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PLACE-BASED CONSERVATION LEGISLATION AND NATIONAL FOREST  
MANAGEMENT: THE CASE OF THE BEAVERHEAD-DEERLODGE  
PARTNERSHIP

By

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Thesis

presented in partial fulfillment of the requirements  
for the degree of

Master of Science  
in Environmental Studies, Natural Resources Policy

The University of Montana  
Missoula, Montana

December 2008

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## Place-Based Conservation Legislation and National Forest Management: The Case of the Beaverhead-Deerlodge Partnership

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This paper investigates the use of place-based conservation legislation as a tool for conflict resolution, wilderness designation and unit-level administrative planning reform on national forests by analyzing the case of the Beaverhead-Deerlodge Partnership in Southwestern Montana. The codification of place-based negotiated compromises over forest management is a significant departure from the administrative planning approach used to resolve multiple-use conflicts by the U.S. Forest Service. The goals of this paper were to develop a place-based legislation typology for natural resources policy, to determine the motivations for seeking this approach, and to analyze its use.

Preliminary research for this project was begun in December 2007 by reviewing relevant natural resources policy literature, documentation and legislation. This was followed by in-depth interviews with 13 natural resource policy professionals. These interviews showed that the interest in the place-based conservation legislation approach was primarily due to a frustration over perceived agency “gridlock,” a desire for increased certainty in the planning process, unresolved wilderness designations, and the need for comprehensive conservation measures in a changing West.

The primary benefits of the place-based legislated approach, according to those interviewed, are its potential to make headway on the wilderness “stalemate” in Montana, to implement needed stewardship and restoration of national forests, to catalyze public lands and law reform, and to try to provide increased stability for local timber economies. On the other hand, some interviewees worried that a focus on unit-level legislation would lead to poor national forest governance, while others questioned the ability to fund and implement these initiatives. Still others were concerned over statutory language releasing IRAs and mandating mechanical treatments. These considerations are important not only at the unit level, as in the case of the Beaverhead-Deerlodge Partnership, but also because of precedents that this approach might set.

Finally, the place-based legislation policy typology developed for this paper includes national parks and wildlife refuges, national forest units, and protected land laws like wilderness law, companion designations, conservation omnibus acts, and place-based conservation legislation. This is important, for each legislation type has a different purpose, allowing for a more nuanced analysis of individual pieces of legislation.

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## I. Introduction

This project investigates the use of place-based conservation legislation as a way to resolve multiple use conflicts on public lands, in particular those managed by the U.S. Forest Service. The place-based conservation legislation proposed by the Beaverhead-Deerlodge Partnership<sup>1</sup> in southwest Montana presents a timely and representative case study of this type of legislated initiative, and is the focal point for this investigation. This research seeks to accomplish three main goals: (1) to identify and analyze the motivations for seeking place-based conservation legislation as well as the arguments for and against using this approach, (2) to better develop the place-based conservation legislation typology in order to facilitate further analysis in the field of natural resource policy, and (3) to analyze place-based conservation legislation as an approach to resolving multiple-use conflicts on national forests, particularly from the perspective of public lands governance and public land law reform.

Section I begins by discussing the backgrounds of some of the factors that have created natural resource conflicts on national forest lands managed for “multiple uses;” factors like inventoried roadless area (IRA) conservation, wilderness designation, timber production, and both the changing climate and demographics of the West. Section II describes the methods used to accomplish this study. Section III puts the place-based legislation approach to natural resource conflicts in a larger policy context, discussing public lands enabling legislation, the tension between statutory detail and administrative discretion, and the legal language (and controversy) surrounding the “release” of IRAs. In this section I also outline a policy typology used to categorize different types of place-specific legislation and contextualize unit-based approaches like the one being pursued by the Beaverhead-Deerlodge Partnership (B-D Partnership). Section IV is a case study of the B-D Partnership. This section starts with a background of both the Beaverhead-Deerlodge National Forest (B-DNF) and the B-D Partnership, and then compares the B-DNF’s Revised Land and Resource Management Plan (LRMP) to the B-D Partnership Strategy and the proposed Beaverhead-Deerlodge Conservation, Restoration and

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<sup>1</sup> Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, Revised Draft, October 9, 2007, <http://www.bhdlpartnership.org/PDFs/Legislation-Draft.10.09.07.pdf>.

Stewardship Act of 2007. Throughout this section I use the policy information gained from the in-depth interviews to guide the inquiry and to provide a background for the analysis. Section V analyzes the place-based conservation legislation approach from multiple perspectives, including the motivations for seeking this approach, wilderness designation and IRA preservation, forest planning, implementation, and natural resources governance. This section uses the case of the B-D Partnership and the in-depth interviews to provide specific examples, as well as drawing and expanding upon the concepts outlined in the previous four sections.

## **Background**

The natural resources conflict that is most central to the creation of place-based conservation legislation is likely the one over inventoried roadless area (IRA) designation and preservation. There has been a lot of debate surrounding whether or not (and how much) IRA acreage should be protected as wilderness, released to multiple-use, or given another land management designation altogether. What began with the passage of the Wilderness Act in 1964<sup>2</sup> was followed by two Roadless Area Review and Evaluation processes (RARE I and RARE II) which were meant to inventory all remaining roadless areas within national forests for potential wilderness designations.<sup>3</sup> This conflict continues today with the uncertainty surrounding the 2001 Roadless Area Conservation Rule (RACR)<sup>4</sup> and the subsequent alternative process of IRA preservation and release through the state petition process and the Roadless Area Conservation National Advisory Committee (RACNAC), proceeding under the Administrative Procedures Act (APA).<sup>5</sup>

The contemporary debate over roadless area preservation, wilderness designation and resource extraction on national forests has also provoked critiques of the Forest Service and its multiple-use management mandate. The Forest Service manages over 193 million acres of national forests in 44 states.<sup>6</sup> Currently, these lands contain 58 million

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<sup>2</sup> 16 U.S.C. § 1131 (2000).

<sup>3</sup> Mike Anderson, "A Decade of National Forest Roadless Area Conservation: Background Paper." *The Wilderness Society*, 2008: 2-4.  
<http://wilderness.org/Library/Documents/upload/Roadless%20background%20TWS%20Anderson%20Jan%202008.pdf>.

<sup>4</sup> *Federal Register* 64 (October 19, 1999): 56,306.

<sup>5</sup> 5 U.S.C. 553 (e) (2000); and 7 C.F.R. 1.28.

<sup>6</sup> Anderson, "A Decade of National Forest Roadless Area Conservation," 1.

acres of IRAs and 35 million acres of designated wilderness, leaving around 100 million acres of land accessed by the largest road network in the world.<sup>7</sup> Since their creation, roughly 386,000 miles of roads have been built on our national forests, mostly to facilitate the harvest of commercial timber.<sup>8</sup>

Timber harvesting, however, has declined over the past two decades. According to the Forest Service, the annual U.S. timber harvest peaked in 1989 at 18.8 billion board feet and has been declining ever since.<sup>9</sup> There are a number of different reasons for this trend, some related to Forest Service management and some not, though this decline has been difficult for those who depend upon the timber industry for their livelihoods in any case. Many former timber towns in the western United States that did not successfully diversify their economies have fallen on hard times.<sup>10</sup>

In addition to economic and cultural considerations, national forests are experiencing more pressure, from more sources, than ever before. Intense wildfires and a build up of “fuels,” invasive species, loss of open space, and unmanaged motorized recreation increasingly threaten public lands, and are becoming more difficult to balance under multiple use planning mandates.<sup>11</sup> Combined with the stresses of a hotter and drier climate, as well as expanding recreational and residential development, these pressures are impacting fish and wildlife populations, increasing wildfire management costs, and threatening water resources.<sup>12</sup> Increasing fire suppression demands, particularly in the wildland urban interface (WUI), have created budget overruns that have pulled scarce Forest Service resources away from mitigating these sources of pressure, at times keeping the agency from accomplishing even the basic stewardship needs of the forests.<sup>13</sup>

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<sup>7</sup> Ibid., 2.

<sup>8</sup> Ibid.

<sup>9</sup> It should be noted that in the South, timber harvest actually continued to climb after 1989, especially on private lands. See Darius M. Adams et al. “Estimated Timber Harvest by U.S. Region and Ownership, 1950-2002.” *U.S. Forest Service, Pacific Northwest Research Station, General Technical Report PNW-GTR-659*, January, 2006:14, 17. [http://www.fs.fed.us/pnw/pubs/pnw\\_gtr659.pdf](http://www.fs.fed.us/pnw/pubs/pnw_gtr659.pdf).

<sup>10</sup> See Thomas Michael Power, *Lost Landscapes and Failed Economies: The Search for a Value of Place*. (Washington, D.C.: Island Press, 1996), 57-58.

<sup>11</sup> Dale Bosworth, *A New Chapter in the History of American Conservation*. USDA Forest Service, October 30, 2006. <http://www.fs.fed.us/projects/four-threats/>.

<sup>12</sup> U.S. Forest Service. *Forest Service Performance and Accountability Report – Fiscal Year 2004* (Washington, DC: U.S. Department of Agriculture, 2005), 7-8. <http://www.fs.fed.us/plan/par/2004/docs/par-2004.pdf> (Accessed 11/06/2008).

<sup>13</sup> Ibid., 7.

As a resource becomes scarce, it increases in value. Professor emeritus of history, Roderick Nash, wrote that, “A simple scarcity theory of value, coupled with the shrinking size of the American wilderness relative to American civilization, underlies modern wilderness philosophy.”<sup>14</sup> As civilization and development grow around them, wild areas are becoming increasingly scarce resources. Just 2.39 percent of the 48 contiguous states is federally designated wilderness,<sup>15</sup> while 58.5 million acres of roadless areas remain unprotected in our National Forests (about 30 percent of our total National Forest System). Furthermore, existing forest plans allow for road building on 34 million of these acres, or 59 percent of remaining IRAs, though this threat seems small when compared with threats like unmanaged off-highway vehicle (OHVs) use in IRAs.<sup>16</sup>

Wild areas are becoming increasingly scarce, hence more valuable to the people who care about them, but this theory of marginal valuation also applies to the natural resources traditionally derived from our public lands such as timber.<sup>17</sup> While the demand for natural resources continues to increase world-wide, the supply of timber in the United States has not followed suit for a number of political, economic, and ecological reasons, especially on public lands. This perceived competition over scarce resources has caused conflict.

Former Forest Service Chief Jack Ward Thomas states that out of this conflict has emerged “a seemingly perpetual political melee guided by professional activists on both – maybe all – sides, replete with political organizers, propagandists, spin doctors, demonstrators, and occasional bona fide terrorists.”<sup>18</sup> For a number of reasons, including the impossibility of a long-term 13 billion board feet (bbf) per year timber harvest nationwide, Thomas thinks that the preservationist side has “won” the battle.<sup>19</sup> If this is

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<sup>14</sup> Roderick Frazier Nash, *Wilderness and the American Mind*. 4<sup>th</sup> ed. (New Haven and London: Yale University Press, Nota Bene, 2001), 249.

<sup>15</sup> Wilderness.net. “The National Wilderness Preservation System: Common Misconceptions.” October, 2008. <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=misconceptions>.

<sup>16</sup> The Wilderness Society. “National Forest Roadless Areas.” <http://www.wilderness.org/OurIssues/Roadless/index.cfm>.

<sup>17</sup> Martin Nie, *The Governance of Western Public Lands: Mapping Its Present and Future*. (Lawrence: University of Kansas, 2008), 15.

<sup>18</sup> Jack Ward Thomas, “The Future of the Forest Service – Who Will Answer an Uncertain Trumpet?” In *Challenges Facing the U.S. Forest Service: A Critical Review*, ed. Daniel Kemmis, (Missoula: O’Connor Center for the Rocky Mountain West and The University of Montana Press, 2008), 35.

<sup>19</sup> *Ibid.*



correct, it was a short term win. While those whose livelihoods have depended upon timber continue to hope and advocate for a resurgence of the timber industry, conservationists are split over the relative risks of keeping the timber infrastructure intact versus letting it disappear, states Thomas.<sup>20</sup> Some conservationists that are pushing for wilderness protection for all IRAs still view timber companies with mistrust. Holding out for an uncompromised “win” to them is both ethically and strategically important. Other conservationists are worried about environmental and demographic changes that they see taking place, as well as the potential loss of timber processing infrastructure that might be needed to help mitigate and reverse those changes through ecological restoration.<sup>21</sup>

In addition to these physical and social factors, since the 1980s, nearly every aspect of Forest Service policy has been the subject of criticism, especially forest planning under the National Forest Management Act (NFMA)<sup>22</sup> and the National Environmental Policy Act (NEPA).<sup>23</sup> The current method of conflict resolution used by the Forest Service, the “legal planning model,”<sup>24</sup> tends to promote agency paralysis rather than on-the-ground stewardship in many cases.<sup>25</sup> As such, there is a large amount of dissatisfaction with the status quo, as well as acknowledgement that it may not be the most effective approach to forest planning in the long run.<sup>26</sup> Absent reform of the Forest Service’s administrative planning process, stakeholders are left to either continue to participate in the forest planning process as-is or to seek out solutions available to them outside of this process.

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<sup>20</sup> Ibid.

<sup>21</sup> Tim Baker and Michael Garrity. “Ending the Wilderness Drought.” in *The Natural Allies Chronology*. ed. Bill Schneider. NewWest.net, February 22, 2008, [http://www.newwest.net/topic/article/ending\\_the\\_wilderness\\_drought/C41/L41/](http://www.newwest.net/topic/article/ending_the_wilderness_drought/C41/L41/).

<sup>22</sup> 16 U.S.C. § 1600-1614 (2000).

<sup>23</sup> 42 U.S.C. § 4321-4375 (2000).

<sup>24</sup> The legal planning model, writes Law Professor Robert Keiter, relies upon the detailed planning standards outlined in the NFMA (or FLPMA, in the case of the BLM) with the “extensive procedural mandates” of laws like NEPA and the ESA superimposed over this planning process. The resulting forest plans create both legally binding obligations and legally enforceable standards, providing “an array of litigation opportunities.” “The basic objection to the present legal-planning regime is its complexity,” writes Keiter, “particularly its reliance on process to make what are quite difficult value-based resource allocation decisions.” See Robert B. Keiter, “Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective.” *Utah Law Review* 1127, 2005: 1180-1181, 1187.

<sup>25</sup> Ibid., 1180.

<sup>26</sup> Christine M. Cromley, “Community-Based Forestry Goes to Washington,” Ronald D. Brunner ed. *Adaptive Governance: Integrating Science, Policy and Decision Making*, (New York: Columbia University Press, 2005), 258. Quoting Committee Chairman, Senator Frank Murkowski at the end of ten hearings of a subcommittee of the Senate Energy and Natural Resources Committee.

Combined with other factors affecting conservation and timber interests, the current climate is ripe for the creation of new compromises and new coalitions. For some conservationists in Montana, it is no longer sufficient to rely upon the “de facto” preservation that many IRAs have enjoyed since at least the decline of the Forest Service’s timber program in the early 1990s.<sup>27</sup> It has also been nearly 25 years since a new wilderness area has been designated in Montana.<sup>28</sup> Likewise, timber interests in the region point out that the infrastructure that supports local timber companies is being pushed to the brink of extinction. The prospect of adding fuels reduction and restoration work to traditional timber harvesting is very appealing, especially if innovative funding authorities like “stewardship contracting” are incorporated. These groups view adhering to the status quo as unsatisfactory, and see the potential for resolving conflict in a mutually beneficial way by crafting a negotiated compromise. The Beaverhead-Deerlodge Partnership is one such group, composed of three conservation organizations (The Montana Wilderness Association, Montana Trout Unlimited, and the National Wildlife Federation) and five timber companies (Pyramid Mountain Lumber, Sun Mountain Lumber, Roseburg Lumber, RY Timber, and Smurfit-Stone).<sup>29</sup>

Mark Rey, Undersecretary of Agriculture for Natural Resources and Environment writes that we are on the cusp of the “4<sup>th</sup> chapter in the history of the American conservation experience.”<sup>30</sup> This trend, states Rey, will be marked by a number of grassroots initiatives that have become buzzwords in the fields of conservation and forestry: “collaboration,” “regionalism,” and “cooperation.”<sup>31</sup> While most of the initiatives falling under these headings thus far have been voluntary and advisory to the land management agencies, a small (and perhaps growing) number have sought or are seeking to create unit-level legislation for consideration by Congress, either skipping the administrative planning approach entirely or doing so after having been disappointed by

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<sup>27</sup> Thomas, “The Future of the Forest Service,” 35.

<sup>28</sup> Montana Wilderness Association, “Wilderness Areas,”

<http://www.wildmontana.org/resources/areas.php>, (Accessed on 01/31/2008).

<sup>29</sup> See the Beaverhead-Deerlodge Partnership website, <http://www.bhdlpartnership.org/>. This is also discussed much more thoroughly in Section IV.

<sup>30</sup> Mark Rey, “A New Chapter in the History of American Conservation,” In *Challenges Facing the U.S. Forest Service: A Critical Review*, ed. Daniel Kemmis (Missoula: O’Connor Center for the Rocky Mountain West and The University of Montana Press, 2008), 24.

<sup>31</sup> Ibid.

its outcome. Such “place-based conservation legislation” has been utilized in the past in well-known cases such as the Quincy Library Group and the Valles Caldera National Preserve, along with other cases discussed in more detail in later sections of this paper.<sup>32</sup>

There is more place-based legislation in the works too. In addition to the Beaverhead-Deerlodge Partnership’s proposed legislation (to be introduced to Congress in 2009), another group in Montana has drafted similar legislation for the Blackfoot and Clearwater Valleys,<sup>33</sup> as has a group for the Colville National Forest region in eastern Washington.<sup>34</sup> While this type of strategy has been lauded by some as an innovative and cooperative problem-solving method,<sup>35</sup> it has also been the subject of intense criticism, as one will see in the case study of the B-D Partnership in Section IV.

Critical analysis of this approach is needed, for when one combines the potential for parochialism among local stakeholders with the question of democratic access to Congressional subcommittees, not only is this a significant departure from the status quo deference and discretion given to the Forest Service, but the potential for unintended consequences is also very real. Questions linger over meeting standards of good governance, certainty and accountability, local versus national representation, flexibility and durability, as well as funding and implementation. These questions need to be explored much further before the place-based legislation approach is accepted as a viable solution to multiple-use conflicts. Though this approach has seen relatively little use so far, interest in place-based conservation legislation is high, and one can assume that if campaigns like that of the Beaverhead-Deerlodge Partnership are successful, we will see a more widespread use of this approach in the future.

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<sup>32</sup> See The Valles Caldera National Preserve, <http://www.vallescaldera.gov/>; The Quincy Library Group, <http://www.qlg.org/>.

<sup>33</sup> Blackfoot-Clearwater Landscape Stewardship Project, “The Blackfoot-Clearwater Landscape Stewardship Pilot Act of 2008,” *Landscape Proposal*, 2008, <http://www.blackfootclearwater.org/proposal>.

<sup>34</sup> Northeast Washington Forestry Coalition (Colville National Forest), “Blueprint Collaborative Process,” <http://www.newforestrycoalition.org/blueprint.Summary.htm>.

<sup>35</sup> Perry Backus, “State Backs Compromise Plan for Forest Management,” *The Missoulian*, June 28, 2006, <http://www.missoulian.com/articles/2006/06/28/news/mtregional/news04.txt>.

## II. Methods

This case study was completed over the course of six months in early 2008. In addition to a review of natural resource policy literature and associated agency and non-governmental organization (NGO) documents, the study utilized informal consultations with key players, administrators, and policy professionals, as well as 13 supplemental, in-depth interviews of place-based conservation legislation practitioners and natural resource policy professionals in the Northern Rockies.<sup>36</sup> Each interview lasted from 35 minutes to nearly 2 hours, and was qualitative and inductive in nature. Interview subjects were identified from the literature review, recommendations from other policy professionals (via chain referral) and according to their knowledge of the B-D Partnership Proposal or similar initiatives seeking place-based conservation legislation in the region.

Though a small sampling of people, this was a diverse and knowledgeable group, many of whom have worked in the conservation or natural resources fields for decades. Six of the people interviewed supported the B-D Partnership, four were opposed to it, and three were undecided. Four of those interviewed were actually part of the B-D Partnership while nine were regional or national policy professionals, or land managers with knowledge in this area of policy and the B-DNF.

Each respondent was sent an “Interview Questionnaire”<sup>37</sup> to be used as a general guide in the interview. Interviews were inductive in nature and conducted under a promise of confidentiality. Each interview was recorded on a standard cassette dictating machine with the permission of the interviewee, and transcribed using the University of Montana Environmental Studies Program’s manual transcription device. This work was completed by the author by the end of May, 2008, and resulted in 127 pages of single-spaced transcripts.

The B-D case is not only controversial, but ongoing. As such, the interviews are analyzed in this paper for themes in natural resource governance and conflict resolution, not for individual dialogue or personal position statements, which were held in strict confidence. Specific quotations found in this paper were either approved by the person

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<sup>36</sup> This was a purposive sampling. Though a total of 25 people were contacted during the scoping process, only 13 of those could be scheduled for interviews.

<sup>37</sup> See Appendix A for a sample interview questionnaire.

interviewed, remain anonymous, or were taken from public media sources (press releases, articles, speaking engagements, hearings, etc.).

This project contains three main threads of inquiry: The first was a literature review of primary and secondary sources. The author identified and reviewed relevant literature, case studies, litigation, and legislation relating to national forest management, enabling legislation, conflict resolution, and place-specific legislation. Much of this work was accomplished through a review of natural resources policy literature, legislative records, and agency documentation.

The second was investigative research focused on identifying other instances of place-based conservation legislation. The author documented key instances and provisions where Congress has provided place-specific legislative direction as a tool to resolve conflict over multiple-use lands in the national forest system.<sup>38</sup> The scope of this documentation was limited to cases of negotiation between extractive, recreation and conservation uses, and is not exhaustive.<sup>39</sup> This investigation was completed through a literature and legal search, phone calls, in-person communication, and personal inquiry. The focus was on the identification and analysis of relevant policy and law, as well as the continued search for cases of place-based conservation legislation, not on the positions or opinions of those contacted during communications.<sup>40</sup>

Lastly, the case study focused on researching the policy context and interests surrounding the Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007. The case study was largely supplemental to the paper and consisted of a literature review and archival research; personal interviews of key players, stakeholders, and experts in the area; and a critical analysis of the forces and incentives leading up to the formation of the Beaverhead-Deerlodge Partnership Plan and proposed legislation.<sup>41</sup>

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<sup>38</sup> See Appendix B of this paper.

<sup>39</sup> As discussed in Section III in the context of “quid pro quo” and “wilderness reciprocity,” these cases are essentially negotiated compromises between public lands interest groups, codified by Congress at the behest of the parties involved.

<sup>40</sup> The author wishes to thank the U.S. Forest Service’s Legislative Affairs Office for their interest and cooperation in helping to find a number of place-based laws focused on national forest management.

<sup>41</sup> The author would further like to thank all of those interviewed, as well as the many people who supplied documents and expertise throughout this project, in particular the folks in the NEPA and Appeals Office at U.S. Forest Service Region One and at the Beaverhead-Deerlodge National Forest Supervisor’s Office.

### **III. The Policy Context**

Since 1905, national forests in the United States have been governed by the U.S. Forest Service in accordance with the prescriptions and guidelines set forth in a number of public lands laws. For the most part, Congress' preferred method of public lands law reform has been to overlay increasingly detailed procedural demands on top of already existing legislation rather than to choose any large, substantive overhaul.<sup>42</sup> The statutes most relevant to forest planning reform and place-based conservation legislation are the Organic Administration Act of 1897 (Organic Act), the Multiple Use Sustained Yield Act (MUSYA) of 1960, the National Environmental Policy Act of 1969 (NEPA) and the National Forest Management Act (NFMA) of 1976. Understanding this history is critical to understanding not only the genesis of the place-based conservation legislation approach, but the enduring fight over agency discretion in forest management. The history of the Wilderness Act and the conflict over roadless area preservation and release also figure prominently in this approach.

In addition, I compare different types of place-based enabling legislation in this section of the paper. This yields a rough policy typology that helps to differentiate between the place-based enabling legislation used for National Parks and National Wildlife Refuges, National Forest units, and protected lands laws like individual Wilderness and Companion Designations, Place-Based Conservation Legislation, and Conservation Omnibus Acts. This typology is important to establish because each type of place-based legislation serves a different purpose, and should therefore be evaluated differently.

#### **National Forests and Public Lands Law**

The U.S. Forest Service, housed within the Department of Agriculture, currently manages 155 national forests, 23 national grasslands, and a number of research and

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<sup>42</sup> Keiter, "Public Lands and Law Reform," 1129.

experimental areas within its nine administrative regions.<sup>43</sup> This is a large organization by any standards, but its beginnings were relatively modest. The Forest Service's Organic Act,<sup>44</sup> enacted in 1897, detailed three purposes of national forests. It states that, "No national forest shall be established, except to improve the forest within the reservation, 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 the citizens of the United States."<sup>45</sup> When the Forest Service was created in 1905, Gifford Pinchot was hand picked by Teddy Roosevelt as its first Chief.<sup>46</sup> Pinchot sought "congressional support without congressional supervision,"<sup>47</sup> which he received with the enactment of the "paradoxical" Organic Act.<sup>48</sup> This began what is commonly called the "Custodial Era," and the tradition of agency discretion.<sup>49</sup>

By granting the Forest Service broad management discretion, Congress essentially said that national forests are best managed by forestry professionals rather than politicians (though sometimes this line is blurred). Under Pinchot, administrative discretion meant that the agency was able to determine "the greatest good for the greatest number in the long run," but after World War II and the end of the Custodial Era, that increasingly meant that the agency was free to prioritize timber production over other values on national forests.<sup>50</sup> In 1930, the Knutson-Vandenberg Act gave the Forest Service a monetary incentive to "get out the cut" through a guaranteed share of any

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<sup>43</sup> James Rasband et al, *Natural Resources Law and Policy*, (New York: Thomson West, 2004) 211, 212.

<sup>44</sup> 16 U.S.C. § 473-551 (2000).

<sup>45</sup> 16 U.S.C. § 475 (2000).

