

THE LEGAL FRAMEWORK



FOR PUBLIC WATERSHED INVESTMENT PARTNERSHIPS



Center for Natural Resources
and Environmental Policy

Policy Report No. 8
Pre-publication review draft
July, 2012

PREFACE

The Center for Natural Resources and Environmental Policy is an applied research and education center at The University of Montana. The Center's goal is to shape policy for people and places, including urban, rural, working, and wild landscapes. The Center operates on the principle that the best way to do this is through public processes that are well informed and provide meaningful opportunities for all interested citizens, stakeholders, and decision makers to participate. To help achieve this mission, the Center produces policy reports to build and share knowledge on options to prevent and resolve natural resources conflicts. To ensure the reports are relevant, the Center partners with appropriate organizations involved in formulating and influencing public policy. While not representing the official policy of any of these organizations, our publications benefit a great deal from this input and review.

In 2006, the Center (under its previous name, the Public Policy Research Institute) published [The Legal Framework for Cooperative Conservation](#), which described the growth of collaborative conservation involving new types of partnerships between public and nongovernmental partners, and provided an overview of the legal authorities that enable and constrain such partnerships.

This policy report takes a similar approach to a particular type of collaborative partnership involving non-federal parties' investment in restoration and other activities aimed at improving the health of publicly owned watershed lands to enhance the security and quality of public drinking water supplies. This focus emerged from discussions with diverse participants in watershed investment partnerships and through the author's participation in the [Carpe Diem West's](#) Healthy Headwaters program and the recently formed [Healthy Headwaters Alliance](#), a coalition of leaders in this movement. Support from the Bullitt Foundation made this involvement and related research possible.

The Legal Framework For Public Watershed Investment Partnerships
by Sarah Bates

TABLE OF CONTENTS

Preface	1
Introduction: Cities, Meet Your Watersheds.....	3
From Trees to Tap: A New Kind of Partnership	6
Legal Issues and Challenges	11
Strategies for Success	18
Key Resources.....	21



INTRODUCTION: CITIES, MEET YOUR WATERSHEDS

Over the past several decades, public resource management has become an increasingly collaborative endeavor. This is not a new trend, but has accelerated with new laws and policies favoring public and stakeholder engagement responding to citizens' desires to be involved in important planning and management decisions. This more inclusive approach is not always efficient or harmonious, as evidenced by the persistence of lawsuits and administrative challenges, but there is little doubt that a far broader array of "publics" are now invested in the decisions that affect the resources they care about.

Public resource management itself has evolved to take a broader look at the land as a whole, rather than focusing on individual units marked on maps. Successful public resource managers today engage with the people in affected communities and look for solutions that extend beyond the boundaries of their national forest or resource area, recognizing that the health of the land depends on management actions supported by wide-ranging constituencies.¹

For their part, people whose livelihood or quality of life depends on public lands and resources have increasingly looked for opportunities to support landscape-scale initiatives, ranging from strategic land trades and purchases to overcome fragmented ownership² to regional partnerships to implement measures for wildfire protection and watershed health.³

In one of the more interesting developments in recent years, urban water providers have renewed their connections with the lands that provide their drinking water supplies, sometimes just upstream and sometimes across distant mountain ranges. Working with the managers of these headwaters lands—most of which are in public ownership—they have crafted a variety of partnership arrangements to protect and restore watershed health.

Such public watershed investment partnerships offer an intriguing vehicle for connecting people to the source of their water, providing crucial support for

¹ See the examples described in Matthew McKinney, Lynn Scarlett & Daniel Kemmis, *Large Landscape Conservation: A Strategic Framework for Policy and Action* (Lincoln Institute of Land Policy, 2010).

² See, for example, the [Montana Legacy Project](#), a joint effort between The Nature Conservancy and the Trust for Public Land to acquire and protect 310,000 acres of private forestland from Plum Creek Timber in the northern Rockies.

³ See, for example, the [Front Range Roundtable](#), a coalition of individuals from state and federal agencies, local governments, environmental and conservation organizations, the academic and scientific communities, and industry and user groups, all with a commitment to forest health and fire risk mitigation along Colorado's Front Range.

financially strapped public land managers, and encouraging a broad, landscape-scale approach to sustaining the land and water upon which we all depend. They are related to a larger movement referred to as “payment for ecosystem services,” which provides compensation to individuals or communities to support land management actions that provide benefits to others, such as water purification, flood mitigation, or carbon sequestration. In the case of public watershed investment partnerships, the compensation is going to the federal land management agencies to enhance the services provided by public lands, particularly related to water quality and related watershed services.⁴

For the most part, public watershed investment partnerships emerged in isolation, responding to unique conditions and opportunities. In several instances, personal connections between people living in different areas encouraged shared strategies and lessons.⁵ But until the formation of the [Healthy Headwaters Alliance](#) in 2011-12, there was little formal coordination of such efforts or regular communication of policy goals.

Today, there is a great deal of interest in this approach, including attention from key policy leaders at all levels of government. Calls to replicate the success of initiatives such as the [“Forest to Faucet” partnership](#) that links Denver Water with the Rocky Mountain Region of the Forest Service challenge resource managers and local officials to consider the aquatic threads that connect them. In some cases, opportunities for joint initiatives are obvious and relatively easy to pursue, but sometimes people wonder about the legal or policy issues that might get in the way of productive partnerships.

The Healthy Headwaters Alliance believes that headwaters protection and restoration are highly effective when: (1) carried out by broad-based, collaborative partnerships at the community level; 2) conducted in accordance with comprehensive, evidence-and-science-based watershed plans developed with public input; and (3) broadly funded by land managers, utilities, businesses, and other water users.

Policy Platform of the Healthy Headwaters Alliance (May 2012)



⁴ For an analysis of how federal policies incorporate PES more broadly, see Lynn Scarlett and James Boyd, [Ecosystem Services: Quantification, Policy Applications, and Current Federal Capabilities](#), Resources for the Future Discussion Paper 11-13 (March 2011).

