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Managing the National Forests through Place-Based Legislation

Martin Nie and Michael Fiebig***

The resolution of multiple use conflicts through place-based (national forest-specific) legislation has recently received increased interest. Most of these proposals combine wilderness designation, restoration objectives, economic development, funding arrangements, and other provisions, in a conservation package to be considered by Congress. Interest in the place-based legislative approach is precipitated by numerous factors, including perceptions of agency gridlock, problems related to forest planning, unresolved roadless and wilderness issues, and the embrace of collaboration. Though the national forests have a more unified governing framework than other federal land systems, the U.S. Forest Service has implemented place-based legislation in a few cases. This Article reviews these cases, and then presents a short case study focused on the Beaverhead-Deerlodge Partnership in Montana, which has proposed a place-based bill currently being debated. A brief review of other place-based proposals is also provided. We neither endorse nor oppose these proposals at this point. Instead, we ask a series of questions that we hope will help structure future analysis and debate of place-based national forest legislation. We ask questions pertaining to governance, conflict resolution, precedent, wilderness designation, and funding.

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* Professor of Natural Resources Policy, College of Forestry and Conservation, University of Montana, Missoula, MT. (406) 243.6795; martin.nie@umontana.edu.

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

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INTRODUCTION

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

We examine this approach to national forest conflict by first placing it in a larger political context. Several factors important to national forest management have created a highly uncertain and unstable environment that makes legislative solutions more attractive to some interests. Among these

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

factors, perhaps most important is a forest planning process that leaves most interest groups unsatisfied.

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

Part II then introduces our case study: the BDP proposal. This Part explains the proposal's formulation, its major provisions, and its evaluation by different interests. Personal interviews were conducted with Partnership members, critics, and others in order to better understand the BDP proposal and the context in which it is being offered.² The review is brief, and we use the case mostly as a jumping off point. The story is still unfolding at the time of this writing. But whether it succeeds or fails, the BDP proposal raises several significant issues that are manifest in other places and venues. Based on our research and the interviews conducted for this Article, we suspect that similar place-based laws will be offered in the future, and we hope our analysis of this case will help guide debates elsewhere.

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

I. BACKGROUND

A. Context

We begin by placing the case study in a very general political context. A few key factors are helpful in understanding the reasoning behind place-based national forest legislation and its evaluation by different interests. These factors include a rampant frustration with the United States Forest Service (USFS) and

2. Thirteen in-depth interviews were conducted in 2008. Interviews were tape-recorded and transcribed. Participants were granted confidentiality, so their identities are not revealed and interviews are not cited. Questions pertaining to the BDP in particular, and place-based legislation in general, were asked of all participants. The initial round of formal interviews was followed by several additional inquiries and conversations with those involved in place-based forests proposals throughout the West.

its planning process, unresolved wilderness issues, management of inventoried roadless areas and motorized recreation, and trends in collaborative conservation. The broad picture painted here is supplemented with additional background and analysis in Parts II and III.

First, the obvious: there is a tremendous amount of political and legal conflict over national forest management. Several long-running conflicts mire the USFS in appeals and litigation with challengers from all sides of the political spectrum. A cumulative body of environmental law provides litigators numerous substantive and procedural tools that are regularly used to challenge agency decisions.³ The USFS argues that its multiple analytical obligations, along with a barrage of lawsuits, among other factors, amount to a “process predicament” resulting in “analysis paralysis.”⁴ A surprising number of interests express concern about the inability of the agency to get things done—though people differ about what causes the situation and what work needs doing exactly.⁵ A deep sense of frustration with the current state of national forest management was made explicit by most of those interviewed for this Article. The USFS, according to some interests, is a “paper tiger” which often cannot be relied upon to “get on the ground” and do needed work, even when that work has broad-based support. As shown below, this shared frustration helps explain the formation of the BDP and the key provisions of its proposal.

The agency’s broad statutory mandate helps explain why administrative rulemakings and forest planning processes are the dominant ways in which political choices have been made in the past. Until two recent Supreme Court cases and subsequent changes to the implementing regulations, national forest plans, written in accordance with the National Forest Management Act (NFMA),⁶ were viewed as the place where the USFS made some important resource allocation decisions. It was in this planning venue that political interests and the agency negotiated the general direction of each national forest, including some details about how they would be managed over a ten- to fifteen-year time frame, and with significant implications for potential inclusion in the National Wilderness Preservation System.⁷

Granted, there have always been questions about how prescriptive and binding planning documents actually are on the agency.⁸ Congress has a history

3. See generally U.S. FOREST SERV., SELECTED LAWS AFFECTING FOREST SERVICE ACTIVITIES (2004) [hereinafter SELECTED LAWS] (providing an 810-page listing of these legal authorities).

4. U.S. FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 21 (2002).

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

6. 16 U.S.C. § 1600 (2006).

7. Undeveloped lands must be evaluated for recommended wilderness designation during the plan revision process. 36 C.F.R. § 219.27 (2009).

8. A lot of planning conflict and litigation concerns the degree of specificity required in plans and how and if this binds agencies. That is, whether plans provide nothing but “motherhood generalities” or instead meaningful “blueprints for future resource allocations and protection.” See

of failing to fully fund forest plans.⁹ And because of the inadequacy of resources, forest plans became viewed in some respects as more of a contingent wish list than a secure commitment. Nonetheless, forest plans were typically viewed as important documents that guided and constrained subsequent agency actions while also holding the USFS accountable to some degree.¹⁰ Few were enamored with the process and its implementation, but participants generally understood its overall purpose and utility.

NFMA created a three-tiered regulatory approach to planning.¹¹ At the highest level, national-level regulations govern the development and revision of second-tier forest plans. Site-specific plans make up the third tier, and they must be consistent with both sets of higher-level regulations. Forest plans typically make zoning and suitability decisions and limit and regulate various activities within a forest area, therefore acting as a gateway through which subsequent project-level proposals must pass. They do not, however, authorize or mandate site-specific projects. Instead, plans address issues such as the prioritization of various multiple use goals, the determination of which land is suitable for timber cutting along with allowable volume, and the choice of harvesting and regeneration methods.

However, the purpose of planning is no longer clear because of two significant Supreme Court decisions and subsequent planning regulations promulgated in 2005 and 2008. In *Ohio Forestry Association v. Sierra Club* the Supreme Court ruled that forest plans are generally not ripe for judicial review.¹² Forest plans, said the Court, “do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil criminal liability; they create no legal rights or obligations.”¹³ With exceptions, such as an agency decision to allow some types of uses in a particular area, citizens cannot legally challenge the general direction set forth

George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307, 309 (1999). Coggins saw the potential problem early on: “[T]he greater danger is that the agency will promulgate plans so general as to be meaningless as limitations on or guidelines for subsequent management decisions.” *Id.* Commodity interests have also sought some certainty and guarantees in forest plans. *See, e.g.*, *Wind River Multiple-Use Advocates v. Espy*, 835 F. Supp. 1362 (D. Wyo. 1993) (finding that Resource Planning Act “objectives” related to Average Annual Allowable Sale Quantity are tentative and non-mandatory).

9. COMM. OF SCIENTISTS, U.S. DEP’T OF AGRIC., *SUSTAINING THE PEOPLE’S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY* 169–73 (1999) (reviewing discrepancies in planning and the Congressional budgeting process).

10. *See, e.g.*, CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 74–75 (1987).

11. 16 U.S.C. § 1604(i) (2006). For a more elaborate explanation, see *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961 (9th Cir. 2003).

12. *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

13. *Id.* at 733.

in a forest plan.¹⁴ Instead, ruled the Court, citizens have to wait until more site-specific projects implementing the plan are initiated by the agency.¹⁵

The purpose of federal lands planning took a more serious blow from the Supreme Court in *Norton v. Southern Utah Wilderness Association (SUWA)*.¹⁶ In this decision, the Court ruled that “a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them.”¹⁷ The case focused on the Bureau of Land Management’s (BLM) contested management of off-road vehicles (ORV) in wilderness study areas in Utah.¹⁸ Congress directed the agency to manage these areas in a manner “so as not to impair” these areas until it makes a final decision about their wilderness status.¹⁹ SUWA argued that these areas were being impaired, despite promises made by the BLM in its land use plans for the area.²⁰ The Court held that the BLM’s failure to act—to prevent impairment—was not a “sufficiently discrete” action warranting judicial review.²¹ The agency, said the Court, has considerable discretion in choosing how to meet this legal requirement, despite what is stated in a land use plan.²²

The USFS enthusiastically embraced these two decisions and used them to partly justify its “paradigm shift” in land use planning.²³ The agency’s 2005/2008 planning regulations are based on the idea that plans are strategic and aspirational in nature and do not generally bind the agency to a future course of action. (The 2008 regulations are basically the same as the 2005 planning regulations, though the later iteration went through the NEPA process, as ordered by a District Court).²⁴ Forest plans written in accordance with the 2008 regulations, then, are not decision-making documents per se, but rather one tentative step in a more adaptive planning process. More generally, the regulations should be viewed as an effort by the USFS to reclaim the administrative discretion it once enjoyed.

The USFS uses the *Ohio Forestry* and *SUWA* decisions to insulate itself from judicial challenge to all sorts of agency actions.²⁵ Consider management

14. *See id.* at 738–39.

15. *See id.* at 734.

16. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

17. *Id.* at 71.

18. *Id.* at 55.

19. 43 U.S.C. § 1782(c) (2006).

20. *Norton*, 542 U.S. at 67.

21. *Id.* at 72.

22. *See id.* at 71.

23. *See* 70 Fed. Reg. 1023 (Jan. 5, 2005).

24. The 2008 planning regulations were necessitated by a decision holding the 2005 planning regulations in violation of the APA, NEPA, and ESA. *Citizens for Better Forestry v. U.S. Dep’t Agric.*, 481 F. Supp. 2d 1089 (N.D. Cal. 2007); *compare* 73 Fed. Reg. 21,468 (Apr. 21, 2008), *with* 70 Fed. Reg. 1023 (Jan. 5, 2005) (describing more adaptive and less prescriptive approaches to planning).

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

of wilderness study areas in Montana.²⁶ In 1977, Congress passed the Montana Wilderness Study Act to “provide for the study of certain lands to determine their suitability for designation as wilderness.”²⁷ The Act mandates that the Secretary of Agriculture “shall, until Congress determines otherwise,” administer specific wilderness study areas “to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.”²⁸ Following *SUWA*, the Supreme Court vacated an earlier Ninth Circuit decision holding that the USFS had a nondiscretionary duty to maintain the wilderness characteristics of these areas.²⁹ In the wake of this decision, it is unclear how the USFS can be held accountable to the congressional mandate provided by the Montana Wilderness Study Act.

Taken together, these judicial decisions and planning regulations have created a great deal of uncertainty among the various interests and groups engaged in forest planning processes. As explained below, several actors want more certainty and predictability than “strategic and aspirational” plans can offer. Since its inception, the USFS has fought for maximum levels of administrative discretion, and when it comes to planning, the courts appear willing to grant it.³⁰ But as will be shown, such freedom comes with risks: in this case, the prospect of citizens looking to control the agency through legislative means.

The administrative discretion afforded to the USFS certainly contributed to the formation of the BDP proposal. However, even more important to this story is the history of wilderness designation in Montana and recent trends in wilderness law. In many respects, the interest in place-based legislation represents a new chapter in wilderness politics and strategy. There are roughly 3.4 million acres of federally protected wilderness in Montana.³¹ But unlike most other Western states, Congress never passed a statewide Montana wilderness bill. In fact, 1983 marked the last time a wilderness area was designated in the state.³² As a result, roughly 6.4 million acres of USFS

26. Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243 (1977). Nearly a million acres of USFS inventoried roadless lands in Montana are congressionally designated wilderness study areas having various management prescriptions. *See id.*

27. *Id.* § 2(a).

28. *Id.* § 3(a).

29. *Veneman v. Mont. Wilderness Ass’n*, 542 U.S. 917 (2004), *vacating* *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003). This was followed by a negotiated settlement to a Montana Wilderness Association lawsuit in 2007. U.S. FOREST SERV., BEAVERHEAD-DEERLODGE NATIONAL FOREST: LAND AND RESOURCE MANAGEMENT PLAN, CORRECTED FINAL ENVIRONMENTAL IMPACT STATEMENT 428 (2008) [hereinafter BDNF REVISED PLAN]. The settlement requires the BDNF to manage the Sapphire and West Pioneer Wilderness Study Acts in accordance with applicable laws and policies pending completion of site-specific travel management plans in 2009. *Id.*

30. *See generally* Blumm & Bosse, *supra* note 25.

31. Wilderness.net, U.S. National Wilderness Preservation System Map, <http://www.wilderness.net/index.cfm?fuse=NWPS> (last visited Oct. 7, 2008).

32. Lee Metcalf Wilderness and Management Act of 1983, Pub. L. No. 98-140, 97 Stat. 901 (1983).

inventoried roadless lands in Montana hang precariously in the balance and have been subjected to the roller coaster ride of the USFS's roadless rule.³³

Wilderness advocates are divided over how to break the impasse created by the USFS roadless rule. Some groups have advanced "cleaner" large-scale wilderness proposals,³⁴ while other groups supporting more targeted place-based bills containing wilderness protection *and* other provisions (as discussed in Part II).³⁵ Many agree, however, that there is some urgency to resolving the wilderness issue. Motorized vehicle use in national forests is increasing,³⁶ and several conservationists in the state now believe that motorized vehicle use has eclipsed logging as the greatest threat to wilderness. Conservationists fear that these machines will increasingly intrude into potential wilderness areas and make their protection more difficult in the future because of associated impairments and purported evidence of "historic use." The USFS considers historic use of motorized recreation in making its wilderness recommendations. In its evaluation of wilderness suitability, the Beaverhead-Deerlodge National Forest (BDNF) states that "[m]otorized travel is the activity most likely to reduce Wilderness characteristics."³⁷ Consider also the scope of the problem. For example, within Montana's six million acres of USFS roadless areas, motorized use is permitted on between three and four million.³⁸ The USFS also permits motorized use within some areas recommended for wilderness.³⁹

33. Roadless Home Page, <http://roadless.fs.fed.us> (last visited Oct. 8, 2008) (roadless rules and related court decisions; for a map of inventoried roadless area in Montana, click on 2001 Roadless Rule, Maps, State Maps, Montana).

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

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

36. See Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264, 68,265 (Nov. 9, 2005) (showing increases in motorized vehicle use on national forests).

37. See BDNF REVISED PLAN, *supra* note 29, at C-5. The BDNF's revised plan fails to recommend a number of qualifying roadless areas with very high "wilderness capability" scores for wilderness designation, reasoning that the areas are politically contentious, used for motorized recreation, or possess resource extraction potential. See U.S. FOREST SERV., BEAVERHEAD-DEERLODGE NATIONAL FOREST: LAND AND RESOURCES MANAGEMENT PLAN: FOREST PLAN C-5 (2009) [hereinafter BDNF FOREST PLAN].

38. See John C. Adams & Stephen F. McCool, *Finite Recreation Opportunities: The Forest Service, the Bureau of Land Management, and Off-Road Vehicle Management*, 49 NAT. RESOURCES J. (forthcoming 2010) (showing why ORV interests are now the most potent obstacle to wilderness designation). The result, say these authors, "is that agency allocations for roadless areas frequently determine future wilderness designation." *Id.* Historic use arguments have also been used with some success to defeat various wilderness additions in Montana and Idaho. *Id.* And following the Supreme Court's *SUWA* decision, it is now more difficult to enforce the non-impairment of areas that are wilderness-eligible. See *Norton v. S. Utah. Wilderness Alliance*, 542 U.S. 55 (2004).

According to the USFS, there are lands within Inventoried Roadless Areas, recommended wilderness areas, and Montana wilderness study areas where forest plans have not prohibited motorized wheeled cross-country travel yearlong. This amounts to roughly 3.4 million acres of inventoried roadless areas, 169,000 acres of Forest Plan Recommended Wilderness Areas, and 430,000 acres of Montana wilderness study areas. See U.S. BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF INTERIOR & U.S.

