

Collaborative Planning on State Trust Lands:

A University of Michigan Study

*for the State Trust Lands Partnership Project
of the Sonoran Institute and the Lincoln Institute of Land Policy*



About the Study:

Collaborative planning on state trust lands was identified for further research at the 2004 State Trust Lands Research and Policy Analysis Roundtable convened by the State Trust Lands partnership project of the Sonoran Institute and the Lincoln Institute of Land Policy. In March 2005, under the guidance of Dr. Steven L. Yaffee, a team of eight graduate students from the University of Michigan School of Natural Resources and Environment began conducting a region-wide survey and analysis of eight case studies in which state trust land agencies collaborated with stakeholders in trust land planning and management. The research team conducted 117 on-site and telephone interviews, each lasting roughly one to three hours. Through these interviews, the team answered a set of research questions concerning the benefits, challenges, costs and outcomes of collaborative planning on state trust lands. The goals of this research were to:

- Capture on-the-ground experiences of collaborative planning on state trust lands
- Analyze the advantages and disadvantages of this trust land management approach
- Distill a set of best management practices
- Provide broader recommendations for overcoming barriers to collaborative planning on state trust lands

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HOW DO INTERNAL AND EXTERNAL LEGAL CONSTRAINTS INFLUENCE A COLLABORATIVE PLANNING PROCESS?

A study of collaborative planning on state trust lands is not complete without examining how the law affects both the collaborative process and its outcome. Because state trust land managers must adhere to a constitutional mandate, all collaborative planning efforts on state trust lands inevitably must operate within a legally-defined space. In addition to these “internal” legal constraints, collaborative planning on state trust lands must occur within “external” legal boundaries because trust land management implicates larger land management and natural resource issues. These external legal boundaries include a range of federal, state and local laws and policies.

Both agency and non-agency representatives must consider legal issues when engaging in collaboration. Agency representatives must find a way to collaborate within their existing legal framework and educate other participants about the decision space in which the process may occur. Non-agency participants, in turn, must accept and become comfortable with the leeway provided. According to the Bureau of Land Management and Sonoran Institute *Desktop Reference Guide to Collaborative, Community-Based Planning*, this acclimation process can be challenging for all parties because of the important, but subtle difference between decision-making responsibility and power, which should be shared by all participants, and decision-making authority which an agency legally cannot abdicate. “There is a fine line between empowering the group and making sure that the [legal] sideboards are clearly specified.”¹

The eight cases of collaborative planning on state trust lands examined in this report reveal how internal and external legal constraints vary across states, posing challenges for some while serving as key facilitating factors for others (Table 15-1). This chapter will explore the following themes that emerge from an analysis of the eight cases:

- The effect of preexisting legal constraints on the collaborative process and outcome
- The effect of discovering legal issues during collaboration on the process and outcome
- The strategic use of the law to influence the process and outcome
- The legal flexibility of state trust land management

Table 15-1: Legal Constraints that Affected the Collaborative Process / Outcome across the Eight Cases

	Castle Valley	Elliott State Forest	Emerald Mountain	HAMP	Lake Whatcom	Mesa del Sol	SE NM Working Group	Whitefish	Total
Trust Mandate	✓	✓	✓	✓	✓	✓	✓	✓	8
State Constitution*			✓						1
Clean Water Act					✓				1
Endangered Species Act**		✓					✓		2
Federal Lands Policy & Management Act**	✓		✓				✓		3
Internal Revenue Code	✓		✓						2
Safe Drinking Water Act	✓								1
State Regulation / Legislation	✓				✓			✓	3
Legal Contract***			✓						1
Agency / Attorney General Opinion					✓				1
Courts (Litigation)					✓	✓	✓		3

* Other than trust mandate

** And corresponding regulations

*** E.g., Memorandum of Agreement

EFFECT OF PREEXISTING LEGAL CONSTRAINTS ON PROCESS AND OUTCOME

All collaborative planning efforts, regardless of focus, must operate within certain preexisting legal constraints. Some of these legal issues are known to the participants upon engaging in a collaborative process, whereas others are discovered along the way. This first section explores the effect the former situation can have on the collaborative process and outcome, as exemplified by the cases.

