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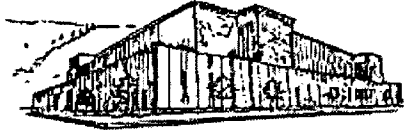
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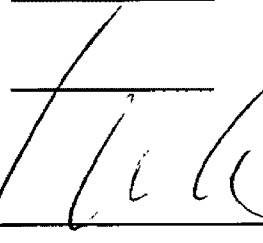
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COLLABORATIVE DECISION MAKING ON PUBLIC LANDS: AN ANALYSIS OF THE LEGAL AND  
POLITICAL FRAMEWORK

by

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presented in partial fulfillment of the requirements for the degree of Masters of Science

The University of Montana

May 2002

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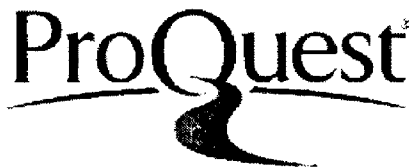


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## I. Introduction

Standing on the rim of San Rafael Swell, a visitor to southern Utah can see the contours of red sandstone open up across the horizon for almost sixty miles. A single paved road travels through a landscape of dry washes, desert flats, and sandstone mesa. Like many remote areas of the West, the region is almost all federally owned, and because of this, has been embroiled in a battle for decades. The issues at stake are not new to the West; debate over appropriate use of federal lands has been the center piece of western conflict for almost as long as people have settled the region. Citizens of Emery County, however, have proposed the San Rafael Swell National Heritage Act as an alternative to years of conflict. The Act outlines land management guidelines for the region, which according to the designers of the Act, protects the region's unique qualities while at the same time providing economic benefits for the local community. The citizens of Emery County see the Act as their opportunity to manage the land locally.

The process that led to the Act is unclear, and at this point, it is too early to offer any substantive evaluation. The importance of this Act, however, is that it represents a major shift in the approach to public land and natural resource management percolating across the West. States such as Utah, are poised at the beginning of a power shift—a shift from centralized management of public lands<sup>1</sup> to more localized, collaborative decision making

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<sup>1</sup>

See Donald Snow, *Empire or Homelands? A Revival of Jeffersonian Democracy in the American West*, in *The Next West: Public lands, Community and Economy in the American West 181, 185* (John A. Baden & Donald Snow eds.) (1997) [hereinafter *The*

among diverse interests.<sup>2</sup> Rural communities, at one time the center of public land debates, are helping to drive this new movement<sup>3</sup> as diverse interests such as loggers and conservationists join together to resolve contentious public land issues.<sup>4</sup> This Paper addresses the question of whether these efforts, often described as “collaborative decision making” or “collaborative groups,” are appropriate for public land decision making. It also seeks to explore the proper legal and political boundaries of their authority.

Collaborative groups are defined as “the deliberate use of unusual coalitions to work on natural resource and environmental issues.”<sup>5</sup> Collaborative decision making has also been described as “environmental democracy.” Environmental democracy entails wider involvement by local communities and lay persons and the introduction of more diverse types of information in the decision making process for protecting the environment. has received increasing support.<sup>6</sup>

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Next West].

2

*See* Barb Cestero, *Beyond the Hundredth Meeting: A Field Guide to Collaborative Conservation on the West's Public Lands* 3 (1999) [hereinafter Cestero].

3

*See id.*

4

*See id* at 63.

5

Donald Snow, speech at “Coming Together on the Land: Evaluating Collaborative Process in Natural Resource Management.” *Collaboration: A Threat or Menace*, at 2 (1998) [hereinafter Snow].

6

Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous waste, and the Devolution of U.S. Federal Environmental Programs*, *Natural Resource Journal*, 2000.

Generally, these groups are comprised of former adversaries or “coalitions of the unlike’ . . . such as Trout Unlimited members, hydro power producers and irrigation district leaders.”<sup>7</sup> Commonly, collaborative groups address issues of both local and national concern,<sup>8</sup> such as controlling the impacts of recreation on desert landscapes in southern Utah.<sup>9</sup> While some collaborative groups chose to negotiate formal agreements, often submitting management proposals to federal agencies for possible ratification,<sup>10</sup> other collaborative groups see their role as informative, educating the public on the implications of natural resource decisions.<sup>11</sup> While the issues and organizational structures may differ between groups, the driving forces are universal—more collaborative, local planning that considers the needs of citizens most directly affected by public land management decisions.<sup>12</sup>

Local participation, however, does not mean local control. Because many of the

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*See* Snow, *supra* note 5 at 2.

8

*See id.*

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The Canyon County Partnership, a coalition of federal management agencies and state and county government from around Moab, Utah, joined together to develop a management plan to address the boom in recreation that threatens the fragile desert landscape of southern Utah. *See* Cestero, *supra* note 7, at 57.

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*See id.*

11

*See id.*

12

*See id.*



communities across the West are surrounded by public lands, the issues are likely to involve national concerns as well.<sup>13</sup> Therefore, successful collaborative groups often include national representatives, such as the Defenders of Wildlife, working alongside local citizens.<sup>14</sup>

The difference between legal authority and political power is fundamental to defining the limits of collaboration and has led to debates over the usefulness of collaborative groups in public land decision making.<sup>15</sup> Advocates describe this phenomena as an experiment in new governance, a revival of Jeffersonian democracy in which local citizens engage in the decisions that affect them directly.<sup>16</sup> Advocates also argue that collaborative groups embody “the devolution of real power to the citizenry, and the creation of new institutions of responsibility to manage that power.”<sup>17</sup> As public land

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<sup>13</sup>

See Snow, *supra* note 5, at 2.

<sup>14</sup>

See Cestero, *supra* note 2, at 63.

<sup>15</sup>

See generally George C. Coggins, “Devolution in Federal Land Law: Abdication by Any Other Name . . .”, 3 Hastings W.-N.W.J.Env’tl. L. & Pol’y 211 (1996) (discussing lack of legal and political framework for collaboration and devolution)[hereinafter Coggins, *Devolution in Federal Land Law*]; George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 Ecology L.Q. 602 (1999) (criticizing collaboration efforts on public lands)[hereinafter Coggins, *Regulating Federal Natural Resources*]; Cestero, *supra* note 6 (discussing collaborative decision making on public lands).

<sup>16</sup>

See The Next West, *supra* note 1, at 185.

<sup>17</sup>

*Id.*

management enters a state of flux.<sup>18</sup> collaborative decision making offers an alternative to traditional interest group advocacy in which "single-issue advocacy and user groups compete for influence over agency decisions."<sup>19</sup>

Critics, however, fear that this movement is another ploy by pro- development forces to capture the decision making process, particularly as changes in land management are less favorable to traditional public land uses.<sup>20</sup> At its core, critics argue, collaborative decision making runs counter to the policies underlying public land laws: federal agencies are generally prohibited from delegating management authority, particularly to a small cadre of local citizens.<sup>21</sup> For instance, Professor George Coggins, a legal scholar on public land issues in the West, has vociferously condemned collaborative decision making.<sup>22</sup> While he acknowledges that federal laws allow agencies wide latitude to implement management objectives, he argues that collaborative decision making

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<sup>18</sup>

*See id.*

<sup>19</sup>

Cestero, *supra* note 2, at 4.

<sup>20</sup>

*See* Coggins, "Devolution in Federal Land Law, *supra* note 15, at 211.

<sup>21</sup>

*See generally* Coggins, *Devolution in Federal Land Law, supra* note 15 (discussing lack of legal and political framework for collaboration and devolution); Coggins, *Regulating Federal Natural Resources, supra* note 15 (criticizing collaboration efforts on public lands).

<sup>22</sup>

*See generally* Coggins, *Devolution in Federal Land Law, supra* note 15 (discussing lack of legal and political framework for collaboration and devolution); Coggins, *Regulating Federal Natural Resources, supra* note 15 (criticizing collaboration efforts on public lands).

exceeds these limits.<sup>23</sup> Instead of resolving contentious issues, he asserts, collaboration is merely an abdication of management responsibilities by federal land managers.<sup>24</sup> In fact, Coggins reasons that federal bureaucrats only embrace the collaborative process because it allows them to “[pass] the buck on difficult and controversial allocation issues.”<sup>25</sup>

In spite of, or maybe in part because of, the debate surrounding the appropriate legal and political framework of collaborative decision making, collaborative groups are becoming increasingly ensconced across the West.<sup>26</sup> However, collaborative decision making is a recent phenomena in the public land arena<sup>27</sup> and, therefore, the proper boundaries of this type of decision making remain unclear.<sup>28</sup> Court decisions and congressional action frame different, and often inconsistent approaches to collaborative decision making. In late 1998, Congress attached a rider to the omnibus spending bill, which mandated that the United States Forest Service implement a locally initiated citizen proposal for managing an area of land that included almost three national forest in

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<sup>23</sup>

See Coggins, *Devolution in Federal Land Law*, *supra* note 15, at 211.

<sup>24</sup>

See Coggins, *Devolution in Federal Land Law*, *supra* note 15, at 211.

<sup>25</sup>

Coggins, *Regulating Federal Natural Resources*, *supra* note 15 at 603.

<sup>26</sup>

See Lisa Jones, *Howdy, Neighbor! As a Last Resort, Westerners Start Talking To Each Other*, *High Country News*, May 13, 1996, 28(9), at 1, 6–8; *The Next West*, *supra* note 1, at 186.

<sup>27</sup>

See *The Next West*, *supra* note 1, at 186.

<sup>28</sup>

See *infra* Part III (discussing legal scope of collaboration).

the Sierra mountains of northern California.<sup>29</sup> In contrast, less than a year later, in a decision of first impression, the D.C. Circuit Court held, in *National Park and Conservation Association v. Stanton*,<sup>30</sup> that the National Park Service unlawfully delegated its statutory authority to manage the Niobrara Wild and Scenic River to a local council.<sup>31</sup> Because of these conflicting authorities, a uniform standard for collaborative decision making is unclear.

This Paper suggests that while collaborative decision making must be approached cautiously,<sup>32</sup> it offers a workable approach to expanding public participation in allocating federally owned natural resources. However, defining the legal boundaries of collaborative involvement in decision making is critical. As such, I suggest that Congress's decision to legislate a locally designed management proposal in California is politically and legally unsupportable and runs counter to the purpose of federal land laws. Congressional legislation that bypasses federally mandated decision making expands collaboration decision making beyond appropriate levels and, therefore, should be discouraged. Conversely, the D.C. Circuit Court's holding in *National Park and*

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<sup>29</sup>

*See infra* Part III (discussing congressional legislation of citizen initiated management plan).

<sup>30</sup>

54 F. Supp.2d 7 (D.D.C. 1999).

<sup>31</sup>

*See infra* Part IV (discussing legal boundaries of collaborative decision making authority).

<sup>32</sup>

*See* Snow, *supra* note 5, at 2.

*Conservation Association v. Stanton* unduly limits collaborative decision making through its narrow interpretation of the "unlawful sub delegation doctrine."<sup>33</sup>

As an alternative to these approaches, I recommend that the appropriate legal boundaries for collaborative decision making center on three issues: (1) collaborative groups must comply with existing public lands laws; (2) agencies must be allowed flexibility under the sub delegation doctrine to interpret final reviewing authority; and (3) collaborative decision making must consider national as well as local interest.

