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Collaboration and the Beaverhead-Deerlodge Partnership: The Good, The Bad, and the Ugly

Ted Fellman

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Collaboration and the Beaverhead-Deerlodge Partnership: The Good, the Bad, and the Ugly

Ted Fellman *

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I. COLLABORATION IN THE WEST

The West has always been a place of contrasts and conflicts. Questions of how to allocate or manage natural resources have evolved to meet the needs of the times. During an era of disposition, the federal government gave away land and resources to encourage settlement in a cash-poor, but land-rich America.¹ After the closing of the frontier, a conservation-era U.S. reserved public lands for forest reserves, national parks, and wildlife refuges, and began to lease natural resources previously given away.² Conflict between competing users of public lands and natural resources remained the constant. More recently, preservation efforts embodied in the

* Juris Doctorate and Masters in Environmental Studies, The University of Montana, 2008.

1. See George Cameron Coggins, Charles F. Wilkinson, John D. Leshy & Robert L. Fischman, *Federal Public Land and Resources Law* 64-116 (6th ed., Foundation Press 2007).

2. See *id.* at 117-145.

Wilderness Act³ and the Endangered Species Act (ESA)⁴ have been added to the mix of competing uses of public lands. The Multiple-Use, Sustained-Yield Act⁵ mandated multiple uses for national forests, while the National Forest Management Act (NFMA)⁶ attempted to balance multiple use and diversity of plant and animal communities through forest planning. The rest of the western story has played out against this backdrop, often framed as jobs versus the environment, wise use versus biodiversity, Old West versus New West.⁷

But the New West is not easily defined. An economic shift from extractive to service industries is one key factor. Timber, grazing, and mining uses of public lands now must compete with recreation, ecosystem services, and biodiversity needs. Conflict is endemic among these competing demands on our public lands. Motorized and non-motorized recreational users fight over access. Loggers and conservationists frame timber harvests as management tools to restore damaged ecosystems or threats to biodiversity. Ranchers and conservationists view wolf reintroduction as a threat to a family lifestyle or a welcome balancing of native diversity. And this is just the debate on public lands. At the same time, the New West faces unprecedented growth, with timber companies and ranching families increasingly selling and subdividing land to meet development demands. These trends raise similar conflicts. Land use and water demands pit developers against environmentalists on water appropriations and critical habitat designations for endangered species.⁸

An elaborate legal framework has grown to address the needs of the changing western landscape. Litigation, participation in forest planning, lobbying, and public processes surrounding agency rulemaking are the tools of choice for many attempting to influence public lands decision-making. But another tool has gained increasing interest and attention: collaboration.⁹

What is collaboration? Like the western landscape itself, the word means many things to many people. Indeed much of the New West lexicon involves such ambiguous terms: ecosystem management, adaptive management, sustainability, restoration. Few people would disagree with the usefulness of people sitting down together to talk through their conflicts. However, agreement over the collaborative concept quickly breaks down in

3. 16 U.S.C. §§ 1131-1136 (2006).

4. 16 U.S.C. §§ 1531-1543.

5. 16 U.S.C. §§ 528-531.

6. 16 U.S.C. §§ 1600-1614.

7. See Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Island Press 1992); Robert B. Keiter, *Keeping Faith with Nature: Ecosystems, Democracy, & America's Public Lands* (Yale U. Press 2003).

8. See Keiter, *supra* n. 7, at 219-310.

9. *Id.*; *Across the Great Divide: Explorations in Collaborative Conservation and the American West* (Philip Brick, Donald Snow & Sarah Van de Wetering eds., Island Press 2001).

the details. Who sits at the table? How are such agreements enforced? What roles do the parties play? Who ultimately decides? What legal framework applies? How do you judge success?¹⁰

I personally have struggled with some of these questions through my experiences facilitating collaborative efforts to resolve environmental disputes. In the Peace Corps in Nicaragua, I worked to mediate an agreement between a national park seeking to protect its forest resources and a local community that depended on fuel wood extracted from the park to cook their meals. At the Environmental Protection Agency, I facilitated working group meetings of various agency and community members to create a transparent decision-making process for Superfund cleanups of contaminants in residential neighborhoods. These experiences were contentious but real. People were not fighting over abstract concepts, but over their direct needs of survival and health. Relationships grew and understanding developed. These collaborative processes had varying degrees of success, but they ingrained in me a sense of what is possible and a belief that process can be as important as results.

I continued this exploration of collaborative conservation in Montana. A few years ago I interviewed about a dozen Montana environmentalists about their experiences with collaboration. As expected, collaboration meant different things to different people and was alternately viewed as the promise of a better future or an illegal undermining of the National Environmental Policy Act (NEPA). One project in particular was frequently mentioned in divergent terms ranging from a model of success to an example of everything wrong with collaboration. That project is the Beaverhead-Deerlodge Partnership (BDP or Partnership).¹¹

This article is an attempt to reconcile these various perspectives on the Beaverhead-Deerlodge Partnership and analyze its substantive and procedural achievements. My analysis covers both legal and practical considerations in assessing, to borrow a western metaphor, the good, the bad, and the ugly aspects of the Partnership. While I make every effort to explore all sides of the issues raised, my assessment is rooted in an ecological perspective. The essential question I ask is whether the Beaverhead-Deerlodge Partnership is good environmental policy for the forest. It has been said that a good compromise leaves all equally dissatisfied. While that may be true, my question is whether the environmental dissatisfaction is worth the price. Various interests are incorporated into the Partnership Strategy, but my analysis seeks to explore the conflict within the conservation community, rather than among competing interests seeking their piece of the public land pie.

10. See Keiter, *supra* n. 7, at 219-310.

11. See *Beaverhead-Deerlodge Partnership*, <http://www.bhdp.com> (accessed May 15, 2008).

My goal is to critique the evolving collaborative approach to public land management, as embodied in the proposed Partnership Strategy, from legal, environmental, policy, and democratic accountability perspectives. This critique should give the reader a better understanding of the strengths, weaknesses, and limits of the Partnership as a potential means for reducing public lands conflict and promoting a more ecologically sustainable approach to accommodating multiple uses of our public lands.

This article begins by exploring collaborative conservation generally and then applies that framework to the BDP. In part II, I examine what collaboration is, its benefits, and some examples. In part III, I discuss the legality of collaboration. Part IV evaluates collaboration by exploring critiques and criteria for success. This lays the groundwork for an analysis of the Partnership as collaboration. My analysis in part V examines substantive issues of wilderness, forest restoration, and legal frameworks. Part V also examines procedural issues such as whether the BDP is a genuine collaboration, implementation of the BDP Strategy, and the scope of interests considered. Finally, I conclude in part VI with a forward-looking assessment of the overall success of the Partnership.

II. WHAT IS COLLABORATION?

A. *Defining Collaboration*

Collaboration has nearly as many names as definitions. Collaborative conservation, cooperative conservation, environmental conflict resolution, multi-party negotiations, and consensus-building are all variations on the collaborative theme. Not surprisingly, the definitions further illustrate this diversity.

American Lands Alliance developed *Collaboration Best Practices for the Conservation Community* with input from 69 conservation leaders from around the country at a November 2006 National Meeting on Collaboration.¹² The *Best Practices* describes collaboration as:

diverse interests coming together to work toward a common goal. Collaborations may involve negotiations, but the collaborative must have come together around common goals or a shared purpose. True collaborations must be open, transparent, inclusive, accessible, and strive for balanced representation. Collaboration does not preclude advocacy, organizing or litigation by the participants.¹³

12. American Lands Alliance and Participants of the National Meeting on Collaboration, *Collaboration Best Practices for the Conservation Community*, <http://www.americanlands.org/issues.php?subsubNo=1148069142> (March 2007) [hereinafter *Best Practices*].

