

# One Third of the Nation's Land (Revisited)

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## The Wasatch Front Prospectus on the Future of Federal Public Lands & Resources

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THE UNIVERSITY OF UTAH

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## Introduction

*The Wasatch Front Prospectus proposes to examine federal public land law, policy, and governance in light of the major changes that have occurred since **One Third of the Nation's Land** was published in 1970 – the last comprehensive review of federal public land law and policy. Since then, public land management has evolved in a context defined by increasingly diverse interests, institutional fragmentation, and remarkable social, economic, and environmental changes. New policies and approaches to land and resource management have emerged organically, reflecting new scientific knowledge, innovative place-based partnerships, and incremental legal and institutional adaptations. To ensure federal public land management is ready to meet 21<sup>st</sup> century challenges, this initiative will highlight changes that have occurred, examine the successes and shortcomings in current federal public land management, and offer recommendations to shape the next 25 years of public land law, policy, and governance.*

Federal public lands account for 28% of all land in the United States and 47% of the American West. These lands are home to iconic national parks and expansive forests; provide vital water to urban centers and working landscapes; house valuable energy resources; support a diversity of fish, wildlife, plants, and endangered species; contain important cultural and heritage resources; provide a place for diverse outdoor recreation activities; and support economic vitality in adjacent communities.

Given this unique and incomparable national asset, it is surprising that the last systematic review of federal public land law, policy, and governance was the *Public Land Law Review Commission of 1965-1969*. Since that commission released its final report in 1970 – *One Third of the Nation's Land* – the challenges and opportunities facing federal public lands have become more numerous and complex. The social, economic, and environmental context of public land management has changed dramatically; more constituents are demanding a broader range of services, climate change has created a new degree of uncertainty, and several promising resource management strategies have emerged organically through innovative experiments by people who care about these lands and resources.

In response to these changes, and in anticipation of the 50<sup>th</sup> anniversary of the *Public Land Law Review Commission's* 1970 report, the Center for Natural Resources & Environmental Policy (University of Montana) and the Wallace Stegner Center for Land, Resources and the Environment (University of Utah) invited recognized experts on public land law, policy, and governance to an exploratory workshop along the Wasatch Front in April 2015 (see Appendix 1 for list of participants). The purpose of the Wasatch Front workshop was to address the question – Is it time for a comprehensive review and update of public land law, policy, and governance?

The participants started by identifying and clarifying the most salient changes that have occurred over the past 50-years relative to social and economic trends; environmental factors, such as climate change, drought, fire, and the like; scientific/technical knowledge and management tools; and the legal and institutional framework governing public lands.

They then considered the merits of undertaking a comprehensive review of public land law, policy, and governance.

The participants concluded that public land law, policy, and governance should be reviewed in light of the changes that have occurred over the past several decades. They also believe that the review process must be carefully defined to ensure thoughtful consideration of diverse perspectives, careful analysis of the perceived limitations and innovations in public land law, policy, and governance, and full recognition of the realistic limitations on any reform recommendations. Although several variables limit the likelihood of comprehensive legal, policy, or management changes like those forged 50 years ago, the participants believe that there are important and fruitful opportunities to positively shape the next 25 years of public land and resources management. The 50th anniversary of *One Third of the Nation's Land* provides a timely opportunity to catalyze this initiative.

To achieve this vision, the participants agreed that that there would be great value in investigating the trends – positive and negative – influencing public land policy and management today; examining in detail the most compelling cross-cutting themes and innovative projects that are emerging; and assessing potential changes in law, policy, and practice. The participants believe that this initiative can and should catalyze a more constructive dialogue around the future of federal public lands and resources. To that end, the participants prepared an initial roadmap for moving forward.

The next step in developing and refining this initiative is to seek the input and advice of other individuals and organizations representing additional interests and viewpoints. To begin those conversations, we are soliciting your ideas, suggestions, and questions on how to move forward in recognizing the 50<sup>th</sup> anniversary of the 1970 Public Land Law Review Commission and shaping the future of federal lands and resources. Thank you for taking the time to review this prospectus and for sharing your thoughts with us.

In sum, this prospectus explains, in broad terms, what has changed on the public lands, the rationale for this initiative, and a proposed roadmap for moving forward. For more information on the initiative, please contact either of the two co-principal investigators:

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## What Has Changed?

Because much has changed since release of *One Third of the Nation's Land*, the participants started by identifying and clarifying the most salient changes with respect to:

- ❖ Social and economic trends;
- ❖ Environmental factors, such as climate change, drought, fire, etc.;
- ❖ Scientific/technical knowledge and management tools; and
- ❖ Legal and institutional framework governing public lands.

The responses to each category are captured in Appendix 2. Realizing that many of these changes cut across these categories, the participants identified the following overarching themes:

1. *The Science of Ecology* – Over the last fifty years, knowledge of natural systems has increased tremendously. With rapid advances in mapping, monitoring, data analysis, modeling, and genetics, we understand complex ecosystems in far greater detail and across a greater number of landscapes. It is no longer acceptable to manage for a balance of nature, because we understand that ecosystems are dynamic and subject to often unpredictable change. We also better understand the need to manage across conventional boundaries at large enough scales to account for the dynamic nature of ecological systems. But while ecological science and understanding have moved forward, many individuals and groups across the political spectrum are frustrated by the prevailing political impasse and policy stagnation.
2. *The Risk of Climate Change* – Climate change may be the most significant threat confronting the nation's public lands and resources. Citizens, resource managers, and policy makers are increasingly faced with a warmer world that is dramatically altering water cycles, wildfire intensity and frequency, and wildlife habitat. Policy and management strategies are increasingly needed to adapt to and mitigate the impacts of climate change. These new strategies will be based on advancements in ecological science, ecosystem resiliency, landscape-scale planning, and working across jurisdictional boundaries.
3. *The Limits of Arid Land Development* – Water is a vital yet diminishing resource in the American West. A growing population, a changing climate, and prolonged drought are exposing shortcomings in western water management. We have altered the driest parts of the West, based long-term water delivery obligations on water supplies that are no longer reliable, ignored natural and ecological limits, unsustainably mined groundwater, and dramatically modified riparian and in-stream habitats. The headwaters of the West's major rivers and streams originate on federal land, and federal lands play an important role in recharging groundwater. Federal land management policies impact both the quantity and quality of water delivered to downstream users, along with flows needed for environmental values and services, and long-term groundwater management. While federal land policy and management will evolve in response to these external pressures, federal agencies need to work

with states to manage a more limited supply of water to support communities, agriculture, and environmental values.