Part II of this Paper outlines the evolution of collaborative decision making on public lands; it discusses the political and legal changes in public land management that led to the rise in collaborative decision making. Part III addresses the tension between the courts and Congress, and outlines the legal boundaries of collaborative decision making. Part VI analyzes both the future of collaborative groups as a force in natural resource decision making, and the conflicting legal guidelines addressing the scope of their authority. Finally, Part VI concludes that federal regulations should incorporate collaborative decision making into regulations that guide natural resource allocation.

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<sup>33</sup>

*See infra* Part III.A (defining unlawful sub delegation doctrine).

## II. Unrest in Public Land States: Laying the Foundation for Collaborative Decision Making

The forces driving collaborative decision making are well documented.<sup>34</sup> Economic, political, and demographic changes across the West<sup>35</sup> have laid the foundation for what Donald Snow, a scholar and writer on public lands, describes as a “renaissance of the local.”<sup>36</sup> The following section offers a brief explanation of how collaborative decision making emerged in response to these changes.

### *A. A Century of Centralized Management Begins to Crumble: The Failure of Scientific Management*

While collaborative decision making has spurred widespread debate,<sup>37</sup> critics and advocates generally agree that it runs counter to public land laws and customs.<sup>38</sup> An in-depth

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<sup>34</sup>

*See generally* Cestero, *supra* note 2 (discussing collaborative decision making on public lands); The Swan Valley, *infra* note 60 (discussing collaboration efforts in Swan Valley, Montana); The Next West, *supra* note 1 (discussing changes in western politics, demographics, and economy).

<sup>35</sup>

*See* The Next West, *supra* note 1, at 185.

<sup>36</sup>

*See* The Next West, *supra* note 1, at 185.

<sup>37</sup>

*See supra* Part I (discussing collaboration generally); *see generally* Coggins, *Devolution in Federal Land Law*, *supra* note 15 (discussing lack of legal and political framework for collaboration and devolution); Coggins, *Regulating Federal Natural Resources*, *supra* note 15 (criticizing collaboration efforts on public lands).

<sup>38</sup>

*See* Snow, *supra* note 5, at 8; *see generally* Coggins, *Devolution in Federal Land Law*, *supra* note 15 (discussing lack of legal and political framework for collaboration and devolution); Coggins, *Regulating Federal natural Resources*, *supra* note 15 (criticizing collaboration efforts on public lands).

discussion of the failures of scientific management are beyond the scope of this paper. However, a brief discussion highlights the emergence of collaborative decision making as a response to the failure of scientific management to allocate natural resources. Historically, centralized decision making has been the driving force behind management of public lands and natural resources.<sup>39</sup> President Theodore Roosevelt, with the help of Gifford Pinchot, the first chief of the Forest Service, implemented a centralized management system based on Progressive Era ideals of governance; technocrats and experts regulate the allocation of natural resources, therefore, removing the decision making process from the public forum. While this system remains the foundation of public land management today,<sup>40</sup> critics have argued that centralized management has failed.<sup>41</sup> Instead of Roosevelt's vision of a de-politicized decision making process, "the heavy hand of politics [can be seen] on virtually every major decision made by the land and water agencies."<sup>42</sup>

Economists and political scientists are equally critical of centralized management.

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<sup>39</sup>

*See generally* Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (1959) (discussing the rise of Progressivism and the effect on scientific, centralized management of public land); Paul W. Hirt, *A Conspiracy of Optimism: Management of the National Forests Since World War Two* (1994) (analyzing Forest Service history); Cawley R. McGregor, *Federal Land, Western Anger: The Sagebrush Rebellion and Environmental Politics* (1993) (discussing history of federal land management in West).

<sup>40</sup>

*See generally* Hirt, *supra* note 39 (analyzing Forest Service history).

<sup>41</sup>

*See* *The Next West*, *supra* note 1, at 185.

<sup>42</sup>

*See* *The Next West*, *supra* note 1, at 192.

Robert Nelson, an expert on public land reform and resource economics, argues that federal land management agencies are forced to "do the wrong thing."<sup>43</sup> Agency budgets are attached to pro-development schemes and most of the guiding statutes are antiques, "holdover[s] from the earliest years of the century, when promoting western development was regarded as an unqualified holy."<sup>44</sup> Finally, "the call for greater local involvement in federal environmental decision making . . . has arisen from the perceived inability of purely scientific and technical endeavors to adequately frame and answer environmental questions."<sup>45</sup>

By the 1990's, federal land management agencies were caught in the middle of an unprecedented controversy: environmentalists condemned the agencies' environmentally destructive, but legislatively driven policies, while industry and development interests accused the agencies of sanctioning the decreasing emphasis on multiple use.<sup>46</sup> Although most interests involved in public lands agree that reforming centralized management is necessary, the shape of this reform remains unclear.<sup>47</sup>

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<sup>43</sup>

*See* The Next West, *supra* note 1, at 191.

<sup>44</sup>

*See* The Next West, *supra* note 1, at 191.

<sup>45</sup>

Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste, and the Devolution of U.S. Federal Environmental Programs*, *Natural Resource Journal*, 2000.

<sup>46</sup>

*See* Hirt, *supra* note 39, at xv.

<sup>47</sup>

*See* The Next West, *supra* note 1, at 190-94.



*B. Fertile Political Ground: the Changing  
Political Landscape of the West*

The changing political atmosphere of the West has also contributed to the emergence of collaborative groups.<sup>48</sup> Collaborative decision making, in large part, was a response to the political gridlock that evolved out of the environmental activism of the 1960s and early 1970s.<sup>49</sup> During these years, environmentalists had been profoundly successful at galvanizing westerners in support of environmental issues.<sup>50</sup> However, the 1980s were plagued by political backlash and by the middle of the decade, environmentalists struggled to retain their advances.<sup>51</sup> Ironically, while public support rose for anti-environmental factions, federal policies continued to de-emphasize development on public lands. By the beginning of the 1990s, the ramifications of these events could be seen in rural communities across the West—stories of resource dependent towns struggling with shrinking timber sales and mistrust of federal agency management agendas are well documented.<sup>52</sup> Against this backdrop, many environmentalists, as well as resource interests, began looking for more

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*See* The Next West, *supra* note 1, at 185.

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*See* Snow, *supra* note 5, at 3.

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*See* Snow, *supra* note 5, at 3.

51

*See* Snow, *supra* note 5, at 3.

52

Some well known examples include Quincy, California, Beaverhead County, Montana, Swan Valley, Montana, and Applegate Valley, Oregon. *See generally* Cestero, *supra* note 6 (discussing examples of collaboration efforts in West).

productive approaches to address the stalemate that had settled over federal lands.<sup>53</sup>

Environmentalists also began to fear that traditional forms of politics contributed to the alienation of local communities.<sup>54</sup> It became apparent that citizens were disillusioned with the litigious and regulatory approach to environmental protection,<sup>55</sup> in which local citizens had been “dealt out of the game by a decades-long battle among communities of ‘experts.’”<sup>56</sup> And, over time “[a]s the [natural resource] issues seemed to climb higher into the stratosphere of politics, the people who lived closest to the resources in question seemed to have less and less to do with it all.”<sup>57</sup> Collaborative decision making, it seemed to many, offered local citizens the opportunity to influence decisions regarding the lands in their communities and provided public land interests groups<sup>58</sup> the opportunity to approach the issue of resource allocation more effectively.<sup>59</sup> As one western governor stated:

We have to show in plain and simple actions that the environment, the economy, and

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<sup>53</sup>

*See Snow supra* note 5, at 3.

<sup>54</sup>

*See* Interview with Barb Cestero, Program Associate, Sonoran Institute, in Bozeman, Montana (Dec. 4, 1999) [hereinafter Cestero Interview].

<sup>55</sup>

*See* The Next West, *supra* note 5, at 195.

<sup>56</sup>

Snow, *supra* note 5, at 5.

<sup>57</sup>

Snow, *supra* note 5, at 5.

<sup>58</sup>

Public land interest groups include resource users such as timber industry representatives, ranchers, recreationists, miners, preservationists, and wildlife interest groups.

<sup>59</sup>

*See* The Next West, *supra* note 1, at 185–86.

the community are compatible. Our citizens are tired of the judicial gridlock and they're feeling left out of the process. They are willing and able to participate. . .

*C. Movement Toward Increased Public Participation: The  
National Environmental Protection Act and  
the National Forest Management Act*

Public participation in land management decision making is not new. Federal laws passed in the late 1960s and early 1970s recognized the desire for increased public involvement in the decision making process.<sup>60</sup> The National Environmental Protection Act ("NEPA")<sup>61</sup> and the National Forest Management Act ("NFMA")<sup>62</sup> are the primary laws guiding public involvement in decisions on federal lands.<sup>63</sup> Both the language of the Acts, as well as their implementing regulations, define traditional approaches to public participation on federal lands.<sup>64</sup> While these laws marked a watershed in federal land management by opening up the decision making process to public review, both laws failed to fully engage the public in the decision making process. This section

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<sup>60</sup>

See Barb Cestero, *From Conflict to Driven? A Social and Political History of Environmental Collaboration in the Swan Valley*. Montana, 20 (1997) (unpublished M.S. thesis, University of Montana (Missoula)) (on file with University of Montana Library) [hereinafter *The Swan Valley*].

<sup>61</sup>

See 16 U.S.C.A. §§ 1600-14 (1994).

<sup>62</sup>

See 42 U.S.C.A. §§ 4321-4370d (1995).

<sup>63</sup>

See 16 U.S.C.A. §§ 1600-14 (1994); 42 U.S.C.A. §§ 4321-4370d (1995).

<sup>64</sup>

See *The Swan Valley*, *supra* note 60, at 18.

provides a brief summary of the laws and offers a critique of each Act's failure to fully engage the public in the decision making process.

## *1. National Environmental Protection Act*

### *(a) Background*

Congress passed NEPA in 1969 against a backdrop of environmental awareness and public demand for increased influence over and access to federal decision making.<sup>65</sup> Briefly, NEPA outlines procedural guidelines for federal agency decision making and includes public review of agency decisions.<sup>66</sup> NEPA is considered the first environmental law of the environmental age, and was created with the intention of developing a national policy that would make federal agencies more sensitive to the ecological impacts of their decisions.<sup>67</sup> While the Act is substantively thin, the language outlines lofty ideals for federal environmental management: “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and

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<sup>65</sup>

See The Swan Valley, *supra* note 60 at 18 (citing *U.S. Congress, Office of Technology Assessment, Forest Service Planning: Accommodation Uses, Producing Outputs and Sustaining Ecosystems* (1992)).

<sup>66</sup>

See George Cameron Coggins et al., *Federal Public Land and Natural Resource Law* 333 (3d ed. 1993).

<sup>67</sup>

See Wendy Nelson Espeland, *Bureaucrats and Indians in a Contemporary Colonial Encounter*, Law and Social Inquiry, Spring 2001.

welfare of man.”<sup>68</sup>

However, simply declaring that agencies be committed to protecting the environment seemed unlikely to generate change.<sup>69</sup> Instead, drafters inserted section 102, which requires agencies to prepare Environmental Impact Statements (EIS). Under section 102, agencies must complete an EIS before any major federal action, such as permitting a proposed mine, takes place.<sup>70</sup> The EIS, among other things, provides a detailed description of the significant impacts, predicted outcomes, and environmental and social costs and benefits of each alternative. In a significant change from pre-NEPA agency decision making, NEPA allows, and in fact requires public input and review of agency decisions through the comment and appeal process.<sup>71</sup> While the process is administratively complex, the agencies primarily use public involvement as a method to gather information and educate the public.<sup>72</sup>

(b) *Benefits*

NEPA has been applauded for opening up the decision making process by requiring

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<sup>68</sup>

42 U.S.C. 4321.

<sup>69</sup>

See Wendy Nelson Espeland, *Bureaucrats and Indians in a Contemporary Colonial Encounter*, Law and Social Inquiry, Spring 2001.

