COOPERATIVE CONSERVATION: THE FEDERALISM UNDERPINNINGS TO PUBLIC INVOLVEMENT IN THE MANAGEMENT OF PUBLIC LANDS

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INTRODUCTION

There is a move afoot to re-engineer one form of public participation in public land management by forming "cooperative conservation" groups to aid federal land managers in the management, analytic and decision processes. Public participation has always been a major feature of modern environmental and natural resource law. But, because the extended public participation that typically accompanies the federal land management decision process is often so expensive and time consuming, some might scoff at the suggestion that more public participation is warranted. Yet, if there is a trend other than increased litigation in natural resource management, it is the expenditure of public tax dollars to increase the avenues, time, and resources devoted to collaboration and enhanced public involvement. Despite the expansive forums for public participation of all types, there does not appear to be a concurrent reduction in conflicts or litigation over federal resource management decisions. This is particularly disheartening given that a primary goal of public participation, to reduce litigation, has been little realized in many federal land management decisions.[1]

Cooperative conservation groups have long existed, both formally and informally, to assist federal land managers. They can be as simple as groups that come together to seek issue resolution through collaboration or to advance a common interest by providing comments during the scoping process for an Environmental Impact Statement ("EIS"), or as formal as advocacy organizations whose mission is to feed information into the decision process in an attempt to influence the outcome. Other functions that have been served by cooperative conservation groups include developing data for the decision process, coordinating community meetings, and making recommendations to federal resource managers. The degree of actual collaboration can vary greatly.

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1. *See, e.g.*, K.J. Gericke & L. Sullivan, *Public Participation and Appeals of Forest Service Plans*, 7 SOC'Y & NAT. RESOURCES 125, 126 (1994).

To foster this spirit of public involvement, President Bush recently issued an Executive Order to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation.[2] The Executive Order defines cooperative conservation as "actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals."[3]

A variety of statutes and regulations exist to guide public involvement, including the National Environmental Policy Act ("NEPA")[4] and the Federal Advisory Committee Act ("FACA"),[5] among others. Similarly, most federal land management statutes and regulations contain extensive provisions for public involvement. For instance, Congress has authorized the Bureau of Land Management ("BLM") to establish Regional Advisory Committees[6] and public notice procedures to assure the opportunity for citizen interests to be considered in the land planning and management processes.[7] In limited instances, Congress has delegated management authority over particular parcels of land to cooperative conservation groups comprised of nonfederal participants.[8]

There are many benefits that can result from incorporating cooperative conservation groups in federal land management endeavors. These collaborative groups may attempt to develop real consensus among local citizen, environmental, commercial and government interests; enhance federal conservation dollars through private participation, assistance, and donation; and create a participatory, decision-oriented process to supplant a bureaucratic process that feeds on itself and leads to litigation and more process, without decisions or outcomes.

Consistent with this desire for bigger voices, in their recent evolution, many cooperative conservation groups seek a more active role in managing public lands. In addition to having the more traditional window-in to the process that assures an opportunity to offer public com-

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2. Exec. Order No. 13352, 69 Fed. Reg. 52,989 (Aug. 26, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/08/20040826-11.html.

3. *Id.*

4. 42 U.S.C. § 4321 (2000); 40 C.F.R. §§ 1-1500.6 (2003).

5. 5 U.S.C. app. §§ 1-16 (2000).

6. 43 U.S.C. § 1739 (2000); 43 C.F.R. § 1784.0-1 (2003); Colo. Envtl. Coalition v. Wenker, 353 F.3d 1221 (10th Cir. 2004).

7. 43 U.S.C. § 1739(a), (e) (2000).

8. *See infra* notes 44 to 70.

ment, today's emerging concept involves more direct participation from inside the decision process.[9] However, in the course of examining the potential for cooperative conservation in public land management, the question arises as to how much control over the decision process may be delegated outside the federal government, or stated in the converse, how much control over the decision process must be retained by the federal land management agency? For instance, questions have arisen as to: the level of participation of a nonfederal entity in the federal decision process; whether a federal land management agency simply may cede decision authority to a local government to manage parcels of federal land in the community's backyard; and if not, whether nonfederal management is allowable if decision criteria are provided?

This paper uses the term "cooperative federalism" to identify the constitutional authority for cooperative conservation, or the sharing of federal authority with nonfederal entities in the management of public lands.[10] The federalist underpinnings of the United States government derive in part from *The Federalist Papers*[11] and the Tenth Amendment to the Constitution.[12] In its simplest form, the concept of federalism is encapsulated in the Tenth Amendment, which states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[13] Thus, the concept of federalism in relation to the management of public lands refers to federal power shared with the states or the people to manage in a cooperative manner. Although the concept of cooperative federalism has not been frequently examined by the courts, case authority exists that may determine the contours of cooperative federalism and the

9. This is not dissimilar from certain settlements where environmental litigants have sought to participate in the internal decision processes of mineral development operations or in adaptive environmental management. *See, e.g.*, Robert D. Comer & P.V. O'Connor, *The Changing Role of Local Influence in Mineral Development, Permitting and Operations*, 47 ROCKY MT. MIN. L. INST. 3-1 (2001); Denise A. Dragoo, *What's new with NEPA?*, 47 ROCKY MT. MIN. L. INST. 22-1 (2001).

10. The term "public land" has been used to denote lands that once were a part of the public domain and today are managed by the Bureau of Land Management. The Federal Land Policy and Management Act defines the term "public lands" to mean "any land and interest in land owned by the United States within the Several States *and administered by the Secretary of the Interior through the Bureau of Land Management,* without regard to how the United States acquired ownership . . . ." 43 U.S.C. § 1702(e) (2000) (emphasis added). This paper speaks broadly to lands managed by the Department of the Interior and the U.S. Forest Service and frequently uses the terms public lands and federal lands interchangeably.

11. THE FEDERALIST NO. 47 (James Madison).

12. U.S. CONST. amend. X.

13. *Id.*

ultimate reach of cooperative conservation as a tool in public land management.

This paper first examines the constitutional and federalism framework for cooperative conservation and then explores the statutory context and limitations that affect the potential for cooperative conservation in public land management and environmental conservation. This paper suggests that the constitutional principles governing cooperative federalism delegations by Congress to the Executive Branch provide useful guidance for evaluation of executive delegations to cooperative conservation groups, although delegations initiated by the Executive Branch of the government are potentially subject to greater restriction and scrutiny by the courts.