4. *Energy Development and Use* – The public lands are a storehouse for diverse energy resources that are critical to the nation’s economy and security. These energy resources include conventional coal, oil, and natural gas, as well as renewable wind, solar, geothermal, and hydropower resources. While the use of coal for domestic electricity is declining at a surprising rate, new technologies have unlocked vast quantities of natural gas and oil and new large-scale solar and wind projects are reducing carbon emissions and dependence on fossil fuels. At the same time, the use of the public lands for energy development raises important environmental concerns, including leasing and siting decisions that can adversely impact wildlife, water, air quality, recreation, and other resources.
5. *The Ascendancy of Environmental and Recreational Values*– The American West is home to the fastest growing states and communities in the country, in part because people want to live near these wide-open spaces and enjoy the outdoor recreation and scenic amenities they offer. Recent studies emphasize the important role of national parks, wilderness areas, and other public lands and waters in facilitating robust economic growth, urban development, and a high quality of life. A rapidly growing population increases demand for public land access to support an ever-changing array of recreational uses that often result in crowding, conflict, and loss of “natural” experiences. A seemingly counter-intuitive concern is the “last child in the woods” concept, which presents the challenge of encouraging children to disconnect from their electronics and to spend time in nature.
6. *A Briar Patch of Laws and Policies* – Many of the major laws that now govern the use and management of public lands were passed in the wake of the Public Land Law Review Commission’s 1970 report. These laws include the National Environmental Policy Act (1969), Endangered Species Act (1973), National Forest Management Act (1976), and the Federal Lands Policy and Management Act (1976). They stand in contrast to the “Lords of Yesterday” -- a term coined by Professor Charles Wilkinson to explain the disposition-oriented 19<sup>th</sup> century laws that still govern water, mining, and grazing on western public lands -- creating a conflicting maze of legal mandates, ownership claims, and environmental requirements. While innovative responses to this “briar patch” of laws and policies is emerging through litigation, legislation, executive orders, administrative rules, and organic place-based partnerships, most observers perceive a need for greater clarity and precision to meet the new challenges.
7. *The Role of American Indian Tribal Governments* – Fifty years ago, American Indians rarely had a seat at the table to discuss public land and resource management decisions. They were largely controlled by a paternalistic federal government, and chronically suffered from a severe lack of resources. In the last fifty years, tribes have made tremendous progress legally, financially, and politically. Among other milestones, the courts have affirmed off-reservation Treaty rights that allow tribal

governments co-management authority over Treaty resources. Tribal governments are now an important political force in many western states, and many tribes have acquired both traditional and “modern” expertise that competes with or sometimes even exceeds state and federal agencies. While some tribes still struggle with poverty and creating opportunities for meaningful economic development, others have unlocked energy, timber, tourism, and other businesses to become vibrant, self-sustaining, fully sovereign governments who are demanding a role in public land management decisions.

8. *The Challenge of Managing People and Nature* – The forces identified above create manifold challenges for managing people and nature, such as:

- a. Managing the growing wildland-urban interface in the face of private property right assertions, ongoing development pressures, evolving land management priorities, changes in forest health and composition, and related wildfire risks;
- b. Harvesting timber to reduce the risk of wildfires, manage insect outbreaks, and sustain rural communities economically while protecting wildlife habitat, water quality, and recreational opportunities;
- c. Balancing conventional and renewable energy development with wildlife and habitat management (including endangered species protection and restoration), water resource protection, and cultural resource and wilderness preservation opportunities;
- d. Providing payments to counties with significant federal lands (e.g., through PILT and the Secure Rural Schools payments) as the demand for commodity development changes and continuing to subsidize mining, grazing, energy, and timber harvesting at below fair market value;
- e. Reconciling the interests of a growing number of diverse, well organized, and often contentious constituencies, including industry organizations, ranchers, environmental groups, recreation businesses, Native American tribes, and local communities; and
- f. Coordinating planning across federal agencies and with state, tribal, and local governments given the fragmented ownership of western lands, overlapping jurisdictions, and diverse priorities and mandates.

9. *A Call for Change and a New Type of Leadership* – A growing consensus views the existing system for managing federal lands and resources as costly, bureaucratic, and underperforming. Numerous proposals have been advanced over the past decade or more to create – or at least seriously explore – alternative management standards and governance arrangements. The menu of options includes:

- ❖ Utilizing citizen-driven/place-based multi-stakeholder groups;

- ❖ Employing landscape or ecosystem scale planning;
- ❖ Consolidating land ownership patterns through exchanges and sales;
- ❖ Privatizing federal lands and resources;
- ❖ Transferring public land ownership or management authority to the states;
- ❖ Establishing fiduciary trust management arrangements; and
- ❖ Adopting clear resource management priorities and standards.

The American West, as the “native home of hope,” holds great promise for livable communities, vibrant economies, and healthy landscapes. Yet the region faces serious immediate threats that cloud the future, and the current political environment may lead some people to think it wise to wait for a “better” time to examine the past, present, and future of public land law, policy, and governance. However, the participants in the Wasatch Front workshop see much to be optimistic about, from grassroots, cross-sectoral collaboration to the rapid advancement of science, to the new generation of private and public sector leaders emerging as the baby boomers retire.

### **Is It Time for a Comprehensive Review?**

In light of the many changes that have taken place over the past 50 years, the participants then addressed the question – “Is it time for a comprehensive review and update of public land law, policy, and governance?” Drawing on their extensive personal and professional experience, along with an understanding of alternative models of natural resources study commissions (see Appendix 3), the participants identified a number of compelling reasons to catalyze and complete a comprehensive review.

To begin, *nearly 50 years have passed* since the last PLLRC, and much has changed – new laws, planning processes, court decisions, executive orders, science, technology, wildfires, population growth, private land development, economic transitions, collaborative efforts, motorized recreation, international trade, and so on. While individual laws and policies may have been adjusted to reflect some of these changes, no one has undertaken a comprehensive review of federal public land law, policy, and governance in light of all these changes.

Realizing that a comprehensive review might be approached in variety of ways (see Appendix 2), the participants agreed that an *independent assessment* (rather than an executive-branch led approach or congressional committee study or task force) is the best strategy for moving forward today—one that may catalyze and inform more formal actions by Congress, the executive branch, states, and other key decision-makers. An independent assessment *can be more nimble and take a longer-term, more deliberate approach* that is not driven by political cycles, such as the next Congressional or Presidential election. Nonetheless, this approach should be appropriately connected to existing decision-making processes to facilitate implementation of any recommendations that emerge for changes in law, policy, or governance.