⁵ See, for example, the story of the relationships that fostered new practices in Santa Fe, based on experiences in Denver: Carpe Diem West, [Santa Fe, New Mexico: Sustaining the Watershed](#) (2011).

A good deal of useful literature has been developed on collaborative resource management and best practices for working across jurisdictional lines, but these resources seldom focus on issues raised by watershed investment partnerships involving federal public lands and their urban partners. This report describes a conceptual framework for such partnerships, outlines and briefly addresses their legal authorities and issues that arise in their implementation, and suggests emerging strategies to remove obstacles and improve the opportunities for productive, effective watershed investment partnerships.

As with all collaborative resource management, the measure of success is not in the achievement of a fine process, but in the accomplishment of stated goals with lasting benefits for the land and human communities. Public watershed investment partnerships offer tremendous promise for linking people to the land and encouraging long-term stewardship of land health. We are in the early stages of this evolution, and have much to learn from those who are working creatively and productively throughout the country.

FROM TREES TO TAP: A NEW KIND OF PARTNERSHIP

Water is not the first resource that comes to mind when most people think of public lands, but in fact it is probably their most valuable and irreplaceable component. Congress authorized the creation of the national forest system more than a century ago, in part, “for the purpose of securing favorable conditions of water flows.” Today, the U.S. Forest Service (within the Department of Agriculture) manages 193 million acres of public forestland, much of it in the high-country headwaters of our nation’s major river systems. Former Forest Service Chief Mike Dombeck described water as the “forgotten forest product,” but that is beginning to change with a growing awareness of the critical importance of these watersheds.

Other federal agencies manage public lands and waterways essential to the well-being of the nation’s waters—the U.S. Bureau of Land Management, Fish & Wildlife Service, Bureau of Reclamation, and Army Corps of Engineers—but the primary keeper of high-country watersheds is indisputably the Forest Service.

NATIONAL FORESTS: THE NATION'S WATER TOWERS

Data from the U.S. Forest Service reveal the key role that national forests play in the nation's water supply, and the special importance of these lands in the American West:

- More than 900 cities in the U.S. rely on national forest watersheds for their water supplies.
- 66 million people depend on water flowing from national forest lands.
- In the Rocky Mountain West, where water stored in mountain snows provides essential year-round water for multiple uses, national forests supply over 70% of public water systems that tap streams.

In addition to providing the source of water to downstream water users, national forests furnish critical ecosystem services, including:

- preventing erosion;
- filtering sediment and pollutants;
- replenishing aquifers;
- moderating floods and high runoff flows; and
- protecting water quality.

Water flowing through national forests also supports ecologically valuable wetlands, meadows, and riparian corridors, as well as lakes and streams that provide economically important recreational opportunities.

Healthy, resilient national forest watershed lands are increasingly recognized as a critical part of responding to the impacts of climate change, which include:

- less snowpack and earlier runoff in the spring;
- flooding and erosion due to "flashier" runoff events and more intense storms;
- reduced streamflows during the driest months of the year; and
- drier forest conditions with the risk of more intense fires.

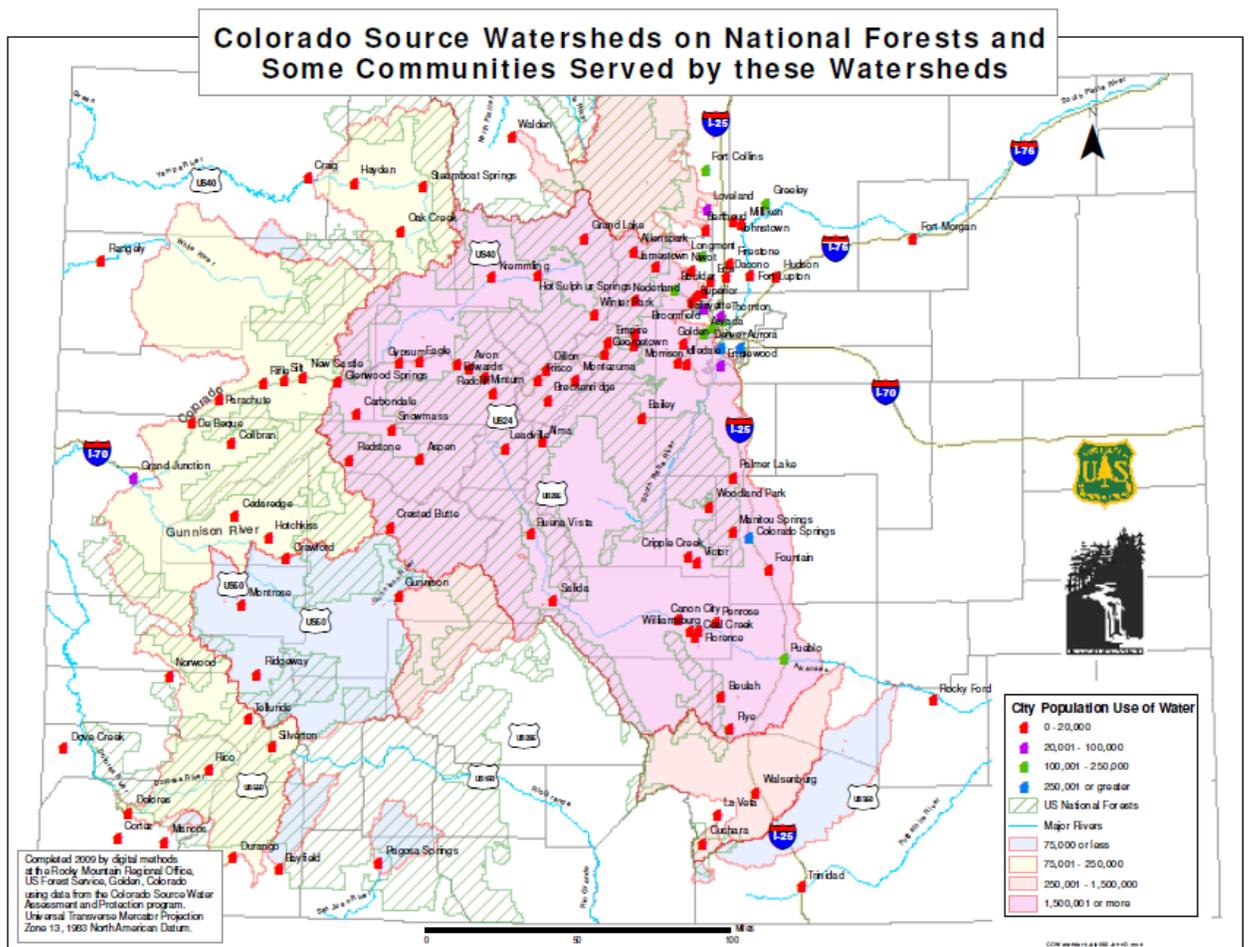
For more on the role of national forests in responding to climate change, see "Forests in Hot Water," [Your National Forests](#), the magazine of the National Forest Foundation (Spring 2009).

