simply ecological elements; social and economic considerations are necessarily embedded in collaborations. See, e.g., Akhtar-Schuster, M., Thomas, R.J., Stringer, L.C., Chasek, P. and Seely, M., *Improving the Enabling Environment to Combat Land Degradation: Institutional, Financial, Legal and Science-Policy Challenges and Solutions*, 22(2) LAND DEGRAD. & DEV. 299 (2011); Tian Shi, *Ecological Economics as a Policy Science: Rhetoric or Commitment Towards an Improved Decision-Making Process on Sustainability*, 48(1) ECOL. ECON. 23, 24 (2004).

<sup>40</sup> Theoretically, stakeholder collaborations can exist independently of agencies and government.

public lands and natural resources in the modern administrative state.<sup>41</sup>

Every acre of land contains multiple natural resources. These include air, watersheds, wildlife habitat, firesheds, and, potentially, oil and gas reserves, underground minerals, recreational resources, viewsheds, and timber.<sup>42</sup> Collectively, these resources operate as an ecosystem in which each part directly or indirectly influences the other parts.<sup>43</sup> Effectively managing any single resource, such as wildfire risk reduction, may require management of other resources like timber and watersheds.<sup>44</sup>

One effect of multiple overlapping resources is that these sources may operate at differing scales of management. For instance, landscape-level resources cannot be effectively managed at an individual parcel level because they operate at a range of thousands or tens of thousands of acres.<sup>45</sup> Consider also the example of wildlife: Few landholders have large enough parcels to be able to unilaterally protect a wolf pack with a range of 100,000 miles.<sup>46</sup> Since resource boundaries do not necessarily correspond with land parcels,<sup>47</sup> effective resource management requires collaboration among various landowners or resource rights-holders to achieve goals pertaining to landscape-level resources, such as optimizing profitability of oil and gas or creating wildlife habitat corridors.<sup>48</sup>

There are three ways to effectively manage a landscape-level resource: (1) a single owner owning the entire landscape; (2) laws and regulations governing

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<sup>41</sup> A survey of Bureau of Land Management employees indicates that over 70% of respondents believed considered all BLM issues to be “somewhat suitable” for collaboration. Between 55 and 66 of respondents felt the individual issues of “recreation,” “land use planning/NEPA,” “range management,” and “fish and wildlife” were conducive to cooperation and collaborative governance. EMILY W. RUELL, NINA BURKARDT, & RYAN M. DONOVAN, BUREAU OF LAND MANAGEMENT, A SURVEY OF BUREAU OF LAND MANAGEMENT EMPLOYEES ON COLLABORATION AND ALTERNATIVE DISPUTE RESOLUTION, OPEN-FILE REPORT 2015-1015 (2015).

<sup>42</sup> Curtis Eaton, Allan Ingelson, & Rainer Knopff, *Property Rights Regimes To Optimize Natural Resource Use—Future CBM Development And Sustainability*, 47 NAT. RES. J. 469-496 (Spring 2007).

<sup>43</sup> Ken J. Wallace, *Classification of Ecosystem Services: Problems and Solutions*, 139(3) BIOL. CONS. 235-246 (2007).

<sup>44</sup> Karen Bradshaw & Dean Lueck, *Contracting for Control of Landscapes*, 100 IOWA L. REV. 2507, 2511 (2015).

<sup>45</sup> *Id.*, at 2516.

<sup>46</sup> See generally CHARLES E. KAY, PREDATORY BUREAUCRACY: THE EXTERMINATION OF WOLVES AND THE TRANSFORMATION OF THE WEST 220 (2007).

<sup>47</sup> Karen Bradshaw & Bryan Leonard, *Virtual Parceling* (The Classical Liberal Institute, New York University School of Law, Working Papers Series, December 13, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2885102](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885102).

<sup>48</sup> Bradshaw & Lueck, *supra* note 44, at 2525.

resource use; or (3) landowners cooperating or transacting to bundle control over landscape-level resources.<sup>49</sup>

With respect to public lands, agency land managers may control the entire landscape, and thus have the legal capacity to plan or regulate resource use within statutory confines. Despite this, agencies also cooperate with nearby and adjacent landowners. As early as 1920, Forest Service employee manuals encouraged rangers to promote informal cooperation by emulating local norms—an implicit understanding of a now well-developed notion that localized, bottom-up cooperative resource management can avoid resource exhaustion.<sup>50</sup> Today, agency officials generally believe that collaborations provide numerous benefits, such as reducing litigation and improving decision-making,<sup>51</sup> although such claims largely lack a quantifiable basis.<sup>52</sup>

## **B. Defining Stakeholder Collaborations**

The difficulty in defining stakeholder collaborations emerges from several factors, including: (1) the existence of multiple resources in shared geographic space; (2) the nested nature of collaborations, ranging from the very specific (e.g. an individual species in a single state) to the very broad (e.g. an international consortium of countries and botanical gardens defining policies for endangered plant species); (3) the differences in semantics and perspectives on whether something is a conflict or a collaboration; (4) the duration of a collaboration; and (5) the breadth of the group’s objective (e.g. the creation of a single plan or a broad, overarching directive from Congress). To unpack these difficulties, our research team surveyed a variety of agency employees, stakeholders, and state officials on their understandings of stakeholders and collaborations.

### *1. Defining a Stakeholder*

Who is a stakeholder? “Anyone who wants to be” is a frequent response from agency officials. Although this definition attempts to highlight that agencies are democratic and non-discriminatory in their selection of stakeholders, it fails to capture the important point that stakeholders ultimately self-select. Interviewees also described a *stakeholder* as “anyone who has a stake in the outcome.” This definition captures the need for stakeholders to feel motivated to participate, but deserves expansion.

Stakeholders who care enough to dedicate the time and emotional energy to

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<sup>49</sup> *Id.*

<sup>50</sup> Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010).

<sup>51</sup> Part IV.A.1.

<sup>52</sup> Part IV.A.2.

a collaboration tend to have a pecuniary, social, or cultural interest in the resource being managed. Virtually no one collaborates for the joy of participating in a group and this reality can be challenging and frustrating.<sup>53</sup> Consider the circumstances: In some collaborations, the process unfolds over decades.<sup>54</sup> It is frequently confrontational, with emotionally-charged group dynamics unfolding in contentious meetings.<sup>55</sup> Frustrated group members may quit.<sup>56</sup> Stakeholders must attend meetings and may be pressed into participating in working group. No one will emerge with exactly the outcome they desire; compromise is the foregone conclusion. As a result, the only parties invested enough to participate tend to be those with an investment in the outcome of the process—that is, a stake in the land and resources being managed.

A few rough examples illustrate this point:<sup>57</sup> Government employees collaborate because they are paid to do so. Nongovernmental organizations participate to promote land and wildlife conservation aims. Alaskan Native and Native American communities may seek to preserve property-rights to resources, such as hunting rights on public lands or cultural resources claims.<sup>58</sup> Commercial land users—such as cattle grazers or timber operators—seek to preserve or expand historic resource extraction, which they perceive as a *de facto* property right premised on historic norms. Recreational land users—including sportsmen, rock climbers, and ATV users—similarly seek to expand or maintain what they perceive as a *de facto* right to use the land, premised on historic uses. State and local government officials participate because of the effects of the land or resource use on the interests they represent, such as constituents or local industry that contributes to the tax base.

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<sup>53</sup> Interview 12.

<sup>54</sup> Appendix III (describing some board members of WACHWG serving the group in the same role for twenty years); Mark T. Imperial et al., *Understanding Leadership in a World of Shared Problems: Advancing Network Governance in Large Landscape Conservation*, 14 FRONTIERS ECOL. AND ENVT. 126, 127 (2016) (describing collaborations as requiring three interconnected leadership types: collaborative leadership, distributive leadership, and architectural leadership).

<sup>55</sup> Interview 12.

<sup>56</sup> Telephone Interview with Jim Dau, Wildlife Biologist for Alaska Department of Fish and Game (ret.) (July 25, 2017).

<sup>57</sup> These examples are illustrative and reductive—they do not capture the full range of the complex, interconnected reasons why people may participate. For example, a government employee may also collaborate because she respects the people in her community or believe that doing so is a vital part of her job from a moral standpoint. The purpose of these very rough examples is to explain natural resources dynamics to those unfamiliar with the field; people operating in natural resources would rightly say this is a crude simplification.

<sup>58</sup> Importantly, different tribes have vastly different motivations—some may seek to exploit resources, others to conserve.

As highlighted by these examples, the incentives for joining a collaboration are multiple and varied. The unifying theme across stakeholders, however, is that each has a highly valued cultural, economic, or social stake in the use of the land or resource at issue.<sup>59</sup>

## 2. *Defining Collaboration*

What role do collaborations play in land and resource management? Collaboration can be broad and shifting. The general aim of collaboration is to have potentially adversarial groups work together to achieve common objectives without resorting to litigation or violence. In the words of a National Park Service Wildlife biologist:

When you have difficult problems, communication is very helpful. When people operate in their own boxes it is very easy to get stubborn and not see other people's perspectives. So people get entrenched. Generally, when people are at [stakeholder collaboration] meetings they might not always be friendly, but they get to hear other people's points of view and they are face to face so they are not typically said in demeaning or mean ways. So the message of the other side comes across better rather than a Twitter battle where people are saying extreme things on either side and making each side more entrenched rather than trying to find common ground. So I think just that getting together face to face, having a wide range of opinions, having thoughtful people that want solutions, I think is the best lesson to take out of [collaborations].<sup>60</sup>

NOAA uses a linear diagram to illustrate the relationship between an agency and stakeholders' decision-making authority within a collaboration. At one end of the spectrum (1), the agency acts unilaterally. At the other end of the spectrum, the stakeholders act unilaterally (4). Neither of these examples would satisfy the definition of collaboration as contemplated by this Report. Instead, I define stakeholder collaboration as either agencies gathering input from stakeholders before deciding how to act (2) or stakeholders deciding and recommending action or the agency to take (3).

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<sup>59</sup> Presumably, each resource on a landscape could collectively or individually be the focus of a collaboration. In the world of finite attention and resources, however, collaborations emerge when groups deem proper management of a particular resource to be especially important. The given land or resource must matter to several groups. (If the given land or resource matters a great deal but only to one or two interested parties, such as adjacent landowners, one would expect to see informal cooperation between the agency and stakeholders or, perhaps, a contracting or co-management relationship.) Part IV.B.1. expands upon this point.

<sup>60</sup> Interview 1.

**Figure 1: Simplified Continuum of Stakeholder Influence**

Agency-Controlled Stakeholder-Controlled			
<i>1 Agency has authority, makes the decision, and then informs stakeholders.</i>	<i>2 Agency gathers input from stakeholders before deciding.</i>	<i>3 Stakeholders decide and recommend actions for agency to take.</i>	<i>4 Stakeholders decide to act and then implement.</i>

*(Adapted from Bens 2005, recreated in NOAA training documents)<sup>61</sup>*

Another definitional issue is how to differentiate collaboration from conflict resolution. One official described a series of surveys that asked in-the-field agency employees to describe an example of their involvement in a collaboration. Several respondents replied that the engagement they identified in their responses was not, in fact, a collaboration, but instead forced by the threat of litigation, and therefore conflict resolution. In response to that feedback, the next set of surveys asked respondents to describe a particular example of conflict resolution. Several respondents replied that the example they identified was not, in fact, conflict resolution, but instead collaboration because they cooperated with the potential adversary.

The threat of litigation is an unspoken factor in many agencies decision to engage with collaboration. By starting with collaboration, agencies attempt to avoid having a disappointed stakeholder ask a court to overturn the decision. This threat may be overt or implicit, but is virtually always present. At the same time, parties are motivated to work together for a variety of reasons, such as the potential to produce more favorable management decisions, achieve lower settlement costs, and/or to preserve reputations and relationships by finding compromise with neighboring landowners.<sup>62</sup>

<sup>61</sup> INGRID BENS, FACILITATING WITH EASE! CORE SKILLS FOR FACILITATORS, TEAM LEADERS AND MEMBERS, MANAGERS, CONSULTANTS, AND TRAINERS 99 (3rd ed. 2012).

<sup>62</sup> For a discussion of the reasons that motivate cooperation rather than litigation among private parties, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Robert H. Mnookin, *Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1981).

### 3. Defining Stakeholder Collaborations

The following definition emerged from synthesizing perspectives encountered by our research team:

**A stakeholder collaboration is a group of people with strong interests in, yet differing views on, the proper management of a particular, localized group of lands or resources, committed in writing to working together to create mutually-agreeable recommendations for managing the resource across changing conditions on an ongoing basis.**

Notably, this definition is not universally agreed upon by interviewees. It does, however, provide a starting point that reflects cross-agency understandings and which future conversations can refine. The remainder of this Report relies upon this definition when referencing the term.

### C. Related Literatures

Collaborative governance of natural resources is a topic being considered by scholars from several disciplines, including public administration, administrative law, and natural resource economics. For example:

- *Collaborative governance* focuses on the process of public-decision-making engaging people across public and private spheres.<sup>63</sup>
- *Polycentric governance* describes multiple layers of governance arrangements and institutions that manage localized concerns and scale to address broad issues.<sup>64</sup>
- *New governance* focuses on private action dominating a regulatory space, against the backdrop of government limits, which can include systems of private governance.<sup>65</sup>
- *Public-private partnerships* describes government working with private organizations, such as companies and industry groups, to achieve shared objectives. These relationships can take a plethora of forms, ranging from contracting-for-goods arrangements to negotiated rulemaking.<sup>66</sup>

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<sup>63</sup> Kirk Emmerson et al., *An Integrative Framework for Collaborative Governance*, 22 J. PUB. ADMIN. & THEORY 1, 2 (2011).

<sup>64</sup> Ostrom, *supra* note 50.

<sup>65</sup> Orley Lobel, *New Governance as Regulatory Governance*, in OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012); Karen Bradshaw, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2515 (2013).

<sup>66</sup> JODY FREEMAN, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (2009).



- *Collaborative adaptive management* focuses on an iterative decision-making process in which people learn from experience and incorporate new information to create flexible management plan amidst changing conditions.<sup>67</sup>
- *Contracting to control landscapes* focuses on arrangements between parties—public or private—to engage in shared management practices, a localized form of private governance.<sup>68</sup>

Administrative law scholars have written extensively about agencies crafting relationships with external actors to achieve shared policy aims.<sup>69</sup> Within the various relationships scholars have identified, there are several that are facially similar to, but ultimately different from, the specific tool of stakeholder collaborations. Notably, stakeholder collaborations are **not**:

- *Inter-agency cooperation*, the cooperation of federal agencies with other federal agencies;
- *Cooperative federalism*, the delegation by federal agencies to states while the agency retains an oversight role;
- *Contracting relationships*, in which agencies pay companies to perform government functions;
- *Private governance*, or the creation and enforcement by private actors of rules governing an industry or practice, as with insurance as regulators or sustainability certifications; or
- *Negotiated rulemaking*, in which agencies working with a regulated industry develop an agreed-upon regulation.

In sum, scholars are beginning a robust theoretical conversation surrounding

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<sup>67</sup> Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 28 (2014). Collaboration now plays a well-recognized role in public lands and resource management. It is one component of collaborative adaptive management, a term that captures that there is no single legal or regulatory fix to the ongoing and unpredictable changes that happen in a natural landscape. Adapting to these changes, proponents argue, requires flexibility and ongoing input from a variety of stakeholders.

<sup>68</sup> Bradshaw & Lueck, *supra* note 44.

<sup>69</sup> A small sampling of this robust literature includes: Jeffrey L. Brudney & F. Ted Hebert, *State Agencies and Their Environments: Examining the Influence of Important External Actors*, 49.1 J. POL. 186-206 (1987); John Child, *Strategic Choice in the Analysis of Action, Structure, Organizations and Environment: Retrospect and Prospect*, 18.1 ORG. STUD. 43-76 (1997); Yves Fassin, *The Stakeholder Model Refined*, 84.1 J. BUS. ETHICS 113-135 (2009); Jeff Frooman, *Stakeholder Influence Strategies* 24.2 ACAD. MGMT. REV. 191-205 (1999); Susan Key, *Toward a New Theory of the Firm: A Critique of Stakeholder "Theory,"* 37.4 MGMT. DEC. 317-328 (1999).

collaboration, both in natural resources contexts, and the administrative state more broadly. As the fields mature, so too will terminological exactness, a process that will be useful for differentiating phenomena that look similar but may, in fact, operate differently. To that end, the following section situates stakeholder collaborations among other collaborative governance tools.

#### **D. A Typology of Collaborative Governance Tools**

Importantly, stakeholder collaborations are not the only collaborative governance tool used to manage land and resources. Several executive orders, for example, instruct agencies to use listening sessions and public comment periods to inform agency decision-making.<sup>70</sup> The chart below categorizes the most common forms of collaborative governance tools. It is important to remember that this is a rough cut intended to distinguish different tools from stakeholder collaborations. As noted previously, there is no consensus on the meaning of these terms, either in theoretical literature or among agency officials.

Notably, this typology attempts to categorize the thousands of collaborative governance structures in existence, but any single collaboration may fall in multiple boxes. Further, a collaboration that begins in one category may transition into another over time. For example, an alternative dispute resolution body may eventually transition into a public-private body devoted to undertaking and monitoring the terms of a decades-long settlement agreement.<sup>71</sup>

The chart serves to reinforce that stakeholder collaborations do not operate in a vacuum. For example, in Alaska there are collaborations centered upon individual animal species (i.e., caribou) and wildlife generally. Agencies have also created meta-collaborations, which coordinate practices across individual collaborations based upon region. Such nested collaboration is ubiquitous given the multi-layered system of governance. Collaborations not only interact with agencies, but also with one another, both directly and indirectly. Collaborations influence and interact with other collaborations, both horizontally and vertically.

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<sup>70</sup> Part II.B.

<sup>71</sup> Such was the case with the natural resource damage settlement process, in which B.P. and trustees had a largely adversarial relationship prior to reaching an \$8.1 billion settlement to restore natural resource damages, but later sought a unified restoration effort to promote coordinated recovery efforts. Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211, 217-18 (2015).