13. *Id.* at 2.

The *Best Practices* cautions that collaboration does not replace NEPA or other environmental laws and does not include “[n]egotiated political deals (i.e. public land legislation), behind closed doors deal making, or other processes that are not open, transparent, and strive to be inclusive. . . .”¹⁴

The Western Collaboration Assistance Network defines collaboration as “a voluntary process through which a broad array of interests, some of which may be in conflict, enter into civil dialogue to collectively consider possible recommendations and actions that improve the management of natural resources to benefit both the environment and surrounding communities.”¹⁵

A collection of essays exploring collaborative conservation in the West offers this definition:

[C]ollaborative conservation emphasizes the importance of local participation, sustainable natural and human communities, inclusion of disempowered voices, and voluntary consent and compliance rather than enforcement by legal and regulatory coercion. In short, collaborative conservation reaches across the great divide connecting preservation advocates and developers, commodity producers and conservation biologists, local residents, and national interest groups to find working solutions to intractable problems that will surely languish unresolved for decades in the existing policy system.¹⁶

Some common themes that emerge from these definitions are that collaborations involve diverse interests based on common goals. Collaborations are voluntary and serve as one of many tools to meet conservation goals. True collaborations are open, transparent, inclusive, and accountable, which helps build trust and credibility. Collaborations are usually advisory.

B. *Why Collaborate?*

The authors of *Making Collaboration Work*¹⁷ evaluated the role of collaboration in natural resource management, based on almost a decade of research “focused on learning how people have worked together successfully to solve common problems, resolve conflicts, and build partnerships in

14. *Id.*

15. Western Collaboration Assistance Network, *What is Collaboration and Why Try It?* http://westcanhelp.org/index.php?option=com_content&task=view&id=3&Itemid=7 (accessed May 15, 2008).

16. Donald Snow, *Coming Home: An Introduction to Collaborative Conservation*, in *Across the Great Divide*, *supra* n. 9, at 2 (quoting Phil Brick and Sarah Van de Wetering).

17. Julia M. Wondolleck & Steven L. Yaffee, *Making Collaboration Work: Lessons from Innovation in Natural Resource Management* (Island Press 2000).

order to move their communities and agencies toward a more sustainable direction.”¹⁸ Their simple answer to the question of why collaborate is that “[c]ollaboration can lead to better decisions that are more likely to be implemented and, at the same time, better prepare agencies and communities for future challenges.”¹⁹ The longer answer is that collaboration builds understanding through information sharing, which allows agencies to learn from and educate the public and manage uncertainty through joint research and fact-finding.²⁰ Collaboration also facilitates wiser decision-making by solving common problems, resolving disputes, and building support for decisions.²¹ Similarly, collaboration helps get work done by coordinating efforts, sharing management responsibility, and mobilizing resources.²² Finally, collaboration strengthens agencies, organizations, and communities by building staff capabilities and promoting community development.²³

The Western Collaboration Assistance Network describes the following potential benefits of working collaboratively:

- Better decisions about challenging projects that are more likely to be implemented;
- Increased public participation and support for management actions;
- Opportunities for information sharing and mutual learning;
- Enhanced understanding of community issues and legal and management restraints;
- Innovative approaches;
- Possible financial savings due to pooling of resources;
- Preparation of agencies and communities for future challenges.²⁴

Thus, some of the benefits of collaboration include better decisions, more likely implementation, information sharing, improved understanding among parties, and innovative solutions.

C. *Some Collaborative Examples*

Perhaps more useful than abstract definitions or general benefits is a brief discussion of some representative case studies in collaboration.²⁵

18. *Id.* at xi.

19. *Id.* at 23.

20. *Id.* at 24-30.

21. *Id.* at 30-35.

22. *Id.* at 36-41.

23. *Id.* at 41-45.

24. Western Collaboration Assistance Network, *What is Collaboration and Why Try It?* http://westcanhelp.org/index.php?option=com_content&task=view&id=3&Itemid=7 (accessed May 15, 2008).

The Quincy Library Group (QLG) succeeded in implementing much of their consensus-based forest strategy through national legislation.²⁶ The QLG consists of timber interests, local environmentalists, citizens, and local government representatives from California's northern Sierra Nevada. The effort began in 1986 as a local environmental proposal to protect remaining roadless lands and restrict logging to second-growth land with existing roads. The Forest Service considered, but rejected, the alternative during forest plan revisions. However, when timber sales declined and the Forest Service imposed regulations to protect the California spotted owl, the local timber industry approached the environmentalists. What followed was a series of meetings at the Quincy Library culminating in a plan with something for everybody, including timber access, jobs, fire protection, preservation of roadless areas, riparian protections, and an end to large clear-cuts. But the Forest Service did not implement the plan in the next years, and the QLG began lobbying Congress to implement the plan directly. National environmental groups resisted this legislative approach that could set a precedent of piecemeal forest legislation overriding environmental laws. Some of these concerns were addressed by Congress when it passed the Quincy Library Group Forest Recovery and Economic Stability Act, which required the Forest Service to follow federal laws as well as California spotted owl protections. The Forest Service reduced the available timber base in the Quincy proposal through two environmental impact statements (EIS) in order to protect California spotted owl habitat. This move met some of the national environmental groups' concerns, but angered the QLG by diminishing the project's economic feasibility. Thus, the QLG succeeded in implementing a watered-down version of their forest strategy through national legislation.²⁷

Another model of collaboration is the Malpai Borderlands Group. Concerned ranchers formed the Malpai Borderlands Group to bring ranchers, scientists, and key agencies together in a large experiment in ecosystem management along the New Mexico and Arizona border with Mexico.²⁸ The non-profit group's mission is to "restore and maintain the natural processes that create and protect a healthy, unfragmented landscape to support a diverse, flourishing community of human, plant and animal life in our bor-

25. The examples discussed here are nationally recognized collaborations. Some Montana collaborative examples include: the Blackfoot Challenge, Three Rivers Challenge, and the Beaverhead-Deerlodge Partnership (discussed in Part V). See Tim Mahoney, *Wilderness and Community Forestry: Opportunity for a New Generation* (Oct. 11, 2007); Red Lodge Clearinghouse, *Blackfoot Challenge*, http://rlch.org/index.php?option=com_content&task=view&id=179&Itemid=36 (last updated Jan. 16, 2008).

26. Ed Marston, *The Quincy Library Group: A Divisive Attempt at Peace*, in *Across the Great Divide*, *supra* n. 9, at 79-90; Keiter, *supra* n. 7, at 274-299.

