

AGENCY ENGAGEMENT WITH STAKEHOLDER COLLABORATIONS, IN WILDFIRE POLICY AND BEYOND

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Political discourse suggests that federal officials in Washington D.C. manage Western lands and resources with little regard for local interests. This narrative is inconsistent with theory and practice alike. A central tenet of socio-ecological systems theory is that land and resources are inherently interconnected with local peoples and economies. Decades of federal land management also reflects the importance of localized inputs into law and policy. Legal scholars have, however, yet to provide a comprehensive account of the modern processes through which agencies engage localized considerations in land and resource decisions.

To fill this void, the Administrative Conference of the United States (“ACUS”) hired the Author as an Academic Consultant to construct a longitudinal account of agencies’ engagement with stakeholder collaborations. The Author identified hundreds of relevant laws and regulations, conducted dozens of interviews, and constructed case studies in Alaska, Arizona, and Maine. This Article presents that research—providing a robust, empirically informed descriptive account of agencies’ engagement with local constituencies to create law and policy.

The resulting account reveals that stakeholder collaborations are widely used. They play a vital role in agency decision-making—particularly for the most pressing, controversial issues. For example, agencies are using

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collaborations to mitigate ex ante wildfire risk. This Article presents a case study of the Forest Service working with a particular collaboration to execute vital wildfire mitigation measures. This account highlights how collaborations facilitate negotiations among competing local interests to guide agency action on thorny issues.

The case study is but one of thousands of stakeholder collaborations that exist in practice. Numerous statutes, regulations, and executive orders require the thirteen federal agencies to use stakeholder collaborations to manage various public land and natural resources. This Article maps the legal landscape of this widely used, but little-known, governance mechanism.

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INTRODUCTION

In the windowless conference room of a drab building, roughly thirty people were waiting for a meeting to start. Several men sat in a tight bunch at a far end of the table, all wearing short-sleeve button down shirts, dark jeans, and work boots. These were the foresters. In the middle of the rectangular arrangement of tables sat a clump of wildlife biologists from the Forest Service. Two Forest Supervisors sat on opposite sides of the room, both in uniform. A collaboration expert in khakis and a polo shirt was nonchalantly checking his phone under the table. A researcher made her way around the room, touching the shoulder of various people as she spoke to them, her dolman sleeves fluttering behind her. After several minutes of casting furtive glances at me, a young reporter crossed the room to sit beside me. Once settled, she whispered: “Who are you? What are you doing here?” I whispered back, as I had many times in the months before, “I am here to watch the meeting, to learn about what this group does.” A few moments later, the meeting began.

In 2017, a federal agency hired me as an academic consultant to research stakeholder collaborations, a widespread but seldom-discussed tool that agencies use to guide decisions.¹ Administrative law scholars have been slow to situate stakeholder collaborations into the lexicon of agency decision-making tools, despite growing interdisciplinary interest in participatory governance.²

My first task was defining the term:

A stakeholder collaboration is a group of people with strong interests in, yet differing views on, the proper management of a particular, localized group of lands or resources, committed to working together to create mutually-

1. The Administrative Conference of the United States (“ACUS”) is a federal agency that recommends best practices for other agencies in consultation with a bi-partisan public-private body. ACUS hired me as an Academic Consultant to conduct research into collaborations, which culminated in an Office of the Chairman Report entitled, *Stakeholder Collaborations for Managing Land and Natural Resources*. This Article summarizes the descriptive component of that report for a legal audience. KAREN BRADSHAW, *STAKEHOLDER COLLABORATIONS FOR MANAGING LAND AND NATURAL RESOURCES* 56–75 (Sept. 28, 2017), <https://www.acus.gov/sites/default/files/documents/Natural%20Resource%20Collaborations%20Report.pdf> [<https://perma.cc/A595-A79V>].

2. This Article situates stakeholder collaborations in the relevant legal, public policy, and natural resources literatures, including: collaborative adaptive management, network governance, and polycentric governance. For this discussion, see *infra* Part I.B. For a typology of collaborations in the context of natural resources that differentiates stakeholder collaborations from other forms of collaborative governance (such as listening sessions), see *infra* Part I.C.

agreeable recommendations for managing the resource across changing conditions on an ongoing basis.³

My next task was charting the constellation of laws, orders, regulations, and policies governing how agencies interact with them. I also spent hundreds of hours observing meetings such as the one described above and conducting interviews with participants. This Article reports that research; it maps thirteen federal agencies' reliance on stakeholder collaborations to manage land and natural resources.

This Article is the first scholarly work to survey and compile relevant laws governing collaborations. It reveals that land and resource management agencies frequently use collaborations.⁴ Congress has passed hundreds of laws requiring agencies to collaborate with stakeholders to manage resources. Each of the past several Presidents have issued executive orders requiring agencies to adopt collaborative approaches.⁵ Similarly, departmental secretaries issue orders establishing specific collaborations; agencies have also promulgated numerous regulations concerning collaboration.⁶ Agency policy documents provide guidance on how an agency should interact with collaborative groups.⁷ Private governance, internal to the collaboration, also plays a crucial—although virtually unstudied—role.⁸ Collaborations operate at the interstices of federal, state, and local administrative boundaries.⁹ Multiple, overlapping collaborations span the entire United States, a

3. A defining feature of stakeholder collaborations is that they are centered upon managing the land and resources in a defined geographic space. Other scholars have correctly noted, however, that the human-natural interaction cannot be limited to simply ecological elements; social and economic considerations are necessarily embedded in collaborations. *See, e.g.*, M. Akhtar-Schuster et al., *Improving the Enabling Environment To Combat Land Degradation: Institutional, Financial, Legal and Science-Policy Challenges and Solutions*, 22 *LAND DEGRADATION & DEV.* 299, 304–05 (2011); Tian Shi, *Ecological Economics as a Policy Science: Rhetoric or Commitment Towards an Improved Decision-Making Process on Sustainability*, 48 *ECOLOGICAL ECON.* 23, 24 (2004).

4. *See* Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 *J. LEGAL ANALYSIS* 121, 172 (2016); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342, 350 (2004).

5. *See infra* Part II.B.

6. *See infra* Part II.C.

7. *See id.*

8. This Article focuses solely on agency interaction with collaborations, but flags the internal governance of the collaborations as a vital, but virtually unstudied, aspect of the broader project of understanding the legal landscape surrounding stakeholder collaborations. *See infra* Part II.D.

9. *See infra* Figure 2 and associated text (displaying maps of three different regional collaborations operating under various agencies, with different boundaries).

complicated network of thousands of nested, inter-connected governance regimes.¹⁰

Agencies officials describe collaborations as widespread and vital to agency decision-making. Considering the following comments:

- “. . . [C]ollaboration is very common if not the norm in DOI interactions with stakeholders.”—Dispute Resolution Specialist, U.S. Department of the Interior¹¹
- “There is a lot that I would consider collaborative adaptive management,” and “we actually do quite a lot” of stakeholder collaborations.—Stakeholder Collaboration Expert, National Oceanic and Atmospheric Administration¹²
- “We wouldn’t be able to do our jobs without collaborations.”—Park Supervisor, National Park Service¹³
- “[P]ublic participation and collaboration are becoming an integral part of [our] mission.”—Report, The Army Corps of Engineers¹⁴

Several local agency officials describe input from stakeholder collaborations as a vital part of their decision-making processes.

Although widespread, the process of collaborating does not produce quick results or seamless negotiations. Collaborations are messy—the forum for working through controversy over high-stakes decisions. The metrics for assessing collaborations are ill-defined and ever-shifting. To capture such complexities, this Article presents a detailed case study of a specific collaboration: The 4 Forest Restoration Initiative (“4FRI”), which manages wildfire risks and related forest restoration. This case study highlights the various metrics upon which success can be measured, the distinction between compromise and agreement, and the extent to which agencies must invest at both an institutional and employee level to maintain productive relationships with collaborators.

This research yields a number of practical insights and prompts theoretical questions. I provide a descriptive account of the benefits and challenges of collaborations, as reported in interviews and observed by researchers. I also outline the best practices agencies should follow, which are assembled as a composite of many varied perspectives. These observations are written for

10. *Id.*

11. Interview 7. See *infra* Appendix (explaining that most interviewees are described generically with non-identifying descriptors, like “Interview 1”).

12. Interview 6.

13. Interview 8.

14. U.S. ARMY CORPS OF ENG’RS, COLLABORATION & PUBLIC PARTICIPATION CENTER OF EXPERTISE (2016), <http://www.iwr.usace.army.mil/Portals/70/docs/cpc/Added%202016/PI%20specialists.Fact%20Sheet%20Summer%202016.pdf?ver=2016-07-20-144453-433> [http://perma.cc/F6H8-PU6H].

policymakers and agency officials contemplating collaboration. Scholars interested in administrative decision-making may also find the first-person observations of agency officials and stakeholders useful, along with the normative questions raised along dimensions such as inclusiveness.

This Article proceeds as follows: Part I defines stakeholder collaborations and situates the term within administrative law and public administration literatures. It explains why landscapes are uniquely suited to collaborative governance, then defines “stakeholder” and “collaboration.” Despite extensive studies of stakeholder collaboration *within* agencies, there is relatively limited information about best practices *across* agencies. This Article provides a longitudinal descriptive account of how federal land management agencies engage with stakeholder collaborations, based upon ethnographic research. This Part concludes by distinguishing stakeholder collaborations from other types of collaborative governance tools.

Part II surveys the legal landscape of stakeholder collaboration. The sheer volume of existing law anticipating collaboration is striking.¹⁵ Statutory mandates vary widely along dimensions of timing, scope, and formality. This Part also provides an overview of the bipartisan nature of collaborative governance for public lands and natural resources, demonstrated by the fact that Presidents Clinton, Bush, Obama, and Trump have all issued orders directing agencies to collaborate. Finally, Part II provides an overview of the extensive regulations governing collaborative practices, and identifies other sources of governance that influence collaboration.

Part III presents a case study of a particular stakeholder collaboration: The 4FRI, which governs 750,000 acres in Northern Arizona, the largest contiguous remaining ponderosa pine forest ecosystem in the world.¹⁶ The “poster child” of Forest Service collaborations, this stakeholder group has received hundreds of millions of dollars in Congressional funding over the past eleven years. The 4FRI has somehow bridged the seemingly unresolvable chasms between timber and environmental interests to create a timber harvest plan to reduce wildfire risk. Yet, critics question its on-the-ground results. After more than a decade, the group has treated only 45,000 acres of timberland through a combination of mechanical thinning and prescribed burns.

I constructed this case study by interviewing agency officials and other stakeholders, attending a 4FRI meeting, and reviewing primary documents

15. See BRADSHAW, *supra* note 1, at 56–75.

16. N. ARIZ. UNIV., ECOLOGICAL RESTORATION INST., THE HISTORY OF THE FOUR FOREST RESTORATION INITIATIVE: 1980s–2010 4, 17 (July 2014), http://openknowledge.nau.edu/1284/7/Egan_Etal_2014_ERIWhitePaper_HistoryOfFourForestRestorationInitiative1980_2010%281%29.pdf [<https://perma.cc/A7KA-ZPRH>].

including: guidance memoranda, reviews, and management plans. This case study captures the complexity of collaborations. For example, various stakeholders describe 4FRI as managing: (1) wildfire risk to the community of Flagstaff; (2) timber harvest on public land; (3) watersheds that flow to Phoenix; (4) a nationally important study of how to restore landscapes to restore wildfire to forest ecosystems; (5) litigation risk, which the Forest Service would otherwise incur as part of standard forest management practices. As one might expect from these diverse motivations, various stakeholders view the success of the group differently, as do non-participants.

Part IV examines the potential benefits and downsides of collaborations, as assessed by stakeholders and agency employees. It is difficult to empirically assess both the beneficial and the harmful potential of collaborations, either for an individual project or in the aggregate. Qualitative analysis, however, yields three rough categories of benefits, as identified by agency officials working with well-functioning collaborations. *First*, agencies reach substantively better decisions because of the diverse viewpoints generated through the collaborative process.¹⁷ *Second*, decisions that result from collaborations have greater social acceptance; opponents are less likely to sue.¹⁸ *Third*, agencies benefit when stakeholders use their internal resources to support the achievement of shared objectives.¹⁹

Conversely, interviewees identified three points of concern, of which agencies should be mindful when engaging with collaborations. *First*, agencies are legally required to retain final decision-making authority and should continually assess the extent to which their incorporation of input from the collaboration is consistent with FACA.²⁰ *Second*, collaborations may disadvantage lower socioeconomic status stakeholders who lack the resources necessary to engage in collaboration, thereby allowing those with time and money to have a disproportionate influence over land and resources.²¹ *Third*, there is a paucity of empirical data supporting the claim that collaborations work, on either an absolute or relative basis.²² These considerations form the foundation of a corresponding set of best practices for agencies engaging with collaborations. Part IV further suggests that courts assessing collaborations need standard metrics for assessing their effectiveness and inclusiveness. It considers the key challenges to agencies' collaborative practices.

17. See *infra* Part IV.A.1.

18. See *infra* Part IV.A.2.

19. See *infra* Part IV.A.3.

20. See *infra* Part IV.B.1.

21. See *infra* Part IV.B.2.

22. See *infra* Part IV.B.3.

The Article concludes by identifying disaster mitigation and response areas as a key growth area for collaborations.

I. STAKEHOLDER COLLABORATIONS

This Part defines stakeholder collaborations, situates them within relevant academic literatures, and distinguishes them from other collaborative tools.

A. *Defining Stakeholder Collaborations*

I define “stakeholder collaborations” as:

a group of people with strong interests in, yet differing views on, the proper management of a particular, localized group of lands or resources, committed in writing to working together to create mutually-agreeable recommendations for managing the resource across changing conditions on an ongoing basis.²³

This is a composite definition, which emerged from interviewing dozens of people interacting with stakeholder collaborations. Notably, interviewees did not universally agree on this definition.²⁴ It does, however, provide a definitional starting point—a baseline of cross-agency understandings, which future research can refine.