I. CONSTITUTIONAL FRAMEWORK FOR COOPERATIVE FEDERALISM IN PUBLIC LAND MANAGEMENT

Constitutional discussions of federal land management typically focus on congressional authority under the Property Clause and are somewhat tangential to evaluating the degree of cooperation permissible in federal land management and the decision processes that may be delegated to and by the Executive Branch of government. Perhaps the constitutional principle most analyzed in reviewing federal delegations of authority is separation of powers between the three branches of government. The importance of separation of powers principles was recognized by James Madison in stating, "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that of which the [separation of powers] is founded."[14]

The Constitution vests legislative authority in the Congress[15] and empowers the Executive Branch to execute those laws.[16] Yet, Congress often leaves "gaping holes in its legislative pronouncements."[17] As a result, while the Constitution precludes Congress from delegating its legislative power to the Executive or Judicial Branches of government,[18] "its legislative handiwork" frequently requires the *de facto* exercise of legislative authority by the Executive Branch.[19] In *American Trucking*, Jus-

14. THE FEDERALIST NO. 47, at 373 (James Madison) (John C. Hamilton ed., 1873).
15. U.S. CONST. art. I, § 1.
16. U.S. CONST. art. I, § 1, art. II, § 3, art. 8, § 18.
17. Field v. Clark, 143 U.S. 649, 692 (1892).
18. This principle generally is termed the nondelegation doctrine. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).
19. *Clark*, 143 U.S. at 692.

tice Scalia recognized that while Article I of the Constitution does not permit the delegation of legislative power, it does allow Congress to delegate decision-making authority provided it is accompanied by an intelligible principle.[20] Although protection of the constitutionally-crafted tripartite system of government drives decisions of the Court,[21] the Court generally has given wide latitude to congressional delegations of authority.

The question of congressional delegation to the Executive was first examined in *Field v. Clark*,[22] where the Court upheld the constitutionality of the Tariff Act of 1890. The Tariff Act contained a "free list" of almost three hundred specific articles that were exempted from import duties unless otherwise provided for by the Act. Section 3 directed the President to suspend the exemption for sugar, molasses, coffee, tea, and hides "whenever, and so often" as he should be satisfied that any country producing and exporting those products imposed duties on the agricultural products of the United States that he deemed to be "reciprocally unequal and unreasonable."[23]

The Court recognized the foundational separation of powers principle stating, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[24] Despite this admonition, the Court upheld the delegation under the Tariff Act, ruling that the power of the President to suspend the Act's exemption from import duties was not the creation of law but rather the execution of an act of Congress.[25] This conclusion was dependent on the facts that the power to suspend the exemption (1) was contingent on the occurrence of a specified event; (2) imposed a duty (not discretion) on the President once he determined the contingency had arisen; and (3) required an exercise by the President of the policy that Congress had embodied in the Act. In so ruling, the Court laid the groundwork for later holdings that an "intelligible principle" must be included in the delegation of authority to guide its exercise by the Executive.

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20. *Am. Trucking*, 531 U.S. at 472.

21. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989). This case, including the dissent by Justice Scalia, provides thoughtful discussion of the Constitutional principles underlying cooperative federalism.

22. *Clark*, 143 U.S. at 680.

23. *Id.*

24. *Id.* at 692.

25. *Id.* at 693.

The intelligible principle doctrine, intuited by the Court from the Constitution, has its origin in *Hampton v. United States,*[26] but is best remembered as one of the lessons of *A.L.A. Schechter Poultry Corp. v. United States.*[27] *Schechter Poultry* is perhaps the most well known delegation case. It invalidated a congressional delegation during the New Deal era of the Great Depression—a particularly tumultuous time in our nation's history. The case arose from indictments brought against chicken wholesalers under the National Industrial Recovery Act ("NIRA").[28] One purpose of NIRA was to accelerate the nation's economic engine during the fallout of the Great Depression.[29]

NIRA authorized the President to approve a "code" of fair competition advanced by a trade or industry group, subject to executive modification, upon finding that the code imposed no inequitable restrictions, was truly representative, and was not designed to promote monopolies or otherwise eliminate, oppress or discriminate against small enterprises.[30] President Roosevelt had approved a trade association code governing aspects of the sale of chickens in the New York metropolitan area. Although generally cited as a nondelegation case, *Schechter Poultry* in fact recognizes congressional delegation as a permissible function, stating that the "Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits . . . ."[31] Yet, "the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[32]

In evaluating the code, the Court sought to determine whether Congress "has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."[33] In *Schechter Poultry,* the Court required Congress to identify "standards of

26. 276 U.S. 394 (1928).
27. 295 U.S. 495 (1935).
28. Act of June 16, 1933, ch. 90, 48 Stat. 195 (current version at 15 U.S.C. §§ 701-712 (2000)).
29. *Id.* at Title I.
30. *Schechter Poultry*, 295 U.S. at 521.
31. *Id.* at 530.
32. *Id.* (citing Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935)).
33. *Id.*

legal obligation" to serve as the measure for compliance with its dictates.[34]

In rejecting the "chicken code," the Court held that the provision of NIRA

> is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied . . . . Instead[,] . . . it authorizes the making of codes to prescribe them. . . . [It] sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion.[35]

The Court described the grant of discretion to the President to enact law under NIRA as "unfettered,"[36] and the concurrence of Justice Cardozo described NIRA as a "delegation running riot."[37]

More recently, in upholding a delegation to establish the United States Sentencing Commission for the purpose of identifying proscriptive sentencing guidelines, the Court in *Mistretta v. United States* stated that:

> Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . .
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> . . . .
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> . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.[38]

The federal courts have upheld most congressional delegations of authority to the Executive Branch, provided the intelligible principle doctrine is satisfied.[39] Although not precisely the same, the principles embodied in the congressional delegation cases form the predicate for review of cooperative federalism through agency delegations of authority to cooperative conservation groups interested in public land management.

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34. *Id.* at 529-30.
35. *Id.* at 541.
36. *Id.* at 542.
37. *Id.* at 553.
38. *Mistretta*, 488 U.S. at 372, 379 (1989) (internal citations omitted).
39. *Am. Trucking*, 531 U.S. at 474.