<sup>46</sup> Jim Posewitz, "National Forest Conservation: The Preservation of Principle and Idealism," in *Challenges Facing the U.S. Forest Service: A Critical Review*, ed. Daniel Kemmis (Missoula: O'Connor Center for the Rocky Mountain West and The University of Montana Press, 2008), 9,10.

<sup>47</sup> Martin Nie, "Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives." 19 *Journal of Environmental Law and Litigation* 223, 2004: 231

<sup>48</sup> Frederico Cheever, "The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion," 74 *Denv. U. L. Rev.* 625 (1997).

<sup>49</sup> Pat Williams, "Forest Service – Where Did You Come From, With What Mission, and Where Oh Where Are You Headed?" in *Challenges Facing the U.S. Forest Service: A Critical Review*, ed. Daniel Kemmis (Missoula: O'Connor Center for the Rocky Mountain West and The University of Montana Press, 2008), 4.

<sup>50</sup> Thomas, "The Future of the Forest Service," 31.

revenue created. This, among other factors, ushered in the “Timber Era” from the 1940s to the early 1990s.<sup>51</sup>

The administrative discretion that served the agency so well during the Custodial Era under Pinchot, allowed the agency to essentially institute a dominant use management paradigm during the Timber Era. The Northern Rockies in particular was a major source of the timber that fed the postwar housing boom, with Montana and Idaho seeing several hundred new timber companies established during this time.<sup>52</sup> The results, however, were mixed. Interest in recreation on public lands had grown and Americans were questioning the widespread timber extraction paradigm on what they viewed as their national forests. If the Forest Service could not provide for recreation and preservation values, perhaps the National Park Service in the Department of the Interior could better manage those lands. Though the Forest Service initially opposed the idea of “multiple use, sustained yield” (MUSY), in order to answer non-timber concerns and to not lose any more lands to the Department of Interior (which was viewed as more preservation focused), the agency helped to draft the Multiple Use Sustained Yield Act (MUSYA) which was passed by Congress in 1960.<sup>53</sup>

MUSYA gave statutory recognition to non-timber uses of national forests.<sup>54</sup> The language of the Act was also constructed in such a way that it does not really limit administrative discretion, going so far as to list possible “uses” in alphabetical order in order to not prioritize or prescribe any one use: “That it 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.”<sup>55</sup> This was subsequently affirmed in *Sierra Club v. Hardin*.<sup>56</sup> In a forest managed for “multiple uses,” the Forest Service can conceivably decide to dedicate 95% - or whatever percentage it sees fit - of the forest to logging and still be within the law as long as “due consideration” of values is provided.<sup>57</sup>

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<sup>51</sup> Ibid.

<sup>52</sup> Paul W. Hirt, *A Conspiracy of Optimism: Management of the National Forests Since World War Two*, (Lincoln: University of Nebraska Press, 1996), 50.

<sup>53</sup> Thomas, “The Future of the Forest Service,” 32.

<sup>54</sup> 16 U.S.C. § 528 et seq. (2000).

<sup>55</sup> Ibid., 528.

<sup>56</sup> 325 F. Supp. (D. Alaska 1971); Rasband, *Natural Resources Law and Policy*, 217.

<sup>57</sup> Ibid.



Though MUSYA did not really rein in administrative discretion, four years and an immense amount of effort later, a law was passed that did. The Wilderness Act was passed on September 3, 1964,<sup>58</sup> and established the National Wilderness Preservation System, constraining land management agency's discretion by enabling Congress to designate wilderness areas on public lands. Wilderness designation removes areas chosen by Congress from MUSY management, preserving them in their "natural condition" for "future generations."<sup>59</sup> According to the Act's often quoted and eloquent passage:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.<sup>60</sup>

Once designated, wilderness areas are managed by the federal agency that had jurisdiction over the land immediately prior to its designation as wilderness, though the act does prescribe how that land must be managed.<sup>61</sup>

In the years immediately following the passage of the Wilderness Act in 1964, a number of other environmental laws were enacted: The Historic Preservation Act of 1966,<sup>62</sup> the National Trails<sup>63</sup> and Wild and Scenic Rivers<sup>64</sup> Acts of 1968, the National Environmental Policy Act (NEPA) of 1969,<sup>65</sup> the Clean Water Act Amendments (CWA) of 1972,<sup>66</sup> and the Endangered Species Act (ESA) of 1973.<sup>67</sup> This seemed to signify a new environmental consciousness and scrutiny on the part of the American people, though at the time the Forest Service was still taking full advantage of their discretion under the MUSYA. Nonetheless, these laws have since further reduced the amount of discretion once enjoyed by the Forest Service.

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<sup>58</sup> 16 U.S.C. 1131-1136 (2000).

<sup>59</sup> *Ibid.*, 1131 (a).

<sup>60</sup> *Ibid.*, 1132 (c).

<sup>61</sup> Rasband, *Natural Resources Law and Policy*, 611.

<sup>62</sup> 16 U.S.C. § 470 (2000).

<sup>63</sup> 16 U.S.C. § 1241 (2000).

<sup>64</sup> 16 U.S.C. § 1271-1287 (2000).

<sup>65</sup> 42 U.S.C. § 4321-4375 (2000).

<sup>66</sup> 33 U.S.C. § 1251 (2000).

<sup>67</sup> 16 U.S.C. § 1531-1544 (2000).

This reduction of administrative discretion would continue with the publication of the “Bolle Report,”<sup>68</sup> which took a hard look at the Bitterroot National Forest, and the subsequent enactment of the National Forest Management Act (NFMA) of 1976.<sup>69</sup> According to the Bolle Report, “multiple use management, in fact, does not exist as the governing principle on the Bitterroot National Forest.”<sup>70</sup> The ensuing Bitterroot Conflict along with contested clear-cutting practices on the Monongahela National Forest would eventually lead to the enactment of NFMA by Congress.<sup>71</sup>

NFMA is significant in the formulation of place-based conservation legislation because rather than change the Forest Service’s mandate, it added yet another layer of procedure and impact analysis to forest planning. Discussion of NFMA’s full affect on forest policy is much too large to reproduce here, but it is important to note that while NFMA did not ultimately reduce administrative discretion to a very large degree, it did reduce it both substantively and procedurally, also giving administrative actions a much greater exposure and public forum in the form of the Land and Resource Management Plans (LRMPs). Each national forest is required to update their LRMP every ten to fifteen years through a prescribed planning process, though the most recent planning rule was still under litigation at the time of this writing.

Like NEPA before it, NFMA, and the regulations promulgated under its authority, also provided a significant set of “legal hooks” by which citizens can appeal administrative decisions and file lawsuits to halt administrative actions. While the Forest Service credits these layers of process for creating “analysis paralysis” or the “process predicament,” they have in fact provided stronger protection for non-timber resources.<sup>72</sup> Even still, the MUSYA, NEPA and NFMA did little to change the fact that the Forest Service still has the last word in planning, and according to some, Congress ultimately

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<sup>68</sup> Arnold Bolle et al, *A University View of the Forest Service: A Select Committee of the University of Montana Presents Its Report on the Bitterroot National Forest*, (Washington D.C.: Congressional Record, November 18, 1970), 1 ; later published as S. Doc. 115, 91<sup>st</sup> Cong., 2d Sess. (1970).

<sup>69</sup> 16 U.S.C. § 1600-1614 (2000).

<sup>70</sup> Bolle, *A University View of the Forest Service*, 1.

<sup>71</sup> Nie, *The Governance of Western Public Lands*, 48.

<sup>72</sup> James Burchfield and Martin Nie, “National Forests Policy Assessment,” *Report to Senator John Testor*, (Missoula: College of Forestry and Conservation, University of Montana, September, 2008), 6-7.

“failed to answer the central philosophical questions regarding forest management,” leaving the need for further clarification or reform.<sup>73</sup>

### **Roadless Area Review and Conservation**

No background on place-based conservation legislation would be complete without delving into the twisted fate of our nation’s roadless areas. Combined with the “process predicament,” roadless area conservation weighs heavily in the place-based conservation legislation approach, especially in light of damages caused by unmanaged motorized recreation (as mentioned in Section I). The Wilderness Act required that within ten years of the Act’s passage, the Secretary of Agriculture or the Chief of the Forest Service would review areas previously classified as “primitive” for wilderness suitability.<sup>74</sup> This process, the first Roadless Area Review and Evaluation (RARE I), not only inventoried primitive areas, but all roadless tracts of over 5,000 acres, resulting in 56 million acres of national forest land that could qualify as wilderness.<sup>75</sup> Unhappy with the outcomes of litigation surrounding RARE I, the agency sought to remedy this through a second RARE process.<sup>76</sup>

The Forest Service initiated a second Roadless Area Review and Evaluation (RARE II) in 1977.<sup>77</sup> In this study, it found 62 million acres of potential wilderness, recommending that 15 million acres be designated as wilderness, 11 million acres be “studied further,” and 36 million acres be managed for multiple uses. This attempt to reinforce agency discretion did not get very far, for in *California v. Block*, the Ninth

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<sup>73</sup> Nie, “Statutory Detail and Administrative Discretion,” 231.

<sup>74</sup> 16 U.S.C. § 1132 (2000).

<sup>75</sup> Rasband, *Natural Resources Law and Policy*, 614.

<sup>76</sup> It should be noted that though the areas identified in RARE I were merely potential wilderness recommendations at this point, the courts affirmed in *Parker v. United States* that the Forest Service could not harvest timber in areas contiguous to roadless areas because it would prevent the President from proposing (and Congress from designating) the area as wilderness in the future; *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), in *Ibid.* Likewise, *Wyoming Outdoor Council v. Butz* required that the Forest Service first prepare an Environmental Impact Statement (EIS) that examined the impact of proposed logging on an area’s potential for wilderness designation; *Wyoming Outdoor Coordination Council v. Butz*, 484 F.2d 1244 (10<sup>th</sup> Cir. 1973); *Sierra Club v. Butz*, 3 Env’tl. L. Rep. 20071 (N.D. Cal. 1972); in *Ibid.*, 615.

<sup>77</sup> *Ibid.*

Circuit ruled that the RARE II EIS did not adequately consider the implications of releasing 36 million acres from wilderness consideration.<sup>78</sup>

The debate over the release of IRAs and the “release language” is an important aspect to the conflict over roadless area preservation. After *California v. Block*, there was pressure by development interests to “release” roadless areas from the court-ordered area-by-area review of wilderness potential.<sup>79</sup> This desire for the release of roadless areas (on the part of development interests) was used to leverage wilderness designations by wilderness advocates. In 1984, with the Reagan Administration considering dropping RARE II altogether and initiating a RARE III instead, Congress intervened and designated 6.8 million acres of wilderness in twenty statewide bills, releasing those lands that were not chosen to multiple use management for one forest planning cycle (roughly 15 years).<sup>80</sup>

In this release scenario, commonly called a “soft release,” the released roadless areas would revert back to multiple-use management for one forest planning cycle, but would get a “new, fair look” by the Forest Service during each subsequent planning revision.<sup>81</sup> This is in contrast to the “hard release” language favored by wilderness opponents. This statutory language permanently disqualifies an area from being designated as wilderness in the future.<sup>82</sup> Even “harder” release language exists too, attaching special provisions and stipulations to released roadless areas that preclude even “pro-wilderness management” of an area.<sup>83</sup>

With public and scientific concerns mounting over roads and roadless area protection, in 1999, Forest Service Chief Mike Dombeck proposed that the Forest Service adopt an 18-month temporary moratorium on road construction across most of the

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<sup>78</sup> *California v. Block*, 690 F.2d 753 (9<sup>th</sup> Cir. 1982).

<sup>79</sup> Doug Scott, *The Enduring Wilderness: Protecting Our Natural Heritage through the Wilderness Act*, (Golden, CO.: Fulcrum, 2004), 82.

<sup>80</sup> Anderson, “A Decade of National Forest Roadless Area Conservation,” 2.

<sup>81</sup> Scott, Doug, *Enduring Wilderness*, 83.

<sup>82</sup> John Leshy, “Contemporary Politics of Wilderness Preservation,” 25 *J. Land Resources and Envtl. L.* 10, 2005: 10.

<sup>83</sup> For example, the Beaverhead-Deerlodge Partnership legislation releases roughly 200,000 acres of IRAs, some of which is included in “stewardship areas” that mandate timber harvest. See Beaverhead-Deerlodge Partnership, “Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007.” Revised Draft – October 9, 2007: 2. <http://www.bhdpartnership.org/PDFs/Legislation-Draft.10.09.07.pdf>; and also Beaverhead-Deerlodge Partnership, *Stewardship Landscape Maps*, <http://www.bhdpartnership.org/maps.htm>. This is also seen in some conservation omnibus bills like the Steens Mountain legislation, as discussed below.

National Forest System.<sup>84</sup> That same year, President Bill Clinton instructed the Forest Service to initiate the rulemaking process that would later become the 2001 Roadless Area Conservation Rule (RACR). With 1.7 million public comments produced, this became the most extensive public involvement process in the history of federal rulemaking, and the comments were overwhelmingly in support of roadless area conservation.<sup>85</sup>

Following the inauguration of President George W. Bush, and the ensuing controversy over the RACR initiated by industry groups,<sup>86</sup> the Bush Administration suspended the rule and replaced it with a “state petitioning” process<sup>87</sup> whereby state governors were given 18 months to petition the Secretary of Agriculture to adopt rules governing roadless area management in their state under the Administrative Procedures Act of 1946 (APA).<sup>88</sup> Only six states submitted petitions, five of which asked the Secretary to follow the roadless rule.<sup>89</sup> Idaho, the sixth state, petitioned for protection of less than one third of the IRA acreage in the state,<sup>90</sup> but the final rule (promulgated in October, 2008) provides much more protected acreage than that while attempting to answer some of the criticisms of the RACR from some rural Idaho communities.<sup>91</sup>

Since 2001, we have seen a legal “back and forth” in the federal court system over the RACR.<sup>92</sup> At the time of this writing, the Roadless Rule is in legal limbo with both the California and Wyoming district court decisions under appeal. Though the RACR does not attempt to resolve the question of whether or not to ultimately “preserve” as wilderness or “release” individual roadless areas, it does attempt to keep all of the pieces intact until those decisions can be made by Congress. As such, the legal status of the

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<sup>84</sup> Anderson, “Roadless Area Conservation,” 3.

<sup>85</sup> Ibid.

<sup>86</sup> Gloria Flora, “Roadless Reflections,” 14 *Duke Environmental Law and Policy Forum* 25, 2004: 411-413.

<sup>87</sup> Anderson, “Roadless Area Conservation,” 4.

<sup>88</sup> 5 U.S.C. 511-599 (2000).

<sup>89</sup> These were Virginia, North Carolina, South Carolina, New Mexico, and California.

<sup>90</sup> Anderson, “Roadless Area Conservation,” 4.

<sup>91</sup> Roadless characteristics are preserved on over 90% of IRA acreage in the final Idaho Roadless Rule (8.5 million acres), while more protection from development is provided for 35% of IRA acreage (3.25 million acres) in Idaho over the 2001 RACR. Even still, it should be noted that the 2001 RACR was “the Environmentally Preferred Alternative” in the Idaho Rule’s FEIS. It predicted 15 miles of road construction or reconstruction over the next 15 years under the 2001 RACR, compared to 50 miles of road under the 2008 Idaho Roadless Rule. *Federal Register*, Vol. 73 No. 201, October 16, 2008: 61457, 61460. [http://roadless.fs.fed.us/documents/idaho\\_roadless/2008-10-16\\_FR\\_Idaho\\_final\\_roadless\\_rule.pdf](http://roadless.fs.fed.us/documents/idaho_roadless/2008-10-16_FR_Idaho_final_roadless_rule.pdf).

<sup>92</sup> Anderson, “Roadless Area Conservation,” 5.

RACR has created uncertainty not only over whether or not IRAs will be conserved in the meantime, but also over when the battles in the district courts will be resolved. This uncertainty provides motivation for interested parties to investigate alternative strategies for dealing with IRAs now. This is evident in the case of the Beaverhead-Deerlodge Partnership as well as in the analogous approaches considered in Section IV.

### **Place-Based Enabling Legislation: A Typology**

“Place-based conservation legislation,” as used in this paper, is just one of a number of types of place-specific enabling legislation used for public lands governance. In contrast to the Forest Service’s unified mission and mandate which is applicable to all national forests, National Parks and National Wildlife Refuges each have place-specific enabling legislation. These pieces of enabling legislation are given priority over their organic acts, as are the small number of unit-level laws governing some National Forests like the Tongass National Forest or the Valles Caldera National Preserve. Likewise, in the context of protected lands law; federal wilderness laws, companion designations and conservation omnibus legislation contain specific, place-based prescriptions – or statutory details – over and above the framework provided by protected area legislation like the Wilderness Act.<sup>93</sup> Developing this policy typology is important, for each of the aforementioned types of place-specific legislation has been used by Congress to fulfill different purposes and to meet different needs. As such, each type also affects public lands governance in different ways. Formulating a typology is one of the first steps toward a comprehensive analysis that assesses the appropriateness of using each of these place-specific tools to formulate public lands policy.

The four broad types of place-specific conservation legislation on public lands discussed here are (1) National Parks and National Wildlife Refuges, (2) National Forest Units, and (3) Protected Lands Laws; with the latter covering (3a) Wilderness Law, (3b) Companion Designations, (3c) Conservation Omnibus Legislation, and (3d) Place-Based Conservation Legislation like that created by the Quincy Library Group and the B-D

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<sup>93</sup> Burchfield and Nie, “National Forests Policy Assessment,” 21.

Partnership.<sup>94</sup> These are outlined below, and a preliminary list of place-based conservation legislation across land management agencies was also compiled for this project, appearing in Appendix B.

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<sup>94</sup> As one will see, “typology” may not be the best descriptor under the “Protected Lands Laws” heading (3a-c). This part of the typology is probably best thought of as a continuum with Wilderness and Companion Designations on one end and Conservation Omnibus Legislation on the other. Place-Based Conservation Legislation then fits nicely in between the two. In any case, though these distinctions are important, their lines become somewhat blurred in many cases.

Table 1: Types of Place-Specific Enabling Legislation

	<b>Defining Characteristics or Provisions</b>	<b>Scale</b>
<b>National Parks and National Wildlife Refuges</b>	Park and refuge establishment legislation, transfer of management authority to the NPS or USFWS (e.g. Black Canyon Of The Gunnison National Park And Gunnison Gorge National Conservation Area Act Of 1999)	Geographically contiguous area
<b>National Forest Units</b>	Unit-level prescriptions (e.g. Tongass Timber Reform Act of 1990)	National Forest units
<b>Protected Lands Laws:</b>		
<b>a. Wilderness and Companion Designations</b>	Wilderness bills and accompanying designations (e.g. Rattlesnake National Recreation Area and Wilderness Act of 1980)	Regional or local
<b>b. Place-Based Conservation Legislation</b>	Forest management prescriptions, wilderness designations, and economic components. Retention of unit management by agency. (e.g. the Herger-Feinstein Quincy Library Group Forest Recovery and Economic Stability Act of 1998)	National Forest units
<b>c. Conservation Omnibus Legislation</b>	Unlimited trading of natural resources commodities in a <i>quid pro quo</i> fashion, including land disposal, changes in jurisdiction, conveyances, rights of way, wilderness designations, etc. (e.g. Clark County Conservation of Public Lands and Natural Resources Act of 2002)	Unlimited, cross-jurisdictional, public and private lands



## NATIONAL PARKS AND NATIONAL WILDLIFE REFUGES

Law professor Robert Fischman has written extensively about the increasing amount of statutory detail in the enabling legislation of national parks and national wildlife refuges. In this context, statutory detail reduces administrative discretion in order to deal with difficult natural resource conflicts.<sup>95</sup> This also indicates, according to Fischman, the “changing attitude of Congress toward parks.”<sup>96</sup> This is important to the analysis of place-based conservation legislation because it provides us with a larger picture of Congress’ involvement with - and methods of resolving - conflicts over natural resource management.

An increase in statutory detail is particularly apparent in National Park Service (NPS) establishment legislation.<sup>97</sup> Contrary to the broad mandates of the 1916 Park Service Organic Act,<sup>98</sup> individual park establishment legislation has increasingly taken away more administrative discretion in the nearly 400-unit national park system. Evidence of this increase in statutory detail can also be seen in the “diverse taxonomy” of protected area categories - fifteen and counting – that have grown out of the simple “parks” and “monuments” system within the National Park System.<sup>99</sup> In cases of conflicting mandates like those found in the Organic Act, Congress has increasingly removed administrative discretion to deal with them, instead prioritizing management mandates. In the case of the NPS, this has not only prioritized the “preservation prong” of the Organic Act (due primarily to an increased recognition of the importance of biodiversity), but also prioritizes funding for these “expressions of congressional preference” over discretionary activities.<sup>100</sup>

The same trend can be found in national wildlife refuge (NWR) establishment legislation, especially when one compares previous organic acts with the National

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<sup>95</sup> Robert L. Fischman, “The Problem of Statutory Detail in National Park Establishment Legislation and its Relationship to Pollution Control Law,” 74 *Denver University Law Review* 779, 1996-1997: 807.

<sup>96</sup> *Ibid.*, 781.

<sup>97</sup> *Ibid.*

<sup>98</sup> The mandate of national parks, monuments and reservations is “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1 (1994). The tension in this mandate to provide “enjoyment” while leaving resources “unimpaired” leaves the NPS a lot of administrative discretion to fulfill it.

<sup>99</sup> Fischman, “The Problem of Statutory Detail,” 790.

<sup>100</sup> *Ibid.*, 783.

Wildlife Refuge Improvement Act of 1997.<sup>101</sup> Congress sought in the Improvement Act<sup>102</sup> to “better integrate the system with its overarching statutory mission, while at the same time giving priority to specific refuge purposes.”<sup>103</sup> What this gives us is a very different system of management for the NWRs than for national forests. In contrast with the broad discretion given the Forest Service to balance the needs of ecosystems and people under the MUSY mandate, the NWRs have been given explicit priorities according to which the refuges must be managed.

The benefits of increased statutory detail are very apparent. When executed properly, it has been shown to be the case in the National Park System that delicate political compromises have been able to garner the necessary support needed for park establishment and preservation.<sup>104</sup> Likewise, states Fischman, Congress might be able to give voice to interests that would otherwise go unnoticed, provide helpful guideposts for agency discretion, and shield the agency from criticism.<sup>105</sup> These benefits could be especially useful in helping to resolve some of the more intractable conflicts that agencies have been ill-prepared to deal with.

This is by no means a perfect fix, however. Rather than deal with existing issues clearly and comprehensively across all federal property, Congress has instead laid out place-specific priorities for new public land designations which can frustrate landscape-level planning and system-wide planning efforts.<sup>106</sup> In turn, these management mandates are often funded over discretionary activities when budgets get tight.<sup>107</sup> Both developments, says Fischman, can impede an agency from “realizing its institutional strengths in technical expertise and flexibility” when too much statutory detail is present.<sup>108</sup> This critique is also germane to the debate over place-based conservation legislation, for each unit-level piece of legislation in some ways fragments the professional management of national forests. This not only raises the pragmatic question

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<sup>101</sup> Robert L. Fischman, *The National Wildlife Refuges: Coordinating a Conservation System Through Law*, (Washington, D.C.: Island Press, 2002), 544.

<sup>102</sup> 16 U.S.C. 668dd. (2002).

<sup>103</sup> Nie, “Statutory Detail and Administrative Discretion,” 244.

<sup>104</sup> Fischman, “The Problem of Statutory Detail,” 804.

<sup>105</sup> *Ibid.*, 804-805.

<sup>106</sup> *Ibid.*, 781.

<sup>107</sup> *Ibid.*, 780.

<sup>108</sup> *Ibid.*, 786.

of how much statutory detail should be present in enabling legislation, but a governance-based one: which institution, Congress or the Forest Service, better represents the desires of the nation and the needs of the forest?

## NATIONAL FOREST UNITS

Congress has at times created unit-level legislation for national forests in an attempt to resolve natural resource conflicts, for experimental management purposes, or to make controversial policy choices in the case of “policy riders.” These cases are different from place-based conservation legislation because the originators of the legislation were not citizen, stakeholder, or “collaborative” groups; and because there were no “quid pro quo” negotiations between interest groups with stakes in the national forest unit. The National Forest System is relatively more unified than the NPS and NWR systems, but there are some cases where national forest units are governed under place-based enabling acts, for example the Tongass Timber Reform Act and the Valles Caldera Preservation Act. Each of these cases is important, for they illustrate some of the challenges associated with reform through statutory detail and management prescriptions.

The conflict over management of the Tongass National Forest in southeast Alaska has been one of the most enduring and intractable natural resource conflicts in the United States. In an attempt to correct the dominant use timber regime created by the Tongass Timber Act and reaffirmed by the Alaska National Interest Lands Conservation Act (ANILCA), Congress passed place-specific unit legislation under the Tongass Timber Reform Act of 1990 (TTRA). The TTRA amended ANILCA, attempting to bring the forest “closer in line” with other units by trying to eliminate the “timber first approach to managing the Tongass.”<sup>109</sup> But the TTRA did not just attempt to institute the MUSY concept on the Tongass, it added two other stipulations. The Act reads:

[T]he 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 demand for

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<sup>109</sup> Martin Nie, “Governing the Tongass: National Forest Conflict and Political Decision Making,” 36 *Environmental Law* 385, 2006: 403.

timber from such forest, and (2) meets the market demand from such forest for each planning cycle.<sup>110</sup>

Seen as a compromise by many of its supporters, as well as an attempt to balance timber harvesting, the law, and other uses,<sup>111</sup> the TTRA in many ways foreshadowed the contemporary attempts at codification of political compromises that one sees in the place-based legislation approach to national forest management conflicts. Far from solving the conflict over the Tongass, though, the TTRA's statutory language, and in particular the "seeking market demand" stipulation, shows how problematic language can drive conflicts over public lands.<sup>112</sup> Natural Resources Policy Professor Martin Nie concludes that the TTRA (along with the history of laws governing the Tongass National Forest from the 1897 Organic Act on) shows that inadequate statutory language has been a "fundamental driver" of forest conflict in southeast Alaska, resulting in disagreement over statutory meaning and uncertainty at to how best to meet statutory obligations. "The over-extended commitments and problematic language contained in these laws," writes Nie, "practically guaranteed intractability and judicial intervention."<sup>113</sup> As one will see in the case of the B-D Partnership, both what a statute says and fails to say can have the potential to cause uncertainty and perpetuate conflict.

