

# MAKING THE HARD CHOICES: A COLLABORATIVE GOVERNANCE MODEL FOR THE BIODIVERSITY CONTEXT

*This is the native home of hope. When it fully learns that cooperation, not rugged individualism, is the quality that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery.*

*--Wallace Stegner<sup>1</sup>*

## I. INTRODUCTION

In the spring of 1993, in the face of fifteen years of all but open warfare between the timber industry and the pro-environmental groups over the destruction of spotted owl habitat,<sup>2</sup> a small coalition of logging industry representatives, local environmentalists, and local political leaders invited the citizens of Quincy, California, to attend an open meeting.<sup>3</sup> At that meeting, the coalition explained what it had been doing in secret since the fall of 1992: working to develop a proposal that would allow all sides in the battle over the spotted owl habitat to come out as winners.<sup>4</sup> The road to that point had not been easy, but the local citizens generally supported any solution that promised to eliminate the intensifying conflict and gave their imprimatur to the work being done by what came to be known as the Quincy Library Group (QLG).<sup>5</sup> Following the show of public approval at this meeting, the QLG set about drafting a forest management plan and lobbying for federal legislation

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1. WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 38 (1969), *quoted in* Governor John Kitzhaber, Address the Western Governors' Association at <http://www.governor.state.or.us/governor/speeches/s981204.htm> (Dec. 4, 1998) [hereinafter Kitzhaber Address] (advocating for collaborative environmentalism). As noted by Governor Kitzhaber, Mr. Stegner was referring specifically to the West when he made this observation on the state of the landscape. But in the opinion of the author, those words apply with equal force to the state of biodiversity protection throughout the nation.

2. The controversy in Quincy centered around the threatened extinction of the California spotted owl due to the logging industry's destruction of old-growth forests in the Pacific Northwest where the owls nested. *See generally* Ed Marston, *The Timber Wars Evolve Into a Divisive Attempt at Peace*, HIGH COUNTRY NEWS, Sept. 29, 1997, at 5, *available at* [http://www.hcn.org/1997/sep29/dir/Feature\\_The\\_timber.html](http://www.hcn.org/1997/sep29/dir/Feature_The_timber.html).

3. *Id.* at 5.

4. *Id.*

5. *Id.*

that would bind the National Forest Service (NFS) to adopt that plan.<sup>6</sup> The House passed this legislation in July of 1997.<sup>7</sup>

On its face the QLG may seem unremarkable, one of a growing number of consensus-based environmental partnerships.<sup>8</sup> But what has generated an uproar among national environmental groups is that the QLG is dictating policy on public lands, consolidating control of ostensibly national policy in the hands of local interests, and excluding the input of government agencies like the NFS, the Bureau of Land Management (BLM), and the U.S. Fish Wildlife Service (FWS), charged with responsibility for the management of these lands.<sup>9</sup> Many hail the cooperative efforts of local citizens' groups, government, and industry as the most progressive means of shaping environmental policy and applaud such efforts as a means of resolving conflicts, reducing costs, and achieving lasting results.<sup>10</sup> However, as

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6. *Id.*

7. *Id.* at 9.

8. See MSNBC, *New Forest Protection Pact Reached*, Sept. 10, 1999 (on file with author) (noting the increased use of cooperative partnerships between industry and environmental groups to improve industry stewardship of natural resources and citing as examples: an agreement by Home Depot to quit selling wood cut from endangered forests, an agreement between Canadian timber firm MacMillan Bloedel and environmental groups to incorporate a sustainable logging program with the assistance of communities in British Columbia's Clayoquot Sound, a pact between the Rainforest Action Network and two U.S. subsidiaries of Mitsubishi to use wood and paper products produced under environmentally sound conditions, and an increase in ownership of forest acres by timber companies adhering to international standards for environmentally sound harvesting set by the Forest Stewardship Council).

9. Martson, *supra* note 2, at 3. Although many have praised the QLG for seeking out what may be the only real chance at protection of the spotted owl in light of well-entrenched timber industry interests, regional and national environmental groups have largely expressed concern over, if not outright disapproval of, the manner in which the QLG has obtained protection for the bird. Environmentalists note that the QLG's use of congressional lobbying as a means of avoiding NFS participation could create a "precedent of piecemeal legislation for individual forests that would inevitably lead to the over-riding of environmental laws." *Id.* at 7. Many believe that by cutting out the NFS and larger environmental groups from the negotiation process, the QLG has marginalized valuable scientific input from agency sources and, in effect, has asserted local dominion over what is a national, public resource for which the NFS is responsible by law. See Editorial, *Sierra Logging Bill Needs Major Revisions*, S.F. CHRON., Oct. 21, 1997, at A22 (arguing that the QLG bill is based on a "flimsy scientific premise," in that the proposed use of controlled logging in certain old-growth areas as a means of fire prevention would, in fact, increase the risk of fire); Editorial, *Who Should Determine the Fate of a Forest?*, S.F. CHRON., June 15, 1997, at A8 (claiming that the QLG bill is slanted toward timber industry concerns and that it failed to include more recent scientific data); Jane Braxton Little, *National Groups Object to Grassroots Power in D.C.*, HIGH COUNTRY NEWS, Mar. 31, 1997, available at [http://www.hcn.org/1997/mar31/dir/Western\\_National\\_g.html](http://www.hcn.org/1997/mar31/dir/Western_National_g.html) (noting that large environmental groups feel alienated by the QLG's "top-down" approach, which essentially bypasses national and regional concerns in attempts to achieve local relief).

10. For examples of the widespread support that collaborative efforts, like the QLG, have received in the biodiversity context, see generally Milo Mason, *Interview: Bruce Babbitt*, 11 NAT. RESOURCES & ENV'T, Summer 1996, at 35 [hereinafter Mason, *Babbitt Interview*]. Secretary Babbitt explains that during his leadership, the Interior Department has reinvented itself by adopting collaborative approaches as the best means of achieving the twin goals of biodiversity protection and

demonstrated by the QLG controversy, others criticize such approaches for increasing the control of well-entrenched industry interests by excluding broader, national interests from the negotiating table.<sup>11</sup>

This Note examines the use of a collaborative governance model<sup>12</sup> in the context of biodiversity<sup>13</sup> protection and proposes a new model of

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sustainable development. *See also* William D. Ruckelshaus, *Foreword to The Endangered Species Act and Private Property*, 32 LAND & WATER L. REV. 480 (1997) (emphasizing the need for collaborative processes as a means out of gridlock created by adversary approaches to species protection); Bob Armstrong, *Our Federal Public Lands*, 12 NAT. RESOURCES & ENV'T, Summer 1997, at 7 (stating that "[c]ollaborative stewardship has become one of the guiding principles of [the Bureau of Land Management]"); Kitzhaber Address, *supra* note 1 (explaining the Western Governors' Association new "enlibra" approach to biodiversity protection, emphasizing stakeholder involvement at the state land management level).

11. *See supra* note 9. Some critics feel that, ultimately, the kind of local control over environmental issues implemented by groups like by the QLG provides industry factions with yet another arena in which to assert their interests. According to critics, such groups provide industry organizations with a means of avoiding the costs and rigors of national lobbying and negotiating by giving them access to more easily controlled local forums. This, in turn, results in an easily exploited means of promoting their interests at the expense of the environment. *See generally* Michael Axline, *Federal Lands and Invisible Hands*, 25 ECOLOGY L.Q. 611 (1999).