II. CONGRESSIONALLY MANDATED COOPERATIVE FEDERALISM IN PUBLIC LAND MANAGEMENT

The Property Clause of the Constitution[40] grants Congress broad discretion to manage public lands,[41] which seems to include the authority to delegate federal land management responsibilities to third parties. In *Kleppe v. New Mexico,* the Court stated that the Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the [United States].[42] In *Camfield v. United States*,[43] the Court first defined the breadth of the Property Clause, stating that "the general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."[44] Independent of the general Organic Act delegation authorities, discussed *infra* Part IV, Congress has made several forays into cooperative federalism by delegating authority on an experimental basis for nonfederal management of specific parcels of public lands. The scope of the shared responsibility varies in each instance.

Although it has occurred infrequently, Congress occasionally has vested significant authority over federal resources in private entities, including the complete transfer of decision-making authority over federal lands. Perhaps the most well known experiment in cooperative federalism is California Senator Dianne Feinstein's Quincy Library Group Forest Recovery Act.[45] The Act establishes an alternative management strategy and grants the Quincy Library Group responsibility to "protect trees and forests and wood products, stored wood, and wood in use directly on [2.5 million acres of] the National Forest System [in Northern California] and, in cooperation with others, on other lands in the United States, from natural and man-made causes."[46] Specific statutory delegations to the Group include fuel break construction, group and individual

40. U.S. CONST. art. IV, § 3, cl. 2.

41. Kleppe v. New Mexico, 426 U.S. 529 (1976); Calif. Coastal Comm'n v. Granite Rock, 480 U.S. 572 (1987); Leo Sheep v. United States, 440 U.S. 668 (1979); Light v. United States, 220 U.S. 523 (1911).

42. *Kleppe,* 426 U.S. at 535 (citing U.S. CONST. art IV, § 3, cl. 2).

43. 167 U.S. 518 (1897).

44. *Id.* at 525.

45. Quincy Library Group Forest Recovery Act, Pub. L. No. 105-277, div. A § 101(e), 112 Stat. 2681 (1998).

46. *Id.*

tree selection, and riparian management. The Quincy Library Group developed the "Quincy Library Group Community Stability Plan" to achieve desired management objectives. Membership in the Group is strictly voluntary, and while the Quincy Library Group has no enforcement authority, the Act mandates that the Secretary of Agriculture must implement the recommendations of the Group.[47]

Similarly, the purpose of the Valles Caldera Preservation Act[48] is to preserve, through an experimental management regime, a national monument and surrounding forest land on the Baca Ranch in New Mexico. The Act seeks to incorporate elements of public and private administration to promote long-term financial sustainability for management of the Valles Caldera landscape.[49] The Act instituted cooperative conservation through a Board of Trustees, which is charged with a broad grant of authority to (1) provide management and administrative services for the area; (2) establish and implement policies that serve the purposes of the Act; (3) collect and disperse funds; and (4) work with others, including state, tribal, and federal entities, to advance the Preserve's management objectives.[50] The Secretary of Agriculture may assess performance of the Trustees' efforts, but if dissatisfied, may only make recommendations to Congress.[51] The Secretary may not act directly on the management activities of the Trustees, although she may suspend any Trustee decision found to be inconsistent with the purposes for which the Preserve was established.[52]

The Presidio Trust[53] was established to manage a former military base near the Golden Gate Bridge and Golden Gate National Park in California. Portions of these lands remain subject to federal management while other lands have been designated for management by the Trust. The statute provides generalized management direction and policy statements for the Board of Directors and grants broad management discretion to the Trustees.[54] There is no federal involvement in management of the lands subject to the Trust.

47. *Id.*
48. Valles Caldera Preservation Act, Pub. L. No. 106-248, 114 Stat. 598 (2000).
49. *Id.* at § 102.
50. *Id.* at § 107.
51. *Id.* at § 109(c).
52. *Id.*
53. Omnibus Parks and Land Management Act of 1996, Pub. L. No. 104-333, 110 Stat. 4093 (codified at 16 U.S.C. § 460(bb) (1996)).
54. *Id.* at § 103.

The Columbia River Gorge National Scenic Area Act[55] ("Columbia Gorge Act") established a National Scenic Area and created the Columbia River Gorge Commission ("Commission") to manage and administer the waterway. The Columbia Gorge Act also established a "partnership between the Federal Government, the states of Oregon and Washington, and the nearly 50 units of local government within the Columbia River Gorge for the purpose of protecting and enhancing" the property and resources within the Gorge.[56] The Act also ratified an interstate compact between the states of Oregon and Washington—a solution seen by one court as an "innovative solution to a difficult land preservation problem."[57] Similar to the situation in the Niobrara River case, discussed *infra* Part IV, little federal land borders the Columbia River Gorge in the Scenic Area, although the private land along much of the Columbia River is surrounded by National Forest System lands and is within the Forest boundary. The congressionally chartered Commission consists of several members from each state, with only a single, nonvoting Forest Service representative. Congress specifically mandated that the Commission prepare resource inventories and other studies and conduct land use planning and zoning for the Scenic Area.[58] Congress also funded the Commission's activities, including appropriations for land use acquisition, local government payments to offset tax revenue losses resulting from formation of the scenic area, economic development grants, and appropriations for the development of recreational and interpretive facilities.[59] The legislation obligates the Secretary of Agriculture to develop guidelines, in consultation with the Commission, for management of the Scenic Area lands by the Commission.[60] All land use within the Columbia River Gorge Scenic Area, whether private, federal, or local, must be consistent with the management plan developed by the Commission, which also conducts the management plan consistency reviews. If the Commission disagrees with any recommendations of the Secretary, it may override that recommendation by a two-thirds vote.[61]

The Columbia River Gorge Commission is one of the few examples of cooperative federalism that has been challenged on constitutional

55. Columbia River Gorge National Scenic Area Act, Pub. L. No. 99-663 (codified as amended at 16 U.S.C. §§ 544-544p (1986)).

56. 132 Cong. Rec. 29,496 (1986) (statement of Sen. Hatfield).

57. Columbia River Gorge United v. Yeutter, 960 F.2d 110, 115 (9th Cir. 1992).

58. Columbia River Gorge National Scenic Area Act § 6.

59. *Id.* at §§ 14, 16.

60. *Id.* at § 8(f).