INTERNAL LEGAL CONSTRAINTS

Collaborative planning on state trust lands must take place within the confines of a state’s trust mandate. As discussed in Chapter 3, this legal mandate varies in substance and clarity across states as a consequence of history, as well as agency and court interpretation.² While the cases do

not provide enough data to explore the intricacies of constitutional language across states, they highlight how the existence of a legal mandate influences the process and outcome. The cases also shed light on how variations in mandate clarity and flexibility affect the collaboration.

Effect of Trust Mandate on Process

The presence of a legal mandate can play a role in determining participant involvement in a collaborative process. In the Elliott State Forest Planning Process in Oregon, the mandate was a factor in limiting membership composition of the Steering Committee, as neither the Bureau of Land Management nor the U.S. Forest Service was invited to participate on the Steering Committee, despite having a stake in the process. This decision was justified on the ground that their federal mandates were too different from the State Land Board's mandate. Oregon Department of Forestry Southern Area Director Dan Shults explained:

We consciously did not include the federal land management agencies. The constitutional mandate for the Elliott State Forest is far different from the mission on federal lands in Oregon. We felt that there would be little value added to the process and likely an increase in the time it would take to develop the plan³

In the Mesa del Sol Planning Process in New Mexico, the mandate also was a factor in determining participant involvement. While the Mesa del Sol case did not involve a formal collaborative working group, it involved a number of specific parties, including the University of New Mexico (UNM). A beneficiary of the Mesa del Sol trust lands, UNM perceived that they had a right to be involved in the planning process because of the trust mandate. In fact, the University Board of Regents sued Commissioner of Public Lands Jim Baca early in the process to block the sale of Mesa del Sol property, claiming the sale did not generate enough revenue for the trust. Following that lawsuit, UNM became an active participant with the State Land Office throughout the 20-year planning process.

A state's legal mandate also can determine the stakeholder group's level of decision-making power. Unlike decision-making authority, which a trust land manager cannot legally relinquish, decision-making power can and should be shared with non-agency participants. Perhaps paradoxically, the trust mandate can facilitate this allocation of power, providing a stakeholder group with a means to gain influence over trust land management decisions. For example, in the Emerald Mountain Planning Process in Colorado, the trust land mandate became an important facilitating factor. It has been said that the Partnership was able to successfully influence State Land Board decision making because it embraced the legal constraints imposed by the mandate. Instead of resisting the Board's legal interpretation, the Emerald Mountain Partnership embraced it and focused on helping the Board achieve its goal of revenue generation. The Partnership recognized the Board's need to only accept a trust land proposal if and when it could achieve market value, and no less.⁴

Likewise, in the Castle Valley Planning Process in Utah, the trust mandate was a source of power for the Castle Rock Collaboration (CRC). Pursuant to Utah's trust mandate, the School and Institutional Trust Lands Administration (SITLA) must obtain "fair market value" for trust land parcels. At first, the CRC viewed this legal obligation as a significant obstacle because the group

equated revenue generation with development, which was contrary to CRC goals. However, with the realization that SITLA could satisfy its mandate without pursuing development in the area, the CRC was able to identify conservation initiatives that served both parties' interests and hence increased the likelihood of SITLA approval.⁵

While the trust mandate can empower a stakeholder group, it also can create a division between the trust land agency and other stakeholders. This rift can perpetuate mistrust and hinder progress. Participants in four of the eight cases recounted struggling with this dynamic. In the Houghton Area Master Plan (HAMP) Process in Arizona, for instance, the Arizona State Land Department (ASLD) reportedly was unable to make certain concessions because of its mandate. This limitation frustrated many members of the Citizens Review Committee who viewed the ASLD as distancing itself from the group and collaborative process.⁶ Similarly, the Whitefish Neighborhood Planning Process in Montana struggled to bridge the gap between the Department of Natural Resources and Conservation (DNRC) and the Whitefish School Trust Lands Advisory Committee. This disconnect emerged because of disagreement about mandate interpretation. As discussed further below, the DNRC and Advisory Committee endlessly debated the correct interpretation of the agency's constitutional obligations. Unable to develop a common understanding, the Committee and DNRC remained at odds for much of the planning effort, to the detriment of the collaborative process.⁷ The Lake Whatcom Landscape Planning Process in Washington and the Emerald Mountain Planning Process were two additional cases that encountered this challenge at some point.