Landowners, industrial land users, nongovernmental organizations, states, tribes, sportsmen, conservationists, and other stakeholders form stakeholder collaborations as a structural vehicle for negotiating issues related to particular land or resources. The collaboration develops rules and norms for internal governance, such as monthly meetings and how internal disputes will be resolved. Over time, the collaboration identifies specific

23. See M. Akhtar-Schuster et al., *Improving the Enabling Environment to Combat Land Degradation: Institutional, Financial, Legal and Science-Policy Challenges and Solutions*, 22 *LAND DEGRADATION & DEV.* 299, 304–05 (2011); Tian Shi, *Ecological Economics as a Policy Science: Rhetoric or Commitment Towards an Improved Decision-Making Process on Sustainability*, 48 *ECOLOGICAL ECON.* 23, 24 (2004).

24. Nearly everyone interviewed for this project could identify examples of specific collaborations, but noted that it was an active struggle to categorize other, less-obvious examples of agencies working with non-agency actors on a defined objective. This confusion is consistent with broader lack of scholarly consensus in creating typologies of collaborations. See Richard D. Margerum, *A Typology of Collaboration Efforts in Environmental Management*, 41 *ENVTL. MGMT.* 487, 487–88 (2008).

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

The goal of collaborations is for adversaries—even potential litigants—to gather around a table to discover mutually-agreeable solutions to present to agencies. This Article focuses upon stakeholder collaborations that interact with of public lands and resources, although collaborations occur in a wide array of substantive and governance contexts.²⁵

Agencies work closely with collaborations but are *not* themselves members of the collaboration.²⁶ Instead, agencies play a supportive role, such as initiating the formation of a collaboration, providing meeting space, assigning personnel to act as liaisons between the collaboration and agency, sharing information, and generating funding. Agencies also informally share a portion of their decision-making authority with collaborations when they engage stakeholders in meetings and working groups to reach mutually-agreeable decisions. The agency is legally required, however, to retain the sole decision-making authority, even when made in consultation with collaborative groups. Decision-making is an iterative process, unfolding over decades and repeating in response to ever-changing natural conditions. Stakeholder collaborations may serve in a consultative role over many years. They often work with agencies to achieve multiple objectives while striving to build trust and maintain positive relationships.

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

25. Theoretically, stakeholder collaborations can exist independently of agencies and government.

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

1. Defining a Stakeholder

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

Stakeholders who care enough to dedicate the time and emotional energy to a collaboration tend to have a pecuniary, social, or cultural interest in the resource being managed. Virtually no one collaborates for the joy of participating in a group of adversaries, which can be challenging and frustrating.²⁷ Consider the circumstances: In some collaborations, the process unfolds over decades.²⁸ The process is frequently confrontational, with emotionally-charged group dynamics unfolding in contentious meetings.²⁹ Frustrated group members may quit.³⁰ Stakeholders must attend meetings and may be pressed into participating in working groups. No one will emerge with exactly the outcome they desire; compromise is the foregone conclusion. As a result, the only parties invested enough to participate tend to be those with an investment in the outcome of the process—that is, a stake in the land and resources being managed.

A few rough examples illustrate this point:³¹ Government employees collaborate because they are paid to do so. Nongovernmental organizations participate to promote land and wildlife conservation aims. Alaskan Native and Native American communities may seek to preserve property-rights to resources, such as hunting rights on public lands or cultural resources claims.³² Commercial land users—such as cattle grazers or timber

27. Interview 12.

28. See Mark T. Imperial et al., *Understanding Leadership in a World of Shared Problems: Advancing Network Governance in Large Landscape Conservation*, 14 *FRONTIERS ECOLOGY & ENV'T* 126, 126–27 (2016) (describing collaborations as requiring three interconnected leadership types: collaborative leadership, distributive leadership, and architectural leadership).

29. Interview 12.

30. See Telephone Interview with Jim Dau, Wildlife Biologist, Alaska Dep't of Fish and Game (ret.) (July 25, 2017).

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

32. Importantly, tribes are independent, sovereign entities with different motives.

operators—seek to preserve or expand historic resource extraction, which they perceive as a *de facto* property right premised on historic norms. Recreational land users—including sportsmen, rock climbers, and ATV users—similarly seek to expand or maintain what they perceive as a *de facto* right to use the land, premised on historic uses. State and local government officials participate because of the effects of the land or resource use on the interests they represent, such as constituents or local industry that contributes to the tax base.

As these examples highlight, stakeholders' incentives for joining a collaboration are multiple and varied. The unifying theme is that each has a highly valued cultural, economic, or social stake in the use of the land or resource at issue.³³

2. Defining Collaboration

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

When you have difficult problems, communication is very helpful. When people operate in their own boxes it is very easy to get stubborn and not see other people's perspectives. So people get entrenched. Generally, when people are at [stakeholder collaboration] meetings they might not always be friendly, but they get to hear other people's points of view and they are face to face so they are not typically said in demeaning or mean ways. So the message of the other side comes across better rather than a Twitter battle where people are saying extreme things on either side and making each side more entrenched rather than trying to find common ground. So I think just that getting together face to face, having a wide range of opinions, having thoughtful people that want solutions, I think is the best lesson to take out of [collaborations].³⁴

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

34. Interview 1.

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

The threat of litigation is an unspoken factor in many agencies' decision to engage with collaboration. By engaging in collaboration, an agency is essentially attempting to avoid having a disappointed stakeholder petition a court to overturn an agency's decision. This threat may be overt or implicit, but it is virtually always present. At the same time, stakeholders are motivated to work together for a variety of reasons, such as the potential to produce more favorable management decisions, achieve lower settlement costs, and/or to preserve reputations and relationships by finding compromise with neighboring landowners.³⁵

B. Related Literatures

Stakeholder collaborations relate to burgeoning interdisciplinary literatures on how citizen input can guide governance decisions, particularly with respect to natural resources. A non-exhaustive summary includes growing bodies of literature in the following topics:

- *Collaborative governance* focuses on the process of public decision-making engaging people across public and private spheres.³⁶
- *Polycentric governance* describes multiple layers of governance arrangements and institutions that manage localized concerns and scale to address broad issues.³⁷

35. For a discussion of the factors that motivate cooperation rather than litigation among private parties, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW 280–82 (1991). See also Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1981).

36. See Kirk Emerson et al., *An Integrative Framework for Collaborative Governance*, 22 J. PUB. ADMIN. RES. & THEORY 1, 2 (2012).

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

- *New governance* focuses on private action dominating a regulatory space, against the backdrop of governmental limits, which can include systems of private governance.³⁸
- *Public-private partnerships* describe government working with private organizations, such as companies and industry groups, to achieve shared objectives. These relationships can take a plethora of forms, ranging from contracting-for-goods arrangements to negotiated rulemaking.³⁹
- *Collaborative adaptive management* focuses on an iterative decision-making process in which people learn from experience and incorporate new information to create a flexible management plan amidst changing conditions.⁴⁰
- *Contracting to control landscapes* focuses on arrangements between parties—public or private—to engage in shared management practices, a localized form of private governance.⁴¹
- *Stakeholder theory* describing agencies crafting relationships with external actors to achieve shared policy aims.⁴²

For decades, political leaders and the public have pressed land and resource management agencies to identify more effective techniques for

38. See Orly Lobel, *New Governance as Regulatory Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012); Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2515 (2013).

39. William J. Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT 24, 27–32 (Jody Freeman & Martha Minow eds., 2009).

40. Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 7 (2014); Barbara A. Cosens et al., *The Role of Law in Adaptive Governance*, 22 ECOLOGY & SOC'Y. 1, 11 (2017); Marie Fujitani, *Participatory Adaptive Management Leads to Environmental Learning Outcomes Extending Beyond the Sphere of Science*, 3 SCI. ADVANCES, no. 3, 2017, at 7. Collaboration now plays a well-recognized role in public lands and resource management. It is one component of collaborative adaptive management, a concept that acknowledges that there is no single legal or regulatory fix to the ongoing and unpredictable changes that happen in a natural landscape. Adapting to these changes, proponents argue, requires flexibility and ongoing input from a variety of stakeholders. *Id.* at 37.

41. See Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507, 2509–11 (2015).

42. A small sampling of this robust literature includes: Jeffrey L. Brudney & F. Ted Hebert, *State Agencies and Their Environments: Examining the Influence of Important External Actors*, 49 J. POL. 186 (1987); John Child, *Strategic Choice in the Analysis of Action, Structure, Organizations and Environment: Retrospect and Prospect*, 18 ORG. STUD. 43 (1997); Yves Fassin, *The Stakeholder Model Refined*, 84 J. BUS. ETHICS 113 (2009); Jeff Frooman, *Stakeholder Influence Strategies*, 24 ACAD. MGMT. REV. 191 (1999); Susan Key, *Toward a New Theory of the Firm: A Critique of Stakeholder "Theory,"* 37 MGMT. DECISION 317 (1999).

managing inevitable conflicts, so that disagreements over proper resource management do not devolve into litigation or violent protests.⁴³ Collaboration has emerged as a leading solution. The collaborative model involves agencies tasking warring stakeholders with hashing out a mutually-acceptable solution. Today, collaborations play a role in governing virtually all public lands and natural resources in the administrative state.⁴⁴

Although frequently framed as new, collaboration between federal agencies and local landowners and users is in fact quite old. In 1920, Forest Service employee manuals encouraged rangers to promote informal cooperation by emulating local norms⁴⁵—an implicit understanding of a now well-developed notion that localized, bottom-up cooperative resource management can avoid resource exhaustion.⁴⁶ Today, agency officials generally believe that collaborations provide numerous benefits, such as

43. Some conflicts result in litigation, in which a disappointed stakeholder asks a court to overturn a decision reached by an agency. *E.g.*, *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 293 (D.C. Cir. 1988); *see also* Thomas C. Brown, George L. Peterson & Bruce E. Tonn, *The Values Jury to Aid Natural Resource Decisions*, 71 *LAND ECON.* 250, 250 (1995). Other conflicts erupt into protests that capture national attention, as with the militia takeover of the Malheur National Wildlife Refuge in Hammond, Oregon, or the Standing Rock Sioux protest of the Dakota Access Pipeline. *See* John M. Broder, *Geography Is Dividing Democrats Over Energy*, *N.Y. TIMES* (Jan. 27, 2009), <http://www.nytimes.com/2009/01/27/science/earth/27coal.html> [<https://perma.cc/4TN3-LVD3>]; Juliet Eilperin, *Standing Rock Sioux Want 'No Forcible Removal' of Protesters from Dakota Access Pipeline Site*, *WASH. POST* (Feb. 5, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/02/05/standing-rock-sioux-want-no-forcible-removal-of-protesters-from-dakota-access-pipeline-site/?utm_term=.889d525da096 [<https://perma.cc/HHZ5-5E2W>]; Kirk Johnson, *Trial To Begin in Standoff at Oregon Wildlife Refuge*, *N.Y. TIMES* (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/us/oregon-malheur-wildlife-refuge-bundy.html?mcubz=3.11> [<https://perma.cc/X7WJ-EXGP>].

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

45. *See* Doug MacCleery, *Re-Inventing the United States Forest Service: Evolution from Custodial Management, to Production Forestry, to Ecosystem Management*, in *RE-INVENTING FORESTRY AGENCIES: EXPERIENCES OF INSTITUTIONAL RESTRUCTURING IN ASIA AND THE PACIFIC* (Patrick Durst et al. eds., 2008), <http://www.fao.org/docrep/010/ai412e/AI412E06.htm> [<https://perma.cc/9JK4-7HPP>].

46. *See* Ostrom, *supra* note 37, at 654–55, 664.

reducing litigation and improving decision-making,⁴⁷ although such claims largely lack a quantifiable basis given the dearth of longitudinal analysis.⁴⁸

C. *A Typology of Collaborative Governance Tools*

As the fields surrounding collaborative governance are maturing, so too is terminological exactness. With this precision, scholars are creating a finer-grained account of various collaborative tools—differentiating between models that fall under the general umbrella of “collaborative” but are, in fact, quite different. Within the various tools scholars have identified, several that facially appear similar to stakeholder collaborations are distinguishable in important ways. Notably, stakeholder collaborations are *not*:

- *Inter-agency cooperation*, in which federal agencies cooperate with other federal agencies;
- *Cooperative federalism*, in which federal agencies delegate some governance responsibilities to states while retaining an oversight role;
- *Contracting relationships*, in which agencies pay companies to perform government functions;
- *Negotiated rulemaking*, in which agencies working with a regulated industry develop an agreed-upon regulation.

I combed through thousands of laws and statutes to identify stakeholder collaborations. Through that process, various look-alike tools emerged. Several executive orders, for example, instruct agencies to use listening sessions and public comment periods to inform agency decision-making.⁴⁹ To differentiate collaborative tools from the statutory perspective, the chart below categorizes the most common forms of collaborative governance tools as revealed through a statutory survey. It is important to remember that this is a rough cut—there exists as of yet no consensus on the meaning of these terms, either in interdisciplinary literatures or among agency officials.

Notably, this typology attempts to categorize the thousands of collaborative governance structures in existence, but any single collaboration may fall in multiple boxes. Further, a collaboration that begins in one category may transition to another over time. For example, an alternative dispute resolution body may eventually transition into a public-private body

47. See *infra* Part IV.A.1.

48. See *infra* Part IV.B.3.

49. See *infra* Part II.B.

devoted to undertaking and monitoring the terms of a decades-long settlement agreement.⁵⁰

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

50. Such was the case with the natural resource damage settlement process, in which B.P. and trustees had a largely adversarial relationship prior to reaching an \$8.1 billion settlement to restore natural resource damages, but later sought a unified restoration effort to promote coordinated recovery efforts. See Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211, 217 n.23 (2016).