Another well-known case, that of the Valles Caldera National Preserve, is a case of experimental management of public lands. In 2000, the federal government purchased the long sought-after Baca Ranch in New Mexico and created the Valles Caldera Trust (VCT) to manage it.<sup>114</sup> The Valles Caldera Preservation Act of 2000<sup>115</sup> authorized the VCT to manage the 89,000 acre ranch as a wholly owned government corporation. The trustees consist of the Santa Fe National Forest Supervisor, the Bandelier National Monument Superintendent, and seven presidential appointees in order to represent diverse regional interests. The VCT had two years to develop a plan to make the Valles

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<sup>110</sup> Tongass Timber Reform Act, Pub. L. No. 101-626 § 101, 104 Stat. 4426 (1990); as cited in *Ibid.*, 404.

<sup>111</sup> *Ibid.*, 404-405.

<sup>112</sup> *Ibid.*, 406.

<sup>113</sup> *Ibid.*, 407.

<sup>114</sup> Sally K. Fairfax, Lauren Gwin and Lyn Huntsinger, "Presidio and Valles Caldera: A Preliminary Assessment of Their Meaning for Public Resource Management," 44 *Natural Resources Journal* 445, 2004: 461.

<sup>115</sup> Pub. L. No. 106-248, Title. 1 (2000).

Caldera National Preserve (VCNP) economically “self-sustainable” by 2015. However, failure to meet that goal could, at worst, result in the VCNP reverting to traditional Forest Service management under the MUSY mandate (As a side note, an interesting comparison with the VCNP is that of the Presidio Trust, which is much more “under the gun” to become self-sustaining, facing disposal to a private entity if it fails). On the contrary, if the VCNP meets with economic success, the Secretary of the Interior may recommend that the trust be reauthorized beyond its current 20 year lifespan.<sup>116</sup> The plan also requires the Preserve to be audited by the Government Accountability Office (GAO), three and seven years out, potentially making the VCNP a valuable lesson in adaptive management.<sup>117</sup> While the Valles Caldera Trust is only just short of half-way through its initially chartered life span, it has interpreted its charter (not surprisingly) along the lines of the Forest Service’s doctrine of “sustainable use.”<sup>118</sup>

Though this may be the case, the enabling legislation of the VCNP mandates management in a much different way than traditional national forest lands. The VCNP is to be managed as a “working ranch,” for the dual purposes of “protecting and preserving” the land, as well as for management of renewable resources for multiple use and sustained yield (MUSY).<sup>119</sup> In other details, the trust is authorized to sell land to the Pueblo of Santa Clara for fair market value,<sup>120</sup> and required to manage the Redondo Peak area above 10,000 feet as non-motorized and roadless except in the case of emergencies.<sup>121</sup> These management mandates are prioritized in the enabling legislation in much the same style as National Wildlife Refuge management priorities, but toward different ends. The VCNP legislation achieves this prioritization through a six point list: The preserve is to be managed (1) as a working ranch, (2) for preservation and protection, (3) according to MUSY, (4) for public use and access for recreation, (5) for renewable resource utilization (in order to benefit local communities, enhance management

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<sup>116</sup> Valles Caldera Preservation Act, S. 1892, Title I, Sec. 110a-c. Valles Caldera National Preserve, [http://www.vallescaldera.gov/about/trust/trust\\_botact.aspx](http://www.vallescaldera.gov/about/trust/trust_botact.aspx).

<sup>117</sup> Fairfax et al., “Presidio and Valles Caldera,” 461.

<sup>118</sup> *Ibid.*, 465.

<sup>119</sup> Valles Caldera Preservation Act, S. 1892, Title I, Sec. 105b (2000).

<sup>120</sup> *Ibid.*, Sec. 104g (1).

<sup>121</sup> *Ibid.*, Sec. 105g.

objective of the surrounding National Forest, and provide cost savings to the trust), and (6) in order to optimize the generation of income based on existing market conditions.<sup>122</sup>

How this experiment will fare when compared with other unit-level national forest legislation and traditional multiple-use management is still to be seen, though the “three-year audit” by the GAO in 2005 showed mixed results.<sup>123</sup> While the Valles Caldera Trust has been shown to have made progress with respect to establishing and implementing management policies “to achieve the goals of preserving and protecting the Caldera and providing for public recreation and sustained yield management,”<sup>124</sup> it has been dogged by issues common to many public lands management initiatives. Long-term funding and fire management were found to be major concerns. With the mandated goal that VCP become financially self-sufficient by 2015, not only are the costs associated with fire planning, management and suppression somewhat daunting, but the Preserve’s revenue stream is dependent upon tourism and recreation that might be harmed by large fires.<sup>125</sup> Likewise, even though some prioritization has been provided in the legislation, the Trust faces some of the same challenges that the Forest Service faces under multiple use management: balancing conflicting goals and objectives for resource development use while at the same time preserving resources for recreation and wildlife needs.<sup>126</sup>

Lastly, in the case of policy riders, members of Congress often times add riders to omnibus spending bills in order to make controversial decisions under the cover of a larger, and often times important, appropriations bill. This abuse in public land governance is long-standing, with many examples of policy riders exempting, or attempting to exempt, projects from judicial review, NEPA requirements, the ESA, and other environmental laws.<sup>127</sup> One of the most infamous examples of the use of policy riders is the 1995 Timber Salvage Rider which effectively mandated the harvest of healthy, valuable timber in the Pacific Northwest, contrary to the ESA, NFMA, and the

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<sup>122</sup> Ibid., Sec. 108d (1-6).

<sup>123</sup> U.S. Government Accountability Office (GAO), *Valles Caldera Trust Has Made Some Progress, but Needs to Do More to Meet Statutory Goals*, GAO-06-98, Report to United States Congressional Committees, November, 2005: 3-4. <http://www.gao.gov/new.items/d0698.pdf>.

<sup>124</sup> Ibid., 9.

<sup>125</sup> Ibid., 22-26.

<sup>126</sup> Ibid., 29-30.

<sup>127</sup> Or in the case of the Arctic National Wildlife Refuge (ANWR), attempting to open a protected area up to oil and gas development. Nie, *Governance of Western Public Lands*, 184.

Northwest Forest Plan.<sup>128</sup> Though this rider was extremely controversial in both scope and intent (and was fiercely lobbied against), it was nested within an appropriations bill meant to give relief to the victims of the Oklahoma City bombing tragedy, leaving legislators with a “Hobson’s choice,” and it passed.<sup>129</sup> This type of unit-level legislation carries with it lessons that can be taken to other forms of place-based legislation, namely that the power that Congress has to create place-specific legislation carries with it both opportunities and dangers for those with interests in national forests. It also illustrates the power that control through the appropriations process can wield over public lands policy.

### WILDERNESS AND COMPANION DESIGNATIONS

As stated previously, the designation of wilderness takes place-specific legislation enacted by Congress. The process by which this legislation is formulated has always been the result of incremental, give-and-take compromises made between many interests.<sup>130</sup> For example, wilderness has always had its strong voices of opposition: primarily the resource extraction industry lobby in the beginning, and now motorized recreation interests.<sup>131</sup> At the same time, wherever there has been a wilderness designated, there have been proponents advocating for its designation, and from all ends of the political spectrum. While the Wilderness Act provides a governing framework for all designated wilderness areas within the National Wilderness Preservation System, each area has its own enabling legislation that is idiosyncratic (to a certain extent) through use of the special provisions and exemptions authorized under Section 4 (d) of the Wilderness Act.<sup>132</sup> Negotiations between interest groups are also made over the boundaries of wilderness areas, resulting in setbacks, “cherry stems,”<sup>133</sup> and the release of non-designated areas. In these compromises, it is safe to say, pragmatism has played as much of a role as idealism.<sup>134</sup> Law Professor John Leschy speculates that many of the

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<sup>128</sup> Richard J. Lazarus, *The Making of Environmental Law*. Chicago: University of Chicago Press, 2004: 159.

<sup>129</sup> *Ibid.*, 160.

<sup>130</sup> Scott, Doug. *The Enduring Wilderness*, 114.

<sup>131</sup> *Ibid.*, 108-111.

<sup>132</sup> 16 U.S.C. 1131-1136, Sec (4) (2000).

<sup>133</sup> Cherry stems refer to the creation of non-wilderness corridors within or between wilderness areas, usually as a wilderness boundary concession to interests that cannot operate within wilderness areas.

<sup>134</sup> Scott, Doug, *The Enduring Wilderness*, 117. This is revisited in the context of place-based conservation legislation in Section V of this paper.

compromises over the years must have been “difficult for wilderness advocates to swallow,” but they were necessary to get the legislation through Congress, and the achievement has been plain: the preservation of an area larger than the state of California.<sup>135</sup> This tradition of compromise can be traced all the way back to the creation of the Wilderness Act, when Howard Zahniser courted a broad consensus among legislators in order to make the Act as strong as possible.<sup>136</sup>

Another negotiation tool that has been used by stakeholders and Congress has been the pairing of companion designations or special management areas with wilderness designations during negotiations over new wilderness areas. Special management areas (SMAs) are “federal lands designated by Congress for a specific use or uses.”<sup>137</sup> SMAs are usually paired with (or within) individual wilderness bills, and include designations such as backcountry areas, reserves, conservation areas, wildlife areas, fish management areas, cooperative management areas, and national recreation areas.<sup>138</sup> Sometimes SMAs are designated to answer competing interests by allowing activities to occur in them that would be prohibited in wilderness areas (for example, motorized or mechanized recreation), while at other times SMAs form “complementary legislation” by protecting critical areas where a wilderness designation would be unlikely to occur because an area is not predominantly of wilderness quality.<sup>139</sup>

These forms of special designation should also be looked at as instances of increased statutory detail, limiting agency discretion through prescribing a dominant use or prioritized management regime. In cases where SMAs are used instead of wilderness designations, paradoxically, they often authorize uses that alter or destroy wilderness characteristics, potentially precluding them from future wilderness designations. Sometimes this is referred to as “wilderness light.”<sup>140</sup> A current example of a proposed

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<sup>135</sup> Leshy, “Contemporary Politics,” 3.

<sup>136</sup> *Ibid.*, 119.

<sup>137</sup> 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: 64.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*, n. 19.

<sup>140</sup> Bill Schneider, “Are We Ready for Wilderness Lite?” *NewWest.net*, October 11, 2007, [http://www.newwest.net/topic/article/are\\_we\\_ready\\_for\\_wilderness\\_lite/](http://www.newwest.net/topic/article/are_we_ready_for_wilderness_lite/).



SMA in this category can be found in the “Lost Creek Protection Area” proposed in the Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007.<sup>141</sup>

## CONSERVATION OMNIBUS LEGISLATION

Much like the place-based conservation legislation approach that is the subject of this paper, conservation omnibus legislation establishes a series of trade-offs and compromises in order to designate new wilderness areas, but at a scale much greater than the national forest unit level. Conservation omnibus legislation deserves special attention in this discussion, for it provides evidence of the far-reaching effect of legislated compromises when taken to their logical extremes.

Sometimes called “quid pro quo wilderness” legislation, conservation omnibus legislation takes the negotiated compromise farther than other forms of place-specific legislation.<sup>142</sup> Supporters bill this strategy as “a way forward through collaboration,” and a way to “avoid impasse and come together to hammer out difficult compromises that accommodate most interests.”<sup>143</sup> As “something for everyone,” these bills often include provisions for the disposal of federal land, land exchanges between multiple parties (private, federal, local, state, management agencies, etc.), public land conveyances, changes in zoning, wilderness exemptions, roadless area and WSA releases, rights of way, and utility corridors – pretty much any land use commodity that could possibly be traded among stakeholders and across jurisdictions.<sup>144</sup> This differs from the traditional IRA “release” language options discussed above because the land being released does not necessarily revert back to agency multiple-use management. In many cases such lands are traded to private or other governmental entities, not only removing agency discretion altogether, but shrinking and reorganizing the federal estate. This could be said to be much “harder” than the traditional “hard” release. Furthermore, when these bills do

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<sup>141</sup> Title II, Sec. 310. Beaverhead-Deerlodge Partnership, *Act*, 13.

<sup>142</sup> Janine Blaeloch and K. Fite, “*Quid Pro Quo* Wilderness,” *The Western Lands Project*, 2006: 1, <http://www.westernlands.org/quid-pro-quo.pdf>. (Accessed on 04/20/07).

<sup>143</sup> Timothy Brown et al, *Collaborative Conservation Strategies: Legislative Case Studies from Across the West*, Western Governor’s Association (WGA), June, 2006: 1, <http://www.westgov.org/wga/publicat/omnibus06.pdf>.

<sup>144</sup> See Janine Blaeloch, “An Analysis of *Quid Pro Quo* ‘Wilderness’ Bills Currently Before the 109<sup>th</sup> Congress.” *Western Lands Exchange*, August, 2006: 1-13. <http://www.westernlands.org/assets/QPQ4.pdf>. (Accessed on 04/25/07).

release lands to multiple-use management, they often provide additional prescriptions and prohibitions as seen below in the Steens Mountain case.

The sheer number of provisions in these omnibus bills is also staggering, and acts that fall within this category tend to be very complex. While there is a common overall strategy to conservation omnibus land bills, their size, complexity and differing details make them difficult to evaluate as a whole. Some doubt that Congress is able to give such bills the line-by-line scrutiny that is needed to prevent any unintended consequences that might emerge from omnibus legislation (though lobbyists regularly do just that). Two of the best-known examples of this approach are the Steens Mountain legislation and the Southern Nevada legislation of the early 2000s.

The Steens Mountain Cooperative Management and Protection Act of 2000 is often cited as the beginning of this type of legislation, as well as the first large omnibus bill in the “land exchange” format.<sup>145</sup> In 1999, Interior Secretary Bruce Babbitt announced that he was contemplating national monument designation for a large area of the Steens Mountains in Oregon under the Antiquities Act of 1906.<sup>146</sup> Many local and regional interests were opposed to such a designation, and three efforts at negotiations failed to reach a consensus (including an resource advisory council appointed by Babbitt) before a bill was finally constructed by a “bi-partisan” team of four interest group representatives put together by Oregon Sen. Ron Wyden (D) and Rep. Greg Walden (R).<sup>147</sup> What came out of the Steens Project was a land exchange bill that designated 170,000 acres of wilderness (97,000 acres “cow free”) within a larger “Cooperative Management Area,” a trade of 104,000 acres of public land for 18,000 acres of private land, \$5 million in cash payments to area ranchers, as well as the creation of the Steens Mountain Advisory Council (SMAC). The SMAC is composed of interest group representatives, is advisory to the BLM, and is tasked with overseeing management of the Steens, including the wilderness area.<sup>148</sup> As such, the enabling legislation for the Cooperative Management Area includes unit-level prescriptions that go beyond multiple-

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<sup>145</sup> Blaeloch and Fite, “*Quid Pro Quo* Wilderness,” 1.

<sup>146</sup> Andy Kerr, “The Steens Mountain Cooperative Management and Protection Act of 2000,” in Timothy Brown ed. *Collaborative Conservation Strategies: Legislative Case Studies from Across the West*, Western Governor’s Association (WGA), White Paper, June, 2006: 9, <http://www.westgov.org/wga/publicat/omnibus06.pdf>.

<sup>147</sup> *Ibid.*, 10.

<sup>148</sup> Blaeloch, and Fite, “*Quid Pro Quo* Wilderness,” 2-3.

use management. This further shows that these types of laws do not just release unprotected lands to MUSY management, but tend to provide additional prescriptions and prohibitions. We will see that this is also the case in the B-D Partnership's legislation.

Though the Steens bill is considered the first conservation omnibus bill, the most often cited example of conservation omnibus legislation comes from southern Nevada, and is actually composed of one revenue bill and two omnibus land bills: The Southern Nevada Public Land Management Act (SNPLMA) of 1998, The Clark County Conservation of Public Lands and Natural Resources Act of 2002, and The Lincoln County Conservation, Recreation and Development Act of 2004.<sup>149</sup> SNPLMA set the stage for the other two omnibus bills by authorizing the BLM to sell public land within a specific boundary around Las Vegas, using the revenue accrued from the sales for public interest projects including conservation.<sup>150</sup> Rapid growth, combined with a scarcity of privately-held land, created strong pressure in the Las Vegas region for federal land disposal. At the same time, there was a growing concern about the environmental effects of further development in the area. Other land use pressures mounted. The first negotiated land bill (the Clark County bill) was spearheaded by Senator Harry Reid (D) and Senator John Ensign (R). They established three ground rules at the outset of negotiations: (1) all Clark County land provisions would be resolved in a single, holistic land bill; (2) specific provisions would move forward only after internal resolution between the Senators; and (3) substantial changes to the bill after introduction would maintain the overall balance of conservation, recreation and development.<sup>151</sup>

What came out of this case, and the ensuing Lincoln County deal, were two Federal land "sale" bills that essentially traded 30 new wilderness areas totaling around 1.3 million acres for the sale of 125,000 acres of public land through auction, the "hard" release of 477,000 acres of Wilderness Study Areas (WSAs), the conveyance of another

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<sup>149</sup> Kai Anderson, "Clark County Conservation of Public Lands and Natural Resources Act of 2002 and The Lincoln county Conservation Recreation and Development Act of 2004," in Timothy Brown ed. "Collaborative Conservation Strategies: Legislative Case Studies from Across the West." *Western Governor's Association (WGA)*, White Paper, June, 2006: 16, <http://www.westgov.org/wga/publicat/omnibus06.pdf>.

<sup>150</sup> Bureau of Land Management, "SNPLMA." *U.S. Department of the Interior*, 2007. <http://www.nv.blm.gov/snplma/> (Accessed 04/27/0).

<sup>151</sup> Anderson, "Clark County Conservation of Public Lands," 18, 20.

22,000 acres of Federal land to local and state interests, and other large land “exchanges,” as well as numerous nonconforming use provisions within the Wilderness Areas for utility corridors, ORV trails, and other special provisions.<sup>152</sup>

Proponents of conservation omnibus bills point out three main benefits to this type of legislation in distributive politics: 1) moving forward on wilderness designations that have stalled for political reasons, 2) providing for the needs of growing municipalities hemmed in by public land (providing land, water, and an increased tax base), and 3) the utilization of “collaborative” processes to formulate democratic outcomes, or “win-win” solutions.<sup>153</sup> Overcoming the “inertia” of entrenched positions is something that parties to omnibus land bills are very proud of.<sup>154</sup>

There are also many who oppose this approach, citing a number of reasons including the preponderance of provisions that could weaken the wilderness designation through exceptions. Because of the complex, negotiated nature of conservation omnibus bills and their “something for everyone” mandates, the wilderness that does actually get designated is often rife with exemptions, omissions, and qualifiers. A list of such exemptions would be too large for this paper, but one can look to the proposed Owyhee Initiative Implementation Act of 2006 (OI) for a representative sampling.<sup>155</sup> The OI would allow post-fire reseedling with non-native grasses, gives special privileges to owners of inholdings within the wilderness, and contains “language that appears to give livestock grazing in wilderness primacy over wilderness itself.”<sup>156</sup> The OI also allows fencing around wilderness to accomplish wilderness management objectives, the removal of Area of Critical Environmental Concern (ACEC) designations, and the increase of cattle numbers on grazing allotments to above pre-wilderness conditions. Reserved water rights are also specifically excluded from the wilderness portions of the bill.<sup>157</sup>

Land exchanges are among the most controversial provisions of these bills. Though modern incarnations of land disposal have tried to tighten up the standards of

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<sup>152</sup> Ibid. at 18, 19; see also Blaeloch, J. and Fite, K. “*Quid Pro Quo* Wilderness,” 3.

<sup>153</sup> Brown, *Collaborative Conservation Strategies*,” 28-30.

<sup>154</sup> Ibid., 30.

<sup>155</sup> Now renamed “The Owyhee Public Lands Management Act of 2008” and included in the Omnibus Public Lands Bill of 2008 (S. 3213) to be considered by the Senate in November, 2008. See <http://www.owyheehinitiative.org/>.

<sup>156</sup> Blaeloch, “An Analysis of *Quid Pro Quo*,” 9-11.

<sup>157</sup> Ibid., 12.

appraisal and sale, the history of such exchanges is replete with tales of public land being sold to private interests at substantial losses, only to be “flipped” soon after for double the profit. A 2001 audit by the Interior Department found that the BLM’s head appraiser had inflated private land values in St. George, Utah, prior to a proposed exchange.<sup>158</sup> In another case, according to the U.S. Office of Special Counsel, a 2002 BLM audit of one such land transaction showed that the government stood to lose between \$97 million and \$117 million dollars as a result of the land sale.<sup>159</sup> Soon after, citing “decades of problems with its land appraisals,” the Department of Interior removed the land appraisal function from its land management agencies, consolidating it into the Appraisal Services Directorate (ASD) in order to remedy the problem.<sup>160</sup> Even still, the GAO found in 2006 that out of 324 appraisals evaluated in an audit of the ASD (about 50% of the total value of land appraised since ASD’s inception, or \$3.2 billion worth of land), 41% (132 appraisals) were deemed “not in compliance” with appraisal standards.<sup>161</sup>

Lastly, like place-based conservation legislation, conservation omnibus land bills are often seen by their supporters as a “collaborative” or “democratic” approach to wilderness designation and other land use interests. They may have this potential, but many examples of previous omnibus bills show that relatively few interests are represented. For example, the Steens Mountain bill was crafted by just four people.<sup>162</sup> In the case of the pending Owyhee Initiative, two environmental groups that had previously (and successfully) sued on grazing issues claimed that they were barred from discussions and negotiations (along with mountain biking groups).<sup>163</sup> Truly collaborative initiatives adhere to increasingly well-defined standards of best practices and a broad representation of stakeholder interests.<sup>164</sup> For conservation omnibus bills, the issue of who decides what interests are involved in crafting this type of legislation, as well as how representative of

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<sup>158</sup> Blaeloch, “*Quid Pro Quo*,” 8.

<sup>159</sup> U.S. Government Accountability Office (GAO), *Interior’s Land Appraisal Services: Actions Needed to Improve Compliance with Appraisal Standards, Increase Efficiency, and Broaden Oversight*. GAO-06-1050, Report to United States Congressional Requestors, September, 2006: 2. <http://www.gao.gov/htext/d061050.html>. Accessed 04/27/07.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*, 5.

<sup>162</sup> Kerr, “Steens Mountain,” 9.

<sup>163</sup> Blaeloch, “*Quid Pro Quo*,” 10.

<sup>164</sup> Matthew McKinney and William Harmon, *The Western Confluence: A guide to Governing Natural Resources*. (Washington, DC: Island Press, 2004) 208-214, 241.

the “public good” they are, seems to remain idiosyncratic and devoid of governing principles.<sup>165</sup>

In light of all of the problems associated with omnibus legislation, is there a place for omnibus bills within the conservation movement? Bruce Babbitt, former Secretary of the Interior, advocates for a “very large consolidation effort” that should be undertaken by Congress in order to make our public lands more ecologically sustainable.<sup>166</sup> Such an effort would trade lands that are ecologically less valuable in urban areas for inholdings, wildlife corridors, and environmentally critical lands that could bolster existing ecosystems.<sup>167</sup> Omnibus land bills could rightfully play a role in such exchanges and consolidation, though this says nothing of their appropriateness in the designation of wilderness or in place-specific management provisions that deserve individual attention. According to Kai Anderson, former staffer for Sen. Reid, the Clark County bill alone included “more than a dozen” provisions that would have warranted their own legislation and individual scrutiny, but instead were included in the omnibus bill.<sup>168</sup>

Under partisan legislative and executive branches, the conservation omnibus legislation approach was gaining momentum until relatively recently. With the change in the federal legislature in the fall of 2006 toward a more “wilderness friendly” representation, we have seen a moratorium on future conservation omnibus bills called for by Rep. Nick Rahall, Chairman of the House Committee on Natural Resources. “Wilderness designations should not be the result of a quid pro quo. They should rise or fall on their own merits,” said Rep. Nick Rahall in the House Resources Subcommittee on Forests and Forest Health, “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.”<sup>169</sup> Either way, the lessons learned from the conservation omnibus

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<sup>165</sup> It should be noted that to some extent this has to be the case, as no two situations are alike, though standards of “good governance” should at least be decided upon and met.

<sup>166</sup> Babbitt, Bruce E. *Cities in the Wilderness*. Washington D.C.: Island Press, 2005: 161.

<sup>167</sup> Ibid.

<sup>168</sup> Anderson, “Clark County,” 20.

<sup>169</sup> Greg Stahl, “CIEDRA Begins Legislative Journey: Wilderness Bill Suffers Blow in First Congressional Hearing,” *Idaho Mountain Express*, October 28, 2005, <http://www.mtexpress.com/index2.php?ID=2005106024>.

experience can help to guide future use of place-based conservation legislation, and will be discussed further in Section V.

While there are commonalities and differences between this approach and place-based conservation legislation, it should be noted that these distinctions are blurred in many cases. The sheer scope and scale of most omnibus bills is enough to set them apart from other forms of place-based legislation. “Place-based conservation legislation,” as used in this paper, refers to unit-level legislation, while conservation omnibus bills deal with a nearly unlimited range of statewide and regional issues across multiple public land units and agencies. While the reasons for interest in these two approaches are very similar, the scope of the place-based conservation legislation approach is limited to public lands conservation and management through the use of statutory detail, staying away from land disposal, conveyances, sales, and the granting of rights of way.<sup>170</sup> Furthermore, management of the land in question is retained by the federal land management agency in place-based conservation legislation, while that is not necessarily the case in conservation omnibus legislation. Even still, if we imagine the Protected Lands Laws section more as a continuum (with Wilderness and Companion Designations on one end and Conservation Omnibus Legislation on the other, and Place-Based Conservation Legislation in the middle), cases like that of the Steens Mountain Cooperative Management and Protection Act of 2000 would sit somewhere in between Place-Based Conservation Legislation and Conservation Omnibus Legislation.

#### PLACE-BASED CONSERVATION LEGISLATION

While no definition of “place-based conservation legislation” at the unit-level was found in natural resource policy literature, it should be mentioned that Law Professor Robert Keiter discusses “place-specific” legislation in the context of public lands and law reform. He defines place-specific public lands legislation as the set of laws that are crafted by Congress in order to “modify the otherwise uniform multiple-use mandates governing specific public lands.”<sup>171</sup> This definition encompasses the typology that was

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<sup>170</sup> Though nothing precludes Congress from using these commodities in the B-DNF case or others, such use would reclassify that legislation as “conservation omnibus legislation” under this typology.