<sup>70</sup>

See George Cameron Coggins et al., *Federal Public Land and Natural Resource Law* 333-35 (3d ed. 1993).

<sup>71</sup>

See *id.* at 335.

<sup>72</sup>

See *The Swan Valley*, *supra* note 60, at 21.

federal agencies to make information they considered in the decision making process available to the public. Advocates of NEPA contend that this requirement “ensures that the public, including environmental groups, can play a role in both the decision making process and the implementation of that decision. Publication of the EIS provides the public with an assurance that the agency has indeed, considered environmental concerns in its decision-making process.”<sup>73</sup> In fact, the Council on Environmental Quality (CEQ), in its twenty-five year review of NEPA concluded that:

Since its enactment, NEPA has significantly increased public information and input into agency decision-making. NEPA opened up for public scrutiny the planning and decision-making processes of federal agencies, in many cases providing the only opportunity for the public to affect these processes. Partly as a result of NEPA, public knowledge of and sophistication on environmental issues have significantly increased over the last 25 years. So too have public demands for effective and timely involvement in the agency decision-making processes.<sup>74</sup>

*(c) Challenges*

Despite NEPA’s innovations and its successes, NEPA’s limitations are well documented. Although its goal was to promote positive environmental policies, the law

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<sup>73</sup>

Frona M. Powell, *The North American Commission For Environmental Cooperation's San Pedro Report: A Case Study and Analysis of the CEC Process*, Environmental Lawyer, June 2000.

<sup>74</sup>

*Id.*

does not require agencies to chose environmentally superior alternatives.<sup>75</sup> Instead, NEPA merely requires agencies to comply with the EIS process. In fact, the United States Supreme Court has determined that NEPA is a procedural, rather than substantive law.<sup>76</sup> Accordingly, “if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . NEPA merely prohibits unformed rather than unwise agency action.”<sup>77</sup>

Perhaps, more importantly in the context of collaborative decision making, NEPA has also been criticized for its failure to engage the public in meaningful ways.<sup>78</sup> Jonathon Poisner, Professor of Law, argues that the Act and its regulations curtail meaningful public involvement in the decision making process. The laws do not specifically require the agency to actively involve citizens in the decision making process. Instead, they obligate the agency to merely consider environmental impacts and demonstrate by fully disclosing these impacts that they considered them. Therefore, although the law designates specific guidelines to

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<sup>75</sup>

See Wendy Nelson Espeland, *Bureaucrats and Indians in a Contemporary Colonial Encounter*, Law and Social Inquiry, Spring 2001.

<sup>76</sup>

Frona M. Powell, *The North American Commission For Environmental Cooperation's San Pedro Report: A Case Study and Analysis of the CEC Process*, Environmental Lawyer, June 2000.

<sup>77</sup>*Id.*

<sup>78</sup>See *The Swan Valley*, *supra* note 60, at 19.

inform the public, responsibility for project development is retained by the agency.<sup>79</sup> Many critics also argue that an institutional desire to protect agency discretion is at the root of these procedures. The result, then, is a public that is not engaged in making the decisions but is merely reviewing the decision already made by the agency. Agencies are "solely responsible for developing the proposed project, conducting all necessary analysis, and providing citizens with pertinent information."<sup>80</sup> Agencies retain considerable discretion for the methods and timing of public involvement.<sup>81</sup> Consequently, public participation is stalled at the input level of the decision making continuum.

Similarly, another critic observed:

that attempts to involve agency and public collaboration in the NEPA process has not worked well. Citizens often feel that decisions have already been made. Parties generally report being surprised and not consulted until the process is well underway, by which time it is difficult to influence its direction. The final, serious flaw that critics point out is NEPA's lack of attention to the human dimensions of the decision making process. The social, economic and cultural effects of decisions are seldom,

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<sup>79</sup>

Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 *Env'tl. L.* 53, 54-55 (1996) (stating that NEPA led to an unprecedented level of citizen participation in environmental decisionmaking, spawning a great national experiment in participatory pluralism);

<sup>80</sup>

See *The Swan Valley*, *supra* note 60, at 19. (citing Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, *Land and Water Review* XXV (1): 43-60).

<sup>81</sup>

See *The Swan Valley*, *supra* note 60, at 19.



or at least not systematically, considered as required by NEPA.<sup>82</sup>

Finally, although these criticisms refer to the limitations of public participation in Endangered Species Act, these observations resonate with NEPA:

Public notice, comment, and hearings tend to limit citizens to reacting to proposals already developed. Collaborative decision-making, or interactive participation, which includes stakeholders in "face-to-face problem solving," offers greater opportunities for creative public involvement. This is particularly true in planning, where panels or working groups may meet periodically to identify information needs, raise issues, propose new approaches, or monitor progress.<sup>83</sup>

In conclusion, NEPA has failed to engage the public in the decision making process. According to Poisner, "NEPA fails as a means for encouraging deliberative democracy. . . . As a result, NEPA's citizen participation generates more heat than light, creating citizen participation pathologies that leave both citizens and agencies frustrated by the process."<sup>84</sup>

(d) *The Next Step: Collaboration and NEPA*

Supporters of collaboratives recognize the importance of reconciling collaborative

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<sup>82</sup>

Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 *Envtl. L.* 53, 54-55 (1996).

<sup>83</sup>

Robert L. Fischman and Jaelith Hall-Rivera, *A Lesson for Conservation From Pollution Control Law: Cooperative Federalism for Recovery under the Endangered Species Act*, *Columbia Journal of Environmental Law*, 2002 (internal citations omitted).

<sup>84</sup>

Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 *Envtl. L.* 53, 54-55 (1996).

decision making with NEPA:

currently there is growing interest in finding ways to make the "NEPA process" more collaborative across not only federal agencies, but also state and local agencies, non-government associations (NGO), and private landowners. . . . Indeed, collaboration, collaborative planning, ecosystem management, and sustainability are all common terms of reference in environmental policy today and when one searches the roots of this change, one returns to the simple words of NEPA.<sup>85</sup>

If NEPA's ability to institute ecologically sound decisions is limited, how then can a collaborative approach fit into existing NEPA guidelines? The intersection between NEPA and collaborative decision making will be integral to developing a workable framework for collaboration.

## 2. *The National Forest Management Act*

While the National Forest Management Act ("NFMA") is less important to this discussion, however, a brief discussion is necessary.<sup>86</sup> NFMA was passed by Congress in 1976, legislated unprecedented restraints on the Forest Service<sup>87</sup> as well as providing for

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<sup>85</sup>

Margaret A. Shannon, *Will NEPA be "An Agenda for the Future" Or Will It Become "A Requiem For the Past"?: A Book Review of the National Environmental Policy Act: An Agenda For the Future*, Buffalo Environmental Law Journal, Fall, 2000).

<sup>86</sup> See 16 U.S.C.A. §§ 1600-1614 (1994).

<sup>87</sup>

See Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* 144-45 (1992).

public participation in Forest Service management.<sup>88</sup> Generally, NFMA guides Forest Service land use planning by directing the Secretary of Agriculture to develop comprehensive, long range management plans (referred to as forest plans) for each national forest.<sup>89</sup> All management decisions, therefore, must be consistent with these plans.<sup>90</sup> Similar to NEPA, NFMA also affirmed citizens' right to review Forest Service decision making and contains specific language regarding public participation.<sup>91</sup> Specifically, NFMA requires "public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public . . . the Secretary shall publicize and hold public meetings . . . that foster public participation."<sup>92</sup> However, similar to the public participation components contained in NEPA, NFMA also fails to engage citizens in the decision making process.<sup>93</sup>

### 3. *The Federal Advisory Committee Act*

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<sup>88</sup>

*See The Swan Valley, supra* note 60, at 19.

<sup>89</sup>

*See* George Cameron Coggins et al., *Federal Public Land and Natural Resource Law* (3d ed. 1993).

<sup>90</sup>

*See id.*

<sup>91</sup>

*See The Swan Valley, supra* note 60, at 19.

<sup>92</sup>

16 U.S.C.A. § 1604(d) (1994).

<sup>93</sup>

*See The Swan Valley, supra* note 60, at 23.

While an in depth discussion of the Federal Advisory Committee Act (FACA) is beyond the scope of this Paper, it is important to touch on it briefly. FACA was originally designed to control the influence of special interest groups on federal advisory committees. The Act requires that federal advisory committees have balanced memberships, open meetings, public access to meeting minutes, and limits on the amount of committees formed<sup>94</sup>. Historically, this law has been viewed as a legal roadblock to agency participation in collaborative decision making. One author argues that the sweep of lawsuits against federal agencies created a “FACA-phobia.”<sup>95</sup> However, both the federal agencies and the local, community groups overestimated FACA’s restrictions. The outcome of a series of lawsuits by environmentalists alleging that agency participation in community-collabortaive groups violated FACA seem to indicate that FACA does not inhibit the development of collaborative groups.<sup>96</sup> In *Public Citizen v. United States Dep’t of Justice*,<sup>97</sup> the court stated that FACA applies only to groups “organized by, or closely tied to, the [f]ederal

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<sup>94</sup>

Thomas C. Beierle and Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, Environmental Law Reporter, July 1999).

<sup>95</sup>

Sean T. McAllister, *The Confluence of a River and a Community: An Experiment with a Community-Based Watershed Management in Southwestern Colorado*, University of Denver Water Law Review, Spring 2000.

<sup>96</sup>

*Id.*

<sup>97</sup>

491 U.S. 440, 461 (1989) (It was not the intent of FACA to bring all “private advisory committees within FACA’s terms. . . [and is] “limited to groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status.”).

[g]overnment, and thus enjoying a quasi-public status."<sup>98</sup> Therefore, collaborative efforts that are "consultative forms of public involvement," do not trigger FACA.<sup>99</sup>

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<sup>98</sup>

*Id.*

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Thomas C. Beierle and Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decision Making*, Environmental Law Reporter (1999).

### III. The Legal Scope of Collaboration: Tensions Between the Court and Congress.

Court decisions and congressional action frame different and often inconsistent approaches to public participation in natural resource decision making. Therefore, a discussion of these authorities outlines the legal parameters that surround collaboration. Because defining the legal scope of collaboration is fundamentally a question of determining the acceptable levels of authority an agency may delegate to a citizen group,<sup>100</sup> a discussion of the unlawful sub delegation doctrine provides an appropriate starting point. Following that, Part III addresses the D.C. Circuit Court's interpretation of the unlawful sub delegation doctrine in *National Park and Conservation Association v. Stanton*<sup>101</sup> as it applies to local decision making on National Park Service land. Finally, Part III ends with a discussion of Congress' decision to mandate legislatively a citizen initiated management proposal.

#### *A. Constitutional Restraints to Local Decision Making: Unlawful Sub Delegation Doctrine*

The Constitution delegates exclusively to Congress the power to make necessary and

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*See generally* Coggins, *Devolution in Federal Land Law*, *supra* note 15 (discussing lack of legal and political framework for collaboration and devolution); Coggins, *Regulating Federal Natural Resources*, *supra* note 15 (criticizing collaboration efforts on public lands).