12. This Note adopts the term "collaborative governance" to refer to a model of collaborative participation in government decision making. This model is an offshoot of negotiated rulemaking (often framed in terms of regulatory negotiation, or "reg-neg") in administrative policymaking. The goals of negotiated rulemaking and this model of collaborative governance are two-fold: the efficient utilization of limited administrative resources and the enactment of more responsive law. The approach proposed in this Note centers around the involvement of relevant, affected interests ("stakeholders") who typically participate in negotiations of varying levels of formality and public dialogue with other stakeholders and agency representatives to arrive at a consensus-based rule or regulation. This Note uses the term "collaborative model" interchangeably with "collaborative governance" to refer to this model generally and to contrast the regulatory regime that adopts consensus-based decision making with the "adversarial regime," or "adversarial model," that utilizes litigation to protect, develop, and enhance the interests of given parties. The term "collaborative approaches" refers specifically to methods of collaboration, particularly the use of stakeholder negotiations to arrive at consensus-based decisions.

In addition, this Note frequently uses the term "collaborative environmentalism" to refer to the collaborative governance model as applied to environmental issues, particularly issues of biodiversity preservation. However, the collaborative environmentalism that this Note proposes encompasses more than the traditionally limited conception applied by proponents of reg-neg. The focus in this Note is on a model of collaborative governance that stresses the organic aspects of negotiated rulemaking—the development of relationships, interactions, and long-term adaptability—rather than a limited focus on cost and efficiency improvements under a negotiated rulemaking regime. Ultimately, collaborative governance is concerned not solely with the use of collaborative approaches, but with a transformation in the way stakeholders view the rulemaking process that allows for flexibility through collaboration. *See generally* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (discussing "collaborative governance" as a normative model for redefining the concept of administrative law, rather than as a cure-all for the problems of the existing model). This transformation calls for a new mode of political thinking that stresses relationships, interactions, and long-term goals. Such a model adopts an organic view of the law, not unlike the holistic view of ecosystems that has led to the changes outlined in this Note.

13. Biodiversity is a nebulous concept which scientists and lawmakers have struggled to define. *See* Patrick A. Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 230 n.18 (1998) (noting the varied

collaborative governance adapted to the goals of biodiversity protection in ecosystem management planning. Part II of this Note briefly outlines the global threat to biodiversity and examines the evolution of biodiversity protection from a legal and scientific standpoint, focusing on the shift from the single species protections embodied in the Endangered Species Act (ESA) to the ecosystem management regime supported by current scientific data. The last section of Part II then outlines the shift from the traditional, adversarial model of achieving biodiversity goals embodied in the ESA, to the collaborative model that is a linchpin of the ecosystem management regime. Part III analyzes the chief criticisms of the collaborative model and the benefits in the adoption of such a model. Part IV proposes a redefined model of collaborative governance that will facilitate the use of collaborative processes in resolving biodiversity disputes and reduce abuses of this approach. This Note concludes by noting that federal initiatives, which advance collaborative approaches over the adversary system, will significantly impact biodiversity policy and are essential to positive, long-term results.

## II. SPECIES PROTECTION & ECOSYSTEM MANAGEMENT: THE EVOLUTION OF BIODIVERSITY PROTECTION

### *A. The Global Threat to Biodiversity*

As the world rushes into the twenty-first century, man's increasing need to develop and exploit natural resources has created a global crisis resulting from the rapid loss of biodiversity.<sup>14</sup> Scientific and legal commentators note

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definitions of biodiversity advanced by scientists). Although most individuals would agree that biodiversity should be protected, the level of protection envisioned by a given individual depends upon the inclusiveness (or exclusiveness) of that individual's definition of biodiversity, a definition generally adopted as a means of promoting an agenda. Used in this way, "biodiversity" is nothing more than a useless platitude. However, by eliminating rhetoric and focusing on current scientific thought, one can extract a general definition of biodiversity that is useful for the purpose of framing an argument, whether one is opposed to or in favor of biodiversity protection. For purposes of this Note, biodiversity is defined as "the variability among living organisms from all sources including *inter alia* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part [including] diversity within species, between species and of ecosystems." WALTER V. REID ET AL., WORLD RESOURCES INSTITUTE, BIODIVERSITY PROSPECTING: USING GENETIC RESOURCES FOR SUSTAINABLE DEVELOPMENT ANNEX 4, Art. 2, 304-05.

14. See Parenteau, *supra* note 13, at 232-33. Human activity has resulted in much greater extinction rates than the normal, so-called "background" rate of extinction and may result in a loss of twenty percent of global biodiversity by the year 2040. *See id.* The problem of human impacts on biological diversity is further exacerbated by the fact that human knowledge of the earth's biological diversity is so incomplete, making it difficult to gauge, both the true rate of extinction and the value of those species lost. *Id.*

that the loss of biodiversity is one of the greatest environmental problems facing the world in this new millennium.<sup>15</sup>

Commentators proffer numerous justifications for making biodiversity protection an essential goal.<sup>16</sup> Generally, these justifications arise either from an “anthropocentric” viewpoint, viewing biodiversity as a resource that has economic value to man,<sup>17</sup> or from a “biocentric” viewpoint that gives biodiversity an intrinsic value, worthy of protection.<sup>18</sup> Regardless of the justifications, a growing conservation ethic in the United States and worldwide has forced politicians to respond to the general consensus that biodiversity should be protected.<sup>19</sup> The most notable response to this conservation ethic was the enactment of the single species protections

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15. See Edward J. Heisel, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 *ECOLOGY L.Q.* 229, 233 (1998) (“The loss of biodiversity is generally agreed to be among the top environmental crises facing humanity today.”). See also Parenteau, *supra* note 13, at 230.

16. See Heisel, *supra* note 15, at 233.

17. For an excellent discussion of the primary arguments in favor of preserving biodiversity, see generally Parenteau, *supra* note 13, at 236-46. Commentators claim numerous traditional anthropocentric benefits including new medicines, food, shelter, and clothing, as well as several indirect benefits of ecosystem services such as pollination, air and water quality maintenance, climate regulation, and nutrient recycling that may be more difficult to quantify economically, but nevertheless provide realizable economic value to human beings, primarily through cost savings and increased productivity. *Id.* at 237-42. See generally Gretchen C. Daily, *Introduction: What are Ecosystem Services?*, in *NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS I* (Gretchen C. Daily ed., 1997).

Scientists and economists have had difficulty in formulating cost-based justifications, primarily due to inadequate information on the nature of global biodiversity and the inability of classical economics to properly value biodiversity benefits. See Parenteau, *supra* note 13, at 246. Furthermore, the market tends to undervalue biodiversity and skews economic incentives towards exploiting biodiversity, rather than preserving it. *Id.* at 247-48. One of the key reasons for this inability to properly measure biodiversity value has been the inability to accurately catalog the earth's biological resources. The National Biological Survey was a key initiative designed to enhance this knowledge and assist in making better value judgments in decisions impacting upon biodiversity. See Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 *ENVTL. L.* 355, 356 (1994). However, the surveyors were forced to scale back their efforts because of political opposition from Republicans who thought the Survey would result in further restrictions on private property rights due to increased classifications of threatened and endangered species. *Id.*

18. See Parenteau, *supra* note 13, at 236-46. Many commentators argue that economic values cannot reflect the true value of biodiversity. Rather, they claim that an even more compelling reason for the preservation of habitat and species diversity arises from a “biocentric” viewpoint. *Id.* at 243. This viewpoint asserts an inherent aesthetic and spiritual value of species and the moral imperative that human beings exercise as stewards of nature. *Id.* at 243-46. These arguments rely on the works of such conservationists as Henry David Thoreau, John Muir, Aldo Leopold, Rachel Carson, Wallace Stegner, and Edward O. Wilson. *Id.*

19. See Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 *ENVTL. L.* 463, 470-71 (1999) (noting the heightened public awareness of biodiversity loss during the last half of the twentieth century that prompted the passage of legislation protecting endangered species).

embodied in the Endangered Species Act (ESA),<sup>20</sup> and more recent attempts to develop a comprehensive ecosystem management regime.<sup>21</sup>

### *B. The Evolution of Biodiversity Protection*

Until the turn of the century, the traditional view of biodiversity in this country centered on the function of plant and animal species as commodity resources.<sup>22</sup> In particular, private interests viewed these resources in terms of their economic utility as food, clothing, building materials, and other similar uses.<sup>23</sup> However, this view of biodiversity gradually expanded to encompass more diverse uses, most notably recreational and aesthetic uses.<sup>24</sup> Much of this change resulted both from groundbreaking scientific work establishing the impact of biodiversity on human well-being and from a growing appreciation for the intrinsic value of diverse species.<sup>25</sup> Environmentalists then began to adopt a more holistic view of biodiversity, concentrating on the moral right of species preservation and the interrelatedness of organisms in a healthy environment.<sup>26</sup>

As biodiversity evolved into a more multifaceted resource, the federal government began to expand its involvement in policies impacting biodiversity to ensure protection.<sup>27</sup> In response to the growing environmental

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20. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1974) (codified as amended at 16 U.S.C. §§ 1531-43 (1994)).