27. Marston, *supra* n. 26; Keiter, *supra* n. 7, at 274-299.

28. Kelly Cash, *Malpai Borderlands: The Searchers for Common Ground*, in *Across the Great Divide*, *supra* n. 9, at 112-121; Malpai Borderlands Group, <http://www.malpaiborderlandsgroup.org/> (last updated Feb. 20, 2008).

derlands region.”²⁹ The Malpai Borderlands Group’s approach is to work together to “encourage profitable ranching and other traditional livelihoods, which will sustain the open space nature of our land for generations to come.”³⁰ Through front porch meetings and fortuitous relationships, the Malpai Borderlands Group succeeded in facilitating The Nature Conservancy’s sale of the Gray Ranch to a local conservation-minded rancher, implementing prescribed burns on public and private lands, and assisting efforts to protect threatened species like the Chiricahua leopard frog. The Malpai Borderlands Group’s common agenda has secured one million acres of open space in cooperative conservation ownership, protection and reintroduction of various species, 200 permanent monitoring sites to gather information on ecosystem health, and conservation programs, such as land restoration and cost-sharing range improvements.³¹

The Applegate Partnership in Oregon is a watershed group involving conservation organizations, industry, natural resource agencies, and residents “cooperating to encourage and facilitate the use of natural resource principles that promote ecosystem health and diversity.”³² The Applegate Partnership’s mission statement reads: “Through community involvement and education, this partnership supports management of all land within the watershed in a matter that sustains natural resources and that will, in turn, contribute to economic and community well-being and resilience.”³³ The Partnership grew from discussions between environmentalist Jack Shipley and logger Jack Neal about collaborative land management after the timber industry’s economic slump in the early 1990s.³⁴ Seeking to overcome gridlock and conflict between special interests in southwest Oregon, they began a series of roundtable discussions to address forest management issues. They invited farmers, ranchers, environmentalists, loggers, agency officials, and local residents who shared the watershed to find common ground. The resulting Applegate Partnership’s goal was to improve natural resource management through consensus and a stable local economy. The Applegate Partnership worked with federal land management agencies to advance watershed planning projects, including innovative timber sales that incorporated best management practices for reducing fire risks and enhancing forest health. The Partnership served as a model for Adaptive Management

29. Malpai Borderlands Group, <http://www.malpaiborderlandsgroup.org/> (last updated Feb. 20, 2008).

30. *Id.*

31. Cash, *supra* n. 28, at 112-121; Malpai Borderlands Group, <http://www.malpaiborderlandsgroup.org/> (last updated Feb. 20, 2008).

32. Applegate Partnership and Applegate River Watershed Council, <http://www.arwc.org/aboutus.html> (accessed May 15, 2008).

33. *Id.*

34. Cassandra Moseley, *The Applegate Partnership: Innovation in Crisis*, in *Across the Great Divide*, *supra* n. 9, at 102-111; Red Lodge Clearinghouse, *Applegate Partnership*, http://rlch.org/index.php?option=com_content&task=view&id=96&Itemid=36 (last updated Mar. 19, 2008).

Areas, received Forest Service grants to monitor forest responses to different management treatments, completed a community Fire Protection Strategy, and restructured a private land ditch system to allow fish migration.³⁵ The Partnership experienced some internal tension when some environmental organizations resigned over fears of weakening environmental laws and differences in decision-making processes. Federal agencies also resigned after a timber industry suit found Federal Advisory Committee Act (FACA) violations, which caused further changes in direction for the Partnership.³⁶

This brief survey of some of the most widely referenced collaborative conservation efforts demonstrates some common themes. Successful collaborations involve a wide range of interests, are usually initiated by locals, and seek to find common ground. Most approaches combine private and public efforts to achieve ecosystem management goals.

Following the Quincy Library Group model, negotiated public lands legislation has become an increasingly common method for overcoming the inertia of public lands conflict.³⁷ As efforts to designate wilderness areas throughout western states increasingly failed, collaborative approaches combined conservation designations with local economic development.³⁸ Some common themes to successful collaborative public lands legislation are strong congressional leadership, lengthy and complex conflicts that are not adequately resolved through administrative or judicial action, and a commitment by parties to deliberate compromise before pursuing legislation.³⁹ However, the inertia of conflict can also undermine collaborative efforts since many parties might believe that their interests will be best served through other approaches requiring less compromise.⁴⁰

III. IS COLLABORATION LEGAL?

The threshold inquiry into collaborative conservation is whether it is legal. Not surprisingly, the answer depends on what kind of collaborative process is involved. Some environmental laws, such as the Clean Air Act and Clean Water Act, require some cooperative conservation processes, while many other environmental laws, such as NEPA, NFMA, and ESA, require public participation and interagency coordination.⁴¹ Other laws that encourage cooperative conservation include the Negotiated Rulemaking

35. Red Lodge Clearinghouse, *Applegate Partnership*, http://rlch.org/index.php?option=com_content&task=view&id=96&Itemid=36 (last updated Mar. 19, 2008).

36. Moseley, *supra* n. 34, at 106-108.

37. Western Governors' Association White Paper, *Collaborative Conservation Strategies: Legislative Case Studies from Across the West* (June 2006).

38. *Id.* at 31.

39. *Id.* at 31-32.

40. *Id.* at 33.

41. Sarah Bates Van de Wetering, *The Legal Framework for Cooperative Conservation* 9, 11 (Public Policy Research Institute The University of Montana 2006).

Act of 1989, Administrative Dispute Resolution Act of 1990, and President Bush's Executive Order 13352, "Facilitation of Cooperative Conservation."⁴² However, there is a tension between collaboration and open government principles. For example, FACA creates strict procedures for how federal agencies may assemble, convene, and receive recommendations from non-governmental advisory groups.⁴³ This has led some federal agencies to avoid contact with nonfederal entities out of fear of FACA suits. This "FACA-phobia" can discourage collaborative conservation or minimize agency participation in collaborative efforts.⁴⁴

Despite some explicit legal support for collaborative conservation, the flexible nature of collaboration raises a number of additional legal issues. Under the constitutional doctrine of separation of powers, Congress may delegate authority to agencies to fill in details of its statutes, provided Congress guides agency action through "an intelligible principle."⁴⁵ However, agencies may not "subdelegate" their authority to others.⁴⁶ "Most importantly, a federal agency may not fully shift its administrative responsibilities to third parties, but always must retain final decision-making authority over the public resources that are its responsibility. Further, any management sharing must be consistent with the governing statutes and must ensure that there are no conflicts of interest among participants."⁴⁷ The Niobrara Scenic River Advisory Council is an example of a collaborative group that overstepped subdelegation limits on authority because the National Park Service (NPS) shared decision-making power with a private group.⁴⁸ However, the Columbia River Gorge Commission, a partnership of federal agencies, states, and local governments working together on land use planning issues in a designated National Scenic Area, withstood constitutional challenge.⁴⁹ Another approach to avoid subdelegation issues is for Congress to delegate authority to new entities to achieve defined management objectives, such as the Valles Caldera Trust, which Congress authorized to manage the Valles Caldera National Preserve in New Mexico.⁵⁰

Most collaboratives evolve more organically from the ground up, which raises slightly different legal questions. Such collaboratives may avoid FACA conflicts by not actively involving federal agencies. Additionally, such collaboratives do not face legal obstacles of open government and public participation laws. Legal issues arise, however, when these collaboratives seek to implement their strategies. This is when privately negotiated

42. *Id.* at 10.

43. *Id.* at 13-15.

44. *Id.*

45. *Id.* at 16.

46. *Id.*

47. *Id.*

48. *Natl. Parks & Conserv. Assn. v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999).

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

50. *Van de Wetering*, *supra* n. 41, at 17-18.

deals collide with agency process and all of the discussed legal requirements. Generally, collaboratives have attempted to implement their strategies in two manners.

First, collaboratives may attempt to influence existing agency decision-making processes, such as forest planning or environmental analysis. For example, a group of various interests may create a mutually acceptable alternative that it presents to the land management agency to consider in its forest planning process or NEPA analysis. While the collaborative has recommended an approach to the agency, the decision-making process is still open to the public at large and controlled by applicable laws. Thus, no sub-delegation problems arise and legally defined processes are followed.

Another approach is for a collaborative to present its strategy directly to Congress to enact through specific legislation. Such negotiated omnibus public lands legislation is most common when wilderness designations are involved, which require congressional designation. This approach avoids legal problems because any group may freely lobby Congress to enact legislation in its interest. The public process is essentially shifted to the political process, rather than an agency decision-making process. Such approaches have raised questions regarding the interaction of place-based legislation with other federal laws, in particular whether specific legislative directives to implement a local plan can supersede other environmental laws. This question will be explored in more detail below.