Water managers are acutely aware of the source of their supplies, and in some cases have acquired lands or otherwise asserted legal authority in critical watershed areas to protect their integrity. Boulder, Colorado, for example, manages a 448-square-mile protected mountain watershed, which includes the largest active glacier in the state. With authorization from Congress, the city purchased lands from the U.S. government's newly created national forest system nearly a century ago, including the Arapaho Glacier and the entire Arapaho watershed. Today, city water managers tightly regulate recreation in watershed lands to protect water quality.

For its part, Salt Lake City sought authority in state law to enforce water quality protection ordinances throughout the 185-square miles of the five Wasatch Front watersheds that provide its water, using this authority to restrict a variety of activities including cattle grazing, sewage systems, and recreation use in some areas. In addition, the Salt Lake City Public Utilities Water Rights and Watershed Purchase Fund uses a surcharge on water customers' monthly bills to purchase critical watershed lands and conservation easements from willing sellers.

Others do not have this opportunity to acquire or assert direct authority over watershed lands, but instead have worked with federal land managers to locate their water collection, storage, and conveyance facilities on public lands. Denver Water, for example, maintains 12 reservoirs in both the South Platte and Colorado River drainages; its largest facility, Dillon Reservoir, is encompassed by the White River National Forest. Overall, nearly 90 percent of the 14.5 million acres of national forest in Colorado are in watersheds that contribute to public water supply.





National forests yield the vast majority of water that supplies over 100 communities in Colorado. Scores of source watersheds are "nested" within each other, so this map shows only the boundaries of the largest source watersheds to simplify.

Source: U.S. Forest Service, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5166261.pdf

Thus, management of public lands is management of water, and the well-being of national forest headwaters directly affects the quality and reliable flows of water to millions of people downstream. Today's forest managers—working in the reality of chronic budget shortfalls and ongoing reductions—are challenged by the impacts of a warming climate as well as sprawling urban growth and expanding recreation at the wildland-urban interface. Each of these issues demands urgent attention, but the agency's dedicated and talented staff simply do not have the resources to address them without additional support.

Public watershed investment partnerships have emerged in response to various combinations of these challenges and the unique needs and priorities of different water providers. Some involve assessment of user fees on water customers to finance restoration work on national forest lands; in other cases, the non-federal partner provides in-kind support, or develops coordinated management or education initiatives. There is no single model, but much good thinking on the subject by the leaders of the Carpe Diem West network has produced a useful framework to understand the programs now in place.

Carpe Diem West divided existing programs into two broad categories, and provided examples of each (See the comprehensive summary table in the Carpe Diem West's [2011 report](#) for key features of these and other programs):

- **Water utility** programs, which allocate small portions of their customers' user fees to pay for a wide range of watershed protection and restoration work on public lands. Existing programs include:
 - o [Forest-to-Faucet Partnership](#) between Denver Water and the Rocky Mountain Region of the Forest Service
 - o Santa Fe's [Municipal Watershed Plan](#)

- **Private resort** programs, which collect a modest fee (typically \$1 per room per night on an opt-out basis) to support on-the-ground forest restoration projects that improve the watershed. Participating resorts include:
 - o Vail Resorts, in Colorado
 - o Snowbird Resort, in Alta, Utah

The funds collected through such programs do not necessarily go directly to the Forest Service, but more typically are collected and disbursed by non-profit groups such as the [National Forest Foundation](#) or a local land stewardship organization such as the [Cottonwood Canyons Foundation](#) in Utah. Most strategies are complex and multi-faceted, incorporating a variety of in-kind contributions such as public education about watershed protection and health and direct involvement in watershed protection activities. Salt Lake City, for example, pays for backcountry rangers and enforcement officers in what one official describes as a "co-management" arrangement on national forest watershed lands.

For the purposes of this analysis, the following key features characterize these various public watershed investment partnerships:

- All include land management actions (fire prevention, landscape restoration, etc.) that take place on **public** lands, primarily national forests⁶;
- All involve contributions (monetary or otherwise) from **non-federal** partners to support the actions on public lands; and
- All focus on outcomes related to **water** quality and/or security of supplies.

The legal authorities for these partnerships are as varied as the approaches. Embarking on any new public land collaboration may introduce novel bureaucratic challenges for both the governmental and nongovernmental parties. And, because public resources valued by many interests are involved, the specter of opposition and legal challenge is always present. The next section of the report provides broad guidance for those considering involvement in a public watershed investment partnership, and the resources section at the end of this report includes useful guides to federal agreements and stories of existing partnerships to illustrate some of the proven strategies.

LEGAL ISSUES AND CHALLENGES

This section outlines a few of the questions that may arise when partners are contemplating a public watershed investment partnership. This information is intended to alert readers to potential issues and to familiarize them with available resources. It is not meant as a source of or substitute for legal advice.