Figure 1: Collaborative Governance Structures for Land and Resource Management

Name	Actors	Resource Level	Scope of Collaboration	Conflict or Collaboration	Duration of Collaboration	Breadth of Collaboration	Example
Collaborative Resource Governance	Major international bodies or nation-states	Focused on a single resource cluster	International or national	Collaboration among aligned actors	Ongoing	Designed to operate as a body formulate rules and policy to effect national or international practice	Botanic Gardens Conservation International
Regional Governance Collaboration	Agencies, non-governmental organizations, industry, states	Focused on multiple resource clusters	Multi-state or regional	Collaborative	Ongoing	Variable	Landscape Conservation Cooperation Network, BLM Regional Advisory Councils
Stakeholder Collaborations (sometimes called "working groups")	Federal agencies, state agencies, non-governmental organizations, industry, citizens	Focused on single resource cluster (focus resource may shift over time)	Within a landscape-level; 5,000 acres or more.	Vacillates between conflict and collaboration; may exist to avoid litigation	Ongoing	May use planning documents as an organization tool, but the overarching objective is more than a single document	Western Arctic Caribou Herd Working Group; 4FRI
Public-Private Partnerships	Non-governmental organizations or industry working in partnership with federal agencies	Focused on a single land unit, resource or resource cluster	Local or regional	Collaborative; defining feature of group is large degree of ideological alignment	Ongoing	Agency and ideologically aligned parties pool resources to increase efficacy towards achieving a shared objective	USFWS Species Recovery Plans, National Parks Friends Alliance

Name	Actors	Resource Level	Scope of Collaboration	Conflict or Collaboration	Duration of Collaboration	Breadth of Collaboration	Example
Alternative Dispute Resolution Bodies	Industries, non-governmental organizations, agencies	Focused on a single resource, or resource cluster	Landscape level	Adversarial; defining feature of group is high degree of likelihood to litigate if resolution is not reached	In existence only as long as the particular dispute is ongoing	Narrow – a single-shot issue.	Natural Resource Damages Cooperative Assessments
Task forces	Industries, non-governmental organizations, agencies, individuals with expertise, consultants	Focused on a single resource, or resource cluster	Local, regional, state, or national	Collaborative	Short term—the group only exists for the period of time necessary to issue an Article or recommendations	Variable	The Governor's Task force on Arizona Wildfire (precursor to 4FR)
Listening sessions, notice and comment periods	Industries, concerned citizens, state agencies, local municipalities, non-governmental organizations	Focused on a single resource, project, or resource cluster	Local or regional	Can be collaborative or adversarial	Short term	Forum for the agency to hear different perspectives on a contentious issue; air out differences	President Obama's memorandum on <i>A 21st Century Strategy for America's Great Outdoors</i> ; NEPA and APA requirements for notice and comment.
Informal relationships	Industries, non-governmental organizations, agencies	Focused on a particular geographic region	Local	Can be collaborative or adversarial	Long term	Enormous breadth, potentially spanning any issue	National Park Supervisors and subsistence users in Alaska

II. MAPPING THE LEGAL LANDSCAPE

The United States manages land and resources on behalf of the public.⁵¹ The Constitution grants Congress control over all public lands,⁵² which it largely delegates to the executive branch.⁵³ Within the executive branch, thirteen administrative agencies manage most federal land and natural resources.⁵⁴ Agency employees interact daily with diverse stakeholders with varied perspectives on how best to manage public lands. This Part explores how Congress, the president, and agencies create stakeholder collaborations. It outlines the relevant statutes, executive orders, regulation, and policy guidelines. This overview provides a longitudinal account of the widespread use of collaborations. It shows that agencies are currently using hundreds of stakeholder collaborations to inform policy decisions on topics ranging from marine mammals to wildfires, national parks to rivers.

A. Federal Statutes

This sub-Part identifies the two key federal statutes that guide agencies' use of collaborations. (Non-law readers should note that a plethora of other statutes, such as the Administrative Procedure Act, might also affect agencies' actions.)

1. Federal Advisory Committee Act

In 1972, Congress passed the Federal Advisory Committee Act (“FACA”), which outlines how federal agencies may partner with citizens

51. See CAROL HARDY VINCENT, LAURA A. HANSON & CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 6 (2017).

52. U.S. CONST. art. IV, § 3, cl. 2.

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

54. This list excludes agencies with limited landholdings and no management function, like the Department of Energy. It also intentionally excludes agencies, like the U.S. Geological Survey and Environmental Protection Agency, that support land management agencies but do not have a regulatory or management mandate and are therefore excluded from this list. The U.S. Geological Survey has been quite involved in conversations surrounding collaborative adaptive management and joint fact-finding. See, e.g., NICOLAS L. ROFOUGARAN & HERMAN A. KARL, U.S. DEP’T OF THE INTERIOR & U.S. GEOLOGICAL SURVEY, PROFESSIONAL PAPER NO. 1710, SAN FRANCISCO CREEK—THE PROBLEM OF SCIENCE IN ENVIRONMENTAL DISPUTES, JOINT FACT FINDING AS A TRANSDISCIPLINARY APPROACH TOWARD ENVIRONMENTAL POLICY MAKING (2005), <https://pubs.usgs.gov/pp/pp1710/pp1710.pdf> [<https://perma.cc/LP2P-FX32>].

and private entities.⁵⁵ FACA applies when agencies coordinate with an organized, cohesive group of non-agency actors—long-term consultants, nongovernmental organizations, companies, or industry groups—for input on agency policies and decisions. It does not apply to government-to-government coordination, as when a federal agency works with tribal, state, or local governments. The applicability of FACA is governed by a few court decisions, which collectively suggest that if the agency convenes or controls an ongoing group with a limited membership that produces consensus and recommendations, then it must seek FACA certification.⁵⁶ At the time of this writing, over 1,000 FACA certified collaborations exist.⁵⁷

Congress enacted FACA before alternative dispute resolution and collaborative government became widely popular, according to some agencies.⁵⁸ As a result, some officials view the statute as out-of-step with modern imperatives to collaborate.⁵⁹ FACA certification can take years to complete, a fact that can serve as a major impediment to the formation of a new group.⁶⁰ Indeed, agencies actively counsel employees on how to

55. For discussions on the influence of FACA on stakeholder collaborations for managing public lands and collaborations, see Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND, RESOURCES, & ENVTL. L. 67, 107–08 (2003); Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, 29 ENVTL. L. REP. 10399, 10399 (1999); Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L.J. AM. U. 111, 118–19 (1996); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 454 (1997); Sheila Lynch, *The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?*, 71 WASH. L. REV. 431, 432 (1996).

56. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 442 (1989); *Miccosukee Tribe of Indians v. S. Everglades Restoration All.*, 304 F.3d 1076, 1082–83 (11th Cir. 2002); *Byrd v. EPA*, 174 F.3d 239, 246 (D.C. Cir. 1999); *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 613 (D.C. Cir. 1996); *Nat. Res. Def. Council v. Abraham*, 223 F. Supp. 2d 162, 176 (D.D.C. 2002); *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1012 (D.D.C. 1994).

57. See generally BUREAU OF LAND MGMT., BUREAU OF LAND MANAGEMENT NATIONAL POLICY FOR THE FEDERAL ADVISORY COMMITTEE ACT: WHAT BLM STAFF NEED TO KNOW WHEN WORKING WITH ADR-BASED COLLABORATIVE COMMUNITY WORKING GROUPS (2005), <https://www.ntc.blm.gov/krc/uploads/880/BLM%20Field%20Guide%20-%20Federal%20Advisory%20Committee%20Act%20-%202005-05-01.pdf> [<https://perma.cc/863K-R935>] [hereinafter GUIDE]; Rebecca J. Long & Thomas C. Beierle, *The Federal Advisory Committee Act and Public Participation in Environmental Policy* (Resources for the Future, Discussion Paper No. 99-17, 1999), <https://ageconsearch.umn.edu/record/10817/files/dp990017.pdf> [<https://perma.cc/F3U9-T5NB>].

58. See WENDY GINSBERG & CASEY BURGAT, CONG. RESEARCH SERV., R44253, FEDERAL ADVISORY COMMITTEES 3–4 (2016).

59. Interview 12.

60. Interview 3.

construct stakeholder groups that do not trigger the need for FACA certification.⁶¹ The danger of avoiding FACA certification is that agency decisions made in consultation with non-certified stakeholder collaborations may run afoul of the non-delegation doctrine, which limits agencies' ability to share decision-making authority provided by Congress.

2. Administrative Dispute Resolution Act

The Administrative Dispute Resolution Act⁶² requires that Federal agencies adopt a policy for alternative dispute resolution across agency functions. In 2005, the Office of Management and Budget and the President's Council on Environmental Quality jointly issued a Memorandum on Environmental Conflict Resolution.⁶³ The memorandum directs federal agencies to ensure the effective use of ECR consistent with eight principles: informed commitment, balanced and voluntary representation, group autonomy, informed process, accountability, openness, timeliness, and implementation.⁶⁴ A revised memorandum issued in 2012 reinforces these commitments and places greater emphasis on early collaboration. Implementation of the Administrative Dispute Resolution Act led the Executive to shift its focus from conflict resolution towards collaboration.⁶⁵

3. Agency- and Resource-specific Collaboration Statutes

Congress has also enacted hundreds of statutory provisions requiring federal agencies to collaborate with stakeholders to govern specific lands and natural resources. These statutes are primarily contained within four titles: Conservation (U.S.C. Title 16); Indians (Title 25); Public Buildings, Property, and Works (Title 40); and Public Lands (Title 43).⁶⁶

Congressional directives to agencies vary widely along the dimensions of collaboration outlined above, including the structure of the collaboration, the time period for which it will exist, and the parties with whom the agency is to collaborate. To provide examples of the wide variation among statutory

61. See BUREAU OF LAND MGMT., *supra* note 57, at 13.

62. 5 U.S.C. §§ 571–584 (2018).

63. Memorandum on Environmental Conflict Resolution, 41 WEEKLY COMP. PRES. DOC. (Nov. 28, 2005).

64. See *id.* at 7.

65. See discussion *supra* Part II.A.2.

66. For a summary of the relevant statutes, see BRADSHAW, *supra* note 1, at 56–75.

provisions, consider three statutory provisions contained within Title 16, Conservation:

1. When establishing the Gunnison Gorge National Conservation Area, Congress instructed the Secretary of the Department of the Interior to develop a protection and management plan “in close consultation with appropriate Federal, State, county, and local agencies.”⁶⁷
2. In the declaration of purpose for the Protection and Conservation of Wildlife, Congress stated:

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas⁶⁸

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

The Secretary of the Interior, the Secretary of Agriculture, or the head of any other Federal agency, shall assist, advise, and cooperate with States or their political subdivisions, landowners, private organizations, or individuals to plan, protect, and manage river resources. Such assistance, advice, and cooperation may be through written agreements or otherwise.⁶⁹

Each of these statutes contains a different degree of collaboration. The Gunnison Gorge legislation requires consultation, essentially the acting agency running ideas past outside entities. The Protection and Conservation of Wildlife Statute, in contrast, requires the Department of the Interior to play a supporting function to state and public or private organizations protecting,

67. Establishment of the Gunnison Gorge National Conservation Area, 16 U.S.C. § 410fff-5 (2018).

68. 16 U.S.C. § 661 (2018).

69. Assistance to State and Local Projects, 16 U.S.C. § 1282(b)(1) (2018).

rearing, and stocking wildlife. This requirement is so broad as to require regular, ongoing communication between federal agencies and an array of public and private partners.

The Wild and Scenic Rivers Act is similarly broad in requiring the Departments of Interior and Agriculture to work with various levels of government, landowners, private organizations and individuals to coordinate the planning and management of river resources. It broadly specifies that this cooperation can take the form of written agreements—presumably contracts or memoranda of understanding—or not. In each example, Congress requires federal agencies to act in concert with stakeholders to manage the resources at issue (conservation, wildlife, and rivers), but provides for varying degrees of influence for external stakeholders.

Land and resource management agencies are subject to multiple, sometimes competing, statutes. For example, National Oceanic and Atmospheric Administration (“NOAA”) has exclusive federal management over fishery resources in the U.S. Exclusive Economic Zone⁷⁰ and retains jurisdictions over whales, dolphins, porpoises, seals, and sea lions.⁷¹ NOAA operates under multiple acts that require some degree of collaborative governance, including cooperative federalism,⁷² and interagency cooperation.⁷³ Several acts authorize or require NOAA to collaborate with nongovernmental stakeholders, including the Estuary Restoration Act of

70. See Magnuson-Stevens Fishery Conservation and Management Act (FCMA), 16 U.S.C. §§ 1801–1884 (2018).

71. See Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h (2018).

72. See Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101–5108 (2018); OFFICE OF PRIVACY & OPEN GOV’T, DEPT. ORGANIZATION ORDER 10-15, UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE AND ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION § 3.01(nm) (2012) [hereinafter NOAA DOO 10-15] (requiring a cooperative state and federal management regime for intercoastal fisheries management efforts).

73. See Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–666c (2018) (requiring several federal agencies and state agencies to coordinate wildlife management with modifications to streams and bodies of water); Coastal Wetlands Planning, Protection, and Restoration Act, 16 U.S.C. §§ 3951–3956 (2018); Meteorological Services to Support Aviation Authority, 49 U.S.C. § 44720 (2018) (creating an inter-agency partnership with the Secretary of Commerce to provide meteorological information to the Federal Aviation Administration); NOAA DOO 10-15, *supra* note 72, § 3.01(dd) (creating an interagency task force devoted to coastal wetlands restoration projects in Louisiana).