<sup>171</sup> Keiter, “Public Lands and Law Reform: Putting Theory,” 1202.

just outlined, but it is too broad to accurately describe the approach that is the subject of this paper.

As used here, “place-based conservation legislation” refers to federal land-unit enabling laws that provide additional prescription and managerial discretion, in a reciprocal fashion, in order to achieve wilderness designations, prescribe conservation management practices, and provide for local economic stability. Furthermore, these laws are often crafted by regional stakeholder groups and submitted to Congress in order to prescribe management and conservation outcomes for conflicts over public land managed for MUSY. These pieces of legislation generally prescribe wilderness designations, restoration objectives, a more predictable flow of natural resource commodities like timber, and specific management methods such as Stewardship Contracting, adaptive management and monitoring. The sideboards of this approach, though somewhat flexible, exclude both the very broad language and scope of conservation omnibus bills, and the very narrow language of stand-alone wilderness bills or national forest unit management prescriptions (e.g. the TTRA). While this typology may be new, the use of place-based conservation legislation is not, as seen in the well-know case of the Quincy Library Group.

The Quincy Library Group (QLG) was formed in 1992 in order to try to reconcile a crashing timber economy with protection of the Northern California Spotted Owl on the Lassen and Plumas National Forests.<sup>172</sup> The group, named after the library where they first held their meetings in the town of Quincy, California, started from collaborative problem-solving sessions between a former Plumas County Supervisor, a timber industry forester, and an environmental attorney; but soon spread to include local business owners, school officials, timber union leaders, and other stakeholders in the region.<sup>173</sup>

Much like the Beaverhead-Deerlodge Partnership Strategy, the QLG developed a “Community Stability Proposal” that was intended to protect wilderness areas and scenic river corridors, reduce the threat of large-scale fire, and provide for the local timber economy. The centerpiece of this plan was a timber thinning regime that would also

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<sup>172</sup> Liz Claiborne Art Ortenberg Foundation. *The Quincy Library Group*. Workshop on Collaborative Resource Management in the Interior West, Red Lodge, Montana, October 18-22, 2001: 3. <http://www.redlodgeclearinghouse.org/stories/quincy.pdf>. Accessed 11/30/07, and on file with the author.

<sup>173</sup> Cromley, “Community-Based Forestry,” 224, 225.



provide lumber to local mills.<sup>174</sup> While this plan purposefully “defected from the preservationist ideal” by authorizing a significant increase in timber harvesting, it justified this by assuming that local communities have more of a stake in national forests than urban and national interests do, especially those represented by the national conservation organizations.<sup>175</sup>

The QLG submitted the plan administratively as a forest planning alternative, but the Forest Service crafted its own preferred management alternative instead. After the Forest Service declined to accept the QLG’s plan, the QLG chose to submit their plan to Congress which eventually passed the Herger-Feinstein Quincy Library Group Forest Recovery Act as a rider on an appropriations bill in 1998 after significant political wrangling.<sup>176</sup>

Strong objections from national environmental groups questioned the precedent set by such place-based legislation that answered “political” rather than “ecological” objectives.<sup>177</sup> The large scale of the project, the end-run around an administrative solution, problems of accountability and the parochial “capture” of federal land round out the serious criticisms that continue to follow the QLG today.<sup>178</sup> While the QLG chose to attempt to minimize conflict in the policy formulation stage by selecting a relatively small set of policy specialists and stakeholders to craft their plan (versus a more public decision-making process), this forced those who disagreed with the plan to challenge its implementation through appeals and litigation.<sup>179</sup> As such, the Quincy case can hardly be called a success from the perspective of conflict resolution, as litigation, infighting and a questionably cooperative Forest Service continue to frustrate implementation of the Act. Though the Herger-Feinstein Quincy Library Group Forest Recovery and Economic Stability Act passed in the year 1998, implementation issues related to litigation and conflicting statutory language continue to frustrate the organization. Out of the over 9000 acres that the QLG Act allocated for timber harvest annually, only 200 acres have

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<sup>174</sup> Ibid.

<sup>175</sup> Sarah Beth Pralle, *Branching Out, Digging In: Environmental Advocacy and Agenda Setting*, Washington, D.C.: Georgetown University Press, 2006: 154.

<sup>176</sup> Cromley, “Community-Based Forestry Goes to Washington,” 224, 225.

<sup>177</sup> Liz Claiborne Art Ortenberg Foundation. *The Quincy Library Group*, 14.

<sup>178</sup> Ibid. at 14, 15.

<sup>179</sup> Pralle, *Branching Out, Digging In*, 220.

been harvested in total.<sup>180</sup> Likewise, crews have built fire breaks on only 12 percent of the land mandated in the legislation.

The crux of this disagreement is over how to reconcile the QLG legislation with the Sierra Nevada Forest Plan Amendment of 2001, which came out of the Sierra Nevada Ecosystem Framework. This “Sierra Framework” was the result of a massive planning effort that took 14 years, included 11 forests, and affects 11.5 million acres.<sup>181</sup> The process was “uncommonly open,” garnering 47,000 public comments.<sup>182</sup> It grew out of the same tension between timber extraction and spotted owl habitat preservation that helped to form the QLG.<sup>183</sup>

These two mandates, the Sierra Framework and the Herger-Feinstein QLG Act contradict each other in important ways over fire and fuels, as well as old growth preservation.<sup>184</sup> Both address fire and fuels, but the Sierra Framework mandates mechanical thinning as an interim measure only, on the way to supporting an old growth ecosystem managed primarily by fire and wildlife. The QLG, on the other hand, mandates mechanical thinning in perpetuity, not only as a fire management tool, but also to provide for a stable timber supply for local mills.<sup>185</sup> Furthermore, updated management guidelines in the Sierra Framework were to also help guide implementation of the QLG, but those guidelines would result in significantly lower timber harvests for the QLG pilot project area than mandated by the Herger-Feinstein Act.<sup>186</sup> These differences, combined with ambivalence on the part of the then recently inaugurated Bush administration, fairly guaranteed a legal battle.

One again finds in the case of the QLG that inadequate or contradictory statutory language and site-specific legislative mandates have the potential to create and perpetuate conflict rather than to solve it. This is not to say that such an outcome is necessarily the case when utilizing the place-based conservation legislation approach, but that lessons

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<sup>180</sup> Liz Claiborne and Art Ortenburg Foundation, *The Quincy Library Group*, 36. This can also be blamed on the time that it takes to complete NEPA process requirements.

<sup>181</sup> *Ibid.*, 13.

<sup>182</sup> Dave Owen, “Prescriptive Laws, Uncertain Science and Political Stories: Forest Management in the Sierra Nevada,” 29 *Ecology L. Q.* 747, 2002: 766

<sup>183</sup> *Ibid.*, 764.

<sup>184</sup> *Ibid.*, 770.

<sup>185</sup> *Ibid.*, 770-771.

<sup>186</sup> *Ibid.*, 771-772.

can be learned here that may guide both the formulation and evaluation of place-based conservation legislation. One important lesson from the Quincy case is that it shows how difficult it can be to meld unit-level legislation into pre-existing planning processes. This will be discussed further in the Section V.

#### IV. The Case of the Beaverhead-Deerlodge Partnership

Interest in place-based conservation legislation is increasing, with many groups in the western United States either drafting legislation or considering such strategies.<sup>187</sup> As it turns out, there are a number of shared reasons for this; enough that we can reasonably expect to see more of these initiatives in the future. If this is true then it is important to look critically at representative cases such as the Beaverhead-Deerlodge Partnership (B-D Partnership), not only to discern the factors and events that are driving such initiatives, but to analyze the potential affect that codification of proposed pieces of place-based conservation legislation might have on both individual forests and across the West. Whether or not this “trend” comes to pass, what it might tell us about public lands governance warrants an in-depth look.

At their first press conference on April 24, 2006, the B-D Partnership unveiled a forest management plan for the Beaverhead-Deerlodge National Forest (B-DNF) that attempted to accommodate preservation, restoration, and timber extraction interests into a single, mutually beneficial alternative.<sup>188</sup> This group of stakeholders, many of which were once on opposite sides of the table, laid out in their original forest planning alternative a strategy that called for the designation of 573,000 acres of new wilderness and 713,000 acres of “suitable timber base,” along with stewardship provisions centered on roads and water quality.<sup>189</sup> Reactions from both supporters and critics were swift. On the one hand, the Partnership was applauded for finally “breaking the gridlock” in the name of conservation and rural economic growth,<sup>190</sup> while being criticized as not being “inclusive” enough<sup>191</sup> and turning the B-DNF into a “tree plantation” on the other.<sup>192</sup>

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<sup>187</sup> In addition to the Beaverhead-Deerlodge Partnership Proposal, see also the Blackfoot Clearwater Landscape Stewardship Project Proposal, available at <http://www.blackfootclearwater.org/> (Last accessed August 10, 2008), and the Northeast Washington Forestry Coalition (the Colville National Forest) proposal, available at <http://www.newforestrycoalition.org/> (Last accessed August 10, 2008).

<sup>188</sup> Backus, “Timber, Conservation Groups reach deal.”

<sup>189</sup> Beaverhead-Deerlodge Partnership, “Timber and Conservation Groups come together to forge a new vision for the Beaverhead-Deerlodge National Forest,” *Press Release*, Deerlodge, Montana, 04/24/06: 3, <http://www.bhdlpartnership.org/press.htm>.

<sup>190</sup> *The Montana Standard*, “Forest Plan Compromise – Breaking Gridlock,” (editorial) Butte, MT, June 15, 2006. <http://www.bhdlpartnership.org/PDFs/Press-MontanaStandard-06-15.06.pdf>.

<sup>191</sup> Representing only “timber and wilderness.” Coffman, C. Ted, Frank G. Nelson, and David Schulz (Madison County Board of Commissioners), “Madison County Speaks Out on the ‘Partnership

As stated previously, the Beaverhead-Deerlodge Partnership in Southwestern Montana presents a timely opportunity to study place-based conservation legislation in the policy formulation stage. This Partnership is also interesting due to the fact that the unit-level natural resource reciprocity represented therein is based upon trading wilderness designations and stewardship initiatives for commodity production programs on a national forest, while omitting the broader land conveyances and giveaways that characterize the similarly constructed “conservation omnibus” legislation discussed above. By studying the case of the B-D Partnership we aim to create a better understanding of the forces driving such legislated initiatives, some of the potential benefits and problems with such strategies, and a clearer view of how place-based conservation legislation might change or fit with the existing system of natural resources governance on our public lands. These are important considerations, for such a departure from the forest planning paradigm and managerial discretion has the potential to produce unintended consequences.

This section of the paper starts with background information about the B-D National Forest, followed by a short history of the B-D Partnership. It then compares the Forest Service’s Revised Land and Resource Management Plan (LRMP) to the B-D Partnership’s latest version of the proposed “Beaverhead Deerlodge Conservation, Restoration and Stewardship Act of 2007” and the B-D Partnership Strategy. The key provisions in the comparison are wilderness designations and IRA preservation, ecological restoration and environmental standards, and the timber base proposed by each management approach.

### **The Beaverhead-Deerlodge National Forest**

The Beaverhead-Deerlodge National Forest is the largest in the State of Montana. This landscape covers 3.38 million acres in the southwestern corner of the state and crosses eight counties: Granite, Powell, Jefferson, Deer Lodge, Silver Bow, Madison,

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Strategy,” *The Montana Standard*, Butte, MT, July 19, 2006, <http://www.montanastandard.com/articles/2006/07/23/newsopinion/hjjdjchgjahifb.txt>.

<sup>192</sup> Wuerthner, George, “The Problems with the Beaverhead-Deerlodge Partnership.” First published on NewWest.net on Nov. 20, 2007, <http://www.bhdlpartnership.org/PDFs/Critics-Wuerthner-Document-11-20-07.pdf>, (Accessed 05/01/08).

Gallatin and Beaverhead Counties.<sup>193</sup> The forest is ecologically diverse, ranging from alpine lakes in the Pintler, Gravelly, Pioneer, and Beaverhead Mountains; to low and mid-elevation Lodgepole Pine forests like those found in the massive Deer Lodge Valley, and finally the broad grasslands of the Big Hole region.<sup>194</sup> The area is marked by the climatic extremes typical of continental climates: cold winters, hot summers, and moderate precipitation. Historical uses of the region have also been diverse: the hunting, harvesting, and fishing of indigenous tribes; the trapping, mining, grazing and timber extraction of 20<sup>th</sup> Century European-Americans; and the motorized and non-motorized recreation and national forest amenities focus of our contemporary era. Management of the land that is now the B-DNF has always had a measure of contention over competing uses.<sup>195</sup>

Human groups have utilized the region that is now the B-DNF for at least the last 12,000 years.<sup>196</sup> For Native Americans like the Salish that inhabited the region, Bitterroot and Camas plants were some of the earliest harvested foods, and staples of the indigenous diet. Migratory game animals such as bison, elk, deer, and pronghorn also provided key sustenance for the Salish, the Shoshone, the Blackfeet, and the Gros Ventre that moved in and out of the region. The seasonal climatic variation of the region limited permanent habitation: both people and animals traditionally migrated between summer and winter ranges to adapt to heat, cold, and varying abundances of food and natural resources.<sup>197</sup> These seasonal migrations continued into the modern historic era, with both Native-Americans and early European-Americans adapting to landscape and weather conditions. Early Euro-Americans were first drawn to the area by the fur trade, but mineral development soon followed in the late 1850s.<sup>198</sup> Many of these settlements didn't last long, as is shown by the many ghost towns on the B-DNF. At around the same time as the mining boom, livestock and timber operations sprang up to feed and supply

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<sup>193</sup> U.S. Forest Service, *Beaverhead-Deerlodge National Forest, Revised Land and Resource Management Plan* (LRMP). Dillon, MT: U.S. Department of Agriculture, January, 2008: 2.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> U.S. Forest Service, "Cultural History," Beaverhead-Deerlodge National Forest, <http://www.fs.fed.us/rl/bdnf/>, (accessed 04/20/2008).

<sup>197</sup> Ibid.

<sup>198</sup> U.S. Forest Service, *Final Environmental Impact Statement* (FEIS), Beaverhead-Deerlodge National Forest, <http://www.fs.fed.us/rl/bdnf/>, (accessed 03/16/2008).

the burgeoning mining camps. When the local timber market declined or large trees became scarce, logging operations simply picked up and moved to more abundant areas in the forest.<sup>199</sup>

Homesteading was not far behind resource extraction, often with a patented “home ranch” in the primarily privately-owned, low elevation valleys; and then seasonal “rider’s cabins” in the mountains on what is now the B-DNF. This history of movement and migration across the landscape is important, for it not only establishes a history of timber and grazing on what is now public land, but the types of traditional use also indicate the dynamism of the natural landscape and climate on the B-DNF.<sup>200</sup> These “traditional” means of accessing the forest for both livelihoods and recreation figure strongly into the discourses of the contemporary debate.<sup>201</sup>

The ecology of the B-DNF is fairly typical for the Northern Rockies, with the Pine sub-family being the most abundant forest type in the region.<sup>202</sup> The five tree species dominating this sub-family are the Lodgepole pine, Whitebark pine, Limber pine, Ponderosa pine and Douglas fir. Lodgepole pine is by far the most dominant, accounting for 46 percent of the forested area, or 1.26 million acres of the B-DNF.<sup>203</sup> Whitebark pine, the second most abundant tree species covers just a fraction of that covered by Lodgepole pine, at 301,346 acres. For further comparison, grasslands and shrublands cover 694,966 acres of the B-DNF, primarily in the southern third of the national forest.<sup>204</sup> The northern two-thirds are truly dominated by the Lodgepole, with 52.6 percent of Lodgepole pine stands “middle aged,” or 20-120 years old. 7.8 percent of the stands are younger than this, while 39.6 percent are older than those in the broad “middle-aged” category.<sup>205</sup>

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<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> John C. Russell, *A Social Analysis to Finalize the Beaverhead-Deerlodge National Forest Plan*, Adams-Russell Consulting, Contract Number AG-0356-C-06-0024, The Beaverhead-Deerlodge National Forest, Dillon, MT. 12/09/2006: 8-10, 13-16, <http://www.fs.fed.us/r1/b-d/forest-plan/revision/soc-assessment-exec-sum.pdf> (Accessed 02/05/2008, since removed, but on file with the author).

<sup>202</sup> U.S. Forest Service, *LRMP*, 452.

<sup>203</sup> Ibid., 452.

<sup>204</sup> Ibid., 463.

<sup>205</sup> Ibid., 453.

The lodgepole pine (*Pinus contorta*) is a disturbance-dependent species that is also relatively short-lived at less than 200 years.<sup>206</sup> In fact, many of the cones of the lodgepole pine require heat to release seeds sealed within their cones by resin-coated scales. Following a large fire, large amounts of these stockpiled seeds are released, usually creating a dense, even-aged distribution of lodgepole re-growth. For this reason, older stands of trees (100-140 years old) are particularly susceptible to mountain pine beetle attacks. The even-aged stands of beetle-killed lodgepole then become fuel for intense forest fires, starting the cycle anew.<sup>207</sup> According to Forest Service studies, beetle infestations probably peaked in the B-DNF in the years 2005 and 2006, at 408,900 acres and 399,830 acres respectively.<sup>208</sup> As discussed later, the disturbance-dependent lodgepole pine, beetle infestation cycles, and historic fire regime figure prominently into the key provisions of the B-D Partnership Strategy and proposed legislation.

As the name implies, the Beaverhead-Deerlodge National Forest was formed in 1996 when the Forest Service merged the Beaverhead and the Deerlodge National Forests into one administrative unit. The two original forests were proclaimed much earlier, in 1908 by President Theodore Roosevelt in two separate executive orders.<sup>209</sup> In accordance with the National Forest Management Act (NFMA) of 1976, the Beaverhead and Deerlodge National Forests completed their first forest planning cycle in 1986 and 1987 respectively,<sup>210</sup> with the Beaverhead National Forest Land Management Plan becoming the first in the United States under the 1982 Planning Rules.<sup>211</sup> This latest forest plan revision is only the second such planning cycle for these forests, and will be the first forest plan of the amalgamated Beaverhead-Deerlodge National Forest.

### **The Beaverhead-Deerlodge Partnership**

In January of 2006, the Beaverhead-Deerlodge Partnership formed in order to create a planning alternative during the revision of the Land and Resources Management

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<sup>206</sup> Kershaw, Linda et al., *Plants of the Rocky Mountains*, Edmonton: Lone Pine, 1998: 34.

<sup>207</sup> Ibid.

<sup>208</sup> U.S. Forest Service, *LRMP*, 446.

<sup>209</sup> U.S. Forest Service, *The Beaverhead-Deerlodge National Forest*, <http://www.fs.fed.us/r1/b-d/>.

<sup>210</sup> U.S. Forest Service, *The Beaverhead-Deerlodge National Forest*, "History," <http://www.fs.fed.us/r1/b-d/about/>.

<sup>211</sup> Jack DeGolia, Public Affairs Officer, B-DNF. Personal communication with the author on 01/28/2008.



Plan (LRMP) for the B-DNF.<sup>212</sup> The Partnership - composed of four local timber companies, one national timber company, and three conservation organizations – originally crafted a strategy that would drastically increase both the forest acreage considered “suitable for timber production” and the acreage recommended for wilderness preservation, as well as instituting a number of stewardship projects and standards on the forest.<sup>213</sup> The Partnership submitted their proposal under “notice and comment” procedures during the forest planning process (albeit after the deadline) for the B-D Draft Forest Plan in the spring of 2006.

This most recent revision of the B-DNF forest plan began in 2002, with a Draft Plan and Draft Environmental Impact Statement issued in June, 2005.<sup>214</sup> In December, 2005, just after the closing of the comment period for the B-D Draft Plan and Environmental Impact Statement, Senator Conrad Burns (R – Montana) held a hearing on the “Forest Plan Revision Process in Region 1” before the U.S. Senate Subcommittee on Interior and Related Agencies, Committee on Appropriations.<sup>215</sup> Common themes in this hearing were the complexity, uncertainty and expense of the forest planning process, and the ways that this process influences restoration and stewardship needs on national forests.<sup>216</sup> “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,” stated John Gatchell of the Montana Wilderness Association (MWA), “We want tangible commitments. We all want to know where we stand today and what will remain tomorrow.”<sup>217</sup> Former Forest Service Chief Dale Bosworth summed up the “process predicament” of the post-timber era very well in the hearing, “Today we’re in an era of restoration, trying to restore these ecosystems. The

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<sup>212</sup> Beaverhead-Deerlodge Partnership, “Beaverhead-Deerlodge Partnership Strategy,” April 24, 2007, <http://www.bhdlpartnership.org/PDFs/Proposal-FinalPartnershipStrategy.4.14.06.pdf> (Accessed on 11/30/07).

<sup>213</sup> Members of the B-D Partnership include: Montana Trout Unlimited, Montana Wilderness Association, National Wildlife Federation, Pyramid Mountain Lumber, RY Timber, Roseburg Forest Products, Smurfit-Stone Container and Sun Mountain Lumber. Beaverhead-Deerlodge Partnership, “Beaverhead-Deerlodge Partnership Strategy.”

<sup>214</sup> Russell, John C., *Social Analysis*, 2.

<sup>215</sup> U.S. Government Printing Office (GPO). *Examination of the Forest Plan Revision Process in Region 1*. S. Hrg. 109-705, U.S. Senate, Subcommittee on Interior and Related Agencies, Committee on Appropriations, Missoula, MT. December 2, 2005. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:25118.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:25118.wais).

<sup>216</sup> *Ibid.*, 4, 22, 26, 36, 48.

<sup>217</sup> *Ibid.*, 26.

very same laws that slowed down the extraction slow down the restoration process.”<sup>218</sup> According to Bosworth and others at the hearing, we have different needs now than when NFMA and NEPA were first passed, and the Acts are now causing some unintended consequences.

Many of the same views were echoed by those testifying from many different “sides” of the issue. According to those interviewed for this project, informal discussions among stakeholders at this hearing planted the seed that would grow into the Beaverhead-Deerlodge Partnership. “I remember thinking, the time is right for conservation and industry to look at solving problems together,” one said.<sup>219</sup> This was echoed at the hearing by John Gatchell when he seemingly summed up the spirit that would bring the Partnership together, “Talk to your neighbors, work out differences, and you will be rewarded.”<sup>220</sup> The stage was set.

Future B-D Partnership members Bruce Farling (Montana Trout Unlimited), John Gatchell (Montana Wilderness Association) and Sherm Anderson (Sun Mountain Lumber Company) were all on the panel at the hearing, while Greg Kennett (Ecosystem Research Group), Tim Baker (Montana Wilderness Association) and others were present in the audience. The Missoula, Montana, based company Ecosystem Research Group (the company that would be contracted to prepare the B-D Partnership Strategy) had just prepared technical biological comments for the Forest for the Future Coalition, which is composed of the five timber companies now in the B-D Partnership. The informal discussions about cooperation at the hearing lead the group to decide to meet again more formally to see what they could come up with. After a couple of meetings it was evident that common ground was attainable, and the newly minted “Beaverhead-Deerlodge Partnership” asked for a meeting with the Regional Forester, Gail Kimbell, in early February, 2006. The Partnership wanted assurances that there would be an outlet for the hard work that it was proposing. According to the Regional Forester there seemed to be one in spite of the fact that the comment period had been closed for nearly three months. In fact, initial feedback from the Forest Service was very encouraging. Gail Kimbell

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<sup>218</sup> Ibid., 48.

<sup>219</sup> Personal interview with the author.

<sup>220</sup> U.S. GPO, *Examination of the Forest Planning Revision Process*, 24.

indicated that they had until April 15<sup>th</sup>, 2006, to submit a “Partnership Alternative” for the Forest Service’s consideration.<sup>221</sup>

Under these assumptions, the Partnership went to work. Every Monday, for a couple of months the partners sat in a conference room at the Ecosystem Research Group’s (ERG) office in Missoula, Montana, working out the details of the Partnership Strategy with fisheries and wildlife biologists, foresters, economists and ERG’s GIS staff. According to one interviewee, the Partnership really “jammed” and came up with a rough draft by March, 2006, working it into a final proposal by the April 15<sup>th</sup> deadline.<sup>222</sup> Shortly after submitting its proposal, the Partnership met with the Regional Forester and the Interdisciplinary Team (IDT) to discuss the provisions of the proposal and some concerns raised by the IDT. After this meeting, the Partnership attempted to address the concerns raised by the Forest Service by both broadening the range of interested parties involved with the proposal and by providing more specifics.<sup>223</sup> The Partnership did this through meetings with stakeholders, experts, and the Forest Service itself, but some of those interviewed for this project felt that the Forest Service just kept “raising the bar.”<sup>224</sup>

In December, 2006, the Forest Service commissioned a “Social Analysis” in order to better understand resident’s opinions of the Partnership Strategy.<sup>225</sup> The results were mixed. One respondent wrote, “No one is happy with the Forest Service Plan, but the partners have developed a viable option that solves some of the forest health, wilderness, and timber harvest issues that are perceived to be inadequately addressed in the draft plan.”<sup>226</sup> Some residents in the region also liked the idea of former adversaries working together to come up with a “win-win” solution to a formerly “intractable” conflict.<sup>227</sup> Some also felt that the Partnership Strategy was “raising the bar” with respect to how the forest is managed to support both local economies and conservation. Respondents stressed that they were impressed by the opportunity to “get things done” and to “overcome the gridlock.”<sup>228</sup>

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<sup>221</sup> Information common to a number of personal interviews with the author; spring, 2008.

<sup>222</sup> Personal interview with the author.

<sup>223</sup> Russell, *A Social Analysis*, 2-3.

<sup>224</sup> Personal interview with the author.

<sup>225</sup> Russell, “A Social Analysis,” 6.

<sup>226</sup> *Ibid.*, 5.

<sup>227</sup> *Ibid.*, 14.