21. See Heisel, *supra* note 15, at 235 (noting the traditional, piecemeal approach toward biodiversity protection that focused on protection of single species and the need for more comprehensive approaches). An ecosystem management regime attempts to utilize scientific management principles and public involvement to protect not just single species from harm, but to delineate and protect whole habitat systems and the various interdependent species within them. The concurrent goals of such a regime are to protect the viability of the ecosystems while allowing for the sustainable development of the natural resources within those ecosystems. See STEVEN L. YAFFEE ET AL., ECOSYSTEM MANAGEMENT IN THE UNITED STATES: AN ASSESSMENT OF CURRENT EXPERIENCE 13-19 (1996). See also R. Edward Grumbine, *What is Ecosystem Management?*, 8 CONSERVATION BIOLOGY, Mar. 1994, at 27, 29. See generally Jacqueline Lesley Brown, *Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform*, 12 J. ENVTL. L. & LITIG. 151 (1997). For an example of an ecosystem management proposal at the federal level and an explication of its foundation principles, see *infra* note 38.

22. See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 782-83 (3d ed. 1993).

23. *Id.*

24. *Id.*

25. See *supra* notes 17-18.

26. *Id.* See generally THE BIOPHILIA HYPOTHESIS (Stephen R. Kellert & Edward O. Wilson eds., 1993) (noting the strong cultural and psychological connections between all organisms).

27. See COGGINS, *supra* note 22, at 782-84. Until the early part of the twentieth century, state agencies, in particular fish and game agencies, exercised almost exclusive control over biodiversity protection. *Id.* They concerned themselves mainly with individual species that were of value to

ethic, Congress passed the ESA in 1973 primarily to promote the preservation of large, emblematic species.<sup>28</sup> Moreover, the ESA recognized the importance of a policy of habitat preservation as a means of preventing biodiversity loss and attempted to incorporate habitat preservation in its species protection regime.<sup>29</sup>

The Supreme Court has interpreted the ESA expansively. In the landmark case *Tennessee Valley Authority v. Hill*,<sup>30</sup> the Court focused on the plain

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sportsmen and the tourism industry. *Id.* See also Petersen, *supra* note 19, at 467-68 (noting that the federal government restricted itself to protection of biodiversity outside of state jurisdiction, primarily through designations of protected lands, but that the states had primary responsibility for wildlife protection).

However, as the conservation ethic began to develop and the recreational and aesthetic aspects of species grew in emphasis in the early 1900s, the federal government exercised more decisive control over species preservation, setting aside federal lands of scenic importance and protecting the species within their boundaries. COGGINS, *supra* note 22, at 782-84. See also Petersen, *supra* note 19, at 467-71 (detailing the growing importance of the conservation movement and its influence on increasing consolidation of biodiversity protection powers in the federal government). This emphasis on the aesthetic and recreational aspects of wildlife made federal control over biodiversity largely patchwork. Real protection existed only where there was a fortuitous relationship between beautiful, natural scenery and species habitat, primarily in National Parks and later in National Wilderness Areas. COGGINS, *supra* note 22, at 782-84. See generally Heisel, *supra* note 15 (detailing the history, variety, and piecemeal nature of federal land use programs initiated by the government to protect species). National and state park areas are not dedicated exclusively to biodiversity protection, but rather to the preservation of scenic beauty. *Id.* at 232. Furthermore, these parks are ineffective to protect biodiversity in and of themselves, as they are, at best, a patchwork collage of ecosystems, leaving several of the nation's ecosystems unprotected. *Id.*

28. See 119 CONG. REC. 922 (1973) (statement of Rep. Dingell), reprinted in COMM. ON ENV'T & PUB. WORKS, LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, 1009 (1982). See generally Petersen, *supra* note 19, at 473-81 (noting the views of Congressmen that the Act was aimed at protecting large, emblematic species that were tied to the national cultural heritage, and the widespread failure of legislators to recognize the broad prohibitions the language of the Act entailed). Petersen refers to such species as "charismatic megafauna," noting that the term was coined by Dennis Murphy, the Director of the Center for Conservation Biology at Stanford University, to refer to large, emblematic species such as the bald eagle, gray wolf, bison, and grizzly bear, which represent the great natural beauty of North America. *Id.* at 479 n.153.

29. See 16 U.S.C. § 1531(b) (1994). The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.* See also Petersen, *supra* note 19, at 471-72 (noting the failed attempts at habitat protection in early endangered species legislation although legislators seemed to be aware at the time that such measures would be critical to biodiversity protection). In the years leading up to and following the enactment of the ESA, scientists began to assert more forcefully the importance of biodiversity to human well-being and, in particular, the importance of habitat preservation to the preservation of biodiversity. Heisel, *supra* note 15, at 234-35. See also EDWARD O. WILSON, THE DIVERSITY OF LIFE 254 (1992). But in practice, the habitat designation requirement of the ESA has only nominally served to protect ecosystems. Parenteau, *supra* note 13, at 260. One scholar notes that the ESA has failed as a law TO protect ecosystems, adopting an "emergency room" approach to protecting single species. *Id.*

30. 437 U.S. 153 (1978). This is the infamous "Snail Darter Case" in which the Court interpreted the plain language of the ESA broadly to forbid construction of a dam on the Little Tennessee River upon evidence that the section of the river where the dam was to be built was the only known habit of a rare fish, the snail darter. *Id.*

language of Section 7 of the ESA to determine that Congress intended that the ESA would preempt the primary missions of other federal agencies in order to effectuate the ESA's species preservation goals.<sup>31</sup> As a result, the Court enjoined the completion of a dam that threatened an obscure species of fish, thus escalating the conflict between biodiversity preservation and economic development.<sup>32</sup> This application of the ESA outraged many in Congress who never intended the ESA to be applied in a manner that would preserve species of little economic or symbolic importance at the expense of development.<sup>33</sup> Since the passage of the ESA and the Court's decision in *Tennessee Valley Authority v. Hill*, environmental groups have utilized the federal courts as their primary means of advancing an agenda of biodiversity protection,<sup>34</sup> doing so with a great deal of success.<sup>35</sup> As a result, the ESA

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31. *Id.* at 174 (“[E]xamination of the language, history, and structure of [section 7 of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”).

32. Petersen, *supra* note 19, at 495.

33. *Id.* at 485.

34. Axline, *supra* note 11, at 620-21. One scholar notes:

[C]itizens concerned about the impacts of development on ecological systems on federal lands have few resources. There are no economic incentives for citizens to participate in decisionmaking that affects federal resources, and unlike its efforts to insure freely operating markets, the government does not protect citizen participation in the abstract. Instead, citizens must find specific authorization before they are allowed to participate in governmental decisionmaking.