Effect of Mandate Clarity on Process

The cases of collaborative planning on state trust lands reveal that trust mandates vary in clarity across states. Comparing the Whitefish Neighborhood Planning Process with the HAMP Process illustrates how this variation can influence collaboration.

Mandate clarity can determine the level of agency involvement in the collaborative process and thereby affect the working relationship between a trust land agency and stakeholders. The HAMP Process is a case that struggled to foster a high degree of collaboration between these two groups. Along with New Mexico, Arizona has the most restrictive trust mandate in the continental United States; the New Mexico-Arizona Enabling Act is the only one to explicitly require that the land granted be held "in trust." As discussed in Chapter 3, this language imposes a specific legal responsibility, known as a fiduciary duty, on the state to manage the land for the "beneficiaries" of the land grant and thus limits the state's management discretion.⁸ This unequivocal obligation limited the Arizona State Land Department's (ASLD) ability to work collaboratively with the Citizens Review Committee (CRC) and other stakeholders in the HAMP process. The most obvious consequence was the ASLD's decision to distance itself from the collaborative group and participate in a resource capacity, instead of as a CRC member. According to ASLD Planning Section Manager Gordon Taylor, serving as a resource helped ensure that the agency would not be held to a final outcome that it legally or philosophically could not support:

We get involved with committees, but it's as a resource person. We've found that if we get put onto a committee ... we're listed as one of the people who has

supported [the final document] even though we may be in objection to certain elements of it ... by virtue of our association with the committee then there's ... tacitly the buy-in ... and that could conceivably be used by the community to leverage the Department on various land issues.⁹

This limited agency willingness to commit frustrated and confused CRC participants. CRC member Phil Swaim noted that it was “difficult with the State Land Department sort of sitting back and saying we'll wait and see what you come up with and see if we support it or not.”¹⁰

In contrast, the Whitefish Neighborhood Planning Process created an Advisory Committee that included the Department of Natural Resources and Conservation (DNRC) as another group member. This greater level of agency participation may be attributable to the fact that Montana's legal mandate was perceived as more ambiguous than Arizona's trust obligation and hence gave the agency more leeway to join stakeholders at a decision-making table. Pursuant to Montana's Constitution, the state has a fiduciary duty to trust land beneficiaries, as well as a responsibility to “maintain and improve a clean and healthful environment in Montana for present and future generations.”¹¹ These dual constitutional obligations have led many Whitefish participants and stakeholders to view the fiduciary duty created by Montana's trust mandate as less clear-cut than those of other states.

By determining the level of agency involvement in a process, mandate clarity also can influence the allocation of decision-making power. In the Whitefish case, Advisory Committee members became equal decision makers with the DNRC because they were sitting at the same negotiating table. Citizens Review Committee (CRC) members in the HAMP case, on the other hand, struggled throughout the process to determine how much influence they had over the Arizona State Land Department's (ASLD) final decision because the agency distanced itself from the rest of the group.¹²

Variation in mandate clarity can shape the collaborative process by influencing the public's understanding and acceptance of the trust mandate. Without a solid grasp of the mandate, a collaborative process often must dedicate considerable time to educating process participants and outside stakeholders about the legal constraints inherent in trust land management. This education process takes away time and focus from substantive issues. The Whitefish Neighborhood Planning Process exemplifies that challenge. During that collaborative process, the DNRC's dual constitutional obligations fueled an ongoing debate over whether the state had to maximize short-term revenue production, or adopt a more long-term management approach that protected its natural assets. Indeed, the DNRC and Advisory Committee spent hours debating the merits of the parties' legal arguments because some believed there was room for interpretation. These discussions took up meeting time that could have been spent discussing substantive planning issues. They also prolonged the process.¹³ Alternatively, the HAMP Process did not have to dedicate much time to stakeholder education. All interviewed participants had a clear understanding of Arizona's trust mandate and accepted the legal limitations within which they were working. This difference could be attributed to the perceived clarity of Arizona's mandate. Citizens Review Committee members did not have the legal space to push against the Arizona State Land Department's (ASLD) interpretation. Accordingly, after minimal education by the ASLD, it did not become an issue.