Also pertinent to the case study and its public reception is the widespread embrace of collaborative conservation and trends in cooperative federalism and devolution. The language and application of more collaborative and decentralized approaches is pervasive in natural resources management. On numerous occasions, former adversaries have eschewed the courts and familiar venues of conflict resolution in favor of more cooperative, broad-based, and “win-win” solutions.⁴⁰ The national forests have provided fertile ground for this movement. Not only does the agency extol the advantages of collaboration and “pre-decisional dialogue,”⁴¹ but so too have an assortment of respected conservation leaders voiced their support for working more collaboratively with the agency and commodity interests.⁴² The BDP is often viewed and debated in this context, with some proponents of the proposal selling it as a collaborative model that finally resolves several conflicts, and detractors criticizing it as an exclusive group of narrow interests sacrificing the federal lands for more parochial concerns.

Closely aligned with the collaborative philosophy, the Bush Administration advanced, albeit selectively, a more decentralized approach to federal lands management, with state and local governments given a larger role to play.⁴³ There is no better example of this move towards cooperative

FOREST SERV., U.S. DEPT. OF AGRICULTURE, OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED PLAN AMENDMENT FOR MONTANA, NORTH DAKOTA, AND PORTIONS OF SOUTH DAKOTA 35, available at <http://www.fs.fed.us/r1/dakotaprairie/projects/ohv-tri-state-feis-1-01.pdf>.

39. See BDNF REVISED PLAN, *supra* note 29, at C-5.

40. For background and case studies in collaboration, see the Red Lodge Clearinghouse, <http://www.rlch.org> (last visited Dec. 27, 2009).

41. See, e.g., Mark Rey, *A New Chapter in the History of American Conservation*, in CHALLENGES FACING THE U.S. FOREST SERVICE 22–25 (Daniel Kemmis, ed. 2008) (saying that a fortunate trend in collaborative conservation is evolving into a fourth chapter in the history of American conservation); Dale Bosworth & Hutch Brown, *After the Timber Wars: Community-Based Stewardship*, 105 J. FORESTRY 271 (2007) (“The future of national forest management lies in Community-based stewardship”). A “collaborative and participatory approach to land management planning” is also required in the 2008 planning regulations. National Forest System Land Management Planning, 73 Fed. Reg. 21,468, 21,508 (Apr. 21, 2008).

42. See, e.g., Mitch Friedman, *A Marshall Plan for the U.S. Forest Service*, in CHALLENGES FACING THE U.S. FOREST SERVICE 26–29 (Daniel Kemmis ed. 2008) (making the case for community-based collaborative restoration); Mitch Friedman, *The Forest Service is Dead; Long Live the Forest Service!*, GRIST.ORG, Feb. 28, 2006, <http://www.grist.org/article/friedman1/> (last visited Dec. 27, 2009); Ray Vaughan, *A Modest Proposal for the U.S. Forest Service (Short Version)*, in *Management by Exclusion: The Forest Service Use of Categorical Exclusions from NEPA: Oversight Hearing Before House Comm. on Natural Resources*, 110th Cong. 86 (2007) (“The seemingly endless days of conflict and trench warfare among competing concerns wear down parties while the needs of the forests are sidelined.”); see also U.S. Forest Serv., Roadless Area Conservation National Advisory Committee, http://fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_036217.pdf (last visited Jan. 16, 2009).

43. Support for devolution was most apparent when state and local interests advocated commodity production on federal lands. See Robert L. Fischman & Angela M. King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 129 (2007) (reviewing the prevalence of cooperative federal-state arrangements in public land law). See generally Robert B. Keiter, *Breaking Faith With Nature: The Bush Administration and Public Land Policy*, 27 J. LAND,

federalism than the Bush Administration's approach to roadless area management. It replaced Clinton's purported "top-down" and "one-size-fits-all" roadless rule⁴⁴ with a state-petitioning process that allowed states to petition the federal government for how they would like roadless areas in their states to be managed.⁴⁵ The 2005 rule emphasized the importance of the locality: "Collaborating and cooperating with States on the long-term strategy for the management of [roadless areas] would allow for the recognition of local situations and resolution of unique resource management challenges within a specific State."⁴⁶

Idaho took full advantage of this opportunity and submitted a petition, to be implemented by the USFS, directing how 9.3 million acres of inventoried roadless areas in Idaho were to be managed in the future.⁴⁷ Idaho's roadless rule shares some important characteristics that define other place-based proposals, as outlined below, with one difference being its administrative rather than legislative basis. Though several conservation groups supported the Idaho roadless rule, it was subsequently challenged in Court by an assortment of conservation groups who oppose the state petitions approach in general and the Idaho rule in particular.⁴⁸ As discussed below, place-based approaches, especially when they involve inventoried roadless areas protected under the 2001 rule, have deepened divisions in the conservation community.⁴⁹

The roadless story, and others like it, are important to our case study because they represent a noticeable shift in federal lands management. Political interests in Montana, like elsewhere, regularly view collaborative and decentralized strategies as viable options that can be pursued when deemed advantageous.⁵⁰ And those strategies most sympathetic to state and local interests have had a relatively friendly reception by the executive branch. The

RESOURCES, & ENVTL. L. 197, 249 (stating that for the Bush Administration "devolution represents a convenient means to an end and not a core principle").

44. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001).

45. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005).

46. Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636, 42,638 (July 16, 2004). Though critics argue that the petitions process was a clever way to either undermine or eviscerate the 2001 rule, its supporters counter that it helped fix the errors inherent in that rule (e.g., inaccurate maps) and helped build local support for roadless area protection. See, e.g., Martin Nie, *Interview with Mark Rey*, HEADWATERS NEWS, Apr. 22, 2009, <http://www.headwatersnews.org/p.Rey042209.html> (addressing this debate and stating the intentions in promulgating the state petitions rule).

47. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456 (Oct. 16, 2008).

48. See, e.g., Complaint for Declaratory and Injunctive Relief, *Jayne v. Rey* (D. Idaho 2009) (4:09-cv-00015-BLW), available at <http://newsroom.law360.com/articlefiles/83679-Idaho%20Roadless%20Rule.pdf>.

49. See *infra* notes 236–237 and accompanying text.

50. For related stories and guides see, e.g., Red Lodge Clearinghouse: Collaboration Handbook, <http://rlch.org/content/view/261/49/> (last visited Dec. 27, 2009); Cooperative Conservation homepage, <http://cooperativeconservation.gov/> (last visited Jan. 16, 2010).

ultimate effect is that several political interests now advance conservation solutions that are ostensibly more grassroots, collaborative, and home-grown in nature.

B. Federal Lands Governance

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

1. Overarching National Forest Laws in Comparison to the National Parks and Wildlife Refuges

Three laws are central to understanding national forest management: the 1897 Organic Act,⁵¹ the Multiple Use Sustained Yield Act (MUSYA) of 1960,⁵² and NFMA, enacted in 1976.⁵³ The 1897 Organic Act states in part that “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States”⁵⁴ This broad mandate establishes an ongoing tension because some interests emphasize the “protect” and “water flows” provisions while others highlight the “supply of timber” component.⁵⁵

In 1960, Congress added MUSYA to the Organic Act.⁵⁶ Through MUSYA, Congress formally articulated the multiple use mission of the Service: “. . . [i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”⁵⁷ There is relatively little in MUSYA directing or constraining forest managers, and its flexibility has been

51. 16 U.S.C. §§ 473–482, 551 (2006).

52. *Id.* § 528.

53. *Id.* § 1600.

54. Organic Administration Act of 1897, Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (1897) (codified as amended at 16 U.S.C. § 475 (2000)).

55. What Congress intended by the USFS Organic Act has been open to some interpretation throughout the years. *See* *United States v. New Mexico*, 438 U.S. 696, 719–25 (1978) (Powell, J., dissenting in part) (highlighting Congressional intent, as embodied within the USFS Organic Act, to protect more than simply water flows and timber supplies).

56. 16 U.S.C. § 528 (2006).

57. *Id.*

used by the USFS over the years to defend everything from designating 58.5 million acres as protected roadless areas⁵⁸ to proposing an 8.7 billion board foot timber sale in the Tongass National Forest in southeast Alaska.⁵⁹

High profile conflicts on Montana's Bitterroot National Forest and West Virginia's Monongahela National Forest triggered what eventually became NFMA.⁶⁰ It is primarily a planning-based statute calling for interdisciplinary forest planning processes and opportunities for public participation.⁶¹ It provided stronger protection of non-timber resources. Important prescriptions are found in the Act, including clearcutting guidelines and restrictions on timber harvesting,⁶² and a mandate to "provide for diversity of plant and animal communities,"⁶³ among other enforceable standards.

NFMA's implementing regulations have historically provided additional substantive and procedural obligations, such as implementing NFMA's diversity mandate by ensuring "wildlife viability."⁶⁴ The rewriting of these regulations has been controversial, and the 2000, 2005, and 2008 versions were legally challenged by commodity and environmental interests.⁶⁵ Because NFMA did not answer some central questions about the appropriate balance and intensity of uses on national forests, conflict has shifted to the regulatory and planning arenas.⁶⁶ And while discretion once gave the USFS authority to manage federal forest lands without much challenge, it now leads to numerous lawsuits and administrative appeals because many interest groups believe that USFS's actions are inconsistent with congressional direction.

There remain core differences of opinion as to how the national forests are required and ought to be managed. The executive branch, members of Congress, and the judiciary⁶⁷ give different answers at different times. These

58. See Special Areas, Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).

59. See *Sierra Club v. Hardin*, 325 F. Supp. 99, 122–24 (D. Alaska 1971).

60. See WILKINSON & ANDERSON, *supra*, note 10, at 139–51; Martin Nie, *The Bitterroot Controversy*, in FORESTS AND FORESTRY IN THE AMERICAS: AN ENCYCLOPEDIA, <http://www.encyclopediaofforestry.org/index.php?title=Currentissues01> (last visited Dec. 27, 2009).

61. 16 U.S.C. §§ 1600–1614 (2006).

62. *Id.* § 1604(e).

63. *Id.* § 1604(g)(3)(B).

64. The 1982 rule provided that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." 36 C.F.R. § 219.19 (1982).

65. See *Complaint, Am. Forest & Paper Ass'n v. Veneman*, No. 1:01-cv-00871-GK (D.D.C. 2001) (2000 forest planning regulations), *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1070, 1080, 1090 (N.D. Cal. 2007) (ruling the 2005 regulations are in violation of the APA, NEPA, and ESA); *Complaint of Petitioner, Defenders of Wildlife v. Schafer* (N.D. Cal. 2008) (No. C08-02326) (challenge to 2008 regulations).

66. See, e.g., MARTIN NIE, *THE GOVERNANCE OF WESTERN PUBLIC LANDS: MAPPING ITS PRESENT AND FUTURE* (2009) (examining these shifts in political venue).

67. For a revealing look at how differently members of the Ninth Circuit Court of Appeals view National Forest management, see *Lands Council v. McNair*, 494 F.3d 771 (9th Cir. 2007) (part of a trilogy of cases where the Ninth Circuit wrestles with questions pertaining to scientific uncertainty, administrative discretion, judicial oversight, and their impacts on forest management and timber-dependent communities).

strong disparities of opinion can have a debilitating effect on the USFS, whose personnel also differ on what uses should be prioritized by the agency.⁶⁸

The open-ended nature of these laws also leaves the USFS susceptible to executive-level pendulum swings, with the agency being whipsawed back and forth depending on who controls the White House. The intractable nature of several forest policy conflicts—from the roadless rule to forest planning regulations—can be partly understood in this context, as one Administration negates the workings of the last. Abrupt changes in policy direction make it difficult for USFS personnel to implement these executive-based initiatives and goals and leave the agency open to criticism that it is without direction and a clear sense of purpose.⁶⁹

These core forestry laws are supplemented with dozens of others that are substantive and procedural in nature, such as NEPA and the Endangered Species Act (ESA).⁷⁰ As in other federal land systems, different national forest units may be encumbered with significantly different legal responsibilities. Some national forests, for example, have listed species,⁷¹ water rights compacts,⁷² tribal treaty obligations,⁷³ and special planning prescriptions, such as the Northwest Forest Plan,⁷⁴ that necessitate very different types of management. But aside from these differences, most think the system is relatively consistent, so that national forests are all generally governed under the rubric of multiple use, sustained yield, and other vague principles. In most cases, differences in management emerge, not from legislation, but out of the universal planning processes that are required of each forest.

The relatively unified national forest system is quite different from the national park and wildlife refuge systems. National parks are usually governed by two sets of law: the mandate found in the National Park Service Organic Act

68. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, FOREST SERVICE DECISION-MAKING: A FRAMEWORK FOR IMPROVING PERFORMANCE (GAO/RCED-97-71) 5 (1997) ("Strengthening accountability for performance within the Forest Service and improving the efficiency and effectiveness of its decision-making is contingent on establishing long-term strategic goals that are based on clearly defined mission priorities. However, agreement does not exist on the agency's long-term strategic goals. This lack of agreement is the result of a more fundamental disagreement, both inside and outside the Forest Service, over which uses the agency is to emphasize under its broad multiple-use and sustained yield mandate and how best to ensure the long-term sustainability of these uses.").

69. See, e.g., *id.*

70. See SELECTED LAWS, *supra* note 3 (providing an 810 page listing of these legal authorities).

71. See U.S. Forest Service, Threatened, Endangered & Sensitive Species, <http://www.fs.fed.us/biology/tes/> (providing a listing of such species on national forest lands) (last visited Dec. 28, 2009).

72. See, e.g., Water Rights Compact State of Montana United States of America, Department of Agriculture, Forest Service, MONT. CODE ANN. § 85-20-1401 (2009), available at <http://data.opi.mt.gov/bills/mca/85/20/85-20-1401.htm>.

73. See, e.g., Martin Nie, *The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585 (2008) (reviewing cases of reserved treaty rights on federal forests and rangelands).

74. See Regional Ecosystem Offices, Northwest Forest Plan (NWFP) Overview, <http://www.reo.gov/general/aboutNWFP.htm> (last visited Jan. 16, 2010).

of 1916⁷⁵ and the site-specific enabling legislation controlling how one particular park unit is to be managed. So, for example, Glacier National Park is governed by the preservation/recreation mandate spelled out in the 1916 Organic Act⁷⁶ and also by more specific provisions found in its 1914 “establishment” legislation.⁷⁷ The 1872 enabling law establishing Yellowstone National Park provides another historical reference of place-based legislation.⁷⁸ These enabling acts are important because their place-specific purposes and mandates are often given priority by Congress and the courts, meaning that site-specific provisions trump those expressed in the more general Organic Act.⁷⁹ Further, enabling acts can be quite detailed in how Congress wants a particular park unit managed, thus limiting managerial discretion in many cases.⁸⁰ All sorts of substantive and procedural mandates and exemptions are written into these enabling acts, such as grazing provisions, consultation requirements, and basic zoning and management decisions.⁸¹

National wildlife refuges are governed similarly in this regard.⁸² This system is characterized by a tiered-use framework in which a hierarchy of uses is used to make refuge management decisions.⁸³ At the top of this hierarchy are the purposes for which an individual refuge was created: “[T]he conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System.”⁸⁴

Like the national parks, national wildlife refuges often have dual purposes: those found in the 1997 Refuge Improvement Act (“Organic Act”)⁸⁵ and more specific provisions found in refuge-level enabling acts.⁸⁶ The Organic Act, as law professor Robert Fischman explains, “[N]eglects to harmonize the underlying discord among the various units of the System”⁸⁷ [and] “reflects the continual struggle to counteract the centrifugal, divergent push of establishment mandates with the centripetal, coordinating pull of systemic management.”⁸⁸

75. 16 U.S.C. § 1 (2006).