1. Do the parties have the legal authority to enter into this agreement?

Federal land management agencies are part of the executive branch of government, operating under legal authority defined by and delegated to the agencies by the U.S. Congress. Thus, any formal agreement committing an agency to a particular action must be consistent with and must cite the legal authority granted by a congressional act. Some laws provide this authority to all federal agencies; others apply specifically to a particular agency.

⁶In other cases, utilities have provided financial incentives for private landowners to protect and enhance watershed services. See, for example, Carpe Diem West, [Eugene, Oregon: Giving Back to the Watershed](#) (2011).

Importantly, there is no single type of agreement that may be appropriate for a public watershed investment partnership. Utilities and nongovernmental groups wishing to provide support for watershed enhancement work on public lands have used a wide range of agreements to accomplish their purposes, ranging from the more formal statement of mutual responsibilities in a Challenge Cost Share Agreement⁷ to an aspirational statement of principles for cooperation in a Memorandum of Understanding (MOU).⁸ When tight accountability for expenditure of funds is required, a more formal agreement is appropriate.

The Forest Service uses a Collection Agreement to accept money, equipment, property or products from a non-federal entity to accomplish a purpose authorized by law. This is a useful vehicle for receiving outside financial or in-kind support, but the Forest Service, or anyone acting on behalf of the Forest Service, is prohibited from soliciting money, either verbally or in writing for the agency.⁹

The Forest Service developed a useful decision tree to assess the type of agreement that may be appropriate in a given situation. It is reproduced on the following page. Note that a public watershed investment partnership might utilize several types of agreements at different stages of the process. The [Forests To Faucet](#) partnership between Denver Water and the Rocky Mountain Region of the Forest Service, for example, captured the key terms of agreement in an MOU, and then negotiated Collection Agreements for particular projects.

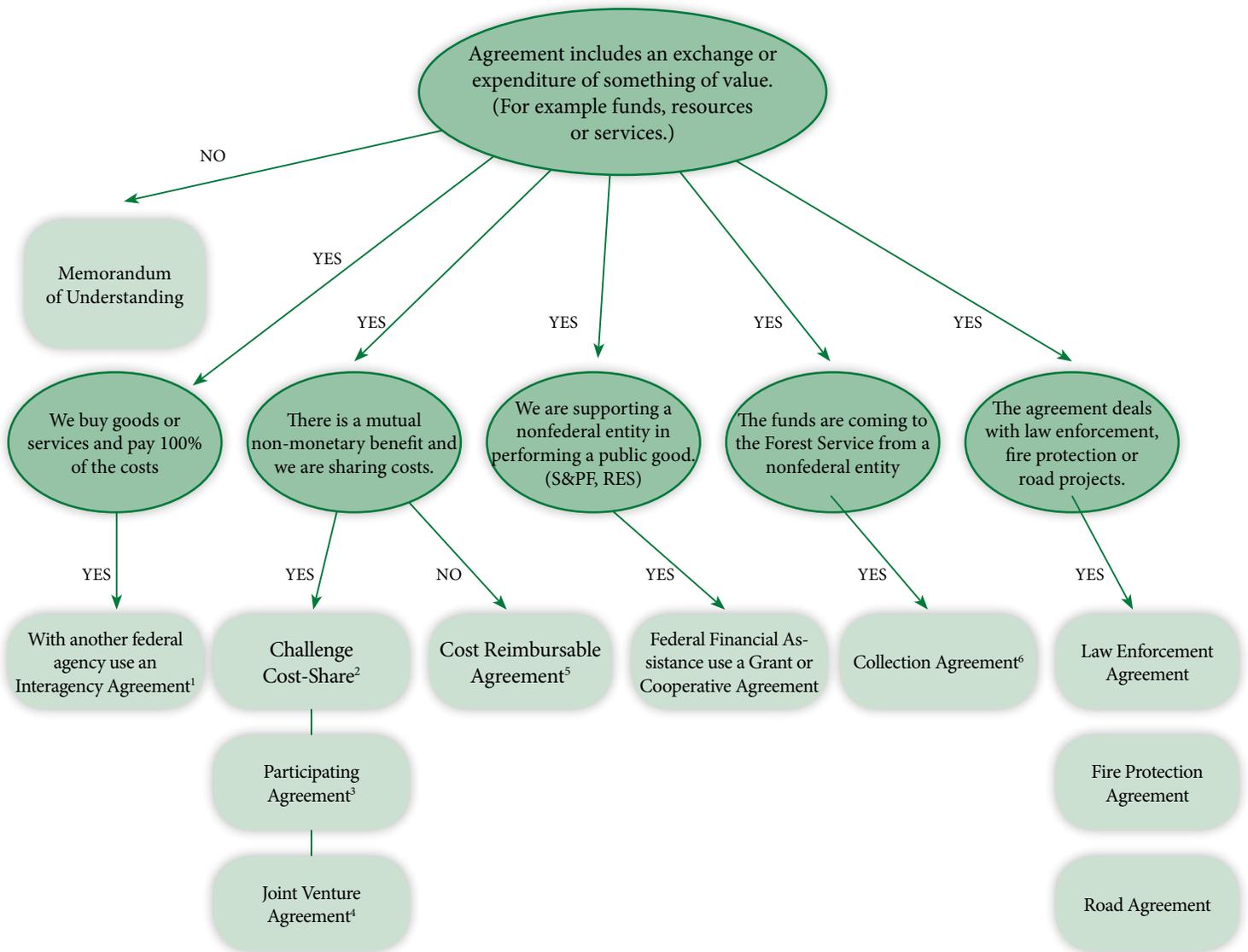
The particular legal authority for an agreement may determine particular elements, such as the time during which the agreement may last. For example, the legislation authorizing stewardship contracts limits project duration to ten years.