<sup>228</sup> *Ibid.*, 5

That said, the concerns that were evident in many local stakeholder responses related to the potential cost of implementing the Partnership’s legislated strategy, worries about a loss of access, and a long-held distrust of both timber companies and environmental organizations.<sup>229</sup> Some citizens were also concerned by the perceived “lack of openness and fairness” in the formulation of the B-D Partnership’s Strategy – they felt as though there were “winners and losers” in the negotiated compromise.<sup>230</sup> Local residents in the B-DNF region were also weary from the time that both the Forest Service and the Partnership Strategy had taken, fatigued by what seemed to be a never-ending process. They wanted to see something done.<sup>231</sup>

The Northern and Southern counties in the region also differed greatly with respect to their support of the B-D Partnership Strategy. The Northern counties have traditionally been much more dependent upon timber harvesting, while the Southern counties have historically been ranching communities that are traditionally opposed to any new wilderness designations.<sup>232</sup> Issues of “access” permeated this divide too, as Beaverhead and Madison Counties (in the south) had “cooperating agency” status with the Forest Service during the forest planning process, and are located closer to the B-DNF Forest Supervisor’s office.<sup>233</sup> This caused some respondents to view the Southern Counties as having undue influence over the Forest Planning process and its ultimate outcome.

In spite of some of the positive responses in the “Social Analysis,” and though the Forest Service had once praised the efforts of the Partnership Strategy as a “thoughtful, constructive response to our proposed alternative [that] warrants thorough consideration,”<sup>234</sup> the agency declined to evaluate the Partnership Proposal as a separate alternative, finally citing it as “incomplete,” “speculative,” and without support from interest groups like motorized recreationists and mountain bikers.<sup>235</sup> Instead, the Forest Service crafted their own “Alternative 6” in the Revised Land and Resource Management Plan (LRMP) which in part responded to the Partnership’s proposal, but also incorporated

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<sup>229</sup> Ibid., 18, 20.

<sup>230</sup> Ibid., 23.

<sup>231</sup> Ibid., 26.

<sup>232</sup> Ibid., 14.

<sup>233</sup> Ibid., 9.

<sup>234</sup> Ibid., 3.

<sup>235</sup> U.S. Forest Service, *B-D LRMP*, 36, 560.

suggestions from the over 11,000 public comments submitted during the planning process.<sup>236</sup> This alternative is also the Forest Service’s “preferred alternative,” as discussed below.<sup>237</sup>

When the Revised Draft Forest Plan was released in September of 2006, the Partnership decided that the Forest Service had not adequately addressed their interests and began crafting legislation that would mandate implementation of the Partnership Strategy. Not only did some members of the Partnership feel as though they had been misled by the Forest Service during the policy formulation stage (which took a lot of time, effort and funding), but they also felt that the Forest Service’s “Alternative 6” failed to fully acknowledge and address their concerns. Seeking a more “guaranteed” implementation of the Partnership Strategy was also a consideration. Since any new wilderness designations on the B-DNF would have to be legislated by Congress anyway, the next logical step for the Partnership was to draft legislation, hoping that if it was passed it would also provide some certainty for implementing the proposed timber harvests and ecological restoration projects too.

In January, 2007, the Partnership released the first draft of their legislation to implement the Partnership Strategy in the form of the “Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007.”<sup>238</sup> It plans to introduce this legislation to Congress in late 2008 or (more likely) early 2009.<sup>239</sup> If codified as proposed, the latest draft of this piece of place-based conservation legislation would bypass the Forest Service’s planning process to designate 18 IRAs as wilderness, create six “stewardship areas” with mandated timber treatments, and implement stewardship contracting authority and a comprehensive road standard on the forest.<sup>240</sup>

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<sup>236</sup> Jack De Golia, “Forest Plan for Beaverhead-Deerlodge Released for Public Comment,” U.S. Forest Service, Beaverhead-Deerlodge National Forest, February 4, 2008:5.

<sup>237</sup> U.S. Forest Service, *B-D LRMP*, 37.

<sup>238</sup> See Beaverhead-Deerlodge Partnership, <http://www.bhdlpartnership.org/partners.htm>. There have been three public versions of this legislation so far, with the most recent dated October 9, 2007. Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*. Revised Draft. <http://www.bhdlpartnership.org/partners.htm>.

<sup>239</sup> Tom France, “The Beaverhead-Deerlodge Partnership.” *Presentation at the Missoula City Club Forum*, 11/16/2007, Double Tree Edgewater Hotel, Missoula, MT.

<sup>240</sup> See Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 3-10.

## **A Comparison: The Beaverhead-Deerlodge National Forest LRMP and the Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007**

The B-D Partnership's Strategy and draft legislation attempt to fulfill three main goals: (1) the support of local timber jobs by mandating the mechanical treatment of roughly 698,500 acres of national forest, (2) the institution of an ambitious restoration and road standard agenda, and (3) the preservation of 569,542 acres of IRAs as wilderness.<sup>241</sup> These represent significant increases over the management goals contained in the B-DNF's LRMP. They also represent a significant departure from the status quo, affecting wilderness, IRAs, timber harvesting, restoration, funding, and management of the national forest, with many different potential outcomes and effects - some good and some bad.

A number of individuals and organizations have expressed their support of the B-D Partnership Strategy. Montana's Governor, Brian Schweitzer (D), called the "collaboration" between conservationists and timber companies "truly remarkable."<sup>242</sup> Secretary of State Brad Johnson (R) called it "a significant step forward in forest management" and a "historic effort,"<sup>243</sup> and Senator Max Baucus remarked that, "The conservation groups and timber companies involved in the alternative management plan should be applauded for their willingness to put common sense first."<sup>244</sup> Others praised the development of a management plan that would benefit fish and wildlife habitat while helping local economies.<sup>245</sup>

By the same token, there has been a lot of criticism associated with the B-D Partnership Proposal, and from many different sides of the conflict. The Alliance for the

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<sup>241</sup> Ibid.

<sup>242</sup> Brian Schweitzer, letter to Bruce Ramsey (Forest Supervisor), June 19, 2006: 1. Quoted in Beaverhead-Deerlodge Partnership, *Supporters*. <http://www.bhdlpartnership.org/PDFs/Support-LetterFromSchweitzer.pdf>.

<sup>243</sup> Brad Johnson, letter to Gail Kimbell (Regional Forester), June 14, 2006:1. Quoted in Beaverhead-Deerlodge Partnership, *Supporters*. <http://www.bhdlpartnership.org/PDFs/Support-LetterFromBradJohnson.pdf>.

<sup>244</sup> Max Baucus, letter to Bruce Ramsey (Forest Supervisor), June 14, 2006: 2. Quoted in Beaverhead-Deerlodge Partnership, *Supporters*. <http://www.bhdlpartnership.org/PDFs/Support-LetterFromBaucus.pdf>.

<sup>245</sup> E.g. *see* Peter G. Dart (President, Rocky Mountain Elk Foundation), letter to Gail Kimbell (Regional Forester), June 14, 2006:1. Quoted in Beaverhead-Deerlodge Partnership, *Supporters*. <http://www.bhdlpartnership.org/PDFs/Support-LetterFromDart.pdf>.

Wild Rockies (AWR) published a newspaper advertisement lambasting the Partnership as “Green Scammers.”<sup>246</sup> George Wuerthner, an outspoken advocate for roadless area protection, has written numerous articles criticizing the B-D Partnership Strategy, referring to the proposed wilderness designations as “ice cream wilderness” (i.e. looks great, but unhealthy) and the strategy as “a bargain with the devil.”<sup>247</sup> Critics worry that conservation interests in the Partnership are giving away too much and gaining too little in return for those sacrifices. Valid questions over project funding and ecological outcomes abound. Many of the critics want to see all 1.8 million acres of inventoried roadless lands<sup>248</sup> become wilderness (and are concerned about the nearly 1.3 million acres not protected in the Partnership’s legislation<sup>249</sup>), and feel that the nearly 700,000 acres of management by mechanical treatment<sup>250</sup> is too large to be sustainably harvested.<sup>251</sup> Motorized recreationists are also vehemently opposed to the Partnership Strategy, viewing all new wilderness designations as a loss of their recreation base.<sup>252</sup>

The main provisions of the draft legislation and their comparison to the Forest Plan are discussed below.

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<sup>246</sup> Alliance for the Wild Rockies. “Green Scammers.” *The Missoula Independent*, May 4 – May 11, 2006:33.

<sup>247</sup> George Wuerthner, “Beaverhead-Deerlodge National Forest Deal Would Create More Ice Cream Wilderness,” *NewWest.net*, 05-15-2006. [http://www.newwest.net/main/article/beaverhead\\_deerlodge\\_national\\_forest\\_deal\\_has\\_created\\_more\\_ice\\_cream\\_wilder/](http://www.newwest.net/main/article/beaverhead_deerlodge_national_forest_deal_has_created_more_ice_cream_wilder/); Bill Schneider, “Sparks Still Flying Over Forest Stewardship Plan,” *NewWest.net*, 05-24-2006. [http://www.newwest.net/main/article/sparks\\_still\\_flying\\_over\\_beaverhead\\_deerlodge\\_plan/](http://www.newwest.net/main/article/sparks_still_flying_over_beaverhead_deerlodge_plan/)

<sup>248</sup> U.S. Forest Service, *B-D LRMP*, Appendix C-3.

<sup>249</sup> Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 8-10.

<sup>250</sup> *Ibid.*, 3-4.

<sup>251</sup> Wuerthner, “Ice Cream Wilderness.”

<sup>252</sup> See generally, Montanans for Multiple Use. <http://www.mtmultipleuse.org/>.

Table 2: A Comparison

	<b>Beaverhead-Deerlodge Partnership Strategy and Legislation</b>	<b>Beaverhead-Deerlodge National Forest LRMP Preferred Alternative</b>
<b>Wilderness Acreage Designated or Recommended (out of 1.8 million acres of IRAs)</b>	569,542 acres (16 areas; designated)	329,000 acres (12 areas; recommended)
<b>Eligible Lands/Unsuitable Lands where Timber Harvest is Allowed</b>	698,500 acres	1,614,000 acres
<b>Eligible Lands/Suitable for Timber Production</b>	698,500 acres	299,000 acres
<b>Minimal Area to be Treated Mechanically</b>	70,000 acres (over 10 years)	None
<b>IRA Acreage Released</b>	Approx. 200,000 acres	None
<b>WSA Acreage Released</b>	132,274 acres	None
<b>New Special Management Area</b>	11,600 acres	None

A. Wilderness Designation and IRA Preservation

Conservationists have been nervously watching as the remaining 58.5 million acres of Inventoried Roadless Areas nationwide are threatened by oil and gas leases, timber sales, motorized recreation and other forms of encroachment.<sup>253</sup> With the Roadless Area Conservation Rule (RACR) stalled in the courts, wilderness designation is arguably the most important avenue open to protecting the remaining roadless areas. As mentioned previously, Montana has not seen a new wilderness designation in over 25 years, and comprehensive wilderness bills like the Northern Rockies Ecosystem Protection Act

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<sup>253</sup> April Reese, “As States Ponder Protection, Roadless Forests Unravel,” *High Country News*, July 24, 2006, <http://www.hcn.org/issues/326/16412>.



(NREPA) have resulted in political stalemate thus far.<sup>254</sup> Right or wrong, this political stalemate is largely seen as a holdover from the “Timber Wars” of the 1980s and 90s, though frustrations with current public lands governance and its affect on economics, preservation, and recreation also dominate the conflict. The Beaverhead-Deerlodge National Forest currently has nearly 220,000 acres of designated wilderness, just over 1.8 million acres of IRAs, and roughly 299,000 acres designated as “suitable base” for timber production (in addition to areas open to fuels reduction and thinning) according to the preferred alternative in the 2008 Revised LRMP.<sup>255</sup>

A multitude of factors are considered during forest planning, but the fate of Inventoried Roadless Areas (IRAs) and recommended wilderness designations tend to receive a proportionally larger share of the attention.<sup>256</sup> To date, the B-DNF contains two wilderness areas: the Anaconda Pintler and the Lee Metcalf, which together constitute only 219,662 acres out of the total 3.38 million acres in the National Forest. Management of these wilderness areas is also shared with the Bitterroot National Forest, the Gallatin National Forest and the Bureau of Land Management (BLM).<sup>257</sup> The Forest also contains two Wilderness Study Areas (WSAs), the 56,415 acre Sapphire Mountains WSA and the 153,759 acre West Pioneer WSA.<sup>258</sup> Neither WSA is recommended for wilderness designation in the LRMP,<sup>259</sup> while portions of both would be made wilderness areas by the Partnership’s legislation.<sup>260</sup> While the LRMP would continue status quo conservation of all WSA acreage, the Partnership’s legislation would release a total 132,274 acres of WSA to potential timber harvesting.<sup>261</sup>

The USFS’ preferred alternative in the 2008 Revised Land and Resource Management Plan (LRMP), “Alternative 6,” recommends designating almost 18% of the forest’s remaining IRA’s as wilderness. If Congress chose to act on this

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<sup>254</sup> Pat Williams, “Guest Opinion: Lack of Legislation for Montana Wilderness Imperils Public Lands,” *Billings Gazette*, November 5, 2007. [http://www.crmw.org/Op-Ed/PW\\_Wilderness\\_11-2007.htm](http://www.crmw.org/Op-Ed/PW_Wilderness_11-2007.htm).

<sup>255</sup> U.S. Forest Service, *B-D LRMP*, 443.

<sup>256</sup> Jenkins, Matt. “Roadless Forest Plans Draw Crowds – And Lawsuits.” *High Country News*, December 26, 2005. <http://www.hcn.org/issues/313/16004>.

<sup>257</sup> U.S. Forest Service, *Beaverhead-Deerlodge National Forest*, “Wilderness,” <http://www.fs.fed.us/r1/b-d/recreation/index-wilderness.shtml>.

<sup>258</sup> U.S. Forest Service, *B-D LRMP*, 428.

<sup>259</sup> U.S. Forest Service. *B-D LRMP*, Appendix C – 132-135, 175-179.

<sup>260</sup> Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 9-10.

<sup>261</sup> *Ibid.*

recommendation, this would mean an additional 329,000 acres of wilderness for the B-DNF.<sup>262</sup> This represents an increase of roughly 156,280 recommended wilderness acres over the combined total recommended by the 1986 Beaverhead and 1987 Deerlodge Forest Plans, which together recommended only 172,720 additional acres.<sup>263</sup> Even still, many IRAs with outstanding wilderness qualities (referred to as “wilderness capability” by in the forest plan) were not recommended for wilderness designation in the LRMP due to the potential for conflicts with resource extraction and motorized recreation interests.<sup>264</sup>

Even this increased amount of acreage recommended for wilderness protection by the USFS is still significantly less than the approximately 569,554 acres of additional wilderness that the B-D Partnership proposes to add to the forest.<sup>265</sup> The B-D Partnership’s legislation would also preserve six more IRAs than the USFS’ preferred alternative. For conservationists, though, questions remain over the fate of the 1,276,626 acres of IRAs on the B-DNF that will not be added to the National Wilderness Preservation System (NWPS) by the Partnership’s legislation.<sup>266</sup> Though neither the Partnership Strategy nor the Partnership’s proposed legislation specifically mentions the “release” of IRAs, at this time the Partnership states that it supports implementation of the Recreation Opportunity Spectrum (ROS) on the remaining IRAs. Furthermore, it states that “management guidance *must* accommodate temporary access for mechanized harvest and to remove timber in portions of roadless areas included in stewardship

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<sup>262</sup> U.S. Forest Service, *B-D LRMP*, 283.

<sup>263</sup> *Ibid.*, 279.

<sup>264</sup> For example, the 53,494 acre Big Horn Mountain IRA, the 39,252 acre Black Butte IRA, the 21,686 acre Electric Peak IRA, and nine other large IRAs found to have “high” wilderness capabilities by the USFS were not recommended for protection under the Wilderness Act, saying nothing of the many areas with “moderate” capabilities or high-capability IRAs that were only partially recommended for preservation; See U.S. Forest Service. *Beaverhead-Deerlodge National Forest, Revised Land and Resource Management Plan*. Dillon, MT: U.S. Department of Agriculture, January, 2008: Appendix C-3 to C-184

<sup>265</sup> Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 8-10.

<sup>266</sup> *Ibid.*, 284. And the stakes are high. The B-DNF RLRMP lists the wilderness suitability of IRA acreage on the B-DNF as follows: 616,306 acres as “high,” 685,306 acres as “moderate,” and 399,137 acres as “low” in wilderness suitability. U.S. Forest Service. *Beaverhead-Deerlodge National Forest, Revised Land and Resource Management Plan*. Dillon, MT: U.S. Department of Agriculture, January, 2008: 284.

projects.”<sup>267</sup> No specific acreage is given regarding how much overlap there is between the 698,500 acres of “Stewardship Areas” and the remaining unprotected IRAs, but the “Stewardship Landscape Maps” provided on the B-D Partnership’s website indicate that mechanical treatment areas significantly overlap with multiple IRAs across the B-DNF.<sup>268</sup> This “release” of somewhere in the order of “200,000 acres” of roadless areas is understandably quite disturbing to many conservationists who would like to see unprotected IRAs conserved according to the purpose and intent of the RACR.<sup>269</sup> Though the 2001 Roadless Area Conservation Rule remains in legal limbo (as discussed earlier), some conservationists believe that these IRAs could still be safeguarded if they are preserved in the meantime.

To be fair, when compared with the Forest Service’s LRMP, one finds that even though the Partnership Strategy would allow timber harvesting and road building within Inventoried Roadless Areas and the Forest Service’s plan would not (unless the RACR is rescinded), the Forest Service’s plan does not exactly preserve all roadless areas either. Under the Forest Service’s preferred alternative, IRAs remain at risk from mining, oil and gas exploration, grazing, and motorized recreation interests. Locatable mineral exploration and development is allowed in IRAs under the 1872 General Mining Act (and in the RACR), and road building for oil and gas development is only precluded by the 2001 RACR if the leases were issued after 2001. Oil and gas leases in IRAs will also still occur under the designation “controlled surface use” (CSU) according to the B-DNF’s Revised Plan.<sup>270</sup> While this stipulation precludes road building, it does not preclude drilling and occupancy. The CSU designation also contains language that allows it to be waived if the RACR is no longer in effect.<sup>271</sup>

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<sup>267</sup> Beaverhead-Deerlodge Partnership, “Partnership Strategy for the Beaverhead-Deerlodge National Forest.” April 24, 2007: 28. <http://www.bhdlpartnership.org/PDFs/Proposal-FinalPartnershipStrategy.4.14.06.pdf> (Accessed 11/30/07). Emphasis mine.

<sup>268</sup> It should be noted that on more than one occasion in the in-depth interviews I was told that “200,000 acres” of IRA would be “released,” though this was before the latest version of the proposed legislation was made available, and there was no specification of what these lands were being released to. *See* Beaverhead-Deerlodge Partnership, “Recommended Wilderness and Eligible Lands,” [http://www.bhdlpartnership.org/Maps/RecommendedWildernessBase\\_11x17.pdf](http://www.bhdlpartnership.org/Maps/RecommendedWildernessBase_11x17.pdf) (Accessed 11/11/2008).

<sup>269</sup> *Ibid.*

<sup>270</sup> U.S. Forest Service. *B-DNF LRMP*, 286.

<sup>271</sup> *Ibid.*

Likewise, a number of IRAs and two Wilderness Study Areas (WSAs) in the B-DNF are currently open to motorized recreational use through administrative “backcountry” designations<sup>272</sup> which, according to the Forest Service’s studies, cause detrimental biophysical effects.<sup>273</sup> There are potential social impacts too, including the displacement of forest visitors that find that mechanized use tends to void “quiet use.” While the B-D Partnership’s legislation would bring more of these IRAs into the NWPS, thereby affording them permanent protection, it too leaves nearly 1.3 million acres potentially open to motorized recreation, pending ongoing travel management plans.

Apparently as a concession to OHV users, snowmobile riders and mountain bikers, this proposed legislation would also create the 11,600-acre “Lost Creek Protection Area” as a companion designation to the new wilderness areas. This special management area (SMA) would be managed essentially as wilderness except for allowing non-motorized, mechanized travel (mountain biking) all year long, and motorized travel “during periods of adequate snow-cover” on existing trails.<sup>274</sup> Even with these apparent concessions, motorized and mechanized recreation groups remain strong opponents to the B-D Partnership Strategy.<sup>275</sup>

The B-D Partnership Strategy and draft legislation has also caused a significant rift in the conservation community over wilderness designations and IRA preservation. This “rift” is not only evident in the transcripts of the interviews conducted for this paper, but has been very visible in the mainstream media too.<sup>276</sup> Many conservationists in the region are divided over both the ethics and practicality behind using a quid pro quo strategy for designating wilderness, viewing it as either “selling out” by compromising too much for too little wilderness, or taking a necessary step forward to break the

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<sup>272</sup> Ibid., 345-355, 428.

<sup>273</sup> U.S. Forest Service, “Unmanaged Motorized Recreation,” 2008: 2. <http://www.fs.fed.us/publications/policy-analysis/unmanaged-recreation-position-paper.pdf> (Accessed on 10/13/08).

<sup>274</sup> Ibid. at 8.

<sup>275</sup> E.g. Montana Mountain Bike Alliance, “Threat to Mountain Biking in the Beaverhead-Deerlodge National Forest,” *Position on the B-D Partnership*, 2008, <http://www.montanamountainbikealliance.com/about/position-on-b-d-partnership> (Accessed 10/03/08).

<sup>276</sup> See Bill Schneider, *Natural Allies Chronology*, NewWest.net, 12/2005-05/2005, [http://www.newwest.net/main/article/the\\_natural\\_allies\\_chronology/](http://www.newwest.net/main/article/the_natural_allies_chronology/).

“stalemate” and preserve IRAs before it is too late.<sup>277</sup> The formulation of place-based conservation legislation comes from negotiated compromises over wilderness designations, wilderness for timber in the case of the B-D Partnership Strategy. Conservationists that oppose “quid pro quo” negotiations like this stress that conservation interests risk the most in these deals, as preservation of roadless areas is a “zero-sum game” and the outcomes of such deals tend to be much narrower due to the reciprocity inherent to the process.<sup>278</sup> This type of bargaining also offends the ideals of some wilderness advocates who believe that all eligible IRA acreage that is left should be preserved as wilderness.

Conservationists that support negotiated compromises like these over wilderness largely point to the paucity of wilderness designations in the Northern Rockies over the past 25 years.<sup>279</sup> They say that the status quo is not working and ask the pragmatic question, “If not this, then what?” While some people think that large, national-interest wilderness bills like NREPA are the “wave of the future,” others think that place-based “compromise” bills like the B-D Partnership’s are the only pragmatic approach to future wilderness preservation.<sup>280</sup> “We’re not willing to fall on our swords over roadless areas,” said one person interviewed. This debate over pragmatism versus idealism will be discussed further in Section V, as will the implications of a divided conservation movement.

## B. Ecological Restoration and Environmental Standards

Resource use and the exclusion of fire for nearly 100 years has changed wildlife habitat on the B-DNF, with aspen communities, riparian shrub communities, and sagebrush communities (from conifer encroachment) in decline.<sup>281</sup> In addition, mining, timber harvesting, and roads have been shown to be the primary sources of watershed

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<sup>277</sup> Bill Schneider, “The Wilderness Drought and how the Green Group Feud keeps it Alive,” *NewWest.net*, 05/01/2008, [http://www.newwest.net/topic/article/the\\_wilderness\\_drought\\_and\\_how\\_the\\_green\\_group\\_feud\\_keeps\\_it\\_alive/C41/L41/](http://www.newwest.net/topic/article/the_wilderness_drought_and_how_the_green_group_feud_keeps_it_alive/C41/L41/).

<sup>278</sup> Personal interview with the author.

<sup>279</sup> Schneider, “The Wilderness Drought.”

<sup>280</sup> *Ibid.*

<sup>281</sup> U.S. Forest Service, *B-DNF LRMP*, 485-486.

impairment on the Forest through sedimentation.<sup>282</sup> The USFS Northern Region contains over 54,700 miles of roads with only 2 percent of these paved.<sup>283</sup> The Region has a 200 million dollar annual road maintenance need - \$4000 per mile – in order to maintain roads to management standards. In addition, the Northern Region had a road maintenance backlog of \$429 million dollars in 2001, which is presumed to have grown over the past seven years.<sup>284</sup>

The B-D Partnership attempted to meet some of these needs when designing the restoration provisions in their strategy and proposed legislation. The Partnership’s “Restoration Strategy” outlines eight priorities: (1) the removal of excess permanent roads; (2) the restoration of natural landscape patterns; (3) the modification of fuels along the forest periphery to allow fire to take a more natural role; (4) the modification of age class distribution to provide a more natural mix of wildlife habitat, reduce fire severity, and lessen the severity of insect outbreaks; (5) the improvement of aquatic habitat; (6) the enhancement of recreational resources that are inadequately funded; (7) the reduction of the impacts of invasive species; and (8) to keep timber management as an economically viable tool for land management and a rural economic base.<sup>285</sup>

These goals are to be accomplished primarily through the use of timber harvesting techniques, prescribed burns, road obliteration, and culvert replacement up to Best Management Practice (BMP) standards.<sup>286</sup> As discussed below, prescribed burning and other silvicultural methods will only be used as “secondary options” to timber harvesting.<sup>287</sup> Permanent roads, both newly “relocated” and in treatment areas where there are already high densities of roads, will be managed at a density of 1.5 miles per

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<sup>282</sup> Ibid., 101.

<sup>283</sup> Donna Sheehy, “Reconditioning and Stabilization of Unpaved Roads for Reducing Road Maintenance and Impacts on Fisheries Habitat,” *ICOET Proceedings*, 2001, Road Ecology Center eScholarship Repository, John Muir Institute for the Environment, University of California, Davis, 2001:121, <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1009&context=jmie/roadeco>.

<sup>284</sup> Ibid., 122. Nationwide, the USFS has an estimated \$10 billion maintenance backlog on over 400,000 miles of national forest roads. See John Cramer, “Forest Road Work May Drive Up State Jobs,” *The Missoulian*, January 4, 2008, <http://www.missoulian.com/articles/2008/04/01/news/local/news03.txt>.

<sup>285</sup> Beaverhead-Deerlodge Partnership, “Partnership Strategy,” 10.

<sup>286</sup> Ibid., 10-12.