76. *Id.*

77. 16 U.S.C. § 161.

78. *Id.* § 21 (2006).

79. Units in the National Park system are subject to the 1916 Organic Act to the extent that it does not conflict with provisions specifically applicable to them. 16 U.S.C. § 1c(b).

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

81. See *id.* (reviewing the types of provisions found in Park establishment legislation).

82. 16 U.S.C. § 668dd (2006).

83. *Id.* § 668dd(a).

84. *Id.* § 668dd(a)(4)(d).

85. Pub L. No. 105-57, 111 Stat. 1252 (codified at 16 U.S.C. § 668dd).

86. *Id.*; see generally ROBERT FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* (2003).

87. Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 618 (2002).

88. *Id.* at 462.

This tension aside, the national park and refuge systems provide an opportunity to rethink traditional approaches to multiple use conflicts on national forests. Not only is Congress capable of speaking with more clarity, but it can also legislate different approaches to different places and units of public lands on an individualized basis.

2. *Examples of Place-Based Legislation*

At first blush, then, it appears simple: the national forest system is a unified and rather homogenous system governed by a core statutory framework. But upon closer inspection, this simple comparison becomes more complicated. There are, in fact, some national forests and national forest areas that are currently governed by place-specific laws, and they offer some valuable lessons that we will consider in Parts III and IV. This Part reviews four basic types of place-based forest laws already on the books: (1) forest-specific legislation like that governing the Tongass National Forest and part of the Sierra Nevada, (2) forest-specific provisions and exemptions provided by Congress via the appropriations process, (3) individually tailored protected land designations, and (4) federal wilderness laws.

Let us start with the most contested national forest in the system: Alaska's Tongass National Forest. It is governed by a complicated patchwork of national and Alaska-specific laws.⁸⁹ For years this National Forest, under the terms of the Alaska National Interest Lands Conservation Act of 1980, was provided forty million dollars annually in order to supply a congressionally mandated 450 million board feet of timber for sale each year, regardless of cost or market demand.⁹⁰

This mandated cut caused enormous environmental problems that were addressed by the Tongass Timber Reform Act (TTRA) of 1994.⁹¹ The law designated parts of the Tongass as wilderness and codified a protective land use designation used in the Tongass Forest Plan.⁹² The TTRA brought the Tongass closer in line with other national forests. But unlike other national forests, the TTRA mandates that the Tongass seek to meet market demand for timber.⁹³

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

90. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, tit. VII, § 705(a), 94 Stat. 2371, 2420 (1980).

91. Tongass Timber Reform Act, Pub. L. No. 101-626, 104 Stat. 4426 (1990) (amending 16 U.S.C. § 539d (1988)).

92. The TTRA directs the Secretary to manage "in perpetuity" lands designated in Tongass Forest Plans as Land Use Designation II (LUD II). Pub. L. No. 101-626, § 201, 104 Stat. 4426, 4429 (1990). These congressionally protected "LUD II" lands are generally to be managed in a roadless state to retain their wildland character. See S. REP. No. 101-261, at 15 (1990).

93. "Subject to appropriations, other applicable law, and the requirements of [NFMA], . . . the Secretary shall, to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from

This Tongass-specific provision has been endlessly debated and litigated, partly because it must be balanced with nation-wide environmental safeguards that were also secured by the TTRA.⁹⁴ The “seek to meet market demand” provision was designed to give the USFS *more* discretion than it had under the Alaska National Interest Lands Conservation Act and its requirement to harvest so many board feet per year.⁹⁵ The TTRA, said the Ninth Circuit, “envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation.”⁹⁶

The USFS is responsible for interpreting the Tongass-specific market provision and determining how to balance it with its more general statutory obligations.⁹⁷ But many interests are unsatisfied with the agency’s balancing act. Some timber interests, for example, want the market demand provision to be more aggressively implemented, with the USFS offering a predictable and steady stream of timber in order to *create* and sustain a large integrated wood products industry in the region.⁹⁸ Conservationists, on the other hand, contend that the agency mistakenly prioritizes the market demand provision to the detriment of its other legal responsibilities, from ensuring wildlife diversity to providing opportunity for Native subsistence.⁹⁹ In typical fashion, Congress added to the USFS’s responsibilities with the TTRA with the expectation that the law would be seamlessly integrated with others. But the fit has not always been so snug.

The challenge of reconciling forest-specific provisions with existing laws and processes also characterizes another controversial place-based forest law: the Herger-Feinstein Quincy Library Group Forest Recovery Act (Herger-Feinstein Act).¹⁰⁰ The Quincy Group formed as a way to promote ecological sustainability and community stability in the Sierra Nevada of northern California.¹⁰¹ The group wrote a “community stability proposal” directing management of the Lassen, Plumas, and part of the Tahoe National Forests.¹⁰² With the USFS unable or unwilling to adopt the proposal, the group took to

such forest for each planning cycle.” Tongass Timber Reform Act, Pub. L. No. 101-626 §101 (1990) (amending 16 U.S.C. § 539d(a)).

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

95. See *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995).

96. *Id.*

97. See U.S. FOREST SERV., TONGASS LAND AND RESOURCE MANAGEMENT PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT, PLAN AMENDMENT: RECORD OF DECISION 17–18 (2008) (explaining the TTRA market mandate in terms of providing for an integrated forest products industry in southeast Alaska).

98. See *id.* at APPENDIX L, VOL. 3, 127–30 (summarizing and responding to divergent interpretations of the TTRA’s market demand provision).

99. *Id.*

100. Pub. L. No. 105-277, div. A, sec. 101(e), tit. IV, § 401, 112 Stat. 2681-305 (1998) (codified at 16 U.S.C. § 2104 (2006)) [hereinafter Herger-Feinstein Act].

101. *Id.* For history and background, see Quincy Library Group, <http://www.qlg.org/> (last visited Jan. 14, 2009).

102. Herger-Feinstein Act, *supra* note 100, § 401(b)(2), 112 Stat. 2681-305.

Washington and succeeded with passage of the Herger-Feinstein Act.¹⁰³ This law required the pilot project to be consistent with applicable federal laws but also provided place-specific direction regarding how these national forests must be managed in terms of timber targets, fire, roadless areas, and other issues.¹⁰⁴

Implementing this place-based law has proven problematic. These difficulties arise in part because of ongoing concerns about how to integrate the Herger-Feinstein Act into the larger Sierra Nevada Framework,¹⁰⁵ a very politicized region-wide forest planning initiative.¹⁰⁶ Important differences between the Herger-Feinstein Act and the Sierra Framework, from fire and fuels management to old growth preservation, set the stage for future conflict.¹⁰⁷ And sure enough, when the 2001 Sierra Nevada Framework plan reduced the level of timber cutting allowed in Quincy area forests, the Quincy Group—once the poster-child of collaboration¹⁰⁸—took to the courts arguing that their law was being subordinated.¹⁰⁹ On the other hand, several projects initiated by the USFS that are designed to implement the Herger-Feinstein Act have been administratively appealed and litigated by several environmental groups, thus frustrating the law's implementation.¹¹⁰ The question of how to fund Herger-Feinstein-related fuel reduction projects has also been addressed by the Ninth Circuit,¹¹¹ and we pick up this relevant issue in Part III.

A more ubiquitous way that Congress controls unit-specific national forest management is through the appropriations process.¹¹² This type of Congressional control is different than the place-based laws reviewed above. But here too, Congress mandates what a particular national forest must do or

103. *Id.* § 401, 112 Stat. 2861-305.

104. *Id.* § 401(c)(3), 112 Stat. 2681-306.

105. The Sierra Nevada Forest Plan is available at U.S. Forest Serv., Sierra Nevada Forest Plan Amendment, <http://www.fs.fed.us/r5/snfpa/> (last visited Jan. 29, 2010).

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

107. *See, e.g., id.*

108. *See* Jane Braxton Little, *A Quiet Victory in Quincy*, *HIGH COUNTRY NEWS*, Nov. 9, 1998, available at <http://www.hcn.org/issues/142/4591>.

109. *See* Keiter, *supra* note 43, at 229–33 (reviewing this mismatch and the resulting litigation).

110. *See* U.S. FOREST SERV., STATUS REPORT TO CONGRESS F.Y. 2006: HERGER FEINSTEIN QUINCY LIBRARY GROUP FOREST RECOVERY ACT PILOT PROJECT (2007), available at http://www.fs.fed.us/r5/hfqlg/monitoring/report_to_congress/2006/fy06_report_to_congress_web_final.pdf (stating that fluctuating budgets, appeals and litigation have affected accomplishment targets); Quincy Library Group, Appeal and Litigation Summary, <http://www.qlg.org/pub/act/appeals.htm> (last visited Jan. 16, 2010) (stating that “the NEPA activist’s strategy of filing appeals and law suits continues to prevent the strategic implementation of hazardous fuel reduction and forest restoration projects in the eight county area of the Herger Feinstein Quincy Library Group pilot project”).

111. *Ctr. For Biological Diversity v. Rey*, 526 F.3d 1228 (9th Cir. 2009).

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

how to do it, often for a specified amount of time. Rather than through traditional legislative channels, Congress controls management through the appropriations process, often via policy riders.¹¹³ Examples abound, such as the series of riders on interior appropriations bills that allow the Secretary of Agriculture to renew grazing permits before NEPA reviews are completed.¹¹⁴ Perhaps most notable was the infamous “salvage timber rider” that exempted several national forests in the Pacific Northwest from environmental review.¹¹⁵ Such riders are often controversial because they make special provisions or exemptions for one national forest. When viewed in this light, place-based legislation is not nearly as uncommon as first assumed. Congress has regularly intervened in the management of national forests, it has just done so most often by using, and sometimes abusing, the appropriations process.

Protected land and wilderness laws provide additional examples of place-based, or unit-level legislation. Consider, for example, USFS-managed national monuments like Admiralty,¹¹⁶ Giant Sequoia,¹¹⁷ and the Santa Rosa-San Jacinto Mountains.¹¹⁸ Like the laws described above, they have unique “place-based” governing authorities. So too do USFS-administered national recreation areas and other specially-designated landscapes.¹¹⁹ The oldest, perhaps, is the Bull Run Watershed Management Unit in the Mount Hood National Forest, in Oregon, which was reserved in 1892 and given further legislative protection in 1904.¹²⁰ Watershed protection and restoration is also the goal of the Lake

113. For a look at how the appropriations process was used to govern the Tongass National Forest, see Nie, *supra* note 89, at 445–49.

114. See Pub. L. No. 108-447, div. E, tit. III, sec. 339, 118 Stat. 3039, 3103 (2005); see also LINDA LUTHER, CONG. RESEARCH SERV., PUB. NO. RL33267, THE NATIONAL ENVIRONMENTAL POLICY ACT: STREAMLINING NEPA 19 (2006).

115. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, Pub. L. No. 104-19, tit. II, sec. 2001, 109 Stat. 194, 240–47 (1995).

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

117. Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 25, 2000).

118. Pub. L. No. 106-351, 114 Stat. 1362 (2000).

119. For a comprehensive listing of “special recreation and conservation overlays,” see GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 946–47 (2007). Included in the listing for National Forest lands are special management areas (such as Greer Spring, Missouri, 16 U.S.C. § 539h (2006)), recreation management areas (such as Fossil Ridge, Colorado, 16 U.S.C. § 539i (2006)), protection areas (such as Bowen Gulch, Colorado, 16 U.S.C. § 539j (2006)), scenic areas (such as Columbia River Gorge, Oregon-Washington, 16 U.S.C. § 544-544m (2006)), scenic research areas (such as Opal Creek, Oregon, 16 U.S.C. § 545b (2006)), national scenic areas (such as Mount Pleasant, Virginia, 16 U.S.C. § 545 (2006)), national forest scenic areas (such as Mono Basin, California, 16 U.S.C. § 543 (2006)), and national preserves (such as Valles Caldera, New Mexico, 16 U.S.C. § 698v (2006)).

120. Proclamation No. 28, 27 Stat. 1027 (1892). Grazing and trespass was prevented by the Bull Run Trespass Act of 1904. 58 Pub. L. No. 206, 33 Stat. 526. The area provides the city of Portland, Oregon, its main source of domestic water; and when USFS management of the area threatened this supply, Congress intervened with legislation. See Donald H. Blanchard, *Clearcutting the Bull Run Watershed: A Standard of Reasonableness in Forest Service Decision-Making*, 8 ENVTL. L. 569, 580–84 (1977–1978) (reviewing the history preceding passage of the Bull Run Act). The Bull Run Watershed Management Act provides various types of watershed protections for the unit. Pub. L. No. 95-200, 91

Tahoe Restoration Act of 2000, which enables the USFS to plan, implement, and pay for various restoration projects in the area.¹²¹

More numerous are statewide or place-specific laws establishing federal wilderness areas. While federal wilderness areas are generally managed in accordance with the Wilderness Act of 1964,¹²² place-specific wilderness laws typically contain an assortment of special management provisions and exemptions that are applicable to one unit.¹²³ The USFS is often responsible for managing one wilderness area differently than another, and some wilderness-eligible USFS land is also controlled by place-based laws directing interim management. For example, the Montana Wilderness Study Act requires the USFS to manage selected inventoried roadless areas in a particular way until Congress decides whether to designate them as wilderness.¹²⁴

Federal wilderness laws have also come bundled with complementary designations specifying how adjacent lands must be managed in the future.¹²⁵ Various special designations have been used in the past, but each essentially removes a landscape from discretionary USFS management by directing the agency to manage it in a particular fashion. These alternative designations have been made both instead of and in addition to designating land as wilderness.¹²⁶ In Montana, several wilderness bills have tried to secure wilderness designation

Stat. 1425 (1977) (codified at 16 U.S.C. 482b (2006)). Subsequent legislation has expanded the area and types of protection in response to USFS management, and it is currently managed in cooperation and partnership with the Portland Water Bureau. *See* Pub. L. No. 104-208, 110 Stat. 3001 (1996) (codified at 16 U.S.C. 482b (2006)) (prohibiting the cutting of trees in parts of the unit with special exceptions); Pub. L. No. 107-30, 115 Stat. 210 (2001) (protecting the Little Sandy River as part of the Bull Run); *see also* H.R. 427, H.R. 434, and H.R. 451: *Hearing Before the House Comm. on Resources*, 107th Cong. 47–56 (Apr. 25, 2001) (reviewing USFS management of the area and why permanent protection is desired by bill proponents).

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

122. Pub. L. No. 88-577, 78 Stat. 890 (1964); 16 U.S.C. § 1131–1136 (2006).

123. *See* ROSS W. GORTE, CONG. RESEARCH SERV., PUB. NO. 98-848 ENR, WILDERNESS LAWS: PROHIBITED AND PERMITTED USES 1998; NATURAL RESOURCES LAW CTR, SPECIAL USE PROVISIONS IN WILDERNESS LEGISLATION 2004, *available at* <http://www.colorado.edu/law/centers/nrlc/projects/wilderness/SpecialUseProvisions>. For a more critical examination, *see* GEORGE NICKAS & KEVIN PROESCHOLDT, KEEPING THE WILD IN WILDERNESS: MINIMIZING NON-CONFORMING USES IN THE NATIONAL WILDERNESS PRESERVATION SYSTEM (2005), *available at* <http://www.wildernesswatch.org/pdf/Special%20Provisions.pdf>.

124. Pub. L. No. 95-150, 91 Stat. 1243 (1977); *see supra* notes 26–28 and accompanying text.

125. For extensive analysis of alternative designations, *see* NATURAL RESOURCES LAW CTR., PROTECTIVE DESIGNATIONS ON FEDERAL LANDS: CASE STUDIES OF NATIONAL CONSERVATION AREAS, NATIONAL MONUMENTS, NATIONAL PARKS, NATIONAL RECREATION AREAS, AND WILDERNESS AREAS 2 (2004). The Center concludes that areas with various non-wilderness designations “were unquestionably better off than if they had been managed under the default principle of multiple use.” *Id.* The move from a multiple use mandate to a more dominate use mandate, says the Center, “can allow the managing agency to focus on the special resources of concern in the area.” *Id.* at 16.