*Id.*

Axline argues that collaborative models place control of federal land decisions in the hands of groups with the resources to influence outcomes, thereby providing a more cost-effective forum for these groups to enhance profits. *Id.* Environmental groups, on the other hand, typically have fewer resources and Axline argues that courts are the only outlet for such groups to find meaningful representation in decision making affecting ecosystems. *Id.*

Environmental groups likely prefer the adversary approach, often eschewing more traditional political outlets, such as lobbying and public relations. Such groups prefer litigation because the broad interpretation that courts give to the ESA, combined with the low cost of access to the courts, give them a greater chance of achieving maximum benefit, whereas collaborative approaches may skew the results in favor of affluent interests. For this reason, this Note argues for a strong government role in promoting equity in the collaborative model, so that the full benefit of the collaborative model may be realized by all parties involved.

35. See John Skow, *Scorching the Earth to Save It*, OUTSIDE, Apr. 1999, available at <http://www.outsidemag.com/magazine/0499/9904search.html> (chronicling the litigation successes of the Southwest Center for Biological Diversity, a radical grassroots environmental organization based in Tucson, Arizona, and its unwillingness to participate in collaborative processes because of its tremendous successes litigating under the ESA). Since 1991, the Southwest Center for Biological Diversity has filed over 100 ESA lawsuits in federal court and has won eighty-two percent of them. *Id.* The group calls this strategy “‘the legal train wreck’ approach. . . . Throw a pile of thorny lawsuits on the tracks, and the logging, mining, and wildlife bureaucrats have to clear them off before the trains can run.” *Id.* See also Nicholas Lemann, *No People Allowed*, THE NEW YORKER, Nov. 22, 1999, at 96 (detailing the prowilderness, antipeople views of the Southwest Center for Biological Diversity and its success in destroying the ranching and land development industries through ESA litigation). Kieran Suckling and Peter Galvin, the heads of the Southwest Center for Biological Diversity, turned to ESA litigation as a means of preserving biodiversity when a friend persuaded them to think, “‘We’re crazy

protects not only the large, symbolic species envisioned by once supportive legislators, but also many unnoticed and, some might say, “uninspiring” plant and animal species such as the snail darter. This protection often comes at the expense of lucrative development.<sup>36</sup> Due to this broad application of the ESA and the success of environmental groups at using the adversarial system to promote biodiversity protection, both private parties and public officials have expressed widespread dissatisfaction with the ESA, calling for its reform.<sup>37</sup>

As dissatisfaction with the ESA and its focus on single species protection has increased,<sup>38</sup> both federal and local policymakers have focused on policies that will protect biodiversity on lands under the control of government agencies.<sup>39</sup> This approach recognizes the holistic nature of ecosystems<sup>40</sup> and

to sit in trees [to prevent logging] when there’s this incredible law where we can make people do whatever we want.” *Id.* at 106.

36. See *supra* note 30. In the Snail Darter Case, the Tennessee Valley Authority claimed that the Tellico Dam was of vital economic importance to the region, stressing that the dam was nearly completed and much expense had gone into the project. *Hill*, 437 U.S. at 157-58.

37. Petersen, *supra* note 19, at 485-87 (noting the changed perception of the ESA as an inflexible law aimed at eliminating development following the decision in *Hill*). See also Heisel, *supra* note 15, at 235 n.26 (noting criticisms of the ESA’s single species approach).

38. See *supra* note 36. The increased support for collaborative processes is a result of growing stakeholder dissatisfaction with the adversarial process embodied in the single species protection regime of the ESA. The ESA has drawn criticism from private landowners and industry stakeholders who have expressed dissatisfaction with the ESA’s tendency to engender conflict between economic development and private property rights on the one hand and biodiversity concerns on the other. Mason, *Babbitt Interview*, *supra* note 10, at 36 (describing the “chaotic result” of political infighting between agencies under the adversarial model and the inconsistency that marked federal land management decisions as applied to private property owners). See generally Institute for Environment and Natural Resources Bd., *Institute for Environment & Natural Resources Board Principles*, 32 LAND & WATER L. REV. 623 (1997) (outlining proposals for reform of the ESA’s failure to engage affected parties, lack of flexibility, creation of fear and uncertainty among landowners who may have endangered species on their property, and failure to align species protection goals with economic incentives). Furthermore, critics believe that the adversarial relationship prevents potentially creative, win-win solutions that would arise out of cooperative approaches. Mason, *Babbitt Interview*, *supra* note 10, at 37-38 (noting that the prescriptive role played by the government under the adversarial model should give way to a collaborative model to promote cooperative solutions allowing all parties to achieve their goals). Critics also point to the ESA’s tendency to place the costs of species preservation on a few parties while the public at large gets the benefits. See generally Joel M. Carson, Comment, *Reintroducing the Mexican Wolf: Will the Public Share the Costs, or Will the Burden Be Borne by a Few?*, 38 NAT. RESOURCES J. 297 (1998) (analyzing the failure of an endangered species reintroduction program to compensate private interests for losses incurred as a result). See generally Parenteau, *supra* note 13 (analyzing the major criticisms of the ESA). Parenteau states:

[T]he [ESA] usually does not kick in until a species has declined to the point where heroic efforts are often needed to rescue it. . . . [T]he ESA has historically taken a species by species approach. . . . The [ESA] [f]ails to [t]ake [e]conomics into [a]ccount. . . . [L]andowners are motivated to destroy habitat before it becomes ‘infest[ed]’ with an endangered species. . . . [and the ESA unfairly spreads] the costs of habitat conservation.

Parenteau, *supra* note 13, at 278-84.

39. See *infra* note 40.

40. See generally WILSON, *supra* note 29. Scientific data generally supports the arguments of biologists that species depend not only upon their habitats, but upon the existence of other species

focuses on maintaining healthy ecosystems as a means of preserving species,<sup>41</sup> rather than attempting to protect a species only after it has become threatened with extinction. Agencies have utilized this ecosystem management focus to achieve sustainable development, the ultimate goal of federal land use policy.<sup>42</sup>

### *C. Collaborative Environmentalism in the Ecosystem Management Regime*

Collaborative governance is critically important to the new, holistic conception of biodiversity and it is a linchpin of both the ecosystem management regime and its underlying goal of sustainable development.<sup>43</sup>

within their habitats with which they form various symbiotic relationships, as well as upon the interrelatedness of diverse habitats and the “corridors” that link them. *Id.*

41. See U.S. DEP’T OF AGRIC., COMM. OF SCIENTISTS, SUSTAINING THE PEOPLE’S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY XV (1999) [hereinafter PEOPLE’S LANDS] (proposing adoption of an ecosystem management regime for National Forests and Grasslands focused on sustaining “ecological processes” rather than “commodity outputs”). See generally Greg D. Corbin, Comment, *The United States Forest Service’s Response to Biodiversity Science*, 29 ENV’T L. L. 377 (1999) (discussing the move to adopt an ecosystem management regime as a response to criticisms of land management centered on single species protections).

42. See THE PRESIDENT’S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE IV (1996) (describing sustainable development as “meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs”). See also PEOPLE’S LANDS, *supra* note 41, at xiv (calling sustainable development the “guiding star” in developing management policy for National Forests and Grasslands). See also Thomas C. Jackson, *Lessons from the Endangered Species War*, 12 NAT. RESOURCES & ENV’T 105 (1997). Sustainable development may be defined as “the promotion of economic development in a way that is compatible with long-term protection of the environment.” *Id.* This involves balancing the interests of private parties seeking to exploit the biodiversity resource and those seeking to preserve it.

43. Recently, Secretary of Agriculture Dan Glickman convened a meeting to review and evaluate NFS land management practices. See PEOPLE’S LANDS, *supra* note 41, at xiii. In the report from this meeting, the Committee reiterated the goals of sustainable development, including the need to protect the valuable biodiversity of national forests and grass lands via an ecosystem approach. *Id.* at xvi (“[P]lanning for the multiple use and sustained yield of the resources of national forests and grasslands should operate within a baseline level of ensuring the sustainability of ecological systems and native species.”).