**Figure 2. Collaborative Governance Structures for Land and Resource Management**

Name	Actors	Resource Level	Scope of Collaboration	Conflict or Collaboration	Duration of Collaboration	Breadth of Collaboration	Example
Collaborative Resource Governance	Major international bodies or nation-states	Single resource cluster	International or national	Collaboration among aligned actors	Ongoing	Designed to operate as a body formulate rules and policy to effect national or international practice	Botanic Gardens Conservation International; Forest Stewardship Council
Regional Governance Collaboration	Agencies, non-governmental organizations, industry, states	Multiple resource clusters	Multi-state or regional	Collaborative	Ongoing	Variable	Landscape Conservation Cooperation Network, BLM Regional Advisory Councils
Stakeholder Collaborations (sometimes called “working groups”)	Federal agencies, state agencies, non-governmental organizations, industry, citizens	Focused on single resource cluster (focus resource may shift over time)	Within a landscape-level; 5,000 acres or more.	Vacillates between conflict and collaboration; may exist to avoid litigation	Ongoing	May use planning documents as an organization tool, but the overarching objective is more than a single document	Western Arctic Caribou Herd Working Group; 4FRI
Public-Private Partnerships	Non-governmental organizations or industry working in partnership with federal agencies	Objective focused on a single land unit, resource or resource cluster	Local or regional	Collaborative; defining feature of group is large degree of ideological alignment	Ongoing	Agency and ideologically aligned parties pool resources to increase efficacy towards achieving a shared objective	USFWS Species Recovery Plans, National Parks Friends Alliance
Alternative Dispute Resolution Bodies	Industries, non-governmental organizations, agencies	Focused on a single resource, or resource cluster	Landscape level	Adversarial; defining feature of group is high degree of likelihood to litigate if resolution is not reached	Finite. In existence only as long as the particular dispute is ongoing.	Narrow – a single-shot issue.	Natural Resource Damages Cooperative Assessments
Task forces	Industries, non-governmental organizations, agencies, individuals with expertise,	Focused on a single resource, or resource cluster	Local, regional, state, or national	Collaborative	Short term – the group only exists for the period of time necessary to issue a report or	Variable	The Governor’s Task force on Arizona Wildfire (precursor to 4FRI)

Name	Actors	Resource Level	Scope of Collaboration	Conflict or Collaboration	Duration of Collaboration	Breadth of Collaboration	Example
	consultants				recommendations		
Listening sessions, notice and comment periods	Industries, concerned citizens, state agencies, local municipalities, non-governmental organizations	Focused on a single resource, or resource cluster	Local or regional	Can be collaborative or adversarial	Short term	Forum for the agency to hear different perspectives on a contentious issue; air out differences.	President Obama's memorandum on A 21 <sup>st</sup> Century Strategy for America's Great Outdoors; NEPA and APA requirements for notice and comment.
Informal relationships	Industries, non-governmental organizations, agencies	Focused on a particular geographic region	Local	Can be collaborative or adversarial	Long term	Enormous breadth, potentially spanning any issue	National Park Supervisors and subsistence users in Alaska.

## II. LEGAL LANDSCAPE

The United States owns land and natural resources, which the government manages on behalf of the public. The Constitution grants Congress control over all public lands,<sup>72</sup> which it largely delegates to the executive branch.<sup>73</sup> Within the executive branch, 13 administrative agencies manage most federal land and natural resources.<sup>74</sup> Collectively, these agencies manage approximately one-third of the

<sup>72</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>73</sup> The Supreme Court has ruled that such delegation is allowable if Congress provides an “intelligible principle” to guide executive action. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (U.S. 1928).

<sup>74</sup> This list excludes agencies with limited landholdings and no management function, like Department of Energy. It also intentionally excludes agencies, like the U.S. Geological Survey and Environmental Protection Agency, that supports land management agencies but does not have a regulatory or management mandate and are therefore excluded from this list. The U.S. Geological Survey has been quite involved in conversations surrounding collaborative adaptive management and joint fact-finding. For example, *see* NICOLAS L. ROFOUGARAN AND HERMAN A. KARL, U.S. DEP’T OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, SAN FRANCISQUITO CREEK—THE PROBLEM

land in the United States.<sup>75</sup>

**Figure 3. Land and Resource Management Agencies**

<b>Department of Commerce</b>
National Oceanic and Atmospheric Administration
<b>Department of the Interior</b>
Bureau of Indian Affairs
Bureau of Reclamation
US Fish and Wildlife Service
National Park Service
US Geological Survey
<b>Department of Agriculture</b>
Forest Service Natural Resource Conservation Service
<b>Department of Defense</b>
US Army Corps of Engineers

Congress, the President, and upper-level agency officials guide agency action through statutes, executive orders, regulation, and policy guidelines.

## **A. Federal Statutes**

### *1. Federal Advisory Committee Act*

In 1972, Congress passed the Federal Advisory Committee Act (“FACA”), which outlines how federal agencies may partner with citizens and private entities.<sup>76</sup> FACA applies when agencies coordinate with an organized, cohesive group of non-agency actors—long-term consultants, nongovernmental organizations, companies, or industry groups—for input on agency policies and

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OF SCIENCE IN ENVIRONMENTAL DISPUTES, JOINT FACT FINDING AS A TRANSDISCIPLINARY APPROACH TOWARD ENVIRONMENTAL POLICY MAKING, PROFESSIONAL PAPER 1710 (2005).

<sup>75</sup> VINCENT, HANSON, & ARGUETA, *supra* Note 1, at 3.

<sup>76</sup> For discussions on the influence of FACA on stakeholder collaborations for managing public lands and collaborations, see Sheila Lynch, *The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?*, 71 WASH. L. REV. 431 (1996); Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L. J. 111 (1996); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. OF REG. 451 (1997); Thomas C. Bierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decision-Making*, 29 ENV'T L. REP. 10399 (1999); Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. OF LAND, RESOURCES & ENV'T L., 67 (2003).

decisions. It does not apply to government-to-government coordination, as when a federal agency works with tribal, state, or local governments. The applicability of FACA is governed by a few court decisions, which collectively suggest that if the agency convenes or controls an ongoing group with a limited membership that produces consensus and recommendations, then it must seek FACA certification.<sup>77</sup> At the time of this writing, over 1,000 FACA certified collaborations exist.<sup>78</sup>

Congress enacted FACA before alternative dispute resolution and collaborative government became widely popular, according to some agencies.<sup>79</sup> As a result, some view the statute as out-of-step with modern imperatives to collaborate.<sup>80</sup> FACA certification can take years to complete, a fact that can serve as a major impediment to the formation of a new group.<sup>81</sup> Indeed, agencies actively counsel employees on how to construct stakeholder groups that do not trigger the need for FACA certification.<sup>82</sup> The danger of avoiding FACA certification is that agency decisions made in consultation with non-certified stakeholder collaborations may run afoul of the non-delegation doctrine, which limits agencies ability to share decision-making authority provided by Congress.

## 2. *Administrative Dispute Resolution Act*

The Administrative Dispute Resolution Act<sup>83</sup> requires that Federal agencies adopt a policy for alternative dispute resolution across agency functions. In 2005,

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<sup>77</sup> *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989); *Miccosukee Tribe of Indians v. S. Everglades Restoration All.*, 304 F.3d 1076 (11th Cir. 2002); *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999); *Calif. Forestry Ass'n v. U.S. Forest Serv.* 102 F.3d 609 (D.C. Cir. 1996); *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994); *Nat. Res. Defense Council v. Abraham*, 223 F.Supp.2d 162 (D.D.C. 2002).

<sup>78</sup> See generally BUREAU OF LAND MANAGEMENT, NATIONAL POLICY FOR THE FEDERAL ADVISORY COMMITTEE ACT: WHAT BLM STAFF NEED TO KNOW WHEN WORKING WITH ADR-BASED COLLABORATIVE COMMUNITY WORKING GROUPS (2005), <https://www.ntc.blm.gov/krc/uploads/880/BLM%20Field%20Guide%20-%20Federal%20Advisory%20Committee%20Act%20-%202005-05-01.pdf> (hereinafter BLM FACA ADR Guide); Rebecca J. Long & Thomas C. Beierle, *The Federal Advisory Committee Act and Public Participation in Environmental Policy* (Resources for the Future, Discussion Paper 99-17, 1999), <http://www.rff.org/files/share-point/WorkImages/Download/RFF-DP-99-17.pdf>.

<sup>79</sup> See WENDY GINSBERG & CASEY BURGAT, FEDERAL ADVISORY COMMITTEES: AN INTRODUCTION AND OVERVIEW, CONG. RESEARCH SERV., R44253 (2016).

<sup>80</sup> Interview 12.

<sup>81</sup> Interview 3.

<sup>82</sup> See generally BLM FACA ADR Guide, *supra* note 78.

<sup>83</sup> 5 U.S.C.S. §§ 571-584 (2017).

the Office of Management and Budget and the President's Council on Environmental Quality jointly issued a Memorandum on Environmental Conflict Resolution.<sup>84</sup> The memorandum directs federal agencies to ensure the effective use of ECR consistent with eight principles: informed commitment, balanced and voluntary representation, group autonomy, informed process, accountability, openness, timeliness, and implementation.<sup>85</sup> A revised memorandum issued in 2012 reinforces these commitments and places greater emphasis on early collaboration. Implementation of the Administrative Dispute Resolution Act led the Executive to shift its focus from conflict resolution towards collaboration, a move illustrative of this Report's prior discussion about situating collaborations along the spectrum from conflict to collaboration.<sup>86</sup>

### 3. *Agency- and Resource- Specific Collaboration Statutes*

Congress has also enacted hundreds of statutory provisions requiring federal agencies to collaborate with stakeholders to govern specific lands and natural resources. This Report provides a novel overview of statutes encouraging or requiring agencies to collaborate. Appendix I summarizes these statutes, which are primarily contained within four titles: Conservation (U.S.C. Title 16), Indians (Title 25) Public Buildings, Property, and Works (Title 40), and Public Lands (Title 43).

Congressional directives to agencies to collaborate varies widely along the dimensions of collaboration outlined above, including the structure of the collaboration, the time period for which it will exist, and the parties with whom the agency is to collaborate. To provide examples of the wide variation among statutory provisions, consider three statutory provisions contained within Title 16, Conservation:

1. When establishing the Gunnison Gorge National Conservation Area, Congress instructed the Secretary of the Department of the Interior to develop a protection and management plan "in close consultation with appropriate Federal, State, county, and local agencies."<sup>87</sup>
2. In the declaration of purpose for the Protection and Conservation of Wildlife, Congress stated:

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and

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<sup>84</sup> OFFICE OF MGMT & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AND THE PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION (November 28, 2005).

<sup>85</sup> *Id.*

<sup>86</sup> See discussion *supra* Part II.A.2.

<sup>87</sup> Establishment of the Gunnison Gorge National Conservation Area, 16 U.S.C. § 410fff-5 (2012).

significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas . . .<sup>88</sup>

3. In the Wild and Scenic River Act, Congress specified:

The Secretary of the Interior, the Secretary of Agriculture, or the head of any other Federal agency, shall assist, advise, and cooperate with States or their political subdivisions, landowners, private organizations, or individuals to plan, protect, and manage river resources. Such assistance, advice, and cooperation may be through written agreements or otherwise.<sup>89</sup>

Each of these statutes contains a different degree of collaboration. The Gun-nison Gorge legislation requires consultation, essentially the acting agency running ideas past outside entities. The Protection and Conservation of Wildlife Statute, in contrast, requires the Department of the Interior to play a supporting function to state and public or private organizations protecting, rearing, and stocking wildlife. This requirement is so broad as to require regular, ongoing communication between federal agencies and an array of public and private partners. The Wild and Scenic River Act is similarly broad in requiring the Departments of Interior and Agriculture to work with various level of government, landowners, private organizations and individuals to coordinate the planning and management of river resources. It broadly specifies that this cooperation can take the form of written agreements—presumably contracts or memorandum of understanding—or not. In each example, Congress requires federal agencies to act in concert with stakeholders to manage the resources at issue (conservation, wildlife, and rivers), but provides for varying degrees of influence for external stakeholders.

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<sup>88</sup> 16 U.S.C. § 661 (2012).

<sup>89</sup> Assistance to State and Local Projects, 16 U.S.C. § 1282 (2012).



Land and resource management agencies are subject to multiple, sometimes competing, statutes. For example, National Oceanic and Atmospheric Administration (NOAA) has exclusive federal management over fishery resources in the U.S. Exclusive Economic Zone<sup>90</sup> and retains jurisdictions over whales, dolphins, porpoises, seals, and sea lions.<sup>91</sup> NOAA operates under multiple acts that require some degree of collaborative governance, including cooperative federalism,<sup>92</sup> inter-agency cooperation.<sup>93</sup> Several acts authorize or require NOAA to collaborate with nongovernmental stakeholders, including the Estuary Restoration Act of 2000,<sup>94</sup> Federal Ocean Acidification Research and Monitoring Act of 2009,<sup>95</sup> Geophysical Sciences Authorities Act<sup>96</sup> and National Aquaculture Act.<sup>97</sup>

NOAA reports suggest that “agency-driven decision-making in natural resource management has generally moved towards processes that involve stakeholders,” that participation has become a “fundamental component” of operations, and that various federal legislation “mandates public participation in some form.”<sup>98</sup> It maintains a robust educational program on developing stakeholder collaborations for coastal management areas with a centralized support team for collaborative efforts. Further, NOAA maintains stakeholder engagement experts to help the agency satisfy its various obligations—and desires—to collaborate.<sup>99</sup>

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<sup>90</sup> Magnuson-Stevens Fishery Conservation & Management Act (MSA), 16 U.S.C. §§ 1801-1884 (2012).

<sup>91</sup> Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423h (2012).

<sup>92</sup> Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101-5108 (2012); OFFICE OF PRIVACY AND OPEN GOVERNMENT, DOO 10-15, UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE AND ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (2012) § 3.01(nn) (requiring a cooperative state and federal management regime for intercoastal fisheries management efforts) [hereinafter NOAA DOO-10-15].

<sup>93</sup> Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c (2012) (requiring several federal agencies and state agencies to coordinate wildlife management with modifications to streams and bodies of water); Coastal Wetlands Planning, Protection, and Restoration Act, 16 U.S.C. §§ 3951-3956 (2012); NOAA DOO-10-15 § 3.01(dd) (creating an inter-agency task force devoted to coastal wetlands restoration projects in Louisiana); Meteorological Services to Support Aviation Authority, 49 U.S.C. § 44720 (2012) (creating an inter-agency partnership with the Secretary of Commerce to provide meteorological information to the Federal Aviation Administration).

<sup>94</sup> 33 U.S.C. §§ 2901-2909 (2012).

<sup>95</sup> 33 U.S.C. §§ 3701-3708 (2012).

<sup>96</sup> 33 U.S.C. §§ 883d, 883e (2012).

<sup>97</sup> 16 U.S.C. §§ 2801-2810 (2012); NOAA DOO-10-15 § 3.01(jj).

<sup>98</sup> NOAA OFFICE FOR COASTAL MANAGEMENT, SOCIAL SCIENCE TOOLS FOR COASTAL PROGRAMS: INTRODUCTION TO STAKEHOLDER PARTICIPATION (2015) (hereinafter NOAA SOCIAL SCIENCE TOOLS).

<sup>99</sup> *Id.*, at 9.

Statutes sometimes create overlapping collaborative structures in the same geographic space, managed by different agencies. For example, NOAA, the Bureau of Land Management (BLM) and U.S. Fish and Wildlife Service (USFWS) maintain three distinct regional collaboration bodies, each with different guidelines.<sup>100</sup> The Figure below illustrates each of these collaborations and how they overlap.

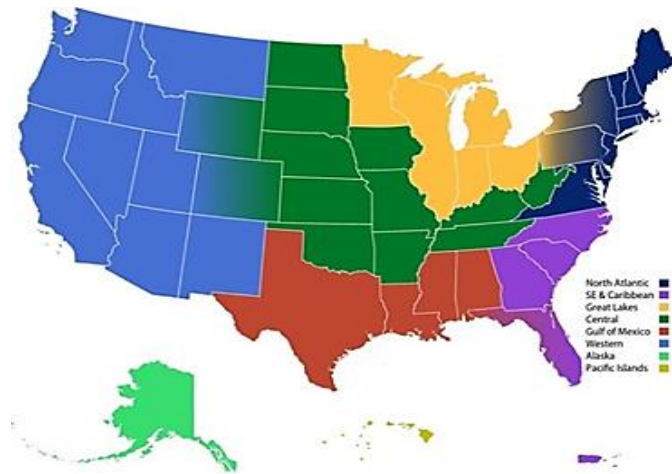
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<sup>100</sup> NOAA maintains a regional collaboration program in the form of Regional Collaboration Network, which consists of eight regional teams comprised of NOAA staff and external partners within a region. The Network is designed to share information and develop relationships, as well as to provide quick response to environmental disasters. *See* NOAA'S REGIONAL COLLABORATION NETWORK, 2015 ANN. REP. (2015).

The Federal Land Policy and Management Act of 1976, as amended by the Public Rangelands Improvement Act of 1978, required the Bureau of Land Management to establish advisory council's representative of major citizen interests concerned with resource management planning or the management of public lands. BLM has more than 30 Resource Advisory Councils covering the Western United States, in addition to a multitude of less-formal stakeholder collaborations. 43 U.S.C. §§ 1701-1787 (2012).

The Secretary of the Department of Interior created the Landscape Conservation Cooperative Network, an interagency, tribal and non-governmental network of 26 collaborations. The council of the group includes 31 participants, including seven federal agency directors, three tribal participants, one indigenous participant, four state agency directors, four NGO participants, one LCC participant, two major partnership participants four international participants and five at large participants. LCC COUNCIL CHARTER (REVISED 2015). The LCCs are coordinated by a team at the U.S. Fish and Wildlife Service, with input from the LCC Council, an advisory group The LCCs received about \$11 million for science support during the fiscal years 2014 and 2015. *Id.*

**Figure 4. Regional Collaborative Councils**



*NOAA Regional Collaboration Network*



*BLM Regional Advisory Councils*



*USFWS Landscape Cooperation Council*

In addition to top-down directives from Congress to collaborate in a specific area, the President, states, or private entities, may also create or govern collaborations.