126. *Id.*

for some lands, while simultaneously “holding” other lands for future designation possibilities, and yet others for special management.¹²⁷ The Lee Metcalf Wilderness and Management Act provides an example with its establishment of four wilderness units in addition to the Cabin Creek Special Management Area.¹²⁸ Such designations have been used to find political compromise for contested lands and to limit agency discretion in how non-wilderness lands are managed.¹²⁹

More recent wilderness legislation continues the tradition of political compromise. These laws, and some proposed bills, go beyond the “release” of selected roadless lands in exchange for wilderness designation.¹³⁰ Instead of simply releasing these lands to discretionary multiple use management, some laws (or “conservation packages”) provide more prescription in how non-wilderness lands must be managed by the agency in the future. In some cases, the deal-making has become more complicated, with more actors seeking legislated assurances for how a public land unit will be managed, inside and outside of the federally designated wilderness.

Though not focused on the national forests, the Steens Mountain Cooperative Management and Protection Area Act of 2000 provides an example.¹³¹ Among other provisions, this complex legislation designates about 175,000 acres of wilderness and a much larger “Cooperative Management and Protection Area.”¹³² The Act mandates how both areas are to be managed, while also creating an advisory council to oversee management and make recommendations to the BLM.¹³³ Depending on one’s perspective, the Steens Act provides either a positive model of how legislative packages might be crafted in the future or “a new breed of compromise” posing a serious threat to

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

128. Pub. L. No. 98-140, 97 Stat. 901 (1983). Subsequent management of the Cabin Creek Area has been controversial, with debate centered on how to meet the Act’s purpose of preserving the Area and its wildlife while providing compatible historic recreational (motorized) use. *See* Faye B. McKnight, *The Use of “Special Management Areas” as Alternatives to Wilderness Designations or Multiple Use Management of Federal Public Lands*, 8 PUB. LAND L. REV. 61 (1987) (using the Cabin Creek case to examine the strengths and weaknesses of alternative protected land designations).

129. *See* NATURAL RESOURCES LAW CTR., *supra* note 125, at 16–17.

130. Wilderness politics often centers on the “release” of non-designated lands to multiple use management, and whether or not such lands might be considered for wilderness designation in subsequent forest plans. Conservationists favor a “soft release” whereby non-designated lands would get another look in future planning processes. Others prefer “hard release” language that permanently disqualifies an area from future wilderness consideration. *See generally* ROSS W. GORTE, WILDERNESS LEGISLATION: HISTORY OF RELEASE LANGUAGE, 1979–1992, CRS REPORT FOR CONGRESS, 93-280 ENR 1993 (explaining the history, use, and questionable relevance of release language in new wilderness legislation).

131. Pub. L. No. 106-399, § 101, 114 Stat. 1655, 1658 (2000) (codified at 16 U.S.C. § 460nnn-11 (2006)).

132. *Id.* §§ 101, 201, 114 Stat. at 1658.

133. 16 U.S.C. § 460nnn-51 (2006).

public lands management.¹³⁴ The Steens Act also preceded a number of controversial omnibus wilderness laws¹³⁵ and proposed bills¹³⁶ that conveyed or proposed to convey selected federal lands to private and state ownership in exchange for wilderness designation in other areas. These wilderness bills, rightly or wrongly, have influenced debate over the BDP proposal (which does not include controversial land sales).

Another place-based law generating much debate and scrutiny is the Valles Caldera National Preserve and Trust.¹³⁷ Here, the USFS plays a smaller managerial role than in the examples referenced above. But the legislation illustrates how lawmakers are willing to reconsider how newly acquired lands might be managed. In 2000, Congress acquired the privately owned Baca Ranch in northern New Mexico.¹³⁸ Instead of simply buying the property and transferring its management to the USFS or the National Park Service, Congress found “an experimental management regime should be provided by the establishment of a Trust capable of using new methods of public land management that may prove cost-effective and environmentally sensitive.”¹³⁹ A nine-member board of trustees, which includes a USFS official, manages the Preserve.¹⁴⁰ Congress directed the Trust to operate the holding as a working ranch, providing multiple use and sustained yield management.¹⁴¹ This case is also significant because the law aims to pull the Valles Caldera out of the traditional federal lands funding stream by “allowing and providing for the ranch to eventually become financially self-sustaining.”¹⁴² As discussed below, the BDP, among other place-based efforts, are similarly proposing ways in which federal lands management can be funded without relying so much on the highly uncertain, and often inadequate, congressional appropriations process.

All of the cases referenced above demonstrate that there is some history of using place-based legislation in the national forest system, a trend most

134. JANINE BLAELOCH & KATIE FITE, QUID PRO QUO WILDERNESS: A NEW THREAT TO PUBLIC LANDS 1 (2005), available at <http://www.westernlands.org/quid-pro-quo.pdf>.

135. See, e.g., Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, 16 Stat. 1994 (2002) (codified at 16 U.S.C. § 460qqq (2006)); Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424, 118 Stat. 2403 (2004) (codified at 16 U.S.C. § 1241 (2006)); White Pine County Conservation, Recreation, and Development Act of 2006, Pub. L. No. 109-432, tit. III, § 301, 120 Stat. 2922, 3028 (2006) (codified at 16 U.S.C. § 1241 (2006)); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tit. I, subtit. O, 123 Stat. 991 (2009).

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

137. Pub. L. No. 106-248; 114 Stat. 598 (2000) (codified at 16 U.S.C. § 698v (2006)).

138. U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-06-98, CALDERA TRUST HAS MADE SOME PROGRESS, BUT NEEDS TO DO MORE TO MEET STATUTORY GOALS 1 (2005).

139. 16 U.S.C. § 698v(a)(12) (2006).

140. *Id.* § 698v-5(a).

141. *Id.* § 698v(b).

142. *Id.* § 698v(a)(8). Of course, to “allow and provide” for financial self-sufficiency is different than requiring it and progress on this front has been mixed. See generally GOV'T ACCOUNTABILITY OFFICE, *supra* note 138.

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

Interest in the legislated approach to forest management is growing. Though different than the BDP in fundamental ways, several place-based initiatives are underway in Montana and Idaho. Take, for example, the Blackfoot-Clearwater Landscape Stewardship Project.¹⁴³ This legislative proposal is designed as a demonstration project that would secure a more permanent balance between wilderness, restoration, resource use, and recreation.¹⁴⁴ The proposal currently includes wilderness designation, motorized recreation provisions, and a restoration pilot project.¹⁴⁵ It also seeks authorizing appropriations of \$750,000 per year for ten years in order to accomplish the group's planning, management, restoration, and monitoring objectives.¹⁴⁶ Also requested is congressional funding for a biomass facility for Pyramid Lumber, one of the key stakeholders of the group.¹⁴⁷ Though legislation is sought, the pilot project's core provisions are consistent with the applicable Lolo National Forest Plan.¹⁴⁸

To the northwest of the Blackfoot-Clearwater is the "Three Rivers Challenge."¹⁴⁹ It hopes to end the bitter timber wars that have characterized management of the Kootenai National Forest. To that end, a broad group of stakeholders are advocating passage of the "Three Rivers Challenge Cooperative Stewardship, Restoration and Conservation Act."¹⁵⁰ The bill's draft discussion version includes several provisions designed to protect and

143. Blackfoot Clearwater Stewardship Project, <http://www.blackfootclearwater.org/> (last visited Jan. 21, 2009).

144. BLACKFOOT CLEARWATER LANDSCAPE STEWARDSHIP PROJECT, PROJECT DESCRIPTION 1 (2007) (on file with authors).

145. *Id.* at 1–2.

146. *Id.* at 3.

147. *Id.*

148. *Id.* at 2.

149. See DRAFT FOR DISCUSSION, THREE RIVERS CHALLENGE COOPERATIVE STEWARDSHIP, RESTORATION, RECREATION AND CONSERVATION ACT OF 2009 (2009), available at http://www.threeriverschallenge.com/3RC%20legislation_Nov%202008.pdf [hereinafter THREE RIVERS CHALLENGE]; see also Rick Bass, *Yaak Forest Group Champions Sustainable Local Economy*, NEW WEST, Jan. 19, 2009, available at http://www.newwest.net/topic/article/yaak_forest_group_champions_sustainable_local_economy/C41/L41/.

150. See generally THREE RIVERS CHALLENGE, *supra* note 149.

restore portions of the Kootenai, while “generating a more predictable flow of wood products for local communities.”¹⁵¹ Among these provisions include mandated restoration projects, broad stewardship contracting authority, wilderness designation, a special conflict resolution process, and the permanent establishment of some motorized and non-motorized areas on the forest, among other special designations.¹⁵²

Finally, a more nascent, but potentially larger place-based effort exists in Idaho’s Clearwater Basin. With leadership provided by Idaho Senator Mike Crapo,¹⁵³ several interests are negotiating management of the Clearwater and Nez Perce National Forests. At this point, the “Clearwater Basin Collaborative” is assessing the potential of resolving several issues via legislation, including drafting a comprehensive land use allocation bill and funding strategy.¹⁵⁴ Like other place-based efforts, wilderness designation is being discussed along with restoration and economic development provisions. These examples, among others in Washington State¹⁵⁵ and southeast Alaska,¹⁵⁶ demonstrate a growing interest in finding legislated solutions to national forest management.

II. THE BEAVERHEAD-DEERLODGE PARTNERSHIP PROPOSAL

This Part first places the BDP in a political context, outlining some sources of conflict and common concerns shared by its participants. It then explains four central provisions of the BDP proposal: wilderness designation, timber supply, restoration, and stewardship contracting.

151. *Id.* at 1.

152. *See generally id.*

153. *See* Press Release, Clearwater Basin Collaborative Announced (May 29, 2008), *available at* http://crapo.senate.gov/media/newsreleases/release_full.cfm?id=298110.

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

155. *See* Northeast Washington Forestry Coalition, <http://www.newforestrycoalition.org/> (last visited Jan. 21, 2009). This group seeks to resolve conflict by providing guidance and recommendations regarding how the Colville ought to be managed, but does so mostly through existing planning processes. At one point, however, the group sought “authorities to establish restoration and responsible forestry zones, designate new wilderness, and provide funding to pay for new recreation facilities including trails, community wildfire protection and forest restoration.” NW. WASH FOREST COALITION, BLUEPRINT FOR THE COLVILLE NATIONAL FOREST: FREQUENTLY ASKED QUESTIONS (2008) (on file with authors).

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

A. Background

The BDNF covers 3.38 million acres in southwestern Montana.¹⁵⁷ Larger than Glacier and Yellowstone National Parks combined, it includes sixteen mountain ranges, 400 miles of the Continental Divide, and some of the best elk habitat in the state.¹⁵⁸ Resource allocation conflicts—with some interests wanting more commodity use and motorized access and others more preservation of the forest—are common on the BDNF, as they are elsewhere. Consider, for example, that 152 administrative appeals have been filed on the BDNF during the last decade, and that twenty-five lawsuits have been filed over the past two decades.¹⁵⁹ Most of these challenges have centered on timber-related projects, with a handful of conservation groups most responsible for making them.¹⁶⁰

Wilderness designation, and the lack thereof, is a major source of conflict on the BDNF. To date, the BDNF manages two federal wilderness areas, the Anaconda-Pintler and a portion of the Lee Metcalf, totaling 225,147 acres.¹⁶¹ Not presently included in the federal wilderness system are 1.9 million acres of inventoried roadless areas on the BDNF.¹⁶² The BDNF also manages two wilderness study areas totaling 210,174 acres.¹⁶³ USFS management of wilderness study areas in Montana has been controversial because the Montana Wilderness Study Act though designed to protect these places, did not prohibit the use of off-road vehicles in these areas.¹⁶⁴ And off-road vehicle use obviously has the potential of diminishing those wilderness characteristics that Congress intended to protect.¹⁶⁵

The state of Montana's timber industry is also pertinent to this case study because the BDP seeks to provide it with greater certainty and stability. A multitude of economic factors help explain why so many mills have closed in

157. BDNF REVISED Plan, *supra* note 29, at 2. The Beaverhead and Deerlodge National Forests were merged into one administrative unit in 1996.

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

159. See PETER N. ZIMMERMAN & ERIK J. TOMASIK, U.S. FOREST SERVICE, NORTHERN REGION, NEPA APPEALS AND LITIGATION (2008) (on file with authors).

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

161. U.S. FOREST SERV., BEAVERHEAD-DEERLODGE NATIONAL FOREST: LAND AND RESOURCE MANAGEMENT PLAN, CORRECTED FINAL ENVIRONMENTAL IMPACT STATEMENT 293 (2009), available at http://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5052782.pdf.

162. *Id.* at 277.

163. BDNF REVISED PLAN, *supra* note 29, at 428.

164. See *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 146 F. Supp. 2d 1118, 1121 (2001).

165. As the Montana District Court summarized the situation, “[T]he controversy at hand questions what it means to ‘maintain’ these areas-in-limbo. Did Congress intend to keep the land and its use as it was in 1977? Or did Congress intend to preserve the potential of the land without major concern for its use while it was studied?” *Mont. Wilderness Ass'n*, 146 F. Supp. 2d 1118, 1122 (2001). See *supra* note 29 (reviewing this case in light of the Supreme Court’s *SUWA* decision).

the state and why those remaining see the future with some trepidation.¹⁶⁶ International market trends, increased Canadian imports, lower prices, and fewer housing starts are largely responsible for the industry's woes.¹⁶⁷ Several timber mills in Montana, for example, received help from the Trade Adjustment Assistance Program, thus indicating that imports have seriously challenged several Montana mills.¹⁶⁸ But the Partnership's timber industry interests also count access to federal timberlands as part of the equation.¹⁶⁹ They partly blame appeals, litigation, and excessive analysis by the USFS for the diminished and always uncertain timber supply.¹⁷⁰ For the timber industry, a more certain supply from the BDNF will at least resolve one of the industry's problems.¹⁷¹

Forest plans were completed for the BDNF in 1986 and 1987.¹⁷² As required by NFMA, the revision of these plans began in 2002 using the 1982 planning regulations.¹⁷³ Before the BDP formed, its eventual members expressed frustration at what they considered to be a broken forest planning process. Conservationists and the timber industry asked for more assurances than provided by the agency in its revision of the forest plan, while timber

166. The factors most responsible for the industry's demise is a perennial debate in Montana. On one side are those quick to blame the USFS, mostly because of diminished supply. *See, e.g.*, CHARLES E. KEEGAN & TODD A. MORGAN, UNIV. OF MONTANA, BUREAU OF BUSINESS AND ECONOMIC RESEARCH, MONTANA'S TIMBER AND FOREST PRODUCTS INDUSTRY SITUATION 2004 (2005) (report prepared for Montana's congressional delegation). On the other side are those who see international market trends as being most significant. *See, e.g.*, Bosworth & Brown, *supra* note 41, at 272 (reviewing studies showing how highly productive plantation forests in the U.S. and abroad "have erased the postwar need for large-scale timber supplies from national forest land").

167. Bosworth & Brown, *supra* note 41, at 272.

168. Imports of softwood timber from British Columbia have challenged several mills in Montana whom have subsequently applied for Trade Adjustment Assistance, as provided in the Trade Act of 1974. 19 U.S.C. § 2273 (2006). A listing of petition determinations in Montana, which include several timber mills is available at U.S. Dep't of Labor, Trade Adjustment Assistance, http://www.doleta.gov/tradeact/taa/taa_search.cfm (search by state) (last visited Jan. 27, 2009). In its determination of eligibility, the Department of Labor found that in many of these cases an increased reliance on import purchases among the mills' declining customers and that such imports contributed significantly to decline in sales. *See* Sun Mountain Lumber, Inc., Trade Adjustment Assistance Case No. 64233 (2008), available at <http://www.doleta.gov/tradeact/taa/taadecisions/taadecision.cfm?taw=64233>.