Many of the frustrations inherent in federal land and resource management do not originate in a single law or regulation, but rather from their *cumulative nature and agency implementation, as well as* a genuine diversity of public opinion on the appropriate use of these lands and resources. A comprehensive review would critically examine the briar patch of law, court decisions, policies, and governing arrangements that have evolved over the last 50 years. It would also acknowledge and address the present *political paradox*, which makes it very difficult to get much done at the national level with respect to federal public lands and resources, while at the local level a growing movement of citizen-driven, place-based initiatives has been getting things done on-the-ground.

A comprehensive assessment may be the best way to *generate constructive dialogue* and reflection among a diversity of interests and perspectives; shifting the current polarized dialogue to a more deliberate, nuanced conversation would be a valuable contribution in and of itself. Such an assessment can *highlight the most promising ideas and strategies* that have emerged over the past 50 years, including concepts such as sustainability, adaptive management, collaboration, traditional ecological knowledge, and so on. Because many of these strategies are already being implemented, this would be an opportunity to highlight them and explore how, if at all, they might be advanced or replicated. Such an effort may serve as a *springboard for change*, perhaps using one or more approaches to replicate or revise policy and practice – whether on-the-ground, administratively, legislatively, or through local and state governments. Or this effort may be an efficient and effective way to better institutionalize some ideas and to address changing agency cultures.

The Wasatch Front participants also realized that several challenges must be addressed in the process of catalyzing and convening a comprehensive review of public land law, policy, and governance. For starters, the *political climate in Washington, D.C. is very polarized and partisan*. Given that it is unlikely that Congress or any Administration will soon come together to undertake another hard look at federal land policy, management, and governance, *this reality strongly supports an independent assessment*. Although an independent assessment - convened and completed by a philanthropic foundation, university, or other relatively neutral organization - may be a more feasible proposition, history suggests that these types of independent assessments have not always prompted significant change in policy or practice unless they ultimately integrate and engage the right people from Congress, the Administration, and state, local, and tribal governments.

Another challenge is the fact that *public land issues are complex, controversial, and involve many constituencies*. The current politics surrounding federal public lands and resources suggests that it will be difficult to design and proceed with a study that is seen as objective given that some people will want to debate the purpose and scope of the review, who gets a seat at the table, how to reach agreements among diverse stakeholders that are not watered-down and meaningless, and how to create the incentives for policy makers and practitioners to consider and implement recommendations. Although these issues are challenging, participants at the Wasatch Front workshop have many years of experience in designing and completing successful initiatives that are inclusive, informed, deliberative, and lead to meaningful change.



Some people may see the Wasatch Front Prospectus as a call for yet another expert commission and argue that *expert commissions are an outdated concept*. In part, the participants agree with that assessment of expert commissions. The record of past public land law review commissions, as well as other more recent natural resources study commissions, suggests that there is a strong tendency for such commissions to generate predetermined outcomes. So-called “expert” commissions do not seem to command as much attention or operate with as much authority as they may once have, in part because of the proliferation of information, studies, and reports available through the internet and otherwise. Today, a legitimate, credible, effective comprehensive review must avoid predetermined outcomes and seek to convene an inclusive, informed, and deliberative dialogue that results in meaningful outcomes. It should provide an opportunity to engage decision-makers, experts, and advocates, as well as stakeholders and unaffiliated citizens – people who use federal public lands but do not belong to any organized interest group.

Although there are compelling reasons to complete a comprehensive review of public land law, policy, and governance, *there could be unintended consequences in opening up this type of conversation*. People representing different interests may see this as a way to “reform” some of the most significant natural resource laws on the books, such as the Endangered Species Act, National Environmental Policy Act, General Mining Act of 1872, Taylor Grazing Act, or the Federal Land Policy and Management Act. Though some people may agree that certain laws need to be revised and updated, other people may have a vested interest in the status quo. One effective way to prevent and mitigate this inevitable tension is to ensure that any proposals for change are accompanied by a clear rationale and to expressly acknowledge contrary arguments and concerns.

Finally, some people may assert that *a comprehensive review adds little value at this point in time*. Many of the most promising strategies in public land policy and management, such as multi-party collaboration and large landscape conservation, are already happening on-the-ground. While true, a comprehensive review could affirm these best practices and explore opportunities to replicate them by removing legal and institutional barriers or by creating new administrative and financial incentives and pilot projects. Further, a comprehensive review would add significant value by capturing for posterity the experience and views of the generation of leaders – including scholars, administrators, lawyers, scientists, advocates, and others – that helped create and implement the laws and policies governing federal public lands and resources. Many of these leaders are approaching the twilight of their career, and a comprehensive review would be an effective way to harness the lessons they have learned and visions for the future.

Considering the arguments for and against such a comprehensive review, and keeping in mind the significant improvements that emerged over time from the 1970 PLLRC, the participants concluded that now is the time for a very strategic, deliberate comprehensive review. This conclusion emerged from three related propositions: (1) If not now, when?; (2) If not us, who?; and (3) Form should follow function. Based on this conclusion, the participants engaged in a robust conversation around the following key questions:

- ❖ *What is the purpose and scope?* The participants dismissed the idea of a public land “law” review per se; there was little appetite for an initiative focused primarily on generating comprehensive recommendations for public land law reform. By contrast, the participants agreed that a more compelling approach is to build on what is working, articulate a vision for the next 25 years, address key cross-cutting themes or problems (e.g., climate change; agency culture, capacity, and funding; and integrative planning across jurisdictions), and identify potential improvements to facilitate these changes.

After a wide-ranging discussion, the participants gravitated toward a scope of work that is best understood as a series of concentric circles. The primary focus of attention (the inner circle) would be lands and resources managed by the U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and the National Park Service. Because the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers manage scarce water resources, the participants agreed that the law, policies, and practices governing water resources must also be acknowledged and addressed but not as a central focus (the middle circle). Realizing that natural resources issues frequently cross jurisdictional boundaries, and endorsing the principles of ecosystem management and large landscape conservation, the participants agreed that it was also important to address the relationship between the federal public lands and tribal lands and resources, state school trust lands, military lands managed by the U.S. Department of Defense, local community concerns, and private land conservation (the outer circle).

Geographically, the participants gravitated toward a primary focus on the American West, and to include Alaska and the remainder of the continental United States as issues and themes dictate.