In outlining these goals, the Committee placed critical importance on the use of collaborative approaches. The Committee stated:

To pursue sustainability, the process of stewarding National Forest System lands needs to engage those who have the information, knowledge, and expertise to contribute; those who have sole control or authority over lands and activities adjacent to the national forests and grasslands; those who have the skills, energy, time, and resources to carry out stewardship activities; and those who can independently validate the credibility of stewardship decisions and the reality of achievements. In short, many and diverse collaborative relationships between and among the Forest Service and other agencies, governments, organizations, communities and individuals are central to building stewardship capacity . . . . Because sustainability of ecological, economic, and social systems is not the responsibility of any single agency or landowner, collaborative planning is necessary to establish the relationships, commitments, and responsibilities necessary for

The new ecosystem management focus in government land use policy, particularly at the federal level,<sup>44</sup> gives private and public stakeholders greater opportunity to utilize collaborative decision making.<sup>45</sup> As a matter of sound land management policy, government agencies have focused on the need for open sharing of information and increased collaboration with stakeholders impacted by decisions concerning biodiversity and land use.<sup>46</sup> Government agencies, responsible for formulating land management policy, are aware that essentially all land management decisions entail conflict. Therefore, they have tied collaborative governance to ecosystem management policy as a means of eliminating the dissatisfaction and inefficiencies created by the adversarial model embodied in the ESA.<sup>47</sup> Agency decision makers have focused on collaborative governance both as a means of achieving more politically acceptable and resilient decisions and to encourage a flexible decision-making process more open to divergent viewpoints and stakeholder involvement.<sup>48</sup> Nevertheless, collaborative

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effective stewardship.

PEOPLE'S LANDS, *supra* note 41, at xxiii-xxv.

Many officials involved with formulating land management policy see collaborative environmentalism as instrumental in helping to establish an ecosystem management approach that better protects biodiversity. Bruce Babbitt, former Secretary of the Interior, is an outspoken proponent of collaborative approaches. He views the flexibility and innovation of consensus as the critical factors in achieving the goals of sustainable development and biodiversity protection. Mason, *Babbitt Interview*, *supra* note 10, at 36-37. Increasingly, parties are jumping on the bandwagon of collaborative environmentalism, particularly in western states where the management of federal lands and the protection of the varied ecosystems within them come into conflict constantly. Recently, a group of western governors gathered at the Enlibra summit to profess their support of collaborative processes in achieving sound land use policies that will protect biodiversity. See Kitzhaber Address, *supra* note 1.

44. See *supra* note 41 (detailing federal level proposals for more widespread utilization of the collaborative model in decisions impacting land management and biodiversity preservation). See also YAFFEE, *supra* note 21, at 53-54 (noting the presence of four federal ecosystem management programs in Wyoming, seven in Colorado, four in Idaho, four in Montana, three in Nebraska, and one in Utah). See generally Lane Krahl & Doug Henderson, *Uncertain Steps Towards Community Forestry: A Case Study in Northern New Mexico*, 38 NAT. RESOURCES J. 53 (1998) (detailing the implementation of a collaborative model in the Vallecitos Federal Sustained Yield Unit of the Carson National Forest in Northern New Mexico).

The ecosystem management regime, and the collaborative model utilized within it, are most prevalent at the federal level because of the vast amount of federally owned lands, particularly within western states, where many of the conflicts between development pressures and biodiversity preservation occur. However, state governments have increasingly moved to incorporate collaborative approaches into their own land management regimes. Kitzhaber Address, *supra* note 1.

45. See *supra* note 40.

46. See generally PEOPLE'S LANDS, *supra* note 41 (discussing the proposed adoption of an ecosystem management regime in National Forest and Grassland management policy and the critical importance of using collaborative approaches in arriving at effective and innovative solutions).

47. *Id.*

48. See Freeman, *supra* note 12, at 31-32. See also PEOPLE'S LANDS, *supra* note 41.

Collaborative planning is a shared process within which agencies cooperate with one another,

environmentalism is a recent phenomenon in the specific context of ecosystem protection,<sup>49</sup> and the close involvement of stakeholders in land use and planning decisions under an ecosystem management regime has generated criticism.<sup>50</sup>

### III. ANALYSIS OF COLLABORATIVE ENVIRONMENTALISM AS A MODEL FOR PROMOTING BIODIVERSITY

#### *A. Criticism of the Collaborative Model*

Although negotiated rulemaking in the biodiversity context typically garners support and recognition from industry groups, local environmental organizations, and government agencies,<sup>51</sup> it has not been without detractors. Most notably, larger national and regional environmental organizations<sup>52</sup> disapprove of the approach as biased and deficient in consideration of relevant data and affected interests.<sup>53</sup> It is not surprising that national and regional environmental groups are the most outspoken critics of collaborative environmentalism as the courts and the adversary system have traditionally been their best, and often only, means of combatting affluent development

work with other public and private organizations, and engage communities and citizens in envisioning and working toward a sustainable future on the national forests and grasslands . . . Collaborative planning creates opportunities for people and organizations to work together, *builds stewardship capacity by cultivating understanding around problems and issues as well as strategies and actions, and designs new institutions that encourage individuals and organizations to pursue sustainability.*

*Id.* at xxv (emphasis added).

49. Negotiated rulemaking has achieved widespread recognition in the pollution control context. *See* Freeman, *supra* note 12, at 36 (noting that “the EPA has by far the most experience with the process and has produced twelve negotiated rules”). *See also* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1273 (1997) (“[M]uch of the current empirical analysis of negotiated rulemaking focuses on the EPA. Because the EPA has attempted and completed the most negotiated rulemakings, and has figured prominently in past claims about both the need for, and success of, negotiated rulemaking . . . .”) (footnotes omitted). *See generally* Brian J. Pinkowski, *Facilitative Government: An Experiment in Federal Restraint*, 38 NAT. RESOURCES J. 1 (1998) (detailing the use of a collaborative approach as an alternative to the lengthy Superfund process at a contaminated site in Colorado).

However, the traditional single species focus of biodiversity law has prevented collaboration in areas impacting biodiversity because of the adversary role in which parties are cast. *See generally* Mason, *Babbitt Interview*, *supra* note 10. The move to adopt ecosystem management regimes is a recent response to dissatisfaction with the old approach to biodiversity protection.

50. *See supra* notes 9, 11.

51. *See supra* note 10.

52. *See supra* notes 9, 11.

53. *See supra* note 9. *See also* Axline, *supra* note 11, at 621 (noting that “[i]nformation and the ability to contradict misinformation is more limited at the local level, giving profit-seekers with the resources to control information flow a distinct advantage”).

interests and promoting their own agendas.<sup>54</sup>

Large environmental groups view collaboration with suspicion.<sup>55</sup> This is due, in part to feelings of disenfranchisement when smaller, more localized groups are allowed successfully to steal some of their thunder.<sup>56</sup> Large environmental groups also voice valid concerns about the unequal distribution of negotiating power under collaborative approaches that tends to favor industry and work against the goal of species protection.<sup>57</sup> To national environmental groups the word “consensus” conjures up images of powerful industry groups subverting national environmental policy by collusion with government agency personnel.<sup>58</sup> This threat is not entirely imagined, as agency decision makers typically enact federal land use and resource policy at the local level and are, therefore, highly susceptible to community pressure.<sup>59</sup> Often, communities become reliant upon the revenue from industry groups located in their areas. This association influences agency staff working to implement environmental policies locally. Furthermore, smaller, local environmental groups have far fewer resources at their disposal than other stakeholders,<sup>60</sup> reducing their power at the negotiating table. Many times local environmental groups are susceptible to the same influences and community pressures as agencies because of their local orientation.<sup>61</sup>

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54. See *supra* note 34.