⁷ Challenge Cost Share Agreements, authorized by the Interior and Related Agencies Appropriations Act of 1992 (Public Law 102-154), enable projects to be financed through matching funds from partners including public and private agencies, organizations, institutions, and/or individuals. Agency policy for applying this authority is described in Forest Service Manual 1587.12 and Forest Service Handbook 1509.11 (Chapter 60). The USDA Forest Service [Agreements Desk Guide](#) provides useful illustrations of Challenge Cost Share case studies (p. 53) and a sample agreement (p. 54).

⁸ There is no specific legal authority for an MOU, which is appropriate where the parties will engage in separate activities in a coordinated and mutually beneficial manner and nothing of value will be exchanged between the agency and its partners. An MOU may not be used to: (1) obligate or fund projects; (2) exchange funds, property, services, or anything of value; or (3) perform work that isn't authorized by program legislation. USDA Forest Service, [Agreements Desk Guide](#) 10 (2003).

⁹ Note, however, that the [National Forest Foundation](#) has legislative authority to solicit funds on behalf of the Forest Service. See the discussion below about the ability of the agency to receive funding from non-federal sources.

DECISION TREE TO DETERMINE APPROPRIATE INSTRUMENT FOR A PARTNERSHIP
 SOURCE: [USDA FOREST SERVICE PARTNERSHIP GUIDE](#)



Notes:

- 1: Agreement can include funds to another agency or another agency providing funds to the Forest Service. Use procurement with any other entity besides federal agency.
- 2: No set percentage of cost-share; activity must be part of Forest Service mission.
- 3: Specifically for pollution abatement, manpower/job training, publication of forest history materials, or forest protection. No specified cost-share.
- 4: Cooperator must contribute at least 20% of total cost, activities must include agriculture teaching activities at institution of higher education.
- 5: Forest Service buying goods/services from a State Cooperative Institution of higher education. Services or goods available in-house for agriculture teaching activities.
- 6: There must be no conflict of interest: a signed agreement and apportionment authority is needed prior to starting work.

2. Can the federal agency receive funds and in-kind services from an outside group?

Many of the resources concerning partnerships involving public land management initiatives focus on arrangements in which federal monies are directed to nongovernmental groups to pay for land management actions or through exchange of goods and services in stewardship contracting.¹⁰ There is less information readily available on agreements that funnel dollars and in-kind services from outside sources to the agency for on-the-ground activities, but these arrangements are allowed within a few important parameters.

Federal law provides several important constraints on the ability of federal agencies to receive funds, all related to the separation of powers established by the U.S. Constitution. The U.S. Congress has exclusive authority to raise, borrow, and spend funds on behalf of the federal government; an agency within the executive branch, such as the Forest Service, may only spend money from the U.S. Treasury pursuant to congressional appropriations.

Congress has added details to the broad constitutional provisions to account for income outside of federal appropriations. The federal Miscellaneous Receipts Statute¹¹ provides that—unless otherwise authorized by law—monies received by a government official from any source outside the appropriations process must be delivered to the U.S. Treasury. Thus, an agency such as the Forest Service may not supplement its funding from outside sources without explicit permission from Congress. Some examples of such congressional authority include the Collaborative Forest Restoration Act, the National Forest Foundation Act, and the Secure Rural Schools and Community Self-Determination Act.

¹⁰ Stewardship contracting, authorized by Pub. L. 108-7, § 323, enables the Forest Service to enter into a contract that integrates forest product removal and restoration services, working in partnership with a variety of cooperating partners and emphasizing benefits to the local community. Watershed restoration is often a key goal of a stewardship contract. If the value of goods (forest products) ends up exceeding the cost of providing the services, the Forest Service may collect and retain the excess receipts. For more information, see USDA Forest Service, [Stewardship Contracting: Basic Stewardship Contracting Concepts](#) (Aug. 2009). See also useful information on the [Red Lodge Clearinghouse](#) website.

¹¹ Codified at 31 U.S.C. § 3302(b), this law was enacted in 1849 to address abuses of government authority by individuals receiving payments in their official capacity. See Timothy D. Matheny, [“Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions.”](#) Army Lawyer (Sep. 1997): 31, which focuses on military applications but includes good background and context on the statute.

The prohibition on soliciting does not restrict the Forest Service from approaching and discussing potential projects with cooperators, where the Forest Service and the cooperator share mutual interests and may benefit in the same qualitative way. When approaching potential cooperators the first step is to discuss the project, separate and apart from funding. More than one cooperator may be approached. The purpose is to ascertain how many cooperators may have a mutual interest in the project and wish to commit to its joint completion. Once a cooperator or group of cooperators is identified, a discussion of contributions should follow. Contributions may include cash, services, in-kind contributions, donation of equipment, and so forth. The focus should always be on the discussion of contributions necessary for joint completion of the project, not soliciting money on behalf of the agency.

USDA Forest Service Manual 1580.42e

Some broad parameters of federal contracting and ethics law may limit or prescribe the terms that may be included in such an agreement or the ways in which partners may work with one another. The [USDA Office of Ethics](#) provides detailed guidelines and resources for determining what rules apply in a given situation, and the Forest Service [Partnership Guide](#) (especially Appendices H and I) includes excellent guidance for the application of these rules to partnerships such as those involving public watershed investments. Key ethics rules that might arise in this situation include these:

- Agency personnel must avoid conflicts of interest or the appearance of impropriety in all partnership activities.
- The agency may not endorse or sponsor commercial enterprises, products, or services.
- Agency personnel may attend partnership efforts to raise funds for mutually beneficial projects, but their active participation is limited to providing information about how the contributions will support agency efforts; they may not actively solicit funds.
- The Forest Service may accept cash donations under the restrictions of the Acceptance of Gifts Act¹²; fewer restrictions apply to gifts and donations directed through the [National Forest Foundation](#).

¹² 7 U.S.C. § 2269.

3. Does this partnership compromise the federal agency's authority to manage public lands as required by law?

As explained more fully in a 2006 policy report ([The Legal Framework for Cooperative Conservation](#)), there are some legal constraints on the ability of a federal agency to share management authority over public resources. These do not prohibit but may define the outer limits of what might be included in a public watershed investment partnership agreement.