2000,⁷⁴ Federal Ocean Acidification Research and Monitoring Act of 2009,⁷⁵ Geophysical Sciences Authorities Act⁷⁶ and National Aquaculture Act.⁷⁷

NOAA reports suggest that “agency-driven decision-making in natural resource management has generally moved towards processes that involve stakeholders,” that participation has become a “fundamental component” of operations, and that various federal legislation “mandates public participation in some form.”⁷⁸ It maintains a robust educational program on developing stakeholder collaborations for costal management areas with a centralized support team for collaborative efforts. Further, NOAA maintains stakeholder engagement experts to help the agency satisfy its various obligations—and desires—to collaborate.⁷⁹

Statutes sometimes create overlapping collaborative structures in the same geographic space, managed by different agencies. For example, NOAA, the Bureau of Land Management (“BLM”), and U.S. Fish and Wildlife Service (“USFWS”) maintain three distinct regional collaboration bodies, each with different guidelines.⁸⁰ The Figure below illustrates each of these collaborations and how they overlap.

Figure 2: Overlapping Regional Collaborative Councils

74. 33 U.S.C. §§ 2901–2909 (2018).

75. 33 U.S.C. §§ 3701–3708 (2018).

76. 33 U.S.C. §§ 883d–883e (2018).

77. 16 U.S.C. §§ 2801–2810 (2018); NOAA DOO 10-15, *supra* note 72, § 3.01(jj).

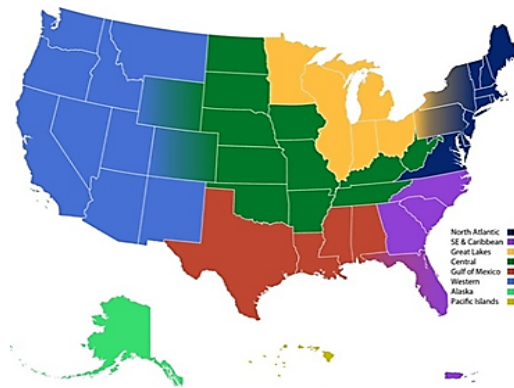
78. OFFICE FOR COASTAL MGMT., NAT’L OCEANIC & ATMOSPHERIC ADMIN., SOCIAL SCIENCE TOOLS FOR COASTAL PROGRAMS: INTRODUCTION TO STAKEHOLDER PARTICIPATION I (2015).

79. *See id.* at 9.

80. NOAA maintains a regional collaboration program in the form of Regional Collaboration Network, which consists of eight regional teams comprised of NOAA staff and external partners within a region. The Network is designed to share information and develop relationships, as well as to provide quick response to environmental disasters. *See Nat’l Oceanic & Atmospheric Admin. Regional Collaboration Network, 2015 ANN. REP.*

The Federal Land Policy and Management Act of 1976, as amended by the Public Rangelands Improvement Act of 1978, required the Bureau of Land Management to establish advisory council’s representative of major citizen interests concerned with resource management planning or the management of public lands. BLM has more than thirty Resource Advisory Councils covering the Western United States, in addition to a multitude of less-formal stakeholder collaborations. 43 U.S.C. §§ 1701–1787 (2018).

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



2.A. NOAA Regional Collaborations



2.B. BLM Regional Advisory Councils



2.C. USFWS Landscape Cooperation Councils

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

B. Executive Orders

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

- President Bill Clinton signed an executive order for the National Wildlife Refuge System, which noted as a guiding principle: “Conservation partnerships with other Federal agencies, State agencies, Tribes, organizations, industry, and the general public can make significant contributions to the growth and management of the Refuge System.”⁸¹
- President George W. Bush signed several executive orders creating stakeholder collaborations, including the Establishment of Great Lakes Interagency Task Force and Promotion of a Regional Collaboration of National Significance for the Great Lakes, which tasked the Interagency Task Force with convening and establishing

a process for collaboration among the members of the Task Force and the members of the Working Group . . . with the Great Lakes States, local communities, tribes, regional bodies, and other interests in the Great Lakes region regarding policies, strategies, plans, programs, projects, activities, and priorities for the Great Lakes system.⁸²
- President Barack Obama’s executive order on Stewardship of the Ocean, Our Coasts, and the Great Lakes entrusted the United States with “ensuring a comprehensive and collaborative framework for the stewardship of the ocean, our coasts, and the Great Lakes that facilitates cohesive actions across the Federal Government, as well as participation of State, tribal, and local authorities, regional governance structures, nongovernmental organizations, the public, and the private sector.”⁸³
- Although President Trump has not yet explicitly created a stakeholder collaboration through executive order, he did require an Interagency Task Force on Agriculture and Rural Prosperity to “provide State, local, and tribal officials—and farmers, ranchers, foresters, and other rural stakeholders—with an opportunity to suggest to the Task Force legislative, regulatory, and policy changes.”⁸⁴ This, like the other

81. Exec. Order No. 12996, 61 Fed. Reg. 13,647 (Mar. 28, 1996).

82. Exec. Order No. 13340, 69 Fed. Reg. 29,043 (May 20, 2004).

83. Exec. Order No. 13547, 75 Fed. Reg. 43,023 (July 19, 2010).

84. Exec. Order No. 13790, 82 Fed. Reg. 20,237 (Apr. 25, 2017).

examples, highlights a president requiring agencies to collaborate with diverse stakeholders on complex natural resource issues.

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

- President George W. Bush’s Committee on Ocean Policy, which included a directive to “facilitate, as appropriate, coordination and consultation regarding ocean-related matters among Federal, State, Tribal, local governments and the private sector, foreign governments, and international organizations.”⁸⁵
- President Barack Obama’s *A Twenty-First Century Strategy for America’s Great Outdoors*, a memorandum directing the relevant secretaries to conduct “listening and learning sessions around the country where land and waters are being conserved and community parks are being established in innovative ways.”⁸⁶ These sessions sought to engage a range of interested groups, including “tribal leaders, farmers and ranchers, sportsmen, community park groups, foresters, youth groups, businesspeople, educators, State and local governments, and recreation and conservation groups.”⁸⁷
- President Trump emphasized the shortcomings of decision-making without collaboration, noting that:

Monument designations that result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders may also create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth.⁸⁸

Trump directed the Secretary of Interior to review monument designations with a size of over 100,000 acres, which had been designated after January 1, 1996. The order focused on monuments

85. Exec. Order No. 13366, 69 Fed. Reg. 76,591 (Dec. 20, 2004), *revoked by* Exec. Order No. 13547, 75 Fed. Reg. 43,021 (July 22, 2010).

86. Presidential Memorandum on Creating a 21st Century Strategy for America’s Outdoors, 2010 DAILY COMP. PRES. DOC. 20,768 (Apr. 20, 2010).

87. *Id.*

88. Notably, Presidents are not required to undergo public process to designate monument under the Antiquities Act, 16 U.S.C. §§ 431–450ss-5 (2018).

designated or expanded “without adequate public outreach and coordination with relevant stakeholders.”⁸⁹

These examples underscore the variety of collaborative governance techniques used to manage land and natural resources, and illustrate alternatives to stakeholder collaborations.⁹⁰

C. Agency Regulations and Policy / Guidance Documents

Agencies have promulgated numerous regulations governing collaborations. Agencies may also guide employees on collaboration through policy documents. For example, the Bureau of Land Management has issued national policy documents on topics like engaging stakeholders, dispute resolution, and how to assess whether a collaboration requires FACA certification.⁹¹

Several agencies maintain centralized offices for collaborative governance. The Bureau of Land Management has maintained a Collaboration and Alternative Dispute Resolution Program since 1997.⁹² The Forest Service maintains a National Collaboration Cadre, “a network of people from around the US provide coaching and training to National Forests and their communities who are interested in understanding and developing collaborative processes.”⁹³ The Cadre offers classes and works with existing collaborative groups.⁹⁴

Additionally, agencies without direct land and management responsibilities support collaborations. For example, Congress created the U.S. Institute for Environmental Conflict Resolution within the Udall

89. Exec. Order No. 13792, 82 Fed. Reg. 20,429 (May 1, 2017).

90. For a discussion of the various types of stakeholder collaborations, *see supra* Part I.

91. BUREAU OF LAND MGMT., NATIONAL NATURAL RESOURCES POLICY FOR COLLABORATIVE STAKEHOLDER ENGAGEMENT AND APPROPRIATE DISPUTE RESOLUTION: WHAT BLM, COMMUNITIES AND THE PUBLIC NEED TO KNOW FOR PREVENTING CONFLICT AND RESOLVING DISPUTES INVOLVING PUBLIC LANDS AND RESOURCES (2009), https://www.blm.gov/sites/blm.gov/files/Services_CADREngagementandADRGuide.pdf [<https://perma.cc/H24T-LUMZ>].

92. *Collaboration and Alternative Dispute Resolution Office*, FED. LAB. REL. AUTHORITY, <https://www.flra.gov/components-offices/offices/collaboration-and-alternative-dispute-resolution-office-cadro> [<https://perma.cc/UN2J-W3TU>] (last visited May 19, 2019).

93. *USDA Forest Service National Collaboration Cadre*, COLLABORATIVE PLAN., https://www.fs.fed.us/emc/nfma/collaborative_processes/default.htm [<https://perma.cc/5ZVX-92R3>] (last visited May 19, 2019).

94. *See id.*

Foundation in 1998.⁹⁵ The Institute supports efforts to assess and mediate conflicts surrounding the environment, natural resources, and public lands.⁹⁶ Agencies also review collaborations to develop lessons learned and best practices from existing and past collaborations.⁹⁷ The existence of intra-agency teams designed to support collaborations does not, however, necessarily translate to individual collaborations relying upon these tools.⁹⁸

D. Other Sources of Legal Authority

International law, state law, and local laws may also govern collaboration. This Article flags, but does not review, the influence these laws may have on how agencies and agency partners collaborate. State agencies, in particular, can play important roles in collaborations. For example, the Western Arctic Caribou Herd Working Group (“WACHWG”) was largely supported by the State of Alaska Department of Fish and Wildlife in its infancy; it was only much later that the National Park Service became a participant and funder of the group.⁹⁹

Stakeholder collaborations themselves are internally governed—private bodies subject to private rules. At the level of an individual collaboration, the governance might take the form of a charter or memorandum of understanding governing the behavior of stakeholders. At a broader degree of generality, nongovernmental organizations and corporations that are part of private groups may also follow internal private governance rules. Further, facilitators of collaborative groups may be subject to private rules of a governing body (such as a university) with which they are facilitated. The

95. *About Us*, UDALL FOUND., <https://www.udall.gov/AboutUs/MissionAndHistory.aspx> [<https://perma.cc/3UBV-HYX9>] (last visited May 19, 2019).

96. *See id.*

97. For example, in 2015, the U.S. Geological Survey conducted a survey of 3,161 Bureau of Land Management employees about collaboration and alternative dispute resolution. RUELL, BURKARDT & DONOVAN, *supra* note 44, at xiii.

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

99. *See* Karen Bradshaw, *Participatory Governance as a Risk Management Tool*, __ B.Y.U. L. REV. __ (forthcoming 2020) (presenting a case study of the Western Arctic Caribou Herd Working Group).

boundaries encountered by third parties seeking to judicially enforce these rules are largely unexplored, but merit further research.

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

E. Judicial Review

Courts play a crucial oversight role in agency decisions informed by collaborations. In a forthcoming paper, I outline how judges are evaluating agencies' use of collaborations and sketch a framework for judicial review of the appropriate uses of collaborations.¹⁰⁰ This Article, however, focuses on a bottom-up account of collaborations, as described from the perspective of agency officials and stakeholders participating in them.

III. CASE STUDY: THE 4 FOREST RESTORATION INITIATIVE

Many envision Arizona as an arid desert landscape; however, a significant portion of the southwestern state is, in fact, forested. The Arizona forest ecosystems contain several different types of forests within them, comprised primarily of ponderosa pine, conifer, piñon juniper, and juniper savannah.¹⁰¹

Arizona forests have long been subject to disputes regarding proper management, which peaked in 1980s, an era some call the Timber Wars because it was defined by “prolonged and ugly battles.”¹⁰² During the 1980s and 1990s, the “very aggressive old growth timber industry started to bump up against pressure from the environmental side of the equation,” including the listing of endangered species, such as the Mexican Spotted Owl.¹⁰³ Ultimately, wide-scale timber harvest across Arizona and New Mexico came

100. *See id.*

101. Interview 3.

102. *Id.*

103. *Id.*; see Jean Palumbo, *Mexican Spotted Owl*, NAT'L PARK SERV., <https://www.nps.gov/articles/mexican-spotted-owl.htm> [<https://perma.cc/7Z39-4BRE>] (last updated Feb. 3, 2015).

to a halt.¹⁰⁴ An invisible, but deeply entrenched, outcome of the conflict was distrust between environmental groups, the forestry industry, and state and federal agencies.

Although by 2000 large-scale timber harvest had effectively stopped within the state, the timbered landscapes of Arizona remained. The abrupt shift from intensively managed forests in which trees were frequently harvested to unmanaged forests with limited tree and brush removal created risk for catastrophic wildfires. A series of high-profile fires raised public and political concern within the state. In 1996, three large wildfires burned in the Coconino National Forest.¹⁰⁵ The forest supervisor and the Flagstaff fire chief began to advocate for a new model of wildfire suppression, claiming that the Forest Service could not do it on their own.¹⁰⁶ In response, the Grand Canyon Forests Partnership started performing field treatments (such as timber thinning) to reduce wildfire risk. In 2002, the Rodeo-Chediski Fire burned from June 18 until July 7, and became what was then the largest recorded wildfire in Arizona history.¹⁰⁷ The need for *ex ante* wildfire risk reduction strategies was becoming clear, but the treatments necessary—essentially thinning small trees and brush—were controversial among environmental nongovernmental organizations that had successfully organized around the management controversies that defined the 1980s and '90s.