- ❖ *What are the desired outcomes, and how do we define and measure success?* The options here ranged from reframing the current debate, to highlighting best practices, proposing policy revisions, seeking targeted statutory and regulatory changes necessary to implement practices that are widely supported and achieve desired outcomes, and creating pilot projects to replicate best practices and to foster innovative experiments. In the end, the participants acknowledged that success should be envisioned as incremental and iterative by creating a process that opens informed dialogue and build a foundation for continued dialogue, deliberation, and possible action. Success should also be measured in terms of both process and substance, meaning that changing the tone and content of the ongoing dialogue may, by itself, constitute a major success by laying the groundwork to facilitate future incremental change.
- ❖ *Who is the audience?* The participants agreed that it is important to obtain input and advice from the public, stakeholders, decision-makers at all levels of government, and experts. The group emphasized the need to engage young people, given that they are the leaders of tomorrow and will inherit the nation’s legacy of public lands.

Any output from the initiative should be designed to reach those most likely to bring about change while resonating with those who provide input.

- ❖ *How should such an initiative be structured?* The answer to this question depends, of course, on the purpose and scope of the initiative. That said, the participants agreed that the structure should maximize the likelihood of making a meaningful contribution and facilitating meaningful change. The structure should be inclusive and based on the best available science and knowledge. To this end, the participants also agreed that it would be desirable to recruit two well-recognized individuals from different political perspectives to serve as co-chairs of this initiative.

## Moving Forward

The 50<sup>th</sup> anniversary of *One Third of the Nation's Land* (1970) provides an ideal opportunity to take stock of the past, present, and future of federal public lands and resources. Given the political environment in Washington, D.C., however, it is unlikely that Congress or any Administration will soon come together to review of federal land law, policy, and governance.

To fill this gap in leadership, the participants agreed that it is time to catalyze, convene, and coordinate an open, inclusive, and informed ***Federal Public Lands & Resources Initiative***. The general contour of this idea is to mobilize and engage a diverse group of informed people with the best available information to clarify the changes that have occurred since 1970, identify what is or is not working, articulate a vision for the next 25 years, and highlight the most promising strategies to achieve that vision.

The Wasatch Front workshop participants intentionally stopped short of developing a detailed action plan on how to move forward. Rather, they agreed that it is important to share this idea with other people, seek their input and advice on both the goals and preliminary roadmap, and to move forward in a careful incremental and evolutionary way. To that end, the following narrative is presented as a place to begin; it will be adjusted over time based on conversations with other people and the outcomes of each step of the suggested process. Realizing that articulating and achieving a 25-year vision is a long-term proposition, the participants agreed that is critical to be patient but persistent in order to create the necessary momentum and network to support this work along the way.

### *Preliminary Objectives*

The preliminary objectives of this initiative are to:

1. *Facilitate an informed, open discussion* on the trajectory of federal public land law, policy, and governance by clarifying where we've been over the past 50-years, emphasizing what is or is not working as well as over-arching and cross-cutting themes;

2. *Inspire and equip individuals and organizations* by collaboratively developing a 25-year vision for federal public lands and highlighting strategies to achieve this vision (based in part on what is or is not working);
3. *Identify and support appropriate changes in law, policy, and practice after careful deliberation* based on the outcomes of the first two objectives.

### *A Preliminary Roadmap*

Although many approaches might achieve these ambitious goals, the participants agreed on the following steps and preliminary organizational structure (see image below):

- ❖ Phase 1 – Develop and Refine the Purpose, Scope, and Roadmap (2015/2016)
  - Share the Wasatch Front Prospectus with individuals and organizations representing diverse interests and viewpoints; seek their input and advice on (1) the purpose and scope of the initiative; (2) the preliminary action plan and deliverables; (3) ways to improve the overall initiative; and (4) clarify if they would be willing to participate in some way if asked.
  - Clarify the purpose and scope, including but not limited to the following open questions:
    - Which federal public lands should be included in this initiative?
    - What are the most compelling crosscutting themes or issues?
    - What are the most promising strategies for public land management?
    - What models of governance are emerging that might show the way to better public land and resource management?
    - What stakeholders and interests need to be included in the process, and how do we strike the appropriate balance between broad stakeholder inclusion and efficient group size?
    - How do we engage, support, and build capacity in emerging leaders as the federal agency officials retire in the next decade?
  - Create an inclusive Leadership Team to oversee and guide the initiative (15-18 people); consider the merits of supplementing this team with a larger Advisory Council of 25-30 people, and explore the role of students and millennials on the Leadership Team and Advisory Council;
  - Seek financial and other support to move this initiative forward; and
  - Sharpen and refine the overall plan of action, including but not limited to:
    - Products (identify the most effective ways to inform, educate, inspire, and otherwise facilitate change)
    - Conveners

- Funders
- Participants
- Public & Stakeholder Engagement
- General Schedule of Meetings and Products
- Strategies to Share Outcomes and Promote Change
- Staffing
- Budget and Fundraising

❖ Phase 2 – Tell the Story of Change (2016)

- Explain the trajectory of change since 1970, capturing and communicating both positive and negative trends, experiments and pilot projects, and so on;
- Synthesize the evolution of seemingly disparate threads of change, from social, economic, and environmental to scientific, technical, legal, cultural, and political;
- Products – The results of this phase of the initiative will be one or more reports (and perhaps a series of editorials) to catalyze, inform, and sustain local and national conversations; one or more workshops to share the findings and conclusions with diverse audiences, and to then explore implications for policy and practice; a website or other social media to foster momentum; and a network of ideas, people, and activities.

❖ Phase 3 – Analyze Cross-Cutting Themes and Explore Implications for Policy & Practice (2017/2018)

- Convene a series of multi-stakeholder policy dialogues to examine the most compelling crosscutting themes and issues – such as climate change; agency culture, transition, and budgets; collaboration; and so on. Identify implications for policy and practice, barriers to progress, and options to move forward on each theme or issue.
- Products: This phase of the initiative will generate a series of policy reports prepared by Working Groups focused on particular themes or issues. The policy reports would then be “peer reviewed” to ensure they are based on the best available information and represent the diversity of interests and viewpoints associated with each theme or issue. The final step in this phase would be another policy dialogue to review the penultimate drafts of the policy reports and to develop strategies to implement best practices.