IV. EVALUATING COLLABORATION

In order to evaluate the collaborative efforts of the Beaverhead-Deerlodge Partnership, it is first necessary to evaluate collaboration generally. This evaluation will examine some critiques of collaboration and explore possible criteria for successful collaboration.

A. *Critiques of Collaboration*

One vocal critic of collaborative processes is George Cameron Coggins who argues that devolution of federal land responsibilities to local collaborative processes is an illegal “abdication of legal management responsibilities by federal land managers.”⁵¹ Coggins argues that “[t]he appropriate level of management decision making concerning public resources is a policy or political problem, not a legal question, because the law is settled.”⁵² Coggins argues that the Constitution delegates power over federal lands exclusively to Congress, while Congress has in turn delegated that power, with substantive and procedural limits, to four main federal land manage-

51. George Cameron Coggins, “Devolution” in *Federal Land Law: Abdication by Any Other Name*, 14 Hastings W.-N.W. J. Envtl. L. & Policy 485, 486 (2008).

52. George Cameron Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 Ecol. L.Q. 602 (1999).

ment agencies that must make final decisions, subject to judicial review and legislative override.⁵³ Coggins contrasts this legally defined system of separation of powers with devolved collaboration:

[t]he underlying theory is that a self-selected group of local people who promise to be civil with one another can do a better job of allocating federal natural resources than the duly constituted federal authorities. Many federal bureaucrats are enthusiastic about this kind of private process because it is an all-purpose method of passing the buck on difficult and controversial allocation issues.⁵⁴

"But national lands are not private lands, and allocation of national resources is not a local issue. Ownership does matter. When the subject is every American's natural heritage, devolved local collaborationism is entirely inappropriate."⁵⁵ Coggins argues "[d]evolved collaboration as currently advocated crosses the line at which judicial deference insulates agency irresponsibility from reversal. Every pertinent statute says that the Secretary or an agency, not local citizens, shall decide the allocation questions. No statute authorizes abdication of the authority. It is illegal. Period."⁵⁶

Coggins argues that many premises underlying collaboration are unproven or untrue. First, the underlying assumption that "all participants are reasonable people who will see all sides of an issue and reach appropriate, mutually acceptable compromises . . . is demonstrably false."⁵⁷ "The West is home to a disproportionate number of every kind of obdurate extremist, demagogue, and outright crook. Reasoned discourse with them will be unavailing."⁵⁸ Coggins also questions the assumption that agreement or consensus is possible, noting that often values, premises, interests, and ideologies are strong, irreconcilably different, and unlikely to change by talking.⁵⁹ Coggins further questions the assumption that everybody wins in a collaboration, noting that distribution of losses is more likely given past resource damage.⁶⁰ Coggins challenges the assumption that allocation and conservation of federal lands and resources are "local problems better solved by local people with knowledge of local conditions," noting that public resources allocation is a value question that should be resolved by

53. *Id.*

54. *Id.* at 603.

55. *Id.*

56. *Id.* at 606.

57. *Id.* at 607.

58. *Id.*

59. *Id.*; George Cameron Coggins, *Of Californicators, Quislings, and Crazies: Some Perils of Devolved Collaboration*, in *Across the Great Divide*, *supra* n. 9, at 166 [hereinafter Coggins, *Across the Great Divide*].

60. Coggins, *supra* n. 52, at 607; Coggins, *Across the Great Divide*, *supra* n. 59, at 167.

the legitimate political process.⁶¹ Similarly, Coggins dismisses the premise that all legitimate voices are heard in a collaboration, noting that some groups intentionally exclude outside interests, even though there are no outside interests when public lands and resources are at stake.⁶²

Coggins argues that as a matter of policy, collaboration can be a mask for cooptation and may interfere with national priorities. Noting that national conservation groups increasingly oppose local collaborations for being exclusive, time-wasting, futile, and resulting in no precedents, Coggins suggests that declining western economic interests use collaboration to forestall more radical legal reforms, as evidenced by collaboratives' emphasis on vague concepts such as "community," "lifestyle," and "custom and culture" to preserve the status quo.⁶³ Another related issue is the conflict between national and local priorities. "The federal lands are national assets, not local fiefdoms. The public natural resources belong to the entire American public; they are not just local storehouses to be looted in the deregulation riots."⁶⁴ Congress has legislated federal procedural requirements and substantive standards for land management agencies to follow in allocating such national assets.⁶⁵ Such processes are legally required and override contrary local decisions.⁶⁶ Additionally, local collaboration cannot effectively address the magnitude of ecosystem-scale management that implicates multiple jurisdictions, agencies, parties, and remedies.⁶⁷ "Land-use planning for federal land tracts must embrace more than local concerns."⁶⁸

Coggins' overall point is that collaboration is illegal abdication of authority, and while the legally required decision-making process is imperfect, the process is fundamentally sound and produces decisions consistent with law and public preference.⁶⁹ "Instead of allowing federal land managers to devolve their authorities and responsibilities onto local citizens' councils, a far better balance will be achieved if only legislators would legislate, judges would judge, and managers would manage in accordance with law."⁷⁰

Robert Keiter makes a more optimistic critique of collaboration. Keiter identifies five governing principles, both procedural and substantive, for a viable and legitimate community-based collaborative initiative: fairness, equity, accountability, sustainability, and scientific integrity.⁷¹ Procedurally, fairness and equity require inclusive processes that involve all in-

61. Coggins, *Across the Great Divide*, *supra* n. 59, at 167.

62. Coggins, *supra* n. 52, at 607.

63. *Id.* at 607-608; Coggins, *Across the Great Divide*, *supra* n. 59, at 168.

64. Coggins, *Across the Great Divide*, *supra* n. 59, at 169.

65. *Id.*; Coggins, *supra* n. 52, at 608.

66. Coggins, *Across the Great Divide*, *supra* n. 59, at 170.

67. *Id.*

68. *Id.*

69. *Id.* at 170-171; Coggins, *supra* n. 52, at 610.

70. Coggins, *Across the Great Divide*, *supra* n. 59, at 171.

71. Keiter, *supra* n. 7, at 248-249.

terests and operate openly and transparently. This builds trust and fosters new and innovative solutions. Accountability, in both political and legal terms, requires public land outcomes to be assessed from both national and local perspectives and comply with governing federal laws. Substantively, collaborations should produce sustainable results with lasting environmental benefits that also meet community needs. Such long-term results should be measured over time by monitoring whether goals are met and revised as necessary. Credible science can set baseline requirements, define risk thresholds, or provide information regarding potential opportunities or consequences.⁷²

Michael McCloskey, former chairman of the Sierra Club, questions many of the claimed advantages of collaboration, such as better decisions, improved processes, and building trust and acceptance.⁷³ McCloskey suggests that consensus-building leads to lowest common denominator compromises, time consuming and wearing processes, and little reduction in political resistance or litigation.⁷⁴ He argues that representative democracy is undermined by local consensus processes where minorities can veto outcomes and subject national issues to local communities' decisions.⁷⁵ As an alternative to collaboration, McCloskey suggests that public participation better serves the public interest, especially when stakeholder discussions are regarded as input rather than finished policy, local interests are balanced with state and national interests, and majority decisions replace consensus rules.⁷⁶

B. Criteria for Evaluating Collaboration

One of the most difficult challenges of collaboration is evaluating its success. Opinions abound regarding particular collaborative efforts, but finding objective and measurable criteria for evaluation is more elusive. The above critiques offer some guiding principles. The following are some additional criteria.