In 2003, Governor Janet Napolitano formed working groups to discuss how to fix forests, which were increasingly recognized as vital to watersheds, communities, tourists, and rural livelihoods.¹⁰⁸ Napolitano started the Governor's Forest Health Council, which ran parallel with other forest and

104. See Emery Cowan, *4FRI Green Light Signals Truce in Timber Wars*, ARIZ. DAILY SUN (Apr. 23, 2015), https://azdailysun.com/news/local/fri-green-light-signals-truce-in-timber-wars/article_85507636-3e0d-5a05-a7a4-eea6ed71a9ee.html [https://perma.cc/8A55-SW8X].

105. Sean C. Kyle & William M. Block, *Effects of Wildfire Severity on Mammals in Northern Arizona Ponderosa Pine Forests*, in 21 TALL TIMBERS FIRE ECOLOGY CONFERENCE PROCEEDINGS 163, 164 (W. Keith Moser & Cynthia F. Moser eds., 2000); Anne Minard, *This May Much Like '96 Fire Season*, ARIZ. DAILY SUN (May 15, 2002), https://azdailysun.com/this-may-much-like-fire-season/article_8d6bf660-d8da-5385-8311-816c26904ae9.html [https://perma.cc/K5S8-SKSD]; Michelle Nijhuis, *Flagstaff Searches for Its Forests' Future*, HIGH COUNTRY NEWS (Mar. 1, 1999), <https://www.hcn.org/issues/149/4806> [https://perma.cc/Z4LR-PD9H].

106. Nijhuis, *supra* note 105.

107. Michael Johnson, *Rodeo-Chediski Fire Underscored Need to Thin Forest*, WHITE MOUNTAIN INDEP. (June 16, 2017), https://www.wmicentral.com/news/apache_county/rodeo-chediski-fire-underscored-need-to-thin-forest/article_b86b09ae-b995-555a-b3af-d072dc7e6e17.html [https://perma.cc/J7QS-5L3H]. In 2011, the Wallow Fire became the biggest fire in Arizona history. Marc Lacey, *Wildfire Is Now the Largest in Arizona's History*, N.Y. TIMES (June 14, 2011), <http://www.nytimes.com/2011/06/15/us/15wildfires.html?mcubz=3> [https://perma.cc/QA3V-7XBS].

108. Ariz. Exec. Order No. 2003-11, 9 Ariz. Admin. Reg. 2,049 (June 20, 2003).

wildfire management groups.¹⁰⁹ The group began discussing the emerging practice of forest restoration—managing forests to create wide spaces between large trees, which could sustain wildfire—rather than the traditional focus on fuel treatments. Over time, additional collaborative groups emerged to address the issue, such as the Northern Arizona Woods Supply Study and the Greater Flagstaff Forest Partnership.¹¹⁰ When it became clear that the same stakeholders were in multiple groups, the groups coalesced into what eventually became the 4 Forest Restoration Initiative (“The 4FRI”).¹¹¹

The 4FRI is an organization that joins three overlapping groups of stakeholders who work in concert to manage forest resources in a way that encourages healthy development of national forests in Arizona.¹¹² The effort spans four national forests: Coconino, Kaibab, Apache-Sitgreaves, and Tonto, all of which are located along the Mogollon Rim.¹¹³

Figure 3: Land Subject to 4FRI

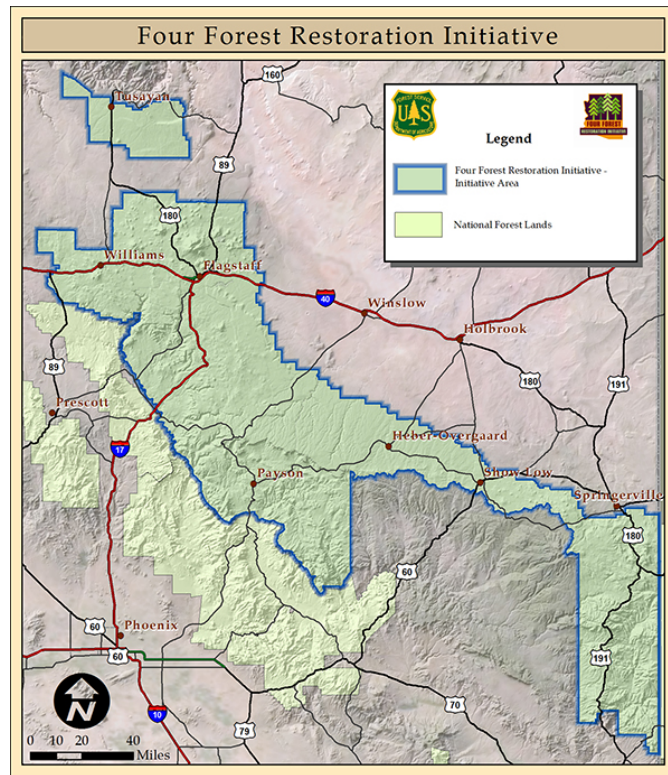
109. GOVERNOR’S FOREST HEALTH ADVISORY & OVERSIGHT COUNCILS, STATEWIDE STRATEGY FOR RESTORING ARIZONA’S FORESTS, at ix, xviii (2007), <https://repository.asu.edu/attachments/82153/content/RestoringArizonasForests.pdf> [<https://perma.cc/R2Q5-8L5X>].

110. *Id.* at 30.

111. Four Forest Restoration Initiative, *History 4FRI*, U.S. DEP’T AGRIC.: FOREST SERV., <https://www.fs.usda.gov/main/4fri/about-history> [<https://perma.cc/V6HR-YTH4>].

112. *See* FOUR FOREST RESTORATION INITIATIVE (4FRI), STAKEHOLDER GROUP CHARTER 1–2 (2013), https://www.merid.org/sitecore/shell/Controls/Rich%20Text%20Editor/~/_/media/Files/Projects/tongass%20implementation/4FRI_charter_amended_022713.pdf [<http://perma.cc/UP5P-PCU4>].

113. *See id.* at 1.



Courtesy United States Forest Service

Notably, 4FRI is a collaborative that informs management practices on largely contiguous public lands managed by a single decision-maker. For these reasons, it avoids many of the ownership and administrative challenges that are present in landscapes with more diverse ownership and administrative regimes.

The 4FRI stakeholder charter outlines eight specific actions that are necessary to achieve its mission, including: working closely with the Forest Service during the National Environmental Policy Act (“NEPA”) process, developing more efficient collaborative processes, leveraging industry contracts to contribute to forest thinning, supporting private and public financial investments, and influencing policy change where appropriate.¹¹⁴

The Forest Service is not a formal member of the group, but instead serves in an advisory capacity and as a liaison to the agency. The group was designed with this structure to avoid the need for FACA certification, which was described by one official as having “too many requirements and roadblocks”

114. *See id.* at 1–2.

and being “not inclusive.”¹¹⁵ The 4FRI and Forest Service operate under a Memorandum of Understanding that delineates the role and authority of the collaboration in informing decision-making processes.¹¹⁶ One Forest Service official noted that “you have to constantly remind [the stakeholder group] that they are not making the decision; the Forest Service is the decision-maker.”¹¹⁷ Yet the same official explained that “we take a lot that the group says and pretty literally just put it in the [Environmental Impact Statement].”¹¹⁸ He concluded that there is “a fine line between FACA and collaboration.”¹¹⁹

At the July 26, 2017, stakeholder meeting, this relationship was highlighted through discussion of an Environmental Impact Statement for forest restoration work. The NEPA requires an agency to consider several alternatives in an Environmental Impact Statement before undertaking major federal action that will affect the human environment.¹²⁰ The Forest Service was preparing an Environmental Impact Statement for restoration activities on 15,000 acres.¹²¹ The agency had decided to eliminate one option from the proposed alternatives from consideration in the Environmental Impact Statement and described that decision-making process to 4FRI. Several stakeholders objected to the removal of the option. One said that a working group member “with litigation in their back pocket” strongly advocated against dropping the alternative.¹²²

The Coconino Forest Supervisor responded:

If there was a consensus among this group, we honor that. If this group comes together around that alternative and can do so in the next hour, the board is open to revisiting that. It is not our intent to

115. Interview 4.

116. U.S. DEP’T. OF AGRIC., FOREST SERV., FS AGREEMENT NO. 10-MU-11031600, MEMORANDUM OF UNDERSTANDING BETWEEN THE 4 FOREST RESTORATION INITIATIVE (4FRI) COLLABORATIVE STAKEHOLDER GROUP REPRESENTATIVES AND THE U.S. FOREST SERVICE, (2011),

http://web.archive.org/web/20170623101257/http://www.4fri.org/pdfs/MOU_with_signatures.pdf [<https://perma.cc/EJ7M-GKK9>].

117. Interview 4.

118. *Id.*

119. *Id.*

120. 42 U.S.C. § 4332(c) (2018).

121. U.S. DEP’T. OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE FOUR-Forest Restoration Initiative Coconino and Kaibab National Forests (2014), [hereinafter FINAL ENVIRONMENTAL IMPACT STATEMENT] https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3823226.pdf [<http://perma.cc/RA4Y-ZRHX>].

122. 4FRI stakeholder meeting, Flagstaff, Arizona (June 2017).

close down what the consensus of this group is. If that's something you want to move forward with, we will do it.¹²³

Similarly, in the meeting, the Supervisor noted:

What's beautiful about this group, and what it offers us, is that we don't have to do traditional NEPA. That's the nice thing about a group and the social context around it. Ideally, we would just have one alternative and compare it to the no action and be good to go.¹²⁴

This sentiment reflected a story that numerous people told researchers at and after the meeting. Previously, 4FRI had worked for years to reach consensus on an EIS. At the public meetings surrounding the EIS, a group that did not participate in 4FRI raised serious, strong objections to the document. With every objection, the Forest Service Supervisor who was running the objection process would turn to the 4FRI representative and ask, "did you consider this point?" When the collective responded "yes," the Supervisor would say "that point has been considered" and dismiss the objection.¹²⁵

The clear implication from the Supervisor's response was that 4FRI was the appropriate forum for public involvement—that if a group or individual cared about the outcome, the appropriate forum was the collaborative, not the NEPA process. The general sense from the retelling of this story was that it was a defining moment for the group—a catalyzing moment where stakeholders understood that their work was directly and overtly influencing Forest Service decision-making. A Forest Service employee noted that the supervisor "used the collaborative as a buffer."¹²⁶

Five full-time Forest Service employees are devoted to 4FRI. The Forest Service provides 4FRI with an annual budget of approximately \$33 million,¹²⁷ comprised of several different funding sources ranging from regional restoration funds that go to Collaborative Forest Landscape Restoration ("CFLR") projects to direct matches for funds from other sources that cover time spent in stakeholder participation or capital investments in sawmills.¹²⁸ The 4FRI is unusual among CFLR projects in that only approximately 10% of its funding comes from that source.¹²⁹ This diversified

123. *Id.*

124. *Id.*

125. *Id.*

126. Interview 4.

127. See FOREST SERV., U.S. DEP'T OF AGRIC., FY 2014 BUDGET JUSTIFICATION (2013).

128. See also Emery Cowan, *4FRI Gets \$10 Million Boost from Forest Service*, ARIZ. DAILY SUN (Feb. 2, 2016), http://azdailysun.com/news/local/fri-gets-million-boost-from-forest-service/article_05995ac6-e70b-5647-9444-a20b357ceffe.html [http://perma.cc/3XY4-F734].

129. *Id.*

funding, paired with 4FRI's status as a high-profile "poster child" of the Forest Service's required stakeholder collaborations, protects it from funding deficits.

Further, the group has historically been well-represented politically. Representatives from the offices of Arizona Senators McCain and Flake occasionally attended meetings, and introduced riders on congressional bills to assist 4FRI at its request.¹³⁰ Moreover, the stakeholders lobby Congress each year for funding, with four or five members of the stakeholder group visiting the offices of Washington politicians.

In this sense, one Forest Service employee described 4FRI as "a political arm" and "lobbying" for the Forest Service, with more funds.¹³¹ Interestingly, a stakeholder group is funding a private party to create policies regarding low value timber regulations, considering putting language in a bill to allow the region to be a pilot program in low value timber regulations. Because of the resources contributed by stakeholders, the National Forest in Northern Arizona "is in a really unique place to be able to influence nationwide" and notes that national working groups are feeding off efforts produced by the collaboration.¹³²

The 4FRI is organized into three distinct groups with unique functions, operating in tandem to achieve the initiatives set out by 4FRI stakeholders. Members are organized into three groups: (1) the stakeholder group, (2) the steering committee, or (3) the subsidiary work groups.¹³³ The stakeholder group serves as the primary decision-making body and is made up of both individuals and organizations while also being open to the public.¹³⁴ The steering committee acts as a governing body for administration: they coordinate meetings, recordkeeping, and suggestions for work groups.¹³⁵ The steering committee is also subject to other charter rules, detailing their

130. Press Release, Senator John McCain, Senators McCain & Flake Urge Forest Service to Improve Efforts To Prevent Catastrophic Wildfires (Nov. 6, 2015), <https://web.archive.org/web/20181225144604/https://www.mccain.senate.gov/public/index.cfm/2015/11/senators-mccain-flake-urge-forest-service-to-improve-efforts-to-prevent-catastrophic-wildfires>; Press Release, Senator Jeff Flake, Flake and McCain Urge Forest Service to Open More Arizona Acres for Forest Thinning (Mar. 25, 2014), <https://web.archive.org/web/20181223075226/https://www.flake.senate.gov/public/index.cfm/2014/3/flake-and-mccain-urge-forest-service-to-open-more-arizona-acres-for-forest-thinning>.