❖ Phase 4 – Convene a National Conference (2019)

- The capstone of this initiative is to organize and convene a national conference in 2010 to (1) commemorate the 50<sup>th</sup> anniversary of *One Third of the Nation’s Land*; (2) share the body of work that has been produced in

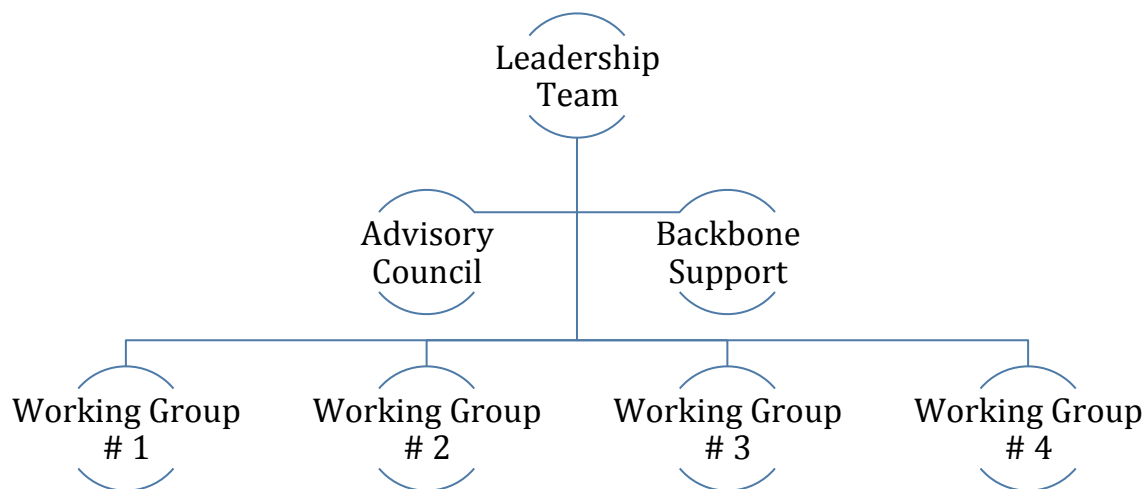
phases 2 and 3; and (3) engage a diverse group of individuals and organizations in further shaping the future of federal lands and resources.

- Products: In addition to informing, educating, and inspiring participants, this phase of the initiative will result in a book that synthesizes the findings and conclusions of the previous phases, and generates specific suggestions to remove barriers and advance the most promising strategies for federal lands and resources. It may include suggestions (or draft language) for pilot projects, legislation, administrative rules and regulations, and other policy instruments to implement recommendations and facilitate change. Other potential outcomes to facilitate change may include additions to the website and network established in phase 2. These products would be designed to promote and support identified changes at the local, regional, and national level.

*Convening, Staffing, and Resource People*

At this point, the participants supported the idea of the University of Utah and the University of Montana providing the “backbone support” to move this initiative forward.

***Preliminary Organizational Structure***



## **Appendix 1**

### **Participants in Exploratory Workshop**

- ❖ Bob Keiter, University of Utah (co-Principal Investigator)
- ❖ Matthew McKinney, University of Montana (co-Principal Investigator)
- ❖ William Barquin, Attorney General, Kootenai Tribe/Nation
- ❖ Dinah Bear, attorney; former general counsel, White House Council on Environmental Quality
- ❖ Anne Castle, former Assistant Secretary Water and Science, US Department of the Interior
- ❖ Sally Collins, former Associate Chief, US Forest Service
- ❖ Patrick Field, Consensus Building Institute (lead facilitator)
- ❖ John Leshy, Hastings School of Law/former solicitor, US Dept. of the Interior
- ❖ Peter Pollock, Lincoln Institute of Land Policy
- ❖ John Ruple, University of Utah (lead researcher)
- ❖ Lynn Scarlett, The Nature Conservancy/former deputy secretary, US Dept. of the Interior
- ❖ Rebecca Watson, former Assistant Secretary Lands and Minerals Management, DOI
- ❖ Charles Wilkinson, University of Colorado

## **Appendix 2**

### **Then and Now: A Reflective Assessment**

#### **Social and Economic**

- ❖ Population diversity – population is changing, face of public land users is changing
- ❖ Population size – demand for access and use, development in the WUI
- ❖ Western urbanization – havens for the wealthy, amenity ranchers, and the philosophical shift that goes with it; rural west is now bifurcated between wealthy amenity communities and the struggling rural poor
- ❖ Shift away from resource extraction (in the West) to a knowledge-based economy
- ❖ Role of Tribes – not included in the last Public Land Law Review Commission; today they often have significant capacity and expertise, and effective legal and political engagement
- ❖ Recreational industry -- larger, more sophisticated, business-oriented, better organized
- ❖ Privatization of land protection through land trusts, easements, etc.
- ❖ Increased disconnect between water pricing policies and the true value of water
- ❖ Rapid decline in federal timber harvest from 11 million (?) board feet to 3
- ❖ Urban populations growing disconnect to landscape, wilds, and public lands.
- ❖ Public engagement – shift towards active, collaborative engagement away from comment/response
- ❖ Technology – importance as a management tool, public engagement tool, transparency implications, etc.
- ❖ Proliferation and diversification of interest groups
- ❖ Differences in state culture/priorities, with some states shifting towards information-based economies while others focus more heavily on traditional extractive resources
- ❖ Pushback from interests that perceive rural lifestyles to be at risk from shift away from commodity production
- ❖ Shift towards recognition of ecosystem services, valuation of ecosystems
- ❖ Public expectations/public demand for efficient delivery of services (agency management of public lands) that are difficult to integrate into multiple-use mandate
- ❖ Citizens demanding that federal, state, tribal, and local governments do more and do it more efficiently, which is complicated by poor intergovernmental collaboration and redundant efforts – frustration over inefficiencies
- ❖ Aging agencies that cannot deliver services quickly and nimbly and efficiently due to a number of factors; drought in federal agency funding – agencies are struggling to do what they are tasked to do

#### **Environmental**

- ❖ Much cleaner air and water: success!
- ❖ More land fragmentation
- ❖ More motorized recreational use



- ❖ Climate change unleashing a host of issues: water, precipitation timing, wildfire, sea level rise
- ❖ Transition from active management towards more hands-off management (e.g. proliferation of wilderness and change in fire suppression policy)
- ❖ Energy extraction – proliferation in domestic production and less concern over energy independence
- ❖ More attention to environmental conditions/quality – but what to do is “receding from us” in part because of the complexity
- ❖ ESA as a management driver, which distracts from ecosystem services/management
- ❖ Shift towards landscape connectivity, landscape scale planning, biodiversity, etc.
- ❖ Impacts of population growth, development, fragmentation, etc. on wildlife management and migration
- ❖ Limits of water resources – impacts on people, habitat, agriculture – and the tradeoffs this will entail – role of science in understanding and management; growing recognition of the role forests play in providing water resources
- ❖ Increase in birding and fishing, but a decrease in hunting
- ❖ More and more endangered species
- ❖ Biodiversity much more on people’s minds; urbanization and pressures on corridors and migratory paths
- ❖ Ecosystem services as a newer way of thinking.
- ❖ Increasing public connection between public lands, the resources they provide, and quality of life – but too often recognition is only post-crisis and loss of services (e.g. post fire)
- ❖ Decline in timber harvest on USFS lands
- ❖ Motorized recreation – access to previously inaccessible areas & proliferation of use
- ❖ ***We have more and more attention and expertise to these may issues but it gets harder and harder to get anything done***