<sup>287</sup> Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 10.

square mile.<sup>288</sup> All “new” access roads are to be considered “temporary” in the B-D Partnership’s plan, to be removed and recontoured within five years of their construction.<sup>289</sup>

The funding of these restoration priorities and mandates relies upon a central provision of the Partnership Strategy: the use of Stewardship Contracting authority.<sup>290</sup> Stewardship Contracting is an approach used by land management agencies that attempts to satisfy both resource needs and the needs of local communities by allowing the exchange of goods for services.<sup>291</sup> No additional appropriations are requested in the Partnership Strategy outside of discretionary budgets, though the language of the proposed legislation does mandate a minimum number of acres to be treated, whether under Stewardship Contracting authority or not.<sup>292</sup>

“Stewardship End Results Contracting” grants the Forest Service the authority to contract with private and public entities to “achieve land management goals” and to “meet the needs of local communities.”<sup>293</sup> Under Stewardship Contracting Authority, five contracting mechanisms can be employed by the agency: (1) the exchange of goods for services, (2) the retention of receipts for local stewardship projects rather than returning them to the general treasury, (3) the use of “end results contracting” that allows the contractor to develop the method used to carry out the contract in the most efficient manner, (4) the use of “best-value contracting” which allows the Forest Service to consider non-economic criteria when selecting contractors, and (5) the ability to enter into multiyear contracts which can allow an individual stewardship contract to run up to 10 years.<sup>294</sup> A fairly recent innovation, Stewardship Contracting has received a mixed but mostly positive review, and is considered further in the context of meeting the Partnership’s ambitions in Section V.

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<sup>288</sup> Ibid., 4-5. Though “relocated permanent roads” must be “designed to resolve existing resource problems” and “access the same destinations” as the old roads, there seems to be enough leeway in this prescription to potentially cause conflicts (Sec. 102(c)(2)).

<sup>289</sup> Ibid., 5.

<sup>290</sup> Ibid., 12.

<sup>291</sup> 16 U.S.C. 2104; Sec 323 P.L. 108-7 (2003)

<sup>292</sup> A “minimum of 70,000 acres” must be treated before the term of authorization or the Act runs out. Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 8.

<sup>293</sup> Cromley, “Community-Based Forestry,” 234.

<sup>294</sup> Ibid., 234-235.

### C. Timber Supply

One of the central provisions of the B-D Partnership's proposal is to stabilize the timber industry by providing a more predictable supply of timber. The Northern Rockies region of the United States is currently undergoing a widespread demographic and economic transition. This transition is characterized in part by a change from an economy dominated by extractive industries like timber harvesting, to more service-oriented industries.<sup>295</sup> Southwest Montana, where the B-DNF is located, is no exception to this trend.<sup>296</sup> Timber production declined on the B-DNF by 6% between 1985 and 2000, though this is small compared to the 31% average decrease in Montana as a whole during the same time period.<sup>297</sup> Further perceptions of changes related to "forest health" come from increased worries over wildland fires due to bark beetle infestations, a "fuels" build up resulting from over a century of forest fire suppression, and a changing climate that is creating a hotter and drier Northern Rockies.<sup>298</sup>

The B-DNF identified 1,489,148 acres of land on the Forest as "tentatively suitable for timber harvest and available for further timber analysis" during the formulation of management alternatives for its 2008 LRMP.<sup>299</sup> This acreage was determined through a process of subtraction, eliminating, "non-forest lands, areas physically unsuited due to fragile soils, steep slopes, wetlands, areas where reforestation cannot be assured within 5 years, or areas withdrawn from timber production by an Act of Congress, the Secretary of Agriculture or the Chief of the Forest Service."<sup>300</sup> According to resource objectives contained in the Forest Service's preferred planning alternative (Alternative 6), 299,000 acres of land (out of the aforementioned roughly 1.5 million acres) were ultimately found to be "suitable for timber production," with a

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<sup>295</sup> Power, *Lost Landscapes and Failed Economies: The Search for a Value of Place*, 57-58.

<sup>296</sup> Headwaters Economics, "Montana," *Economic Profile System*, <http://www.headwaterseconomics.org/profiles/montana.html>, (accessed 05/01/08).

<sup>297</sup> U.S. Forest Service, *Beaverhead-Deerlodge National Forest Draft Forest Plan*, <http://www.fs.fed.us/rl/bdnf/>, (Accessed 04/29/2008).

<sup>298</sup> U.S. Forest Service, *Beaverhead-Deerlodge National Forest Final Environmental Impact Statement* (FEIS), <http://www.fs.fed.us/rl/bdnf/>, (accessed 03/16/2008); John C. Russell, "A Social Analysis," 10.

<sup>299</sup> U.S. Forest Service. *B-DNF LRMP*, 436.

<sup>300</sup> *Ibid.*, 436.



projected output of 14 million board feet per year (mmbf).<sup>301</sup> Final timber production output from suitable timber lands is also dependent upon area productivity, further site-specific environmental analysis, and the financial resources available annually to produce timber.

Over the past five years, B-DNF timber offers have increased from an average of 9 mmbf to 14 mmbf due to an emphasis on fuels reduction by the agency. The Forest Service anticipates this level to remain the same for the next five years, if not the next decade.<sup>302</sup> The highest levels of timber harvest on the Forest occurred in 1988 and 1990 at 40.7 mmbf on 6,000 acres of land per year, but has never occurred since, due largely to evolving administrative and judicial interpretations of agency legal requirements, advances in scientific understand of how ecosystems work, and shifting public attitudes concerning management priorities for National Forest lands.<sup>303</sup> Under “Alternative 6,” Long Term Sustainable Yield (LTSY) is capped at 24 mmbf (without budget constraints) on suitable timberlands.<sup>304</sup>

In a strange twist of nomenclature, the Forest Service also classifies other lands that are open to timber harvesting as “Unsuitable Lands where Timber Harvest is Allowed.”<sup>305</sup> These are lands that are not suitable to be managed for the purposes of timber production, but may be harvested for fuels reduction, thinning, and stewardship purposes. The B-DNF’s preferred alternative specifies 1,614,000 acres of forest in this category. Considerations here include the retention of 10% of old growth for each tree dominance type, reducing 74,000 acres of conifer encroachment, and promoting 67,000 acres of aspen recovery.<sup>306</sup> This brings the total acreage in the B-DNF where “timber harvest is allowed” in the preferred planning alternative to 1,913,000 acres.<sup>307</sup> None of this is “mandated” for harvest, though trends indicate that the average of 14 mmbf per year will continue.

On the other hand, the Beaverhead Deerlodge Partnership’s most recent draft of its legislation, “The Beaverhead-Deerlodge Conservation, Restoration and Stewardship

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<sup>301</sup> Also called “suitable timber base.” Ibid., 443.

<sup>302</sup> Ibid., 438.

<sup>303</sup> Ibid., 439.

<sup>304</sup> Ibid., 443.

<sup>305</sup> Ibid., 444.

<sup>306</sup> Ibid., 446.

<sup>307</sup> Ibid., 444.

Act of 2007,” mandates mechanical treatment of an eligible land base of 698,500 acres of land.<sup>308</sup> This is accomplished through the designation of six “Stewardship Areas”<sup>309</sup> in Section 101 of the legislation, each with a specific acreage of “eligible land” that “shall” be managed under “landscape scale restoration projects.”<sup>310</sup> In this latest version of the draft legislation, a “landscape scale restoration project” is defined as an area within a Stewardship Area where “vegetation management through commercial timber harvest, prescribed burning and other silvicultural techniques shall occur” in order to mimic the effects of fire, reduce risk and severity of insect infestations, restore watersheds, enhance habitat, and “maintaining the current infrastructure of wood products manufacturing facilities.”<sup>311</sup> This harvest is mandated in no uncertain terms according to the language of the Act.

Section 102 of the bill adds even more mandates to the implementation phase, including restoration methods and a timeframe. In addition to the requirements mandated in the previous section, it further specifies that: “vegetation *shall* be managed through timber harvest, [with] prescribed burning as a secondary option with other silvicultural techniques...;” “wildlife habitat *shall* be restored and maintained through mechanical treatment...;” and “vegetation management *shall* include commercial timber harvest...”<sup>312</sup> Section 102 also stipulates that no later than one year after the legislation is enacted, the Secretary “shall” begin implementing at least one “landscape-scale restoration project” per year.<sup>313</sup> Designated benchmarks state that within the Stewardship Areas, the Secretary “shall mechanically treat timber that yields value for meeting the restoration goals of this Act,” on a minimum of 14,000 acres within two years, 35,000 acres within five years, and 70,000 acres within ten years after the date of enactment.<sup>314</sup> It also specifies that one environmental impact statement (EIS) shall be prepared for each landscape-scale restoration project, and that no additional environmental analysis under

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<sup>308</sup> Beaverhead-Deerlodge Partnership, *Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007*, 3-4.

<sup>309</sup> “The term ‘Stewardship Area’ means the six areas... in which the Secretary shall implement one or more landscape scale restoration projects as directed by Section 102.” *Ibid.*, 2.

<sup>310</sup> The sum total acreage of these areas is 698,500 acres “that shall be managed under landscape scale restoration projects;” *Ibid.*

<sup>311</sup> *Ibid.*, 2.

<sup>312</sup> *Ibid.*, 5. (Emphasis mine.)

<sup>313</sup> *Ibid.*, 4.

<sup>314</sup> *Ibid.*, 5.

NEPA is required.<sup>315</sup> Finally, the authorization of this Act will expire after ten years, but only if a “minimum of 70,000 acres have been treated.” If 70,000 acres have not been treated at that time, the authorization continues until that goal is met.<sup>316</sup>

When compared to earlier versions of this legislation, this latest version contains much stronger language toward mandated outcomes, seemingly in an attempt to make the timber side of the agreement as certain as the wilderness designations would be. In fact, both “certainty” and “durability” were mentioned by many of the people interviewed for this project as reasons for seeking place-based conservation legislation.

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<sup>315</sup> Ibid., 6.

<sup>316</sup> Ibid., 8.

## V. Analysis

This section analyzes the use of place-based conservation legislation to resolve conflicts over natural resources on national forests. I examine place-based conservation legislation from five different perspectives: (1) motivations for seeking place-based legislation; (2) wilderness designations and IRA preservation; (3) forest planning and reform; (4) implementation; and (5) national forest governance. These perspectives were chosen in accordance with the most prevalent themes that emerged from relevant policy literature, documents obtained during research conducted for this paper, personal correspondence, and the in-depth interviews. Multiple perspectives of analysis are important not only as an organizational tool, but also because these different perspectives yield different reasons for or against the use of place-based conservation legislation.

### **Motivations**

Assessing what motivates groups to seek the place-based conservation legislation approach is important in at least two ways. First, it allows one to evaluate the potential success of this approach by comparing it to what practitioners aim to accomplish through its use. Second, it gives those who are interested in formulating alternatives to place-based conservation legislation a starting point from which to create natural resource policy reforms. In other words, the reasons that groups give for seeking place-based conservation legislation tell us something about where they see the status quo as falling short of their expectations, hinting at both what needs to be done to change it and what is working policy-wise within Forest Service administrative planning.

Among the many reasons given by practitioners for seeking place-based legislation, there were four that were mentioned more frequently than others. These were (1) a frustration over perceived agency “gridlock,” (2) a desire for more certainty in national forest planning outcomes, (3) the desire to designate wilderness and to preserve IRAs, and (4) concerns over changing economic, recreational, demographic and ecological trends in the Rocky Mountain West. This is not to say that all parties seeking solutions to these issues think that place-based conservation legislation is the best answer, but that the status quo is not addressing these issues adequately in their minds.

Gridlock: Frustrations over agency gridlock and its relation to place-based legislation is a perfect case in point. For example, Partnership members believe that the Forest Service is so consumed with planning process requirements, administrative appeals and litigation that little on-the-ground work is getting done. Though the Partnership sees place-based legislation as a potential remedy to this, others disagree with that assessment. “Is this an answer to gridlock?” said one person interviewed, “Sure we have USFS gridlock, but we have judicial gridlock too. We don’t see anyone proposing an end-run around the judicial system though.”<sup>317</sup> For this person, “gridlock” performs the same “check and balance” function that we see throughout our system of government. At the same time, another person brought up the very real frustration that this engenders when one perceives that urgent needs on the forest are not being met. “Nobody feels like they’re getting what they want on just about anything, and so people are looking for some sort of guarantee for their particular issue.”<sup>318</sup> And another remarked, “The Forest Service seemed uninterested in making the kinds of concessions we sought, or changing the direction of the B-DNF in any significant way.”<sup>319</sup> Given concerns over current ecological and social trends, this desire for agency action and an increased level of certainty is understandable.

Certainty: The desire for more certainty in national forest planning outcomes came up frequently, and across a broad spectrum of issues from wilderness designation to ecological restoration and forest commodity extraction. A lot of this desire stems from the view that since the Forest Service has ultimate discretion in forest management, other group’s invested in (and in some cases, economically dependent on) how the forest is managed are left having to react to changing decisions, policies and budgets, especially regarding timber management and restoration initiatives. “Without certainty of some areas being protected, folks feel like they have to fight all new extraction,” said one respondent.<sup>320</sup> Likewise, another person who could be considered more on the “conservation side” of the debate stated, “I personally think that it’s essential that the [timber] infrastructure stays if we want to be able to do anything in the future, but how

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<sup>317</sup> Personal interview with the author.

<sup>318</sup> Personal interview with the author.

<sup>319</sup> Personal interview with the author.

<sup>320</sup> Personal interview with the author.

can you do that if they don't have a guaranteed supply?"<sup>321</sup> Some of the people with these interests hope to find certainty through the use of place-based legislation. This motivation is closely tied to the lack of certainty in new wilderness areas recommended by the agency during the planning process too.

Unresolved Wilderness: In fact, the lack of new wilderness designations in Montana over the past 25 years was mentioned by every person interviewed when asked why there is interest in the use of place-based conservation legislation. One policy professional said, "Wilderness in Montana has been frozen for 20 years – there's nothing happening – and timber, there's this paralysis around that. I think that people have looked at those two things and realized that with things being paralyzed the way they are and have been, the only people really benefiting from that paralysis are the off-road vehicle types."<sup>322</sup> Increasingly there is a realization that new wilderness designations (and the preservation of IRAs) are tied to broader land management issues and conflicts. From the timber side of the equation, the hope is that new wilderness designations might allow anti-logging conservation groups to relax their grip on appeals and litigation. From the conservation side, the hope is that new wilderness designations would start to deal with unresolved IRAs and uncertainty in the wake of RACR litigation. "We used to think that time was on our side," said one conservationist, "but it's not, because of the ORV intrusion... ORVs have actually eclipsed logging as the greatest threat to wilderness."<sup>323</sup> Unauthorized or unmanaged ORVs produce roads and impacts that can disqualify areas from congressional designation.<sup>324</sup> The concern was also mentioned that new wilderness designations are going to have to be more piece-meal, incremental, and contain more quid pro quo aspects than they have in the past due to increased scarcity and competition between uses, though it should be noted that respondents were fairly divided over this point.

Comprehensive Conservation: Whether this is true or not for new wilderness designations, there was a view among those interviewed that recent economic, social, and

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<sup>321</sup> Personal interview with the author.

<sup>322</sup> Personal interview with the author.

<sup>323</sup> Ibid.

<sup>324</sup> 16 U.S.C. 1131-1136 Sec. 2 (c). *Norton v. Southern Utah Wilderness Alliance* also made it more difficult for conservationists to litigate to force agencies to manage OHV use in WSAs; 124 S. Ct. 2773 (2004).

ecological changes call for new approaches to public lands management. Some think that place-based legislation is a perfect example of this, while others, even if skeptical of this approach, thought that at least the dialogue that is being created around proposals like the B-D Partnership Strategy is a good thing. Though wilderness designation and timber harvesting stand out in the B-D Partnership's approach as the "two sides that have come together," the ability to also prescribe ecological restoration, stewardship, fuels and fire mitigation, and forest road removal is a large part of the attraction to the place-based legislation approach, especially when facing a warmer and drier climate in the Northern Rockies. "The answer is in the biology," one person said.<sup>325</sup> "The worst thing right now for restoration would be to have these small, independent mills leave. So how do we devise legislation that actually rewards districts that can come up with collaborative processes that show what success looks like, that show the connection between restoration work and wildland protection and habitat connectivity in the context of climate change?"<sup>326</sup>

Interestingly, there were more commonalities than differences of opinion among those interviewed, even from traditionally divergent points of view. When I mentioned this during one of the interviews, the person replied, "The vast majority of us are on the same page. The more that's said the more it's like, 'Okay, maybe the time is right to make some national changes.'"<sup>327</sup> "I remember thinking that the time is right," said another person, "for conservation and industry to start solving problems together... here's an opportunity for us – an opportunity to get beyond the gridlock and the warrior mentality and the adversarial approach that's been going on for over 20 years."<sup>328</sup> The question remains as to whether or not place-based conservation legislation is the right method to do so.

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<sup>325</sup> Personal interview with the author.

<sup>326</sup> Personal interview with the author.

<sup>327</sup> Personal interview with the author.

<sup>328</sup> Personal interview with the author.

## Wilderness Designation and IRA Preservation

This past decade has seen the least amount of wilderness designated since the Wilderness Act was passed.<sup>329</sup> This could be attributed to the increased scarcity of suitable parcels,<sup>330</sup> or that many of the politically easy designations have already been made, but both the Forest Service's RARE studies and independent analyses have shown that a number of potential wilderness areas that meet or exceed the criteria of the Wilderness Act have not yet been protected.<sup>331</sup> This leads one to believe that the current "wilderness drought" is due more to conflicts over values or a lack of political will than it is about wilderness suitability. Studies have shown that Americans on the whole support more wilderness, but that the designation process is often "held hostage" by local communities.<sup>332</sup>

This has probably always been the case, for (as previously stated) the designation of wilderness has been a negotiated process since 1964.<sup>333</sup> Furthermore, the final decision by Congress over each proposed wilderness area is typically the product of political considerations with local or state-wide focuses rather than national ones.<sup>334</sup> Compromises were made during the process of crafting each wilderness bill,<sup>335</sup> and wilderness designation continues in this fashion with two thirds of all bills since 1980 containing one or more special management provisions,<sup>336</sup> not to mention compromises over boundaries, acreage, and which suitable areas are to be designated. One person pointed out that the B-D Partnership strategy is merely a continuation of this trend, "I don't see any wilderness being generated in Montana absent some coalition with the

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<sup>329</sup> Wilderness.net, "Number of Acres Legislated by Year," *The National Wilderness Preservation System*, October, 2008, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=chartResults&chartType=legislatedAcreage>.

<sup>330</sup> Congress has designated 107 million acres as Wilderness, leaving 58 million acres of IRAs on National Forests and an untold amount of roadless acreage being managed by the BLM, NPS, and USFWS.

<sup>331</sup> For examples on the B-D National Forest, see Beaverhead-Deerlodge National Forest. "Appendix C: Evaluation of Inventoried Roadless Areas for Wilderness Potential." in U.S. Forest Service, *B-DNF LRMP*, 2008: 1-184.

<sup>332</sup> Sandra Zellmer, "A Preservation Paradox: Political Prestigation and an Enduring Resource of Wildness," 34 *Environmental Law* 1015, 2004: 1049.

<sup>333</sup> Scott, *The Enduring Wilderness*, 118.

<sup>334</sup> George Cameron Coggins, "Wilderness in Context." 76 *Denv. U. L. Rev.* 383, 1998-1999: 393.

<sup>335</sup> Leshy, "Contemporary Politics," 2.

<sup>336</sup> Craig W. Allin, "Wilderness Policy," in Charles Davis ed. *Western Public Lands and Environmental Politics* (Boulder: Westview Press, 1997), 183.



timber industry. I don't think the environmental community is even close to having enough muscle to do that."<sup>337</sup>

The compromise strategy used by the Partnership reflects what Law Professor John D. Leshy refers to as the mixture of "idealism" and "pragmatism" that characterizes many successful social movements.<sup>338</sup> Increasingly, more conservation organizations are coming to the conclusion that the wilderness designation process needs to have a healthy dose of both. While the idea of wilderness embodies American ideals that are deeply rooted in our history, it is our pragmatism that ushers individual bills through the codification process. This pragmatism also leads one to the point that was made by many of those interviewed: that since the designation of wilderness requires an act of Congress anyway; it was not very hard to go "one step further" by including the other provisions of the Partnership Strategy within one piece of legislation.

The conflict, in this case, has occurred over how much compromise is necessary and appropriate, as well as whether or not a negotiated compromise at the local level or the Congressional level is better either democratically or substantively. While the Partnership claims that "in a democracy, elected officials provide the best representation of the public,"<sup>339</sup> this is disputed by Law Professor Sandra Zellmer who notes that, though Congress is usually viewed as the "most democratic of the policy-making branches," agency policymaking is actually more visible and predictable.<sup>340</sup> Zellmer's basic point here is that the political level at which Congress operates does not necessarily make it a very open, accessible and accountable institution for matters like these. There are no public comment periods, no methods of appeal, and no professional land managers in Congress.

This is not to say that administrative planning is not subject to some of the same political criticisms as Congress is. It should be noted that under the status quo, political compromises and negotiations also occur at the administrative level before wilderness recommendations ever make it to Congress. For example, the B-DNF plan failed to recommend for wilderness designation a number of qualifying roadless areas with very

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<sup>337</sup> Personal interview with the author.

<sup>338</sup> Leshy, "Contemporary Politics," 3.

<sup>339</sup> Bob Bosche, "The Beaverhead Deerlodge Partnership," *City Club Forum*, Missoula, MT. November 16<sup>th</sup>, 2007.

<sup>340</sup> Zellmer, "Preservation Paradox," 1083-1084.

high “wilderness capability” scores, reasoning that the areas are politically contentious, used for motorized recreation, or possess resource extraction potential.<sup>341</sup> Both the place-based legislation approach and administrative planning approach are sometimes at odds with the large “citizen-initiated” wilderness bills like the Northern Rockies Ecosystem Protection Act (NREPA)<sup>342</sup> and America’s Red Rock Wilderness Act of 2007<sup>343</sup> that aim for comprehensive IRA preservation through wilderness designations. Wilderness policy expert Doug Scott cautions not to let “the perfect be the enemy of the good.” This legislative “give and take” is the real reason why the NWPS grows by incremental decisions rather than by some sweeping vision, and is a necessary process.<sup>344</sup> “Visionary though it was,” writes Scott, “the Wilderness Act was itself an incremental step, the product of compromise and accommodations that fueled its way to enactment.”<sup>345</sup>

Some argue that this was the case with the 2001 Roadless Area Conservation Rule too. “Every wilderness bill of any consequence has involved some trade-off – some release of lands to multiple use,” said another person interviewed, “And it was only when we stalemated on wilderness that we tried to create some sort of de facto or de juris ‘stop-gap’ through the RACR, but it was never envisioned as the end-all, it was envisioned as something to hold on to the trading pieces until you were ready to trade again.”<sup>346</sup> This person argues that we are ready to trade again now. Considering our current “wilderness drought,” others reason that whatever strategy has been used over the past 25 years in the Northern Rockies does not seem to be working, and the time is ripe to try something new.<sup>347</sup>

To their credit, the B-D Partnership’s plan attempts to account for both the relationship between rural economies and public lands, as well as the political capital

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<sup>341</sup> For example, the 53,494 acre Big Horn Mountain IRA in the Gravelly Range scored “high” on both wilderness suitability and capability, but was not recommended for wilderness due to ORV and mountain biking recreational uses as well as the potential for oil and gas development. Many other examples also exist in Revised Plan. U.S. Forest Service, *B-DNF LRMP*, Appendix C-20 – C-23.

<sup>342</sup> H.R. 1975 (2007).

<sup>343</sup> S. 1170 (2007).

<sup>344</sup> Scott, *The Enduring Wilderness*, 118.

<sup>345</sup> Ibid.

<sup>346</sup> Personal interview with the author.

<sup>347</sup> See generally, Bill Schneider’s *Natural Allies Chronology*. NewWest.net. 12/2005-05/2005. [http://www.newwest.net/main/article/the\\_natural\\_allies\\_chronology/](http://www.newwest.net/main/article/the_natural_allies_chronology/).

needed to create new wilderness designations.<sup>348</sup> This is important, for some believe that the easy work with respect to wilderness designation is done.<sup>349</sup> Protecting the last remaining roadless acreage in this country will likely take more political and social capital than ever before, and perhaps new approaches to old debates. There is also a growing realization that the “winner take all” attitude to resolving environmental conflicts like what was prevalent in the “timber wars” is counterproductive in the long run.<sup>350</sup> Even after all of our remaining roadless areas have been dealt with, the long-term viability of those areas is going to depend in large part upon the cooperation and buy-in of local communities, as well as the continued existence of infrastructure necessary to accomplish ecological restoration goals on surrounding lands. Wilderness “islands” won’t do it in the long run, as the concept of “island biogeography” from the science of conservation biology makes clear. As such, care needs to be taken to both avoid an anti-wilderness backlash and to provide for the ecological health and connectivity of the areas surrounding wilderness. Packaging wilderness designations with more comprehensive conservation measures in the form of place-based legislation can do both, according to this view.

This acceptance of compromise in wilderness designation is nowhere near universal. Critics point out that government bureaucracies usually want to do, as one person put it, “What’s politically expedient rather than [what’s] ecologically sound.”<sup>351</sup> The worry is that local communities who formulate the compromises that lead to place-based conservation legislation are often willing to “sacrifice long-term sustainability for more short-term economics,”<sup>352</sup> and that Congress might be willing to listen to them. Others stress that while compromises for wilderness may be important, each provision should be subject to a “stand alone” test. As one person commented about a place-based proposal that he helped formulate, “Our attitude was that each one of those pieces had its own integrity, individually, and could stand alone; and the reason to bundle them was to kind of build the politics to get something through.”<sup>353</sup> Such a “stand alone” test might

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<sup>348</sup> B-D Partnership, *Strategy*, 4.

<sup>349</sup> From multiple personal interviews with the author.

<sup>350</sup> Thomas, “The Future of the Forest Service,” 35.

<sup>351</sup> Personal interview with the author.

<sup>352</sup> *Ibid.*

<sup>353</sup> Personal interview with the author.

be useful when evaluating and considering the individual provisions in a proposed piece of place-based legislation. Some provisions in the B-D Partnership's case such as the "release" of roughly 200,000 acres of IRAs "stewardship area" management that requires mechanical treatment,<sup>354</sup> might not meet this standard for some people.