The U.S. Congress, which holds plenary authority to regulate the use and management of the public lands, may delegate to federal agencies the authority to fill in details of open-ended statutes. For example, the Federal Land Policy & Management Act contains a broad delegation of power to the U.S. Bureau of Land Management (BLM), authorizing the Secretary of the Interior to “enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands.” Similarly, the Multiple Use-Sustained Yield Act authorizes the U.S. Forest Service, through the Secretary of Agriculture, “to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons” for such purposes as forest protection and coordinated management. Either of these authorities might be the basis for a public watershed investment partnership agreement.

Importantly, federal agencies may not “subdelegate” this authority to nonfederal parties. That is, a federal agency may not fully shift its administrative responsibilities to third parties, but always must retain final decision-making authority over the public resources that are its responsibility to manage and protect. Further, any shared management must be consistent with the governing statutes and ensure that there are no conflicts of interest among participants. (See the 2006 policy report referenced above for examples of the application of this rule to several actual partnerships.)

In most cases, the sort of management actions contemplated by public watershed investment partnerships would not raise subdelegation issues. If an agreement contemplates establishment of a cooperative management team, it is crucial that the federal agency retain this final management decision authority.

In a broader sense, federal resource management agencies are obligated to act consistently with the plans and regulations they have adopted pursuant to federal law. For its part, the Forest Service's land and resource planning process is guided by regulations updated substantially in 2011-2012. The National Forest Planning Rule requires national forest planners to identify priority watersheds for maintenance or restoration early in the assessment process, and requires

each forest plan to include “components to maintain, protect, and restore public water supplies, groundwater, sole source aquifers, and source water protection areas” located on national forest lands.

Consistent with this mandate, the Forest Service embarked on an ambitious national [Watershed Condition Framework](#), starting with an assessment of existing watershed conditions in 2011. The agency next identified priority watersheds, and began work on Watershed Action Plans. This strategic analysis and interactive on-line watershed data provide crucial information about the lands best suited for productive partnerships and investment by utilities and nongovernmental groups.

The U.S. Forest Service’s watershed condition classification, priority watershed designation and Watershed Restoration Action Plans are the first three steps in the agency’s Watershed Condition Framework. This interactive mapping capability will better provide current and future partners important information on potential needs for watershed restoration and maintenance and will also increase the public’s awareness of their local watershed conditions and the role they can play in improving them.

USDA Forest Service
[Watershed Condition Framework](#) (2012)

4. What other legal challenges might arise?

Unless specifically exempted by federal law, any land management action taken by a federal agency must comply with all relevant environmental and public process statutes—and thus may be subject to challenge by citizen groups or others unhappy with the outcome. So, for example, a partnership between community members, a water utility, and the Forest Service might cooperatively decide to share the costs for a series of watershed projects and enter into an agreement authorized by federal law as described above, but the work itself may be delayed by administrative appeals or lawsuits if others believe the decision violated provisions of the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), or another relevant statute.

Challenges are most likely when the management actions involve significant removal of timber or other actions that might modify sensitive wildlife habitat. This is the case in a currently pending challenge in the Gallatin National Forest in central Montana, where the [Bozeman Municipal Watershed Project](#) proposes burning, harvesting, and thinning 4,800 acres in the drainage that provides 80 percent of the Bozeman area’s water.

¹⁴ See 76 Fed. Reg. No. 30, 8480, 8491 (2/14/11).

According to the Forest Service, the project would “[p]rotect the municipal watershed and treatment plant from excessive sediment or ash associated with severe fire and reduce the risk of a crown fire in the urban interface immediately north of the Forest boundary.” The agency believes that a severe wildfire in this watershed could put so much sediment and ash in the creeks that the municipal treatment plant would be overwhelmed and might be shut down.¹⁵

Several environmental groups challenged the actions proposed in the Bozeman watershed, arguing that the logging projects would threaten habitat for lynx and grizzly bears and would destroy habitat for other old-growth dependent species. And, contrary to the watershed-protection goals stated by project proponents, the environmental plaintiffs argue that the logging and construction of temporary roads would adversely affect water quality by adding sediment to the streams. They also contend that the proposed actions would do little to reduce the likely severity of forest fires.¹⁶

In short, even the most collaborative and cooperative watershed partnership should anticipate public scrutiny of proposed actions that alter public lands. Transparency, early and continuous outreach and involvement, and full accountability to all applicable federal laws may reduce the possibility objections rising to the level of administrative and judicial appeals.

STRATEGIES FOR SUCCESS

Each public watershed investment partnership arises from and responds to the unique needs of the community, its watershed lands, and the individuals engaged in the collaborative process. Thus, while there is no simple recipe for success, our survey of the legal framework within which these partnerships emerge suggests some areas in which policy and practice could support and strengthen these efforts.

¹⁵ After fires in 1996 and 2002 in the Upper Platte River watershed in Colorado, heavy rains flushed debris, burned logs, and more than 750,000 cubic yards of sediment into the Strontia Springs Reservoir, part of Denver Water’s municipal supply system. As [High Country News](#) reported in a 2012 story, the utility spent more than \$26 million dredging the reservoir, treating the water, and reseeded the watershed’s forests.

¹⁶ See the complete list of objections in the plaintiffs’ [press release](#) and complaint: [Alliance for the Wild Rockies and Native Ecosystems Council v. Christensen](#), Case 9:12-cv-00055-DLC (filed April 10, 2012).

Emphasize the “public” part of the partnership through broad educational efforts aimed at connecting people with their watersheds.

Although public awareness about watersheds and water quality has grown in recent years, most utility customers know very little about the source of their water. Innovative campaigns by forward-looking utilities and their partners provide excellent models for sparking curiosity and concern for the well-being of public watersheds. As demonstrated by a poll conducted in Santa Fe, utility customers are willing to pay modest fees for watershed protection and restoration, once they’ve learned about threats and options.¹⁷

Ensure consistency of individual watershed projects with established goals and standards of public land and resource management.