## Scientific and Technical

- ❖ Ecosystem approaches and ecosystem services
- ❖ Recognition and great learning about climate change at varying scales
- ❖ Huge advances in digital mapping
- ❖ Huge advances in remote sensing with lower cost and increased power
- ❖ Adaptive management; good theory, not easy to implement in practice
- ❖ Advancements in genetics
- ❖ Huge advancements in modeling
- ❖ New principle and concepts related to equilibrium dynamics, habitat/population rehabilitation, restoration, resilience, etc.
- ❖ Huge advances in energy extraction technology -- wind, solar, fracking, directional drilling . . .
- ❖ We are far more nuanced, sophisticated, and expert in our scientific understanding, methods, and approaches; there has been a proliferation of science and many sub-disciplines; an increase in the number of “ologists;” a serious challenge to integrate all this knowledge and understanding

- ❖ Perhaps too much science, too little judgment; massive amount of data and the risk of losing sight of the forest for the trees
- ❖ Growing tension between using best available science in decision-making and the politics of science
- ❖ Growing appreciation of “traditional ecological knowledge”
- ❖ Monitoring is moving from the expert system of instruments by an agency to vast amounts of cheaper technology and data that can be controlled by or at least accessible to citizens – the decontrol of data and information
- ❖ More data from lots of sources outside of government – public accessibility of remote sensing data enables public oversight and engagement
- ❖ Control of information changing as data becomes more readily available – no longer the realm of the experts, proliferation of experts
- ❖ Transformational change in capacity to measure resources, and impacts on public health and the environment
- ❖ Decreased support and funding for long-term monitoring and the longitudinal data
- ❖ Transferability – how do we scale up community or watershed based collaborative initiatives? How to institutionalize without atrophy?
- ❖ Change in technology, use of technology, remote sensing, GIS, spatial analysis . . .
- ❖ ***Information paradox – “information is everywhere, but knowledge is rare” – challenges inherent in managing exponential growth in information***

## **Legal/Institutional**

- ❖ Increasing role of courts in land management planning and other issues
- ❖ Views of climate: on the ground people can engage on specific issues like drought or storm events, but nationally deeply divided
- ❖ Loss of expertise in federal agencies as staff retire
- ❖ Implementation of key statutes is not always in line with statutory intent and recent scientific knowledge. ESA implementation, for example, is often species-specific rather than embracing a more habitat/ecosystem orientation – which is contemplated in the ESA itself and supported by scientific evidence.
- ❖ Federal land planning mode of the 1970’s – has it really upheld its promise? Is it working?
- ❖ Land grant education growing and changing and much more integrative than earlier; increased role in providing technical expertise, incoming agency staff have higher level of expertise, broader understanding of rangeland and ecosystem/forest health
- ❖ Political system changes – “deep trough” – deep divisions, polarization, more emphasis on campaign funding – overwhelms congressional capacity
- ❖ Effervescence of community based stewardship as an outgrowth of dysfunction – transcending federal dysfunction
- ❖ Disconnect between local collaborative initiatives and the frequent election of polarizing local politicians
- ❖ Political polarization: deep divisions in political discourse, beginning to make its way down even into local country politics; political gridlock
- ❖ Way issues are framed – staff forced to address issues while talking around politically polarizing issues – e.g. water supply planning that relies on water supply

projections that include climate change, but the staff cannot directly mention climate change – results in loss of transparency and trust in government

- ❖ Sagebrush rebellion of this era is different than the 1970's in that it is part of the larger political partisan frame now, giving it amplification, powerful symbolism
- ❖ Management has moved from active to the approach of “let nature take its course”
- ❖ An increased awareness of connectivity and systems, but no more of an unbounded problem then
- ❖ Loss of expertise in the federal system with retirement and lack of expert backfilling – risk of repeating mistakes because of lost institutional knowledge; loss of trust and working relationships with other agencies, communities, interest groups, etc.
- ❖ Federal land planning model is broken – workarounds for challenges that cannot be addressed head-on (e.g. non WSA ands with Wilderness Characteristics because Wilderness Study Areas are too controversial)
- ❖ Recognition of trans boundary nature of issues and global context (e.g. Columbia and Colorado rivers, ecosystem planning)
- ❖ Fiscal relationships – royalty rates, LWCF, PILT & SRS, sharing with states, etc. – bind interests together even when their missions are divergent

## **Appendix 3**

### **Alternative Approaches to Natural Resources Study Commissions**

#### **Introduction**

The purpose of this document is to highlight different approaches to catalyze and coordinate systematic studies to examine natural resource law, policy, and governance. For each one of the following examples, we have tried to capture the origin, purpose, composition, and outcomes of the initiative. Given that our purpose is to stimulate thinking about the possibility of a public land law review initiative in the 21<sup>st</sup> century, the following narrative comes in at about the 30,000-foot level. *We can certainly consider other models identified by participants at the exploratory workshop as we move forward.*

#### ***Public Land Law Review Commissions***

- Congress established the 1879-1881 commission to investigate the public land laws in response to widespread abuse and inconsistent implementation
  - Composed of two senior federal government officials and three civilians appointed by the President
  - JW Powell is widely considered to be the mastermind behind this commission, which was infused with his ideas and recommendations
  - The final report was almost completely ignored
  
- President Roosevelt created the 1903-1905 commission to address many of the same problems of abuse and inconsistent implementation as the first commission
  - The President appointed its three members, including Gifford Pinchot – the chief architect of the commission and its recommendations
  - The commission was never viewed as an impartial body, but rather as a vehicle for Pinchot to advance his ideas; consequently, its final report was largely ignored by Congress and others
  - That said, the commission and its report raised public awareness about natural resource exploitation and abuse of public land laws; in sum, it helped catalyze the growing conservation movement
  
- Congress authorized the 1930-1931 commission to examine the future disposition of unreserved lands and address a myriad of issues related to grazing, water, timber, and mineral resources
  - President Hoover appointed the 21-member commission, including representatives from federal government agencies, natural resource professions, and the political and journalism communities; one-half of the nominations were recommended by the governors of the 11 western states
  - Commission members broke into sub-groups, toured the West, convened public hearings, and convened to draft the final report