<sup>101</sup>

54 F. Supp.2d 7 (D.D.C. 1999).

proper rules for governing federal property.<sup>102</sup> In response to this mandate, Congress has delegated regulatory power to four main federal land management agencies—the Forest Service, the Bureau of Land Management, the National Park Service, and the Fish and Wildlife Service.<sup>103</sup>

The unlawful delegation doctrine addresses delegation from Congress to an agency,<sup>97</sup> and the unlawful sub delegation doctrine outlines the limits of the agencies' ability to delegate decision making authority to citizens.<sup>104</sup> The law is well established that Congress may, without violating the unlawful delegation doctrine, grant authority to an executive agency to adopt rules and regulations, as long as it provides some "intelligible principle" by which the agency is to exercise that authority. Therefore, Congress must delegate to the executive branch the authority to manage federal property.<sup>105</sup> Congressional delegation is common, and in fact, was upheld as early as 1911, when the United States Supreme Court decided *United States v. Grimaud*.<sup>106</sup> Similarly, the Court has allowed "implied" delegations

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<sup>102</sup>

See U.S. Const. art. IV, § 3, cl. 2.

<sup>103</sup>

See Coggins, *Regulating Federal Natural Resources*, *supra* note 15 (citing George C. Coggins & Robert L. Glicksman, *Public Natural Resource Law* (Supp. 1990)).

<sup>104</sup>

See *National Park and Conservation Ass'n. v. Stanton*, 54 F. Supp.2d 7, 18 (D.D.C. 1999) (citing *Perot v. Federal Election Comm'n*, 97 F.3d 553, 557 (D.C. Cir. 1996)).

<sup>105</sup>

*Mistretta v. United States*, 488 U.S. 361, 372, (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406,(1928)).

<sup>106</sup>

220 U.S. 506 (1911) ("Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.")

by congressional acquiescence.<sup>107</sup>

However, the courts have interpreted the unlawful sub delegation doctrine to prohibit agencies from delegating their authority to implement a statute to a private entity.<sup>108</sup> When Congress vests an agency with the authority to administer a statute, the agency may not shift that responsibility to a private entity, particularly when the entity's subjectivity is questionable due to conflicts of interest.<sup>109</sup> However, in some instances, Congress may allow agencies to delegate their authority.<sup>110</sup> Below is a discussion of the limited case law addressing the doctrine of unlawful delegation.

*Perot v. Federal Election Commission* outlines the parameters of proper delegation by an agency to a private entity. In *Perot*, the Federal Election Committee, a federal agency, issued a regulation permitting eligible non-profit organizations to host candidate debates,

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<sup>107</sup>

*See United States v. Midwest Oil*, 236 U.S. 459 (1915) ("an implied grant of power to preserve the public interest would arise out of . . . congressional acquiescence.").

<sup>108</sup>

*See National Park and Conservation Ass'n.*, 54 F. Supp.2d at 18 (citing *Perot v. Federal Election Comm'n*, 97 F.3d 553, 557 (D.C. Cir. 1996)). While courts generally refer to the doctrine as the "unlawful sub delegation doctrine," the *National Park and Conservation Association* court referred to it as the "doctrine of unlawful delegation" for simplicity purposes. *Id.*

<sup>109</sup>

*See id.* at 18 (citing *Sierra Club v. Sigler*, 695 F.2d 957, 962 (5th Cir. 1983)); *see also Perot v. Federal Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996). Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 55 S.Ct. 837, 846, 79 L.Ed. 1570 (1935).

<sup>110</sup>

*United States v. Widdowson*, 916 F.2d 587, 592 (10th Cir. 1990) (citing *United States v. Giordano*, 416 U.S. 505 (1974) ("[t]he relevant inquiry in any delegation challenge is whether Congress intended to permit the delegatee to delegate the authority conferred by Congress.")).



provided, however, that the private entities employ "pre-established objective criteria" to determine who may participate. The court reasoned that:

[r]ather than mandating a single set of "objective criteria" all staging organizations must follow, the FEC gave the individual organizations leeway to decide what specific criteria to use. (Citations omitted.) One might view this as a "delegation," because the organizations must use their discretion to formulate objective criteria they think will conform with the agency's definition of that term. But in that respect, virtually any regulation of a private party could be described as a "delegation" of authority, since the party must normally exercise some discretion in interpreting what actions it must take to comply.

It does not follow, argued the court, that merely because the agency did not "spell out precisely" what the term "objective criteria" means, it unlawfully delegated its authority. In fact, the authority to determine what the term "objective criteria" means ultimately rests with the agency, and as such, the agency may determine, that a private parties criteria is not objective. Therefore, the court held that the agency did not unconstitutionally delegate legislative authority to private interests.

In fact, in *Sierra Club v. Lynn*,<sup>111</sup> the court found that "[i]n the absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy cannot be expected to ignore useful and relevant information merely because it emanates from an applicant." However, the court emphasized, that this does not mean that an agency may substitute

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<sup>111</sup>  
502 F.2d 42 (5<sup>th</sup> Cir.1974.)

private entity's "efforts and analysis" for its own.

It appears that the case law allows sub delegation of authority to private sectors in cases where the agency retains final reviewing authority.<sup>112</sup> Courts have interpreted the scope of final reviewing authority broadly. *United Black Fund, Inc. v. Hampton*,<sup>113</sup> outlines a standard of appropriate reviewing authority. The facts are these: Plaintiff, United Black Fund, is a nonprofit charitable corporation, which raises funds for local health and welfare agencies in inner-city Washington, D.C. Plaintiff applied to the Chairman of the United States Civil Service Commission ("the Chairman") for solicitation privileges in the "Combined Federal Campaign," an annual fund drive by several charities. The Chairman denied Plaintiff's request, explaining that an Executive Order directed the Chairman of the Civil Service Commission to make arrangements that would allow voluntary health and welfare agencies to solicit funds. Based on this Order, the Greater Washington Area was a "federated community," and as such, a federation of local voluntary agencies belonging to United Way of America, Inc. ("United Way") was participating in the Campaign as an umbrella group. Local agencies wishing to receive funds from the drive, such as Plaintiff, may receive funds by applying to the Washington area united fund. Plaintiff filed suit, arguing that the Executive Order was an unlawful delegation of authority by the President of the United States.

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<sup>112</sup>

*See id.* at 19 (citing *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 904 (D.D.C. 1972)); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952).

<sup>113</sup>

352 F. Supp. 898 (1972).

The court rejected Plaintiff's claim. It observed that the federal agency responsible for local charitable organizations did not unlawfully delegate its authority to determine charitable solicitation privileges because the agency retained sufficient oversight; it required the private entities to meet independent federal standards such as nondiscrimination standards.<sup>114</sup> The court reasoned that:

Certainly it would be an abuse of discretion for the Chairman to surrender all authority over the policies of United Way and its member united funds and chests, but it seems clear from the record . . . that this is not the case. . . [A]ll local agencies wishing to participate as members of a united fund or community chest in the Combined Federal Campaign *must meet independent federal standards regarding such important matters as nondiscrimination standards*, which are spelled out in the Chairman's Manual on Fund Raising. It is apparent . . . that the Chairman retains authority to review the policies even of those organizations which have been approved by United Way to make sure that they do in fact meet federal requirements. Final decision-making authority concerning eligibility of federations of local charities . . . does not, then, rest in a private organization.<sup>115</sup>

Interestingly, the court added that the Chairman's delegation was in fact advantageous for the federal agency: "[The] Chairman's 'methods and standards' are not an abuse of discretion on any theory of invalid subdelegation and, . . . such methods and

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<sup>114</sup>

*See id.* at 904-05.

<sup>115</sup>

*Id.* at 904; *see also R. H. Johnson & Co. v. Securities and Exchange Commission*, 198 F.2d 690, 695 (2d Cir.), cert. denied 344 U.S. 855 (1952) (subdelegation by federal agency to private entity is not invalid when the federal agency or official retains final reviewing authority); *Harwell v. Growth Programs, Inc.*, 315 F.Supp. 1184, 1188 (W.D.Tex.1970) (same).

standards are a reasonable means of permitting a great number of local volunteer health and welfare agencies to participate in the Combined Federal Campaign without unduly burdening the normal operations of the federal government.”<sup>116</sup>

More recently, two cases have addressed the extent to which federal agencies may delegate authority in the public lands arena. In both cases, the court rejected the government’s delegation of authority, finding that it was too broad. In *Natural Recourse Defense Council v. Hodel*,<sup>117</sup> environmental and wildlife organizations claimed that the Bureau of Land Management (“BLM”) violated, among other statutes, the Taylor Grazing Act and FLPMA when it amended regulations for management of livestock grazing on public lands. At issue was the Secretary of the Interior’s “Cooperative Management Agreements” (CMAs). Under the CMAs, the BLM permits ranchers to graze livestock on the public lands in a way that the ranchers deem as appropriate. The court found that the CMA program “is contrary to Congressional intent and was enacted without proper regard for the possible environmental consequences which may result from overgrazing on the public lands.”<sup>118</sup> Specifically, the court found that: “The CMA program disregards defendants’ duty to prescribe the manner in and extent to which livestock practices will be conducted on public lands. The program also overlooks defendants’ duty of expressly reserving, in all permits, sufficient authority to revise or cancel livestock grazing

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<sup>116</sup>

*Id.*

<sup>117</sup>

618 F. Supp. 848 (E.D.Cal. 1985).

<sup>118</sup>

*Id.*

authorizations when necessary.”<sup>119</sup> Interestingly, the court’s reasoning highlights an important policy concern underlying collaborative decision making:

the Congressional mandate that public lands be managed “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values.” . . . Some or all of these knowledgeable permittees may even be inclined to limit their livestock grazing to levels which will guarantee the vitality of such values, even at the expense of their own private ranching interests. Had Congress left a gap in its regulatory scheme which allowed defendants to decide whether individual ranchers should be entrusted with such decisions, this Court would be in no position to second guess the wisdom of the CMA program. However, Congress, in directing that the Secretary prescribe the extent of livestock practices on each allotment, precluded such entrustment,....<sup>120</sup>

In the second and more recent case, *National Park and Conservation Association v. Stanton*,<sup>121</sup> the court squarely addresses the question of appropriate delegation of federal decision making to a local council. The next section discusses the court’s interpretation of the unlawful sub delegation doctrine as it applied in *National Park and Conservation Association v. Stanton*.

*B. National Park and Conservation Association v. Stanton:  
The Unlawful Sub Delegation Doctrine*

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<sup>119</sup>

*Id.*

<sup>120</sup>

*Id.*

<sup>121</sup>

54 F. Supp.2d 7 (D.D.C. 1999).

The parameters of the unlawful sub delegation doctrine as it applied to local, collaborative decision making were tested in *National Park and Conservation Association v. Stanton*.<sup>122</sup> At issue was whether the National Park Service (“NPS”) unlawfully delegated<sup>123</sup> its statutory duty to manage and administer the Niobrara National and Scenic River to a local private citizen group.<sup>124</sup>

### 1. *The Case*

The Niobrara river, flowing through north central Nebraska, is home to several threatened and endangered species and is recognized as one of the premier canoeing rivers in the country.<sup>125</sup> The Niobrara is also unique in that a majority of the river runs through private land. Against a backdrop of local opposition, Congress added sections of the river to the National Wild and Scenic Rivers system. As a wild and scenic river, the Niobrara falls within the National Park Service's jurisdiction.