169. *See, e.g.*, *Examination of the Forest Plan Revision Process in Region 1*, *supra* note 158, at 12, 15, 30 (statements of Charles Keegan, Sherman Anderson, and Mike Hillis); *Management Challenges on Montana's National Forests, Oversight Field Hearing Before the Comm. on Resources*, 108th Cong. 22–23 (2003) (statement of Sherman Anderson).

170. *See, e.g.*, *Examination of the Forest Plan Revision Process in Region 1*, *supra* note 158, at 12, 15, 30 (statements of Charles Keegan, Sherman Anderson, and Mike Hillis).

171. *Id.*

172. U.S. FOREST SERV., FOREST PLAN: BEAVERHEAD NATIONAL FOREST 1 (1986); U.S. FOREST SERV., FOREST PLAN: DEERLODGE NATIONAL FOREST (1987). In 1986, BDNF was still two separate forests (the Beaverhead National Forest and the Deerlodge National Forest), such that two forest plans were initially created.

173. *See* 36 C.F.R. §§ 219.35, 219.10(g) (1982); U.S. FOREST SERV., RECORD OF DECISION FOR THE FINAL ENVIRONMENTAL IMPACT STATEMENT AND REVISED LAND AND RESOURCE MANAGEMENT PLAN, BEAVERHEAD-DEERLODGE NATIONAL FOREST (2009), available at http://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5052838.pdf.

interests wanted more stable supplies. The BDNF, according to Sun Mountain Lumber Co., “should be providing sustainable and predictable levels of production and services.”¹⁷⁴ And according to the Montana Wilderness Association,

The forest plan is a contract between the people who own and those who manage our national forests. This contract should provide clarity and certainty for all who have a stake in public lands [In Montana] different people seek different commitments in the forest plan contract, whether it’s small mills, snowmobilers, hunters, communities or conservationists. We want tangible commitments. We want to know where we stand today and what will remain tomorrow.¹⁷⁵

It is during the plan revision period that the BDP formed and submitted a proposal to be considered by the USFS, even though the public comment period had ended. The Partnership consists of three conservation organizations (Montana Trout Unlimited, Montana Wilderness Association, National Wildlife Federation) and five timber companies (Pyramid Mountain Lumber, Roseburg Forest Products, RY Lumber, Smurfit-Stone Container, Sun Mountain Lumber).¹⁷⁶ The Partnership’s objective was to create a forest plan “that provides greater predictability, defuses conflict, and implements meaningful on-the-ground projects.”¹⁷⁷

With encouragement by the USFS’s Region 1 Office, the Partnership submitted their forest planning proposal for consideration by the agency. The USFS did not, however, study the proposal as a separate planning alternative. Instead, the USFS added an “alternative 6” to the BDNF’s Revised Draft Plan to partly respond to the Partnership’s proposal.¹⁷⁸ Even though this alternative was chosen by the USFS, the Partnership decided that its interests were not adequately addressed in the adopted forest plan. So in February 2007, the Partnership released draft legislation to implement their strategy.¹⁷⁹ The “Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007” (the “BDP proposal”) has gone through various iterations and continues to be a work in progress.¹⁸⁰ But its core philosophy and approach remain unchanged, and the Partnership is currently lobbying Montana’s congressional delegation for the bill’s passage.¹⁸¹

174. *Examination of the Forest Plan Revision Process in Region 1*, *supra* note 158, at 16 (statement of Sherman Anderson).

175. *Id.* at 20 (statement of John Gatchell).

176. For more information about BDP members, see Beaverhead-Deerlodge Partnership: Montanans Working Together, <http://www.bhdlpartnership.org/> (last visited Jan. 14, 2010).

177. ECOSYSTEM RESEARCH GROUP, PARTNERSHIP STRATEGY FOR THE BEAVERHEAD-DEERLODGE NATIONAL FOREST 1 (2006) [hereinafter PARTNERSHIP STRATEGY].

178. See BDNF REVISED PLAN, *supra* note 29 (providing an overview and analysis of these alternatives).

179. Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007 (Proposed Bill) (2007) (on file with authors).

180. See *supra* notes 289–300 and accompanying text.

181. See *id.*

B. Key BDP Proposal Provisions

There are four central provisions of the proposal that we wish to emphasize: wilderness, timber supply, restoration, and stewardship contracting. We now consider each in turn.

1. Wilderness Designation

The BDP seeks to designate roughly 570,000 acres as federal wilderness in sixteen areas across the BDNF.¹⁸² Most of these areas were included in previous (unsuccessful) wilderness bills and have been the source of much controversy.¹⁸³ The Partnership's wilderness recommendations are considerably higher than those made by the BDNF, which recommended 329,000 acres in its forest plan revision.¹⁸⁴ The wilderness component is central to the Partnership's strategy and bill for two reasons. First, it is what brought and kept conservation interests at the negotiating table. Second, federal wilderness designation requires an Act of Congress,¹⁸⁵ meaning that legislating part of the Partnership's proposal was unavoidable.

The importance of the wilderness provision does not lessen its controversy. The designations are opposed by an assortment of motorized vehicle groups, a mountain biker organization, some adjacent counties, and commodity interests because of lost access.¹⁸⁶ Criticism has also come from some environmental interests who believe that too many inventoried roadless areas and wilderness study areas are being sacrificed and instead deserve wilderness protection. These interests question why participating environmental groups would be willing to release more than 200,000 acres of roadless lands, some for possible timber management. Also questioned is the decision to sacrifice portions of two wilderness study areas that already have some legal protection.¹⁸⁷ The quality of the lands being released is also a concern to critics. They emphasize that most of the wilderness designations made in the BDP proposal are in alpine and sub-alpine areas that receive relatively few

182. Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007 (Revised Proposed Bill), tit. II, § 201 (2007) [hereinafter BDP Proposed Bill].

183. See *supra* note 127.

184. BDNF REVISED PLAN, *supra* note 29, at 284.

185. Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136 (2006)).

186. See, e.g., John C. Russell, A SOCIAL ANALYSIS TO FINALIZE THE BEAVERHEAD-DEERLODGE NATIONAL FOREST PLAN (2006), available at <http://www.fs.fed.us/rl/b-d/forest-plan/soc-assess/social-analysis120906.pdf> (analyzing the mixed reactions to the BDP proposal).

187. See *supra* notes 26-28 and accompanying text; see also Bill Schneider, *The Beaverhead-Deerlodge Partnership: Right Idea, Wrong Bill*, NEW WEST, Nov. 28, 2008, available at http://www.newwest.net/topic/article/the_beverhead_deerlodge_partnership_right_idea_wrong_bill/C41/L41/ (questioning the decision to sacrifice portions of the West Pioneers and Sapphire Wilderness Study Areas in order to reach compromise).

threats compared to the more ecologically significant lower lands being released to timber management.¹⁸⁸

2. *Timber Supply*

The second central provision of the Partnership's proposal aims "to produce a diverse forest with far fewer roads while also generating a more predictable flow of wood products for local communities."¹⁸⁹ To this end, the Partnership initially supported designating approximately 713,000 acres as "suitable for timber production" under stewardship contracts.¹⁹⁰ These important designations are made in forest plans, in accordance with NFMA, and act as a gateway through which subsequent projects must pass.¹⁹¹ A timber project, for example, could not generally take place in an area unless it was "zoned" as suitable for timber harvesting. But instead of leaving such determinations to the BDNF, the Partnership's draft bill takes a different approach.¹⁹² It designates "stewardship areas" that include "eligible lands" where "landscape scale restoration projects *shall* be implemented."¹⁹³ Approximately 2.27 million acres of the 3.35 million acre forest would be designated as "stewardship areas."¹⁹⁴ The approach, in other words, is to first designate stewardship areas on the BDNF, and to then carve out a percentage of these lands to make them eligible for landscape scale restoration projects. These projects shall include vegetation management through commercial timber harvest, prescribed burning, and other silvicultural techniques.¹⁹⁵

The BDP proposed bill includes language stipulating that "the Secretary shall mechanically treat timber that yields value for meeting the restoration goals of this Act," on a minimum of 70,000 acres of eligible land within ten years of the Act's passage.¹⁹⁶ This provision is among the most controversial because critics see it as a legislated and unsustainable mandate to cut timber for the benefit of local mills. After all, the BDNF's plan revision only designated 299,000 acres as suitable for timber production.¹⁹⁷ Supporters, however, believe that the stewardship areas/eligible lands provision offers a reasonable way to provide some long-term stability and predictability to an industry that is

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

189. PARTNERSHIP STRATEGY, *supra* note 177, at 5.

190. *Id.* at 1.

191. 16 U.S.C. § 1604(k) (2006).

192. BDP Proposed Bill, *supra* note 182.

193. *Id.* § 3 (emphasis added).

194. *Id.*

195. *Id.* § 3.

196. *Id.* tit. I, § 101(d).

197. BDNF REVISED PLAN, *supra* note 29, at 443. This does not include the 1,614,000 acres designated as unsuitable lands but where timber harvest is allowed in order to meet other resource objectives. *Id.* at 444.

needed if forest restoration is to be accomplished in the future. They emphasize that the bill does not mandate so many board feet to be cut per year, but simply designates those lands that are *eligible* for harvesting in the future—all while complying with existing laws and newly legislated standards.

3. *Forest Restoration*

Forest restoration is the third key part of the Partnership strategy. The partners are unified in their belief that the BDNF requires forest restoration through active forest management. For them, simply designating wilderness—much of which is high alpine “rocks and ice” country—is not sufficient. They have instead adopted a more landscape-level approach prioritizing a number of specific restoration objectives. These objectives include the removal of some permanent roads, restoring more natural patterns on the forest, modifying fuels along the forest periphery, reducing threats from fire and insects by modifying tree age class diversity, and improving aquatic habitats, among others.¹⁹⁸

Key to the Partnership’s restoration strategy is to “retain timber management as a viable management tool.”¹⁹⁹ The Partnership contends that many problems on the BDNF will not self-correct, but will require large-scale and multi-faceted restoration projects. To accomplish this, “landscape scale restoration projects,” which could be up to 50,000 acres in size, are mandated in the draft legislation.²⁰⁰ The bill requires implementation of at least one landscape-scale restoration project annually on eligible lands, while providing a very specific set of priorities and restoration requirements (including road density standards, vegetative management prescriptions, and limits on new access roads).²⁰¹

4. *Stewardship Contracting*

Stewardship contracting is the fourth provision we wish to emphasize, as it would primarily be used to achieve the Partnership’s restoration objectives.²⁰² In 1998, Congress authorized the USFS to use stewardship contracting to achieve various land management goals such as restoring forest and rangeland health and water quality, improving fish and wildlife habitat, and reducing hazardous fuels.²⁰³ To achieve these goals, stewardship contracting allows the exchange of goods for services.²⁰⁴ In other words, the commodities produced

198. BDP Proposed Bill, *supra* note 182, tit. I, § 102.

199. PARTNERSHIP STRATEGY, *supra* note 177, at 12.

200. BDP Proposed Bill, *supra* note 182, § 3.

201. *Id.* § 102.

202. *Id.* § 103.

203. Pub. L. No. 105-277, § 347, 112 Stat. 2681-298 (1998). This authority was initially implemented on a pilot basis, but Congress extended and expanded the authority in 2003. Pub. L. No. 108-7, div. F, tit. III, § 323, 117 Stat. 11, 275 (2003). For more background *see* Stewardship End Result Contracting, 68 Fed. Reg. 38,285, 38,286 (June 27, 2003).

204. 16 U.S.C. § 2104(d) note (2006).

through a contract, like timber, are exchanged for requested restoration services, like decommissioning roads or replacing culverts. Stewardship contracting allows a national forest to retain the receipts generated by selling timber for use in future stewardship projects.²⁰⁵ This provision is attractive to the Partnership because stewardship receipts do not have to return to the Department of Treasury's general fund as required of timber sales.²⁰⁶

The stewardship contracting approach to forest restoration is increasingly used by the USFS and BLM,²⁰⁷ and the tool squares perfectly with the Partnership's philosophy and objectives. The Partnership has little faith that restoration needs on the BDNF will be adequately funded through the normal appropriations process, so it sees stewardship contracting as the best vehicle to accomplish its fuel reduction and restoration objectives. Proponents of stewardship contracting emphasize the tool's ability to foster collaboration, provide a more steady supply of timber, and to get work accomplished more effectively and efficiently "on-the-ground."²⁰⁸ Stewardship contracting, says the Partnership, "[w]ill help ensure that local communities benefit economically from restored landscapes and a dependable timber supply."²⁰⁹ As discussed below, the Partnership's emphasis on stewardship contracting is also controversial, and some say not feasible, in the lodgepole pine-dominant BDNF.

The Partnership's proposal and draft legislation were received with considerable controversy.²¹⁰ We analyze some of the specific arguments in Parts III and IV, but for now, readers ought to appreciate one important aspect of the debate. Much of it focuses on process and the degree of collaboration used to write the Partnership's proposal. Supporters emphasize its collaborative nature, while opponents, including two adjacent counties, focus on the narrow range of interests represented by the Partnership and the way in which the deal was cut.²¹¹ Further, the groups that have most often appealed and litigated decisions on the BDNF are not represented in the Partnership.²¹²

205. *Id.*

206. *Id.*

207. See U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-09-23, FEDERAL LAND MANAGEMENT: USE OF STEWARDSHIP CONTRACTING IS INCREASING, BUT AGENCIES COULD BENEFIT FROM BETTER DATA AND CONTRACTING SERVICE 10 (2008) [hereinafter GAO STEWARDSHIP CONTRACTING].

208. See *id.* at 5.

209. PARTNERSHIP STRATEGY, *supra* note 177, at 5.

210. For extensive coverage, perspectives, and a chronology, see Bill Schneider, *Montana's Wilderness Drought, a Chronology*, NEW WEST, July 16, 2009, available at http://www.newwest.net/topic/article/montanas_wilderness_drought_a_chronology/C41/L41/.

211. See, e.g., Letter from Beaverhead County Commissioners to Beaverhead Deerlodge Partnership Members, May 1, 2006 (on file with authors); Madison County Board of Commissioners, *Madison County Speaks Out on the Partnership Strategy* (July 19, 2006) (on file with authors); see also Russell, *supra* note 186, at 11.

212. U.S. Forest Serv., USFS Northern Region Non-Monetary Litigation, 1985-Present (on file with authors); U.S. Forest Serv., Beaverhead-Deerlodge National Forest: All Appeals, All Types (2008) (on file with authors).

III. QUESTIONS AND ANALYSIS

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

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

A. *Governance and Conflict Resolution*

Would a proliferation of place-based forest laws disunify the relatively consistent mission and mandate of the USFS?

Can place-based legislation be an effective way of resolving long standing political conflicts over forest management? Could legislation help reduce appeals and litigation?

Are place-based laws likely to conflict with preexisting agency mandates, environmental laws, and planning requirements?

Can legislation achieve greater certainty and stability for the timber industry while balancing for other uses and environmental values?

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

solutions to national forest management and the need to sometimes plan and manage at larger landscape, and even regional, scales.²¹³

In theory, the place-based legislative approach might help resolve several enduring political conflicts, like roadless area management. Such issues could be dealt with squarely in legislation, rather than pushing them into alternative forums of conflict resolution, like interminable planning or rulemaking processes. In some respects, it is useful to analyze the BDP and other place-based proposals as a continuation of the multiple versus dominant use debate. Since the 1960s, calls have been made to replace the multiple use paradigm with some sort of dominant use arrangement, such as legislatively zoning some lands for protection and others for commodity production.²¹⁴ But unlike some of the top-down reform proposals of the past, the place-based approach seeks to do the same thing from the bottom-up. Both approaches seek to do via legislation what has historically been done via forest planning at the administrative level.