The conservation community's *Collaboration Best Practices* outlines some evaluative criteria.⁷⁷ The *Best Practices* lists openness, inclusion, transparency, accessibility, balanced and diverse representation of interests, focus on common goals, application of NEPA and other relevant laws, use of best available science, maintaining participant independence to advocate for goals in other forums, consensus decision-making, and actively seeking

72. *Id.*

73. Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, 34 Val. U. L. Rev. 423, 427-428 (2000).

74. *Id.* at 428-430.

75. *Id.* at 430-432.

76. *Id.* at 432-434.

77. *Best Practices*, *supra* n. 12.

broader input as necessities for collaborative processes.⁷⁸ They also suggest independent facilitation, long-term monitoring of results, and initiation by non-agency groups.⁷⁹

One academic survey compiled lessons from roughly 200 collaborative initiatives working over a decade to conclude that successful collaborative efforts build on common ground; create new opportunities for diverse groups to interact; focus on problems in innovative ways; foster responsibility, ownership, and commitment; recognize people rather than institutions; are proactive; and mobilize resources and support from varied sources.⁸⁰

V. THE BEAVERHEAD-DEERLODGE PARTNERSHIP: THE GOOD, THE BAD, AND THE UGLY

The Beaverhead-Deerlodge Partnership grew from a non-traditional response to forest planning.⁸¹ The Forest Service's 2005 draft land and resource management plan for the Beaverhead-Deerlodge National Forest (BDNF) stirred disappointment among some conservation groups and timber companies. Timber companies were concerned over proposed reductions in the suitable timber base on the forest, while conservation groups wanted greater habitat protections and forest restoration.⁸²

Early in 2006, leaders from the National Wildlife Federation, Montana Wilderness Association (MWA), and Montana Trout Unlimited began a three month series of meetings with the leadership of Sun Mountain Lumber and other timber companies to explore potential areas of agreement for a comprehensive management strategy for the BDNF. The April 2006 Beaverhead-Deerlodge Partnership Strategy (BDP Strategy or Strategy) proposed to connect timber harvest with forest restoration through stewardship contracts, while increasing designated wilderness. The Strategy endorsed motorized activities on over a million acres of the forest.⁸³

Disappointed with progress during the Forest Service's forest planning process, and aware of the fact that wilderness designation requires congressional approval, the Partnership drafted legislation, the Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act (BDP Bill or Bill), to implement their Strategy in 2007.⁸⁴

The Partners met with political leaders, organizations, and businesses in the area to build support for their Strategy. The Partnership received letters

78. *Id.* at 2-3.

79. *Id.* at 3.

80. Wondolleck, *supra* n. 17, at 20-21.

81. Beaverhead-Deerlodge Partnership, *About the Partnership*, <http://www.bhdlpartnership.org/partners.htm> (accessed April 15, 2008).

82. *Id.*

83. *Id.*

84. Beaverhead-Deerlodge Partnership, *Revised Draft Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, <http://www.bhdlpartnership.org/legislation.htm> (Oct. 9, 2007) (there is no congressional bill number at this time) [hereinafter BDP Bill].

of support from Governor Brian Schweitzer, Senator Max Baucus, and a number of county commissioners, unions, and conservation organizations.⁸⁵ The Partnership conducted outreach to numerous county commissions, recreation groups, business interests, conservation groups, watershed groups, civic organizations, organized labor, and state and federal government representatives, and the Partnership presented their Strategy in many different settings.⁸⁶ The Partnership also garnered some editorial support in the *Missoulian* and *Montana Standard*.⁸⁷

The Partnership raises a number of unique issues, both substantive and procedural. The discussion below explores many of these issues in an effort to evaluate the potential success of this collaborative effort. Substantively, the discussion focuses on whether the Partnership Strategy may successfully contribute to viable and sustainable ecological preservation and restoration of public lands on the BDNF. Procedurally, the discussion examines whether the Partnership represents a genuine collaborative effort at achieving these goals. My discussion explores the good, the bad, and the ugly aspects of the issues raised by the Partnership Strategy.

A. Substantive Issues

The main substantive issues advanced in support of the BDP Strategy are new wilderness designations and forest restoration through stewardship contracting. My evaluation of the BDP Strategy starts with these substantive claims of success.

1. Wilderness

The BDP Bill would designate approximately 573,000 acres of new wilderness in 16 areas on the Beaverhead-Deerlodge National Forest in Montana.⁸⁸ Protecting wildlands in Montana would be a significant conservation achievement, especially considering that Montana has not had a new wilderness designation in 25 years.⁸⁹ In comparison, the Forest Service's preferred alternative for its revised forest plan would recommend 329,000 acres for wilderness designation.⁹⁰ This wilderness centerpiece to the BDP would be good for the ecological sustainability of the forest.

85. Beaverhead-Deerlodge Partnership, *Supporters*, <http://www.bhdppartnership.org/supporters.htm> (accessed April 15, 2008).

86. Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Partnership Powerpoint Presentation* 15-16, <http://www.bhdppartnership.org/powerpoint.html> (Jan. 17, 2008).

87. Beaverhead-Deerlodge Partnership, *Press*, <http://www.bhdppartnership.org/press.htm> (accessed April 15, 2008).

88. BDP Bill, *supra* n. 84, at § 201.

89. The Lee Metcalf Wilderness, designated in 1983, was the last successful wilderness enactment in Montana.

90. *Final Environmental Impact Statement for the Beaverhead-Deerlodge National Forest Land and Resource Management Plan* 1 (USFS Jan. 2008) [hereinafter BDNF FEIS].

Critics, including some members of the conservation groups involved in the Partnership, charge that the BDP Strategy only protects “rock and ice” as wilderness, which is de facto protected because there is little timber value to these lands and much is inaccessible due to steep slopes or other topography.⁹¹ At the same time, the Strategy would put much of the low elevation forests into the suitable timber base, thereby relinquishing wildlands with higher ecological value. Once wilderness qualities are lost by road building or logging, these remaining unprotected wildlands can never be designated wilderness in the future. Additionally, logging would be allowed on 200,000 acres of currently inventoried roadless areas.⁹² The release of these unprotected wildlands would be bad for the ecological sustainability of the forest.

An alternative wilderness bill is the Northern Rockies Ecosystem Protection Act (NREPA) (H.R. 1975), which would designate nearly seven million acres of wilderness in Montana. There is robust debate regarding the political viability of NREPA, but it does serve as a point of comparison with the BDP Bill. Whether a smaller scale incremental approach with local support is more likely to be passed by Congress than a larger scale comprehensive wilderness bill is open to speculation.⁹³ But NREPA would protect significantly more wildlands in Montana without releasing wilderness-quality wildlands to development.

Ultimately, additional wilderness designation advances ecological protections for the forest. But at what cost? Whether this particular wilderness approach gives up too much potential wilderness, is too piecemeal in light of other approaches, or wastes political capital that is developing for more ambitious wilderness designations are the key issues to consider in evaluating the substantive success of the wilderness component of the Partnership Strategy.⁹⁴

2. Restoration and Stewardship Contracting

Another primary objective of the BDP Strategy is to put Montanans to work by producing wood products using restoration forestry, including activities that fix damaged habitat and recreational areas. Proponents of the BDP Strategy note that uncertainty regarding public lands logging plagues local timber companies, which threatens local economies. The Strategy

91. Eve Byron, *Conflict Marks MWA Anniversary*, Helena Independent Record (April 20, 2008); George Wuerthner, *The Problems with the Beaverhead-Deerlodge Partnership 2* <http://www.bhdppartnership.org/PDFs/Critics-Wuerthner-Documents-11-20-07.pdf> (Nov. 20, 2007).

92. Wuerthner, *supra* n. 91, at 2; but see Bruce Farling & Tom France, *Why George Wuerthner is Wrong about the Beaverhead-Deerlodge Partnership 2*, <http://www.bhdppartnership.org/PDFs/Critics-WuerthnerResponseFinal-sjs.pdf> (accessed May 15, 2008) (arguing that “the bulk are slivers next to existing road systems, including tracts that though classified as ‘roadless,’ actually have roads”).