61. *Id.* at § 6(f)(3)(B).

grounds. In *Columbia River Gorge United v. Yeutter*,[62] individual property owners organized "Columbia Gorge United–Protecting People and Property" and challenged the constitutionality of the Columbia Gorge Act under the Commerce,[63] Property,[64] Compact,[65] and Equal Protection[66] Clauses and the Tenth Amendment[67] to the Constitution. The Court of Appeals for the Ninth Circuit held that the Act did not violate the authority granted to Congress under any of the constitutional claims.[68]

The final example of congressionally authorized cooperative conservation considered by this paper is the Upper Delaware River Council ("Council") legislation, which is advisory in nature only. The Council prepares a River Management Plan, provides a forum for issues affecting river management, conducts conformance reviews, and monitors resource threats and impacts to land and water resources within the legislated boundary of its member communities.[69] The Council is composed of representatives from participating New York towns, Pennsylvania townships, state governments, and the Delaware River Basin Commission, which is an interstate authority. The National Park Service ("NPS") also participates as a nonvoting member through a cooperative agreement. The role of the Council is merely as an advisor, making recommendations to the Secretary of the Interior, who retains full authority to accept or reject those recommendations and to evaluate their consistency with the River Management Plan.[70]

These examples of congressional delegations explore a breadth of options available in the establishment of cooperative conservation groups and are consistent with the authority granted to Congress by the Property Clause of the Constitution. Congress enjoys plenary authority over management of federal lands and there is no explicit constitutional requirement that the Executive Branch must be the entity responsible for their management. However, delegation of authority is not necessarily unlimited and may be constrained by constitutional separation of powers principles, especially the nondelegation and intelligible principle doctrines.

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62. 960 F.2d 110 (9th Cir. 1992).
63. U.S. CONST. art. 1, §8, cl.3.
64. U.S. CONST. art. 4, §3, cl. 2.
65. U.S. CONST. art. 1, §10, cl. 3.
66. U.S. CONST. amend. V.
67. U.S. CONST. amend. X.
68. *Yeutter*, 960 F.2d at 113, 114.
69. National Parks and Recreation Act of 1976, Pub. L. No. 95-625, 92 Stat. 3467 (codified at 16 U.S.C. §1274(19) (1978)).
70. *Id.* at § 704.

In those limited instances where Congress has delegated management authority to a cooperative conservation group, it also has established both a management policy and an intelligible principle for managing federal resources, which often contain limitations as well. In each instance, Congress provided clear management objectives to the managing entity, thereby providing a standard for carrying forward its legislative intent. However, the issue is somewhat more complicated when delegations based on cooperative federalism are initiated by the Executive Branch and the courts have more aggressively scrutinized these actions.

III. THE STATUTORY FRAMEWORK FOR COOPERATIVE FEDERALISM IN EXECUTIVE DELEGATIONS

In *United States Telecom Ass'n v. FCC*,[71] the United States Circuit Court for the District of Columbia examined the question of permissible delegations by the Executive Branch to nonfederal entities. In order to foster a competitive telecommunications market, the Telecommunications Act of 1996 ("Telecom Act")[72] authorized the Federal Communications Commission ("FCC") to require telecommunications carriers already established in a locality (incumbent local exchange carrier or "ILEC") to make particular network elements available to their competitors (competitive local exchange carrier or "CLEC"). The process of making these network elements available to a CLEC was termed "unbundling." In identifying the particular network elements the ILECs would have to "unbundle" and make available to their competitors, the FCC was to "consider, at a minimum, whether . . . the failure to provide access to such network elements would *impair* the ability of the [CLEC] seeking access to provide the services that it seeks to offer."[73] In the face of widely varying telecommunications markets across the country, the FCC "subdelegated"[74] its authority to outside, nonfederal parties—specifically, state commissions—to determine whether a CLEC would be "impaired" by failure to unbundle network elements. The FCC believed

71. 359 F.3d 554 (D.C. Cir. 2004), *petition for cert. filed* (U.S. June 30, 2004) (No. 04-18), (U.S. Sept. 17, 2004) (No. 04-15). This opinion was written by Senior Circuit Judge Stephen Williams who taught Administrative Law at the University of Colorado during portions of the 1970s and 1980s.

72. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 151 *et seq.* (1996)).

73. *U.S. Telecom*, 359 F.3d at 562; 47 U.S.C. §251(d)(2) (2000) (emphasis added).

74. The term subdelegate is often used to describe an Executive Branch delegation to a third party, typically a nonfederal entity. *See, e.g.*, United States v. Widdowson, 916 F.2d 587, 592-93 (10th Cir. 1990); *U.S. Telecom*, 359 F.3d at 564-66.

that an impairment determination by the state commission would allow for a more "nuanced" decision specific to the particular local market.[75]

The court disagreed and ruled that allowing state commissions to determine impairment was an improper subdelegation. It found that the FCC had improperly delegated the critical determination of whether the statutory impairment requirement had been satisfied.[76] The court also found that the FCC had improperly delegated to the states the crucial decisions of defining and applying the statutory impairment standard to the specific circumstances of the local markets.[77] Notably, the Telecom Act is silent and does not specifically authorize delegation to nonfederal entities. Thus, in invalidating the FCC delegation to the state commissions, the court stated that:

> The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to . . . [congressional delegations to the Executive Branch]. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.[78]

Although the court recognized that, where provided by Congress, delegations in the nature of cooperative federalism are authorized,[79] the court announced a standard for executive delegations not clearly advanced by the cases cited in support thereof.[80] In fact, the *U.S. Telecom* court characterized its rule as being "strongly suggested," rather than being mandated, by case precedent.[81]

The court did, however, identify several opportunities for nonfederal input in agency decision-making short of agency subdelegation of decision-making authority. By way of example, in *dicta,* the court specifically recognized three instances where input into the FCC decision-making process can occur without the need for an explicit congressional

75. *U.S. Telecom*, 359 F.3d at 563.

76. *Id.* at 568.

77. *Id.*

78. *Id.* at 565.

79. The concept of cooperative federalism may be even more appropriate in the context of federal land management when contrasted with regulatory functions as exercised by agencies such as the FCC. It is noteworthy that virtually every major environmental law specifically authorizes the delegation of authority to state, local, and tribal governmental entities to administer federal environmental regulatory programs.

80. *See infra* notes 99-116 and accompanying text.