55. See generally Marston, *supra* note 3.

56. Terry Terhaar, a graduate student at Yale Forestry School, and former Sierra Club regional vice president for northern California and Nevada, noted in an interview with Ed Marston that part of the reason for the harsh reaction against the QLG experience with collaborative environmentalism resulted from the division of power between large state and national environmental groups and localized, grassroots organizations. He stated:

[The national environmental groups] all really talked a good line about wanting to help grassroots activity, but what we really wanted was their letter of support for a bill.

In my work, I was somewhere in between the national staffs and the state organizations, and I know that a lot of the national staffs don't have time to get involved in gritty details. So if something comes along that they don't like, the easiest thing is for them to blow it out of the water.

*Id.* at 12.

57. See generally Axline, *supra* note 11. See also *supra* notes 9, 34.

58. See *supra* note 9.

59. See Axline, *supra* note 11, at 616. One scholar notes:

The relationship of the Forest Service to the timber industry also constrains the Forest Service's planning freedom. Rural constituencies reliant on timber sale revenues may provoke politicians to place pressure on the Forest Service to sustain that revenue. Consequently, the Forest Service becomes trapped: cutting off timber sales would cause loss of employment and revenue in local communities but continued timber sales risk over-harvesting and below-cost sales.

*Id.* (footnotes omitted)

60. See *supra* note 34.

61. See *supra* note 56. See also Axline, *supra* note 11, at 616. One scholar noted:

Because national forests are located near rural communities, foresters make management decisions to support perceived needs in the communities. By sharing timber proceeds with those

Because industry groups are typically the most vocal proponents of collaborative environmentalism,<sup>62</sup> environmental groups view the use of the collaborative process as a forum-shopping attempt by industry agents to negotiate reduced costs for their development interests.<sup>63</sup>

Another criticism, particularly relevant in the QLG situation, is that consensus groups (in particular the industries that may come to dominate them) may use the collaborative approach to promote legislation allowing industry to circumvent federal policies governing land management.<sup>64</sup> Environmental groups fear that allowing consensus-based groups to draft legislation impacting the management of public lands will create a piecemeal land management policy, fragmenting formerly uniform controls and preventing the effective monitoring of compliance with land management plans designed to protect biodiversity.<sup>65</sup>

In short, the chief danger of collaborative environmentalism is the potential that powerful groups will use more easily influenced local collaborative processes to subvert broader public policy concerns under the guise of local progress. The critical challenge of collaborative environmentalism, given this potential abuse, is to ensure that collaborative approaches are truly representative of the interests affected and that powerful interest groups, typically on the industry side, do not abuse collaborative approaches to avoid burdensome regulatory duties. Strong, neutral government participation at the agency level will be essential in achieving a balance between concerned parties and ensuring that all interested stakeholders are invited to the negotiating table, preventing well-entrenched groups from abusing the collaborative decision-making process. However, the collaborative model must be flexible<sup>66</sup> and thus must recognize that some

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communities, the Forest Service strengthens the link between timber sales and the livelihood of local constituencies. The resulting dependency of these communities on timber production causes over-harvesting and destructive harvesting methods.

*Id.* (footnotes omitted).

Logically, members of local environmental groups would be susceptible to the same kind of pressures as their fellow citizens, given the typically close-knit nature of small, rural communities dependent almost solely on a single resource.

62. See Axline, *supra* note 11, at 617 (explaining that “[o]ne of the reasons that profit-seekers are currently advocating more local control is that historically receptive federal venues have become less hospitable”).

63. See *supra* note 11.

64. See *supra* note 9. In addition, it might be argued that such legislation could reduce responsiveness in that problematic legislation would be more difficult to change when needed than agency-adopted regulation.

65. See *supra* note 9.

66. See Freeman, *supra* note 12, at 31-33 (discussing the role of the “Flexible, Engaged Agency”).

tailor-made approaches may be acceptable and, indeed, preferable, depending on the context.

### *B. Benefits of the Collaborative Model*

Despite criticisms that the collaborative model holds the potential for abuses of industry forum-shopping and for exclusion of essential stakeholders, proponents of collaborative governance have expressed widespread dissatisfaction with the adversary approach as well as a desire to reach consensus-based solutions.<sup>67</sup> The time and costs of the adversary approach are often cited as critical reasons for eschewing adversary models in favor of consensus-based ones.<sup>68</sup> However, there are other, more convincing reasons for adopting a collaborative approach to biodiversity protection.<sup>69</sup>

#### *1. Collaborative Model Promotes Innovation and Free Flow of Information*

The adversary model restricts the free-flow of information essential to providing a viable solution to underlying land management conflicts.<sup>70</sup> Parties cast in the roles of potential litigants typically avoid divulging information that might damage their chances for a favorable outcome at trial.<sup>71</sup> The adversary model thus stifles the opportunity for innovative solutions to underlying problems because the concealed information could be essential to providing a viable solution to an underlying problem.<sup>72</sup> Collaborative approaches eliminate the risk of stymied decision making by

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67. See *supra* note 10 (detailing the growing government recognition of collaborative approaches to promoting biodiversity in the context of land use management).

68. See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 30 (1992) (asserting that negotiated rulemaking “can reduce the time and cost of developing regulations”).

69. See generally Freeman, *supra* note 12.

70. *Id.* at 11-12.

71. *Id.* (noting that in traditional rulemaking, parties “often take extreme positions in notice and comment, preferring to posture in anticipation of litigation rather than focus on the regulatory problem posed by the agency”). See also Harter, *supra* note 68, at 19-23 (outlining the numerous grievances with the adversary model and the posturing for litigation that prevents innovative decision making).

72. Freeman, *supra* note 12, at 11-12. One scholar noted:

[T]he indirect nature of rule making tends to undermine problem solving and reward adversarialism. Because the agency is the focal point of informal rule making, parties miss opportunities to engage constructively with each other in a sustained way. They [take extreme positions in anticipation of litigation]. This encourages the agency to compromise or split the difference between competing positions, which can constrain the range of solutions to numeric limits or standards that fall somewhere between the poles represented by the parties.

*Id.* (footnotes omitted).

giving parties an opportunity to meet face-to-face, thereby increasing the honest transfer of required information and the range of available solutions.<sup>73</sup> Moreover, regardless of the ultimate outcome of collaborative negotiation and decision making, the openness of the process itself results in a better knowledge base upon which stakeholders may predicate future collaboration.<sup>74</sup> This is critically important because properly conceived collaborative environmentalism is designed to be an ongoing process, not a single transaction.<sup>75</sup>

## 2. *Collaborative Model Results in More Flexible Policies Better Suited to Changed Circumstances*

Increased flexibility and adaptability in the decision-making process is an attendant benefit of the improved information exchange and innovation afforded by the collaborative model.<sup>76</sup> Adversarial approaches place parties in unyielding, extreme positions and result in a “rigid rulemaking and implementation process.”<sup>77</sup> Furthermore, in an adversarial process, the government agency views both parties skeptically, and, as a result, ameliorates conflict by striking an exact middle ground in the form of a rule meant to be universally applied. This lack of rules specifically tailored to a given context limits the range of possible solutions.<sup>78</sup> Collaborative approaches build upon an evolving knowledge base and cooperative relationships to promote ongoing involvement in the improvement of rules as

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73. *Id.* at 23 (“Problem-oriented deliberation is widely thought to be more conducive to creativity and innovation than either positional bargaining or indirect communication through a paper record.”) As Freeman notes, “The collaborative claim that problem solving tends to produce higher-quality rules rests upon the belief that unanticipated or novel solutions are likely to emerge from face-to-face deliberative engagement among knowledgeable parties who would never otherwise share information of devise solutions together.” *Id.* at 22-23. This appears to be an adaptation of the familiar maxim that *two heads are better than one*.