93. See Tim Baker and Michael Garrity, *Ending the Wilderness Drought*, <http://www.newwest.net/topic/article/19602/C41/L41/> (Feb. 22, 2008).

94. *Id.*

aims to fix this problem by putting local timber companies back to work on our public lands.⁹⁵ To meet this goal, the Bill designates 2,272,000 acres of stewardship areas on the forest, with nearly 700,000 acres managed as landscape-scale restoration projects.⁹⁶

The Bill mandates at least one “landscape-scale restoration project” annually,⁹⁷ creating a binding legal duty to “mechanically treat timber” on 7,000 acres annually.⁹⁸ The Strategy aims to assure a continuous supply of timber for local logging interests, while also meeting certain restoration requirements.⁹⁹ All of these restoration goals are to be facilitated by using stewardship contracts for the required landscape-scale restoration projects.¹⁰⁰ For a national forest with its share of abusive management, this restoration mandate sounds like good news.

However, stewardship contracting is not necessarily the restoration panacea described. One critic notes that the goal of sustaining the economic viability of the timber industry is inconsistent with restoration: “even good faith efforts to manage the forest for ecological restoration will be fatally flawed and under pressure to get the cut out.”¹⁰¹ Critics also doubt that stewardship contracting can raise enough money to fund the required restoration work, especially on a dryland forest that typically loses money on its timber program. George Wuerthner, an outspoken environmental writer comments:

What we question is whether the Beaverhead-Deerlodge National Forest is the appropriate place for any commercial timber production. The forests on the BDNF grow slowly and trees are small. It’s questionable whether logging—if all costs were considered—can be done economically (and ecologically) anyplace on the BDNF. Only by ignoring most of the real costs can anyone assert that it makes any economic sense to log here.¹⁰²

95. Ecosystem Research Group, *Partnership Strategy for the Beaverhead-Deerlodge National Forest* 1-6, <http://www.bhdppartnership.org/PDFs/Proposal-FinalPartnershipStrategy.4.14.06.pdf> (April 14, 2006).

96. BDP Bill, *supra* n. 84, at § 101(a).

97. *Id.* at § 102(a).

98. *Id.* at § 102(d).

99. *Id.* at § 102(c) (restoration requirements include: 1) limiting permanent road densities to below 1.5 miles per square mile; 2) making new access roads temporary; 3) reclaiming certain existing roads; 4) managing vegetation by timber harvests and prescribed burns; 5) replacing and resizing existing culverts to reduce sediments and restore fish habitat; 6) restoring wildlife habitat by mechanical treatment and prescribed burning 7) applying Inland Native Fish Strategy (INFISH) standards for riparian habitat conservation and management; 8) utilizing commercial timber harvests to reduce fire and insect risks, restore healthy forests, produce revenue for habitat restoration, and provide economic stability to local communities by maintaining wood products infrastructure).

100. *Id.* at § 102(b).

101. Wuerthner, *supra* n. 92, at 1.

102. *Id.* at 2-3.

Another critic claims that on the BDNF, “the American taxpayer loses about \$1,400 per acre of forest cut down. It will cost taxpayers \$280,000,000 to log these roadless lands. Money-losing timber sales don’t raise any money for restoration work.”¹⁰³

Furthermore, stewardship contracting is a contracting tool, not a planning tool, which raises additional questions as to how it will be applied. The Forest Service expressed concern that because stewardship contracting requires periodic congressional reauthorization, it would be inappropriate to require all vegetation projects under a forest plan to require the use of such an uncertain tool.¹⁰⁴ Additionally, the Forest Service noted that “to generate enough funds through stewardship contracting to achieve the results described by the Partnership would require a tremendous amount of timber harvest. There is no science or other information presented by the Partnership on how resource values would or could be protected from such a large unprecedented harvest program.”¹⁰⁵

Some critics fear that there are no assurances that the restoration work will accompany the timber “treatment.” The Burned Area Recovery settlement on the Bitterroot National Forest tells a cautionary tale. Restoration work was supposed to accompany the permitted logging, but while most logging was completed within a few years, the restoration work has barely begun and funding is elusive.¹⁰⁶

So the question becomes whether stewardship contracting can generate the funding needed for road removals and other restoration work that should follow the timber “treatment.” Without answering these practical concerns, the BDP Strategy is just more logging dressed in restoration rhetoric. Many foresters believe that unhealthy forests need thinning and other “treatment” for ecological health. However, honest debate would address the underlying science in an open and accountable setting, rather than packaging timber harvests as restoration. Additionally, the Bill mandates timber treatment at a speed and scope that makes monitoring and evaluation of the Strategy’s effectiveness difficult. Over 10 years, 70,000 acres of forest will be mechanically treated in 10 different landscape-scale restoration projects. Although the Forest Service would be required to report to Congress at five year intervals,¹⁰⁷ there is good reason to question how much data will be available over the short-term to allow effective and accurate adaptive management to meet changing ecological needs. Given the binding targets for timber treatment, there is no indication that adaptive management is even appropriate for a Strategy that seeks certainty through

103. Michael Garrity, AWR, *Green Scammers Ad*, <http://www.bhdppartnership.org/PDFs/Critics-IndependantAdRant.pdf> (May 11, 2006).

104. BDNF FEIS, *supra* n. 90, at 954.

105. *Id.* at 965.

106. See Daryl Gadbow, *Furor Over Forest Restoration Front and Center*, *Missoulian* (Feb. 2, 2005).

107. BDP Bill, *supra* n. 84, at § 104(a).

yearly landscape scale restoration projects that would affect 70,000 acres of forest before a second congressional report could present sufficient data to track trends and gauge successes in ecological terms.¹⁰⁸

There are additional concerns that such "restoration projects" are not economical for timber companies that would have to retrofit mills to process smaller diameter trees and adapt to new markets that might not provide the same profit margins as past logging. Thus, the bad news is that stewardship contracting might not prove to be the restoration tool described, while the economic certainty is less than certain.

A final analysis can only be made in retrospect, but past failed efforts advise caution. While restoration forestry is certainly an ecological improvement over large scale commercial timber harvests, the ability of stewardship contracting to deliver the goods has yet to be proven. Unfortunately, the Partnership Strategy invests all of its hopes in the ability of stewardship contracting to provide economic stability to timber companies, restore damaged forests, and provide all the requisite funding for these efforts. Rather than test these admirable goals with a slower pilot approach, the Strategy mandates 70,000 acres of treatment over 10 years from a suitable timber base of 2,272,000 acres of stewardship areas. In contrast, the Forest Service's preferred alternative recommends 299,000 acres as suitable for timber production and does not have a mandate for yearly landscape-scale treatments, although timber harvest goals are included in board feet.¹⁰⁹ In explaining some of the reasons for not fully analyzing the Partnership Strategy during forest planning, the Forest Service noted that "[h]istorically harvesting to the degree proposed by the Partnership has been shown to adversely affect threatened, endangered, and sensitive species and degrade water quality."¹¹⁰ Thus, despite the potential to redirect forest management in a more ecologically sustainable manner, the Strategy's approach may be too much, too fast, with too little proof of achieving its stated goals.

3. *Relationship to Other Laws*

An additional substantive issue of concern is the BDP Bill's relationship to other laws. The Bill directly addresses this issue by declaring: "Except as provided for in this Act, the Secretary shall manage the Beaverhead-Deerlodge National Forest in accordance with all existing laws and regulations."¹¹¹ Recall that the Quincy Library legislation was altered by Congress to include language explicitly requiring the pilot project to adhere to all federal environmental laws. Here the "except as provided for in this Act" language gives marching orders to the Forest Service to implement the

108. *Id.*

109. BDNF FEIS, *supra* n. 90, at tbl. 1.

110. *Id.* at 36.