When dealing with public resources, all partners need to be familiar with the legal standards and policy guidelines the sideboards for what might be done. For example, a watershed restoration project that includes actions inconsistent with a forest resource management plan may face challenges that will delay or even block the project. On the other hand, when partners participate throughout the resource management planning process and incorporate elements of watershed health with larger landscape goals, individual projects are likely to be approved far more easily and with less controversy. The Forest Service’s [Watershed Condition Framework](#) offers an excellent launching point for productive public watershed investment partnerships.

Clearly articulate the legal authority for any written partnership agreement, and confirm compliance with the constraints inherent in that authority.

Any agreement with a public resource management agency must clearly state the legal authority upon which it is based. Agency legal counsel can provide advice on the appropriate form of agreement, which may range from a non-binding Memorandum of Understanding to a formal contract involving financial accountability.

¹⁷ This poll and the broader campaign to which it was connected are described in Carpe Diem West, [Santa Fe: Sustaining the Watershed](#) (2011).

Engage mixed groups of stakeholders, community leaders, utility managers, and agency personnel in interactive training and outreach efforts related to watershed partnerships.

With declining budgets and increased pressures for action on threatened watersheds, agency personnel often feel pressured to engage in partnerships that produce financial and in-kind support from outside sources. Sometimes, this pressure results in hasty partnerships that raise issues about conflicts of interest or other ethical concerns.¹⁸ The Forest Service provides training for employees about the legal and other constraints on partnerships, but this training would be equally useful for the many groups who are interested in engaging with the agency.

In addition to on-line trainings such as webinars, there would be great value in convening roundtables around the country to engage mixed groups of stakeholders, community leaders, utility managers, and public resource managers to share stories about successful (and not-so-successful) public watershed investment partnerships and to explore together the issues that might arise in future collaborations.

A good deal of useful information is available through the [National Partnership Office](#), developed by the Forest Service in collaboration with the National Forest Foundation. It would be helpful to highlight model agreements and supporting information relevant to agreements in which outside parties provide financial and in-kind support for watershed projects.

Secure financial and in-kind support from a variety of sectors to ensure a community-wide sense of ownership and investment.

Broad and diverse investment in public watershed investment partnerships includes both financial support (user fee surcharges, voluntary check-off fees, charitable foundation grants) and a wide array of in-kind services (on-the-ground work parties, watershed education campaigns, cooperative resource management efforts). Legal and ethical issues are least likely to arise when the sources of support are diverse and there is little likelihood of one non-federal entity exerting improper influence over public resource decisions. Community-wide investment ensures a more lasting and acceptable partnership, including possibly unexpected benefits from individuals taking voluntary efforts to protect and enhance their watershed.

¹⁸ For example, in 1997, the National Forest Foundation entered into an agreement with Subaru that included apparent product endorsement by the Forest Service's mascot, Smokey Bear and other "branding" activities. Although the Forest Service was not a party to the agreement, the agency entered into an MOU with the National Forest Foundation that effectively committed it to participate in the endorsement activities in return for financial and in-kind support (use of vehicles). In 1998, the USDA Office of the Inspector General found that this agreement violated agency regulations regarding partnerships and product endorsement. The [report](#) is a useful and cautionary read for anyone contemplating a partnership between an agency and commercial entity.

¹⁹ See, for example, this [webinar](#) on ethical issues in partnerships, convened in late 2011.

KEY RESOURCES

Selected Laws, Regulations, and Agency-generated Guidance

USDA Forest Service, [Agreements Desk Guide](#) (2003).

This guide is aimed at Forest Service employees contemplating entering into a wide range of agreements with nongovernmental partners. It supplements and illustrates examples of the application of the key sections of the Forest Service Manual and Forest Service Handbook.

USDA Forest Service Handbook, [Section 1509.11](#), *Grants, Cooperative Agreements, and Other Agreements Handbook* (updated regularly)

Forest Service Handbooks are the principal source of specialized guidance and instruction for carrying out the direction issued in the Forest Service Manual (see link below). Specialists and technicians are the primary audience of Handbook direction. Handbooks may also incorporate external directives with related USDA and Forest Service directive supplements. This Handbook offers detailed guidance for agency officials, with sample agreement forms.

USDA Forest Service Manual, [Section 1580](#), *Grants, Cooperative Agreements and Other Agreements* (updated regularly)

This section of the Forest Service Manual contains legal authorities, objectives, policies, responsibilities, instructions, and guidance related to agreements for use by Forest Service line officers and primary staff.

U.S. Department of the Interior Bureau of Land Management, [Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners](#) (2012).

This guidance document focuses in particular on the opportunity for agencies to participate in BLM resource planning through processes mandated by the National Environmental Policy Act (NEPA). Some of the information in this document may be helpful if parties are contemplating a Memorandum of Understanding with the BLM.

Reports and Other Publications

Carpe Diem West, [*Policy Platform of the Healthy Headwaters Alliance*](#) (May 2012). The Healthy Headwaters Alliance is a coalition of water utilities, elected officials, land managers, scientists, conservationists, recreationists, timber companies, and business leaders “working to promote the health and resilience of the headwaters that provide water security to communities across the American West.” This policy platform reflects several years of dialogue and joint work sessions convened by Carpe Diem West.

Carpe Diem West, [*Watershed Investment Programs in the American West*](#) (Nov. 2011).

This report updated an [*earlier summary*](#) of “user contribution programs” in the region, offering an expanded typology of funding partnerships, case studies of successful collaboration, and suggesting key policy questions to be addressed as such programs expand throughout the country.

National Forest Foundation and USDA Forest Service National Partnership Office, [*Partnership Guide*](#) (May 2005).