74. *See id.* at 23 (noting that “[a] process conducive to the disclosure and debate of data is more likely to make better use of available information and expose information gaps than one that promotes secrecy and indirect communication”). Ultimately, a properly implemented collaborative regime provides feedback mechanisms upon which parties draw to improve the overall rule. *Id.* at 47.

75. Freeman, *supra* note 12, at 29. Freeman notes that in a collaborative regime, “[r]ules are not one-time transactions, but rather, they are building blocks in a process, alternative hypotheses to be deployed and revised in light of experience.” *Id.*

76. *Id.* at 28 (“[A] flexible, adaptive system capable of responding to advances in science, technology, knowledge, and shifting human judgments will produce better rules that are more likely to accomplish legislative goals.”).

77. *Id.* at 18.

78. *Id.* at 14 (noting that “[r]ules produced through notice and comment are . . . resistant to revision and adaptation . . . [in part because] a rule is usually intended to be universally applied, not tailor-made to specific contexts of parties”) (footnotes omitted).

circumstances dictate.<sup>79</sup> Flexibility in the decision-making process also includes the willingness of agencies to allow parties to a negotiation some latitude in defining the problem to be confronted, the method of achieving the desired results, and the implementation and enforcement of the final product.<sup>80</sup>

### 3. Collaborative Model Improves Representation of Resource-Deficient Interests

The collaborative model offers the opportunity for more widespread participation in the decision-making process and representation of more diverse interests than provided by the adversary model.<sup>81</sup> Parties with the most extensive resources to influence government agencies drive the traditional decision-making process.<sup>82</sup> This influence marginalizes the interests of groups with fewer resources.<sup>83</sup> A properly implemented collaborative model avoids this marginalization by providing a forum for the

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79. *Id.* at 28-29 (discussing the importance of provisional rules in a collaborative model of administrative governance, stressing the need for ongoing “monitoring and information exchange”).

It is important to note that flexibility in the rulemaking process does not mean instability. As Freeman explains, the revision of rules is not meant to be a sudden occurrence, but a deliberative process to meet changing circumstances. This requires the same information sharing and willingness to explore innovative solutions that the initial rulemaking process utilized. *Id.* at 29.

80. Freeman, *supra* note 12, at 31. Freeman states that the role of a flexible agency in the collaborative model is “the business of regulatory research and development.” *Id.* To this end, agencies may be involved in setting minimum standards, acting both as “convenor-facilitator[s]” of negotiations between parties, and as “capacity-builder[s]” of collaborative partnerships. *Id.* Freeman argues that such roles will require the use of financial and technical resources in managerial activities that will help to facilitate both cooperation and identify available information and affected parties. *Id.* Despite protests that this kind of involvement essentially relegates the agency to the sidelines in negotiations, *see supra* note 9, Freeman asserts that the agency’s authority is not undermined as “facilitating broad participation depends upon an agency’s ultimate authority to impose its own solutions.” *Id.* at 32. The agency role will be largely defined by the context of the regulatory problem, including the history, available information, nature of the conflict, and relative power of the parties. *Id.* In the context of biodiversity, presumably, this role would be rather strong, given the fact that the available information on extinction rates and biological value is dynamic and uncertain, the conflict frequently involves the utilization of resources that cannot be replenished, and the industry interests tend to be well-entrenched and powerful with respect to their opponents. If collaborative environmentalism is to offer a means of achieving biodiversity protection, it must offer advantages over litigation that environmental groups have used with great success in the past. To ensure these advantages, agencies must exert their influence to support the less powerful interests involved.

81. *Id.* at 39 (outlining the requirements under the Federal Advisory Committee Act (FACA) utilized under the Negotiated Rulemaking Act for expansive public participation, including requirements that a “balance of views be represented,” that the meetings be public, and that “no interested party . . . be entirely excluded from the process; participants who are not members of the chartered negotiating committee must be given an opportunity to express their views”) (footnotes omitted).

82. *See supra* note 34.

83. *Id.*

inclusion of less affluent stakeholders. It also provides financial and technical support for those parties that would not ordinarily participate meaningfully in the adversary model.<sup>84</sup> In this context, government agencies play a critical role in ensuring the inclusion of all essential parties and the availability of resources for meaningful participation.<sup>85</sup>

#### 4. *Collaborative Model Creates Satisfaction with the Decision-making Process*

Increased participation directly results in increased satisfaction with the decision-making process. As more stakeholders obtain access to the mechanisms that create the rules they live by, satisfaction with the decision-making process, and in turn, the democratic process in general, increases.<sup>86</sup> Satisfaction with this process enhances compliance with negotiated rules, reduces challenges to their validity, and promotes future participation in the decision-making process, whether carried out via a collaborative process or through a traditional notice-and-comment rulemaking.<sup>87</sup>

#### 5. *Collaborative Model Results in Long-Term Reductions in Economic and Social Costs*

One of the most frequently mentioned problems with the adversary approach is the high economic cost associated with lengthy decision-making proceedings and litigation over challenged rules.<sup>88</sup> Likewise, the social costs of the adversary process are high, in that it tends to breed conflict and division within the communities affected by the outcomes of the decisions.<sup>89</sup>

84. Freeman, *supra* note 12, at 32. Freeman explores the possibilities of the collaborative model: In order to prevent well-resourced groups from dominating deliberative processes, the agency may provide technical assistance grants or other needed support to consumer or community groups. When collective action problems or differential power make balanced representation within a negotiating group impossible, the government itself will need to self-consciously represent the concerns of unrepresented interests.

*Id.* (footnotes omitted).

85. *Id.*

86. *Id.* at 27 (noting that “participation in [collaborative rulemaking] by interested and affected parties has independent, democratic value . . . . [and] [m]eaningful participation enables the contributions of the most affected parties to be *institutionalized* and gives them some *responsibility* for the regulatory regime”).

87. *Id.* (asserting that “participation [in the collaborative model] can enhance the quality of decisions by improving the information base of rules, thereby increasing the likelihood of successful implementation and providing important feedback on the rules’ effect in practice”).

88. See Harter, *supra* note 68, at 19-23.

89. See Marston, *supra* note 3, at 4-5. Detailing the social unrest that resulted from forest plans

Of all the claimed benefits of collaborative models, cost savings generate the most controversy.<sup>90</sup> To date, the experience with negotiated rulemaking is limited, and the data is somewhat mixed.<sup>91</sup> Studies of individual negotiated rulemaking experiences demonstrate some reduction in time and costs.<sup>92</sup> Initial systematic studies, however, indicate only minor advantages,<sup>93</sup> and some claim none at all.<sup>94</sup> Ultimately, the real cost and time benefits of the collaborative process will only be determined after further research.

It may well be that the economic and social advantages will increase over time, because the information sharing and creation of cooperative working relationships will likely create a more efficient and less costly process in subsequent negotiations involving the same parties. This potential long-term cost and inefficiency reduction would make sense in light of the long-term problem-solving focus of collaborative processes. Regardless of the results of future studies, economic cost-benefit analyses should not detract from the real value of the collaborative model: the creation of better underlying law.

#### IV. A NEW MODEL FOR COLLABORATIVE GOVERNANCE IN THE BIODIVERSITY CONTEXT

##### *A. A New Collaborative Model*

The examination of the benefits of a collaborative approach over the adversary system<sup>95</sup> demonstrates that the real value of collaborative models is not solely, or even largely, the reduction of the high costs and inefficiency associated with the current administrative system.<sup>96</sup> Rather, a properly structured collaborative model has independent value in its ability to redefine altogether the administrative system.<sup>97</sup> The collaborative model focuses on a problem-solving approach to administrative governance. The model provides the flexibility to improve information and identify potential, fundamental

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developed in the wake of the listing of the spotted owl as an endangered species, Marston reports:

When federal timber stopped coming off the forests, and mills in the surrounding area began to close, Quincy got hot. Sierra Pacific Industries closed its mills during public hearings so that angry workers could attend, store owners put up yellow ribbons in their windows as a sign of solidarity with timber, and "things got scary," says [Feather River College forestry professor Mike] Yost.