111. BDP Bill, *supra* n. 84, at § 106.

BDP Strategy regardless of conflicting ecological mandates for the forest. The most obvious conflict is with the roadless rule. While the fate of the roadless rule is battled in court, the BDP Strategy would open some roadless areas on the Beaverhead-Deerlodge to “temporary roads.”

Direct conflicts with other environmental laws raise additional questions about the effect of this statutory language.. If the Strategy could only be implemented by ignoring the Endangered Species Act or the Clean Water Act, a judge could be left to interpret whether the “except as provided” language gives the BDP Strategy primacy over other environmental laws. Whether this conflict is likely to occur does not diminish this critique of place-based legislation undermining federal environmental protections. In fact, this concern is reinforced by the Forest Service’s response to the Partnership Strategy’s forest management approach:

It would be presumptuous for the forest to think that large scale timber harvest is the answer to restoring all watersheds. The Partnership Strategy is proposing to harvest over 7000 acres a year in one or two watersheds (15,000 to 40,000 acres) or approximately 17 to 47 percent of a watershed with large cutting units. This wholesale strategy would violate 36 CFR 219.27 (d) (2), which identifies a 40 acre harvest opening limit for all vegetation types on the BDNF. It is only after site-specific analysis, identifying specific rationale, that the Forest may exceed these size openings. We agree there are times where this strategy is desirable, but there is not enough site-specific information to support a forest wide strategy to harvest large acreages within watersheds. After consideration, the ID Team determined there are too many unknowns, and little if any science, which indicates the Partnership Strategy could be implemented successfully, while protecting the other resource values. In fact, the ID Team felt there is more science indicating that given the current condition of the BDNF, existing laws, and regulations, treating large acres in individual watersheds across the forest could not be accomplished without adversely effecting resources to the degree that legal requirements like the Clean Water Act, Endangered Species Act, National Historic Preservation Act, and National Forest Management Act would be violated. The Partnership has presented no information, specific to the BDNF, indicating how their strategy would protect the re-

sources and meet the legal framework identified in the EIS.¹¹²

The Strategy also raises intriguing NEPA questions. The Bill requires one EIS for each landscape-scale restoration project.¹¹³ The Strategy shifts the terms of any NEPA challenge, since landscape scale treatments are framed as restoration projects, rather than timber harvests. Furthermore, the mainstream conservation groups involved in the Partnership are likely to defend any such restoration projects challenged, further raising the bar for a successful NEPA challenge. Many would view this as a good development, since NEPA litigation is often cited as one of the contributions to gridlock on the national forests. This Strategy would tilt the scales in favor of timber treatment because such treatment would arguably have positive environmental impacts. Questions may remain as to whether the Strategy constrains alternatives available for the Forest Service to consider in its NEPA analysis and whether this creates a sufficient opportunity to seek judicial review of specific stewardship projects. Regardless, the Strategy would alter the NEPA debate significantly.

B. *Procedural Issues*

The procedural issues underlying the BDP are equally important to an evaluation of the Partnership as a collaborative tool for advancing environmental goals on public lands.

1. *Collaboration or Negotiation?*

Proponents of the BDP Strategy extol how a collaborative process overcame gridlock and produced a non-traditional alliance that advanced multiple interests. Many involved in the BDP note how trust and credibility have been gained through the process. As noted above, the Partnership made extensive outreach efforts to promote its Strategy and gained many supporters. According to the Partners: "Over the last year we've talked to other Montanans about our efforts, building support for what we're doing, and modifying our proposal to reflect these constructive discussions. We are still talking with others and we stand ready to make further adjustments as we learn more."¹¹⁴

Critics cry foul. Noting that three mainstream conservation organizations met privately with five timber companies to hammer out the details of the deal without seeking or even allowing broader participation, these critics question the legitimacy of the process. The Alliance for the Wild Rock-

112. BDNF FEIS, *supra* n. 90, at 953.

113. BDP Bill, *supra* n. 84, at § 102(e).

114. Ed Regan and Tim Baker, *Breaking Free of Forest Service Gridlock*, Butte Standard op-ed (April 24, 2007).

ies even placed an ad in the Missoula Independent calling the Partnership “Green Scammers” and leading with the accusation that “[b]ehind closed doors, self-appointed interlopers sold out your Beaverhead-Deerlodge National Forest!”¹¹⁵

Criticism comes from inside the BDP conservation groups as well. Former MWA board member Paul Edwards expressed concern with the BDP Strategy: “I appreciate MWA’s anxiety and misery with the endless rejection of (new wilderness designations), but I don’t think the answer is to collaborate with those who have no desire to see wilderness preserved for its own sake. . . . I think they’ve made a deal with the devil.”¹¹⁶ Russ Titus, a 20-year MWA member, believes the deal, which was “totally hatched in quiet,” undermines efforts of conservation groups.¹¹⁷ Titus wrote to the MWA board:

By collaborating with five sawmills and two conservation groups not seriously concerned with wilderness designation, MWA . . . [is] seeking fast and painless wilderness tokens at the cost of the most essential element of the wilderness ethic: working and sweating for wilderness support among the people that live near it.

. . . Does MWA intend to continue the current practice of collaborating with any partner offering to help gain wilderness designation in its area of commercial operations in return for our help in gaining access to saw timber in that area?¹¹⁸

Such an exclusionary process is more akin to a negotiation than a true collaboration. The *Collaboration Best Practices for the Conservation Community* specifically states that collaboration does not include “[n]egotiated political deals (i.e. public land legislation), behind closed doors deal making, or other processes that are not open, transparent, and strive to be inclusive . . .”¹¹⁹ Indeed much of the literature on collaboration places open process and accountability high on the list of required characteristics for a true collaborative process.¹²⁰ Some conservationists describe BDP “outreach” efforts more as information sessions than legitimate efforts to seek input. This is not to argue that the Partnership’s Strategy does not represent a meaningful negotiation; however, it should be recognized as such, rather than holding itself out as a collaborative effort. The Strategy

115. AWR, *Green Scammers Ad*, <http://www.bhdppartnership.org/PDFs/Critics-IndependantAdRant.pdf> (May 11, 2006).

116. Byron, *supra* n. 91.

117. *Id.*

118. *Id.*

119. *Best Practices*, *supra* n. 12, at 2.

120. *Id.*; Keiter, *supra* n. 7, at 248-249.

may represent a viable political solution to agency gridlock because of its non-traditional support, but in terms of collaborative principles of openness, inclusiveness, and representing diverse interests, the Partnership falls short of true collaboration.¹²¹

Accountability is a key collaborative criterion. The Partnership's outreach efforts attempt to build support and accountability for the Strategy. But this approach is backwards. Since the actual negotiations were exclusive between two primary interests, many critics view the Partnership as unrepresentative and unaccountable.

2. *Legislation v. Forest Planning*

The BDP was born of frustration with forest planning. Many collaborative efforts arose from similar frustrations with agency processes that failed to deliver the goods that local communities desired. However, while the BDP began pursuing legislation to implement its Strategy, the Forest Service continued its forest planning. The result is that parallel tracks are moving towards the goal of implementing their visions for the future of the forest. Members of the BDP have played both angles, submitting comments on the FEIS, while still pursuing congressional action to directly implement their Strategy. This raises fundamental questions about the legitimacy of either approach. Is this just strategic planning to take multiple approaches to implementing their Strategy, or does it show a lack of faith in public process?