Comprehensive and user-friendly guide for Forest Service and NGO partners to the laws and regulations governing land stewardship partnerships involving the U.S. Forest Service, as well as best practices for collaboration. Despite its emphasis on one agency, this guide is useful for all those involved in partnerships with federal resource managers.

Pinchot Institute for Conservation, [*Partnership with the USDA Forest Service: Improving Opportunities and Enhancing Existing Relationships*](#) (Sep. 2001).

Developed in response to a congressional request for analysis of specific problems and successes encountered while partnering with the Forest Service and suggesting recommendations for improving the agency’s partnership abilities, this report focuses on potential legislative fixes for identified issues.

Public Policy Research Institute [now the Center for Natural Resources & Environmental Policy], [*The Legal Framework for Cooperative Conservation*](#) (2006).

This user-friendly report describes the legal framework that enables and constrains collaborative partnerships related to federal public lands and resources. Examples include partnerships that have faced legal challenges under the Federal Advisory Committee Act and other statutes.

Other Resources

National Forest Foundation [Conservation Connect](#)

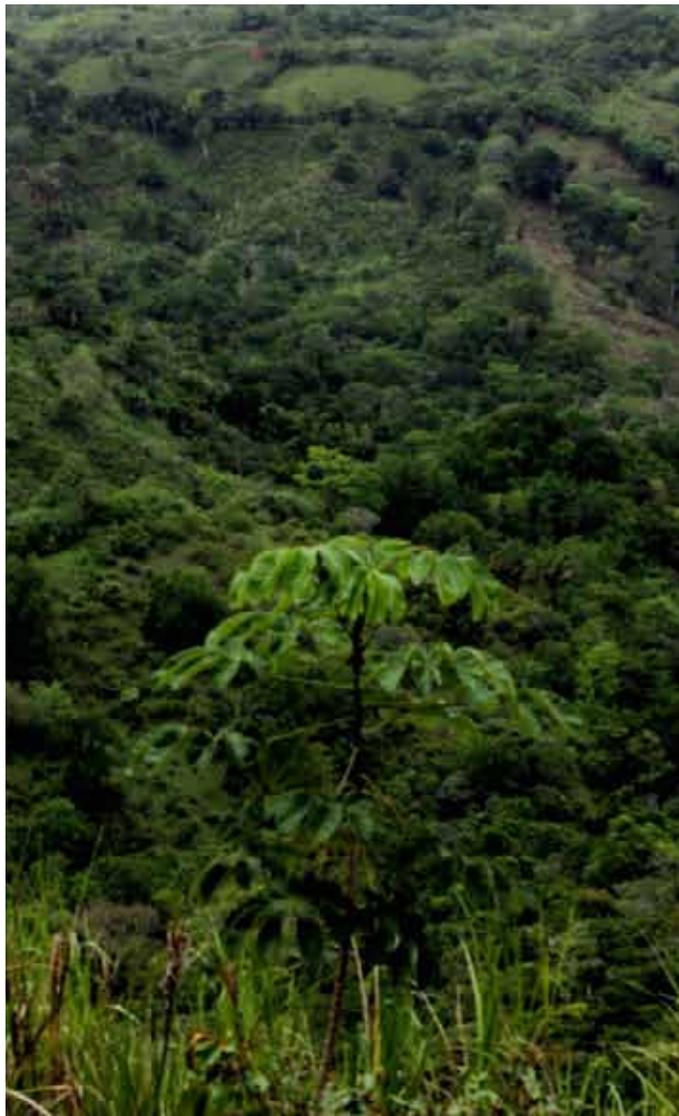
This “learning network for collaboration” offers a wide range of tools for partners, including webinars, technical assistance, best-practice case studies, and facilitation and other capacity-building assistance.

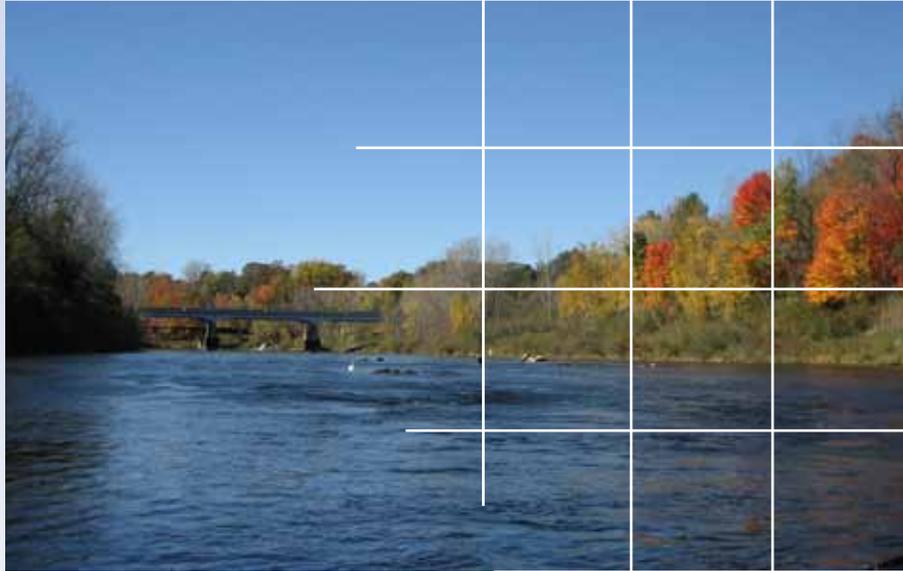
[Practitioners Network For Large Landscape Conservation](#)

This is an alliance of professionals and citizens devoted to leading, managing, researching, advocating, funding, educating, or setting policy to advance large landscape conservation initiatives, some of which include elements in common with public watershed investment partnerships.

Red Lodge Clearinghouse [Collaboration Resources](#)

This website offers a collaboration handbook, collaboration stories, a facilitator directory, and links to sources for technical assistance and training opportunities.





Center for Natural Resources
and Environmental Policy

32 Campus Drive
116 University Hall
Missoula, MT 59812
www.cnrep.org