## **B. Executive Orders**

Presidents Clinton, Bush, Obama, and Trump each issued executive orders requiring agencies to adopt some form of collaborative governance. Consider the following examples, which focus on the specific tool of stakeholder collaborations:

- President Bill Clinton signed an executive order for the National Wildlife Refuge System which noted as a guiding principle: “Conservation partnerships with other Federal agencies, State agencies, Tribes, organizations, industry, and the general public can make significant contributions to the growth and management of the Refuge System.”<sup>101</sup>
- President George W. Bush signed several executive orders promoting stakeholder collaborations, including the Establishment of Great Lakes Interagency Task Force and Promotion of a Regional Collaboration of National Significance for the Great Lakes, which tasked the Interagency Task Force with convening and establishing “a process for collaboration among the members of the Task Force and the members of the Working Group . . . with the Great Lakes States, local communities, tribes, regional bodies, and other interests in the Great Lakes region regarding policies, strategies, plans, programs, projects, activities, and priorities for the Great Lakes system.”<sup>102</sup>
- President Barack Obama’s executive order on Stewardship of the Ocean, Our Coasts, and the Great Lakes entrusted the United States with “ensuring a comprehensive and collaborative framework for the stewardship of the ocean, our coasts, and the Great Lakes that facilitates cohesive actions across the Federal Government, as well as participation of State, tribal, and local authorities, regional governance structures, nongovernmental organizations, the public, and the private sector.”<sup>103</sup>
- Although President Trump has not yet explicitly created a stakeholder collaboration through executive order, he did require an Interagency Task Force on Agriculture and Rural Prosperity to “provide State, local, and tribal officials—and farmers, ranchers, foresters, and other rural stakeholders—with an opportunity to suggest to the Task Force legislative, regulatory, and

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<sup>101</sup> Exec. Order No. 12996, 61 Fed. Reg. 13647 (1996).

<sup>102</sup> Exec. Order No. 13340, 69 Fed. Reg. 29043 (2004).

<sup>103</sup> Exec. Order No. 13547, 75 Fed. Reg. 43023 (2010).

policy changes.”<sup>104</sup> This, like the other examples, highlights a president requiring agencies to collaborate with diverse stakeholders on complex natural resource issues.

Notably, each of our recent presidents have also issued executive orders requiring collaborative governance in forms other than stakeholder collaborations, including coordination, consultation, listening sessions, and *ex post* review of stakeholder consultation as a marker of decision-making legitimacy. Consider:

- President George W. Bush’s Committee on Ocean Policy, which included a directive to “facilitate, as appropriate, coordination and consultation regarding ocean-related matters among Federal, State, tribal, local governments and the private sector, foreign governments, and international organizations.”<sup>105</sup>
- President Barack Obama’s *A 21<sup>st</sup> Century Strategy for America’s Great Outdoors*, a memorandum directing the relevant secretaries to “listening and learning sessions around the country where land and waters are being conserved and community parks are being established in innovative ways.” These sessions sought to engage a range of interested groups, including “tribal leaders, farmers and ranchers, sportsmen, community park groups, foresters, youth groups, businesspeople, educators, State and local governments, and recreation and conservation groups.”<sup>106</sup>
- President Trump emphasized the shortcomings of decision-making without collaboration, noting that: “Monument designations that result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders may also create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth.”<sup>107</sup> Trump directed the Secretary of Interior to review monument designations with a size of over 100,000 acres, which had been designated after January 1, 1996. The order focused on monuments designated or expanded “without adequate public outreach and coordination with relevant stakeholders.”<sup>108</sup>

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<sup>104</sup> Exec. Order No. 13790, 82 Fed. Reg. 20237 (2017).

<sup>105</sup> Exec. Order No. 13366, 69 Fed. Reg. 76591 (2004), *revoked*, Exec. Order No. 13547, 75 Fed. Reg. 43021 (2010).

<sup>106</sup> Presidential Memorandum on Creating a 21st Century Strategy for America’s Outdoors, 75 FR 20765 (APRIL 20, 2010).

<sup>107</sup> Notably, Presidents are not required to undergo public process to designate monument under the Antiquities Act, 16 U.S.C. §§ 431-450ss-5 (2012).

<sup>108</sup> Executive Order 13792 (April 2, 2017).

These examples underscore the variety of collaborative governance techniques used to manage land and natural resources, and illustrate alternatives to stakeholder collaborations.<sup>109</sup>

### **C. Agency Regulations, Secretarial Orders, Policy / Guidance Documents, and Support**

Agencies have promulgated numerous regulations governing collaborations. Appendix B provides a novel summary of agency regulations pertaining to collaborations. Secretarial Orders can also create or influence collaborations.<sup>110</sup> Agencies may also guide employees on collaboration through policy documents. For example, the Bureau of Land Management has issued national policy documents on topics like engaging stakeholders, dispute resolution, and how to assess whether a collaboration requires FACA certification.<sup>111</sup>

Several agencies maintain centralized offices for collaborative governance. The Bureau of Land Management has maintained a Collaboration and Alternative Dispute Resolution Program since 1997.<sup>112</sup> The Forest Service maintains a National Collaboration Cadre, “a network of people from around the US provide coaching and training to National Forests and their communities who are interested in understanding and developing collaborative processes.”<sup>113</sup> The Cadre offers classes and works with existing collaborative groups.<sup>114</sup>

Additionally, agencies without direct land and management responsibilities support collaborations. For example, Congress created the U.S. Institute for Environmental Conflict Resolution within the Udall Foundation in 1998.<sup>115</sup> The Institute supports efforts to assess and mediate conflicts surrounding the environment, natural resources, and public lands.<sup>116</sup> Agencies also review collaborations to develop

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<sup>109</sup> For a discussion of the various types of stakeholder collaborations, see *supra* Part I.

<sup>110</sup> See, for example, U.S. DEP’T OF INTERIOR SECRETARIAL ORDER NO. 3289 (February 22, 2010).

<sup>111</sup> BUREAU OF LAND MANAGEMENT, NATIONAL NATURAL RESOURCES POLICY FOR COLLABORATIVE STAKEHOLDER ENGAGEMENT AND APPROPRIATE DISPUTE RESOLUTION: WHAT BLM, COMMUNITIES AND THE PUBLIC NEED TO KNOW FOR PREVENTING CONFLICT AND RESOLVING DISPUTES INVOLVING PUBLIC LANDS AND RESOURCES (2009).

<sup>112</sup> U.S. FEDERAL LABOR RELATIONS AUTHORITY, COLLABORATION AND ALTERNATIVE DISPUTE RESOLUTION OFFICE, <https://www.flra.gov/components-offices/offices/collaboration-and-alternative-dispute-resolution-office-cadro> (last visited September 22, 2017).

<sup>113</sup> U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE NATIONAL COLLABORATION CADRE, [https://www.fs.fed.us/emc/nfma/collaborative\\_processes/default.htm](https://www.fs.fed.us/emc/nfma/collaborative_processes/default.htm) (last visited September 22, 2017).

<sup>114</sup> *Id.*

<sup>115</sup> *About Us*, UDALL FOUNDATION, <https://www.udall.gov/AboutUs/MissionAndHistory.aspx> (last visited Aug. 27, 2017).

<sup>116</sup> *Id.*

lessons learned and best practices from existing and past collaborations.<sup>117</sup> The existence of intra-agency teams designed to support collaborations does not, however, necessarily translate to individual collaborations relying upon these tools.<sup>118</sup>

#### **D. Other Sources of Legal Authority**

International law, state law, and local laws may also govern collaboration. This Report flags, but does not review, the influence these laws may have on how agencies and agency partners collaborate. State agencies, in particular, can play important roles in collaborations. For example, the Western Arctic Caribou Herd Working Group was largely supported by the State of Alaska Department of Fish and Wildlife in its infancy; it was only much later that the National Park Service became a participant and funder of the group.<sup>119</sup>

Stakeholder collaborations themselves are internally governed—private bodies subject to private rules. At the level of an individual collaboration, the governance might take the form of a charter or memorandum of understanding governing the behavior of stakeholders. At a broader degree of generality, nongovernmental organizations and corporations that are part of private groups may also follow internal private governance rules. Further, facilitators of collaborative groups may be subject to private rules of a governing body or university with which they are facilitated. The boundaries encountered by third parties seeking to judicially enforce these rules is largely unexplored, but merits further research.

Since interactions with stakeholder collaborations are governed by several overlapping laws, agency employees should be especially mindful of FACA and laws and regulations pertaining to the specific lands and resources being managed. Occasionally, international, state, and local laws may also become relevant. Stakeholder collaborations themselves always operate under a system of private governance, which the agency is not subject to, cannot control, and must consider.

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<sup>117</sup> For example, in 2015 the U.S. Geological Survey conducted a survey of 3,161 Bureau of Land Management employees about collaboration and alternative dispute resolution. RUELL, BURKARDT, & DONOVAN, *supra* note 41.

<sup>118</sup> Fifty-four percent of BLM survey respondents noted that they were “unlikely or very unlikely” to use the Udall Foundation’s U.S. Institute for Environmental Conflict Resolution and between 35-46 % said they were “unlikely or very unlikely” to use a BLM State Natural Resources ADR Advisor, a collaboration specialist in DOI or another agency, BLM’s Washington Office of Collaboration and Appropriate Dispute Resolution. *Id.* at 43-44. In sum, a strong portion of BLM employees surveyed were unlikely to rely on intra-, inter- or pan- agency offices devoted to collaboration.

<sup>119</sup> See *infra* Appendix III.

### III. BEST PRACTICES AND RECOMMENDATIONS

This Section focuses on lessons learned that can inform future agency engagement with collaborations.<sup>120</sup> In sub-Section A, I assess both the potential benefits and challenges of stakeholder collaborations. In sub-Section B, I provide recommendations for agencies considering, establishing, or maintaining a collaboration.

This Section is informed by themes that emerged from interviews with agency personnel and other non-federal agency members of stakeholder groups. These interviews were semi-structured and conducted by myself and a PhD candidate trained in interview methodology. The case studies contained in Appendix III and IV are developed from a review primary documents, such as working group charters, memoranda of understanding, strategic plans, and internal reports.

The first case study is the Western Arctic Caribou Herd Working Group, which manages a herd of 200,000 caribou that roam throughout Alaska and provide the primary means of subsistence for forty Alaskan Native Communities. The group formed in response to near-devastation of the herd in the 1970s and aims to navigate among the competing interests of native communities, subsistence users, recreational hunters, and oil and gas interests. The Working Group, now in existence for over twenty years, has a stable twenty-person board that votes on recommendations conveyed to local subsistence boards and the Board of Game.<sup>121</sup>

The second case study explores the 4 Forest Restoration Initiative (4FRI), which manages 750,000 acres in Northern Arizona, the largest contiguous remaining ponderosa pine forest ecosystem in the world.<sup>122</sup> The “poster child” of Forest Service collaborations, this stakeholder group has received hundreds of millions of dollars in Congressional funding over the past eleven years. Despite this large budget, it has treated only 45,000 acres of timberland through a combination of mechanical thinning and prescribed burns to manage wildfire risk while spurring local industry. The industrial uses of small-diameter timber have failed to materialize, leading the Forest Service and Nature Conservancy to pay for restoration ac-

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<sup>120</sup> The dozen interviews that inform this section provide qualitative data designed to provide a cross-section of experiences from a small and diverse group; the result is not a comprehensive account nor the result of a statistically significant analysis.

<sup>121</sup> See *infra* Appendix III.

<sup>122</sup> See United States Department of Agriculture, Forest Service, Rocky Mountain Research Station Proceedings, Ponderosa Pine Ecosystems Restoration and Conservation: Steps Toward Stewardship, Conference Proceedings RMRS-P-22, Flagstaff, AZ, April 25–27, 2000 (September 2001), [https://www.fs.fed.us/rm/pubs/rmrs\\_p022.pdf](https://www.fs.fed.us/rm/pubs/rmrs_p022.pdf).



tivity that conventional commercial timber operates could not profitably undertake.<sup>123</sup>

### A. Assessing Stakeholder Collaborations

Stakeholder collaborations have become ubiquitous in the modern administrative state.<sup>124</sup> Consider the extent to which various agencies note that collaborations are widespread or important:

- “. . . [C]ollaboration is very common if not the norm in DOI interactions with stakeholders.” - Dispute Resolution Specialist at the U.S. Department of the Interior, home to the most agencies with a mandate to manage land and natural resources<sup>125</sup>
- “There is a lot that I would consider collaborative adaptive management,” and “we actually do quite a lot” of stakeholder collaborations. - Stakeholder Collaboration Expert at NOAA<sup>126</sup>
- “We wouldn't be able to do our jobs without collaborations.” - National Park Service Official<sup>127</sup>
- “[P]ublic participation and collaboration are becoming an integral part of our mission.” - The Army Corps of Engineers<sup>128</sup>

The sheer number of statutes, executive orders, and regulations contemplating stakeholder collaborations indicate that these collaborations have become a tool upon which Congress, the president, and agencies relies.

#### 1. Benefits of Collaboration

The key benefits of stakeholder collaboration can be grouped into three rough categories: (1) generating substantively better decisions; (2) creating greater social acceptance of controversial agency decisions, as well as a perceived reduction in litigation; and (3) advancing agency mandates and goals by organizing and leveraging non-agencies to expend resources on shared objectives. Each of

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<sup>123</sup> See *infra* Appendix IV.

<sup>124</sup> See Christopher DeMuth, *Can the Administrative State be Tamed?* 8(1) J. LEG. ANALYSIS 121 (June 2016); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004-2005).

<sup>125</sup> Interview 7.

<sup>126</sup> Interview 6.

<sup>127</sup> Interview 8.

<sup>128</sup> *Collaboration & Public Participation Center of Expertise*, U.S. ARMY CORPS OF ENGINEERS, <http://www.iwr.usace.army.mil/Portals/70/docs/cpc/Added%202016/PI%20specialists.Fact%20Sheet%20Summer%202016.pdf?ver=2016-07-20-144453-433> (last visited September 22, 2017).

these benefits is discussed below.

**a. Agencies officials believe that they reach substantively better decisions because of the diverse viewpoints garnered through collaboration.**

Stakeholder collaborations can generate different management ideas that become part of the discussion, which may lead to better decisions than what the agency would have developed on its own. Stakeholder groups bring a wider diversity of opinions and experiences to the table, which can shift agency thinking. A Forest Service employee noted, “Left to our own devices, we will go down the narrow path.”<sup>129</sup> Stakeholders can push for a different path, as with members of Alaskan Native Communities encouraging agencies to incorporate indigenous knowledge into their understanding of the caribou herd.<sup>130</sup>

A member of the 4FRI stakeholder collaboration described the influence of the group on the criteria that the Forest Service used for the NEPA process:

[T]hey have certain criteria for data, that might not be the most recently available data, but at that agency because of their litigation, they are more comfortable with certain kinds of data that they feel has defended protective actions more. I think that is where the conflict comes. The stakeholders would like to be innovative and use best available science. The Forest Service Agency has reluctance to switch data midstream because it hasn't been proven in court and might be more vulnerable. We would argue that using best available science would do better in court. It's a kind of a cultural divide, but as a stakeholder we are never sued, they are. So sometimes I have to give it to them.<sup>131</sup>

This example illustrates an example of a collaboration pushing an agency towards what may, in fact, be an objectively better decision—using the best available science, instead of the more defensive position of what has been accepted in court previously. It further serves to highlight the broader point that collaborations force agencies to think outside the box, to consider new and different ideas when making decisions.

**b. Agency officials believe that decisions they make through collaborative processes gain greater social acceptance.**

Natural resource collaborations generally arise around controversial resource uses. Within this adversarial context, many agency employees believe that decisions informed by collaboration may prove more socially acceptable because they portray the agency as open to diversity of opinions. Instead of stakeholders

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<sup>129</sup> Interview 4.

<sup>130</sup> Appendix III.

<sup>131</sup> Interview 4.

sitting back and judging agency compromises, the stakeholders instead negotiate the deals themselves. In this sense, an agency official reports that stakeholder collaborations “do our work for us” by building social consensus around controversial decisions.”<sup>132</sup>

On a related point, agencies believe they are less likely to be sued, or to lose a lawsuit, for a decision that accords with a set of recommendations from a stakeholder collaboration. The same official notes, “Collaboration is not the panacea for getting rid of lawsuits. But it sure as hell makes [that risk] a lot lower.”<sup>133</sup>

Finally, relying on a collaboration reflects the modern reality that unilateral decisions by government may be considered suspect. An official report: “I don’t think anybody can do anything on their own anymore and be legitimate.”<sup>134</sup> Among land and resource management, collaborating on sensitive land and resource management decisions appears to have become the new norm.

**c. Stakeholders in collaborations can, and do, use their relative strengths to advance shared objectives.**

Agencies and stakeholders are both confined in what they can do. For example, stakeholders cannot directly manage public lands, and agencies cannot lobby Congress.<sup>135</sup> Yet, working collectively, stakeholders and agencies can develop common goals, then deploy their relative strengths to advance the objectives. For stakeholders in collaborations, these strengths often include financial resources, manpower, and the capacity to lobby. This synergistic relationship displaces the traditional notion that a principal-agent relationship exists between agencies and external actors, in which agencies are essential controlling external parties.<sup>136</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Although 4FRI lobbies Congress (see Appendix IV), an interviewee from another agency noted that “we are pretty careful *not* to encourage stakeholders to lobby Congress” and suggests that lobbying is “rare” and resisted the implication “that Federal agencies work with NGOs to lobby Congress on our behalf.” E-mail from Interviewee 6 to author.

<sup>136</sup> Instead, as Professor Hannah Wiseman has observed developing elsewhere in the administrative state, the relationships now seem bi-directional. Hannah Jacobs Wiseman, *Delegation and Dysfunction*, 35 YALE J. REG. (forthcoming 2017).

Consider the following:

I think the really good outcome of the CFLRP Act is that the stakeholders have managed to pull off either regional or two national workshops. It is really valuable, the Forest Service is an underfunded agency and one of the things that they continue to cut is the travel and lessons learned so you end up with these forests and districts that end up in isolation and they are very silo-ed. They don't have the obvious authority or the backing to consult with one another or contribute lessons learned. The other stakeholder nonprofit groups get engaged, they actually can develop those workshops, they can find funding to support the travel to them.<sup>137</sup>

Agency and non-agency actors with different capacities and constraints use collaborations as a starting point to pool resources to advance shared objectives. In so doing, decisions become more defensible in court, and private funds can be channeled towards public programs. Concerns arise, however, around the need to ensure that some stakeholders are not excluded and that the goals are consistent with agency mandates.

## *2. Problems with Collaboration*

Despite widespread enthusiasm for collaboration, there may be problems with the practice that remain largely undiscussed. Three issues of concern emerged from the qualitative data: (1) to successfully collaborate, agencies may violate FACA or regulations, knowingly or unknowingly; (2) participation in collaborations is expensive and time-consuming, meaning that less-advantaged stakeholders with strong interests who may be able to engage in less intensive public processes such as notice and comment may be displaced by stakeholder collaborations; (3) we do not really know if stakeholder collaborations are worthwhile relative to other approaches. Stakeholder collaborations may cost more, lead to worse ecological, economic, or social outcomes, and take longer than both agency decision-making and the litigation that might follow. We simply do not know. This void of information cautions against unquestioned enthusiasm for collaborations.