81. *U.S. Telecom*, 359 F.3d at 565.

mandate. These include: (1) where a federal agency establishes a reasonable condition for granting federal approval, as when a federal agency entrusted with broad discretion may condition its grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination;[82] (2) where a federal agency uses a nonfederal entity, such as a state agency or a private contractor, to provide the agency with factual information;[83] and (3) where a federal agency receives advice and policy recommendations from an outside entity, provided the agency itself makes the final decision. The court noted, however, that an agency may not simply "rubber-stamp" determinations of others made under the guise of seeking their advice,[84] nor may vague or inadequate assertions of final review authority save an unlawful subdelegation.[85]

Thus, *U.S. Telecom* announces a standard that any potential for cooperative federalism in public land management is dependent on some form of congressional authorization. However, *U.S. Telecom* should not be read so narrowly as to preclude appropriate delegations to nonfederal entities, especially where congressional authorization is explicit. Virtually every organic act governing the management of federal lands contains some provision for cooperation with interested public parties in the land management decision process separate from the public participation provisions of NEPA, FACA and other federal statutory and regulatory processes. Review of select organic statutes governing resource management by several federal agencies is therefore useful to understanding the scope of cooperative federalism authorized by Congress and the scope of permissible delegation by the Executive Branch to cooperative conservation groups.

IV. STATUTORY OPPORTUNITIES FOR COOPERATIVE FEDERALISM IN PUBLIC LAND MANAGEMENT

While the specific authority of the relevant organic statutes for the land management agencies differs in their particulars, to varying degrees they all authorize the Secretary of the Interior to enter into agreements with outside entities to participate in some aspect of federal resource

82. *Id.* at 566-67.

83. *Id.* at 567 (citing Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation, 792 F.2d 782, 795 (9th Cir. 1986)).

84. *U.S. Telecom,* 359 F.3d at 568 (citing *Assiniboine & Sioux Tribes,* 792 F.2d at 795).

85. *Id.* (citing Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 18-20 (D.D.C. 1999)).

management separate and apart from the opportunity to provide comment during the decision process.

The Federal Land Policy and Management Act ("FLPMA")[86] contains perhaps the broadest delegation of authority among the Department of the Interior land management agencies and the U.S. Forest Service. FLPMA is a modern law that governs the management of lands administered by the BLM. It authorizes the Secretary of the Interior to "enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands."[87] The breadth of this statutory authority to enter into contracts and cooperative agreements for public land management almost seems to be limitless.

In 1960, the Multiple Use and Sustained Yield Act[88] ("MUSY") updated the U.S. Forest Service Organic Act of 1897.[89] MUSY provides broad discretion to engage in cooperative federalism in management of National Forest System lands and authorizes the Secretary "to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons" for a variety of purposes, including pollution control, education, forest protection, law enforcement, and coordinated management.[90] In addition, the National Forest Management Act of 1976 provides for substantial public involvement in the Forest Service decision-making process.[91]

The National Park Service Organic Act grants the Secretary broad authority to manage the Parks, establish advisory committees, and enter into cooperative agreements for research and training throughout the National Park System.[92] NPS's discretion to delegate to cooperative conservation groups appears to be somewhat more limited,[93] although it has been granted significant additional authority to develop partnerships with volunteers and other parties.[94]

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86. 43 U.S.C. § 1791 *et seq.* (2000).

87. 43 U.S.C. § 1737(b) (2000). The legislative history of FLPMA states that Congress did "not intend any diminution in the authority and responsibility of the Secretaries to make public land and National Forest decisions." H.R. Rep. No. 94-1163, at 7 (1976).

88. 16 U.S.C. §§ 528-31 (2000).

89. 16 U.S.C. § 475 (2000).

90. 16 U.S.C. §§ 551(a), 565(a)(1), 568, 583(a) (2000).

91. 16 U.S.C. § 1604(b) (2000).

92. 16 U.S.C. §§ 1, 1-2 (2000).

93. High Country Citizens' Alliance v. Norton, No. 03-WY-1712-CB (D. Colo. April 19, 2004) (order denying motion to dismiss at 22) (without analysis, concluding general lack of NPS authority to subdelegate).

94. There are literally hundreds of national and location-specific NPS authorities governing volunteer and partnering opportunities contained in Title 16 of the U.S. Code.

The National Wildlife Refuge Improvement Act ("Refuge Act") governs the management of wildlife refuges administered by the U.S. Fish and Wildlife Service ("FWS"). It mandates an active public participation process in the preparation of Comprehensive Conservation Plans for wildlife refuge management and requires active coordination by the FWS with adjacent landowners, the state fish and game agency, and other federal agencies.[95] The legislative history to the Refuge Act amendments of 1995 states that:

> The Secretary may enter into cooperative agreements with State fish and wildlife agencies and other entities [f]or the management of programs on, or parts of, refuges, subject to standards established by and the overall management oversight of USFWS. On some existing refuges, State agencies cooperate with USFWS by participating in the management of specific programs, such as hunting law enforcement or other public use-related activities. State[s] also cooperate by managing habitat on parts of individual refuges, particularly in cases where refuge lands are adjacent to or surrounded by State lands.[96]

The same legislative history further provides that "[i]n all these situations, USFWS retains management oversight and is ultimately responsible to ensure that allowed uses remain compatible and that habitat is managed consistently with the purposes for which the refuges were established."[97] Thus, the Refuge Act seems to require that ultimate decision-making authority rest with the FWS while allowing management authority to be delegated in certain circumstances.

The limited case law suggests that delegation by an agency to a third party appears to require that the delegation be authorized by statute and perhaps also that the agency retain ultimate decision-making authority. The cases have not delved into whether decision-making authority can be delegated if a decision framework is provided to the nonfederal entity charged with management responsibility.[98] Presumably, an intelligible principle also must accompany the delegation to guide the delegee's actions. Despite these principles, instances of executive delegation to a third party have been upheld less frequently than legislative delegations. Typically, these delegations are found defective for deviating from the statutory purpose or where potential bias has been inferred.

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95. 16 U.S.C. §§ 668dd(a)(4)(C), (a)(4)(E) (2000).

96. H.R. Rep. No. 104-218, at 12 (1995).

97. *Id.*

98. Perot v. Fed. Election Comm'n, 97 F.3d 553, 559-60 (D.C. Cir. 1996), *reh'g denied,* 96-5288 (Oct. 15, 1996) (suggesting that delegation with decision criteria is acceptable).

No true evaluation of an agency delegation of decision-making authority under a statute as broadly permissive as FLPMA has yet been subject to judicial scrutiny employing the analytic considerations identified by this paper.