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<sup>122</sup>

54 F. Supp.2d 7 (D.D.C. 1999).

<sup>123</sup>

While courts generally refer to the doctrine as the unlawful sub delegation doctrine, the National Park and Conservation Ass'n court referred to it as the unlawful delegation for simplicity purposes. *See id.* at 18.

<sup>124</sup>

*See id.* at 11.

<sup>125</sup>

Unless otherwise noted, the facts are taken from *National Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d. 7 (D.D.C. 1999).

The management regime for the Niobrara river evolved out of a complex process. Congress first created an eleven member advisory commission made up of local interests. Congress's intent in forming the advisory commission was to ease local hostility to the Niobrara's designation by encouraging local and state involvement in designing a general management plan for the river. With the help of the advisory commission, the NPS developed a General Management Plan and Environmental Impact Statement (GMP/EIS). The GMP framed the NPS's management objectives for the Niobrara river and the EIS outlined several management alternatives. The NPS eventually chose an alternative ("Alternative B") that required a two step approach to management of the river. First, in July 1997, the NPS entered into an Interlocal Cooperative Agreement ("the Agreement") with local Nebraska government entities. The Agreement then created the Niobrara Council ("the Council"), made up of members of county and state agencies, local landowners, a representative from the timber and recreational businesses and Fish and Wildlife Service, and one representative of the NPS. The Council was responsible for managing and protecting the Niobrara River according to the standards outlined in the GMP/EIS. The NPS retained authority to terminate both the Council as well as the Agreement if the Council failed to meet established objectives or if it managed the river in a way inconsistent with NPS national environmental standards.

Plaintiffs National Parks and Conservation, Barry Harper, and the American Canoe Association alleged that almost two years had passed since the NPS created the Council but the group had yet to provide a management plan to protect Niobrara's resources.

## 2. Analysis

Plaintiffs alleged, among other issues, that the NPS unlawfully delegated its management authority to the Council.

### (a) NPS' Statutory Obligations

The court initially addresses the NPS' statutory obligations. It recognized that the NPS' mission 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."<sup>126</sup>

The duties of the Secretary of the Interior are explained in 16 U.S.C. § 1281(c) (1999):

The Secretary of the Interior, in his administration of any component of the national wild and scenic rivers system, may utilize such general statutory authorities relating to areas of the national park system and such general statutory authorities otherwise available to him for recreation and preservation purposes and for the conservation and management of natural resources as he deems appropriate to carry out the purposes of this chapter.<sup>127</sup>

Almost fifty years after Congress created the NPS, Congress passed the Wild and

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<sup>126</sup>

National Park Service Organic Act, 16 U.S.C. § 1 (1999).

<sup>127</sup>

*Id.* (emphasis added).



Scenic Rivers Act in 1968 to "preserve [the] selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes".<sup>128</sup>

(b) Advisory Commission

The court recognized that the advisory commission, designed and implemented by Congress, was a lawful extension of the NPS's authority.<sup>129</sup> The court reasoned that Congress knew that a majority of the land included in the Niobrara river system was privately owned, and created the commission to encourage local participation in managing the river. Congress did not intend to wholly shift the NPS's management responsibilities to a private entity such as the Council.<sup>130</sup> The court rejected the NPS's claim that, similar to the advisory committee, the Council also fell within the scope of acceptable subdelegation of authority.<sup>131</sup>

(c) the Council

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<sup>128</sup>

16 U.S.C. § 1271 (1999).

<sup>129</sup>

*See National Park and Conservation Ass'n*, 54 F. Supp. 2d at 18.

<sup>130</sup>

*See id.*

<sup>131</sup>

*See id.* at 20-21.

The court then addressed whether the Council, similar to the Advisory Commission, was an abrogation of the Secretary's duties. Applying this statutory language to the case here, the court first addressed the constitutionality of the Advisory Committee. The court found that the "statutes give the Secretary of the Interior sole responsibility for *administering* the lands included in the National Parks system and the National Wild and Scenic Rivers system." *emphasis added*. The court then interpreted "administering," as used in the statute, to mean "to manage ... to direct or superintend the execution, use, or conduct of ... to manage or conduct affairs. Thus, the Secretary, who is statutorily charged with administering Park Service lands and rivers, "cannot wholly delegate his responsibility to a local entity which is not bound by the statutory obligations set forth above." The court reasoned that: "NPS cannot, under the unlawful delegation doctrine, completely shift its responsibility to administer the Niobrara to a private actor, (citation omitted), particularly a private actor whose objectivity may be questioned on grounds of conflict of interest." According to the court:

Plaintiffs argue that Congress created the Advisory Commission as the "primary channel" for local input regarding the administration of the Niobrara, and that the creation of a local managing council violates the intent of Congress. . . . [T]he Advisory Commission's recommendation for the creation of a local council can not shield NPS from the finding that by following that recommendation it may have unlawfully delegated its duties to the council.<sup>132</sup>

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<sup>132</sup>

*National Park and Conservation Ass'n*, 54 F.Supp. 2d 7.

As stated previously, the threshold inquiry to determine whether an agency unconstitutionally delegated its authority, is whether "Congress intended to permit the delegatee to delegate the authority conferred by Congress." The court found no indication in either statutes or the legislative history that Congress "intended any variation on the doctrine of unlawful delegation."<sup>133</sup>

However, because case law allows an agency to delegate its authority if it retains reviewing authority, the next question is whether the NPS retained sufficient final reviewing authority over the Council. According to management documents, including Alternative B, the Niobrara is to be managed by a local council, with NPS merely

    serving as liaison and providing technical support as needed. (Citations omitted.) The Council is responsible for hiring staff, monitoring the River resources, evaluating access sites and land protection needs, providing educational and information services, providing law enforcement and emergency services, and maintaining roads, bridges, and other river access sites.<sup>134</sup>

The court found that these duties "fall squarely within the Secretary's responsibilities for managing the Niobrara."<sup>135</sup>

Moreover, under the management guidelines, "the Council is encouraged to seek

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*Id.*

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*Id.*

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*Id.*

outside sources of funding to avoid having its decisions "dictated". . . NPS has only one voting member on the Council, and all decisions are made by majority vote." The court found that: "In short, it is clear that NPS retains virtually no final authority over the actions--or inaction--of the Council."<sup>136</sup>

Therefore, the court held that the NPS's delegation of its statutory management duties to the Council violated the unlawful delegation doctrine. Specifically, the court found that:

the NPS retained no oversight over the Council, no final reviewing authority over the council's actions or inaction, and the Council's dominant private local interests are likely to conflict with the national environmental interests that NPS is statutorily mandated to represent. NPS lacks the authority to: appoint or remove members of the Council, aside from its own representative; determine which interests will be represented; select Council officers; establish Council sub-committees; determine the term limit for Council members; veto Council decisions which are contrary to the GMP; independently review Council decisions prior to implementation; and control Council funding. . . [T]he Council does not share NPS' national vision and perspective. NPS controls only one of the 15 Council members, and is the only member, besides FWS, who represents national environmental concerns.<sup>137</sup>

Finally, although the court recognized that the NPS retained authority to dismantle the Council completely if it failed to manage the Niobrara consistent with the plans outlined in GMP, the court argued that "[u]se of such a draconian weapon is highly

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<sup>136</sup>

*Id.*

<sup>137</sup>

*Id.*

unlikely, especially since NPS claims that without local participation, it could not effectively meet its goals and objectives because of local opposition to federal management."<sup>138</sup>

While the court in *National Park and Conservation Association v. Stanton* rejected the NPS decision to delegate its authority to a local council, Congress took an opposite approach when it legislated the Quincy Library Group. The next section discusses Congress' mandate that the Forest Service implement a locally developed management proposal for a large area of national forest land in the northern Sierra Nevada Mountains.

### *C. The Quincy Library Group: Congressional Legislation of a Citizen Initiated Management Plan*

In October 21, 1998, less than a year before the district court decided *Stanton*, Congress passed the "Herger-Feinstein Quincy Library Group Forest Recovery Act ("the Act"), " a locally designed proposal for managing 2.5 million acres of national forest land in the northern Sierra Nevada Mountains.<sup>139</sup> Congress passed the Act as part of the Department of the Interior and Related Agencies Appropriations Act.<sup>140</sup> The Act requires the Forest Service to implement a locally developed management plan for an area of land covering the entire

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<sup>138</sup>

*Id.*

<sup>139</sup>

*See* Cestero, *supra* note 2, at 5.

<sup>140</sup>

*See* Cestero, *supra* note 2, at 5.

Plumas and Lassen National Forests and the Sierraville District of the Tahoe National Forest.<sup>141</sup>

The Act was a product of the Quincy Library Group ("QLG"), a local citizen group initially organized by a timber industry forester, a county supervisor, and an environmental attorney who wanted to tackle the contentious environment in Quincy, California brought on by the timber wars of the early 1990's.<sup>142</sup> The "timber wars" were the result of dramatic changes in timber harvest levels in Lassen and Plumas counties, and surrounding areas, combined with an increased environmental awareness. The controversy was also fueled by concerns over the extinction of the California spotted owl. By 1993, the QLG had developed a "Community Stability Proposal," which included recommendations for maintaining a

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<sup>141</sup>

*See Cestero, supra* note 2, at 5.

<sup>142</sup>

*See id.* By 1999, timber production from QLG national forests was barely 10% of the 1980's levels. A sharp decline in timber-related economic activity and employment coincided with the declining harvest levels. According to a QLG case study:

the Forest Service found itself in a dilemma. On one hand, each forest had only recently adopted a Land and Resource Management Plan (LRMP) that called for high timber production . . . and "timber people" felt they were entitled to the production levels described in those plans. On the other hand . . .

"environmentalists" demanded immediate action to protect spotted owls and other species reported to be at risk, and to preserve large old trees and roadless areas. These contrary views expressed themselves during a two or three year period in a sequence of charges and counter-charges involving sabotage and tree-spiking, demonstrations and counter- demonstrations, and even direct threats of injury or death.

*Engaging, Empowering, and Negotiating Community: Strategies for Conservation and Development*, The Conservation and Development Forum. West Virginia University, and the Center for Economic Options. October 8-10, 1998.

consistent timber supply, implementing an experimental fire control scheme, and designating roadless and riparian areas excluded from timber harvesting.<sup>143</sup> However, after waiting for almost four years for the Forest Service to implement the plan without any results, the QLG bypassed the agency and took its proposal to Congress.<sup>144</sup> The House of Representatives passed the proposal by a vote of 429 to 1.<sup>145</sup> The bill initially died in the Senate after confronting opposition from 140 environmental groups but eventually passed in October 1999 as a rider to the Omnibus appropriations bill and was never debated on the floor of the Senate.<sup>146</sup>

The Act directs the Secretary of Agriculture, acting through the Forest Service, to conduct a 5-year pilot project to implement resource protection and management activities outlined by the QLG on the Plumas, Lassen, and Tahoe National Forests. The Pilot Project focuses on the advantages of fuelbreaks, group selection, individual tree selection, avoidance or protection of specified areas, and riparian restoration. Specifically, the project (1) required 40,000 to 60,000 acres of strategic fuel reduction (harvesting of dead and diseased trees) in fire prone areas each year; (2) required special efforts to protect riparian areas including creation of wide protection zones; (3) required selective harvesting techniques to achieve

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<sup>143</sup>

*See* Cestero, *supra* note 2, at 5.

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*See* Cestero, *supra* note 2, at 5.