### **a. Collaborations may violate the requirement that agencies retain final decision-making authority.**

A variety of doctrines, statutes, and case holdings require agencies to retain final decision-making authority over management decisions, even when working with collaborations.<sup>138</sup> Yet, agencies must share decision-making space to some

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<sup>137</sup> Interview 9.

<sup>138</sup> See *supra* Part II.

degree to motivate stakeholders to participate in a collaboration. If stakeholders do not believe that an agency will implement the collaboration's recommendation, they have minimal incentive to continue collaborating. For example, leaders in two Alaskan Native Communities refused to participate in the WACHWG collaboration when it became clear that the Alaska Department of Fish and Game would not share its decision-making authority.<sup>139</sup>

In requiring agencies to both engage with stakeholders and retain sole final decision-making authority, Congress has created a difficult situation. To navigate this balance, collaborations seem to be paying lip service to retaining sole decision-making authority while in fact sharing some portion of decision space.<sup>140</sup>

The 4FRI case study illustrates this point: The defining narrative of the group centers on the objection process for the first Environmental Impact Statement in which the collaboration participated.<sup>141</sup> The Forest Service Regional Forester handled the objection process by referencing the group decision-making process when evaluating the objections of a non-group-member, Wild Earth Guardians. This suggests a special status for collaborations not available to the public.<sup>142</sup> The 4FRI stakeholders felt validated when the agencies' official decision-making essentially rubberstamped the collaboration's recommendation.<sup>143</sup>

Remember, stakeholders participate in collaborations because they have a pecuniary or cultural interest in the land and resources being managed.<sup>144</sup> If they can protect and advance those interests through participating in a stakeholder collaboration that an agency listens to, they will be highly motivated to participate. The less likely the agency is to follow the recommendation of the collaboration; the less motivated stakeholders will become.

This observation should not be misunderstood as a call for Congress to relax agencies' decision-making authority over public land and resources. The non-delegation doctrine and related laws exist for numerous reasons, including to ensure that agencies manage resources in the public trust—for the collective benefit of all citizens. And stakeholder collaborations tend to be local in nature. Agency accountability to both the local stakeholder collaborations and the political influence of the executive branch therefore provides a check on localized power over resources. This point does underscore, however, the challenges agencies face in retaining sole decision-making authority while motivating stakeholders. More

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<sup>139</sup> See *infra* Appendix III.

<sup>140</sup> See *infra* Appendix IV; Interview 4.

<sup>141</sup> See *infra* Appendix IV.

<sup>142</sup> See *infra* Appendix IV.

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* Part I.A.

importantly, the discussion of the high degree of influence that some stakeholder collaborations are exerting over agency decisions should serve as a reminder of stakeholders who do not participate in the collaboration.

**b. Collaborations' influence over agency decision-making may disadvantage lower socioeconomic status stakeholders who lack the resources necessary to participate but have an interest in the resources at stake.**

Participation in collaborations can prove expensive and time-consuming for stakeholders. Stakeholders with a lower socioeconomic status but strong interests in the land and resources at issue may be displaced by stakeholder collaborations, relative to less-intensive public processes, such as notice and comment periods.

Public land and resources tend to be disproportionately located in rural areas, some of which—like the former timber mill towns of the Pacific Northwest—no longer have strong industrial interests. Accordingly, the burden falls upon local residents to represent industrial interests (i.e., “we want timber jobs back.”). This can prove difficult and ineffective, as many stakeholder collaborations meetings occur at times that are inconvenient, if not impossible, for workers with limited workplace flexibility to attend. For example, the annual WACHWG meetings take place over a two to three-day timeframe in a location that is several flights away from villages in which the Caribou is a primary food source.<sup>145</sup> The 4FRI meetings take place mid-morning on weekdays. Hourly workers or stay-at-home parents might find either meeting difficult to attend, which contributes to the likelihood that only well-funded stakeholder collaborations, such as industrial interests and nongovernmental organizations, will be able to afford to send representatives.

Many stakeholders are paid to attend meetings. Agency officials, representatives of extractive industries, state and local government officials, and employees of environmental nongovernmental organizations are all receiving their wages for attending meetings—it is part of their jobs. The time investment allows careful, data-intensive decision-making. But, it can serve as a functional bar against the perspectives of those who do not belong to such groups, and are individually unable to attend a series of meetings.

Collaboration puts interested stakeholders with insufficient resources to express that interest through meeting attendance at a disadvantage, relative to a one-time listening session or public comment. One response to this concern may be that sufficiently-motivated stakeholders will pool resources to fund representation in collaborations. This position may be true in certain interests—as with sporting groups—but fails to take into effect the income effect with respect to rural

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<sup>145</sup> See *infra* Appendix III.

populations with lower socioeconomic status.

A similar set of concerns revolve around tribal interests. It is striking that 4FRI, the most lauded stakeholder collaboration in the Forest Service, does not have tribal representatives who belong to the collaboration. A stakeholder notes:

I would say we classically miss, and this is across the west, our tribal partners. We have been less than successful at engaging our tribal nations, and there are a lot of reasons for that.<sup>146</sup>

Several factors can give rise to tribes not being represented, although these considerations differ on a tribe-by-tribe basis given the broad diversity of tribal resources and objectives.

Further, tribes may elect to become involved in resource management from a government-to-government relationship instead, under the Section 7 Consultation requirement of the National Environmental Policy Act.<sup>147</sup> Tribes electing to rely solely on this option should not, and legally cannot, have their perspective dismissed because they did not participate in the collaboration. Given the specialized legal status of tribes under NEPA, agencies should strive to include tribes that want to participate in collaborative efforts while understanding that tribes have specialized legal treatment under NEPA that should not be conflated with general public participation.

**c. Claims about the successes of collaborations are not relative; there is no empirical basis for the claim that they work better than alternative approaches.**

When asked about successful and unsuccessful collaborations, the answers of agency officials were anecdotal—stories of particular collaborations that produced positive outcomes, or not. Interestingly, the same collaboration can generate sharply different assessments of success, as illustrated by the enthusiasm with which agency officials speak of 4FRI contrasted with the scathing newspaper editorial on the subject.<sup>148</sup> This divergence highlights the absence of defined metrics by which to judge a collaboration, either in isolation or relative to other means of engagement.

This Report sought to identify the features of, and reasons for, success and failure in collaboration and illustrate each through examples. While several interviewees shared stories comparing successful and unsuccessful collaborations,

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<sup>146</sup> Interview 7.

<sup>147</sup> 42 U.S.C. §§ 4321-4370m-12 (2012).

<sup>148</sup> See *infra* Appendix IV.

when their quotes were circulated for review and inclusion in the report,<sup>149</sup> some retracted these statements out of fear that critique would undermine the unsuccessful collaborations, still in operation. For that reason, this Report does not provide specific instances of unsuccessful collaborations, but flags the important point that they exist.<sup>150</sup>

How do collaborations perform relative to alternative approaches? An agency could, for example, make a decision with only the minimum requisite public input, risk being sued by interest groups, and then, in the event of a lawsuit, ask a court to render the decision acceptable, or not. Litigation may prove less expensive than funding an ongoing collaboration. It is difficult to fully quantify a cost-benefit analysis on this point, however. The benefits and harms of collaboration may extend beyond specific management issues, to influence a generalized sense that the public has of a particular agency, or federal land management generally.

Do collaborations produce the best ecological results? Several examples suggest that some people believe that agencies' emphasis on collaboration leads to over-cooperation with grazing or ranching interests at the expense of ecological objectives. A pernicious effect of collaboration in such instances is that it gives the *appearance* of democratic process that makes the agencies' decision more defensible in court. In one example, members of the local environmental community refused to participate in a collaboration because they felt that previous collaborations amounted to a series of elaborate hand-waving by the agency to give the appearance of appropriate democratic process while giving ranchers the grazing access they wanted.<sup>151</sup>

In another example, which took place in a different state, a member of an independent scientific review board examining agency action was surprised to learn that the local agency position was essentially acquiescence to local ranching interests.<sup>152</sup> When the member of the review board protested that this was

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<sup>149</sup> Interviewees were provided with the opportunity to review their recorded comments used in this report per the interview protocol. See *infra* Appendix V.

<sup>150</sup> These withdrawals should cause future researchers to be thoughtful about the incentives for self-assessment by agency officials and stakeholders in evaluating the success of ongoing collaborations. The unwillingness to engage with negative assessments of collaborations also raises broader questions—outside of the context of this Report—about the degree to which norms against talking about the challenging aspects of collaboration hampers the potential for healthy collaborations, limits the ability to meaningfully assess the relative merit of collaboration, and may be reflective of entrenched agency culture or location-specific norms. Importantly, the individual interviewees are operating in the political and social realities of the situation; they do not personally bear responsibility for the larger issues, they merely reflect them.

<sup>151</sup> Interview 13.

<sup>152</sup> Interview 14.



inconsistent with the requirements of the Endangered Species Act and other federal laws, the agency official acknowledged this as true, but refused to budge.<sup>153</sup>

Regardless of the relative and empirical success of collaboration, some agency officials feel that it is simply the right thing to do. An agency biologist reflected this sentiment, saying, “Just as a person, I think it is valuable to collaborate with people who are invested in decisions that you make. So I think [stakeholder collaborations] are pretty important.”<sup>154</sup> This sense of collaboration as reflective of democratic principles is also discernable in the language of the congressional acts and executive orders requiring collaboration.<sup>155</sup> Eventually, Congress or agencies should consider testing the intuitive sense that collaborations satisfy democratic and practical considerations by explicitly studying and considering the relative costs and benefits of alternatives.

## **B. Best Practices and Recommendations**

This Section provides agencies with a set of recommendation points of consideration when deciding whether to establish a collaboration, through the process of collaboration, and how to maintain a collaboration. It incorporates lessons learned from various stakeholders and agency officials, often in their own words.

### *1. Deciding Whether to Establish a Collaboration*

To the extent that an agency has the flexibility and authority to consider establishing a collaboration (i.e., it is not required by Congress or the President), the agency should assess the situation to determine which kind of collaborative model best addresses the issue at hand.<sup>156</sup> The following factors weigh in favor of creating a new collaboration:

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<sup>153</sup> *Id.*

<sup>154</sup> Interview 10.

<sup>155</sup> See *supra* Part II.A.

<sup>156</sup> NOAA SOCIAL SCIENCE TOOLS, *supra* note 98. NOAA provides the following guidance on deciding when to establish a collaborative:

- Proactive engagement can help to avoid problems
- A problem has been clearly identified
- The best course of action is complex or not apparent
- Support of stakeholders is necessary for the decision to be successful
- Many parties are affected by the decision
- No single agency has clear or complete jurisdiction
- No single agency has the resources or expertise to make and implement a decision
- Issues and solutions are negotiable
- Parties are willing to collaborate.

*Id.* (Adapted from NOAA OFFICE FOR COASTAL MANAGEMENT 2012).

- a. There is a problem, or set of problems, in managing land or natural resources that is affecting the deeply-valued interests of multiple, diverse stakeholders.**

There is strong bottom-up pressure to manage the issue in an acceptable way, which indicates that stakeholders will be willing to participate. A stakeholder in a collaboration describes the need for participants' interest in a resource in order for the collaboration to be successful:

The most successful collaborations are not structured by agencies. When the agencies say 'hey I need a collaboration to get this project done' it is just a false dichotomy . . . . Grassroots efforts by the stakeholders of our federal land end up in the best results for the federal landscape. So you can't force it.<sup>157</sup>

This problem may be highlighted when a crisis occurs, especially if land or a resource a diverse group of stakeholders care deeply about was handled poorly.

Several collaborations emerged from crisis: In the case of ----, population collapse in caribou herds that supported thousands of people<sup>158</sup> and wildfires caused millions of dollars in lost property values.<sup>159</sup> A NOAA employee recalls how a similar circumstance caused renewed attention to an existing collaboration, saying:

There was a really stressful confrontation about a whale that stranded in Moriches Bay in Long Island around Thanksgiving [in 2016]. The whale stranded alive and was on the beach alive for a couple of days. Maybe three days. It was only a few feet from swim-mable water, but it was grounded and it could not get off. When that happens a whale pretty quickly deteriorates. Eventually we, NOAA, hired a veterinarian to euthanize the animal, but before that happened people watching the whale's struggles were terribly upset, as you can imagine. We, NOAA, and our partners who are part of what we call the Marine Mammal Stranding Network were not fully prepared for this particular event. It happened just before the Thanksgiving break and people were on vacation. There were a lot of reasons why we were not as alert as we should have been, but those reasons do not diminish the fact that people were terribly upset with their government's response. I don't blame them.

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<sup>157</sup> Interview 4.

<sup>158</sup> See *infra* Appendix III.

<sup>159</sup> See *infra* Appendix IV.

But out of that came some good. People were really frustrated at their government and wanted to do more to help the whale. We were frustrated with ourselves that we didn't respond as best we could in ways that we knew we could respond and, in fact, in ways we typically do respond. We met with the community a few months after the event, and we formed a much better collaborative process on Long Island. People who were so angry at the loss of this whale are eager to help us respond to the next stranding. The Marine Mammal Stranding Coordinators of Long Island have received a lot of expressions of support saying, "Next time we'll be there, we'll help you, we'll provide you with information, I've got a boat you can use," all that sort of stuff. So often collaboration comes out of crisis. As the aftermath of something like that.<sup>160</sup>

As highlighted by this example, a natural resources disaster—large or small—that negatively affects people attracts attention. It can serve as a catalyzing event. The risk of losing valuable property is perhaps the primary motivator for stakeholders to invest the time to participate over the course of many years.

**b. There is long-standing conflict about how a particular land or resource cluster should be managed among numerous deeply invested stakeholders.**

Regardless of whether they use the tool of collaboration, agencies must manage relationships with several stakeholders competing for mutually-exclusive uses of a finite resource. In the example of the Western Arctic Caribou Herd, Alaskan Native hunters, trophy or sport hunters, hunting guides, transporters, and environmental nongovernmental organizations had sharply differing views about who should harvest caribou, and appropriate methods for harvest.<sup>161</sup> In the 4FRI case study, environmental nongovernmental organizations, the timber industry, and local homeowners were at odds about how to reduce wildfire risks.<sup>162</sup>

Local agency employees tend to be poignantly aware of such resource conflicts, and who the key actors are. The difficulty in resolving the conflict is that desired outcomes tend to be mutually exclusive: cut the trees / don't cut the trees, issue caribou hunting permits to non-native hunters / don't issue hunting permits to non-native hunting permits. Further, many stakeholders conflate an agency not taking their desired approach as a lack of understanding by agency officials. A NOAA official reports:

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<sup>160</sup> Interview 6.

<sup>161</sup> See *infra* Appendix III.

<sup>162</sup> See *infra* Appendix IV.

Key stakeholders of the National Marine Fisheries Service think that we do a terrible job at stakeholder engagement. Fishermen feel that we do not listen to them. Environmental groups feel that we listen only to the fishermen . . . . A large part of the why is people are not really usually satisfied with having provided input. What they want is to persuade us to their position. That's harder . . . . But we have reasons for making decisions that go beyond simply human interactions, there are legal requirements that we have to adhere to.<sup>163</sup>

Under such circumstances, starting a stakeholder collaboration puts stakeholders with divergent perspectives in the same room. This allows stakeholders to communicate directly, but can also exacerbate conflict. Such communication has at least two effects that may emerge, regardless of whether resolution is achieved: humanizing the other side of a conflict, and potentially changing understanding over time. Importantly, these features happen in a bi-directional manner in successful collaborations.

The agency, too, may shift its thinking in response to collaboration. In the Western Arctic Caribou Herd example, state wildlife biologists began the working group to inform Alaskan Natives about biological conditions, so that permitting decisions would make sense against a backdrop of scientific data.<sup>164</sup> Over time, however, agency officials developed an increased familiarity with, and respect for, indigenous ecological knowledge—the intergenerational cultural knowledge that Alaskan Native Communities had about how caribou act over time in response to changing natural conditions.<sup>165</sup> Agency officials shifted from telling Alaskan Natives about the scientific assessment of caribou to exchanging information drawn from various sources, each viewed as legitimate. This highlights the opportunity for bi-directional learning, which can lessen conflict.

**c. There is strong top-down pressure within the agency or from political appointees, indicating that politically-connected figures will draw upon their resources to provide the necessary funding and support.**

Successful collaborations require politically-connected supporters linked to the region at issues. Governors, senators, or high-ranking agency officials who are willing to expend political capital to get the collaborative funding and necessary regulatory or legal permissions seem vital in the success of long-standing collaborations. The 4-FRI, which has an operating budget of \$33 million, not only built upon a collaboration started by the governor, but also fit into a federal statute

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<sup>163</sup> Interview 6.

<sup>164</sup> See *infra* Appendix III.

<sup>165</sup> *Id.*

requiring the Forest Service to collaborate, and had support from well-connected senators who are willing to introduce legislation before Congress to support the organization.<sup>166</sup> Without a high degree of support, well-intentioned stakeholders and agency employees may become distracted with fundraising efforts to cover basic operating costs.

**d. There is strong internal pressure within the agency to embrace a collaborative approach, including willingness to share decision space.**

Individual agencies cannot resolve the tension between true collaboration and limits on nondelegation—this is a Congressional task. Regardless, a genuine willingness on the part of agencies to share what decision-making authority can be shared with local decision-makers is key to successful collaborations. One state agency official explained:

I've seen other collaborative efforts where the agency, because those within it are told they need to do this collaboration, they just do it as a pro forma check the box exercise without really being willing to give up that power and decision-making. In my mind, this becomes a waste of everyone's time because this can't be a true collaboration, and if you don't want to empower the people you are working with then don't even go down that road.<sup>167</sup>

As a precondition to collaboration, the agency should internally assess the degree to which it is willing—and able—to share decision space.

**e. A less resource-intensive form of collaborative governance exists but cannot meet the informational and / or relational needs of the situation.**

Agencies should seek to create the least structurally complex collaborative possible. To this point, a state government employee notes:

I'm involved with a number of different collaborative efforts. One of the mistakes I see people make is that they build huge collaborative groups around relatively simple projects, and I think you have to scale your collaboration to your project. The larger it is the more controversial it is. Obviously, that adds a complexity and the need for more management. Collaborations are inherently difficult, cumbersome, and time consuming entities. So, the more complex and larger your collaborative is the more time you are going to spend just on the collaborative process . . . , the larger it gets the greater the need for professional facilitation, for administrative support, those sorts of things.<sup>168</sup>

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<sup>166</sup> See *infra* Appendix IV.