In *National Park and Conservation Ass'n v. Stanton,*[99] Congress had directed the NPS to manage approximately ninety-five miles of the Niobrara River in Nebraska under the Wild and Scenic Rivers Act. Most of the protected river segments run through private land. In designating the river,[100] Congress established the "Niobrara Scenic River Advisory Commission . . . [to] *advise* the Secretary of the Interior . . . on matters pertaining to the development of a management plan, and the management and operation of [sections of the wild and scenic Niobrara segment lying outside federal National Wild River boundaries]."[101]

In implementing this authority, NPS chose "management by a local council, which would include members from various county and state agencies, as well as local landowners and business people."[102] No federal representation was included on the council. Perhaps most importantly, rather than the council serving in an advisory capacity, NPS delegated its decision-making authority to the council.[103] As a result, the council was not just advising NPS, as required by statute, but instead was making the management decisions required of NPS by the Act. In finding this delegation unlawful, the court concluded that had NPS "provided for NPS management with *involvement* of local entities" rather than management *by* local entities, the delegation most likely would have passed muster.[104] The court also concluded that Congress had not intended to undermine the Secretary's duties or to shift them to any other entity.[105] Thus, while many refer to *Niobrara* as a nondelegation case,[106] in reality the court concluded on relatively narrow grounds that the agency actually violated the terms of the statutorily authorized use of the council for advice—as distinguished from a statutory grant of decision-making authority. The court did not consider whether independent

99. 53 F. Supp. 2d 7 (D.D.C. 1999).

100. Niobrara Scenic River Designation Act of 1991, Pub. L. 102-50, 105 Stat. 254, *codified at* 16 U.S.C. § 1274(a) (1991) (emphasis added).

101. *Id.* (emphasis added).

102. *Nat'l Park & Conservation Ass'n*, 54 F.Supp.2d at 10.

103. *Id.* at 21.

104. *Id.* at 10, 20 (emphasis added).

105. The court also raised concerns regarding compliance by nonfederal entities with other federal statutes where the obligation to comply is incumbent upon the federal government, such as with NEPA. However, there are innumerable examples where nonfederal entities perform such federal activities as EIS preparation under the supervision of a federal agency.

106. *See U.S. Telecom,* 353 F.3d 554.

delegation authority existed under the National Park Service Organic Act or the Wild and Scenic Rivers Act.[107]

In *Trustees for Alaska v. Watt,*[108] the FWS had delegated authority to administer certain activities in the Arctic National Wildlife Refuge to the U.S. Geological Survey and not to a state or private entity. Thus, the intended delegee was a sister Department of the Interior agency. The court held this delegation unlawful, even though it was to another federal agency, on the grounds that Congress specifically had granted authority to administer the Refuge to the FWS.[109] Thus, this case was decided on somewhat different grounds, finding a lack of statutory authority under ANILCA[110] and the Refuge Act for refuge management to be vested anywhere but within the FWS.[111] The 1995 Refuge Act Amendments, discussed *supra* Part IV, may alter the scope of this limitation in certain regards.

In *Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation,*[112] the BLM had delegated the Montana State Board of Oil and Gas Conservation authority to manage oil and gas leasing on Indian lands. The court found this delegation to be inconsistent with the federal government's fiduciary duty to protect tribal interests and with the Indian Mineral Leasing Act.[113] In *Natural Resources Defense Council, Inc. v. Hodel,* the BLM delegated authority to grazing lessees to manage grazing leases. The delegation was found to be inconsistent with the Taylor Grazing Act because a fundamental purpose for enacting the Act was to remove this very management authority from the lessees.[114] The court also concluded that the BLM delegation had failed "to retain necessary governmental authority to enforce overgrazing prohibitions" and constituted an unlawful "abdicat[ion of] the Secretary's statutory duty."[115] In each of these cases, the courts found the delegations unlawful based on narrow statutory construction grounds, with little analysis and without consideration of appropriate statutory delegation authority. The courts have not specifically articulated clear principles to guide cooperative federalism in public land management delegations to cooperative conservation groups.

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107. 16 U.S.C. § 1271 *et seq.* (2000).
108. 524 F. Supp. 1303 (D. Alaska 1981), *aff'd,* 690 F.2d 1279 (9th Cir. 1982).
109. *Id.* at 1309.
110. Alaska Native Interest Land Conservation Act, 16 U.S.C. §§ 3101 *et seq.* (2000).
111. This case was decided prior to the 1995 amendments to the Refuge Act.
112. 792 F.2d 782, 794-96 (9th Cir. 1986).
113. *Id.* at 789; Indian Mineral Leasing Act, 25 U.S.C. § 396 *et seq.* (2001).
114. Natural Res. Def. Council, Inc. v. Hodel, 618 F. Supp. 848, 868-69 (E.D. Cal. 1985).
115. *Id.* at 853.

If the intelligible principle standard of the congressional delegation doctrine applies, a relatively simple standard emerges: any executive delegation of a cooperative federalism nature must articulate an intelligible principle standard for the delegation. Similarly, if the *U.S. Telecom* standard applies, the delegation also must be authorized by the relevant statute. These rules are rational and protect the tripartite system of government as defined by the delegation case law; Congress legislates and the agency implements pursuant to its granted authority, even where authority is exercised through a third party delegation in accordance with statutory parameters. Although *U.S. Telecom* strongly suggests explicit statutory authorization for executive delegations is required, it is not inconceivable that *U.S. Telecom* goes too far,[116] and that an executive delegation could be valid provided it is "not inconsistent" with guiding statutory authority.

Evaluation of these issues in light of the statutory authority of FLPMA may provide some guidance. FLPMA grants broad authority for a cooperative federalism approach to public land management. It provides that "the Secretary may enter into contracts and cooperative agreements involving the management, protection development, and sale of public lands."[117] The subject matter of the eligible "contracts and cooperative agreements" is quite encompassing, and includes an array of activities on BLM-administered public lands. FLPMA provides for six primary uses of BLM land, which include grazing, recreation, mining, and wildlife.[118] In addition, the Secretary may conduct investigations, studies, and experiments, on her own initiative or in cooperation with

116. It is noteworthy that in addition to penning the decision in *U.S. Telecom*, Judge Williams authored the D.C. Circuit Court opinion in *American Trucking*, in which the U.S. Supreme Court overturned the nondelegation rulings.

117. 43 U.S.C. § 1737(b) (2000). It is not clear whether FLPMA uses the terms "contracts and cooperative agreements" in their common usage or as terms of art as provided by federal procurement law. If defined by statute, a procurement contract is one that governs a relationship with the United States where the "principal purpose of the [contract] . . . is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6303 (2000). A cooperative agreement governs a relationship with the United States where the "principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law . . . instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and [where] . . . substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated." *Id.* Thus, based on these definitions, broad discretion appears to exist to enter into management agreements for BLM lands based on cooperative federalism, regardless of whether these terms are intended in their common usage or as terms of art.