Many objections from interested citizens on the other side of the issue relate to the amount of wilderness designated. For example, many OHV user groups (and some public lands grazing groups) in the area see all new wilderness designations as directly conflicting with their right to access public lands, and this is a constituency that is gaining power and traction with legislators.<sup>355</sup> In the case of the B-DNF, OHV and grazing interests believe that there is already too much wilderness being proposed.<sup>356</sup> While grazing interests seem to be opposed to wilderness from a philosophical point of view (as the proposed wilderness designations will not impact their grazing), a number of people have pointed out that as far as law-abiding motorized recreation is concerned, these folks have a legitimate right to have their concerns heard.

At the same time there is too little wilderness being proposed according to conservation groups, especially those who want to hold out for large-scale wilderness bills like NREPA.<sup>357</sup> Time is the underlying variable here, and there seems to be a split over the urgency of wilderness protection. As stated numerous times, pressure on our remaining roadless areas from a number of sources is at an all-time high, and there is no reason to believe that this pressure will do anything but increase. While this should not create an incentive to accept wilderness compromises that are poorly crafted or are examples of bad governance (or face the unintended consequences resulting from them), there is an urgency to preservation that needs to be acknowledged.<sup>358</sup>

The potential for unintended consequences to result from implementing place-based legislated compromises rounds out many of the criticisms of this approach with

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<sup>354</sup> Personal interview with the author.

<sup>355</sup> E.g., Montana Congressman Denny Rehburg. See Brett French, "Rehburg Opposes Wilderness Bill," *The Billings Gazette*, October 12, 2007. <http://www.billingsgazette.net/articles/2007/10/12/news/state/26-rehberg.txt>.

<sup>356</sup> Russell, *Social Analysis*, 19.

<sup>357</sup> Wuerthner, "Rethinking Forest Health."

<sup>358</sup> This is also true with the 2001 Roadless Rule, as mentioned earlier. Both waiting for the two federal court cases to be resolved and moving ahead with alternatives that might be considered sub-par represent gambles with respect to the long-term IRA preservation.

respect to wilderness designation and IRA preservation. It will be important for conservationists to try to hold on to their constituency as they move forward. As seen by the unfortunate “environmental rift” that has resulted from the debate over the Beaverhead-Deerlodge Partnership’s legislation versus the long-proposed NREPA, environmental interests not only risk a narrower product due to reciprocity and compromise, but they risk the division of the environmental community and a fractured power base.<sup>359</sup> “One of the things that environmentalists have had going for them for a long time is that there’s always been a lot of solidarity in terms of people sticking together,” one person said, “So if you start chipping away at that, and you start dividing them, then it weakens the whole situation... you start getting all of the in-fighting.”<sup>360</sup> The long-term implications of this rift are yet to be seen, but every indication is that it will be not be good, perhaps even stalling future wilderness designations in region.<sup>361</sup>

There is also the fear that if Congress debates and passes place-based conservation legislation for the B-DNF (or other individual forest units), it will not revisit wilderness in Montana for a number of years following such a process. “[Montana’s Congressional delegation] will feel like they’ve already dealt with it,” said one respondent.<sup>362</sup> Wilderness designations across the West have trended toward being bundled in large, omnibus-style bills since around 1980, while at the same time becoming less frequent.<sup>363</sup> There is sufficient reason to believe that if Congress ratifies the B-D Partnership’s proposed legislation, it could view the outcome as having dealt with wilderness in the Northern Rockies, lessening the chances for other wilderness bills to be considered and ratified in the region for perhaps decades. Likewise, roadless areas deserving of wilderness protection might be excluded due to a lack of political power and access among stakeholders, either due to resources having been allocated elsewhere, or a “lack of time” on the part of a Congress faced with many place-based conservation bills.

On the other hand, such a proposal could influence Congress to consider all suitable wilderness areas in Idaho and Montana, the only two states in the West that have

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<sup>359</sup> Schneider, “Green Group Feud.”

<sup>360</sup> Personal interview with the author.

<sup>361</sup> Schneider, “Green Group Feud.”

<sup>362</sup> Personal interview with the author.

<sup>363</sup> Leshy, “Contemporary Politics,” 5.

not passed statewide wilderness bills.<sup>364</sup> “My prediction is that the B-D Partnership’s proposal will be the engine that drives a fairly large wilderness bill through Congress,” said one respondent, “The B-D Partnership might not want this to happen, to have more areas attached to their bill, but this will drive the debate in Congress. Other areas are close to their own bills too... Congress will opt to deal with these in one large swoop. They won’t want to revisit each one.”<sup>365</sup>

## **Forest Planning**

Though wilderness designation is acknowledged as one of the most important factors driving the place-based legislation approach, dissatisfaction with the current method of forest planning for MUSY is, if not equal, a close second. There is a widespread view that the Forest Service’s legal planning model is not only inefficient, but also ineffective in some areas, spending more time on “process” than actual management. “The agency is in such trouble these days,” said one person interviewed, “it went from a timber organization to a conservation organization, now to almost a paper tiger. They spend more time doing paperwork than they are on the ground.”<sup>366</sup> The Forest Service itself claims that the “process predicament” has created more paperwork for the agency and less on-the-ground management,<sup>367</sup> while the GAO has criticized the Forest Service’s accountability and performance, pointing specifically to problems with multiple-use management.<sup>368</sup>

Synoptic planning also tends to mask “value-based political conflicts” as scientific or technical ones.<sup>369</sup> For example, we have seen that timber harvests on national forests peaked in 1989.<sup>370</sup> While this could be due entirely to scarcity and market competition, many also blame Forest Service management decisions that they say shy away from politically-charged conflicts, sometimes hiding behind science. “The

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<sup>364</sup> Allin, “Wilderness Policy,” 181.

<sup>365</sup> Personal interview with the author.

<sup>366</sup> Personal interview with the author.

<sup>367</sup> U.S. Forest Service. *The Process Predicament: How Statutory, Regulatory and Administrative Factors Affect National Forest Management*. Washington, D.C.: U.S. Department of Agriculture, 2002.

<sup>368</sup> U.S. Government Accountability Office (GAO), *Forest Service Decision-Making: A Framework for Improving Performance*, GAO/RCED-97-71, April, 1997: 5.

<sup>369</sup> Nie, *The Governance of Western Public Lands*, 172.

<sup>370</sup> Adams, “Estimated Timber Harvest,” 14, 17.

Forest Service designs all of their projects to be really, really little and 100% defensible from any sort of challenge,” said one interviewee, “So they’re not doing anything bold or innovative.”<sup>371</sup> Many people agree that the B-D National Forest deserves more wilderness protection than is recommended, needs more restoration work done than is currently planned for, and can sustainably handle a much larger timber harvest than is currently allowed. There are differences, however, over how to best formulate policy and enlist public input, over the most effective way to implement policy, and over how much administrative discretion is necessary to accomplish best management practices.

Discussions over policy formulation and public participation tend to focus on responses to public opinion, conflicts, and emerging science. In the case of the B-D Partnership, the formulation of the Partnership Strategy has been criticized as “not open enough” or not representative of all of the interests that the Strategy will affect. Critics say that the “negotiation table” was too small, and there is evidence that some parties were purposefully left out of the process. While this is understandably upsetting to those who feel as though they have a stake in the outcome but had no voice in the negotiations, the question of “how big to make the table” is a difficult and pragmatic one. The opinion below (supplied by an interviewee) illustrates that this is not only a difficult question for citizen-proposed initiatives, but also potentially for the Forest Service:

I think that you could always include one more [person in the process], but then you start including people that aren’t productive, that start being more obstructionist than productive, and I think that happens in public land planning all the time – public processes where you include all of these people. How the hell can you address 10,000 comments on the Yellowstone Winter Use Plan? You don’t. You fucking rubber stamp them and throw them in some bin.<sup>372</sup>

This sentiment highlights the hard work and potential for frustration that public participation entails, especially as the number of participants grows. This can be especially true for “collaborative” processes that focus heavily on consensus-building and open participation. Good collaborative processes, according Law Professor Matthew McKinney, are “inclusive, informed, and deliberative,” with participants investing the

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<sup>371</sup> Personal interview with the author.

<sup>372</sup> Personal interview with the author.

time and energy to design a process to accommodate all interested parties.<sup>373</sup> This includes “people who are affected by the issue, those needed to implement any outcome, and anyone who may undermine the process and outcome if not included.”<sup>374</sup> There was much debate among those interviewed as to whether or not the B-D Partnership was in fact an example of “collaboration.” “It really just burns me that they call this collaboration,” said one policy expert, “because it was a negotiated deal.”<sup>375</sup> According to the principles listed above, this person was correct.

That does not necessarily invalidate the B-D Partnership’s proposal, though. While such a “collaborative” policy formulation framework sounds democratically ideal, some believe that it is neither possible nor desired in every situation. “The ripple of collaboration can extend out to a place where it becomes almost impossible to get anything done,” said another policy expert. He added that in the case of the B-D Partnership choosing who was going to help create its strategy, “These were the interested people who were willing to help... If one wants to get something done and if one wants to get something done fast, then you pick a smaller, nimble team to get the ball rolling.”<sup>376</sup> Others interviewed also worried that consensus-building processes give too much “veto power” to marginal, and sometimes damaging, special interests. One respondent worried that:

Kawasaki is setting wilderness policy in America. This is made even more possible through collaboration. Local collaboration gives them a big piece of the pie, when they wouldn’t get that at a national level. The B-D Partnership hasn’t included these people, but things aren’t over yet, and they’re the most vocal objectors.<sup>377</sup>

This point of view highlights the fact that focusing on a “collaborative ideal” may in fact yield less than ideal results in some cases. While the topic of which situations are appropriate for “collaboration” is not within the scope of this paper, this is an important point to mention because of the amount of debate that it has created. Ultimately this proposal, “collaborative” or not, will go through the process by which a proposal

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<sup>373</sup> McKinney, *The Western Confluence*, 213-214.

<sup>374</sup> Ibid.

<sup>375</sup> Personal interview with the author.

<sup>376</sup> Personal interview with the author.

<sup>377</sup> Personal interview with the author.



becomes draft legislation, draft legislation becomes a bill, and a bill becomes a law. Every step in this process will also add some measure of accountability. Likewise, even if this proposal does become a law, it will still have to be interpreted and implemented within our existing body of laws and regulations which will add further safeguards and avenues for appeal.

Leadership was another concern of respondents who commented on the reform potential of place-based conservation legislation. “People do make a difference,” said one person, “and you just don’t go to another forest and replicate that.”<sup>378</sup> Others also questioned the transferability of this approach to other forests, not only because of the somewhat idiosyncratic nature of local leadership, but because of the obvious differences in ability to access Congress enjoyed by different geographic locations. Some locales like the Rocky Mountain Front enjoy widespread notoriety and admiration, while others like the Scotchman Peaks are more locally known.<sup>379</sup> This makes a huge difference when one is attempting to find a sponsor and an audience in Congress, though both areas might deserve equal amounts of attention and protection.

The Congressional nature of this approach also creates debate over its certainty and durability. When compared with the wilderness recommendations made in forest plans, wilderness which is designated by Congress through place-based conservation legislation is indeed more certain. Yet the implementation of other negotiated provisions in place-based legislation like stewardship contracting, restoration projects, and timber harvesting will not only still be subject to Congressional appropriations, but also to the final statutory language chosen by Congress. As discussed in the context of national forest governance below, this “black box” view of Congressional lawmaking creates a measure of uncertainty from all sides of the negotiated compromise.

Funding and appropriations fall squarely into this area of concern. If there are no explicit appropriations built into the legislation (as there are not in the B-D Partnership’s draft), the worry is that place-based legislated compromises might become no more than “unfunded mandates.” “If we take these to Congress,” noted one person interviewed, “and Congress tells the Forest Service, ‘this is how you’re going to manage it,’ and gives

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<sup>378</sup> Personal interview with the author.

<sup>379</sup> Both areas in the Northern Rockies have been mentioned as potentially good candidates for place-based conservation legislation.

them one quarter of the budget to do it, well it's going to be a failure.”<sup>380</sup> Others are not worried, relying on Forest Service discretionary budgets to make up for any shortfalls. “They’re going to have to figure it out. They’ve got a billion-dollar budget,” responds one interviewee, “Maybe this forest [the B-DNF] will end up getting more than other forests, but they’ll have to figure it out.”<sup>381</sup> While some Partnership members say that there are enough “written triggers” in the legislation to go to the courts if the Forest Service does not meet the benchmarks that are set out in the bill, nobody wants it to get to that point.

Few people involved in place-based conservation legislation like to discuss “earmarks” any longer either, fearing the political connotations that the provisions have garnered over the years. The reality, though, is that new forest management initiatives can be very expensive. “Generally, when you pass place-based legislation it costs more to implement than what the forest gets under normal processes,” said one respondent, “And so with something like the Quincy Library Group, they submitted a budget which got earmarked through Sen. Feinstein.”<sup>382</sup> This person went on to explain that even though the B-D Partnership is not asking for appropriations in their bill, it would probably have been unlikely to receive earmarks in any event, as nobody in Montana’s Congressional delegation is involved with Interior Department appropriations any longer.<sup>383</sup> The use of earmarks also tend to merely redistribute money from other forests in the region (USFS Region One, in this case), causing budget hardships in neighboring forests, something that groups are loath to advocate for. As such, alternative methods of funding are being sought after in this case, and there are hopes that the extensive use of Stewardship Contracting authority to accomplish the mechanical treatments prescribed in the B-D Partnership’s draft legislation will fully fund the other provisions.

Rightfully, then, people are asking whether or not stewardship contracting can do the work that is being asked of it funding-wise. Monetary values for timber are currently very low, and while restoration methods for Ponderosa Pine, Larch, and Douglas Fir forest types are fairly agreed upon, methods of restoring Lodgepole Pine forests like

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<sup>380</sup> Personal interview with the author.

<sup>381</sup> Personal interview with the author.

<sup>382</sup> Personal interview with the author.

<sup>383</sup> Ibid.

those on the B-DNF are not. The Partnership and its supporters claim that since Lodgepole-dominant forests are “disturbance-dependent,” and that they would be disturbed naturally by either “insects, fire, or both,” there is a choice available to mechanically treat them instead. “It provides diversity should we have these major fire events,” said one proponent, “These treatments could at least leave some kind of mosaic on the ground.”<sup>384</sup>

On the other hand, other experts question the ecological health of substituting one method of disturbance for another. “Over on the B-DNF, 75% of the forest is Lodgepole Pine – there’s really not much of a restoration strategy that you can have for Lodgepole Pine,” one person said, adding that after a having a discussion with some of the “leading forest ecologists in the West” over restoration strategies for the Lodgepole-dominant forests on the B-DNF, they concluded that, “Pretty much there’s not much that you can do except let it burn big.”<sup>385</sup> From the perspective of environmental analysis, this calls into question the mandated mechanical treatment of the large-scale “stewardship projects” in the B-D Partnership’s legislation. If these provisions fail to pass NEPA analysis, this in turn removes the only source of funding provided in the legislation outside of discretionary budgets.

Even outside of the Lodgepole Pine issue on the B-DNF, lingering concerns about an over-reliance on stewardship contracting to fund provisions in place-based conservation legislation remain. A 2004 GAO report on stewardship contracting pointed to both inefficiencies in the implementation of the tool and a lack of criteria for public involvement.<sup>386</sup> Monitoring has also shown that projects using stewardship contracting authority often experience roadblocks, delays, appeals and litigation; including frustrations with agency planning and implementation.<sup>387</sup> Anecdotal evidence exists that NEPA-process delays cause stewardship contracts to be slower than status quo contracting, though this may be due to the “newness” of the tool.<sup>388</sup> Exemptions and new authorities in the legislation are also controversial. The “goods for services” mechanism

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<sup>384</sup> Personal interview with the author.

<sup>385</sup> Personal interview with the author.

<sup>386</sup> U.S. General Accountability Office (GAO), *Additional Guidance on Community Involvement Could Enhance Effectiveness of Stewardship Contracting*, Washington, D.C., June, 2004: 35-41.

<sup>387</sup> Cromley, “Community-Based Forestry,” 237.

<sup>388</sup> *Ibid.*, 238.

can create perverse incentives to log more trees than necessary to reap economic rewards, while the “designation by description” mechanism can lack “adequate control to ensure that contractors are not taking more wood than necessary to fulfill the treatment prescription.”<sup>389</sup>

The overriding fear here is that the stewardship contracting mechanism will be misused to promote a renewed expansion of timber harvesting rather than to fulfill its intended purposes. When one takes into consideration the obvious monetary incentives to use the tool, stewardship contracting has a rather high potential for misuse, especially if ever allowed to fund NEPA analyses. “I worry that stewardship contracts are going to take off on their own because budgets are going to dive, and I see rangers and forest supervisors seeing a self-funding mechanism and... cutting stuff just to keep their budgets going,” commented one interviewee. If budgets are cut and the Forest Service is sitting on billions of dollars worth of timber, there’s worry that stewardship contracting will provide an overwhelming incentive to keep things running.

## **Implementation**

Like other national forests across the country, there is a history of conflict on the B-DNF. Administrative appeals data for the Forest show that 152 appeals were filed by 30 different parties over the past decade.<sup>390</sup> Likewise, litigation records show 25 lawsuits filed by 13 parties over the past two decades.<sup>391</sup> Three parties were responsible for filing the majority of the cases contained in these records, together filing 89 appeals<sup>392</sup> and 11 lawsuits during those time periods.<sup>393</sup> These three parties, the Ecology Center, the Alliance for the Wild Rockies, and the Native Ecosystems Council are politically active and administratively savvy environmental advocacy organizations in the region. Furthermore, the Alliance for the Wild Rockies has not only been a vocal opponent of the

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<sup>389</sup> Ibid., 238.

<sup>390</sup> Data provided via personal correspondence with Peter N. Zimmerman, NEPA, Appeals and Litigation, USFS, Northern Region, 03/05/2008.

<sup>391</sup> Data provided via personal correspondence with Erik J. Tomasik, NEPA, Appeals, and Litigation, USFS Northern Region, 02/29/2008.

<sup>392</sup> Data provided via personal correspondence with Peter N. Zimmerman, NEPA, Appeals and Litigation, USFS, Northern Region, 03/05/2008.

<sup>393</sup> Data provided via personal correspondence with Erik J. Tomasik, NEPA, Appeals, and Litigation, USFS Northern Region, 02/29/2008.

Beaverhead-Deerlodge Partnership, but was also excluded from the Partnership's negotiations.<sup>394</sup> Nationwide, these three environmental organizations rank 3<sup>rd</sup>, 5<sup>th</sup> and 10<sup>th</sup> as the most active appellant groups in the United States.<sup>395</sup>

Also notable is that "timber-related" appeals accounted for 61 percent of the affirmed or reversed appeals available for the B-DNF.<sup>396</sup> Nationwide, timber-related appeals account for only 33 percent of all appeals, showing that this is a significant conflict among interests in the B-DNF.<sup>397</sup> Further supporting this assertion is litigation data from 1985 to present which indicates that 9 out of 20 cases (or 45%) were related to timber sales, a much greater percentage than any other issue on the Forest.<sup>398</sup>

While the above trends in appeals and litigation signify that this conflict will likely continue under any new Forest Service planning alternative for the B-DNF, some citizens still view the administrative planning process and the Forest Service as "the evil they know."<sup>399</sup> For their part, the Partnership is claiming that, "There will be less litigation due to the Stewardship Contracting and community involvement components." Tom France (a member of the Partnership) speculates that in the event of litigation, "A judge will look more favorably upon the Partnership because of these [stewardship contracting] components."<sup>400</sup> This seems unlikely for three reasons derived from data provided above: First, timber sales and related administrative decisions have been shown to be at the core of most management conflicts on the National Forest, indicating a need for further dispute resolution in this area. Second, there is an active and experienced

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<sup>394</sup> Personal interview with the author.

<sup>395</sup> The time period measured was between January 1, 1997 and September 30, 2002. In fact, Forest Service Region 1 (of which the B-DNF is a significant part) receives the second highest number of appeals across the nine USFS regions, second only to Region 5. On the B-DNF, 648 appeals were filed between 1997 and 2002. USFS Region 1 also reviews the most appeals of any region, reviewing 567 appeals and dismissing only 81, indicating that there are active stakeholder groups which are prepared to appeal and litigate forest planning; See Gretchen M.R. Teich, "National Trends in the Use of Forest Service Administrative Appeals," *Journal of Forestry*, March, 2004 (14-19): 17.

<sup>396</sup> It should be noted that "timber," "fuels reduction," "restoration," and "vegetation management" project types were considered "timber related" if they contained harvest provisions that were mentioned in the appeals data as a point of contention; U.S. Forest Service, "Projects and Plans – Pre-October 1, 2006 Appeals, Affirmed/Reversed Appeals." *Beaverhead-Deerlodge National Forest, Northern Region*. [http://www.fs.fed.us/r1/planning/final\\_appeals/beaverhead\\_deerlodge/index.html](http://www.fs.fed.us/r1/planning/final_appeals/beaverhead_deerlodge/index.html) (Accessed 10/01/08).

<sup>397</sup> Teich, "National Trends," 18.

<sup>398</sup> Data provided via personal correspondence with Erik J. Tomasik, NEPA, Appeals, and Litigation, USFS Northern Region, 02/29/2008.

<sup>399</sup> Russell, "A Social Analysis," 14.

<sup>400</sup> France, *City Club Forum*, 11/16/2007.

network of environmental NGOs that will likely appeal and litigate controversial decisions relating to timber harvests on the forest. And third, though the aforementioned administrative decisions are often challenged by the same three environmental organizations listed above, none of these groups were part of the B-D Partnership’s “collaborative” solution.

Likewise, the statutory detail in the Partnership’s draft proposed legislation does not fully rule out uncertainty. The possibility still exists that NEPA analysis will prevent a portion of the aforementioned “mandated” mechanical treatments from being completed. This prompts the question of whether the statutory detail in the B-D Partnership’s legislation, or the administrative discretion of the Forest Service, would in actuality provide more certainty for timber and restoration projects on the National Forest. Though the wilderness component will be a “done deal” if Congress passes the legislation, the timber and restoration provisions will not be. “You’re not going to get a guarantee, but we can agree that you can log over here,” commented one interview respondent, “Well now that the dust has settled and the legislation is passed, now you have other groups coming and saying, ‘Well, I didn’t like that. I wasn’t part of that, and I’m going to file a lawsuit on every one of these projects,’ so you’re still not really getting both sides.”<sup>401</sup> In order to increase the likelihood of the success of these initiatives, noted another interviewee, one really needs to try to remove the controversy behind them, for people will always find another way to protest decisions that they disagree with.<sup>402</sup> As it stands, significant controversy still exists over the B-D Partnership’s legislation.

### **National Forest Governance**

If the place-based conservation legislation approach taken by the B-D Partnership is successful, it is likely that we will see place-based legislation proposed for other national forest units as well. If this is the case, it would be wise for Congress, potential practitioners, and stakeholders to take a hard look at this approach with respect to natural resources governance. Not only will this facilitate an answer to the question of whether

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<sup>401</sup> Personal interview with the author.

<sup>402</sup> Personal interview with the author.

or not this approach is truly a good idea, but if it is deemed as such, it will allow the creation of a “best practices” armature against which these initiatives can be evaluated. The key here is to avoid a “Wild West” atmosphere in which stakeholders and the federal government are continually reacting to these initiatives without an overall strategy or series of guidelines by which to formulate and evaluate them.

Some careful considerations should be made here relating to balancing the proper scale of governance between local and national interests, as well as between statutory details and administrative discretion. Congress should also look carefully at the needs of the unit-level national forest versus the larger national forest system (and landscape) of the United States. While there has been a lot of discussion around the pitfalls present in the status quo model of national forest governance, one should not forget to take into consideration what is good about this system too, as well as the dangers of its replacement with a very different framework.

One such area of concern is the uncertainty that comes with submitting place-based negotiations to Congress for codification. Much is at stake when one lobbies Congress to enact one’s carefully crafted compromises, for Congress is free to amend such plans as it sees necessary and appropriate. The danger lies in the fact that Congress is primarily an institution with political goals rather than goals like preservation, restoration, or timber harvesting. Much of this perspective is also based upon the “black box” view of Congressional legislation mentioned briefly above. “What goes in the front door, and what comes out the back, are often very different,” said one person interviewed, “and then it goes through rules and regulations which totally changes it yet again, and by the time it reaches the ground it looks absolutely nothing like this beautiful idea that went in the front door that solved a lot of problems. So to me, that doesn’t seem to be the right way to make the kinds of changes that people want.”<sup>403</sup>

Congress has also been said to be “unfettered by procedural safeguards,”<sup>404</sup> hence reliance upon it as a democratic venue needs to be considered very carefully. The status quo administrative planning process used by the Forest Service, for better or worse, is required to go through exhaustive public participation processes as well as procedural

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<sup>403</sup> Personal interview with the author.

<sup>404</sup> Zellmer, “A Preservation Paradox,” 1083.

safeguards. Furthermore, appeals provisions, though often blamed for causing “gridlock,” are an important safeguard and means of participation that is entirely absent from the formulation of Congressional statutes.

If more groups seek place-based conservation legislation it will be important for Congress not to limit public participation to “pre-decisional forums” (no matter how “collaborative” the group claims to be) by removing options for administrative appeals or litigation through changes in forest planning regulations.<sup>405</sup> According to Professor Hannah Cortner in a recent publication evaluating Forest Service appeals, this would be problematic from the standpoint of representation:

For some environmental interests, the appeals process is believed to offer their best option for public involvement. They believe that there hasn’t been a place for ‘meaningful public involvement’ up-front in the agency’s decision making, so they resort to the appeals process as their democratic process alternative. This then raises the question about what new innovations will be introduced in pre-decisional processes to account for deficiencies in existing participatory processes if there are no longer appeals.<sup>406</sup>

An exclusive focus on pre-decisional forums (like negotiation or collaboration) also ignores the possibility that the avoidance of appeals and litigation may be one of the primary motivations for interest groups to come together to negotiate a compromise in the first place. Of course there must be a balance here, for when appeals and litigation are used as “tools for obstruction,” they can create enough ill-will so as to prevent opposing parties from coming to the negotiation table.<sup>407</sup> An important consideration though, is that the prioritization of either process (pre-decisional or post-decisional) will affect the balance between local and national interests. While “collaborative pre-decisional processes” tend to empower local interests, appeals and litigation might be the only meaningful way that national interests can “get to the table.”<sup>408</sup> These issues of who has power and access to place-based legislated solutions should be considered carefully,

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<sup>405</sup> Cortner, Hanna J., Jacqueline Vaughn and Gretchen M. R. Teich. *Designing a Framework for Evaluating the Impacts and Outcomes of Forest Service Appeals*. Workshop Summary, ERI Papers in Restoration Policy. Flagstaff: Ecological Restoration Institute (March, 2003):15.