Our review of other place-based national forest laws should temper excitement about their potential for conflict resolution. At this point, for example, the Valles Caldera Act²¹⁵ has not resolved very basic multiple use conflicts that are in some ways embedded into the legislation itself. Instead, the resolution of such conflicts is simply the responsibility of the Trust, not a federal land agency. Core differences of opinion remain about what uses should be prioritized by the Trust, how to apply NEPA, and the well-worn question of how to balance resource use with environmental protection.²¹⁶

Unit-specific laws like the Tongass Timber Reform Act and the Heger-Feinstein Act have engendered more conflict than consensus. Part of this conflict is due to the contested statutory language in each Act (for example, what constitutes “market demand” on the Tongass), and part is due to how such laws fit into the preexisting legal and planning framework. Recall, for example, the ongoing problem of how to reconcile differences between the Heger-Feinstein Act and the Sierra Framework plan, all while complying with NEPA,

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

214. See, e.g., PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND* 3, 48 (1970), available at <http://hdl.handle.net/1957/11183> (recommending a dominant use approach to public lands management); see also the collective work of Marion Clawson, including *The Concept of Multiple Use Forestry*, 8 ENVTL. L. 281 (1978) and *FORESTS FOR WHOM AND FOR WHAT?* (1975).

215. 16 U.S.C. § 698v-3 (2006) (establishing a multiple use sustained yield purpose of the Preserve).

216. See April Reese, *Cash-Strapped Valles Caldera Preserve Seeks New Revenue Amid Calls for Federal Takeover*, LAND LETTER, Mar. 19, 2009, available at <http://www.eenews.net/Landletter/2009/03/19/5/>; April Reese, *Program in Valles Caldera National Preserve Comes Under Fire*, LAND LETTER, Dec. 8, 2005, available at http://original.rlch.org/news/12_08_05_valles.html; April Reese, *Valles Caldera "Experiment" Lacking in Public Input, Critics Say*, LAND LETTER, Dec. 14, 2006.

NFMA, and the ESA.²¹⁷ The USFS has been forced to walk this minefield with legal grenades thrown from all directions. When the USFS tries to implement the Sierra Framework and its interpretation of NEPA, NFMA, and the ESA, it gets sued by the Quincy Library Group for subordinating the Herger-Feinstein Act; and when the agency tries to implement the Herger-Feinstein Act, it gets challenged by environmental groups for not complying with NEPA, NFMA, and the ESA.²¹⁸ Where the chips ultimately fall is still uncertain, but it is safe to say at this point that the Herger-Feinstein Act did not resolve core conflicts about managing the Sierra Nevada.

Even if place-based laws aid in conflict resolution, they might still present the same sorts of challenges that face the national parks and wildlife refuges, such as how to simultaneously meet and pay for mandates expressed in organic and enabling legislation.²¹⁹ And while a forest-specific law might resolve some conflicts, it could also reduce the agency's ability to adapt to future circumstances. Ever-present in forest management is the tension between prescriptive law and agency discretion. The BDP proposal, among other place-based proposals, could swing the pendulum too far by making adaptation more of an afterthought than a central governing principle. The BDP case therefore presents a paradox of sorts. On the one hand, the Partnership seeks to provide greater certainty and stability in forest management. On the other hand is the popular embrace of adaptive management and the principles on which it is based.²²⁰ The question that emerges, then, is how the BDP proposal, and

217. See 42 U.S.C. §§ 4321–4347 (2006); 16 U.S.C. §§ 1600–1614 (2006); 16 U.S.C. §§ 1531–1544 (2006).

218. See, e.g., *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003); *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1008 (9th Cir. 2006) (rejecting NEPA, NFMA, and ESA claims against a fuel reduction project); *Sierra Nevada Forest Prot. Campaign v. U.S. Forest Serv.*, No. Civ. S042023MCEGGH, 2005 WL 1366507, at *1 (E.D. Cal. May 26, 2005), *aff'd*, 166 F. App'x 923 (9th Cir. 2006) (rejecting a NEPA cumulative effects challenge to a fuel reduction project); *Sierra Nevada Forest Prot. Campaign v. Tippin*, No. CIVS06-00351, 2006 WL 2583036, at *1–2, 21 (E.D. Cal. Sept. 6, 2006) (finding NEPA and NFMA violations related to the protection of the California Spotted Owl); see also Keiter, *supra* note 43, at 229–33 (analyzing these cases and others).

219. See Fischman, *supra* note 80 (analyzing the problems associated with the trend of increased congressional involvement in national park management).

220. Long favored by scholars and scientists, the rhetoric of adaptive management is now embraced by the USFS, on paper at least. See, e.g., 73 Fed. Reg. 21,468 (Apr. 21, 2008) (stating that land management plans are strategic in nature and “one stage in an adaptive cycle of planning”). Monitoring is a key part of any adaptive approach to forest management. Until monitoring becomes required and funded, we are suspicious of agency promises of adaptive management. See generally THOMAS H. DELUCA, GREGORY H. APLET, & BO WILMER, *THE WILDERNESS SOCIETY, THE UNKNOWN TRAJECTORY OF FOREST RESTORATION: A CALL FOR ECOSYSTEM MONITORING 5* (Science & Policy Brief, Dec. 2008), available at <http://wilderness.org/files/Ecosystem-Monitoring-Brief.pdf> (“Federal land management has generally exhibited a chronic omission of feedbacks in dictating future management approaches.”); U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-06-670, *WILDLAND FIRE REHABILITATION AND RESTORATION: FOREST SERVICE AND BLM COULD BENEFIT FROM IMPROVED INFORMATION ON STATUS OF NEEDED WORK* (2006) (reviewing the lack of monitoring in fire rehabilitation and restoration projects).

similar initiatives, will ensure sufficient room to adapt to new problems and changed circumstances.

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

There are other expectations, aside from the BDP's timber supply provision, that are of concern to us. First is the expectation that the legislation will help the BDNF cut through its "process predicament." Without additional funding that could expedite the environmental review process, we fail to see how additional legislation will help matters. When it comes to meeting its NEPA obligations, the USFS needs more funding, leadership, and institutional support, not more law. We also fear the inevitable backlash that will result if the BDP's timber targets are not met on time because of the agency's NEPA requirements.

Even less realistic is the BDP's belief that greater certainty and stability for the timber industry can be achieved through legislation. This pursuit is a dominant theme in natural resources policy and its application to forest management has been debated ad nauseum.²²¹ It is a shibboleth to some, and unlikely to be achieved according to a former USFS Chief,²²² among other

221. See, e.g., Con H. Schallau & Richard M. Alston, *The Commitment to Community Stability: A Policy or Shibboleth*, 17 ENVTL. L. 429 (1987). They note that "[p]ublic land legislation contains a general theme of concern for the economic stability of communities. However, there is little explicit statutory direction on how large a role community stability concerns should play in Forest Service decisions." *Id.* at 460 (internal citation omitted). They go on to say that "[c]onfusion about community stability stems from the fact that although Congress frequently reaffirms its desire to achieve community stability, it has not provided any operational guidelines for doing so." *Id.* at 479. See also REPORT OF THE SOCIETY OF AMERICAN FORESTERS NATIONAL TASK FORCE ON COMMUNITY STABILITY 13 (1989) (on file with authors) (noting that "the agency's community stability policy is permissive rather than prescriptive."); James P. Perry, *Community Stability: Is There a Statutory Solution?* in *Community Stability in Forest-Based Economics*, Proceedings of a Conference in Portland, Oregon, November 16-18, at 32 (Dennis C. Le Master & John H. Beuter, eds. 1987) (noting that "Congress has not, in any legislation which applies generally to all National Forest System lands, provided any direction that requires the agencies to meet a community stability requirement"); Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81 (1993) (tracing the concept's lineage and debate).

The short-lived Sustained Yield Forest Management Act of 1944, Pub. L. No. 78-273, 58 Stat. 132, provided the most explicit statutory recognition of community stability. The Act established sustained yield forest management units and aimed to "promote the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supplies of timber." *Id.* Termination of the program began in 1953. See Bates, *supra* note 221, at 93-94.

222. For former USFS Chief Jack Ward Thomas, "[g]iven the myriad of interacting variables, it is time for concerned citizens and leaders to accept the reality that the dream of a stable timber supply from public lands is an illusion." Thomas, *supra* note 112, at 14.

skeptics who question the assumptions on which the concept is based.²²³ There are simply too many external and uncontrollable impediments to achieving this objective: including fluctuating housing starts, cheap Canadian imports, vacillating court decisions, swings in agency budgets, and so on. And then there is the problem of how to balance such an objective with other environmental values and legal responsibilities. The few place-specific laws that include language about economic stability, such as the Oregon and California (O&C) Lands Act²²⁴ and those governing the Tongass,²²⁵ have clashed with other environmental statutes and planning requirements. Unless Congress clearly prioritizes one value over the other, and we doubt it will, some tensions or conflicts will persist.

This is not to say, of course, that local mills and rural communities deserve little consideration. They deserve more, and carefully-screened, restoration-based programs. Tools like stewardship contracting should be used

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

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

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

43 U.S.C. § 1181a.

Once sustained yield is determined, the Act also requires timber from O&C lands to be sold annually at “not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared . . . or so much thereof as can be sold at reasonable prices on a normal market.” *Id.* Associated regulations state that sustained-yield units contain enough land “to provide, insofar as practicable, a permanent source of raw materials to support local communities and industries, giving due consideration to established forest products operations.” 43 C.F.R. § 5040.1 (2009).

Whether or not the O&C Act is a multiple or dominant use statute has received a lot of debate. The Courts have also wrestled with the Act’s provisions and how they were meant to be prioritized. Though timber shall be supplied, O&C lands are also subject to NEPA, the ESA, and other environmental statutes, thus setting up multiple conflicts over their management. See, e.g., *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174 (9th Cir. 1990) (interpreting the O&C Act as a dominant use statute that limits the ability of the BLM to manage for non-timber purposes). *But see* Deborah Scott & Susan Jane M. Brown, *The Oregon and California Lands Act: Revisiting the Concept of “Dominant Use,”* 21 J. ENVTL. L. & LITIG. 259, 311–14 (2006) (challenging the dominant use interpretation of the O&C Act and putting forth a broader conception of community stability).

225. The Alaska National Interest Lands Conservation Act (ANILCA) required Congress to provide at least \$40 million annually so that the Tongass could meet its mandate of supplying at least 450 million board feet of timber for sale each year. See *Alaska National Interest Lands Conservation Act*, Pub. L. No. 96-487, § 705(a), 94 Stat. 2371, 2420 (1980) (codified at 16 U.S.C. 539(d) (2006)). This timber supply mandate ran roughshod over other values and legal obligations. See Nie, *supra* note 89, at 400–03. As discussed above, ANILCA’s controversial timber supply mandate was replaced with language requiring the Tongass to seek to meet market demand for Tongass timber. See *supra* notes 91–99 and accompanying text.

in this regard.²²⁶ Even more important would be a serious federal investment in forest restoration that could be strategically targeted to benefit rural communities and local contractors.²²⁷ The BDP is to be admired for its focus on both sustainable forests *and* communities, and for understanding the benefits of having a functional timber industry in the state. But we are skeptical that the BDP proposal, and place-based legislation in general, is the best way to secure these values. It is, in short, the wrong tool for the right job.

B. Wilderness Politics

Do place-based proposals unnecessarily complicate the politics of wilderness designation? Do they make more straightforward wilderness bills more difficult to pass?

Is the 2001 roadless rule best viewed as a temporary measure that precedes future wilderness negotiations or a policy endpoint? How urgent is the need to designate some inventoried roadless lands as federal wilderness? Does such urgency necessitate greater compromise?

There exists in wilderness politics a tension between idealism and pragmatism.²²⁸ This tension is evident in the Wilderness Act and subsequent wilderness laws,²²⁹ for each are generally the product of negotiation and compromise. Though simplified, this tension is particularly helpful to understanding debate over the BDP proposal. On one side are those idealists who view the proposal as part of a dangerous trend whereby wilderness designation is exchanged for some type of economic development. This model, they say, is different than that practiced in the past because of the scope of concessions made in the legislation. Critics fear that it creates a precedent and expectation that future wilderness bills must be packaged with economic development provisions if they are to be politically feasible.²³⁰ Wilderness

226. See, e.g., Montana Forest Restoration, Restoring Montana's Forests: A New Approach, <http://www.montanarestoration.org> (last visited Jan. 28, 2009) (detailing a collaborative approach used to screen and implement restoration projects).

227. Related ideas and proposals have become more detailed because of the 2009 federal economic stimulus package. See also RURAL VOICES FOR CONSERVATION COALITION, ECONOMIC STIMULUS PROPOSAL: THE FIRST STEPS TOWARDS BUILDING A RURAL GREEN ECONOMY (2009), available at <http://www.sustainablenorthwest.org/resources/RuralGreenEconomyInitiative.pdf> (showing linkages between forest restoration and community development).

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

229. See 16 U.S.C. §§ 1131–1136 (2006); see also Wilderness.net, Wilderness Law Library, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=pubLawlib> (last visited Jan. 16, 2010) (providing a comprehensive database of individual wilderness laws).

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

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

Of course, pragmatists see things differently. Wilderness has always been about compromise, they insist, and concessions have to be made to move the agenda forward.²³¹ Montana’s political context is also important in this regard. The state’s “wilderness drought” will continue unless Montana’s congressional delegation says otherwise. While parts of the delegation support negotiated “home-grown” initiatives, what this means exactly is far from clear.²³² The pragmatists believe that place-based approaches reduce the exposure and risks inherent in wilderness politics. After all, the wilderness proposals, and negotiated details, are brought forth from the bottom-up, thus making wilderness a potentially safer political issue.

If replicated more broadly, place-based forest laws with wilderness components could make it more difficult to pass larger and simpler wilderness laws in the future.²³³ Economic development provisions, like a timber supply mandate, could become de facto requirements. Recent wilderness laws and proposals include those with economic development provisions and more straightforward traditional approaches.²³⁴ But trends could change if congressional leadership allows it. In any event, the possibility deserves consideration because of the precedent that could be established. And the importance of precedent is made clear by the special provisions that are often replicated in wilderness laws. Once used, provisions related to such matters as

Legislative Journey, IDAHO MOUNTAIN EXPRESS, Oct. 28, 2005, available at <http://www.mtexpress.com/index2.php?ID=2005106024>.

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

232. Montana Representative Denny Rehberg is willing to discuss wilderness but strongly believes that “the only way any piece of legislation is going to be successful is through a consensus-building process that starts at the local level.” Rob Chaney, *Wilderness Proposals, Debates Cropping Up*, MISSOULIAN, Feb. 23, 2009, at A1, A7, available at http://www.missoulian.com/news/local/article_cc122255-4669-5687-9ed0-5e52769f7699.html. And a spokesperson for Montana Senator Max Baucus said that any wilderness proposal must “have the support of the local community, boost economic development and jobs, and be a local initiative that includes input from all the interested parties.” *Id.*

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

234. The Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009) includes several straightforward traditional wilderness designations. See, e.g., *id.* at Subtitle A (Wild Monongahela Wilderness), and Subtitle G (Sabinoso Wilderness).

water rights and buffer areas are regularly stamped onto future wilderness bills as a matter of course.²³⁵

Debate over the BDP also foreshadows future conflicts about roadless area management. Some conservation interests oppose the BDP approach, either because it fails to protect all roadless areas in the BDNF or does not designate enough of them as federal wilderness. Some groups are willing to gamble that roadless areas on the BDNF will be permanently protected once the roadless rule litigation runs its course. Why sacrifice an acre, in other words, if this administrative protection is forthcoming? On the other hand are those who view the roadless rule as a more temporary stop-gap measure designed to keep the roadless pieces in place until their permanent status can be decided through legislation. After all, the 2001 and 2005 roadless rules do not usurp Congress's prerogative to designate wilderness or to release roadless lands to multiple use management.²³⁶

Also important to consider are the differences between a federal wilderness and a USFS-managed roadless area. Perhaps most important is that the 2001 roadless rule does not prohibit motorized recreation on roadless lands. Calling the 59 million acres protected under the 2001 roadless rule "de facto wilderness" is simply wrong. While federal wilderness law clearly prohibits motorized recreation, the 2001 roadless rule does not. Motorized recreation is the wildcard in this story. Its usage in roadless areas could be prohibited by travel management plans. But more plausible is that the USFS will allow some use in roadless areas and such use will hamper future efforts at designating areas as wilderness.²³⁷ There is some urgency to designating areas as federal wilderness because of growing threats posed by motorized recreation. This reality forces critics of the BDP and other wilderness proposals to answer how they propose to address this situation. What happens, for example, to roadless lands that are not soon protected as wilderness? Will increasing motorized use in these areas, by design or default, make the question of future wilderness designation moot? Choosing to wait for a more inclusive and pure wilderness law is perfectly understandable. But holding out comes with the significant risk that some roadless lands will be even more contested by motorized recreationists in the future.