<sup>145</sup>

*See* Cestero, *supra* note 2, at 5.

<sup>146</sup>

*See* Cestero, *supra* note 2, at 5.

multi age, multi-story, varied species forest: and (4) banned all logging in certain environmentally-sensitive areas.

The legislation also explicitly states that “[n]othing in this section exempts the pilot project from any Federal environmental law.” As such, the Forest Service is required to complete an environmental impact statement to analyze the effects of the management proposals before it implements any management activities.

The QLG has generated considerable controversy,<sup>147</sup> and because of this it is difficult to disentangle the conflicting stories surrounding both the crafting of the legislation and its implications.<sup>148</sup> However, it appears clear that the QLG closed meetings that at one time had been open to the public. The Group also excluded interested stakeholders, most notably the Forest Service, as well as several local and national environmental groups involved in the region's forest management issues.<sup>149</sup> Without the input of the diverse, and often, opposing views, opponents characterize QLG as a “collaborative advocacy group,”<sup>150</sup> more concerned with lobbying for congressional support than with being inclusive of all affected interests.<sup>151</sup> Still others accuse the coalition of advancing the Sierra Pacific Industries timber company

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*See* Cestero, *supra* note 2, at 6.

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*See* Cestero, *supra* note 2, at 76.

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*See* Cestero, *supra* note 2, at 77.

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*See* Cestero, *supra* note 2, at 76.

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*See* Cestero, *supra* note 2, at 76.



agenda at the expense of local needs,<sup>152</sup> and they have condemned the proposal as “another sweetheart deal for California's largest timber company.”<sup>153</sup>

It is argued that large timber companies support the Act because of the degree of certainty it provides; permitting timber harvesting without the legal challenges and appeals from environmentalists. Some local environmentalists support the Act because it ensures environmental restrictions that may not have been possible. However, support is not universal. Ranchers do not view the QLG as representative of local interest. They oppose the Act because according to one spokesperson, “it appears to grant the Forest Service sweeping new authority to violate established water rights and to limit or even terminate grazing within the pilot project area during the term of the program.” National environmental interests are skeptical as well; how representative of the national interest is a local movement? The QLG is an often cited example of both the benefits and pitfalls of collaboration. And while it may be redundant to add to this discussion, it is important nonetheless, for the very reason that QLG has garnered so much attention: despite one’s opinion of the QLG and its legislation, it represents a major shift in the way public lands have traditionally been managed.

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*See Cestero, supra note 2, at 76.*

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*See Cestero, supra note 2, at 6.*

#### IV. The Future of Collaborative Decision Making and the Scope of Its Authority on Public Lands

Throughout the history of the West, westerners have often sanctioned environmentally destructive and economically untenable solutions to the question of who should control natural resources.<sup>154</sup> Therefore, because of this history, a collaborative decision making process driven by local participation should be approached cautiously.<sup>155</sup> The parameters of collaborative decision making must be well defined both in terms of what is legally appropriate and politically acceptable.

This section discusses the positive role of collaboration as a tool to address natural resources decision making while acknowledging the potential challenges collaborative groups may encounter. Although these ideas are not new,<sup>156</sup> they provide the political framework necessary for understanding the influence and ramifications of collaborative decision making. Following this discussion, this section then analyzes the limited and conflicting legal boundaries of collaboration. Finally, this section concludes by advocating a formal process for collaboration efforts on public lands, based on the Forest Service

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<sup>154</sup>See Coggins, *supra* note 15, at 604.

<sup>155</sup>See Snow, *supra* note 5, at 2.

<sup>156</sup>

See generally The Next West, *supra* note 1 (discussing changes in western politics, demographics and economy); Cestero, *supra* note 2 (discussing collaboration on public lands); A Wolf in the Garden: The Land Rights Movement and the New Environmental Debate (Philip D. Brick & Cawley R. McGregor eds.) (1996) (discussing changes in public land management in the West).

proposed rules. After almost a decade of *ad hoc* collaborative efforts across the West,<sup>157</sup> this proposal provides a structure that separates the good from the bad, the truly collaborative, democratic decision making from the attempts to assert fractious local control under the guise of collaboration.

*A. Collaboration on Public Lands:  
Current Opportunities for Public Participation*

Collaboration has the potential to play a positive role in expanding the parameters of natural resource decision making. First, collaboration provides an opportunity to perform politics more effectively.<sup>158</sup> That is, despite the hopes of Progressive Era conservationists, decisions regarding natural resources are highly political—the majority of laws created to manage public lands foster politicized decision making.<sup>159</sup> Instead of trying to remove politics from the decision making process, collaborative decision making attempts to improve politics.<sup>160</sup> Collaborative groups become political structures that are more responsive

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<sup>157</sup>

*See* The Next West, *supra* note 1, at 186.

<sup>158</sup>

*See* The Next West, *supra* note 1, at 194.

<sup>159</sup>

*See supra* Part II.

<sup>160</sup>

*See* The New West, *supra* note 1, at 186.

and able to integrate local interests.<sup>161</sup> In this way, collaborative decision making offers opportunities to experiment with a revival of Jeffersonian democracy,<sup>162</sup> in which citizens negotiate face-to-face for solutions that affect them directly.<sup>163</sup> Unlike "remote-control governance,"<sup>164</sup> collaborative decision making provides accountability;<sup>165</sup> local westerners become responsible for the decisions they make about the lands and resources in their communities.<sup>166</sup> The result is, therefore, not anti-government but instead, a more democratic approach to federal decision making.<sup>167</sup>

Furthermore, the sense of local responsibility that collaborative groups foster may prove more effective at resolving public land issues commonly left to the agencies. While many of the more intractable issues such as mining are probably beyond the scope of

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<sup>161</sup>

*See* The New West, *supra* note 1, at 186.

<sup>162</sup>

*See* The New West, *supra* note 1, at 185.

<sup>163</sup>

*See generally* Daniel Kemmis, *Community and the Politics of Place* 113 (1990) (analyzing revival of Jeffersonian democracy).

<sup>164</sup>

The New West, *supra* note 1, at 195.

<sup>165</sup>

*See* The New West, *supra* note 1, at 198.

<sup>166</sup>

*See* The New West, *supra* note 1, at 195.

<sup>167</sup>

*See* The New West, *supra* note 1, at 186.

collaboration,<sup>168</sup> issues that are likely to gather widespread support, such as improving fish habitat, are more appropriate for collaborative decision making. Therefore, when opposing interests, joining together around a common desire, negotiate individual demands into a workable agreement, they create a powerful coalition.<sup>169</sup> As these groups maneuver their way through the negotiation process, “they overcome residual opposition through the politics of inclusion.”<sup>170</sup> Divisiveness is more likely integrated into the decision making process.<sup>171</sup> This suggests that agreements developed by collaborative groups may be acceptable to a majority of the interested parties and less likely to encounter opposition.

Even in situations where collaboration fails to produce a tangible product, the effort is worthwhile because collaboration, when done correctly, builds community bonds and lays the foundation for future problem solving.<sup>172</sup> These successes are well documented and their impacts should not be underestimated.<sup>173</sup> The process of working together on a common

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<sup>168</sup>

*See* Snow, *supra* 5, at 8.

<sup>169</sup>

*See* The New West, *supra* note 1, at 195.

<sup>170</sup>

The New West, *supra* note 1, at 196.

<sup>171</sup>

*See* The New West, *supra* note 1, at 196.

<sup>172</sup>

*See* The Swan Valley, *supra* note 60, at 150-51.

<sup>173</sup>

*See generally* Cestero, *supra* note 2 (discussing collaborative decision making on public lands); A Wolf in the Garden, *supra* note 156 (discussing changes in public land management in West).

issue may foster trust and understanding among citizens who have traditionally remained alienated, particularly in communities where resource extraction dominates the local economy.<sup>174</sup> The result is a situation that is more likely to promote, rather than discourage, dialogue, and in the future may lead to tangible problem solving on difficult issues. While the Quincy Library Group fails to provide a workable model for collaborative decision making, critics applaud the group for its success in mending some of the divisiveness that plagued the community in the early 1990s.<sup>175</sup>

Most importantly, collaborative decision making has gathered such momentum that it is unlikely to fade from the political landscape in the near future. Since the early 1990s, collaborative groups have ballooned, and arguably, collaborative decision making has gathered enough widespread support that it constitutes a new environmental movement.<sup>176</sup> Nationally, collaborative decision making is heralded as a solution for addressing difficult resource allocation questions.<sup>177</sup> Even if national politics turned against collaboration, it is unlikely that these efforts would dissolve. Having given local citizens increased influence over participation in the decision making process, federal land management agencies risk

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<sup>174</sup>

*See id.*

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*See Quincy Library Group Forest Recovery and Economics Stability Act of 1997: Hearings on H.R. 858 Before the Sub Comm. on Forest and Forest Health of the Comm. on Resources, 105th Cong. 44, 43 (1997) (statement of Louis Blumberg) [hereinafter Blumberg].*

<sup>176</sup>

*See The New West. supra note 1, at 186.*

<sup>177</sup>

*See generally Cestero, supra note 2.*

disenfranchising these groups by withdrawing support. Because oscillations of western anger directed at the federal government have dominated public land politics since the turn of the century,<sup>178</sup> this is an outcome the federal government should not risk.<sup>179</sup>

However, challenges to collaborative decision making do exist. George Coggins highlights three major concerns. First, collaboration is susceptible to co-option by powerful interest groups.<sup>180</sup> Second, collaboration agreements may contradict national priorities.<sup>181</sup> Third, Coggins is reluctant to trust local westerners to do the right thing if given expanded influence over decision making.<sup>182</sup> Coggins argues that “[f]rom the birth of the Nation, local citizens have banded together, usually at the expense of the general public and often with the

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*See generally* A Wolf in the Garden, *supra* note 156 (discussing changes in public land management in West); Cawley R. McGreggor, Federal Land, Western Anger; The Sagebrush Rebellion and Environmental Politics (1993) (discussing history of anti-federal sentiment in West).

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In each of these "movements," western interest groups sought to obstruct federal management of public resources by asserting local control. While these "movements" eventually dissolved, they succeeded in disrupting management of natural resources and fueling anti-federalist sentiment. *See generally* A Wolf in the Garden, *supra* note 151 (discussing changes in public land management in West); Cawley R. McGreggor, Federal Land, Western Anger; The Sagebrush Rebellion and Environmental Politics (1993) (discussing history of anti-federal sentiment in West).

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*See* Coggins, *supra* note 15, at 603.

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*See* Coggins, *supra* note 15, at 603.

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*See* Coggins, *supra* note 15, at 603.

connivance of federal and local officials."<sup>183</sup> Therefore, while positive outcomes may result from collaborative decision making, collaborative groups, unchecked, have the potential to frustrate their primary objectives by encouraging local control instead of local participation. Consequently, formalizing the collaborative process through agency regulations provides the safeguards against these concerns while also encouraging the flexibility and creativity that fueled collaborative decision making initially.

*B. How Much Is Enough? Defining the Legal Boundaries  
of Collaborative Decision Making Authority*

As this Paper suggests, collaborative decision making is a recent phenomenon and runs counter to public land law and custom and, thus, its legal boundaries remain unclear.<sup>184</sup> This section analyzes the contradicting precedents outlined in the previous section.

*1. The Quincy Library Group*

There is no doubt that Congress has the authority to legislate the Quincy Library Group ("QLG"). But is legislating a locally-driven proposal, such as the QLG proposal, to manage

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<sup>183</sup>

*See* Coggins. *supra* note 15, at 603.