<sup>167</sup> Interview 3.

<sup>168</sup> Interview 3.

Moreover, the 4FRI collaboration evolved from nearly a decade of different task forces and working groups.<sup>169</sup> Groups with a specific task (such as creating a plan or report) and finite timeline may create the capacity of people to work together, without the commitment or expectation incumbent in a collaboration. Getting people in a room to discuss a problem generally gives rise to informal relationships and brainstorming, which can begin to reduce animosity and may build trust. The yeast of these relationships is repeated interactions, sometimes centered around the goal of producing a particular deliverable, such as producing a management plan or report. Thus, listening sessions and task forces, may provide a low-cost way to test the amenability of stakeholders to more involved collaboration tools.<sup>170</sup>

For a variety of practical considerations, agency-initiated collaborations should start at the smallest and least formal scale feasible. There is no magic in the terminology surrounding collaborative governance—if an informal relationship can achieve an objective more quickly and at less expense than a collaboration, the agency should embrace it. A National Park Service employee underscores this point, saying:

It's really one of the things that can either make or break a new [National Park Service] Superintendent coming to a subsistence park in Alaska, how well they can integrate that and how quickly they can establish a sense of trust with their communities and to work with them so that if folks need better access to get to an area that they use for woodcutting but they can't use their snowmachines to get there because the ice on the lake hasn't frozen, that the Superintendent is flexible enough to accommodate that somehow in some way. This is where partnerships on the ground, the collaborations on the ground, are really most powerful, they happen on that one to one, neighbor to neighbor, type basis. As opposed to just being more of the larger agency talking to a tribal government, or talking to a village government.<sup>171</sup>

This is an important point for Congress, the President, and higher-level agency officials to consider: Informal, relational conflict resolution is difficult, if not impossible to require, quantify, or reward. But, it can be the most effective means of managing many resource challenges. A push towards collaboration should not be a push towards formalism – relationships matter and may be both the cheapest

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<sup>169</sup> See *infra* Appendix IV.

<sup>170</sup> *Id.*

<sup>171</sup> NPS employee interview.

and most effective collaborative tool available.<sup>172</sup>

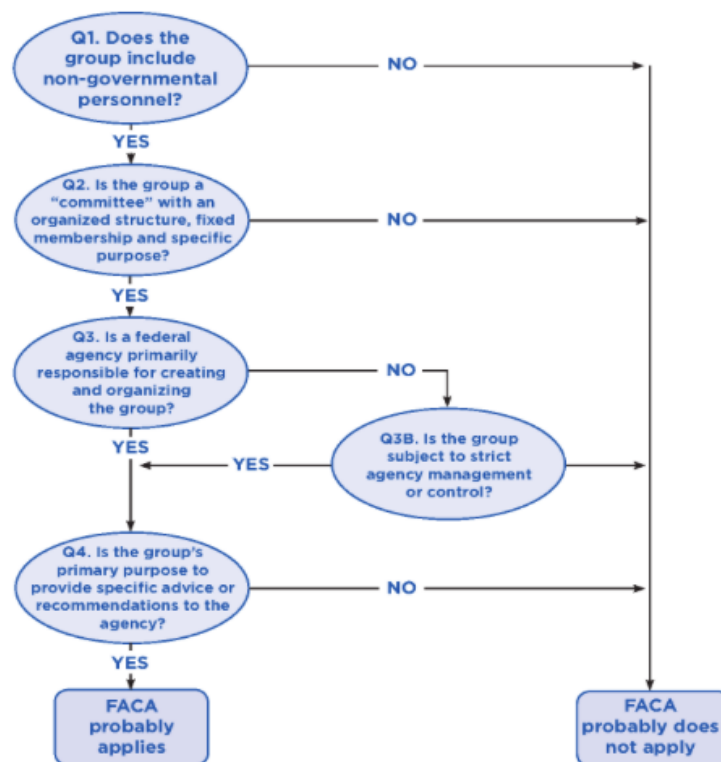
## 2. *Establishing a New Collaboration*

After an agency determines that it wants to work with stakeholders to establish a new collaboration, it should take the following steps:

### a. **Determine whether FACA will apply.**

Agencies deciding whether FACA certification is necessary should consider the following flow chart:

**Figure 5. Flowchart for Determining Whether FACA Applies to a Collaboration**



*(Courtesy of the U.S. Forest Service, National Forest Foundation, Partnership Resource Center)*

Generally, collaborations with more influence on agency decision-making are more likely to be subject to FACA. To the extent that an agency has access to a solicitor or other legal counsel available for such inquiries, they should seek an informal check on the need for FACA—such counsel can serve as a repository of information regarding what other collaborations within the agencies have done in the past.

<sup>172</sup> For a discussion on the importance of informal, norm-based relationships in managing resources and shared geographic space, see ELLICKSON, *supra* note 62.

**b. Identify the relevant legal authorities authorizing collaboration among existing laws and regulations.**

Agencies should consult with a stakeholder engagement center and/or in-agency legal advisor to identify which laws and regulations govern the collaboration. Appendix I and II are useful tools in identifying situations in which collaborations are required, or may already exist. Having this information prior to forming the collaboration allows the agency to communicate the legal standard by which recommendations for the collaboration will be incorporated into agency decision-making, an important foundation for forming clear expectations and trust.

**c. Identify stakeholders who may be willing to participate.**

There exists a broad, if not universal, group of stakeholders for every public land and resource, which can be explained along the dimensions of existence value, taxpayer interest, and teleconnectivity of resources. In Alaska, for example, every resident of the state is legally considered a potential subsistence user of caribou—regardless of where they live, they have equal access to the natural resources of the state.<sup>173</sup> Within that broader category, there are many differing perspectives about the relationship between people, their area of residence, and their interest in hunting rights. One National Park Service official notes:

It just gets to be a very, very complex system of not only political relationships but community relationships, and relationships between people that live in urban areas as well as those that live in rural areas. This group of diffuse and loosely-interested stakeholders is not the group with requisite interest to maintain a long-term commitment to collaboration.<sup>174</sup>

Similarly, a NOAA employee specializing in stakeholder collaboration provided the following response to who counts as a stakeholder, saying:

For the National Marine Fisheries Service . . . really anybody [is a stakeholder]. I think anybody who has an interest in, or is affected by, what we do in the ocean is a stakeholder, and I can't imagine anyone who doesn't. Who isn't affected by what is happening in the ocean in some ways?<sup>175</sup>

Beyond this broad recognition, agency officials drill down to identify stakeholders as those with an interest in the resources. This is the group that will likely have the capacity and interest to participate in a collaboration. The NOAA collaboration specialists discuss this with respect to ocean resources, saying:

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<sup>173</sup> Interview 8.

<sup>174</sup> Interview 10.

<sup>175</sup> Interview 6.



There are some groups that are clearly affected in an immediate and obvious way. People who make their living on the ocean. For us, in particular, fishermen are our primary stakeholder, but there are also other groups who really care about the ocean, the environmental groups care deeply about what is going on in the ocean. They certainly would represent some stakeholders who need to be involved in the management of the oceans.<sup>176</sup>

The heart of identifying key stakeholders with the requisite degree of commitment to enter a collaboration requires looking to those with a cultural or pecuniary interest—someone who makes their living from the resource or land in question, whether extracting the resource or protecting it.<sup>177</sup> This is the first layer of stakeholders. The NOAA collaboration specialist also made the valuable point to consider non-obvious stakeholders:

The National Marine Fisheries Service has a number of stakeholders that you wouldn't think of, like in California the dam owners the people who manage the hydraulic dams in the Sierra Nevada. They are stakeholders because they control the water that endangered salmon species in California need to survive. We don't directly regulate them, but we advise the Federal Energy Regulatory Commission about dams. So the operations of the dams is directly affected by us. Likewise farmers in California's Central Valley are very much our stakeholders. If the salmon need water to migrate upstream to spawn, it means that there is less water available for farming. When water is scarce, as it was during the recent California drought, you can bet that we need to engage with these stakeholders.<sup>178</sup>

Drawing upon the expertise of agency officials who have operated in the region for a long time can provide insight into non-obvious stakeholders, through institutional memory of previous conflicts or collaborations.

It is also important to consider state, tribal, and local government stakeholders. Importantly, this discussion is to predict who will be interested over time and where resources should be targeted in early phases. Different stakeholder groups may respond differently to the same invitation, based upon preexisting relationships (or distrust) with agencies. As a result, agency officials should be mindful of local norms and custom, which may mean different forms of invitation to different stakeholder groups (i.e., sending a letter to one group and having a known agency employee visit another to deliver an informal in-person invitation).

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<sup>176</sup> *Id.*

<sup>177</sup> See *supra* Part I.A.

<sup>178</sup> Interview 6.

Agency officials should not limit access to meetings; all meetings should be well-publicized, and no stakeholders should be discouraged from attending or turned away. Generally, interest wanes over time among stakeholders with superficial interest in the land or resource. The natural attrition of meeting attendees can feel disheartening, but is in fact a natural and important part of the progression of building trust and relationships.

**d. Encourage the collaborative to create its own structure and groundrules.**

If FACA does not apply, the collaborative may need to establish itself structurally. Creating a charter or memorandum of understanding among members can be a good way to build early-stage trust without addressing the divisive issues. Outside facilitators can be useful in this process, but interviewees emphasized the importance of empowering collaborations to structure themselves:

Agencies themselves cannot structure the collaborations. The collaborations themselves must build their structure. If an agency steps into the game knowing how it wants to structure a collaborative then they have started off fundamentally in a non-collaborative manner. I think there are a lot of factors that have to determine what the collaborative structure looks like, but it should not be a lead agency's role in determining that.<sup>179</sup>

A stakeholder of the 4FRI collaboration described the process of setting its own rules, saying:

Oh, issued regulations for a government collaboration? Heck no. I think that defeats the purpose of the collaboration. But the collaboration itself came to a consensus on a lot of governing documents. So, we decided how do you come to consensus, we defined what is consensus for the 4FRI, we set up some decision rules for making recommendations, what does it take to get a recommendation from the 4FRI stakeholder group, we have communication guidelines just to say if the 4FRI stakeholder group is ready to communicate that has to be agreed upon, you can't have one stakeholder going out willy-nilly saying, 'The 4FRI stakeholder group agrees to this,' it has to go through a process with the stakeholder group.<sup>180</sup>

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<sup>179</sup> Interview 3.

<sup>180</sup> Interview 9.

A stakeholder from NOAA had a different perspective, however, saying:

[The step of a collaboration organizing itself] is not always going to be necessary. If we are not seeking consensus from the group, it is my understanding that the Federal government can organize and convene meeting of the stakeholder collaboration group. It does not need to self-organize, and, in my view, it is often more efficient if we do not place the requirement of self-organization upon the group.

Ultimately, for ongoing collaborations, the agency can use the opportunity of initial rule-setting as an opportunity to exhibit the role it will play as the collaboration unfolds: supportive and informative, but not dictatorial. Establishing these relational dynamics early establishes a foundation of trust upon which future, more difficult topics can be broached in the future.

**e. Provide properly sized tasks to the collaboration; avoid doing too much too soon.**

Notably, both case study collaborations took several years before taking on difficult substantive issues. This is consistent with the observation from managers that there is a “Goldilocks element” to the scope of issue that agencies should put before collaborations. If a young collaborative takes on divisive issues or large-scale projects—issues that are too big—it may fail. Alternatively, a mature collaborative that does not do meaningful work will frustrate its membership. As a result, agencies should consider ramping the issues and tasks that it proposes to give to a stakeholder collaboration, starting with small wins, then expanding to more difficult subjects and tasks.

**f. Build trust and relationships with stakeholders, which may require time and the involvement of third-party facilitators.**

A key element of collaboration—some would argue, the very point of collaboration—is the ability to build trust and relationships among former adversaries. This may also prove to be the most difficult aspect of the collaboration. Several interview respondents asked that their comments about difficult personalities hampering specific collaborations be off-record. But, it was noted in several instances that dominant personalities unwilling to consider other perspectives diminished trust within a group.

Agency structure can be another impediment to trust-building. A stakeholder from the 4FRI collaboration also noted that the structure of the Forest Service, and the legal demands upon it, hinder collaboration:

The second barrier is just stakeholders to Forest Service. So it's an interesting lack of trust and the Forest Service is to blame for this too. I feel like the Forest Service responds [to] too many masters. They are a hierarchical organization and what the stakeholder group has seen is that they have developed a relationship locally with the planners here but the Forest Service regional office will wade in periodically and kind of mess up those stated areas of trust or, you know, the agreement areas. And I don't understand what the regional folks that do that are thinking. Because you know collaborat[ion] succeeds on these personal relationships, so you can't sit in the office in Albuquerque, and come over once every 18 months and drop the law, or drop the bomb.<sup>181</sup>

This highlights the central tension between agencies as collaborators and agencies as administrators of other laws passed by Congress.<sup>182</sup> Also, the organizational structure and history of an organization can influence its ability to adapt to a collaborative governance.

A recurring theme was the need to use third-party facilitators to overcome initial barriers and build trust. 4FRI used at least four facilitators before finding one who many believed moved the group towards a more trusting place.<sup>183</sup> Despite 4FRI's success, the recurring problems of difficult personalities and hierarchical constraints persist, proving that it can be difficult to achieve the goal of building trusts and relationships. Agencies and stakeholders alike should target improving contentious relationships to the extent that compromise can be reached; it may prove unrealistic—even counterproductive—to strive for friction-free relationships.

### *3. Maintaining Stakeholder Collaborations*

Once established and operative, stakeholder collaborations require ongoing maintenance by stakeholders, but decreased involvement from agencies.

- a. Agency officials directly involved in collaborations should assign one person to the task of ensuring ongoing compliance with relevant laws, including a brief annual consideration of FACA.**

From a legal perspective, agencies should re-assess the applicability of

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<sup>181</sup> Interview 9.

<sup>182</sup> See *supra* Part II.A; Part III.A.2.

<sup>183</sup> See *infra* Appendix IV.

FACA and changes to the laws regarding collaboration on a recurring basis. The flexible and adaptive nature of collaborations suggests that informal collaborations can become more influential over agency decisions over time, leading to different results in the decision-making process. Agencies should also be mindful of the relationship between stakeholder collaborations and the public participation considerations under the National Environmental Policy Act, along with other relevant federal laws that might conflict with creating a high degree of shared decision-making space.

**b. Collaborations and agencies should establish agreed-to metrics of success jointly and conduct annual assessments on performance along those metrics.**

Collaborations will likely become self-assessing over time. One stakeholder relates the ways in which her group tries to continually improve:

Just that constant openness, the 4FRI tries to do an evaluation every year, a self-evaluation, and it comes up in that self-evaluation who are we missing. I think that's a good process to include in your collaboration groups is that annual look around. Who are we missing? Who would be great?<sup>184</sup>

Other collaborations taper over time, usually because the relationships among group members did not fully form. Also, “collaboration fatigue” can set in if results are slow to emerge.

There is no consensus on the metrics of a successful collaboration. One can imagine many variables, such as the length of the collaboration, natural resource metrics (such as a reduction in wildfires or number of porpoise entanglements), or feelings of the members towards the collaboration. Although social scientists have developed some rating systems, there remains considerable ambiguity. One stakeholder notes that he works on several collaborations, and has “two experiences and when the social scientists publish papers those two collaborations and score very differently in terms of their effectiveness.”

**c. Consider extensions and innovation in collaborative practices, through agency-to-agency learning and collaboration-to-collaboration learning.**

Peer-to-peer learning about collaborative efforts are important to stakeholders and agencies alike. Many of the groups studied are engaged in attending formal and informal events to spread information and best practices about collaboration. Others, however, operate in a vacuum—insisting that their challenges are distinct from other experiences. In fact, there are common, if not universal, themes that

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<sup>184</sup> Interview 9.

emerge. Openness to candidly sharing negative aspects of collaboration, and learning from experience across agencies and resource type, appears to be one opportunity for growth.

Agencies may also look internally at areas of competence outside of natural resources where collaboration may be taking place. For example, there are statutes on the books requiring similar collaborations for tribal relationships both inside and outside of the natural resource conflict. The Bureau of Indian Affairs, the agency responsible for administering many of these statutes, is situated in the Department of the Interior, which manages other public land and natural resources. It has been collaborating with tribes on initiatives ranging from healthcare to education for decades. An unanswered question is whether the lessons learned from that context are being used to inform natural resource collaborations, and vice versa. If not, there exists the potential for information sharing among collaborators and agency officials to improve collaborations.

#### *4. Extensions Beyond Managing Land and Resources*

Congress and the executive can also consider the extent to which stakeholder collaborations in natural resources governance can inform other areas of governance. Disaster response may prove a key growth area for stakeholder collaborations. 4FRI, for example, is centered on wildfire. Extending lessons from that context to hurricane and flooding response may prove a useful exercise.

In the wake of an onslaught of once-in-one thousand-year events, such as the recent hurricane in Houston, the news reports mirror the conversation surrounding land management during catastrophic wildfires in Arizona: No single agency can do it alone; the federal government acting unilaterally is not sufficient, private resources and alternative approaches need to be considered. Against this backdrop, it is likely that early interagency and cooperative federalism approaches will expand to include a broader group of stakeholders. This process could prove especially useful for connecting communities that experience lesser preparedness and evacuation readiness with officials to exchange information. Amidst political pressure to form a response to lesson impacts of inevitable future hurricanes and floods, Congress may be well-served to turn to a collaborative model. Lessons learned from the public land and natural resources context may make disaster relief collaborations more effectively.

A related, but distinct, question exists for administrative law scholars and political scientists: to what extent is collaboration working as a regulatory tool relative to formal legal approaches, such as top-down command and control or litigation? In the portfolio of approaches that agencies can take to achieve objectives, what is the relative value of stakeholder collaborations? Under which

circumstances is it preferable to alternative approaches? These and similar questions form an agenda for agencies, watchdogs, and scholars alike to consider in the future.

## V. CONCLUSION

The key contribution of this project is to enter the concept of stakeholder collaborations into the lexicon of administrative law. Despite robust conversation about collaborative adaptive management in environmental law literature and extra-agency cooperation in administrative law literature, this is the first project in administrative or environmental law to provide a detailed analysis about how stakeholder collaborations operate across agencies. This Report begins by defining stakeholder collaborations, and situating the term in the broader group of collaborative governance tools used to manage resource conflicts. It then outlines the legal landscape governing collaborations, including a novel overview of the relevant statutes, regulations, and executive orders. Two case studies of collaborations are provided, giving detailed insight into how collaborations form and operate over time. From these accounts, this Report discusses the benefits and challenges of collaboration, a section that draws heavily upon interviews with federal agency officials, stakeholders, and state agency employees.