- The over-arching recommendation was to transfer unreserved federal lands to the states, with subsurface mineral rights reserved to the federal government
  - Like the two previous commissions, these recommendations were largely ignored; there were no immediate or long-term results
- Congress authorized the 1964-1970 commission after President Kennedy and Representative Wayne Aspinall (Colorado) reached agreement on passing both the Wilderness Act and the Public Land Law Review Commission Act in 1964
- President Johnson, honoring the agreement, signed both laws in September 1964
  - The PLLRC Act directed the commission to study existing policy relative to retention, management, and disposition of the public lands; examine [in so many words] the tension between legislative and executive authority; compile data to clarify various demands on public lands; and recommend modifications in law, regulation, policy, and practice
  - An 18-member commission was appointed jointly by Congress and the Administration; the 18-members then unanimously selected its 19<sup>th</sup> member as chair ... Rep. Wayne Aspinall
  - A core staff of 25 people, and an advisory council of 25 people (agency officials and representatives of various interest groups) plus representatives of Governors were appointed to assist the commission
  - The commission convened 11 national and regional hearings; heard testimony from over 900 people; produced 39 reports; held 19 meetings to identify problems, consider options, and make recommendations;
  - Scholars differ on whether the report emphasized “retention” or “disposal,” while industry largely support the report and the conservation community largely dubbed it an industry giveaway
  - The PLLRC released a final report *One-Third of the Nation’s Land* with 17 general recommendations derived from 137 “major” recommendations on legislative and administrative changes; the final report included some “consensus” recommendations and “separate views” on other recommendations.
  - The PLLRC’s recommendations led, most notably, to enactment of FLPMA. FLPMA consolidated over 3,000 public lands laws into a single organic act for the BLM. Additional PLLRC recommendations were administratively adopted, taking on regulatory force and effect.
  - The PLLRC recommended (not necessarily in any order of priority):
    1. Requiring “a continuing, dynamic program of land use planning,” that involves the public, and which was satisfied by FLPMA and NFMA. Plans were to be coordinated with “land use plans and attendant management programs of other agencies,” which plans do not always do well.
    2. Giving state and local governments an effective role in planning. FLPMA, NFMA, and NEPA allow for state and local involvement but do not delegate authority. Major impediment seen as state and local capacity, as the Commission recommended federal grants to states. Capacity appears to remain an issue, especially for smaller rural counties.

3. Planning to “obtain the greatest net public benefit,” with “highest and best use of particular areas . . . dominant over other authorized uses.” FLPMA and NFMA include a multiple-use, sustained yield-mandate, but decisions such as resource protection and commodity production result in dominant use areas.
  4. Increasing emphasis on environmental protection and stewardship.
  5. Retaining public lands in federal ownership. FLPMA formally established the federal policy of retaining the remaining public lands in federal ownership unless disposal is in the national interest. Where disposal does occur, the US should apply restrictive covenants and deed restrictions, especially where local zoning is inadequate. Covenants and deed restrictions remain an underutilized tool.
  6. That “no additional grants should be made to any of the 50 states.” For statehood land grants, limitations on use should be eliminated. Limitations set forth in grants generally remain in force.
  7. That if federal public lands were never to become part of the local tax base, some compensation should be offered to local governments (generally counties) to make up for the presence of non-taxable land within their jurisdictions. This recommendation led to creation of the Payment in Lieu of Taxes (PILT) program. Notably, the PLLRC recommended, “payments should not attempt to provide full equivalency with payments that would be received if the property was in private ownership.”
  8. That grazing should be conducted at “fair market value,” and that mineral “[p]atent fees should be increased and equitable royalties should be paid to the United States on all minerals produced and marketed whether before or after patent.” The PLLRC also recommended that minerals be reserved in all future public land disposals. Fair market value recommendations remain politically unpopular and have not been implemented.
  9. That the DOI “have sole responsibility for administering mineral activities on public lands, subject to consultation with the department having management functions for other uses.” BLM retains the lead role, but USFS involvement increased with enactment of FOOGLRA.
  10. That Congress should clarify the reserved water rights doctrine, as applied to federal reservations. Congress has not done so, leaving this responsibility to negotiations and the courts.
  11. Cooperation with states regarding fish and wildlife management, charging fees to hunt and fish on federal land, and designating dominant use areas for key wildlife habitat areas. Coordination has increased, but user fees for federal land have been adopted inconsistently.
  12. That the Homestead Act and Desert Lands Act be repealed and replaced with land sales where agriculture is the dominant use.
- Responding to the PLLRC’s main conclusion that the national legislature should take firmer control of public land and resources policy, Congress in FLPMA, carved out an ambitious future role for itself in classifying federal lands. Section 1714 of FLPMA lays out an elaborate procedural system for withdrawals and

- withdrawal revocations, with each major administrative action subject to hybrid forms of congressional oversight.
- The PLLRC recommended transferring the Forest Service to the Department of the Interior, to be renamed the Department of Natural Resources. The similar land uses and management objectives for the BLM and Forest Service were cited as supporting rationale, but a merger of these two agencies was not explicitly proposed. No legislative proposals were presented to implement this recommendation.

### ***Western Water Policy Review Commission (1995 -1998)***

Congress authorized a presidential advisory commission in 1992 to examine western water policy. After some delay, the US Department of the Interior chartered the commission in 1995 to complete a comprehensive review of federal activities that influence the allocation and use of water resources in the 19 western states. It also examined the legal and institutional framework for water management and the performance of federal agencies.

The commission included 12 members of Congress (the ranking majority and minority members of the committees with the greatest jurisdiction over water), the Secretaries of the Army and the Interior Department, and 8 citizens appointed by the President. The Interior Department provided administrative resources, and an executive director and employees of the Bureau of Reclamation staffed the commission.

The commission accomplished its objectives through meetings with the public, research, symposia, and the assistance of experts. It sought the opinions of people affected by western water policies through a series of public meetings and workshops across the West. The commission established a mailing list, sending newsletters and the draft report to approximately 3,000 individuals and organizations. In addition to seeking public comment, the commission contracted for a series of reports consistent with the mandate of the commission, including a series of basin studies that explored how various needs, interests, laws, policies, and practices play out in a particular basin.