<sup>184</sup>

*See supra* Part II and III.



huge tracts of land a good idea from both a resource management and collaborative decision making perspective? This Paper argues that Congress' decision to implement the QLG's proposal, and in so doing, working outside of existing public land laws and regulations, establishes an unacceptable precedent. In codifying the QLG proposal, Congress suspended both the National Forest Management Act ("NFMA") and the National Environmental Protection Act ("NEPA").<sup>185</sup> As one practitioner observed, "[t]his case demonstrates most clearly that these consensus processes are designed to be implemented; they are not input. . . . they are intended to shape policy."<sup>186</sup>

*(a) Piece-meal approach*

The QLG sets the precedent that collaborative groups may accomplish through congressional legislation what they could not achieve under existing public land laws. The QLG model, thus, allows citizen groups to bypass public land laws that stand in the way of their proposal, at least at the initial stages. This critique highlights a critical aspect of collaborative decision making: it must be integrated into the current public participation process, and should not replace existing regulations and laws.<sup>187</sup>

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<sup>185</sup>See *supra* Part III.

<sup>186</sup>

Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, Valparaiso University Law Review, Spring, 2000.

<sup>187</sup>

See Cestero, *supra* note 2, at 74.

The QLG highlights a critical problem with collaborative decision making--piecemeal approach to resource management. By legislating the QLG proposal, Congress allows a local group of citizens to make decisions about a specific area, and the likely result is a lack of consistency in how public lands and resources are managed. John Leshy, Professor of Law at Arizona State University and former Solicitor of the U.S. Department of the Interior, expressed his concern with this approach recently:

One question is how strong is the value of having some uniformity and consistency of management across an entire national system of lands (e.g., national forests, national parks) by a single institution (the U.S. Forest Service; the National Park Service), and how big a threat to that value is the fragmentation inherent in these arrangements. And how strong is the competing value of experimenting with different management models, and in giving institutions like the U.S. Forest Service and National Park Service some competition in how units of their systems are managed?<sup>188</sup>

At the root of this concern is whether these piecemeal approaches fragment uniform control, and moreover, prevent compliance or coordination with broader management plans at the large ecosystem level. "Such a devolutionary approach faces a number of potentially vexing problems, perhaps most notably those associated with . . . adequate attention to the regional dimension of environmental problems, . . ."<sup>189</sup> Environmentalists also have echoed

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John Leshy, *Public Lands*, The American Law Institute, February 13-15, 2002.

<sup>189</sup>

Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste*,

this concern; they fear that QLG's decision to lobby Congress and avoid Forest Service participation in the management plan creates a "precedent of piecemeal legislation for individual forests that would inevitably lead to the over-riding of environmental laws."<sup>190</sup>

While critics of the current resource management system argue that de-centralized decision making is critical,<sup>191</sup> national environmental and ecological concerns should provide an overarching framework to any decentralized reform. Congressionally mandated collaborative efforts are especially problematic for the National Park Service because of the unique language contained in the National Park Service Organic Act of 1916,<sup>192</sup> the authorizing statute for the National Park Service.<sup>193</sup> Because the Act authorizes individual parks separately,<sup>194</sup> the QLG approach, unfettered, could lead to a series of individually managed parks, limiting, beyond what is desirable, a uniform, national policy for managing national parks.

This is not an isolated concern. One legal scholar warned against any efforts by

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*and the Devolution of U.S. Federal Environmental Programs*, Natural Resource Journal, 2000.

<sup>190</sup>

Matthew Schuckman, *Making the Hard Choices: A Collaborative Governance Model for the Biodiversity Context*, Washington University Law Quarterly, Spring 2001.

<sup>191</sup>

*See supra* Part II.

<sup>192</sup>

*See* 16 U.S.C.A. §§ 1-18f (1993).

<sup>193</sup>

*See id.*

<sup>194</sup>

*See id.*

Congress to allow local communities “to have either nominal or overt control over park policies.” As an example, he cited a congressional proposal in 1996, which created an eleven-member intergovernmental council to make management recommendations for Voyageurs National Park. The NPS would be allowed only one representative on a council made up largely of local and state officials. In the end, Congress did not enact the legislation, principally, because: “[o]pponents of the plan voiced concerns that a delegation controlled by local officials would likely allow increased recreational use of the park, which would, in their estimation, compromise the environmental integrity of the park.”<sup>195</sup>

*(b) National Participation*

*From the standpoint of non-local populations, oftentimes an environmental decision has regional or national implications, either because the decision directly affects an environmental resource that a wide range of non-local stakeholders perceive as a national good, or because the decision indirectly shapes decisions about other resources in non-local areas.*<sup>196</sup>

Politically, the QLG model is unsupportable. The QLG proposal represents local control instead of collaboration between local, regional, and national interests. While the difference is subtle, it is important. By excluding interests groups that may have been unwilling to

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<sup>195</sup>

Richard J. Ansson, Jr., *Funding Our National Parks in the 21<sup>st</sup> Century: Will We Be Able to Preserve and Protect Our Embattled National Parks?*, Fordham Environmental Law Journal, Fall 1999.

<sup>196</sup>

Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste, and the Devolution of U.S. Federal Environmental Programs*, Natural Resource Journal, 2000.

support the proposal, QLG violates a fundamental principle of public land and resource management. The evolution of public land law has created a system in which the remaining federal lands are so sufficiently valuable that they should remain under federal management and, as such, must consider national interests. Consequently, planning on federal lands must embrace more than just local opinion; the allocation of national resources is not a singularly local issue.

This criticism raises another major concern that emerges from the QLG: how to ensure broad stakeholder participation, specifically, national environmental representation. Arguably, the lack of participation by national environmental groups and federal agencies, either because they were not invited or chose not to attend, had the dual effect of consolidating national policy with a few local people while at the same time increasing the control of those interest such as industry, that are welcome to participate.<sup>197</sup> At the very least, limiting representation may re-distribute negotiating power between environmentalists and industry. Worse, it may disenfranchise interests, such as the national environmental groups, that do not participate.

It is well documented that larger environmental groups view collaboration with suspicion.<sup>198</sup> Central to their concerns is, who speaks for the national environmental

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<sup>197</sup>

Matthew Schuckman, *Making the Hard Choices: A Collaborative Governance Model for the Biodiversity Context*. Washington University Law Quarterly, Spring 2001.

<sup>198</sup>

Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, Valparaiso University Law Review, Spring, 2000.

interest? As one environmentalist observed:

Spokespersons for the relevant national groups might be appointed, but it would not be convenient or economically feasible for them to attend frequent meetings in far-off places. Surrogates might also be chosen from among local sympathizers, but how can they be legitimated as representatives in fact? The national groups might not agree that they will faithfully represent their interests. In many cases, only a limited portion of the interested parties will reside in the locality involved.<sup>199</sup>

The result that emerges is a power shift; disenfranchisement of urban constituency, who like their local counterparts, recreate and appreciate public lands, in favor of local interests. Similarly, as one critic observed, the potential exists that the economic interests of the citizens closest to the land or resource at issue would be preferenced over the non-economic interest of urban interest groups. Public lands are still public; QLG is a power shift that is legally and culturally unsupportable.

By limiting participation, the QLG created an unequal distribution of negotiating power that favored industry over resource, land, and species protection. In fact, it is argued that local groups such as the QLG

provide[] industry factions with yet another arena in which to assert their interests. According to critics, such groups provide industry organizations with a means of avoiding the costs and rigors of national lobbying and negotiating by giving them access to more easily controlled local forums. This, in turn, results in an easily

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*Id.*

exploited means of promoting the interests at the expense of the environment.<sup>200</sup>

Compounding this fear, is the concern that small environmental groups may not be able to sufficiently represent national concerns, particularly because they have less resources than many of the other stakeholders. And the effect than may be reduced negotiating power. Or alternatively, local groups may be influenced by the majoritarian views of the local community where they live, particularly because many western communities are still dependant on the revenues that flow from resource industries.

The presence of strong government participation—in the form of agency representation—has been suggested as one solution. As one advocate argued, federal agency representations “will be essential in achieving a balance between concerned parties and ensuring that all interested stakeholders are invited to the negotiating table, preventing well-entrenched groups from abusing the collaborative decision-making process.” However, this solution is flawed as well. According to David H. Getches, Professor of Natural Resources Law at the University of Colorado School of Law, “federal agencies are supposed to enforce the laws rather than facilitate compromise. When a federal agency plays the role of a facilitator, it can blur the bright line of what should and should not be permitted under federal law.”<sup>201</sup> Furthermore, federal agencies have often failed to fulfill their role as neutral

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<sup>200</sup>

Matthew Schuckman, *Making the Hard Choices: A Collaborative Governance Model for the Biodiversity Context*, Washington University Law Quarterly, Spring 2001.

<sup>201</sup>

David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and*

participants concerned with safeguarding national interests. As such, unlike what happened in the QLG, agencies must be required to participate. However, this argument is flawed. Federal resource agencies have often failed to demonstrate a commitment to national or often, ecological concerns.

More importantly, compliance with NEPA may provide the most effective answer to ensuring broad national participation. If, in fact, the QLG proposal must survive an EIS analysis before the Forest Service implements the management guidelines, the possibility for broad, national input exists during the comment and appeal stages. However, even this outcome has its limitations. If, as discussed previously in the NEPA section, the law only requires the agencies to consider, but not necessarily implement public input, reviewing agency decisions by national interests may not be enough.

*(c) Agency Participation*

Congressional legislation of the QLG's proposal acts as a revocation of Congress' delegation of authority to federal land management agencies. Under the QLG approach, Congress creates a system in which it, and not the trained professionals, manage a small area of land almost 2,000 miles away from Washington D.C. The repercussions of this decision are huge. Congressionally mandated management may transform federal agencies into passive participants on public lands rather than driving forces behind policy and regulations.

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*Local Decisions Eclipsed the States' Role?*, Stanford Environmental Law Journal  
January, 2001.



While the QLG excluded the Forest Service entirely, even collaboratives that allow agencies to participate equally with other stakeholders may be problematic for the reasons addressed above. The flip side to this, however, may be appealing to politicians. Limited involvement by agencies absolves politicians from having to resolve contentious environmental issues, as was the case with the QLG and the spotted owl, by simply deferring to citizens to find a solution. In effect, the QLG provided "an easy way out." Based on this observation, QLG emerged as a politically expandable opportunity for politicians to defer extremely difficult decisions over the tension between spotted owl extinction and timber harvesting to a group of local citizens.