*Id.* at 5.

90. See Harter, *supra* note 68, at 19-23.

91. See Coglianesse, *supra* note 49, at 1273.

92. *Id.* at 1272.

93. *Id.* at 1272-73.

94. *Id.* at 1335.

95. See *supra* Part III.B.

96. See *id.*

97. See generally Freeman, *supra* note 12.

problems, better than the “emergency room” approach of the current system.<sup>98</sup> Properly implemented collaborative environmentalism will enhance opportunities for innovative problem-solving and information-sharing. This will result in ecosystem management plans that are dynamic and flexible, increase representation of less-influential stakeholders, and generate satisfaction with the democratic process in general. Such a collaborative model will foster an atmosphere of responsibility for the protection of biodiversity.

*B. Specific Initiatives for Instituting a Viable Collaborative Model in the Biodiversity Context*

The goal of the new model of collaborative environmentalism is the creation of a system of land use and resource planning that better serves the public interests in protecting biodiversity, while remaining responsive to changing information and circumstances. In short, collaborative environmentalism will seek a path not only to less costly or more efficient land management plans, but also to a goal-oriented approach to biodiversity law that will ultimately better the system and facilitate long-term biodiversity protection. The following four proposals—redefined agency and stakeholder roles, reordered utilization of agency resources, enhanced agency discretion, and extended judicial deference to decisions arrived at under the collaborative model—are designed to provide a viable climate for the operation of the redefined collaborative model.

*1. Redefined Agency and Stakeholder Roles*

In order to obtain the benefits of collaborative environmentalism, federal agencies must rethink their roles and the roles of stakeholders in the decision-making process. Government agencies responsible for ecosystem management should redefine themselves as expert mediators and problem-solvers. Agencies should set goal-oriented standards to ensure protection of the broader public interest as expressed in legislative goals. Federal agencies should guide discussion by acting as an informational clearinghouse and keeping stakeholders goal-focused. Moreover, instead of viewing stakeholders as externalities to the decision-making process, agencies should consider interest groups as internal resources and maintain ongoing contact with these groups to facilitate long-term information sharing and revision of rules to reflect changes in this information. Not only must the agencies

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98. See Parenteau, *supra* note 13, at 60.

implement and monitor the collaborative biodiversity decisions of both public and private parties, but they must also revise the decisions as circumstances change, consistent with the goals of flexibility under the collaborative model. Given their vested interest in the new administrative system, parties should view the process of collaboration not as a single transaction measured in terms of what concessions were given and received, but as an ongoing process in which each negotiation serves as an information-building resource and foundation for long-term problem-solving.

### *2. Reordered Utilization of Agency Resources*

Government agencies should reorder their utilization of resources. They should seek to build collaborative partnerships by providing resources to stakeholders, particularly local environmental interests that lack the resources to participate equitably in the collaborative model. Given the proposed model of collaboration, resources that agencies traditionally direct at enforcement and lengthy decision-making processes could be redirected to support less-powerful interest groups. This support should include technical assistance and research grants for experiments in ecosystem management approaches. To offset the cost of redirected resources, the new definition of administrative participation could include increased utilization of self-monitoring by industry or solutions whereby environmental groups take responsibility for policing the negotiated rule. This will require a rethinking of private roles in government, as environmental groups typically oppose use of their scarce resources to police industry—a role they view as properly handled by government agencies. Agencies should focus on the long-term benefits of such a process, not merely the impact on the cost of the initial decision-making process.

### *3. Enhanced Agency Discretion*

Legislators and the courts should avoid constraining government agencies in their utilization of the collaborative model to promote better the innovation that inheres within it. The strictures of the Negotiated Rulemaking Act<sup>99</sup> may be appropriate in a model of collaborative environmentalism that stresses limited rulemaking and defines success in terms of reduced decision-making costs and implementation time. Under the new model of collaborative environmentalism proposed in this Note, however, this narrow view of negotiated rulemaking will not suffice. Agencies must be afforded greater

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99. 5 U.S.C. §§ 561-570 (1994).

freedom to change the scope and direction of the rulemaking process as information is gathered through negotiation and as problems are refined. Further, agencies must be free to add additional parties to negotiations as the scope of rulemaking evolves. Congress should avoid passing specific statutory authority outlining the rulemaking processes in agencies impacted by ecosystem management decisions. Rather, a general, goal-oriented statute that focuses on agency discretion in the use of collaborative processes should be implemented instead. Such a flexible approach should, of course, be subject to notice and comment. Notice should be given as the scope of the rule changes, both to avoid challenges to the legitimacy of the end results, and to help identify parties that may have been unaffected by the initial rule but, who become interested parties as a result of the new rule.

#### *4. Extended Judicial Deference to Collaborative Decisions*

Although still subject to judicial review, courts should extend the traditional deference granted to agencies to rules arrived at under the collaborative model. Agencies should be presumed to commit to the consensus-based agreements in promulgating rules, and courts should presume these decisions to be valid as a matter of law. Judicial review, similarly, should be limited to questions relating to the adequacy of the process. The decreased likelihood of judicial or legislative invalidation of negotiated rules will result in greater willingness to participate in the process and all parties can commit resources to the process with greater confidence. However, to provide legitimacy to the rulemaking process and to avoid administrative excess, a promise of good-faith bargaining should be implied in the process—a commitment by parties to achieve a compromise that will be incorporated into the final rule. Failure to bargain in good faith would be grounds for invalidation of the ecosystem management plan.

#### *C. The Collaborative Model and Biodiversity Policy*

Improved protection of biodiversity will ultimately depend on more than the widespread implementation of collaborative processes. Fundamental policy changes are essential to focus protective mechanisms on ecosystems rather than on individual species. These fundamental policy changes will involve development in land use policies, particularly with respect to well-entrenched industries that operate on federal lands in an atmosphere of entitlement. The piecemeal approach to designating protected habitats must be improved by a system of acquisitions that aggregates interrelated habitats and provides corridors for the natural movements of protected species.

A revitalized commitment to the National Biological Survey is also essential. Only then can decisions impacting biodiversity concerns reflect the most accurate and up-to-date information on the wealth of biodiversity on this continent. Perhaps most important in the short term is that a dedicated source of funding be found to provide for the necessary acquisitions of critical habitats and the improved operational performance of agencies vested with responsibility for the protection of biodiversity.

Given the increasingly holistic approach to land management taken by federal agencies, the increased utilization of collaborative models and policy changes seems to be reciprocal, in that the use of one may help bring about the other. Increased use of collaborative processes will facilitate changes in land management policies that impact biodiversity. Changes in underlying policies towards biodiversity protection at the legislative level will simultaneously allow affected agencies to reduce stakeholder conflict and facilitate an atmosphere of cooperation. Within this context, collaborative approaches will be seen as natural and necessary to the decision-making process, instead of merely novel and experimental supplements.

#### V. CONCLUSION

Adoption of a more organic view of the collaborative governance model illuminates the benefits of collaborative environmentalism: development of relationships, long-term interaction, adaptability, and fundamental improvements in the law and the law-making process. The new model of collaborative governance seeks to redefine the role of government to ensure full realization of these benefits. Government's willingness to redefine its role and use its resources to enhance the collaborative model will be the key component in achieving widespread and effective protection of biodiversity.

*Matthew Schuckman\**

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\* B.A. English (1996), Vanderbilt University; M.B.A. (1998), Vanderbilt University; J.D. (2001) Washington University.