Advocates of collaboration suggest that it improves agency decision-making, increases social acceptance of decisions, and builds trust among former adversaries who will work together in the future. Collaborations may exacerbate environmental justice issues, however, by imposing a costly time commitment upon those who seek to influence the use of land and resource management. Assessment the validity of these claims is limited, however, by a striking a paucity of quantifiable information assessing the relative benefits and harms produced by collaboration relative to alternative tools—an area much in need of future research. Ultimately, stakeholder collaborations are an important tool used by virtually every land and resource management agency. This Report documents how stakeholder collaborations are being used by agencies today, and how they can be improved.

## APPENDIX I: STATUTES ANTICIPATING STAKEHOLDER COLLABORATIONS

### **Title 16 U.S.C.A. Conservation:**

#### Chapter 1. National Parks, Military Parks, Monuments, and Seashores

16 U.S.C.A. § 410ddd. New Bedford Whaling National Historical Park

16 U.S.C.A. § 410fff-5. Establishment of the Gunnison Gorge National Conservation Area.

16 U.S.C.A. § 410uuu. Manhattan Project National Historical Park

16 U.S.C.A. § 469e. Plan for continental glaciation.

16 U.S.C.A. § 470jj. Cooperation with private individuals.

16 U.S.C.A. § 470ii. Rules and regulations; intergovernmental coordination.

#### Chapter 1C. Paleontological Resources Preservation

16 U.S.C.A. § 470aaa-1. Management

#### Chapter 3B. Soil Conservation

16 U.S.C.A. § 590d. Cooperation of governmental agencies; officers and employees, appointment and compensation; expenditures for personal services and supplies.

#### Chapter 5A. Protection and Conservation of Wildlife

16 U.S.C.A. § 661. Declaration of purpose; cooperation of agencies; surveys and investigations; donations

16 U.S.C.A. § 668dd. National Wildlife Refuge System

#### Chapter 5B. Wildlife Restoration

16 U.S.C.A. § 669. Cooperation of Secretary of the Interior with States; conditions

#### Chapter 5C. Conservation Programs on Government Lands

16 U.S.C.A. § 670h. Comprehensive plans for conservation and rehabilitation programs.

16 U.S.C.A. § 670i. Public land management area stamps for hunting, trapping, and fishing on public lands subject to programs.



16 U.S.C.A. § 670c-1. Cooperative and interagency agreements for land management on installations.

16 U.S.C.A. § 670a. Cooperative plan for conservation and rehabilitation.

#### Chapter 6. Game and Bird Preserves; Protection

16 U.S.C.A. § 673c. Conservation of elk in Wyoming.

16 U.S.C.A. § 673e. Cooperation of Secretaries of the Interior, Agriculture and Defense with State of California.

16 U.S.C.A. § 673g. Plan for elk restoration and conservation; coordination of Secretary of the Interior with Federal, State and other officers; integration with State plans.

16 U.S.C.A. § 693d. Cooperation with public and private agencies; contributions and gifts for Robert S. Kerr Center.

16 U.S.C.A. § 698. Big Thicket National Preserve.

16 U.S.C.A. § 698j. Hunting, fishing, and trapping in Big Cypress Preserve and Addition authorized in accordance with applicable Federal and State laws; consultation with appropriate State agency prior to implementation of regulations restricting activities; land use and retention rights of Miccosukee and Seminole Indian Tribes.

16 U.S.C.A. § 698m-2. Establishment of recreational access points, roads, etc., in conjunction with creation of Big Cypress National Preserve Addition; cooperation among agencies.

16 U.S.C.A. § 698m-4. Oil and gas exploration, development, and production in Big Cypress National Preserve and Addition.

16 U.S.C.A. § 698m-3. Status of Big Cypress National Preserve and Addition; report to Congress; plan.

16 U.S.C.A. § 698u-3. Administration of National Preserve.

16 U.S.C.A. § 698w. Special management requirements for federal lands recently added to Craters of the Moon National Monument, Idaho.

#### Chapter 7. Protection of Migratory Game and Insectivorous Birds

16 U.S.C.A. § 715p. Cooperation of State in enforcement of provisions

## Chapter 9. Fish and Wildlife Service

16 U.S.C.A. § 742g. Cooperation with State Department.

16 U.S.C.A. § 742*l*. Enforcement authority for the protection of fish and wildlife resources

16 U.S.C.A. § 753a. Cooperative research and training programs for fish and wildlife resources

## Chapter 9A. Preservation of Fishery Resources

16 U.S.C.A. § 757. Utilization of State services; expenditure of funds.

16 U.S.C.A. § 758b. Cooperation with agencies, organizations, and others.

16 U.S.C.A. § 758e-1. Consultation and cooperation between certain Federal officers, affected States, etc., in carrying out program

16 U.S.C.A. § 758e-1a. Cooperative program for development of tuna and other latent fishery resources in area; establishment; availability of project information

## Chapter 10B. Fish Restoration and Management Projects

16 U.S.C.A. § 777k. Payments of funds to and cooperation with Puerto Rico, the District of Columbia, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, and Virgin Islands

16 U.S.C.A. § 777. Federal-State relationships

16 U.S.C.A. § 777*l*. State use of contributions

16 U.S.C.A. § 839b. Regional planning and participation

## Chapter 16A. Atlantic Tunas Convention

16 U.S.C.A. § 971g. Cooperation in carrying out Convention

## Chapter 18. Watershed Protection and Flood Prevention

16 U.S.C.A. § 1005. Works of improvement

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## **Title 42. Public Health**

42 C.F.R. § 403.748 Condition of participation: Emergency preparedness.

42 C.F.R. § 485.727 Condition of participation: Emergency preparedness.

42 C.F.R. § 491.12 Emergency preparedness.

42 C.F.R. § 485.68 Condition of participation: Emergency preparedness.

42 C.F.R. § 484.102 Condition of participation: Emergency preparedness.

42 C.F.R. § 484.22 Condition of participation: Emergency preparedness.

42 C.F.R. § 486.360 Condition for Coverage: Emergency preparedness.

42 C.F.R. § 485.920 Condition of participation: Emergency preparedness.

42 C.F.R. § 416.54 Condition for coverage—Emergency preparedness.

42 C.F.R. § 483.475 Condition of participation: Emergency preparedness.

42 C.F.R. § 441.184 Emergency preparedness.

42 C.F.R. § 418.113 Condition of participation: Emergency preparedness.

42 C.F.R. § 460.84 Emergency preparedness.

42 C.F.R. § 485.625 Condition of participation: Emergency preparedness.

42 C.F.R. § 494.62 Condition of participation: Emergency preparedness.

42 C.F.R. § 483.73 Emergency preparedness.

42 C.F.R. § 482.15 Condition of participation: Emergency preparedness.

## **Title 50. Wildlife and Fisheries**

50 C.F.R. § 29.2 Cooperative land management.

50 C.F.R. § 70.3 State cooperation in national fish hatchery area management.

50 C.F.R. § 81.2 Cooperation with the States.

50 C.F.R. § 81.3 Cooperative Agreement.

50 C.F.R. § 81.6 Project Agreement.

50 C.F.R. § 81.14 Comprehensive plan alternative.

50 C.F.R. § 82.7 Coordination with States.

50 C.F.R. § 100.14 Relationship to State procedures and regulations.

50 C.F.R. § 222.103 Federal/state cooperation in the conservation of endangered and threatened species.

50 C.F.R. § 402.13 Informal consultation.

50 C.F.R. § 403.05 State and Federal responsibilities after transfer of management authority.

50 C.F.R. § 600.905 Purpose, scope, and NMFS/Council cooperation.

50 C.F.R. § 600.925 NMFS EFH Conservation Recommendations to Federal and state agencies.

## ***Regulations contemplating collaboration not associated with land and natural resources:***

### **Title 2. Grants and Agreements**

2 C.F.R. § 200.25 Cooperative audit resolution.

### **Title 13. Business Credit and Assistance**

13 C.F.R. § 308.3 Planning performance awards.

### **Title 20. Employees' Benefits**

20 C.F.R. § 665.320 May other activities be undertaken as part of rapid response?

20 C.F.R. § 652.300 What role does the Secretary of Labor have concerning the Workforce and Labor Market Information System?

**Title 34. Education**

34 C.F.R. § 363.50 What collaborative agreements must the State develop?

34 C.F.R. § 461.12 What must the State plan contain?

**Title 28. Judicial Administration**

28 C.F.R. § 90.63 Eligibility.

28 C.F.R. § 94.109 Allowable administrative costs.

**Title 32. National Defense**

32 C.F.R. § 651.5 Army policies.

**Title 45. Public Welfare**

45 C.F.R. § 1370.10 What additional requirements apply to State and Indian Tribal grants?

45 C.F.R. § 1370.20 What additional requirements apply to State Domestic Violence Coalitions?

45 C.F.R. § 1302.63 Coordination and collaboration with the local agency responsible for implementing IDEA.

45 C.F.R. § 98.16 Plan provisions.

45 C.F.R. § 1321.1 Basis and purpose of this part.

45 C.F.R. § 1326.30 State plan requirements.



### APPENDIX III:

#### CASE STUDY 1: THE WESTERN ARCTIC CARIBOU HERD WORKING GROUP

Caribou, a North American subspecies of reindeer, have played a central role in the culture and life of Alaskan Native Communities for thousands of years.<sup>185</sup> Traditionally, caribou were afforded cultural and spiritual status, and were a primary source of food. Caribou continue to provide the primary source of sustenance for between 40 and 50 remote Alaskan Native Communities today, who live in remote villages with an average population size of 581 and are reachable only by air, boat, and snowmachine.<sup>186</sup>

The United States gradually began regulating wildlife in Alaska after purchasing the territory from Russia. An early and pervasive conflict emerged because traditional Alaskan native hunting practices differed from those endorsed by state fish and game agencies within the continental United States.<sup>187</sup> For example, Alaskan Native Communities historically took many animals during a brief period, consistent with the migratory patterns of the Western Arctic caribou herd. In another example, the hunters from some villages station themselves by a river, then wait until the animals are swimming across the river to harvest them, to maximize the take.<sup>188</sup> Anthropologists report one Inupiaq elder describing his father as hunting in the following manner:

He went down with his bow and arrows to intercept the caribou. The boys watched as their father proceeded to walk directly toward the caribou herd, which as he approached began to move away from him in a file behind the lead bulls.

Yet the father kept walking openly toward the herd. This had the two brothers scratching their heads wondering why their father was chasing the caribou away from him. Once the father reached the area where the caribou had been grazing, he stopped and laid his bow and arrows on the ground. As the elder told the story, he demonstrated how his father then got into a crouching position and slowly began to move his arms up and down, slapping them against his legs as though he were mimicking a giant bird about to take off in flight. The brothers watched intently as the lead bulls in the caribou herd

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<sup>185</sup> ERNEST S. BURCH JR., *CARIBOU HERDS OF NORTHWEST ALASKA 1850-2000* 44 (Igor Krupnik and Jim Dau, eds., 2012).

<sup>186</sup> Villagers today hunt caribou using snowmachines in the winter and powerboat and all-terrain vehicles in the summer and fall. BURCH, *supra* note 185, at 45 (Alaskan residents and written sources refer to what is known in the rest of the United States as a “snowmobile” as a “snowmachine.”).

<sup>187</sup> There were, of course, traditional Native American practices within the continental United States which western settlers violated, supplanted, and eventually overwrote.

<sup>188</sup> Interview 16.

stopped and looked back curiously at their father's movements. Slowly at first, the caribou began to circle back in a wide arc watching the figure flapping its wings out on the tundra, and then they began running, encircling their father in a closing spiral until eventually they were they were close enough that he reached down, picked up his bow and arrows and methodically culled out the choice caribou one at a time until he had what he needed.<sup>189</sup>

Such hunting practices of Alaskan Native communities reflect indigenous ecological knowledge, a form of information and governance of human relationship with the natural world that is only recently being recognized as valid by Western scientists and courts.<sup>190</sup>

Alaskan Native hunting practices were poorly understood and actively discouraged by early American settlers in Alaska. In the 1900s, Alaskan game wardens used fines, arrest, and gun confiscation to punish traditional hunting practices. Such enforcement mechanisms bred distrust between Alaskan Native Communities and Department officials, which, along with differing perspectives on wildlife management and ethical hunting practices, persists into modern times.

Against the backdrop of sharply different perspectives and a century of distrust, state and federal agencies in Alaska continue to manage wildlife upon which the lives of some rural Alaskan Native communities depend. A series of laws enacted by Congress in the 1970s, such as the Alaskan National Interest Lands Conservation Act, embedded subsistence hunting rights for Alaskan natives and non-native rural Alaskans into federal law. These rights are managed by the Subsistence Resource Commission, which reports to Federal Subsistence Regional Advisory Councils and the Federal Subsistence Board. Alaska maintains a parallel system, which centralizes authority in the Board of Game and Fish and incorporates a broader focus on non-native users including game hunters from other states or countries.

The Western Arctic Caribou Herd is the largest herd in Alaska, with peak size of 500,000 animals and a range of 157,000 square miles.<sup>191</sup> A typical annual migration begins in the winter ranges, which are on the southerly Seward Peninsula

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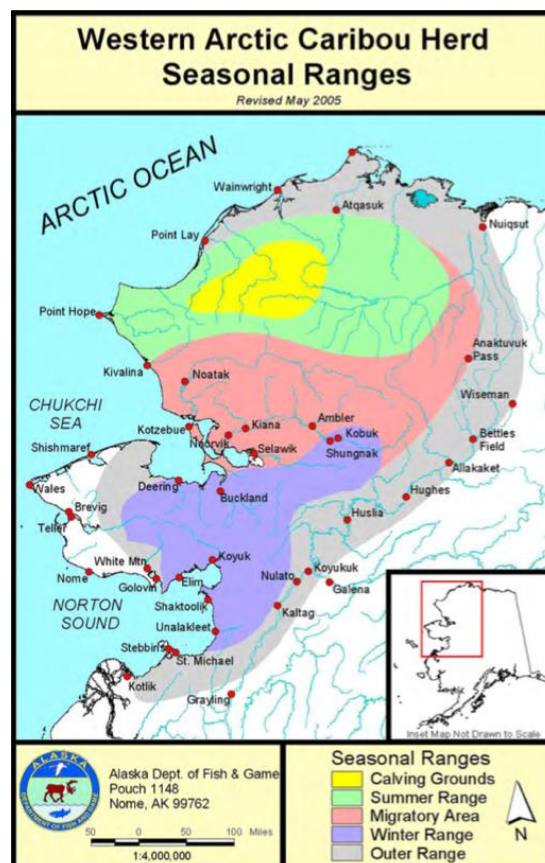
<sup>189</sup> Ray Barnhardt & Angayuqaq Oscar Kawagley, *Indigenous Knowledge Systems and Alaska Native Ways of Knowing*, 36 ANTHRO. AND EDUC. Q. 8, 8-9 (2005).

<sup>190</sup> *Id.*, at 9 (“Until recently, there was very little literature that addressed how to get Western scientists and educators to understand Native worldviews and ways of knowing as constituting knowledge systems in their own right, and even less on what it means for participants when such divergent systems coexist in the same person, organization, or community.”)

<sup>191</sup> WESTERN ARCTIC CARIBOU HERD WORKING GROUP, WESTERN ARCTIC CARIBOU HERD COOPERATIVE MANAGEMENT PLAN 4 (revised December 2011) (hereinafter WESTERN ARCTIC CARIBOU HERD WORKING GROUP).

and the Nulato Hills. The animals migrate northward in April, and reach the calving grounds in the Brooks Range Mountains in late May to June. After calving, the herd disperses to habitat with relief from the relentless insects. It spreads across the northern portion of the range during the summer, then migrates south during the fall. The herd spends September in the Brooks Range, then heads south to the winter range. <sup>192</sup>

**Figure 6. Western Arctic Caribou Herd Range Map**



*Courtesy Alaskan Department of Fish and Game*

The Western Arctic Caribou Herd occupies a landscape that is a patchwork of ownership among federal, state, native, corporate, and private landholders.<sup>193</sup> Each landowner has individual, and sometimes conflicting, approaches to wildlife management.<sup>194</sup> This assortment of land management agencies, public and private owners, and administrative/jurisdictional issues creates a plethora of issues with

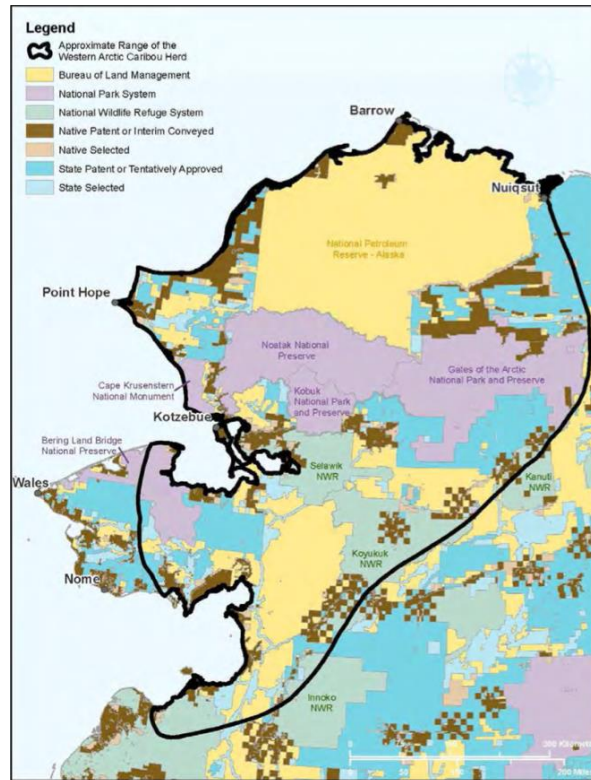
<sup>192</sup> Interview 1.

<sup>193</sup> WESTERN ARCTIC CARIBOU HERD WORKING GROUP, *supra* note 191, at 6.