118. 43 U.S.C. § 1702(l) (2000).

others, involving the management, protection, development, acquisition, and conveying of the public lands.[119]

Application of the intelligible principle standard may open an avenue for decision-making by the collaborative partner where BLM provides a management framework. In other words, it is conceivable that the agency may identify a management or decision-making framework and then allow the collaborative group to make land management decisions consistent with that framework. For instance, the agency could provide criteria for management of a fuels-thinning project to control wildfires by cooperative conservation groups. This approach is consistent with the intelligible principle standard identified for congressional delegation to the Executive Branch. It is possible that a court would also require BLM to retain enforcement authority and to assure that decisions are consistent with the intelligible principles identified to guide the delegation.[120]

However, there may be a further limitation on whether an Executive Branch delegation is a permissible action and more questions exist than do answers. In day-to-day management of the federal government, a somewhat different limitation on delegation often is applied to guide federal contracting activities. The "inherently governmental function" concept takes its contours from the Supreme Court's decision in *Buckley v. Valeo*.[121] An inherently governmental function is "so intimately related to the public interest as to mandate performance by government personnel . . . [and] requires the exercise of substantial discretion in applying government authority and/or in making decisions for the government."[122] The Department of Justice, Office of Legal Counsel ("OLC"), has stated that:

> [U]nder *Buckley* private individuals may not determine the policy of the United States, or interpret and apply Federal law in any way that binds the United States or affects the legal rights of third parties. Nor can any private individuals make funding decisions. . . . Properly appointed Federal officials must maintain both legal and effective con-

119. *Id.* at § 1737(a).

120. *See Hodel*, 618 F. Supp. 848.

121. 424 U.S. 1 (1976).

122. OFFICE OF MANAGEMENT AND BUDGET, Office of Federal Procurement Policy Letter 92-1 (Sept. 23, 1992), http://www.whitehouse.gov/omb/circulars/a076/a076sa5.html (purporting to define inherently federal function from a policy, but not legal, perspective). Although OMB Policy Letter 92-1 has been superceded, this provision has not changed. *See* OFFICE OF MANAGEMENT AND BUDGET, OMB Cir. No. 1-76, Rev. (May 29, 2003) (on file with author).

> trol over the direction of United States Policy in this area as well as control over the allocation of Federal funds.[123]

Examples of inherently governmental functions include: criminal investigations; prosecutions and other judicial functions; ultimate control over the acquisition, use or disposition of United States property; management of government programs requiring value judgments; and selection of program priorities and actions that significantly affect the life, liberty or property of private citizens.[124] Establishment of permit conditions and permit issuance to private parties could be an inherently governmental function under the *Buckley v. Valeo* standard.

Thus, these two standards, one intuited by the Court from the Constitution and one ordained by the Executive Branch, are not identical, but do overlap. The inherently governmental function policy limitation may be a broader restriction or it simply may be an overlay on the intelligible principle standard identified in *Schechter Poultry*. Nonetheless, it is clear that these two standards must either be harmonized or distinguished.

V. COOPERATIVE FEDERALISM IMPLICATIONS FOR CONSERVATION

The President of the United States[125] and the Department of the Interior have recognized the benefits of enhanced public involvement, particularly local involvement, in advancing the purposes of conserving the nation's natural resources and the environment.[126] In fact, each of the cooperative federalism initiatives advanced by Congress attempts to improve resource management by reaching out to the people directly affected by federal land management activities. Cooperative conservation groups have drawn upon their local knowledge and experience to advance the legislative purposes identified for federal lands.

Much of the literature discussing cooperative federalism themes is decidedly political in tone and suspicious in nature. The perspective of those who approach the issue from an academic orientation is particu-

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123. UNITED STATES DEPT. OF THE INTERIOR, Memorandum by the Associate Solicitor dated December 16, 1994 (on file with author).

124. OFFICE OF MANAGEMENT AND BUDGET, OMB Circ. No. 76, Rev. (May 29, 2003).

125. Exec. Order No. 13352, 69 Fed. Reg. 52,989 (Aug. 26, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/08/20040826-11.html.

126. Lynn Scarlett, United States Dept. of the Interior, *A Closer Look at Interior: An Official Explains its Philosophical Vision*, *in* PROPERTY AND ENVIRONMENT RESEARCH CENTER REPORTS (Dec. 2003) available at http://www.perc.org/publications/percreports/dec2003/interior.php (last visited Sept. 20, 2004).

larly critical, suggesting that cooperative conservation is an "ideological fad,"[127] constitutes abdication of federal land management responsibility[128] and is "inconsistent with the laws governing public lands," serving as a means of "avoid[ing] compliance with environmental regulations and to continue business as it used to be, regardless of environmental impact."[129] Those critical of cooperative conservation often are opposed to significant local involvement in multiple use management of natural resources, particularly when that use involves traditional, commodity-based resource values.[130] These critics frequently cloak a preservation-oriented resource philosophy, as distinguished from a conservation philosophy,[131] in terminology equating their perspectives with the "national" or "public" interests.[132] The effect is to marginalize the sustainable nature of western landscapes and the scientific predicate for federal and state land and water resource management activities.

In contrast, individuals actively involved with on-the-ground public land management issues in the West are calling for more local involvement in the federal land management decision process. Even those who might be characterized as being on opposite sides of the philosophical spectrum have argued forcefully for approaches to conservation that recognize and incorporate local cooperative conservation processes.[133] Advocates of cooperative conservation are hopeful that these decision processes will break through the paralysis and litigation borne of the current conflicts in federal land and water resource management to yield improved resource decisions informed by local knowledge. In essence, they see value in local involvement and seem not to share the fear that the local interests will dominate the process, make unlawful decisions, or

127. George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 ECOLOGY L.Q. 602, 603 (1999).

128. *Id.* at 610.

129. Karin P. Sheldon, *How Did We Get Here? Looking to History to Understand Conflicts in Public Land Governance Today*, 23 PUBL. LAND & RESOURCES L. REV. 1, 2 (2002).

130. DANIEL KEMMIS, THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST 168 (2002); Sheldon, *supra* note 129, at 17-18.