C. Precedent

What positive and negative precedent would be set if the BDP and other place-based bills become law? Might "bottom-up" approaches inform a more

235. See Natural Resources Law Center, *supra* note 123 (documenting special use provisions and precedents in wilderness law).

236. See 66 Fed. Reg. 3244, 3252 (Jan. 12, 2001) (explaining how the 2001 rule fits with existing laws and policies); 70 Fed. Reg. 25,654 (May 13, 2005).

237. See *supra* note 38 and accompanying text (reviewing the amount of roadless lands open to motorized use).

system-wide reform of national forest management? Would place-based laws eventually be used as a way to undermine federal environmental laws?

On the one hand, some applicable lessons might be learned from this case and applied elsewhere. All sorts of ways in which to reform national forest management have been proposed in the past,²³⁸ and most of those proposals focus on systemic measures imposed on all national forests from the top-down.²³⁹ Rarer are proposals seeking to learn lessons from the bottom-up, and the BDP offers opportunity in this regard. A number of Partnership participants and critics express concern about the general state of national forest management and its legal and planning framework. Change must happen, they insist, but why not start thinking at the forest-level as opposed to the system-wide level when it comes to reform? Perhaps the BDP and similar initiatives can inform a more system-wide inquiry about national forest law and what can be done about it.

On the other hand, a dangerous precedent could also be set by the BDP proposal. For it to become law, at least part of Montana's congressional delegation would most likely have to support it. With state political support, the bill's chances of success are greatly improved, as Congress has a history of deference to state delegates when it comes to wilderness politics.²⁴⁰ But there is also an expectation that such deference will be shown to other state congressional delegations. So, for example, if Idaho's delegation defers to Montana's in passing the BDP proposal, we should expect that Montana's delegation will play by the same rules. There are exceptions to this reciprocity of course, due to differences in context and a bill's substance. Nonetheless, the game is generally played this way. Proceeding with the place-based approach to national forest management thus merits caution. If the recent spate of place-based bills become law, there will certainly be more offered in the future. And if history offers any indication, some of those proposals will be even more controversial than the BDP.

For a recent example, consider the Clearwater Basin Project Bill debated in 2004.²⁴¹ This "charter forest" and pilot project would have governed parts of the Clearwater and Nez Perce National Forests in Idaho.²⁴² It contained several contested provisions that environmental interests believed set a dangerous

238. See, e.g., NIE, *supra* note 66 (evaluating various options in public lands law reform); Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127 (2005) (analyzing several reform proposals, including place-based and "hybrid" models).

239. See, e.g., ELIZABETH BEAVER ET AL., NATURAL RES. LAW CTR., *SEEING THE FOREST SERVICE FOR THE TREES: A SURVEY OF PROPOSALS FOR CHANGING NATIONAL FOREST POLICY* (2000).

240. SCOTT, *supra* note 231, at 120–21; see also DENNIS ROTH, PUB. NO. FS 391, *THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964–1980*, 4 (1984) (discussing the principle of "comity" in Congressional wilderness politics).

241. S. 433, 108th Cong. (2003).

242. Other controversial pilot projects were advanced in Idaho by a Federal Lands Task Force that sought increased active management of the National Forests. See FED. LANDS TASK FORCE WORKING GROUP, *BREAKING THE GRIDLOCK: FEDERAL LAND PILOT PROJECTS IN IDAHO* (2000).

precedent for how *national* forests ought to be managed.²⁴³ Among these was a provision giving an “advisory” group (consisting of Idaho residents only) an undue amount of power to set forest priorities, schedules, and agendas.²⁴⁴ The bill also imposed deadlines for required environmental analyses.²⁴⁵ If such requirements were not performed in time, their lack of completion could not be used as a basis for challenging the associated projects.²⁴⁶ This controversial bill did not become law, but the political dynamics could be different in the future if place-based enabling legislation becomes more widely used in neighboring states.

Potential for abuse is even more acute if individual forest bills contain special privileges and exemptions that are not available elsewhere. Consider, for example, the Black Hills National Forest. Former South Dakota Senator Tom Daschle used the appropriations process to codify a negotiated settlement regarding future management of part of the Black Hills National Forest.²⁴⁷ The most controversial part of the deal exempted some fuel reduction projects from NEPA analysis, lawsuits, and administrative appeals.²⁴⁸ This special treatment quickly became political fodder as several other members of Congress asked why Senator Daschle and the Black Hills should get exemptions not offered elsewhere.²⁴⁹ This outcry was then followed by several copycat legislative proposals seeking the same exemptions for other national forests.²⁵⁰ The lesson from this case, and others like it, is that subsequent efforts in codifying place-based agreements could have a dangerous snowball effect.

As discussed above, the BDP proposal has its own share of controversial provisions. The process used to craft the proposal has also drawn fire, from perceptions of exclusivity to its consideration by the USFS after the public comment period ended. On a more general level are concerns about giving priority and a privileged voice to self-selected interests in managing national forests. And then there is the question of what types of pork will inevitably be stuffed into future proposals. Future place-based bills will be scrutinized to some degree and may pass or fail on their merits alone. At this point, however, it is worth considering how we might ensure that positive precedent is set and that future proposals are environmentally sound and in the public interest.

243. *Clearwater Basin Project Act; Arapaho and Roosevelt National Forests Land Exchange Act; and Highlands Conservation Act: Hearing on S. 433, S. 1280 and H.R. 1964 Before the Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Natural Resources, 108th Cong.* (2004) [hereinafter *Clearwater Basin Project Act Hearings*].

244. S. 433, 108th Cong. § 3 (2003).

245. S. 433, § 4(f).

246. S. 433, § 4(f)(3).

247. Pub. L. No. 107-206, § 706, 116 Stat. 820, 864 (2002).

248. *Id.* § 706(j), 116 Stat. at 868–69.

249. See *Clearwater Basin Project Act Hearings*, *supra* note 243. This coalition represented members from almost every Western state. See April Reese, *Daschle Fuels Exemption Fires up Western Republicans*, LAND LETTER, Aug. 1, 2002; Brian Stempeck, *Western Senators Pledge to Expedite Fuels Treatment Projects*, GREENWIRE, Aug. 2, 2002.

250. See Reese, *supra* note 249; Stempeck, *supra* note 249.

D. Funding and Implementation

What financial benefits, risks, and limitations are there in expanded use of stewardship contracting? Would a proliferation of place-based laws challenge the USFS from a budgetary standpoint?

As discussed above, the BDP would be primarily implemented and paid for by using stewardship contracting authority. For good reason, the Partnership wants to free the BDNF from the highly uncertain congressional appropriations process, a process that chronically underfunds the USFS and its needed restoration work.²⁵¹ If lawmakers continue to under invest in federal lands and the agencies responsible for managing them, we will undoubtedly see increased use of stewardship contracting and other questionable ways in which national forests try to become more financially self-sustaining, such as user fees. If used appropriately, stewardship contracting could help achieve some core BDP objectives and help stretch scarce dollars. But we question its viability as a primary implementation strategy and raise concerns about its potential abuse and related consequences.

The BDNF is a lodgepole pine-dominant forest and some people question whether such forests have enough economic value to make stewardship contracting viable on such a massive scale.²⁵² For stewardship contracting to work, economically valuable trees must be harvested to pay for associated restoration projects. If timber value is overestimated, or markets for small diameter timber do not materialize or cannot be sustained, restoration projects will not be financed. No one can be certain about what the timber market will bear in the future, so this assertion that restorations projects can be fully funded via stewardship contracting is mostly speculation. The point is that some risks and uncertainties of the proposal cannot be legislated away.

If enacted, the BDP proposal would make stewardship contracting more of a program than a tool, as it would be associated with “official accomplishment targets.” It was not designed for such a responsibility.²⁵³ If overused,

251. Part of this problem is due to the USFS having to transfer money from other agency programs to pay for fire management costs. See U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-04-612, WILDFIRE SUPPRESSION: FUNDING TRANSFERS CAUSE PROJECT CANCELLATIONS AND DELAYS, STRAINED RELATIONSHIPS, AND MANAGEMENT DISRUPTIONS (2004). In 2007, for example, wildland fire-related appropriations represented over 40 percent of the agency's total appropriations. See U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-09-443T, FOREST SERVICE, EMERGING ISSUES HIGHLIGHT THE NEED TO ADDRESS PERSISTENT MANAGEMENT CHALLENGES 2 (2009); see also ROSS GORTE, CONG. RESEARCH SERV., PUB. NO. RL 33990, WILDFIRE FUNDING (2008) (providing an overview of these issues). Another problem is the USFS's line item budget structure that lacks a comprehensive restoration line item.

252. Lodgepole pine accounts for 46 percent of the forested area, or 1.26 million acres, of the BDNF. BDNF REVISED PLAN, *supra* note 29, at 452.

253. Though used in a different context, the GAO makes a distinction between tools and programs. “Both agencies [the USFS and BLM] generally consider stewardship contracting to be a tool, rather than a program, because it has no associated budget or official accomplishment targets. Instead, the agencies must use existing appropriations to plan and administer their stewardship contracting activities.” GAO STEWARDSHIP CONTRACTING, *supra* note 207, at 14.

stewardship contracting has the potential to create problematic incentives. As explained above, its authority allows a national forest to retain receipts from timber sales for use on other stewardship projects. The requirement to use stewardship monies on future stewardship projects distinguishes it from other USFS accounts and slush funds that have caused considerable controversy and recent judicial rebuke.²⁵⁴ Nonetheless, there is a potential for creating a dangerous dependency on stewardship sales. Generating a new stream of revenue for the USFS was not the primary objective of the stewardship contracting law.²⁵⁵ And with diminished budgets, USFS officials may reasonably wish to sell the largest and most economically valuable trees as part of a stewardship contract, so that more dollars can be used to accomplish broadly defined restoration goals.²⁵⁶

The greater danger here is that the USFS will begin to view this contracting approach—and selling more or bigger trees to do more fuel reduction work—as its only option. In a Herger-Feinstein Act-related project in California,²⁵⁷ the USFS only analyzed this financing option in its NEPA analysis of possible fire reduction projects, essentially treating the arrangement as the only way the agency could do restoration work.²⁵⁸ But the state of California questioned this assumption, and the Ninth Circuit found the agency's view too limited and in violation of NEPA.²⁵⁹ Alternative ways to fund fire reduction objectives were not analyzed by the agency, such as requesting a special appropriation from Congress, altering the Service's fuel treatment program, or re-prioritizing other funding.²⁶⁰ It is hard not to sympathize with the agency in this regard. Perhaps it is simply adjusting to its new political reality, and trying to use whatever tools it can to get work done. But the public

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

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

256. How retained receipts are spent by the USFS is unknown because the agency does not track subsequent expenditures. GAO STEWARDSHIP CONTRACTING 2008, *supra* note 207, at 20.

257. Pub. L. No. 105-277, Div. A., § 101(e) title IV, § 401(3), 112 Stat. 2681-305 (1998).

258. NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed plan that has significant environmental effects. 40 C.F.R. § 1502.14(a) (2009).

259. *Sierra Forest Legacy v. Rey*, 526 F.3d 1228 (9th Cir. 2008). In a concurring opinion, Judge John T. Noonan continues to explore possible conflicts of interest apparent in the USFS's approach to funding fuel reduction objectives. 526 F.3d at 1234 (Noonan, J., concurring).

260. *Sierra Forest Legacy*, 526 F.3d at 1228, 1232 (majority opinion).

should not acquiesce so easily and let Congress off the hook. As the Ninth Circuit asks, if fuel reduction work is of the first importance, and “[i]f the USFS does not have enough [funding], why should not Congress be asked to give it more?”²⁶¹ In our view, stewardship contracting, among other tools used to promote financial self-sufficiency, does not absolve Congress of its duty to fund the USFS at responsible levels.

Long-term multi-year stewardship contracts also carry risks. These contracts create some certainty of timber supply, as desired by the BDP, and aid in the possible development of markets for small-diameter timber. The long-term approach is logical on many levels because it facilitates industry investment and allows the agency to take a more landscape-level view of forest restoration. But circumstances change, and what may be cost effective one year may be different the next.

Take, for example, the case of the “White Mountain Project” in Arizona. The Government Accountability Office reports that this very large stewardship project has incurred greater costs than expected and that such costs have “taken a substantial toll on the forest’s other programs,” including range, wildlife, hazardous fuels, and vegetation and watershed management.²⁶² Further, some other fuel reduction projects were not being completed because their funding sources were being “monopolized” by the White Mountain Project.²⁶³ Other national forests in the region also paid a price to service the terms of this contract, and “[a]s the region has redirected funds toward the White Mountain Project, these other forests have become resentful of the disproportionate amount of funding the project has received.”²⁶⁴

Beyond our concerns about overreliance on stewardship contracting, we also question how future place-based laws might be funded. Generally speaking, USFS budgets are programmatically-aligned, not place- or forest-centric.²⁶⁵ Money for programs on the national forests is based on a limited set of resource-specific line-items that get “stovepiped” from National Headquarters to the individual national forests. Some criticize this approach because it does not align well with the integrated or ecosystem-based nature of forest management, and because some prioritized activities, such as restoration, do not have their own line-items.²⁶⁶ Several recommendations have been made in the past about how to fix USFS budgetary problems, including the possibility

261. *Id.* at 1233.

262. GAO STEWARDSHIP CONTRACTING 2008, *supra* note 253, at 49.

263. *Id.* at 50.

264. *Id.*

265. *Cf.* U.S. Forest Serv., Historical Budget Information, <http://www.fs.fed.us/aboutus/budget/> (last visited Jan. 16, 2010) (listing budget documents back to FY2004).

266. *See, e.g.,* RURAL VOICES FOR CONSERVATION COALITION, 2010 APPROPRIATIONS ISSUE PAPER (2009), available at <http://www.sustainablenorthwest.org/resources/rvcc-issue-papers/2009-IssuePapers/2009ipapprops>.

of a “place-based budgeting” structure.²⁶⁷ From a budgetary perspective, the place-based approach could also move the national forests closer to that of the national parks, where state congressional delegations treat parks like their own fiefdoms, exercising inordinate control over a unit via committees and purse strings.²⁶⁸

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

IV. ALTERNATIVES

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

The BDP is essentially an experiment in forest management with some inherent risks. One way of ensuring that future proposals are procedurally and substantively sound is to begin a more deliberate and organized period of experimentation. Instead of considering a flurry of place-based bills on an ad hoc basis, Congress could pass an umbrella statute authorizing experiments in national forest management, without the need for multiple forest-specific laws. This umbrella legislation would provide the legal parameters necessary to

267. See V. ALARIC SAMPLE & TERENCE J. TIPPLE, PINCHOT INSTITUTE FOR CONSERVATION, IMPROVING PERFORMANCE AND ACCOUNTABILITY AT THE FOREST SERVICE: OVERCOMING THE POLITICS OF THE BUDGETARY PROCESS AND IMPROVING BUDGET EXECUTION, DISCUSSION PAPER 99-01 (1999) (draft report on file with authors) (exploring the possibility of replacing the fragmented programmatically-based budget structure of the USFS with one based on budget line items representing national forests).