<sup>194</sup> *Id.*

respect to the Western Arctic Caribou Herd. The figures below illustrate the seasonal ranges of the herd, and the varied ownership and administration of the landscape on which the herd lives.<sup>195</sup>

**Figure 7. Landowners within the Range of the Western Arctic Caribou Herd**



*The black line marks the approximate range of the herd.*

*[Courtesy Western Arctic Caribou Herd Working Group]*

Caribou were the centerpiece of “one of the worst management debacles ever in the state of Alaska, ever.”<sup>196</sup> In 1970, the Western Arctic Herd numbered 243,000, but dropped to 75,000 in 1976. The population collapse had devastating effects on rural Alaskan Native villages, which depended upon herds as a primary food source. In the 1970s, Alaska Department of Fish and Game (“ADFG”) officials became concerned that the caribou herds were declining. They attempted to curb caribou harvest—and thus increase herd numbers—by imposing limits on how many animals hunters could harvest in a specified period of time. ADFG relied on imperfect survey methodologies and discounted the number of caribou seen by Alaskan Natives who lived on the land full-time. ADFG held a series of hearings focused on the problem and issued 3,000 permits to Alaskan Native Communities.

<sup>195</sup> *Id.*

<sup>196</sup> Dau, *supra* note 56

The Department failed to notify or invite representatives from the Athabascan Communities to the hearing, and later refused to issue permits to the overlooked communities. Longstanding distrust exacerbated the poor relationships during a time of crisis.

In the period after the population collapse, a complex arrangement between Federal Subsistence Advisory Boards and the Alaskan Board of Game emerged to govern hunting and fishing regulations. Various stakeholders would argue before the State Board of Game, which was “not very productive” because the groups had different interests, essentially leaving management to the game boards.<sup>197</sup> The Western Arctic Caribou Herd subsequently became the largest herd in Alaska, peaking at roughly 500,000 caribou.

In 1994, ADFG hosted a three- to four-day workshop to determine objective ways to assess caribou harvest levels. After hours and in the hallways between sessions, participants began to discuss creating a working group devoted to the issue. Collaborative strategies were in their infancy in Alaska. Some state employees were familiar with the concept from their experience engaging with Canadians, whom a former state wildlife biologist described as “a decade ahead of Alaskans in terms of working groups.”<sup>198</sup>

A small group hammered out the concept and structure of the Western Arctic Caribou Herd Working Group (“WACHWG”), the focus of which was to have field biologists and users from the major interests come together. The group sought to connect researchers and those reliant on caribou to have an informal, “nuts and bolts” discussion of the population, with the goal of offering a unified set of recommendations to the Board of Game that would improve their decision-making. A founding member of WACHWG noted, “We never envisioned anything formal. We wanted it to be informal, because that’s the way villages work, that’s what people were comfortable with.”<sup>199</sup> The WACHWG intentionally did not have a chair, seeking to avoid hierarchy. It also met in various rural villages, which allowed the local villagers to attend meetings.

For several years, a group of up to nine people would gather for a day in Kotzebue or another rural location to discuss whether and how to form a group. As the idea solidified, it found a receptive source in John Coady, the Supervisor for Region 5 of the ADFG, who lived through the caribou population collapse debacle in the 1970s. Coady allocated a modest amount of the existing regional budget to

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<sup>197</sup> Interview 1.

<sup>198</sup> Dau, *supra* note 56.

<sup>199</sup> *Id.*

convene meetings, assigned an employee to the collaboration, and as one official noted, “had enough moxie for people to take this seriously.”<sup>200</sup>

Early members of the collaboration were poignantly aware about forming a credible group. A former ADFG employee recalls:

It was really tough early on. We were acutely aware of the problems with us picking and choosing representatives of the various user groups, indigenous people, guides, transporters, industry. We realized that if we picked the representatives on the group, it would lose a lot of its credibility. Our hand-picked representatives would just be seen as people friendly to Fish and Game, which would undermine the group.<sup>201</sup>

The group eventually decided to include 20 voting chairs representative of the public. It recognized that it could not give a seat at the table to every interest, so began with the groups most directly dependent on the caribou and worked out from there. There were 40-50 communities that depended upon caribou, so the Board adopted the advisory system developed by the state of Alaska many years before, as a model to structure native subsistence users’ representation.

During initial discussions on establishing some type of co-management group, some Native Alaskan participants expressed their desire to have legal authority to promulgate regulations.<sup>202</sup> They wanted to be equal partners with the state of Alaska and federal agencies in managing the caribou herd. That was impossible, as there was no way that state or federal agencies could cede or share legal management authority with them or any other entity.<sup>203</sup> Because of the inability for agencies to share authority, two leaders of the Alaskan Native community users dropped out of the group, explaining that they did not have time to merely attend meetings without more than advisory authority.<sup>204</sup>

There was also internal resistance within the agency, as some employees feared that WACHWG could become too influential and undermine agency influence. “This wasn’t all smiles and high fives and gold stars. It wasn’t at all certain we could do this.”<sup>205</sup> Initially, some federal agencies were mildly supportive, but

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

did not have time or money to participate fully in the 1990s; it was all state employees.<sup>206</sup> One interviewee remembers that a U.S. Fish and Wildlife Service manager “came to every meeting [with the attitude] ‘We can’t do this. We can’t do this. There is no legal way to share authority. There is no way to do this.’”<sup>207</sup>

Rather than risk the collapse of the budding group by taking on sensitive issues, the organizers focused initially on addressing small issues to build up trust. For the first five years, it avoided management issues altogether to avoid “rocking the boat.”<sup>208</sup> Instead, the focus was on facilitating an environment in which the group could build trust and find a “grudging” consensus over time. The caribou herd was large and growing at during this period, so there was no real controversial management issue requiring WACHWG’s attention.

WACHWG eventually created a subcommittee to draft a cooperative management plan, which was released in 2003 and continues to be periodically reviewed and updated. The current plan contains seven elements: Cooperation, Population Management, Habitat, Regulations, Reindeer, Knowledge, and Education.<sup>209</sup> The plan envisions all stakeholders—including state, federal, corporate, and private landowners and resource managers—working together to carry out the group’s goals by developing cooperative agreements, sharing resources, and providing support in implementation.<sup>210</sup>

Today, WACHWG is a collaboration between stakeholders interested in the long-term conservation of the Western Arctic caribou herd, the ecosystem upon which the herd is dependent, and the traditional and other uses thereof.<sup>211</sup> Stakeholders include “subsistence users, other Alaskan hunters, reindeer herders, hunting guides, transporters, and conservationists” along with agency staff managers, natural resource managers, and biologists who act as consultants to the group—all of whom are knowledgeable about, interested in, and care for the management and conservation of the Western Arctic Caribou Herd.”<sup>212</sup>

The group holds meeting once a year, allowing biologists to update stakeholders on the status of the health and population of the caribou, the range condition, and other matters affecting the herd.<sup>213</sup> Meetings focus on management and

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> WESTERN ARCTIC CARIBOU HERD WORKING GROUP, *supra* note 191, at 6.

<sup>210</sup> *Id.*, at 6, 30.

<sup>211</sup> *Mission*, WESTERN ARCTIC CARIBOU HERD WORKING GROUP, <https://westernarcticcaribou.net/mission/> (last visited July 21, 2017).

<sup>212</sup> *About*, WESTERN ARCTIC CARIBOU HERD WORKING GROUP, <https://westernarcticcaribou.net/> (last visited July 21, 2017).

<sup>213</sup> *Id.*

information transfer, with people talking about the issues they observe with respect to caribou. A typical meeting might include a specialist presenting information on the impact of climate, transportation, or public land use planning, or elders addressing the group drawing upon traditional ecological knowledge disseminated through the generations.<sup>214</sup> There is a technical committee that meets a day prior to the meeting to discuss “nuts and bolts, biology and ecology,”<sup>215</sup> along with other sub-committees, which meet as needed throughout the year.<sup>216</sup>

One founder notes that WACHWG has shifted away from the original conception of connecting field biologists with resource users towards including agency staff members with little on-the-ground experience:

Now, there may be 75-100 agency staff at the annual meetings, some administrators and some biologists—none of whom more than occasionally do field work on this caribou herd. It has become a must-attend annual meeting populated mostly by agency staff who have little direct involvement working with this caribou herd, except for administrative stuff.<sup>217</sup>

The informal tenor of early meetings became more structured over time: today there is a chair, co-chair, facilitator, and several note-takers for the meeting.<sup>218</sup>

WACHWG operates on an uncertain budget. It is not funded by the federal government in the same way that various marine mammal groups have been funded in recent decades (e.g., Alaska Eskimo Whaling Commission, Beluga Whale Committee, and Polar Bear Commission). Over the years, the group has attempted to solicit independent funding to make it autonomous from agencies and less vulnerable to budget shifts. It received a Challenge Grant from the U.S. Fish and Wildlife Service, which lasted for two to three years, time enough to hire a director; however, the grant was not renewed. Funding has been a major impairment for the group, which could not sustain staff time to prepare for meetings or absorb the cost of bi-annual meetings.

Although WACHWG has over 100 people attending meetings, a National Park Service biologist feels that the “delicate balance between being unwieldy and everyone having a voice” is struck largely through having a facilitator and co-chairs who are adept at moving the ball forward.<sup>219</sup> The location shifted from a rotating schedule of rural villages to Anchorage to limit the expenses of agency officials

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<sup>214</sup> *About*, WESTERN ARCTIC CARIBOU HERD WORKING GROUP, *supra* note 212.

<sup>215</sup> Interview 1.

<sup>216</sup> *About*, WESTERN ARCTIC CARIBOU HERD WORKING GROUP, *supra* note 212.

<sup>217</sup> Dau, *supra* note 56.

<sup>218</sup> *Id.*

<sup>219</sup> Interview 3.



attending. The Working Group has collaborated with different federal agencies to implement a cooperative management plan to effectuate cooperation resource management agencies and all people who value and depend on the caribou.<sup>220</sup>

Today, the group—and caribou at the center of it—are facing challenging times. Between 2003 and 2011, the population of the Western Arctic caribou herd declined yearly at an average of 4-6%. As of 2011, the population of the herd was recorded at 325,000.<sup>221</sup> The caribou were traditionally used primarily for subsistence, and today around 10,000 to 15,000 caribou each year are killed for that purpose. Additionally, nonresident and nonlocals kill approximately 500 to 800 caribou each year in hunting expeditions.<sup>222</sup> *The New York Times* recently reported that a controversial predator control regime implemented by the state—killing wolves, with the hope of increasing the number of caribou—had failed.<sup>223</sup>

Additional concerns arise due to resource development and mining expansion westward from Prudhoe Bay into the National Petroleum Reserve-Alaska. Continued expansion would require a transportation corridor to be cut through the range of this herd. These activities likely would affect the migration and distribution of the herd. Additionally, there are concerns that increased tourist aircraft overflight may stress the caribou prior to the winter months at a time when they should be gaining fat reserves.<sup>224</sup>

The primary benefit of WACHWG is largely understood as building strong and trusting relationships among the members. Village residents feel more positively about agency officials who participate in the group.<sup>225</sup> The structural design that facilitated that trust, however, is imperfect. Because many group members have served for many years, there is infrequent turnover, which reduces its potential for information sharing, where group members return to their villages to share what they have learned. The group also comes at a professional cost to the biologists who participate because it lessens the time they can spend detracts from biologists' time in the field. "We invested tremendous time and energy to initially establish and later support this group, and we paid dearly in terms of internal political capital."<sup>226</sup> The worthiness of this investment will be tested in the years ahead, given the many

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<sup>220</sup> WESTERN ARCTIC CARIBOU HERD WORKING GROUP, *supra* note 191, at 2.

<sup>221</sup> *Id.* at 4-5.

<sup>222</sup> *Id.* at 1.

<sup>223</sup> Joanna Klein, *Population Control: Wolves Face Peril Even Within a Preserve*, N.Y. TIMES, July 14, 2017, at D2.

<sup>224</sup> WESTERN ARCTIC CARIBOU HERD WORKING GROUP, *supra* note 191, at 5.

<sup>225</sup> Dau, *supra* note 56.

<sup>226</sup> *Id.*

threats to the herd.

## APPENDIX IV.

### CASE STUDY 2: THE 4 FOREST RESTORATION INITIATIVE

Many envision Arizona as an arid desert landscape, however a significant part of the southwestern state is, in fact, forest. The forest ecosystems contain several different types of forests within them, comprised primarily of ponderosa pine, conifer, pinion juniper, and juniper savannah.<sup>227</sup>

Arizona forests have long been subject to disputes regarding proper management, which peaked in 1980s, an era some call the Timber Wars because it was defined by “prolonged and ugly battles.”<sup>228</sup> During the 1980s and 1990s, the “very aggressive old growth timber industry started to bump up against pressure from the environmental side of the equation,” including the listing of endangered species, such as the Mexican Spotted Owl. Ultimately, wide-scale timber harvest across Arizona and New Mexico came to a halt. An invisible, but entrenched, outcome of the conflict was deep distrust between environmental groups, the forestry industry, and state and federal agencies.

Although by 2000 large-scale timber harvest had effectively stopped within the state, the timbered landscapes of Arizona remained. The abrupt shift from intensively managed forests in which trees were frequently harvested to unmanaged forests with limited tree and brush removal created risk for catastrophic wildfires. A series of high-profile fires raised public and political concern within the state. In 1996, three large wildfires burned in the Coconino National Forest. The forest supervisor and the Flagstaff fire chief began to advocate for a new model of wildfire suppression, claiming that the Forest Service could not do it on their own. In response, the Grand Canyon Partnership started performing field treatments (such as timber thinning) to reduce wildfire risk. In 2002, the Rodeo-Chediski Fire burned from June 18 until July 7, and became what was then the largest recorded wildfire in Arizona history.<sup>229</sup> The need for *ex ante* wildfire risk reduction strategies was becoming clear, but the treatments necessary—essentially thinning small trees and bush—were controversial among environmental nongovernmental organizations that had successfully organized around the management controversies that defined the 1980s and 90s.

In 2003, Governor Janet Napolitano formed groups to discuss how to fix forests, which were increasingly recognized as vital to watersheds, communities,

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<sup>227</sup> Interview 3.

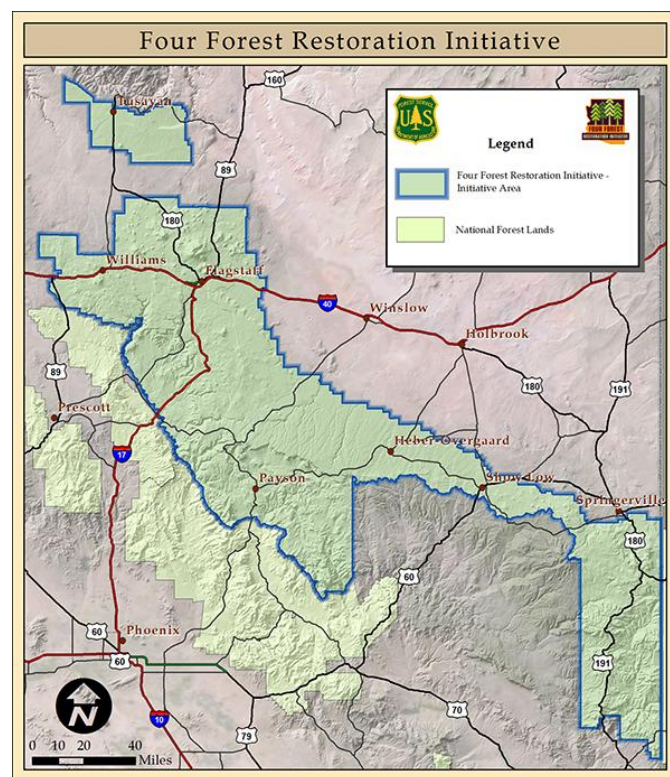
<sup>228</sup> *Id.*

<sup>229</sup> In 2011, the Wallow Fire became the biggest fire in Arizona history. Marc Lacey, *Wildfire Is Now the Largest in Arizona's History*, N.Y. TIMES (June 14, 2011), <http://www.ny-times.com/2011/06/15/us/15wildfires.html?mcubz=3>.

tourists, and rural livelihoods. Napolitano started the Governor’s Forest Health Council, which ran parallel with other forest and wildfire management groups. The group began discussing the emerging practice of forest restoration—creating forests of large, widely spaced trees, which could sustain wildfire—rather than the traditional focus on fuel treatments. Over time, additional collaborative groups emerged to address the issue, such as the Northern Arizona Woods Supply Study and the Greater Flagstaff Forest Partnership. When it became clear that the same stakeholders were in multiple groups, the groups coalesced into what eventually became the 4 Forest Restoration Initiative (“4FRI”).

The 4FRI is an organization that joins three overlapping groups of stakeholders who work in concert to manage forest resources in a way that encourages healthy development of national forests in Arizona.<sup>230</sup> The effort spans four national forests: Coconino, Kaibab, Apache-Sitgreaves, and Tonto, all of which are located along the Mogollon Rim.<sup>231</sup>

**Figure 8. Land Subject to 4FRI**



*Courtesy United States Forest Service*

<sup>230</sup> FOUR FOREST RESTORATION INITIATIVE (4FRI) STAKEHOLDER GROUP CHARTER 1-2 (Feb. 27, 2013), [http://www.4fri.org/pdfs/4FRI\\_charter\\_amended\\_022713.pdf](http://www.4fri.org/pdfs/4FRI_charter_amended_022713.pdf) [hereinafter 4FRI Charter].

<sup>231</sup> *Id.* at 1.

Notably, 4FRI is a collaborative that informs management practices on largely contiguous public lands managed by a single decision maker. For these reasons, it avoids many of the ownership and administrative challenges that are present in landscapes with more diverse ownership and administrative regimes. (To illustrate this point, compare Figure 7 with Figure 8).

The 4FRI stakeholder charter outlines eight specific actions that are necessary to achieve its mission, including: working closely with the Forest Service during the NEPA process, developing more efficient collaborative processes, leveraging industry contracts to contribute to forest thinning, supporting private and public financial investments, and influencing policy change where appropriate.<sup>232</sup>

The Forest Service is not a formal member of the group, but instead serves in an advisory capacity and as a liaison to the agency. The group was designed with this structure to avoid the need for FACA certification, which was described by one official as having “too many requirements and roadblocks” and being “not inclusive.”<sup>233</sup> The 4FRI and Forest Service operate under a Memorandum of Understanding that delineates the role and authority of the collaboration in informing decision-making processes.<sup>234</sup> One Forest Service official noted that “you have to constantly remind [the stakeholder group] that they are not making the decision; the Forest Service is the decision-maker.” Yet the same official explained that “we take a lot that the group says and pretty literally just put it in the [Environmental Impact Statement].”<sup>235</sup> He concluded that there is “a fine line between FACA and collaboration.”<sup>236</sup>

At the July 26, 2017 stakeholder meeting, this relationship was highlighted through discussion of an Environmental Impact Statement for forest restoration work. The National Environmental Policy Act requires an agency to consider several alternatives in an Environmental Impact Statement before undertaking major federal action that will affect the human environment. The Forest Service was preparing an Environmental Impact Statement for restoration activities on 15,000 acres.<sup>237</sup> The agency had decided to eliminate one option from the proposed alternatives from consideration in the Environmental Impact Statement and described that

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<sup>232</sup> *Id.* at 1-2.