131. Interview 4.

132. *Id.*

133. FOUR FOREST RESTORATION INITIATIVE, *supra* note 112, at 2.

134. *See id.*

135. *See id.*

responsibilities, term length, and specific demographic representation that must be part of the committee.¹³⁶

The 4FRI has formal rules about the collaborative process, with specific “decision rules” and prescribed stakeholder meeting ground rules.¹³⁷ The decision rules guide the decision-making process by offering stakeholders four varying levels of agreement to express: (1) agreement without reservations; (2) agreement with reservations; (3) agreement by acquiescence; and (4) disagreement.¹³⁸ Each level of agreement comes with different procedural requirements, ensuring that all reservations and oppositions are recorded.¹³⁹

This system reflects a Forest Service employee’s observation that “to get social consensus, you have to agree not to agree.”¹⁴⁰ The collaborative voting process includes things like ‘agree with reservation’ because we understand you cannot get 100 percent consensus. You go to 100 percent consensus, and you’ll never get there.”¹⁴¹ When a party disagrees, a timeline is established to allow negotiation and compromise, and another set of procedural requirements take effect if no agreement is reached within that time frame.¹⁴² In addition to these procedures, the entire process is governed by ground rules, specifying preparedness, respect, and candid collaboration and participation.¹⁴³

Some stakeholders are not part of the group despite having strong interests in the land and resources being managed. For example, the White Mountain Apache Tribe, which shares a boundary with Apache Sitgreaves National Forest, is not a stakeholder group.¹⁴⁴ Cattle interests are also not represented, which is surprising because the restoration work opens tree stands which

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

137. *Id.* at 3.

138. *Id.* at 4.

139. *Id.*

140. Interview 4.

141. *Id.*

142. FOUR FOREST RESTORATION INITIATIVE, *supra* note 112, at 4–5.

143. *See id.* at 7.

144. *Id.* at 1; *see also* *About Us*, APACHE-SITGREAVES NAT’L FORESTS, https://www.fs.usda.gov/detail/asnf/learning/history-culture/?cid=fsbdev7_012567 [<http://perma.cc/7WDD-DY3D>] (last visited Mar. 13, 2019).

produces more forage production.¹⁴⁵ Attempts to get the Arizona Cattle Growers group and local ranchers involved have proved unsuccessful.¹⁴⁶

A variety of nongovernmental environmental organizations also chose not to participate. The Sierra Club does not participate, a fact that Forest Service employees explain as originating in an organizational mandate that the Sierra Club cannot be a part of a collaboration that cuts trees; it participates informally, however.¹⁴⁷ Other conservation groups, such as the John Muir Project and Wild Earth Guardians, also do not participate. A stakeholder in 4FRI noted that some conservation groups feel that stakeholder collaborations are a long, formal way of giving industry groups what they want, a notion reinforced by their experiences with some earlier cattle grazing stakeholder groups in the state. This critique is bolstered with respect to 4FRI given the history and culture of the Forest Service.

The Forest Service is a line staff organization with a century-old command and control organizational structure designed to maximize timber harvest. As the agency objectives shifted, its structure and many guiding regulations did not. As a result, there is tension between true collaboration—defined by a state agency stakeholder as “shared decision space”¹⁴⁸ and the authority in the agencies’ model. To promote collaboration under this structure, a Forest Service employee cites the words of a Regional Forester, noting, “We cannot violate law, but we try to bend regulation and policy.”¹⁴⁹ When asked what would happen if he was reprimanded for doing so, he responded, “I’ll retire. But the Forest Service doesn’t have good accountability.”¹⁵⁰ This commitment to the collaborative and flexibility with respect to policy has allowed the collaborative to flourish within an organization that was not designed with collaborative governance in mind:

On the administrative side, probably the greatest challenge was the Forest Service learning to be able to work in a collaborative way,

145. See FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 121, at 63.

146. See ARIZ. CATTLE GROWERS’ ASS’N, SAVE ARIZONA’S FOREST ENVIRONMENT (SAFE) 11 (2011), <https://web.archive.org/web/20161221012948/http://azcattlemensassoc.org/CMDocs/ArizonaCG/SAFE/SAFE%20PLAN-for%20email.pdf> (“The 4FRI is a noble effort, but in and of itself it is not of sufficient size or scope to return our forests to health or to invite enough private investment of wood harvesting infrastructure into these rural resource based communities.”).

147. See Taylor McKinnon, Ctr. for Biological Diversity, & Sharon Galbreath, Sierra Club Grand Canyon Chapter, Comment on Four Forests Restoration Initiative Proposed Action (Mar. 14, 2011), https://web.archive.org/web/20160408035232/http://4fri.org/pdfs/documents/NEPA/CBD_SC%20_PA_Comments_3_11_11.pdf.

148. Interview 3.

149. Interview 4.

150. *Id.*

and I can see that this would also be on the social side but it's bringing the social and the administrative together. It's the Forest Service actually learning to operate in a collaborative environment. That is a paradigm change for them, it was enormously challenging. There were a lot of trips and stumbles on the way, which were to be expected. They have done quite well, but we are still bumping up against it. They basically had to move from being an organization that told people what they were going to do, then took feedback, then just went ahead and did what they were going to do. To becoming an environment where power and decision-making is shared.¹⁵¹

To overcome entrenched institutional boundaries, the group used multiple facilitators.

One Forest Service official noted that the Udall Institute sent three different facilitators during the formative stages when people were standoffish but the facilitators were not effective because they allowed a few people to dominate the conversation.¹⁵² The Forest Service put out a facilitation contract, and found a private facilitator who was very effective at integrating people.¹⁵³ He used a phone app when people were uncomfortable speaking, which several people felt was effective in encouraging participation and reducing tension.¹⁵⁴ Now, the group is self-facilitated and there is little mention of bringing in facilitators, although there continue to be strong personalities that dominate the group.

Today, 4FRI is largely seen as a success story, both within the group and within the Forest Service more broadly. The 4FRI serves as a laboratory for collaboration ideas throughout the country, for both the Forest Service and stakeholders like The Nature Conservancy, which is working on digital prescriptions that are being picked up nationally.¹⁵⁵ Dedicated staff, expert in collaborations, can focus on the collective. "We have some really fertile minds and we think up some really neat shit."¹⁵⁶ As a result, several intra-agency representatives visit and study 4FRI.

Despite this general sense of relative excellence, some external stakeholders challenge the purported success of the group. In 2015, the Editorial Board of the *Arizona Republic* noted:

151. Interview 5.

152. *Id.*

153. *Id.*

154. *Id.*

155. See Devin Coldewey, *Nature Conservancy Gives Forest Management a Digital Makeover*, TECHCRUNCH (Apr. 19, 2017), <https://techcrunch.com/2017/04/19/nature-conservancy-gives-forest-management-a-digital-makeover/> [http://perma.cc/M3X5-A97Z].

156. Interview 4.

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

The 4FRI progress report from the Forest Service is disheartening, in a way. It looks like the feds are trying to fool us on the program's real progress. . . . [T]he U.S. Department of Agriculture and local 4FRI public-sector partners are paying millions of dollars a year to conduct thinning projects in the four national forests involved . . . The whole idea of 4FRI, remember, is as a private initiative. . . . As environmentalist Todd Schulke told Pete Alshire of the *Payson Roundup* in December, promoting forest thinning paid for by the feds as evidence of 4FRI's success "is not good for anybody. Inflating the accomplishments to the point where it's unbelievable taxes the credibility of the whole program," Schulke said.¹⁵⁷

In March 2019, Arizona Senator Sinema released a statement expressing dissatisfaction at the slow pace of 4FRI.¹⁵⁸ She called for a increased funding to hasten the progress of the initiative. Nevertheless active stakeholders and members of the Forest Service generally heralded the collaboration as a success, pointing largely to metrics outside of acres thinned and instead toward creating better relationships among previously hostile groups to achieve environmental and safety objectives without litigation.

IV. BEST PRACTICES AND RECOMMENDATIONS

This Section focuses on lessons learned that can inform future agency engagement with collaborations.¹⁵⁹ First, I assess both the potential benefits of stakeholder collaborations, as reported by agencies and stakeholders. Then I present the potential downsides. Finally, I provide recommendations for agencies considering, establishing, or maintaining a collaboration.

157. Editorial Board, *The Forest Service Shouldn't Pat Itself on the Back Yet*, ARIZ. REPUBLIC (Apr. 22, 2015), <http://www.azcentral.com/story/opinion/editorial/2015/04/22/fri-deal-struck-last-get-thinning/26212565/> [<http://perma.cc/QV3P-WDUF>].

158. Saul A. Flores, *Sinema Seeks Proposals for Forest Thinning*, ASSOCIATED PRESS (Mar. 13, 2019), <https://www.apnews.com/bdeb55ab8e2c47d88cc2f7e6bf1bd08c> [<https://perma.cc/3ZQ3-TG5V>] (noting that Senator McSally joined Senator Sinema in seeking a Phase 2 RFP).

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

A. *Assessing Collaborations*

This sub-Part briefly summarizes the benefits of, and concerns about, collaboration. The benefits are largely descriptive in nature—a composite of the views directly expressed by interview subjects, often in their own words. The critiques of collaborations are more generalized and incorporate secondary materials. Interview participants frequently seemed hesitant to directly critique collaborations on-the-record; some participants retracted statements that they initially provided in interviews. I nevertheless incorporate a rough sketch of the challenges of collaboration, with the two-fold hope of: (1) painting a realistic picture of collaboration, rather than one that is more optimistic than that which I observed; and (2) flagging the full scope of issues, with the hope that future scholars will provide more refined versions of the descriptive and normative considerations as the body of research on this topic matures.

1. The Benefits of Collaboration

As described by participants, the key benefits of stakeholder collaboration can be grouped into three rough categories: (a) generating substantively better decisions; (b) creating greater social acceptance of controversial agency decisions, as well as a perceived reduction in litigation; and (c) advancing agency mandates and goals by organizing and leveraging stakeholders to expend resources on shared objectives. Each of these benefits is discussed below.

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

Stakeholder collaborations can generate different management ideas that become part of the discussion, which may lead to better decisions than what the agency would have developed on its own. Stakeholder groups bring a wider diversity of opinions and experiences to the table, which can shift agency thinking. A Forest Service employee noted, “Left to our own devices, we will go down the narrow path.”¹⁶⁰ Stakeholders can push for a different

160. Interview 4.

path, as with members of Alaskan Native Communities encouraging agencies to incorporate indigenous knowledge into their understanding of the caribou herd.¹⁶¹

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

[T]hey have certain criteria for data, that might not be the most recently available data, but at that agency because of their litigation, they are more comfortable with certain kinds of data that they feel has defended protective actions more. I think that is where the conflict comes. The stakeholders would like to be innovative and use best available science. The Forest Service Agency has reluctance to switch data midstream because it hasn't been proven in court and might be more vulnerable. We would argue that using best available science would do better in court. It's a kind of a cultural divide, but as a stakeholder we are never sued, they are. So sometimes I have to give it to them.¹⁶²

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

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

Natural resource collaborations generally arise around controversial resource uses. Within this adversarial context, many agency employees believe that decisions informed by collaboration may prove more socially acceptable because they portray the agency as open to local input. Instead of stakeholders sitting back and judging agency compromises, the stakeholders instead negotiate the deals themselves. In this sense, an agency official reports that stakeholder collaborations “do our work for us” by building social consensus around controversial decisions.¹⁶³

161. See Bradshaw, *supra* note 99.

162. Interview 4.

163. *Id.*

On a related point, agencies believe they are less likely to be sued, or to lose a lawsuit, for a decision that accords with a set of recommendations from a stakeholder collaboration. The same official notes, “Collaboration is not the panacea for getting rid of lawsuits. But it sure as hell makes [that risk] a lot lower.”¹⁶⁴

Finally, relying on a collaboration reflects the modern reality that unilateral decisions by government may be considered suspect. An official report: “I don’t think anybody can do anything on their own anymore and be legitimate.”¹⁶⁵ Among land and resource management, collaborating on sensitive land and resource management decisions appears to have become the new norm.

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

Agencies and stakeholders are both confined in what they can do. For example, stakeholders cannot directly manage public lands, and agencies cannot lobby Congress.¹⁶⁶ Yet, working collectively, stakeholders and agencies can develop common goals, then deploy their relative strengths to advance the objectives. For stakeholders in collaborations, these strengths often include financial resources, manpower, and the capacity to lobby. This synergistic relationship displaces the traditional notion that a principal-agent relationship exists between agencies and external actors, in which agencies are essentially controlling external parties.¹⁶⁷

Consider the following:

I think the really good outcome of the CFLRP Act is that the stakeholders have managed to pull off either regional or two national workshops. It is really valuable, the Forest Service is an underfunded agency and one of the things that they continue to cut is the travel and lessons learned so you end up with these forests and districts that end up in isolation and they are very silo-ed. They don’t have the obvious authority or the backing to consult with one

164. *Id.*

165. *Id.*

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

167. As Professor Hannah Wiseman has keenly observed, relationships and resource flows between agency and non-agency actors are increasingly bi-directional. Hannah Jacobs Wiseman, *Delegation and Dysfunction*, 35 YALE J. REG. 233, 299 (2018).

another or contribute lessons learned. The other stakeholder nonprofit groups get engaged, they actually can develop those workshops, they can find funding to support the travel to them.¹⁶⁸

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

2. The Challenges of Collaboration

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

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

A variety of doctrines, statutes, and case holdings require agencies to retain final decision-making authority over management decisions, even when working with collaborations.¹⁶⁹ Yet, agencies must share decision-making space to some degree to motivate stakeholders to participate in a collaboration. If stakeholders do not believe that an agency will implement the collaboration's recommendation, they have minimal incentive to continue collaborating. For example, leaders in two Alaskan Native Communities refused to participate in the WACHWG collaboration when it became clear

168. Interview 9.

169. *See supra* Part II.

that the Alaska Department of Fish and Game would not share its decision-making authority.¹⁷⁰

In requiring agencies to both engage with stakeholders and retain sole final decision-making authority, Congress has created a difficult situation. To navigate this balance, agencies may be paying lip service to retaining sole decision-making authority while in fact sharing some portion of decision space.¹⁷¹

The 4FRI case study illustrates this point: The defining narrative of the group centers on the objection process for the first Environmental Impact Statement in which the collaboration participated.¹⁷² The Forest Service Regional Forester handled the objection process by referencing the group decision-making process when evaluating the objections of a non-group-member, Wild Earth Guardians. This suggests a special status for collaborations not available to the public.¹⁷³ The 4FRI stakeholders felt validated when the agencies' official decision-making essentially rubberstamped the collaboration's recommendation.¹⁷⁴

Remember, stakeholders participate in collaborations because they have a pecuniary or cultural interest in the land and resources being managed.¹⁷⁵ If they can protect and advance those interests through participating in a stakeholder collaboration, they will be highly motivated to participate. The less likely the agency is to follow the recommendation of the collaboration; the less motivated stakeholders will be to participate.