131. *See* RICHARD W. SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS 88 (1997) (recognizing both resource use and preservation as elements of conservation). *See also* RAY L. WILBUR & WILLIAM A. DUPUY, CONSERVATION IN THE DEPARTMENT OF THE INTERIOR (1931).

132. Coggins, *supra* note 127, at 603; Sheldon, *supra* note 129, at 1-2; KEMMIS, *supra* note 130, at 155-57.

133. KEMMIS, *supra* note 130, at 124-49. *See also* John Baden, *Yellowstone Should be Managed by Trust*, HEADWATERS NEWS, *at* http://www.headwatersnews.org/baden022504.html (Feb. 25, 2004) (recommending consideration of trusts to manage certain National Park lands).

unduly influence federal land managers.[134] Cooperative conservation group involvement in federal land management is considered to be "an experiment in new governance, a revival in Jeffersonian democracy."[135]

Thus, cooperative conservation should not be viewed as a political effort when advanced administratively.[136] Some may view these broad grants of authority to invoke cooperative federalism as diminishing the authority of the Secretary and abdicating federal management responsibilities.[137] However, these grants provide more latitude in the exercise of discretion and create potentially important options in public land management and decision processes. Congress and the courts have provided guidance on permissible delegations of authority, the contours of which may be more limited when undertaken through executive discretion rather than through legislation. But, the underlying concept remains the same. Cooperative conservation is one of many tools available to federal land managers, a tool that should be used when it will serve the essential purpose of better conserving our land, water, and wildlife resources.

The Department of the Interior has recognized the importance of cooperative conservation.[138] When local partners are enlisted to assist with federal resource management activities, federal dollars go further, as do the efforts, energy, and contributions of local participants—those with the most immediately at stake from federal land management decisions and actions; those who live in the communities directly affected by federal land management decisions.

Examples and reasons abound to create consensus through collaboration. Some of these reasons are financial in nature. For instance, during the last two years of the Clinton Administration, funding diminished by nearly fifty percent in the Land and Water Conservation Fund[139] and has subsequently declined even further. In addition, federal dollars can be stretched by partnering, which brings private resources to bear. The Department of the Interior is developing a partnership initiative and has instituted a Cooperative Conservation Initiative.[140] Federal properties, such as the California Coastal National Monument, are actively involved in partnering on a day-to-day basis.

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134. Sheldon, *supra* note 129, at 2, 17-18. *See also* Leigh Raymond, *Localism in Environmental Policy: New Insights From an Old Case*, 35 POL'Y SCI. 179 (2002).

135. Sydney F. Cook, *Revival of Jeffersonian Democracy or Resurgence of Western Anger? The Emergence of Collaborative Decision Making*, 2000 UTAH L. REV. 575, 577 (2000).

136. *See* Coggins, *supra* note 127, at 602; Sheldon, *supra* note 129.

137. Coggins, *supra* note 127, at 602-03.

138. *See* Scarlett, *supra* note 126.

139. *Id.*

140. *Id.*

Some examples are noteworthy. The U.S. Fish and Wildlife Service and the Consolidated Salish and Kootenai Tribes have proposed tribal management of some maintenance, educational, and visitor service activities for the National Bison Range in Montana.[141] In Colorado, citizens have proposed an important regional land management experiment called the Northwest Colorado Stewardship Partnership.[142] Local government and interested community members have an interest in broader day-to-day management responsibility over certain nearby federal lands. A wide-ranging collaboration of BLM, Moffat County and other stakeholders are seeking to identify federal land stewardship priorities and methods for implementation.[143] The objective is to demonstrate new innovative methods for federal land management that ensure responsible use of natural resources while maintaining or enhancing the area's custom and culture.[144] The concept is worthy of detailed consideration to determine how best to utilize community-based planning in the federal land management process.

Another initiative is the Eastern Nevada Landscape Restoration Project.[145] This initiative seeks to develop consensus on the overall health of ten million acres in the Great Basin ecosystem in Eastern Nevada and to implement actions to restore ecosystem health where lacking. BLM has formed a partnership with seventy-five independent nongovernmental partners in an effort to guide its activities and develop broad-based goals and objectives.

Other reasons to support cooperative federalism as a tool in public land management involve good stewardship. Diverse parties are working to improve the quality of riverine habitat along the Duck Trap River in Maine and Buffalo Creek in Pennsylvania. Similarly, the Malpai Borderlands Group is seeking to improve grazing practices, restore the Prairie, and create a grass bank in Arizona and New Mexico. In Alaska, scientists and fishermen are partnering to improve fishing techniques to protect the albatross population.[146] Ripe for collaboration are the harvest of timber fuels and public safety activities that arise under President Bush's

141. John Stromnes, *Bison Range Agreement Unveiled*, THE MISSOULIAN, June 7, 2004, http://www.missoulian.com/articles/2004/07/07/news/top/news01.txt.

142. Joint Press Release, Bureau of Land Management, Little Snake Field Office & Moffat County Commissioners, "BLM, Moffat County, and Interested Stakeholders Work Together to Develop the Northwest Colorado Stewardship Program," *available at* http://www.co.blm.gov/news/2003/northwestpartnership.htm (April 1, 2003) (on file with author).

143. *Id.*

144. *Id.*

145. BUREAU OF LAND MANAGEMENT, GREAT BASIN RESTORATION INITIATIVE: EASTERN NEVADA LANDSCAPE RESTORATION PROJECT (on file with author).

146. *See* Scarlett, *supra* note 126.

Health Forests Initiative. These partnership initiatives supplement federal dollars with private money, initiative, knowledge, and enthusiasm for locally based land management and protection.

CONCLUSION

While the underlying authority for congressional delegations may differ from those for Executive Branch delegations, the protective standards appear to be quite similar. The Property Clause authorizes congressional delegations of authority for cooperative conservation groups to manage public lands. The executive authority to delegate responsibility for public land management would seem to rest on separation of powers and statutory authorities and limitations.

Cooperative federalism is not new to the federal government and its benefits far outweigh the risks when properly implemented. Cooperative conservation is also consistent with American environmental conservation folklore. Aldo Leopold envisioned a nation of citizen stewards of the land.[147] Conservation, built upon a foundation of cooperation and collaboration rather than conflict, will bring America closer to this goal—the goal of land use that is:

environmentally sound,
within the limits of the law, and
the product of enhanced consensus and cooperation.

147. ALDO LEOPOLD, A SAND COUNTY ALMANAC (Ballentine Books 1990) (1949).