<sup>233</sup> Interview 4.

<sup>234</sup> USDA FOREST SERVICE, MEMORANDUM OF UNDERSTANDING BETWEEN THE 4 FOREST RESTORATION INITIATIVE (4FRI) COLLABORATIVE STAKEHOLDER GROUP REPRESENTATIVES AND THE U.S. FOREST SERVICE, FS AGREEMENT NO. 1 O-MU-11 031600 (February 22, 2011).

<sup>235</sup> Interview 4.

<sup>236</sup> Interview 4.

<sup>237</sup> UNITED STATES DEPARTMENT OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE FOUR-FOREST RESTORATION INITIATIVE COCONINO AND KAIBAB NATIONAL FORESTS (NOVEMBER 2014).

decision-making process to 4FRI. Several stakeholders objected to the removal of the option. One said that a working group member “with litigation in their back pocket” strongly advocated against dropping the alternative.

The Coconino Forest Supervisor responded:

If there was a consensus among this group, we honor that. If this group comes together around that alternative and can do so in the next hour, the board is open to revisiting that. It is not our intent to close down what the consensus of this group is. If that’s something you want to move forward with, we will do it.<sup>238</sup>

Similarly, in the meeting, the Supervisor noted:

What’s beautiful about this group, and what it offers us, is that we don’t have to do traditional NEPA. That’s the nice thing about a group and the social context around it. Ideally, we would just have one alternative and compare it to the no action and be good to go.<sup>239</sup>

This sentiment reflected a story that numerous people told researchers at and after the meeting. Previously, 4FRI had worked for years to reach consensus on an EIS. At the public meetings surrounding the EIS, a group that did not participate in 4FRI raised serious, strong objections to the document. With every objection, the Forest Service Supervisor who was running the objection process would turn to the 4FRI representative and ask, “did you consider this point?” When the collective responded “yes,” the Supervisor would say “that point has been considered” and dismiss the objection.

The clear implication from the Supervisor’s response was that 4FRI was the appropriate forum for public involvement—that if a group or individual cared about the outcome, the appropriate forum was the collaborative, not the NEPA process. The general sense from the retelling of this story was that it was a defining moment for the group—a catalyzing moment where stakeholder understood that their work was directly and overtly influencing Forest Service decision-making. A Forest Service employee noted that the supervisor “used the collaborative as a buffer.”<sup>240</sup>

Five full-time Forest Service employees are devoted to 4FRI. The Forest Service provides 4FRI with an annual budget of approximately \$33 million,<sup>241</sup> comprised of several different funding sources ranging from regional restoration funds that go to CFLR projects to direct matches for funds from other sources that cover

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<sup>238</sup> Notes from stakeholder meeting.

<sup>239</sup> *Id.*

<sup>240</sup> Interview 4.

<sup>241</sup> USDA FOREST SERVICE, FY 2014 BUDGET JUSTIFICATION (April 2013).

time spent in stakeholder participation or capital investments in saw mills.<sup>242</sup> The 4FRI is unusual among CFLR projects in that only approximately 10% of its funding comes from that source. This diversified funding, paired with 4FRI's status as a high-profile "poster child" of the Forest Service's required stakeholder collaborations, protects it from funding deficits.

Further, the group is well-represented politically. Representatives from the offices of Arizona Senators McCain and Flake occasionally attend meetings, and have introduced riders on Congressional bills to assist 4FRI at its request in the past.<sup>243</sup> Moreover, the stakeholders lobby Congress each year for funding, with four or five members of the stakeholder group going office through office of Washington politicians.

In this sense, one Forest Service employee described 4FRI as "a political arm" and "lobbying" for the Forest Service, with more funds.<sup>244</sup> Interestingly, a stakeholder group is funding a private party to create policies regarding low value timber regulations, considering putting language in a bill to allow the region to be a pilot program in low value timber regulations. Because of the resources contributed by stakeholders, the National Forest in Northern Arizona "is in a really unique place to be able to influence nationwide" and notes that national working groups are feeding off efforts produced by the collaboration.<sup>245</sup>

The 4FRI is organized into three distinct groups with unique functions, operating in tandem to achieve the initiatives set out by 4FRI stakeholders. Members are organized into three groups: (1) the stakeholder group, (2) the steering committee, or (3) the work groups.<sup>246</sup> The stakeholder group serves as the primary decision-making body and is made up of both individuals and organizations while also being open to the public.<sup>247</sup> The steering committee acts as a governing body for administration: they coordinate meetings, recordkeeping, and suggestions for work

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<sup>242</sup> See also Emery Cowan, *4FRI gets \$10 million boost from Forest Service*, ARIZONA DAILY SUN (Feb 2, 2016), [http://azdailysun.com/news/local/fri-gets-million-boost-from-forest-service/article\\_05995ac6-e70b-5647-9444-a20b357ceffe.html](http://azdailysun.com/news/local/fri-gets-million-boost-from-forest-service/article_05995ac6-e70b-5647-9444-a20b357ceffe.html).

<sup>243</sup> Press Release, Senator John McCain, Senators McCain & Flake Urge Forest Service to Improve Efforts To Prevent Catastrophic Wildfires (Nov. 06, 2015), <https://www.mccain.senate.gov/public/index.cfm/2015/11/senators-mccain-flake-urge-forest-service-to-improve-efforts-to-prevent-catastrophic-wildfires> (last visited September 23, 2017); Press Release, Senator Jeff Flake, Flake and McCain Urge Forest Service to Open More Arizona Acres for Forest Thinning (Mar. 25, 2014), <https://www.flake.senate.gov/public/index.cfm/2014/3/flake-and-mccain-urge-forest-service-to-open-more-arizona-acres-for-forest-thinning> (last visited September 23, 2017).

<sup>244</sup> Interview 4.

<sup>245</sup> *Id.*

<sup>246</sup> 4FRI Charter, *supra* note 233, at 2.

<sup>247</sup> *Id.*

groups.<sup>248</sup> The steering committee is also subject to other charter rules, detailing their responsibilities, term length, and specific demographic representation that must be part of the committee.<sup>249</sup>

The 4FRI has formal rules about the collaborative process, with specific “decision rules” and prescribed stakeholder meeting ground rules.<sup>250</sup> The decision rules guide the decision-making process by offering stakeholders four varying levels of agreement to express: (1) agreement without reservations; (2) agreement with reservations; (3) agreement by acquiescence; and (4) disagreement.<sup>251</sup> Each level of agreement comes with different procedural requirements, ensuring that all reservations and oppositions are recorded.<sup>252</sup>

This system reflects a Forest Service employee’s observation that “to get social consensus, you have to agree not to agree.”<sup>253</sup> The collaborative voting process includes things like ‘agree with reservation’ because we understand you cannot get 100 percent consensus. You go to 100 percent consensus, and you’ll never get there.”<sup>254</sup> When a party disagrees, a timeline is established to allow negotiation and compromise, and another set of procedural requirements take effect if no agreement is reached within that time frame.<sup>255</sup> In addition to these procedures, the entire process is governed by ground rules, specifying preparedness, respect, and candid collaboration and participation.<sup>256</sup>

Some stakeholders are not part of the group despite having strong interests in the land and resources being managed. For example, the White Mountain Apache Tribe, which shares a boundary with Apache Sitgraves National Forest, is not a stakeholder group.<sup>257</sup> Cattle interests are also not represented, which is surprising

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<sup>248</sup> *Id.*

<sup>249</sup> The steering committee must consist of eight members, with one member acting on behalf of the following interest groups: (1) a 501(c)(3) environmental nonprofit group; (2) a commercial forest user (such as wood products); (3) a wood-worker organization or restoration effort employer; (4) a state or federal agency; (5) a tribe; (6) an academic institution; (7) the local government; and (8) an “at-large” member from the 4FRI stakeholder group. *Id.* at 10-11.

<sup>250</sup> *Id.* at 3, 7.

<sup>251</sup> *Id.* at 4.

<sup>252</sup> *Id.*

<sup>253</sup> Interview 4.

<sup>254</sup> *Id.*

<sup>255</sup> 4FRI Charter, *supra* note 230, at 4-5.

<sup>256</sup> *Id.* at 7.

<sup>257</sup> *About Us*, APACHE-SITGREAVES NATIONAL FORESTS, [https://www.fs.usda.gov/detail/asnf/learning/history-culture/?cid=fsbdev7\\_012567](https://www.fs.usda.gov/detail/asnf/learning/history-culture/?cid=fsbdev7_012567) (last visited September 23, 2017).



because the restoration work opens tree stands which produces more forage production.<sup>258</sup> Attempts to get the Arizona Cattle Growers group and local ranchers involved have proved unsuccessful.<sup>259</sup>

A variety of nongovernmental environmental organizations also chose not to participate. The Sierra Club does not participate, a fact that Forest Service employees explain as originating in an organizational mandate that the Sierra Club cannot be a part of a collaboration that cuts trees; it participates informally, however.<sup>260</sup> Other conservation groups, such as the John Muir Project and Wild Earth Guardians, also do not participate. A stakeholder in 4FRI noted that some conservation groups feel that stakeholder collaborations are a long, formal way of giving industry groups what they want, a notion reinforced by their experiences with some earlier cattle grazing stakeholder groups in the state. This critique is bolstered with respect to 4FRI given the history and culture of the Forest Service.

The Forest Service is a line staff organization with a century-old command and control organizational structure designed to maximize timber harvest. As the agency objectives shifted, its structure and many guiding regulations did not. As a result, there is tension between true collaboration—defined by a state agency stakeholder as “shared decision space”<sup>261</sup> and the authority in the agencies’ model. To promote collaboration under this structure, a Forest Service employee cites the words of a Regional Forester, noting, “We cannot violate law, but we try to bend regulation and policy.”<sup>262</sup> When asked what would happen if he was reprimanded for doing so, he responded, “I’ll retire. But the Forest Service doesn’t have good accountability.”<sup>263</sup> This commitment to the collaborative and flexibility with respect to policy has allowed the collaborative to flourish within an organization that was not designed with collaborative governance in mind:

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<sup>258</sup> See UNITED STATES DEPARTMENT OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE FOUR-Forest RESTORATION INITIATIVE COCONINO AND KAIBAB NATIONAL FORESTS (NOVEMBER 2014).

<sup>259</sup> See Arizona Cattle Growers’ Association, *Save Arizona’s Forest Environment (SAFE)* 11 (July 29, 2011), <http://azcattlemensassoc.org/CMDocs/ArizonaCG/SAFE/SAFE%20PLAN-for%20email.pdf> (“The 4FRI is a noble effort, but in and of itself it is not of sufficient size or scope to return our forests to health or to invite enough private investment of wood harvesting infrastructure into these rural resource based communities.”).

<sup>260</sup> Letter from Taylor McKinnon, Center for Biological Diversity & Sharon Galbreath, Sierra Club Grand Canyon Chapter, to Henry Provencio, 4FRI Team Leader, *Four Forests Restoration Initiative Proposed Action* (March 14, 2011), [http://4fri.org/pdfs/documents/NEPA/CBD\\_SC%20\\_PA\\_Comments\\_3\\_11\\_11.pdf](http://4fri.org/pdfs/documents/NEPA/CBD_SC%20_PA_Comments_3_11_11.pdf) (last visited September 23, 2017).

<sup>261</sup> Interview 3.

<sup>262</sup> Interview 4.

<sup>263</sup> Interview 4.

On the administrative side, probably the greatest challenge was the Forest Service learning to be able to work in a collaborative way, and I can see that this would also be on the social side but it's bringing the social and the administrative together. It's the Forest Service actually learning to operate in a collaborative environment. That is a paradigm change for them, it was enormously challenging. There were a lot of trips and stumbles on the way, which were to be expected. They have done quite well, but we are still bumping up against it. They basically had to move from being an organization that told people what they were going to do, then took feedback, then just went ahead and did what they were going to do. To becoming an environment where power and decision-making is shared.<sup>264</sup>

To overcome institutional boundaries, the group used multiple facilitators.

One Forest Service official noted that the Udall Institute sent three different facilitators during the formative stages when people were standoffish that the facilitators were not effective because they allowed a few people to dominate the conversation.<sup>265</sup> The Forest Service put out a facilitation contract, and found a private facilitator who was very effective at integrating people.<sup>266</sup> He used a phone app when people were uncomfortable speaking, which several people felt was effective in encouraging participation and reducing tension.<sup>267</sup> Now, the group is self-facilitated and there is little mention of bringing in facilitators, although there continue to be strong personalities that dominate the group.

Today, 4FRI is largely seen as a success story, both within the group and within the Forest Service more broadly. The 4FRI serves as a laboratory for collaboration ideas throughout the country, for both the Forest Service and stakeholders like The Nature Conservancy, which is working on digital prescriptions that are being picked up nationally.<sup>268</sup> Dedicated staff, expert in collaborations, can focus on the collective. “We have some really fertile minds and we think up some really neat shit.”<sup>269</sup> As a result, several intra-agency representatives visit and study 4FRI.

Despite this general sense of relative excellence, some external stakeholders

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<sup>264</sup> Interview 5.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Devin Coldewey, *Nature Conservancy Gives Forest Management a Digital Makeover*, TECH CRUNCH (Apr 19, 2017), <https://techcrunch.com/2017/04/19/nature-conservancy-gives-forest-management-a-digital-makeover/>.

<sup>269</sup> Interview 4.

challenge the purported success of the group. In 2015, the Editorial Board of the *Arizona Republic* noted:

Launched in 2010 as the largest forest-thinning mission in American history, 4FRI has accomplished a fraction of its goals, which initially envisioned thinning 50,000 acres of grossly over-choked forestland a year through the first 10 years. It has come nowhere near that goal...

The 4FRI progress report from the Forest Service is disheartening, in a way. It looks like the feds are trying to fool us on the program's real progress... the U.S. Department of Agriculture and local 4FRI public-sector partners are paying millions of dollars a year to conduct thinning projects in the four national forests involved... The whole idea of 4FRI, remember, is as a private initiative.... As environmentalist Todd Schulke told Pete Alshire of the *Payson Roundup* in December, promoting forest thinning paid for by the feds as evidence of 4FRI's success "is not good for anybody. Inflating the accomplishments to the point where it's unbelievable taxes the credibility of the whole program," Schulke said.<sup>270</sup>

Ultimately, active stakeholders and members of the Forest Service generally heralded the collaboration as a success, pointing largely to metrics outside of acres thinned and looking instead to bridging difficult relationships to achieve environmental objectives without litigation.

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<sup>270</sup> Editorial Board, *The Forest Service Shouldn't Pat Itself on the Back Yet*, (April 22, 2015), THE REPUBLIC, <http://www.azcentral.com/story/opinion/editorial/2015/04/22/fri-deal-struck-last-get-thinning/26212565/>.

## APPENDIX V: INTERVIEW PROTOCOL

Academic Consultant Karen Bradshaw and Ph.D. Candidate Challie Facemire interviewed over a dozen federal agency officials, state officials, and stakeholders for this Report. In addition to information gathered from the formal interviews, Bradshaw also incorporated comments and events she observed at stakeholder meetings, as well as informal conversations and emails, as indicated throughout the text.

Interviews were semi-structured. Each interviewee was asked the questions below; sometimes additional discussion areas emerged during the interview. Questions were vetted in advance by ACUS staff, several environmental law scholars, a prominent member of a nongovernmental organization with significant experience at a federal agency, two research assistants with training in qualitative methodology, and Alison Cook-Davis, the Assistant Director of Program Evaluation at the Arizona State University Office of Evaluation and Educational Effectiveness.

Interviewees were given two opportunities to review the accuracy of the comments in this report. First, Bradshaw and Facemire emailed each person quoted an individualized copy of each of their statements that would appear in quotations in the report. Second, Bradshaw emailed all participants a draft report, upon which interviewees were welcomed and encouraged to comment.

Some interviewees asked that the transcript of their interview not be quoted in this Report; others asked that generic, non-identifying descriptors (such as “National Park Service employee” or “Interview 1”) be used with their quotes. When there was not specific instruction on this point, the author defaulted to anonymous, non-identifying references. In some cases, gender and interview numbers were changed to obscure the identity of people making comments they felt were especially sensitive. One interviewee asked that significant portions of her interview be retracted from the Report and heavily edited comments provided in the interview; this request was granted.

The default interview transcript is included below; the interviews often varied from this structure to capture other ideas and points the interviewees wanted to make.

Interviewer Name:

Interviewee Name:

Date:

Location:

Recorded (y/n):

Disclosure (Read exactly as written):

Thank you for taking the time to do this interview. This project is done by an academic consultant for the Administrative Conference of the United States. As this is work product for a federal report, your answers may be public or used in this report or other future publications. This is a collaborative project – not an exposé. If you say something that you wish you had not, tell me and I will not include it in the transcript. If we directly quote you in the report, we will try to give you a draft prior to publication to ensure the accuracy of the quote. We will also send a copy of the final report to all participants, which are welcome to share with others in your organization.

Questions:

1. Describe your collaboration name and purpose?
2. What is the resource(s) being managed?
3. Who are the stakeholder participants?
4. What is a **brief** history of the organization? How did it form?
5. What federal statutes and executive orders as well as state and local laws apply to this collaboration?
6. Has your agency issued regulations to govern this collaboration?
7. What challenges have you encountered when conducting these collaborations?
8. Are there any best practices developed at specific agencies that could be usefully adopted by other agencies?
9. What factors should agencies consider in deciding how best to structure these collaborations?
10. How would you advise other agencies to ensure that they've included all the key stakeholders without convening a group that is so large as to become unwieldy?
11. What is the result of the collaboration? Do you create documents, tangible results? How do you measure your success?  
  
*(Do agencies typically issue a rule, reach some sort of agreement with a state or local government, contract with a private entity to carry out some function, or do something else?)*
12. Are there any insights emerging from NRCs that might be generalizable to other areas, such as advisory committees, negotiated rulemakings, and informal stakeholder outreach before rulemaking? Could collaborative adaptive management be applied to other areas of government attempting to address "wicked problems?"