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

170. See Bradshaw, *supra* note 99.

171. See *infra* III; Interview 4.

172. See *infra* III.

173. See *infra* III.

174. See *infra* III.

175. See *supra* Part I.A.

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

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

Public land and resources tend to be disproportionately located in rural areas, some of which—like the former timber mill towns of the Pacific Northwest—no longer have strong industrial interests. Accordingly, the burden falls upon local residents to represent industrial interests (i.e., “we want timber jobs back”). This can prove difficult and ineffective, as many stakeholder collaborations meetings occur at times that are inconvenient, if not impossible, for workers with limited workplace flexibility to attend. For example, the annual WACHWG meetings take place over a two to three-day timeframe in a location that is several flights away from villages in which the caribou is a primary food source.¹⁷⁶ The 4FRI meetings take place mid-morning on weekdays. Hourly workers or stay-at-home parents might find either meeting difficult to attend, which contributes to the likelihood that only well-funded stakeholder collaborations, such as industrial interests and nongovernmental organizations, will be able to afford to send representatives.

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

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

A similar set of concerns revolve around tribal interests. It is striking that 4FRI, the most lauded stakeholder collaboration in the Forest Service, does

176. See Bradshaw, *supra* note 99.

not have tribal representatives who belong to the collaboration. A stakeholder notes:

I would say we classically miss, and this is across the West, our tribal partners. We have been less than successful at engaging our tribal nations, and there are a lot of reasons for that.¹⁷⁷

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

Further, tribes may elect to become involved in resource management from a government-to-government relationship instead, under the Section 7 Consultation requirement of the National Environmental Policy Act (“NEPA”).¹⁷⁸ Tribes electing to rely solely on this option should not, and legally cannot, have their perspective dismissed because they did not participate in the collaboration. Given the specialized legal status of tribes under NEPA, agencies should strive to include tribes that want to participate in collaborative efforts while understanding that tribes have specialized legal treatment under NEPA that should not be conflated with general public participation.

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

When asked about successful and unsuccessful collaborations, the answers of agency officials were anecdotal—stories of particular collaborations that produced positive outcomes, or not. Interestingly, the same collaboration can generate sharply different assessments of success, as illustrated by the enthusiasm with which agency officials speak of 4FRI contrasted with the scathing newspaper editorial on the subject.¹⁷⁹ This divergence highlights the absence of defined metrics by which to judge a collaboration, either in isolation or relative to other means of engagement.

This Article sought to identify the features of, and reasons for, success and failure in collaboration and illustrate each through examples. While several interviewees shared stories comparing successful and unsuccessful collaborations, when their quotes were circulated for review and inclusion in

177. Interview 7.

178. 42 U.S.C. §§ 4321–4370m-12 (2018).

179. See Bradshaw, *supra* note 99.

the report,¹⁸⁰ some retracted these statements out of fear that critique would undermine the unsuccessful collaborations, still in operation. For that reason, this Article does not provide specific instances of unsuccessful collaborations, but flags the important point that they exist.¹⁸¹

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

Do collaborations produce the best ecological results? Several examples suggest that some people believe that agencies' emphasis on collaboration leads to over-cooperation with grazing or ranching interests at the expense of ecological objectives. A pernicious effect of collaboration in such instances is that it gives the *appearance* of democratic process that makes the agencies' decision more defensible in court. In one example, members of the local environmental community refused to participate in a collaboration because they felt that previous collaborations amounted to a series of elaborate hand-waving by the agency to give the appearance of appropriate democratic process while giving ranchers the grazing access they wanted.¹⁸²

In another example, which took place in a different state, a member of an independent scientific review board examining agency action was surprised to learn that the local agency position was essentially acquiescence to local ranching interests.¹⁸³ When the member of the review board protested that this was inconsistent with the requirements of the Endangered Species Act

180. Interviewees were provided with the opportunity to review their recorded comments used in this Article per the interview protocol. *See infra* Appendix.

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

182. Interview 13.

183. Interview 14.

and other federal laws, the agency official acknowledged this as true, but nevertheless refused to budge.¹⁸⁴

Regardless of the relative and empirical success of collaboration, some agency officials feel that it is simply the right thing to do. An agency biologist reflected this sentiment, saying, “Just as a person, I think it is valuable to collaborate with people who are invested in decisions that you make. So I think [stakeholder collaborations] are pretty important.”¹⁸⁵ This sense of collaboration as reflective of democratic principles is also discernable in the language of the congressional acts and executive orders requiring collaboration.¹⁸⁶ Eventually, Congress or agencies should consider testing the intuitive sense that collaborations satisfy democratic and practical considerations by explicitly studying and considering the relative costs and benefits of alternatives.

B. Best Practices and Recommendations

This Section includes a brief set of recommendations for agencies considering whether to establish a collaboration, how to establish a collaboration, and how to maintain a collaboration.¹⁸⁷ Importantly, this is not a comprehensive account—more detailed sources for specific advice are provided throughout. The key contribution, however, is incorporating novel first-person accounts of lessons learned from various stakeholders and agency officials, often in their own words.

To provide a summary of what emerges from these accounts, an agency should begin by asking whether there is a problem that matters deeply to a recognizable group of people and whether it is possible for engagement to generate mutually agreeable solutions. For instance, it is futile to start a collaboration if the agency is not committed to sharing decision-making space with stakeholders. Situations in which there is both top-down and bottom-up support within an agency provide the best likelihood of creating a successful collaboration. Given the availability of other strategies that can incorporate collaborative governance but do not require a full-fledged stakeholder collaboration, agencies should also seek the least formal mechanism for achieving the desired goal.

184. *Id.*

185. Interview 10.

186. *See supra* Part II.A.

187. For a useful, detailed guide on the mechanics of convening and managing stakeholder collaborations, see SHANNON K. ORR, ENVIRONMENTAL POLICYMAKING AND STAKEHOLDER COLLABORATION: THEORY AND PRACTICE (Routledge 2013).

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

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

1. Deciding Whether to Establish a Collaboration

To the extent that an agency has the flexibility and authority to consider establishing a collaboration (i.e., it is not required by Congress or the president), the agency should assess the situation to determine which kind of collaborative model best addresses the issue at hand.¹⁸⁸ The following factors weigh in favor of creating a new collaboration:

188. OFFICE FOR COASTAL MGMT., *supra* note 78, at 10. NOAA provides the following guidance on deciding when to establish a collaborative:

Proactive engagement can help to avoid problems

A problem has been clearly identified

The best course of action is complex or not apparent

Support of stakeholders is necessary for the decision to be successful

Many parties are affected by the decision

No single agency has clear or complete jurisdiction

No single agency has the resources or expertise to make and implement a decision

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

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

The most successful collaborations are not structured by agencies. When the agencies say 'hey I need a collaboration to get this project done' it is just a false dichotomy . . . Grassroots efforts by the stakeholders of our federal land end up in the best results for the federal landscape. So you can't force it.¹⁸⁹

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

Several collaborations emerged from crises, such as a population collapse in caribou herds that fed hundreds of people¹⁹⁰ and wildfires that caused millions of dollars in lost property values.¹⁹¹ A NOAA employee recalls how a similar circumstance caused renewed attention to an existing collaboration, saying:

There was a really stressful confrontation about a whale that stranded in Moriches Bay in Long Island around Thanksgiving [in 2016]. The whale stranded alive and was on the beach alive for a couple of days. Maybe three days. It was only a few feet from swimmable water, but it was grounded and it could not get off. When that happens a whale pretty quickly deteriorates. Eventually we, NOAA, hired a veterinarian to euthanize the animal, but before that happened people watching the whale's struggles were terribly upset, as you can imagine. We, NOAA, and our partners who are part of what we call the Marine Mammal Stranding Network were not fully prepared for this particular event. It happened just before the Thanksgiving break and people were on vacation. There were a

Issues and solutions are negotiable

Parties are willing to collaborate.

Id. at 2. (citing OFFICE FOR COASTAL MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., PLANNING AND FACILITATING COLLABORATIVE MEETINGS TRAINING MANUAL (2012)).

189. Interview 17.

190. See Bradshaw, *supra* note 99.

191. See *id.*

lot of reasons why we were not as alert as we should have been, but those reasons do not diminish the fact that people were terribly upset with their government's response. I don't blame them.

But out of that came some good. People were really frustrated at their government and wanted to do more to help the whale. We were frustrated with ourselves that we didn't respond as best we could in ways that we knew we could respond and, in fact, in ways we typically do respond. We met with the community a few months after the event, and we formed a much better collaborative process on Long Island. People who were so angry at the loss of this whale are eager to help us respond to the next stranding. The Marine Mammal Stranding Coordinators of Long Island have received a lot of expressions of support saying, "Next time we'll be there, we'll help you, we'll provide you with information, I've got a boat you can use," all that sort of stuff. So often collaboration comes out of crisis. As the aftermath of something like that.¹⁹²

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

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

Regardless of whether they use the tool of collaboration, agencies must manage relationships with several stakeholders competing for mutually-exclusive uses of a finite resource. In the example of the Western Arctic Caribou Herd, Alaskan Native hunters, trophy or sport hunters, hunting guides, transporters, and environmental nongovernmental organizations had sharply differing views about who should harvest caribou, and appropriate methods for harvest.¹⁹³ In The 4FRI case study, environmental nongovernmental organizations, the timber industry, and local homeowners were at odds about how to reduce wildfire risks.¹⁹⁴

Local agency employees tend to be poignantly aware of such resource conflicts, and who the key actors are. The difficulty in resolving the conflict is that desired outcomes tend to be mutually exclusive: cut the trees / don't

192. Interview 6.

193. See Bradshaw, *supra* note 99.

194. See *supra* Part III.

cut the trees, issue caribou hunting permits to non-native hunters / don't issue hunting permits to non-native hunting permits. Further, many stakeholders conflate an agency not taking their desired approach as a lack of understanding by agency officials. A NOAA official reports:

Key stakeholders of the National Marine Fisheries Service think that we do a terrible job at stakeholder engagement. Fishermen feel that we do not listen to them. Environmental groups feel that we listen only to the fishermen A large part of the why is people are not really usually satisfied with having provided input. What they want is to persuade us to their position. That's harder But we have reasons for making decisions that go beyond simply human interactions, there are legal requirements that we have to adhere to.¹⁹⁵

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

The agency, too, may shift its thinking in response to collaboration. In the Western Arctic Caribou Herd example, state wildlife biologists began the working group to inform Alaskan Natives about biological conditions, so that permitting decisions would make sense against a backdrop of scientific data.¹⁹⁶ Over time, however, agency officials developed an increased familiarity with, and respect for, indigenous ecological knowledge—the intergenerational cultural knowledge that Alaskan Native Communities had about how caribou act over time in response to changing natural conditions.¹⁹⁷ Agency officials shifted from telling Alaskan Natives about the scientific assessment of caribou to exchanging information drawn from various sources, each viewed as legitimate. This highlights the opportunity for bi-directional learning, which can lessen conflict.

195. Interview 6.

196. See Bradshaw, *supra* note 99.

197. See *id.*

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

Successful collaborations require politically-connected supporters linked to the region at issues. Governors, senators, or high-ranking agency officials who are willing to expend political capital to get the collaborative funding and necessary regulatory or legal permissions seem vital in the success of long-standing collaborations. The 4FRI, which has an operating budget of \$33 million, not only built upon a collaboration started by the governor, but also fit into a federal statute requiring the Forest Service to collaborate, and had support from well-connected senators who were willing to introduce legislation before Congress to support the organization.¹⁹⁸ Without a high degree of support, well-intentioned stakeholders and agency employees may become distracted with fundraising efforts to cover basic operating costs.

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

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

I've seen other collaborative efforts where the agency, because those within it are told they need to do this collaboration, they just do it as a pro forma check the box exercise without really being willing to give up that power and decision-making. In my mind, this becomes a waste of everyone's time because this can't be a true collaboration, and if you don't want to empower the people you are working with then don't even go down that road.¹⁹⁹

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

198. See *supra* Part III.

199. Interview 3.

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

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

I'm involved with a number of different collaborative efforts. One of the mistakes I see people make is that they build huge collaborative groups around relatively simple projects, and I think you have to scale your collaboration to your project. The larger it is the more controversial it is. Obviously, that adds a complexity and the need for more management. Collaborations are inherently difficult, cumbersome, and time consuming entities. So, the more complex and larger your collaborative is the more time you are going to spend just on the collaborative process . . . , the larger it gets the greater the need for professional facilitation, for administrative support, those sorts of things.²⁰⁰

Moreover, the 4FRI collaboration evolved from nearly a decade of different task forces and working groups.²⁰¹ Groups with a specific task (such as creating a plan or report) and finite timeline may create the capacity of people to work together, without the commitment or expectation incumbent in a collaboration. Getting people in a room to discuss a problem generally gives rise to informal relationships and brainstorming, which can begin to reduce animosity and may build trust. The catalyst of these relationships is repeated interactions, sometimes centered around the goal of producing a particular deliverable, such as producing a management plan or report. Thus, listening sessions and task forces may provide a low-cost way to test the amenability of stakeholders to more involved collaboration tools.²⁰²

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

It's really one of the things that can either make or break a new [National Park Service] Superintendent coming to a subsistence park in Alaska, how well they can integrate that and how quickly

200. *Id.*

201. *See supra* Part III.