The Forest Service is clearly frustrated by the Partnership's approach. Noting that parts of the Strategy are illegal or inappropriate for a forest plan and that the Strategy lacks sufficient information to fully consider it as an alternative in the EIS, the Service comments:

These items have been pointed out to the Partnership and a request for changes and additional information to make the alternative viable. After a year of discussions with the Partnership, we have neither received information changing those items which are inappropriate, nor have we received information to make it a complete alternative, which could be analyzed similar to the other alternatives. The Partnership has stated they would provide us with information, but none has been received. Therefore the Partnership Strategy has been dropped from consideration as an alternative in the planning process; however elements of the proposal will be considered as individual comments . . .¹²²

121. *Best Practices*, *supra* n. 12, at 2; Keiter, *supra* n. 7, at 248-249.

122. BDNF FEIS, *supra* n. 90, at 957.

Whatever frustration the Partnership had with the Forest Service during forest planning is obviously mutual.

If the Forest Service does not implement the BDP Strategy through forest planning, which seems likely given the FEIS, the follow-up question is whether the BDP Bill will fare better in Congress. This question cannot be answered with any certainty. As discussed above, successful collaborative public lands legislation benefits from strong political leadership on complex conflicts not adequately resolved through administrative processes.¹²³ The Bill is a response to frustrations with forest planning and enjoys support from Governor Schweitzer and Senator Baucus, which is the type of leadership that could facilitate its passage. However, these strengths are undermined by the Partners' failure to deliberate compromise among diverse interests before pursuing legislation.¹²⁴ Furthermore, regardless of what the BDP proposed, the final legislation could look much different from the current Bill after making it through the proverbial congressional sausage grinder. Congress may add provisions explicitly addressing the Bill's relationship to other laws, as with the Quincy Library legislation. This point must fall in the ugly column since it is impossible to know whether Congress will improve upon the faults in the Bill or undermine its strengths.

Congress may offer some additional legitimacy to the process. By moving the debate to the political arena, the process should be opened to greater input and debate, unless the Bill ends up in a legislative rider. While questions remain as to whether the Bill is a result of a genuine collaboration, at least the exclusionary taint could be tempered by moving the discussion into the political sphere.

3. *National v. Local*

The national versus local debate is one that has plagued collaborative efforts to address public lands management. While some critics like Coggins and McCloskey argue that any devolution of decision-making authority to local groups undermines the national interest in public lands, others see local involvement as a more informed approach to on-the-ground circumstances. The Partnership's interest in creating certainty for local timber companies represents a different perspective from national conservation groups that participate in forest management through agency processes within the framework of federal environmental laws. Although the Partnership does include two national conservation groups, they are both represented by regional offices and local leadership. In addition to legal concerns about delegation of authority, this type of place-based legislation also raises questions about piecemeal forest management. While far from perfect, federal environmental legislation offers a uniform approach to manag-

123. Western Governors' Association, *supra* n. 37, at 31-32.

124. *Id.*

ing public lands, which allows a wide array of interests to participate in established agency processes.¹²⁵

Coggins would take this argument a step further to question whether the Partnership is a mask for cooptation that interferes with national priorities.¹²⁶ Timber companies have consistently blamed environmentalists for locking up forests through litigation, which suggests that this “collaborative” effort may simply be a better strategy for accessing more timber and avoiding more radical reforms that could result from forest planning or continued litigation. By emphasizing local economic needs to guide forest management, the timber companies’ involvement in the BDP subverts national forest planning efforts directed by national legislation.

4. *Motorized Use*

Increased motorized use on the Beaverhead-Deerlodge National Forest was an impetus to form the Partnership’s non-traditional alliance between mainstream conservation groups and timber companies. While the Partnership Strategy addresses this issue, the Bill is silent on the matter.¹²⁷ Presumably, motorized use will remain an issue to be managed through forest and travel planning. Punting on this issue may be political strategy, but it leaves a critical aspect of the forest conflict unresolved.

5. *Resource Advisory Committee*

The BDP Bill requires a Resource Advisory Committee (RAC) for the BDNF with Partnership representatives from both the conservation and industry interests.¹²⁸ This RAC must establish “project specific advisory committees, comprised of industry, recreation, conservation, and livestock interests, to aid in the location, design, and implementation of the landscape projects” required by the Bill.¹²⁹ The nepotistic mandate to install Partnership interests on the RAC, combined with the RAC’s subdelegation to project specific advisory committees to “aid” in “locating, designing, and implementing” landscape projects raises serious questions about the ultimate role of the Partnership in forest decision-making. While both the RAC and the project-specific advisory committees still retain an advisory role, this provision appears to be an effort to push the boundaries of the Partnership’s advisory role. Congressional enactment of the Bill would likely avoid legal subdelegation issues, but this provision could complicate implementation of the Strategy. The Bill even requires the RAC to advise the BDNF on “the

125. Coggins, *supra* n. 52, at 610; Coggins, *Across the Great Divide*, *supra* n. 59, at 170-171; McCloskey, *supra* n. 73, at 432-434.

126. Coggins, *Across the Great Divide*, *supra* n. 59, at 167-170; Coggins, *supra* n. 52, at 607-608.

127. Ecosystem Research Group, *supra* n. 95, at 9; BDP Bill, *supra* n. 84.

128. BDP Bill, *supra* n. 84, at § 103(c).

129. *Id.*

use and disbursement of excess receipts which result from the completion of the landscape scale restoration projects.”¹³⁰ This seems like a recipe for institutionalized conflict with the Forest Service being given marching orders to consult with an advisory group that went over its head to implement its Strategy after failing to get its way through forest planning.

VI. TOWARDS A MORE COLLABORATIVE FUTURE?

It is too early to render a final verdict on the Beaverhead-Deerlodge Partnership. This analysis illustrates some of the good, bad, and ugly aspects of the BDP Strategy. Substantively, success depends on whether the Strategy is ever implemented, by Congress or administratively, and in what final form. Key issues to evaluate substantive success will be the amount of designated wilderness, the scientifically demonstrated effects of restoration work, and the legal relationship of the BDP Strategy to other environmental laws. Procedurally, the Partnership has a mixed record with regard to some principles of collaboration. The BDP was not an open and inclusive process that welcomed diverse interests to the table. The Partnership improves some on accountability flaws through its outreach efforts and by subjecting the Strategy to the political process, although these are tail-end efforts, rather than genuine, up-front efforts.

Genuine collaboration would require taking several steps back and inviting a broader spectrum of interests to the table to discuss management of the forest. The Strategy could represent a starting point for that discussion, but a true collaboration would require an open process that strives for greater accountability among the representatives and their constituents. This could build broader trust, credibility, and accountability. However, it also runs the risk of leading to more conflict without resolution. A genuine collaborative process has its own shortcomings, and a successful process does not guarantee a successful result.

While the Partnership may fail as a collaboration, that does not make it a failure in general. The Partnership is more aptly described as a negotiation between three mainstream conservation groups and five local timber companies. As such, it did produce an impressive agreement that succeeded in building on common ground between those interests. The Strategy would provide some environmental and economic benefits for the forest and surrounding communities. While it might not go far enough for some environmental critics, it does represent an appealing political agreement that could move the forest in a positive direction. As a political compromise it will never represent all interests, but what compromise could?

Collaboration is an evolving tool. It is not the answer for all public lands problems. True collaborations go a long way towards building understanding between diverse interests, and finding creative solutions where tradi-

130. *Id.*

tional approaches breed more conflict. The Beaverhead-Deerlodge Partnership is a cautious compromise between traditional administrative approaches and genuine collaboration. That it fails to benefit fully from either approach is less a condemnation of its efforts than an assessment of its shortcomings.