268. For related analyses see Fischman, *supra* note 80, at 803–06; Keiter, *supra* note 238, at 1127, 1209.

ensure that proposals are in the national interest and are not a backdoor way of undermining environmental regulations. Congress could also provide some general objectives and necessary components if proposals are to move forward, such as requiring that all proposals have a mandatory monitoring program in place.

Two general frameworks should be considered in this context. We are interested in them mostly because of their design, and not necessarily because of their substance. The first is provided by the Collaborative Forest Landscape Restoration Program, established in 2009.²⁶⁹ This program selects and funds carefully screened landscape-level forest restoration projects.²⁷⁰ Such projects must comply with existing environmental laws and be developed and implemented through a collaborative process.²⁷¹ Up to ten proposals can be funded per year (with only two proposals in any one region of the national forest System), and each project is evaluated based on several criteria.²⁷² The program authorizes \$40 million per year for fiscal years 2009 to 2019 to be used to pay for up to 50 percent of selected restoration projects.²⁷³ Once chosen, these projects must incorporate the best available science, use multiple party monitoring, and submit reports to selected congressional committees.²⁷⁴ The program has received broad-based support, from both environmental groups and the forest products industry.²⁷⁵ Many of the program's goals and objectives are similar to those advocated by the BDP, including long-term and landscape-level restoration, rural economic development and stability, collaboration, and more secure funding.²⁷⁶ But unlike the place-based bills reviewed above, the program's demonstration projects are subject to predetermined rules and national-level oversight.

The "Region 7" proposal provides another relevant example of how future experimentation could be organized.²⁷⁷ If enacted by Congress, a virtual region of the USFS would be created in order to house innovative approaches and

269. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tit. IV, 123 Stat. 991 (2009).

270. *Id.* § 4001.

271. *Id.* § 4003(b).

272. *Id.*

273. *Id.* § 4003(f).

274. *Id.* §§ 4003(g)–(h).

275. See, e.g., *Collaborative Ecological Restoration, Hearing on S. 2593 Before the S. Comm. on Energy and Natural Resources*, 110th Cong. (2008).

276. 16 U.S.C. § 7301 (2006).

277. The proposal was made by a group of individuals representing different perspectives whom met several times at the University of Montana's Lubrecht Experimental Forest. For more on the proposal and its process see Daniel Kemmis, *Re-examining the Governing Framework of the Public Lands*, 75 U. COLO. L.R. 1127, 1129 (2004). See also *Community-Based Land Management and Charter Forests, Hearing Before the Subcomm. on Forests and Forest Health of the H. Comm. on Resources*, 107th Cong. 7–11 (2002) (statement of former Congressman Pat Williams) (providing an outline of the Region 7 proposal); Daniel Kemmis, *Region 7: An Innovative Approach to Planning on or Near Public Lands*, LAND USE L. & ZONING DIGEST (2003), at 3.

different models of forest management.²⁷⁸ After receiving congressional authorization to experiment, different trials would be selected in order to test new ideas and foster learning.²⁷⁹ Experiments, trials, and pilot projects could flow from the bottom-up and be housed within this region.²⁸⁰ Details notwithstanding, Region 7's general framework—authorizing and facilitating experimentation based on pre-established guidelines deserves congressional consideration.

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

New approaches to forest planning could also be tested within an experimental framework. As discussed earlier, widespread dissatisfaction with forest planning processes partially explains the growing interest in place-based legislation.²⁸¹ BDP participants seem dissatisfied with both the 1982 and the 2005/2008 planning regulations. In the search for binding commitments and greater predictability, stakeholders now look to Congress rather than a hobbled USFS. But like it or not, some type of forest planning is here to stay. Instead of abandoning the 1982 or 2000 planning regulations in favor of an untested “paradigm shift” in planning found in the 2005/2008 regulations, the USFS could try a series of planning experiments on a smaller scale. All new ideas would be housed within an experimental framework with oversight and sideboards.

A broader-gauged approach is for Congress to revisit forest planning law. The place-based proposals reviewed in this Article show that stakeholders are

278. Region 7 of the USFS was split into Regions 8 and 9 and thus basically disappeared.

279. *Community-Based Land Management and Charter Forests, Hearing Before the Subcomm. on Forests and Forest Health of the H. Comm. on Resources*, 107th Cong. 8 (2002) (statement of Jay O'Laughlin, Director, Idaho Forest, Wildlife and Range Policy Analysis Group).

280. *Id.* at 8–11.

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

trying to achieve greater certainty, among other objectives, via place-based legislation. This is partly because of problems related to NFMA and its interpretation by the Courts and implementation by the USFS. Hence, if so few people seem satisfied with forest planning, then why not make singular changes to NFMA, rather than pass a series of place-based laws? After all, Congress could make the Court's decisions in *Ohio Forestry* and *SUWA* irrelevant by amending NFMA.²⁸² Instead of focusing on symptoms related to a perceived broken planning process, this approach digs deeper to make root-level changes to forest planning law.

Rather than pursuing change on a national scale, perhaps solutions to place-specific problems can be found by experimenting on an even smaller scale. It is certainly possible to carve out some space on the BDNF, even at the district level, within which to try some of the things proposed by the Partnership. Such an approach would not be landscape-scale, but neither would it be so scary to so many different interests. And if it worked as envisioned at this smaller scale, it would be easier to jump to something larger in the future. The question, then, is why not try something smaller first, monitor the results of the carefully screened experiment, and scale-up from there?

Finally, though it didn't work out in the BDP case for various reasons, another option is to embed place-based proposals into the forest planning process for agency consideration. Ideally such proposals could be analyzed by the USFS in a NEPA-based planning model. This approach has been used in the past in other contexts.²⁸³ For example, when considering the proposed reintroduction of grizzly bears into the Selway Bitterroots of Montana and Idaho, the U.S. Fish and Wildlife Service chose a collaboratively written preferred alternative that gave a citizen management committee some implementation authority.²⁸⁴ The proposal was never implemented, but many interests still approve of how the process merged collaboration into the more formalized NEPA process.²⁸⁵

There is also some history of groups submitting their own forest planning alternatives for agency consideration, though these efforts are not always collaborative or detailed in nature. As discussed above, some interests believe

282. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

283. The Gifford Pinchot National Forest, for example, chose a collaboratively written alternative to a proposed timber sale in 2005. See Natalie M. Henry, *Nearly Scrapped, Controversial Timber Sale Finds Support of Coalition*, LAND LETTER, Mar. 31, 2005, available at <http://www.eenews.net/Landletter/2005/03/31/archive/4?terms=nearly+scrapped>.

284. U.S. FISH & WILDLIFE SERV., DEP'T OF THE INTERIOR, GRIZZLY BEAR RECOVERY IN THE BITTERROOT ECOSYSTEM: FINAL ENVIRONMENTAL IMPACT STATEMENT 2-5, 2-11, 2-17 (2000), available at <http://www.fws.gov/mountain-prairie/species/mammals/grizzly/FEIS2000/index.htm>.

285. See, e.g., Sarah Van de Wetering, *Bitterroot Grizzly Bear Reintroduction: Management by Citizen Committee?*, in *ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST* 151-59 (Philip Brick, Donald Snow, & Sarah Van de Wetering eds., 2001).

that forest planning processes are more of a problem than a solution and that legislation offers more permanent resolution of issues. Critics also remind us of the tenuous nature of commitments made in forest plans and that this option still gives the USFS final decision-making authority. While true, it is also worthwhile to consider how we might combine the best of place-based legislation with the security, rigor, transparency, and public process required of NEPA. Most of the place-based proposals reviewed above still require NEPA analysis, but only for projects that implement the proposed legislation. The alternative suggested here differs in that it requires the proposal itself to be subject to NEPA.

CONCLUSION

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

Our analysis shows that several factors precipitate interest in place-based legislation. A highly unstable and uncertain political environment best characterizes contemporary national forest management.

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

There is some history of using place-based legislation in federal lands management. Unit-specific enabling laws characterize management of the national parks and wildlife refuges. These systems are generally governed under the terms of their establishment acts and broader organic legislation. Unlike these systems, the national forests are managed under a more uniform

set of laws, from the 1897 Organic Act to NFMA.²⁸⁶ But our review shows that place-based laws have also been applied occasionally to the national forests. Such laws come in a variety of forms, from legislated protected land use designations to more complex laws like the Tongass Timber Reform Act and the Herger-Feinstein Act.²⁸⁷

There is nothing inherently wrong with seeking legislated solutions to forest management, like those in Alaska and California. Political choices about resource allocation are entirely appropriate for congressional resolution. We thus find some criticism leveled at the BDP and other place-based proposals unwarranted. One strength of the place-based approach is that it allows conflicts to be resolved from the bottom-up, but then legitimized by an Act of Congress—so we get the rule of law, but we get that law individually tailored and place-specific.²⁸⁸ And in theory, Congress will ensure that the national interest is represented.

All of the initiatives discussed here are admirable in their efforts to secure broader-based solutions and conservation strategies that advance wilderness, restoration, and a sustainable timber industry. Whether passed or not, these place-based proposals also advance our thinking about national forest reform—from the bottom up. We also applaud these initiatives for confronting some of the most controversial issues in forest management in a straightforward fashion. If lawmakers do ever revisit NFMA, they should first study how place-based groups have approached the relevant issues.

While we are not opposed to place-based legislation in principle, we hope the aforementioned questions will be answered before the approach is adopted more broadly. Of particular concern to us is the precedent that could be set by these bills. If history is any guide, passage of place-based laws will generate wider interest in the approach, and future bills may not be carefully balanced and constructed. We would like to see greater assurances that future bills will not be used to undermine federal environmental law and to devolve control of federal lands to self-selected stakeholders.

The question of how these initiatives will fit into the larger legal structure also deserves more scrutiny. Simply adding another mandate for the USFS to implement, while retaining NEPA and other legal responsibilities, could increase frustration with and within the agency. Funding these initiatives is also a concern. Stewardship contracting was never designed to serve as the primary funding stream for the USFS, and it should not be treated as such. And though each place-based proposal may make financial sense when viewed in isolation, what effect would a proliferation of place-based laws have on the USFS budget in general?

286. 16 U.S.C. §§ 473–482, 551 (2006); 16 U.S.C. §1600 (2006).

287. 16 U.S.C. § 539d (2006); 16 U.S.C. § 2104 (2006).

288. See Nie, *supra* note 66, at 214–15, 254–55 (reviewing the potential of place-based land laws to deal with political allocation conflicts in comparison to other problematic methods of conflict resolution).

The intent of this Article is to provide a preliminary assessment of place-based legislation and to ask questions that will help guide future debate. We have certainly asked more questions than provided answers, and we plan on addressing some of the issues raised here in future work. Whether or not place-based proposals like the BDP become law, these initiatives are worthy of study and scrutiny because of the lessons and opportunities they provide. They place front-and-center issues that deserve immediate attention, like the fate of inventoried roadless areas, the growth of motorized recreation, forest restoration needs, agency funding woes, and the disarray that currently characterizes forest planning. Though not without problems and challenges, place-based approaches provide detailed alternatives to the status quo and shift the debate over forest management in significant ways.

AFTERWORD

Shortly after this Article was accepted for publication, Montana Senator Jon Tester introduced Senate Bill No. 1470, the “Forest Jobs and Recreation Act” (FJRA).²⁸⁹ The bill includes three place-based proposals reviewed in our Article: the BDP proposal,²⁹⁰ the “Three Rivers Challenge” focused on part of the Kootenai National Forest,²⁹¹ and the relatively modest “Blackfoot-Clearwater Landscape Stewardship Project” dealing with part of the Lolo National Forest.²⁹² The Senator modified some of these agreements and then lumped them together into one multi-faceted bill that has generated a vigorous debate in the region.²⁹³

Some of the bill’s major provisions include those we outlined in Part II.B: wilderness and protected land use designations, a timber supply mandate, restoration objectives, and the use of stewardship contracting.²⁹⁴ It first seeks to designate roughly 677,000 acres of wilderness and 336,000 acres of special management areas in the three national forests, with the latter designed to protect some places from resource use while allowing and enhancing some types of motorized use.²⁹⁵ In exchange for these designations, the bill mandates

289. Forest Jobs and Recreation Act of 2009, S. 1470, 111th Cong. (2009). For more about the bill, see Sen. Jon Tester, Legislation, <http://tester.senate.gov/Legislation/foresthme.cfm> (last visited Dec. 29, 2009).

290. See *supra* Part II.

291. See *supra* notes 149–152 and accompanying text.

292. See *supra* notes 143–148 and accompanying text.

293. See, e.g., Martin Nie, *Place-based Forest Law: Questions, Opportunities Presented by Montana Sen. Jon Tester’s Forest Jobs and Recreation Act*, HEADWATERS NEWS, Sept. 24, 2009, <http://www.headwatersnews.org/p.ForestJobsAct092809.html> (last visited Jan. 15, 2009). New West Network provides the most complete coverage of the debate, with a comprehensive chronology and a series of opinion pieces. See Schneider, *supra* note 210; see also Ray Ring, *Taking Control of the Machine*, HIGH COUNTRY NEWS, July 20, 2009. For more on opposition to Senator Tester’s bill, see The Last Best Place Wildlands Campaign, A Clear Look at the “Forest Jobs and Recreation Act,” S. 1740, <http://testerloggingbilltruths.wordpress.com/> (last visited Jan. 29, 2010).

294. See *supra* Part II.b.

295. Forest Jobs and Recreation Act of 2009, S. 1470, 111th Cong. tit. II (2009).

that 70,000 acres on the Beaverhead-Deerlodge and 30,000 acres on the Kootenai are to be “mechanically treated” by the USFS over the next ten years.²⁹⁶ Priorities and sideboards are set for where these projects can happen,²⁹⁷ so they will most likely be funneled into the roaded front country. Non-timber related restoration goals are set in the bill, though compared to the treatment mandate, they are not quantified nor prescribed in as much detail.²⁹⁸ Also worked into the legislation is funding for a biomass project for a timber mill in the Seeley-Swan Valley.²⁹⁹ And finally, just like the BDP proposal, the bill relies heavily upon the use of stewardship contracting to achieve its treatments and restoration work, though it also authorizes other spending to meet its purposes.³⁰⁰

The Senate Subcommittee on Public Lands and Forests held a hearing on S. 1470 in December 2009.³⁰¹ As expected, members of the Beaverhead-Deerlodge Partnership proposal testified in favor of S. 1470.³⁰² But the bill received a more critical reception by Harris Sherman, representing the USFS as Undersecretary of Agriculture.³⁰³ He raised several questions that were analyzed in Part III of this Article.

The Subcommittee’s ranking member, Ron Wyden of Oregon, expressed a particular interest in Senator Tester’s bill. This is partly because Senator Wyden has proposed his own place-specific national forest law: the Oregon Eastside Forests Restoration, Old Growth Protection, and Jobs Act of 2009.³⁰⁴ The bill sets new management goals and processes for six national forests in eastern Oregon, covering nearly ten million acres. As this Article goes to press, the fates of both bills remain uncertain.

296. *Id.* § 102(b)(2)(D).

297. *Id.* §§ 102(a)(2), (b)(8).

298. *See id.* § 102.

299. *Id.* § 105.

300. *Id.* § 106.

301. *Public Lands and Forests Subcommittee, Hearing to Receive Testimony on S. 1470, S. 1719, S. 1787, H.R. 762 and H.R. 934*, 110th Cong. (2009), available at http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=506d4038-9383-540e-6697-6db84663f270 (webcast).

302. *Id.* (statements of Sherman Anderson and Tim Baker).

303. *See id.* (statement of Sherman Anderson).

304. S. 2895, 111th Cong. (2009).

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