In a notable departure from past commissions, all of the citizen appointees lived and worked in the West, and all but one of the commission's meetings were held in the West. It is also interesting to note that the chair of the commission and its executive director were affiliated with public universities in the West. The commission catalyzed a robust, informed dialogue on water policy in the West; captured the status of the West's water problems and the pressures driving change in water management; documented how policies are changing in response to population growth and a changing economy; and identified what more needs to be done with respect to tribal water needs, riparian and aquatic ecosystems, agricultural practices, and federal agency coordination. While no single solution was identified for all of these complex challenges, the central theme that emerged in the report is that the federal government should support watershed and basin innovation -- a shift towards stakeholder involvement and coordination of agencies along hydrologic rather than political lines. This organizing theme was not a recipe for the creation of federal commissions in each basin.

Rather, it endorsed the organic emergence of watershed and basin initiatives throughout the West as effective forums to integrate multiple needs, interests, and federal programs at different spatial scales. All of the recommendations in the report were presented explicitly within a framework respecting existing property rights in water.

### ***Pew Oceans Commission (2000 - 2003)***

Unlike the models presented above, the Pew Oceans Commission represents an alternative approach to catalyze and coordinate a comprehensive review of natural resource law, policy, and governance. After more than 30 years (1969) after the Stratton Commission (a Congressionally-chartered group to review ocean policy) issued its final report and recommendations on ocean policy and governance, the Pew Charitable Trust realized that the state of our oceans and coasts had changed somewhat dramatically. While some problems considered 30-years ago remained, new environmental, economic, and policy challenges had emerged – all of which exceeded the capacity of the existing governance arrangements. New knowledge about the complex interactions in marine ecosystems and the need to maintain the diversity and resilience of those natural systems further underscored the need for action.

In response, the Pew Charitable Trust created the Pew Oceans Commission, a bipartisan, independent group of 18 American leaders, to chart a new course for the nation's ocean policy. Its mandate was to identify policies and practices necessary to restore and protect living marine resources in U.S. waters and the ocean and coastal habitats on which they depend. The Commission was also charged with “raising public awareness of the principal threats to marine biodiversity and of the importance of ocean and coastal resources to the U.S. economy.”

The Commission brought together a diverse group of American leaders from the worlds of science, fishing, conservation, government, education, business, and philanthropy. It organized into four committees to review the core issues of governance, fishing, pollution, and coastal development; recruited leading scientists to clarify priority issues and to prepare reports summarizing the best scientific information available on those subjects; and also investigated marine aquaculture, invasive species, ocean zoning, climate change, science, and education.

For more than two years, the Commission conducted a national dialogue on ocean issues. It convened a series of 15 regional meetings, public hearings, and workshops to listen to those who live and work along the coasts. From Maine to Hawaii, Alaska to the Gulf of Mexico, the Commission spoke with hundreds of citizens, fishermen, scientists, government officials, tourism operators, and business leaders. Commissioners also held a series of 12 focus groups with fishermen. The Commission was deeply committed to learning from people who live and work along the coasts and around the country, and supplementing that knowledge by collecting the best scientific information available.

The Commission published its final report in 2003 and included several recommendations



to ensure healthy, productive, and resilient marine ecosystems for present and future generations. Among other things, it argued that to achieve and maintain healthy ecosystems requires that we change our perspective and extend an ethic of stewardship and responsibility toward the oceans. Most importantly, it asserted, “We must treat our oceans as a public trust.” In 2005, the Pew Oceans Commission joined forces with the US Oceans Commission (created by President George W. Bush in 2000) to further their overlapping and complementary recommendations and to unify their efforts. *[What, if anything, can be said about the tangible outcomes of this effort? Are oceans managed differently today because of this effort?]*

### ***ESA @ 30 Project (2001 – 2006)***

To help celebrate the 30<sup>th</sup> anniversary of the Endangered Species Act, Professor Dale Goble (University of Idaho) and other scholars and practitioners catalyzed and coordinated a systematic evaluation of the Endangered Species Act. The objective of the *ESA @ 30 Project*, as it was known, was to engage policy-makers, those impacted by the ESA, and those charged with its implementation to identify ways to improve its effectiveness.

The project began in the winter of 2001 when Professor Goble invited several other people to explore the merits of this idea. Housed at the Bren School of Environmental Science and Management, University of California, the organizers agreed to two guiding principles from the beginning: (1) all of the information and analyses of the ESA should be scientifically rigorous; and (2) the dialogue should engage the full spectrum of interests and perspectives on the ESA.

To achieve these objectives and principles, the organizers invited a select group of nearly thirty scholars and practitioners -- including biologists, economists, geographers, land-use planners, natural resource lawyers, philosophers, and policy analysts -- to a two-day discussion of the ESA in November 2002. To focus this discussion, the organizers also invited four individuals who have played significant roles in the evolution of the ESA. The discussion was further focused by three broad questions: (1) What have we learned from the ESA’s successes and failures? (2) What are we seeking to protect and why? and (3) How can we maintain biological resources and services on the working landscape?

Following this initial meeting, the attendees drafted some 40 papers that addressed the three questions from multi-disciplinary perspectives. Following an initial round of peer review, these papers served as the analytical basis for a two-day conference held in Santa Barbara in November 2003. A group of nearly 100 individuals representing a diverse cross-section of the interests impacted by the ESA – including NGOs from both the conservation and development communities as well as federal, state, and local governmental representatives -- met to discuss the papers and share ideas. Several notable experts, such as Bruce Babbitt and Dirk Kempthorne, addressed the group.

The discussions produced a remarkable degree of consensus on potential avenues to improve the effectiveness of the ESA. These ideas were further refined at a series of topical

workshops that were coordinated by four-person committee. Each workshop was hosted by a particular NGO, organized by agency personnel charged with responsibility for that topic, and included participants that represented the diversity of interests and viewpoints on that particular topic. The workshops developed more detailed proposals building on the points of consensus that emerged from the November 2003 conference. Workshops were convened on issues related to habitat conservation plans, state-based programs, ESA one-stop shopping, landowner incentives, and so on.

In addition to convening two national conferences and nearly a dozen smaller workshops, the project produced two books -- *The Endangered Species Act at Thirty: Renewing the Conservation Promise* (Island Press, 2006) and *The Endangered Species Act at Thirty: Conserving Biodiversity in Human-Dominated Landscapes* (Island Press, 2006). The organizers also participated in a series of briefings to groups including congressional staffs, the U.S. Fish & Wildlife Service, the Western Association of Fish and Game Administrators, The Nature Conservancy, the American Farm Bureau Federation, National Cattlemen's Beef Association, Plum Creek Timber Company, Environmental Defense, National Wildlife Federation, and the Center for Biological Diversity. [*What, if anything, can be said about the tangible outcomes of this effort? Are oceans managed differently today because of this effort?*]

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