Alternatively, by excluding the Forest Service, the QLG suggests that government is simply another stakeholder, and "not the body that represents all stakeholders, . . . an absence of distinctive expertise in both agencies and government and that more expertise resides in casually assembled groups of stakeholders." Most significantly, non-participation by the Forest service suggests that local citizens felt that "while the government may still have power to enforce a decision, it lacks any special legitimacy to make decisions. Apparently, government is no longer viewed as having any right to exercise authority by virtue of the democratic process that chooses the office holders who direct government."<sup>202</sup>

*(d) Failure of Democracy*

Lastly, the QLG may represent what one national environmentalist described as a failure

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<sup>202</sup>

Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, Valparaiso University Law Review, Spring, 2000.

of democracy. Although an in depth analysis of this notion is beyond the scope of the Paper, a brief discussion is important. As such, one critic of collaborative decision making observed that:

trying to achieve representation through service on a negotiating group, rather than through the electorate and representative institutions, also poses problems. Most theorists agree that all stakeholders with a real interest in the outcome ought to be members of the group. But institutions of representative democracy provide many more nuanced opportunities for various interests to be heard and exert influence, particularly through opportunities to form alliances in the electoral and lobbying processes. It is simply not mechanically feasible to bring that many voices to the table in a collaborative exercise. These exercises need to be of a workable size. Thus, in practice, fewer voices can be heard.<sup>203</sup>

Interestingly, critics of that the QLG approach, and collaboration generally, who fear that these efforts bypass the democratic process, often focus on concerns that collaboration disenfranchises national interests. Similar to the arguments stated above in the discussion of national representation, one opponent expressed concern that: “Instead of issues being decided by majorities or pluralities in a nationwide constituency, decisions would be made in the context of small, dispersed constituencies.”<sup>204</sup> And furthermore, “[t]he power of such constituencies would not be limited to local issues. Issues of broader import would be subject

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<sup>203</sup>

*Id.*

<sup>204</sup>

*Id.*

to the local communities' decisions."<sup>205</sup>

Lastly, it is worth noting that the inherent conflict of democracy may be advantageous to environmental decision making. It has been argued that: "Full-throated debate develops and focuses issues, generates interest in them, educates the public, and creates the will to find solutions. . . . We do not need a tool to suppress such conflict."<sup>206</sup>

Although this analysis is not entirely supportable, it raises some troubling concerns about the QLG approach.

## 2. National Park and Conservation Association v. Stanton

The court in *National Park and Conservation Association v. Stanton* restricted collaborative decision unduly through its interpretation of the unlawful sub delegation doctrine. By rejecting the National Park Service's ("NPS") authority to delegate its authority because it did not retain significant oversight, the court's holding is inconsistent with the case law. In *United Black Fund, Inc. v. Hampton*,<sup>207</sup> the court agreed that the Chairman of the U.S. Civil Service Commission did not violate the unlawful sub delegation doctrine even though the Commission's reviewing authority was limited to ensuring that the private citizens'

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<sup>205</sup>

*Id.*

<sup>206</sup>

*Id.*

<sup>207</sup>See *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898 (1972).

council complied with broad federal regulations.<sup>208</sup> The court did not seem to be concerned that the citizens operated without significant oversight from the federal agency.<sup>209</sup> Therefore, applying this holding to the facts in *Stanton*, the court incorrectly held that the NPS unlawfully delegated its authority. Similar to the commission in *United Black Fund*, the NPS retained oversight of the Council; the NPS oversaw the Council's compliance with the federal standards outlined in the GMP/EIS and retained the authority to dismantle the Council if it failed to meet these requirements. Therefore, the Council operated within national environmental and land use planning laws. While this oversight is extremely limited, it falls within the broad parameters outlined in the case law.

Politically, the court's decision is unacceptable as well. A majority of collaborative groups operate outside of the federal agency's oversight.<sup>210</sup> Commonly, federal agents act as participants with equal voting rights as citizens, other agencies, and local government officials. Generally, citizens structure the proposals and dictate the agenda to reflect participants' interests. Therefore, applying the *National Park and Conservation* court's requirements that agencies avoid violation of the unlawful sub delegation doctrine by significantly increasing their involvement in collaborative groups is likely to diminish the

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*See id.* at 904.

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*See id.*

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For example, the Swan Valley Ad Hoc Group has been organized as a collaborative since the early 1990's and works independently of any federal agency. *See Cestero, supra* note 2, at 5.

enthusiasm for, and amount of, collaboration efforts. Agencies cannot afford the time and money it would take to participate at the level the court requires. Furthermore, it is probable that local participants will resent the paternalistic role the *Stanton* court's holding forces on the agencies—collaboration grew out of a desire to work outside of traditional decision making schemes in which citizens, and not federal agents, directed the process. Therefore, to create a framework based on the court's holding threatens to circumvent reform that collaborative decision making attempts to provide. Agency oversight is significant at the implementing stage of a citizen proposal. That is, the agency must retain authority to reject the citizen driven proposal; oversight is extended too far if it demands more than that.

However, the council pushes the boundaries of collaboration extremely close to local control. By excluding representatives from national organizations with interests in the Niabrara River, it is less likely that the council will adequately represent national concerns in its management decisions. Because the Niabrara is part of the federal land system, this outcome is unacceptable. Nationally held lands cannot be managed by local control only. Therefore, some aspects of the council provide a workable model for collaborative decision making; the council operates within federal laws and the NPS retains the discretion to terminate the council if it acts inconsistently with national conservation standards. However, the council's reliance on local participation falls short of a successful collaboration by failing to adequately represent national interests.<sup>211</sup> At the very least, a stronger federal agency

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Richard J. Ansson, Jr., *Funding Our National Parks in the 21<sup>st</sup> Century: Will We Be Able to Preserve and Protect Our Embattled National Parks?*, Fordham Environmental Law Journal, Fall 1999.

presence on the Council would be more able to address the issue of national representation.

The court's decision clearly demonstrates that the NPS may not delegate unlimited management discretion to local entities. However, as one legal scholar observed, the court, "does hint at a permissible management scheme that would allow local officials to participate in management decisions."<sup>212</sup> Accordingly, under such a scheme, "(1) the NPS would have to retain broad oversight authority over any council; (2) the council would have to have more NPS representatives; and (3) the representatives of local commercial and landowners would be limited."<sup>213</sup> A successful collaboration between the NPS and local entities would therefore likely require the NPS to create a group loosely based on the Council, but dominated by NPS representatives, and where the NPS has extensive oversight control. Local involvement could exist at a secondary level: "The council could then establish several subcommittees chaired mainly by local officials, "thereby allowing active participation by these officials in management of the park."<sup>214</sup>

It is also important to note that in the two years since the Council was created, it failed to adopt any type of management plan—even preliminarily—for the River. Perhaps, the court's decision may have been more a reaction to the total lack of management rather than a finding of constitutional violation. By analyzing the case from this perspective, it is

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<sup>212</sup>

*Id.*

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*Id.*

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*Id.*

possible to distinguish *Stanton* on its facts, and as such, isolate it from previous line of delegation cases. Arguably, *Stanton* should be read narrowly and limited to its facts. Furthermore, a legal analysis of collaboration should recognize that where the agency retains sufficient reviewing authority through compliance with federal laws and regulations, and the authority to unilaterally reject proposals, is in line with the case law. Perhaps, the strength of *Stanton* is its detailed analysis that taken in light of *Hampton*, provides a workable framework—administrators cannot completely delegate, that is, cannot completely shift their responsibilities without sufficient reviewing authority.

The court however, does identify troubling issues. The Council failed to develop any meaningful proposal, lacked any oversight and independent review by the agency prior to implementation of a management plan, had extremely limited national vision and perspective, and may have chose a management plan in conflict with national environmental issues. Each of these concerns is unique to the land and resource management arena, concerns which previous delegation cases did not face.

In a final analysis, the *Stanton* court addresses real concerns about unlimited delegation to local entities. The court correctly rejected the NPS's authority to delegate such broad power in light of the Council's failure to develop any management plan. However, as the line of cases have found, requiring compliance with federal laws such as NEPA and the ESA, and providing agency reviewing authority may go a long way in addressing the concerns that the *Stanton* court identified.

### 3. *A Model of Collaborative Decision Making*

This section suggests an alternative to the informal, *ad hoc* structure of collaborative efforts in public land decision making. Specifically, collaboration should be incorporated into federal land management guidelines on a short term, experimental basis, incorporating the criticisms of the Quincy Library Group proposal and the *Stanton* court decision. While collaboration is not appropriate for all land and resource issues, a formal structure should include collaboration as one of several approaches to decision making.

First, the role of collaboration in federal decision making should be explicitly stated: collaborative groups should offer input and not make policy, a central criticism of the QLG. Therefore, collaborative proposals are merely recommendations to the agency at the scoping stage and not the implementing stage. Furthermore, collaboration efforts should function within existing public land laws. That is, collaboratives must comply with regulations and policies set in place to direct management of the public lands. For instance, all citizen driven proposals must first go through the citizen review process mandated under NEPA. As Getches observed, requiring agency participation in the process is more likely to ensure that citizen driven proposals are consistent with the national environmental standards. Finally, the end result should be merely input “not a finished product needing only official ratification.”<sup>215</sup> Collaboratives are an additional forum for public input, supplement the notice

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Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, Valparaiso University Law Review, Spring, 2000.



and comment and hearing processes already in place.

Alternatively, as advisors to the federal agencies, collaboratives retain some independence from the agencies and therefore are less likely to be captured by an agency.<sup>216</sup>

“Most of the advantages of problem-solving through group discussion can be obtained without retreating from the norms of a representative democracy, without denying the claims of national majorities and disenfranchising urban populations. [Collaboration] should simply be added to the tool kit for public participation, . . . .”<sup>217</sup>

While the unlawful sub delegation doctrine provides limits to collaboration, final reviewing authority must be interpreted broadly. Because collaboration is an experiment, agencies must have both the opportunity to participate as at least equal members but also retain the discretion to reject proposals, even in cases where agency participation and oversight is limited. By limiting the amount of agency participation, local citizens may continue to craft creative approaches to managing natural resources without overly burdening the agencies.

Lastly, national interests must be included. As this Paper has suggested, the issues facing federal lands are fundamentally national issues. While local citizens may be disproportionately effected, national concerns must be included in the process. As stated earlier, agency participation as well as compliance with NEPA and other environmental laws

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<sup>216</sup>

*Id.*

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*Id.*

provide opportunities to consider national interests.

## VI. Conclusion

Over the past decade collaboration efforts have taken hold across the West. For many participants in collaborative efforts, collaboration offers an alternative to status quo management on federal lands by engaging the citizens most directly affected by natural resource allocation in the decision making process. While criticism of collaboration is widespread, this Paper suggests that because of the rapidly increasing support for collaboration, it will remain a force on the political landscape.

However, the scope of collaborative authority is unclear. Congressional action and court decisions outline contradictory and inconclusive parameters. In 1999, Congress mandated the implementation of a local citizen group proposal to manage a large area of Forest Service land in northern California. Less than a year after Congress passed the citizen group proposal, the D.C. District Court unequivocally rejected the National Park Service's decision to delegate management authority for the Niobrara Wild and Scenic River to a local council, finding that the agency had violated the unlawful sub delegation doctrine.

These decisions fail to define an appropriate level of authority for collaboration. By legislatively mandating the Quincy Library Group proposal, Congress legislated too much control to local citizens; the allocation of natural resource interests extends beyond the local community. However, the court's decision in *Stanton* may unduly restrain collaboration by narrowly defining the boundaries of unlawful sub delegation. Therefore, this Paper suggests that a formal structure outlining the limits of collaboration is both necessary and worthwhile.

While this may pose a risk, if collaboration is to be truly tested and the potential benefits, as well as challenges, realized, federal regulations guiding the decision making process should include specific guidelines outlining the role of collaboration. A formal structure should address the criticisms of both the QLG model and the *Stanton* case. Consequently, collaboration should exist within public land laws—legislating citizen initiatives that bypass existing laws is a dangerous precedent. Second, the courts should interpret the sub delegation doctrine to allow agencies flexibility in both the extent of their involvement as well as the consideration they attach to collaboratively driven recommendations. And in the end, collaboration may become one of the several approaches to address the difficult question of who decides the allocation of federal natural resources.