202. *See id.*

they can establish a sense of trust with their communities and to work with them so that if folks need better access to get to an area that they use for woodcutting but they can't use their snow machines to get there because the ice on the lake hasn't frozen, that the Superintendent is flexible enough to accommodate that somehow in some way. This is where partnerships on the ground, the collaborations on the ground, are really most powerful, they happen on that one to one, neighbor to neighbor, type basis. As opposed to just being more of the larger agency talking to a tribal government, or talking to a village government.²⁰³

This is an important point for Congress, the president, and higher-level agency officials to consider: Informal, relational conflict resolution is difficult, if not impossible to require, quantify, or reward. But, it can be the most effective means of managing many resource challenges. A push towards collaboration should not be a push towards formalism—relationships matter and may be both the cheapest and most effective collaborative tool available.²⁰⁴

2. Establishing a New Collaboration

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

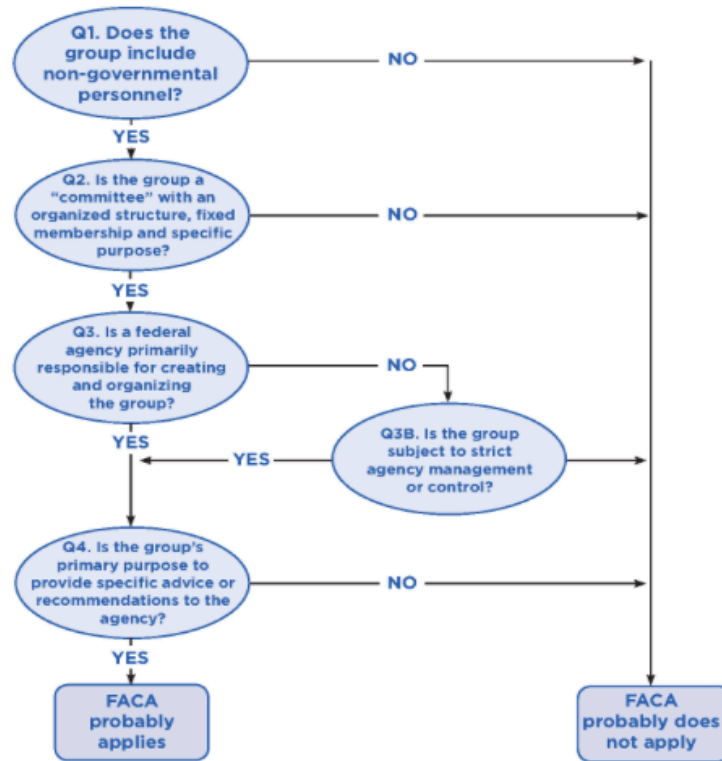
a. Determine whether FACA will apply.

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

Figure 4: Flowchart for Determining Whether FACA Applies to a Collaboration

203. Interview 18.

204. For a discussion on the importance of informal, norm-based relationships in managing resources and shared geographic space, see ELLICKSON, *supra* note 35, at 1.



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

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

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

Agencies should consult with a stakeholder engagement center and/or in-agency legal advisor to identify which laws and regulations govern the collaboration. Officials should consider which collaborations are required or may already exist. Having this information prior to forming the collaboration allows the agency to communicate the legal standard by which recommendations from the collaboration will be incorporated into agency

decision-making, an important foundation for forming clear expectations and trust.

c. Identify stakeholders who may be willing to participate.

There exists a broad, if not universal, group of stakeholders for every public land and resource, which can be explained along the dimensions of existence value, taxpayer interest, and teleconnectivity of resources. In Alaska, for example, every resident of the state is legally considered a potential subsistence user of caribou—regardless of where they live, they have equal access to the natural resources of the state.²⁰⁵ Within that broader category, there are many differing perspectives about the relationship between people, their area of residence, and their interest in hunting rights. One National Park Service official notes:

It just gets to be a very, very complex system of not only political relationships but community relationships, and relationships between people that live in urban areas as well as those that live in rural areas. This group of diffuse and loosely-interested stakeholders is not the group with requisite interest to maintain a long-term commitment to collaboration.²⁰⁶

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

For the National Marine Fisheries Service . . . really anybody [is a stakeholder]. I think anybody who has an interest in, or is affected by, what we do in the ocean is a stakeholder, and I can't imagine anyone who doesn't. Who isn't affected by what is happening in the ocean in some ways?²⁰⁷

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

There are some groups that are clearly affected in an immediate and obvious way. People who make their living on the ocean. For us, in particular, fishermen are our primary stakeholder, but there are also other groups who really care about the ocean, the environmental

205. Interview 8.

206. Interview 10.

207. Interview 6.

groups care deeply about what is going on in the ocean. They certainly would represent some stakeholders who need to be involved in the management of the oceans.²⁰⁸

The heart of identifying key stakeholders with the requisite degree of commitment to enter a collaboration requires looking to those with a cultural or pecuniary interest—someone who makes their living from the resource or land in question, whether extracting the resource or protecting it.²⁰⁹ This is the first layer of stakeholders. The NOAA collaboration specialist also made the valuable point to consider non-obvious stakeholders:

The National Marine Fisheries Service has a number of stakeholders that you wouldn't think of, like in California the dam owners, the people who manage the hydraulic dams in the Sierra Nevada. They are stakeholders because they control the water that endangered salmon species in California need to survive. We don't directly regulate them, but we advise the Federal Energy Regulatory Commission about dams. So the operations of the dams is directly affected by us. Likewise farmers in California's Central Valley are very much our stakeholders. If the salmon need water to migrate upstream to spawn, it means that there is less water available for farming. When water is scarce, as it was during the recent California drought, you can bet that we need to engage with these stakeholders.²¹⁰

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

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

Agency officials should not limit access to meetings; all meetings should be well-publicized, and no stakeholders should be discouraged from attending or turned away. Generally, interest wanes over time among stakeholders with superficial interest in the land or resource. The natural

208. *Id.*

209. *See supra* Part I.A.

210. Interview 6.

attrition of meeting attendees can feel disheartening, but is in fact a natural and important part of the progression of building trust and relationships.

d. Encourage the collaborative to create its own structure and ground rules.

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

Agencies themselves cannot structure the collaborations. The collaborations themselves must build their structure. If an agency steps into the game knowing how it wants to structure a collaborative then they have started off fundamentally in a non-collaborative manner. I think there are a lot of factors that have to determine what the collaborative structure looks like, but it should not be a lead agency's role in determining that.²¹¹

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

Oh, issued regulations for a government collaboration? Heck no. I think that defeats the purpose of the collaboration. But the collaboration itself came to a consensus on a lot of governing documents. So, we decided how do you come to consensus, we defined what is consensus for the 4FRI, we set up some decision rules for making recommendations, what does it take to get a recommendation from the 4FRI stakeholder group, we have communication guidelines just to say if the 4FRI stakeholder group is ready to communicate that has to be agreed upon, you can't have one stakeholder going out willy-nilly saying, 'The 4FRI stakeholder group agrees to this,' it has to go through a process with the stakeholder group.²¹²

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

[The step of a collaboration organizing itself] is not always going to be necessary. If we are not seeking consensus from the group, it is my understanding that the Federal government can organize and convene meeting of the stakeholder collaboration group. It does not

211. Interview 3.

212. Interview 9.

need to self-organize, and, in my view, it is often more efficient if we do not place the requirement of self-organization upon the group.²¹³

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

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

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

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

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

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

The second barrier is just stakeholders to Forest Service. So it's an interesting lack of trust and the Forest Service is to blame for this too. I feel like the Forest Service responds [to] too many masters. They are a hierarchical organization and what the stakeholder group has seen is that they have developed a relationship locally with the

213. Interview 16.

planners here but the Forest Service regional office will wade in periodically and kind of mess up those stated areas of trust or, you know, the agreement areas. And I don't understand what the regional folks that do that are thinking. Because you know collaborat[ion] succeeds on these personal relationships, so you can't sit in the office in Albuquerque, and come over once every 18 months and drop the law, or drop the bomb.²¹⁴

This highlights the central tension between agencies as collaborators and agencies as administrators of other laws passed by Congress.²¹⁵ Also, the organizational structure and history of an organization can influence its ability to adapt to a collaborative governance.

A recurring theme among interviewees was the need to use third-party facilitators to overcome initial barriers and build trust. 4FRI used at least four facilitators before finding one who many believed moved the group towards a more trusting place.²¹⁶ Despite 4FRI's success, the recurring problems of difficult personalities and hierarchical constraints persist, proving that it can be difficult to achieve the goal of building trusts and relationships. Agencies and stakeholders alike should target improving contentious relationships to the extent that compromise can be reached; it may prove unrealistic—even counterproductive—to strive for friction-free relationships.

3. Maintaining a Collaboration

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

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

From a legal perspective, agencies should re-assess the applicability of FACA and changes to the laws regarding collaboration on a recurring basis. The flexible and adaptive nature of collaborations suggests that informal collaborations can become more influential over agency decisions over time, leading to different results in the decision-making process. Agencies should also be mindful of the relationship between stakeholder collaborations and the public participation considerations under the NEPA, along with other

214. Interview 9.

215. See *supra* Parts II.A, III.

216. See *supra* Part III.

relevant federal laws that might conflict with creating a high degree of shared decision-making space.

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

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

Just that constant openness, the 4FRI tries to do an evaluation every year, a self-evaluation, and it comes up in that self-evaluation who are we missing. I think that's a good process to include in your collaboration groups is that annual look around. Who are we missing? Who would be great?²¹⁷

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

There is no consensus on the metrics of a successful collaboration. One can imagine many variables, such as the length of the collaboration, natural resource metrics (such as a reduction in wildfires or number of porpoise entanglements), or feelings of the members towards the collaboration. Although social scientists have developed some rating systems, there remains considerable ambiguity. One stakeholder notes that he works on several collaborations, and has "two experiences and when the social scientists publish papers those two collaborations and score very differently in terms of their effectiveness."²¹⁸

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

Peer-to-peer learning about collaborative efforts are important to stakeholders and agencies alike. Many of the groups studied are engaged in attending formal and informal events to spread information and best practices about collaboration. Others, however, operate in a vacuum—insisting that their challenges are distinct from other experiences. In fact, there are common, if not universal, themes that emerge. Openness to candidly sharing negative aspects of collaboration, and learning from experience across agencies and resource type, appears to be one opportunity for growth.

217. Interview 18.

218. Interview 19.

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

V. CONCLUSION

It is easy to imagine that public lands policy is created by government officials in impressive marble buildings in Washington D.C. In practice, however, relevant policy inputs also come from foresters and environmentalists sitting around peeling laminate tables in drab concrete buildings in Flagstaff, Arizona. Public lands management demands some localized inputs, necessitated by the inherently local nature of land. Interdisciplinary research demonstrates that land is in fact part of broader socio-ecological systems; only in theory do laws governing natural things operate in a vacuum, divorced from myriad social, economic, and ecological factors. In reality, agencies governing ever-fluctuating natural conditions have always—and must now—incorporate such factors into decision-making.

Participatory governance tools are embedded throughout the administrative state, particularly in natural resources and land contexts. This Article seeks to identify and assess one such rarely-studied tool, that of stakeholder collaborations. As a descriptive project reporting ethnographic research, this Article prompts questions at the [somewhat infrequently explored] intersection of administrative law and natural resources. To what extent is collaboration working as a regulatory tool relative to formal legal approaches, such as top-down command and control or litigation? In the portfolio of approaches that agencies can take to achieve objectives, what is the relative value of stakeholder collaborations? Under which circumstances is collaboration preferable to alternative approaches?

Advocates of collaboration suggest that it improves agency decision-making, increases social acceptance of decisions, and builds trust among former adversaries who will work together in the future. Collaborations may,

however, exacerbate environmental justice issues by imposing a costly time commitment upon those who seek to influence the use of land and resource management. Assessment of the validity of these claims is limited, however, by a striking paucity of quantifiable information assessing the relative benefits and harms produced by collaboration relative to alternative tools—an area much in need of future research.

Collaborations appear to hold great potential for addressing deeply polarizing issues and overcoming collective action problems and coordination failures. The extension of agencies' use of collaborations to other policy spheres might prove particularly important with respect to *ex ante* preparedness for natural disasters. An onslaught of once-in-one-thousand-year natural events, including catastrophic hurricanes and wildfires, is highlighting the inability of unilateral government action to manage natural events. Policymakers need to consider private resources and alternative approaches. Amidst political pressure to prepare for inevitable future disasters, Congress may be well-served to turn to a collaborative model.

APPENDIX: INTERVIEW PROTOCOL

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

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

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

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

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

Interviewer Name:

Interviewee Name:

Date:

Location:

Recorded (y/n):

Disclosure (Read exactly as written):

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

Questions:

Describe your collaboration name and purpose?

What is the resource(s) being managed?

Who are the stakeholder participants?

What is a brief history of the organization? How did it form?

What federal statutes and executive orders as well as state and local laws apply to this collaboration?

Has your agency issued regulations to govern this collaboration?

What challenges have you encountered when conducting these collaborations?

Are there any best practices developed at specific agencies that could be usefully adopted by other agencies?

What factors should agencies consider in deciding how best to structure these collaborations?

How would you advise other agencies to ensure that they've included all the key stakeholders without convening a group that is so large as to become unwieldy?

What is the result of the collaboration? Do you create documents, tangible results? How do you measure your success?

(Do agencies typically issue a rule, reach some sort of agreement with a state or local government, contract with a private entity to carry out some function, or do something else?)

Are there any insights emerging from NRCs that might be generalizable to other areas, such as advisory committees, negotiated rulemakings, and informal stakeholder outreach before rulemaking? Could collaborative adaptive management be applied to other areas of government attempting to address “wicked problems?”