<sup>406</sup> Cortner et al., *Designing a Framework*, 15.

<sup>407</sup> Ibid.

<sup>408</sup> Michael Hibbard and Jeremy Madsen. “Environmental Resistance to Place-Based Collaboration in the U.S. West” 16 *Society and Natural Resources* 8, September 17, 2008: 708.



for practitioners of place-based legislation should not forget the broader national interest in national forests in an effort to accommodate local people and local economies.

In the case of the B-D Partnership's draft legislation, many people have concerns about mandated provisions in the bill, and that they were created by a small group of interests, potentially ignoring both the larger interests of the general public and the professional objectivity of the Forest Service. "We like the idea of one large landscape project a year on the B-DNF if that's what they want to do," said one person interviewed, "but our position is that the landscape assessment needs to dictate what happens, not some arbitrary number for a mechanical treatment goal."<sup>409</sup> Likewise, others worry that without the Forest Service on board one will not see the desired level of implementation. Displacing conflict resolution to the Congressional level is not the same as working through it with the agency, and some respondents shared anecdotal stories about how difficult it can be to get the Forest Service to implement a plan that they were not only excluded from helping to formulate, but that also might be in direct opposition to the professional opinions of its staff.

That said, when place-based legislation is formulated in conjunction with the Forest Service and most interested parties, respondents cited the great potential for helping different interests find where they "fit" into the overall plan. "You could see in these rural communities where people would look at the conservation community as a whole and say, 'Well, where do we fit? Where's our place on the land?'" said one interviewee, "So how do you take these proposals and make them comprehensive enough and still follow environmental law, and make it so people can still see their place on the land?"

This highlights the fact that it is not just the end result that is important, but the process by which one gets there. There's a big difference process-wise between starting small and opening up one's proposal in concentric circles to try to build support, versus "marching out and saying 'Take it or leave it; here it is.'"<sup>410</sup> If you take away people's preferred method of engagement, be it helping to formulate policy, commenting on it, or filing appeals or litigation, they're still going to find an avenue to object if controversy

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<sup>409</sup> Personal interview with the author.

<sup>410</sup> Ibid.

exists.<sup>411</sup> The question for one person interviewed then becomes, “When do you want to deal with these people?”<sup>412</sup> This is not just a strategic question for those who would like to implement place-based legislation, but should be answered according to the way in which one thinks public lands ought to be governed, and with what sorts of safeguards in place.

Thinking about such safeguards is important. Passage of the B-D legislation would undoubtedly encourage similar bills to move forward, and some of these may not be in the public interest. For examples of just how questionable this method can be, one need only look to some of the “pilot projects” and “charter forests” created and proposed by the Idaho Federal Lands Task Force, and other such Charter Forest projects under the Bush Administration initiative of the same name. For example, the Central Idaho Ecosystem Trust violates NEPA and the Appeals Reform Act (ARA) by essentially eliminating public involvement and many environmental safeguards through a “streamlined” decision-making processes meant to eliminate “analysis paralysis.”<sup>413</sup> Worse yet is the Colorado Working Landscape Trust proposal in northwest Colorado that releases all WSAs, bars any further wilderness designations, bars litigation and goes so far as to turn the management of some areas currently managed by the NPS in the region over to the trust.<sup>414</sup> As Representative Nick Rahall put it in his statement at a Congressional Oversight Hearing, such “charter forests and pilot projects” were little more than “designer clothes for what the Sage Brush Rebellion, County Supremacy and Wise Use movements have been wearing for more than a century.”<sup>415</sup> Advocates of these movements, said Rahall, would like to turn ownership of our national forests over to states, counties, and even industry.<sup>416</sup> Clearly some “best practices” and firm “sideboards” need to be put in place by Congress if place-based conservation legislation heads down this road.<sup>417</sup>

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<sup>411</sup> Ibid.

<sup>412</sup> Personal interview with the author.

<sup>413</sup> See U.S. Government Printing Office (GPO), *Oversight Hearing, Subcommittee on Forests and Forest Health*, Committee on Resources, U.S. House of Representatives (Washington, D.C.: U.S. Government Printing Office, 107-108, April 25, 2002), 21.

<sup>414</sup> Ibid.

<sup>415</sup> GPO, *Oversight Hearing, Subcommittee on Forests and Forest Health*, 4.

<sup>416</sup> Ibid.

<sup>417</sup> Some possibilities will be suggested in Section VI.

One such concern that came up frequently was that the widespread use of place-based legislation would potentially frustrate landscape-level planning, at a time when cumulative effects and landscape connectivity are becoming increasingly important. “I have an issue with our national/public lands being run by a different legislated package for every forest,” stated one person during their interview, “I don’t think that’s good national governance, and I think that maybe it’s only okay to have a couple introduced to spur a national debate which is way overdue.”<sup>418</sup>

We have seen this same concern in the debate over statutory detail and administrative discretion. Though providing a high level of statutory detail in enabling legislation has some potential benefits over administrative discretion according to Law Professor Robert Fischman (especially in relieving pressure on the agency during implementation, as discussed earlier), there are also a number of problems with it relating to political responsibility and the political nature of Congress.<sup>419</sup> We have also seen in the cases of the TTRA and the QLG that increasing levels of regulatory complexity not only tend to perpetuate conflict, but can invite litigation too. This is echoed by the thoughts of one of the people interviewed for this paper, “In many of our federal agencies there is an overwhelming complex of laws and regulations that they have to follow, and they are all added piecemeal because of some political thing. But people who pass them, and people who write them, and people dream about legislated solutions never talk about taking anything away.”<sup>420</sup>

There is, on the other hand, a hope that the innovations built into place-based legislation will instead spur Congress toward reforming key public land laws like the NFMA. In this view, the statutory detail provided in place-based legislation is not necessarily the end of the discussion, but a means of working toward comprehensive reform. “NFMA has given us very little for the amount of resources that have been put into it,” said one person, “and given that NFMA was an attempt at a one-size piece of legislation for 156 unit of the National Forest System, maybe a conclusion is that you can’t have a national piece of legislation that adequately provides direction for the whole

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<sup>418</sup> Personal interview with the author.

<sup>419</sup> Fischman, “The Problem of Statutory Detail,” 804-806.

<sup>420</sup> Personal interview with the author.

forest system.”<sup>421</sup> This more “experimental view” of place-based conservation seemed to be where many of those interviewed found common ground. Even some of the approach’s most ardent critics thought that the dialogue being generated by the B-D Partnership’s proposal was a good thing. It will be important, though, to carefully consider where national forest management should go from here, while attempting to answer another question that came up in nearly all of the interviews completed for this project, “If not this, then what?”

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<sup>421</sup> Personal interview with the author.

## VI. Conclusion

This paper examined place-based conservation legislation as a method of resolving natural resource conflicts on national forest lands managed for multiple-use. The Beaverhead-Deerlodge Partnership in southwestern Montana and the proposed Beaverhead-Deerlodge Conservation, Restoration and Stewardship Act of 2007 presented a timely and representative case study of a group seeking codification of a negotiated compromise over wilderness designations, timber harvesting, and national forest management provisions. We have seen that perceptions of agency gridlock, uncertainty, unresolved wilderness designations, and the need for comprehensive conservation in a rapidly changing West have motivated actors to seek place-based legislated solutions to natural resource conflicts, a significant departure from the status quo Forest Service's administrative planning process. Given the trends discussed in this paper, the place-based conservation legislation approach will likely be used more if current initiatives like the Beaverhead-Deerlodge Partnership Strategy become codified.

One of the most important findings of this paper is the confirmation that actors are looking for more certainty and durability with respect to the governance of national forests. From the "conservation side" of the equation, people want to see the question of roadless area preservation resolved through informed action rather than omission. They also want to see "needed"<sup>422</sup> restoration and stewardship work completed. From the "industry side" of the equation, people want to see more certainty with respect to timber harvests on national forests from both stewardship programs and traditional timber sales, at least enough to support existing timber infrastructure and augment rural economies. Both of these interest groups want solutions to be durable too, resulting in wilderness designations for suitable IRAs, and stable management commitments for stewardship work and timber harvests. Neither of these views is particularly new either, but the attempt to use place-based conservation legislation to accomplish these goals is a relatively new approach.

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<sup>422</sup> It should be noted that there is some debate over whether or not this is actually the case with respect to the proposed restoration outcomes, as well as the methods to be used.

Another important aspect of this paper was the creation of a policy typology to categorize different types of place-based legislation, which will help to create an evaluative framework that can be used to analyze future place-based legislated initiatives. Different types of place-based legislation are used to accomplish different purposes within different contexts, and therefore should be evaluated in different ways. This policy typology has also firmed up the definition of “place-based conservation legislation” as used in this paper,<sup>423</sup> allowing one to focus specifically on this unit-level approach in a more nuanced fashion. There is a lot of flexibility with respect to what individual instances of place-based legislation actually mandate, and they should not all be evaluated as equals.

We have seen throughout this paper that there are both potential benefits and potential risks to the place-based legislation approach. The most promising potential benefits include gaining traction on designating new wilderness in the Northern Rockies, implementing needed stewardship and restoration activities on national forests, and attempting to bolster the local timber infrastructure in some of Montana’s rural economies. Though these objectives sound promising and mutually beneficial, we have seen that the potential risks are quite formidable too. There is a worry that the processes in which place-based legislation is formulated are not all open, democratic, accountable or transparent enough. Likewise, there are concerns that this approach will ignore national forest units in regions that lack political leadership or access to decision-makers, set legal precedence in unintended ways, remove existing environmental protections, inadvertently prioritize politics over science, and thwart management flexibility and landscape-level coordination. There is also no guarantee that full implementation of such legislation is even possible, not only due to funding and implementation concerns discussed in the Section V of this paper, but also because contradictory statutory language and site-specific legislative mandates have the potential to create and perpetuate conflict rather than solve it. Even if place-based legislation passes and full implementation occurs, there is no guarantee, given the state of the current

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<sup>423</sup> Place-based conservation legislation is federal land-unit enabling laws that provide additional prescription and managerial discretion, in a reciprocal fashion, in order to achieve wilderness designations, prescribe conservation management practices, and provide for local economic stability.

economy and the volatility of the timber market, that the economic objectives of many of these bills will be met.

A more promising aspect of this proposal has been the dialogue and cooperation between national forest interest groups that have been characterized as having opposing views in the past (e.g. conservation and timber interests). Many interest groups are finding that they have much more in common than they thought they did. Hopefully the dialogue being generated at all levels of discourse by the debate over place-based legislation will have a net positive effect, but as we have seen, this will not necessarily be the case. Depending upon how some of the proposed place-based legislated initiatives go, increased polarization of interests could instead be the result. Already we have seen that conservation groups in Montana are bitterly divided over the use of place-based conservation legislation in the case of the B-D National Forest. This may have untold repercussions on future wilderness designations, perhaps even perpetuating the “wilderness drought” in Montana, as columnist Bill Schneider speculates.<sup>424</sup> Again, this does not help the case for using place-based conservation legislation as a conflict resolution tool. The displacement of conflict from one venue to another is not the same as resolving it.

Even still, one of the most compelling points to come from the interview process was the question, “If not this, then what?” While there may not be a consensus on the use of place-based conservation legislation as a conflict resolution tool, there is the widespread opinion that something new needs to be done with respect to forest planning. If this is the case, we need to ask what other policy options with higher probabilities of success are available for interest groups to use? Furthermore, what should “success” look like, and how should it be measured? The full answers to these questions are beyond the scope of this paper, but both need to be considered carefully. Either Congress and land managers seriously consider reformation of the forest planning process, or place-based partnerships will attempt to resolve public land management issues themselves. This

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<sup>424</sup> Bill Schneider, “The Beaverhead-Deerlodge Partnership: Right Idea, Wrong Bill,” *NewWest.net*, November 28, 2008, [http://www.newwest.net/topic/article/the\\_beverhead\\_deerlodge\\_partnership\\_right\\_idea\\_wrong\\_bill/C41/L41/](http://www.newwest.net/topic/article/the_beverhead_deerlodge_partnership_right_idea_wrong_bill/C41/L41/).

might be beyond the power of political determination in either sense. As one person interviewed quipped, “Politics is like water; it charts its own course.”<sup>425</sup>

Whatever may happen with respect to the place-based conservation legislation approach as a whole, there is a useful framework for evaluating the Beaverhead-Deerlodge Partnership’s proposed legislation and similar initiatives that came out of this paper. I believe that three separate aspects of the place-based conservation legislation approach warrant individual scrutiny: (1) the process that was used to formulate the piece of legislation, (2) the effects that the piece of legislation may have on public lands governance, and (3) the substantive provisions contained within the piece of legislation. Looking at proposals through these three lenses – process, governance, and substance – can help to simplify what has been shown to be a complicated policy innovation.

Process-wise, was the policy formulation process used to create the piece of legislation open, inclusive, and representative of local, state, and national interests? The measure here could be whether or not the process successfully addresses the controversy that its provisions attempt to deal with. As discussed earlier, process considerations also rely heavily on balancing pragmatism and idealism. The process needs to be “small enough” to get things done, but “large enough” to be representative, fair and in accordance with democratic ideals.

Governance-wise, what precedents and unintended consequences might the proposed legislation establish, and how accountable will those who are overseeing its implementation be? Aldo Leopold wrote, “To keep every cog and wheel is the first precaution of intelligent tinkering.”<sup>426</sup> Though he was speaking in the ecological sense, this should also be the case in terms of experimentation with natural resources governance, especially with respect to environmental protections and avenues of public participation. The measure here should not only be the retention of at least as many protections as there are in the status quo form of natural resources governance (administrative planning), but also attempts should be made to minimize any irreversible effects that could be caused by the piece of experimental legislation.

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<sup>425</sup> Personal interview with the author.

<sup>426</sup> Aldo Leopold, *Round River*, Oxford University Press: New York, 1993: 145-146.



Lastly, one should evaluate whether each substantive provision in the piece of proposed legislation is able to pass the “stand alone” test. In other words, does each provision possess sufficient integrity to warrant enactment on its own merits? If this is not the case, one should seriously question whether the provision has intrinsic merit and what sort of precedents that provision might set if it is acceded to.

When these rough evaluative criteria are applied to the case of the Beaverhead-Deerlodge Partnership, I feel that it balances uncomfortably on the tipping point between approval and disapproval. The policy formulation process used by the Partnership has been criticized as not having been particularly open. Though the level of “openness” of a given political process is on somewhat of a subjective and sliding scale itself, the volume of appeals and litigation that the Act incurs if it is passed will in part verify its level of openness and inclusivity. I am inclined to think that there will be enough challenges to the timber provisions in the bill to sufficiently frustrate the implementation process and the desired certainty of outcomes. I also believe that if the Forest Service had a “seat at the table,” some of the language of the bill might have been different, and that if passed, it would have been much more likely to be implemented. Likewise, I am sympathetic with those that are frustrated by the fact that the Partnership Strategy was created after (and outside of) the B-DNF forest planning process, and would potentially negate the hard work that was done to find cooperative planning solutions during that process.

Governance-wise, I question the use of place-based conservation legislation like the B-D Conservation Restoration and Stewardship Act of 2007 as a long-term solution to conflicts over national forest management. I base this opinion on the fact that I agree with many of the critiques discussed in Section V of this paper; however I do think that the limited use of such legislation could be an important step toward not only a more comprehensive public lands law reform process, but also a statewide wilderness bill for Montana.

The tension between statutory detail and administrative discretion was handled in an interesting way in this legislation, correctly (in my opinion) reserving the right for citizens to appeal and litigate, but also setting a hard minimum acreage on mechanical treatments that was not broadly agreed upon nor will necessarily pass environmental analysis. Though I believe that NEPA review and Forest Service discretion with respect

to BMPs make for good public lands governance and would not want to see them eliminated from any such proposals, I find that they will likely be at odds with the specific details of the statute if it is passed in its current form. Much like in the case of the Quincy Library Group, the attempt to integrate these statutory details into the exiting forest planning and environmental analysis framework will likely create additional conflicts.

I also worry that precedents set by this case could have unsavory political repercussions. If Montana's congressional delegation uses its political clout to get the B-D Partnership's legislation passed by Congress, it follows that other state's delegations will call upon Montana's delegation to vote for pieces of place-based conservation legislation for their state. It also follows that if this political reciprocity unfolds across the West, it is likely that some bad bills would be passed, perhaps waiving environmental analysis or setting damaging legal precedence.

Substantively, I question the use of language in the latest draft of the B-D Partnership's legislation that both mandates mechanical treatment, and releases an ill-defined amount of IRAs and WSAs to such treatment areas. It seems to me that there is no consensus that all of the "landscape-scale restoration projects" would stand under individual scrutiny, especially in the case of the roughly 200,000 acres of IRAs proposed for treatment. Though one could argue that the NEPA process will provide sufficient oversight for the areas to be treated, if the Environmental Impact Statement (EIS) and the stewardship provisions end up at odds, what results would not be any improvement over the status quo administrative planning paradigm (and it could be even worse from an efficiency standpoint). Furthermore, the IRA and WSA acreage that is scheduled for release would be a "done deal" by this time (as would the additional wilderness designations). Hard-won compromises over wilderness designations and IRA/WSA releases seem wasted if either the other side of the bargain cannot be implemented due to litigation, or if implemented, will be ineffectual in accomplishing the intended purposes (e.g. boosting the timber economy).

The only consideration tempering this view for me is the fact that the timber industry has supported this process with both its time and its money. If maintaining a timber infrastructure in the West is important both economically and environmentally,

and proposals like the B-D Partnership Strategy can attempt to do this in a manner that does not sacrifice conservation ideals, there are good arguments for letting experimental projects go forward on a small scale.<sup>427</sup> Not only does this trust that the timber industry will invest in approaches that will benefit them (no matter what policy analysts like myself may conclude), but that the support of well-crafted compromises by conservation groups may give conservationists “plausible deniability” if the timber industry continues to decline due to market volatility or other pressures beyond their control.

Ultimately, I would like to see national forest management reforms, via place-based conservation legislation or otherwise, proceed in accordance with the precautionary principle. This can be done by not only ensuring that processes are open and inclusive, but that there are multiple layers of safeguards through sunset provisions, evaluation time tables, and the cautious use of fully funded monitoring and adaptive management provisions. These projects should also be small, and created in cooperation with the Forest Service. If projects like this receive widespread support before they are adequately studied, they will no longer be able to be called “experimental.”

This precautionary approach should not only hold true for actions, but for omissions. The failure to protect important IRAs and WSAs, or to allow needed timber infrastructure to collapse when it might have been saved without sacrificing standards of conservation or governance, are not excusable either. Conflicts over national forest management relate to the values that we hold dear, and I believe that any proposed solutions need to adequately deal with these value differences. The place-based legislation drafted by the B-D Partnership represents an important attempt to see national forest conflicts in a different way, but this bill could be made better than it is by attempting to more adequately address the value differences that it has brought to light, including those currently seen within the conservation community. Determining the fate of our remaining roadless areas, the ecological health of our national forests, and the ways in which future generations will be involved in governing their public lands are too important, and too permanent, to get wrong.

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<sup>427</sup> It should be noted that the B-D Conservation, Restoration and Stewardship Act of 2007 was not considered “small” by any of those interviewed.

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## **Appendix A: Interview Questionnaire**

Michael Fiebig, 03/06/2008

The following questions are meant to guide personal interviews with stakeholders in the place-based legislation that is proposed by the Beaverhead-Deerlodge Partnership for the Beaverhead-Deerlodge National Forest (B-D NF). The focus of this inquiry is the examination of place-based legislation as a tool for natural resource conflict resolution on forest service lands that are being managed for multiple-use, including the reasons for choosing this approach, the methods of doing so, and their implications.

### **Interview Questions:**

- 1) Why do you think that stakeholders in the B-D Partnership chose a legislative solution to conflict in the B-D National Forest (e.g. triggering events, history, etc.)? In other words, what factors were considered by the group in moving the proposal to Congress?
  - a. Where other options considered?
  - b. Why not instead rely upon the more traditional forest-planning process?
  - c. What are some of the possible advantages and disadvantages of using this type of place-based legislation?
  - d. Did the group consider and evaluate other cases where stakeholders tried to resolve forest conflict through place-based legislation (e.g., The Quincy Library Group/Herger-Feinstein Act)?
  
- 2) Do you expect that a similar legislative place-based approach will be adopted anywhere else in Montana and/or elsewhere in the U.S.?
  - a. Do you know of any other contemporary stakeholder groups that are interested in this method of conflict resolution?

- 3) What factors do you consider to be significant in ensuring that the legislation (if passed) will be successfully implemented?
- a. How confident are you that the partnership proposal will be adequately funded?
  - b. How confident are you that the stewardship contracts and timber sales will be implemented as envisioned?
    - i. Is it fair to say that the timber industry is risking the most in this proposal because there is no way to be absolutely certain that such sales will proceed as planned?
  - c. Do you believe that the planned contracts and sales will be administratively appealed and/or litigated by other interests?
- 4) What best describes and explains the USFS's response to the partnership proposal?
- a. What about the responses from other stakeholder groups (e.g. motorized recreation, the environmental community, county commissioners)?
  - b. Were these responses expected?
- 5) Who else should I be interviewing about this subject? Are there any other questions that I should be asking?

## Appendix B: Additional Examples of Place-Specific Enabling Legislation

<b>Law</b>	<b>Place</b>	<b>Key Provisions</b>	<b>Citation</b>
Alaska Land Transfer Acceleration Act (2004)	Alaska	Conflict resolution; land conveyances	Pub. L. 108-452 118 Stat. 3575
Bowen Gulch Protection Area – Colorado Wilderness Act of 1993	Colorado	Motorized travel; planning	Pub. L. 103-77 16 U.S.C. § 539j
Bull Run Watershed Management Act (1977, amended 1996 and 2001)	Oregon	Restricted entry; water quality protection	Pub. L. 95-200 91 Stat. 1425 16 U.S.C. 482b
Cascade Head Scenic Research Area Act (1974)	Oregon	Research – education; advisory council	16 U.S.C. § 541 Pub. L. 93–535
Clark County Conservation of Public Land and Natural Resources Act (2002)	Nevada	Wilderness designation with exemptions; public land conveyances, sales and exchanges; WSA releases; NCA creation	Pub. L. 107-282 116 Stat. 1994
Columbia River Gorge National Scenic Area Act (1986)	Oregon, Washington	Conservation; land acquisition; economic development; regional commission; planning; citizen suits	16 U.S.C. § 544-544m 100 Stat. 4274 Pub. L. No. 103-435



Fossil Ridge Recreation Management Area – Colorado Wilderness Act of 1993	Colorado	Conservation; recreation; grazing	Pub. L. 103-77 16 U.S.C. § 539i
Great Lakes Legacy Act (2002)	Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, Vermont	Contaminated sediment remediation; appropriations; advisory council	Pub. L. 106-506 116 Stat. 2355
Greer Spring Acquisition and Protection Act of 1991	Missouri	Recreation; conservation; resource management	Pub. L. No. 102-220; 16 U.S.C. 539h
Herger-Feinstein Quincy Library Group Forest Recovery Act (1998)	California	Cooperative management; timber harvest, thinning; local economic health	Pub. L. 105-277 112 Stat. 2681-231, 2681-305 16 U.S.C. 2104
Highlands Conservation Act (2004)	Connecticut, New Jersey, New York, Pennsylvania	Land acquisition, matching federal funds for conservation; joint identification of priorities (USDA, USDI)	Pub. L. 108-421 118 Stat. 2375
Lake Tahoe Restoration Act (2000)	Nevada	Erosion control; land acquisition; fire risk reduction activities;	Pub. L. 107-303 116 Stat. 2351

		contamination remediation; transportation; monitoring; appropriations	
Lincoln County Conservation, Recreation, and Development Act (2004)	Nevada	Land disposal; Wilderness designations; utility corridors; OHV trail; public land conveyances, transfers, and exchanges	Pub. L. 108-424 118 Stat. 2403
Mono Basin National Forest Scenic Area – California Wilderness Act of 1984	California	Incompatible use restrictions; ecological study; advisory board; traditional cultural and religious use	Pub. L. 98-425 16 U.S.C. § 543
Mount Pleasant National Scenic Area Act (1994)	Virginia	Conservation; planning	Pub. L. 103-314 16 U.S.C. § 545
Mount St. Helens National Volcanic Monument Completion Act (1997)	Oregon	Mineral right acquisition	Pub. L. 105-279 112 Stat. 2690
Opal Creek Scenic Recreation Area – Oregon Wilderness Act of 1984	Oregon	Recreation; harvesting of non-traditional forest products; education and research; advisory council; land exchange	16 U.S.C. 545b Pub. L. § 98-328

Santa Rosa and San Jacinto Mountains National Monument Act (2000)	California	Existing and historical use provisions; local advisory committee	Pub. L. 106-351 114 Stat. 1362 16 U.S.C. 431 note
To Designate the Scapegoat Wilderness, Helena, Lolo, And Lewis and Clark National Forests, Montana (1972)	Montana	Preservation	Pub. L. 92-395 86 Stat. 578
Southern Nevada Public Land Management Act (1998)	Nevada	Public land sales and conveyances; conservation account	Pub. L. 105-263 112 Stat. 2343
Steens Mountain Cooperative Management and Protection Act (2000)	Oregon	Wilderness designations; land exchanges; advisory council; SMA creation; grazing	16 U.S.C. 460nnn - 460nnn-122
Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, sec. 706 (Black Hills Fire Prevention Agreement, 2002)	South Dakota	Timber harvest, salvage	Pub. L. 107-206 116 Stat. 820
Tax Relief and Health Care Act of 2006,	Nevada	Wilderness designations; public lands	Pub. L. 109-432, title III 120 Stat.

Division C, Title III (White Pine County Conservation, Recreation, and Development Act)		disposal, exchanges, transfers, and conveyances; WSA releases; ORV route designation	
Tongass Timber Reform Act (1990)	Alaska	Timber supply; planning	Pub. L. No. 101-626; 16 U.S.C. § 539d
Valles Caldera Preservation Act (2000)	New Mexico	Experimental management and governance	Pub. L. 106- 248 119 Stat. 2570 16 U.S.C. § 698v et seq.