Effect of Mandate Flexibility on Process and Outcome

In addition to mandate clarity, variation in mandate flexibility across states can influence the collaborative process. Comparing the Castle Valley Planning Process with the HAMP Process illustrates this effect.

The cases show that mandate flexibility can influence group dynamics. In the Castle Valley Planning Process, the flexibility inherent in Utah's mandate helped the Castle Rock Collaboration (CRC) and School and Institutional Trust Lands Administration (SITLA) overcome mistrust and build a productive working relationship. While Utah's mandate requires SITLA obtain "fair market value" for trust land parcels, as discussed earlier, it nevertheless places few restrictions in the minimum sale or lease price of trust lands, in comparison to other Western states. This flexibility enabled SITLA to engage in a negotiated trust land sale, offering parcels to the Castle Valley community for purchase for conservation purposes. This offer demonstrated SITLA's openness to engaging in conservation transactions with the community and consequently helped the parties build trust. According to CRC leader Laura Kamala:

I see all the conservation initiatives we did with SITLA as part of the process, because it was key in our growing relationship with them, in proving that there was a conservation market here for SITLA, and it's viable. We could show up with the money and do what we said we were going to do, even with a better record than a lot of the developers they were working with at the time.¹⁴

On the other hand, the HAMP Process struggled a bit with group dynamics. Unlike Utah, Arizona's trust mandate explicitly requires that the land only be sold or leased "to the highest and best bidder at a public auction" for no less than its appraised value.¹⁵ This provision has been legally interpreted to limit the Arizona State Land Department's (ASLD) flexibility, prohibiting the agency from privately negotiating the terms of a sale or lease with a potential buyer, even if the purchaser is a city.¹⁶ Such rigidity frustrated members of the Citizens Review Committee (CRC) who viewed the ASLD as a difficult partner to work with at times.¹⁷

The flexibility of a trust mandate also can determine what options are available to the group. For the Castle Valley Planning Process, the Utah mandate's flexibility enabled the Castle Rock Collaboration and SITLA to explore creative ways, like a conservation sale, to achieve both the revenue needs of SITLA and the open space interests of the community. The Citizens Review Committee in the HAMP Process did not enjoy the same creative freedom because of the strict legal obligations in the Arizona trust mandate.

Effect of Trust Mandate on Outcome

As the above contrast between the Castle Valley Planning Process and HAMP Process demonstrates, a state's trust mandate can influence the outcome of collaborative planning. Three additional cases illustrate how this legal constraint can play a role in determining the substance of a final product. For example, in the Whitefish Neighborhood Planning Process, perceived ambiguity surrounding the state's mandate provided the Whitefish Advisory Committee with the latitude to push for more trust land conservation. In the end, the Whitefish Neighborhood Plan

allowed for development on only four percent of the 13,000-acre area.¹⁸ On the other hand, the Emerald Mountain Planning Process and Elliott State Forest Planning Process had to be more sensitive to their trust land agencies' revenue generation obligations, tailoring their final plans to explicitly meet revenue goals. Indeed, the Steamboat Springs community spent years developing various proposals for Emerald Mountain in hopes of generating the necessary revenue to receive State Land Board approval before finally suggesting a BLM land exchange.¹⁹

EXTERNAL LEGAL CONSTRAINTS

Because state trust land management involves larger land management and natural resource issues, collaborative planning on state trust lands must occur within "external" legal constraints, in addition to the boundaries delineated by the trust mandate.

Effect on Collaborative Process

Several of the major federal environmental and natural resource laws come into play in the examples of collaborative planning on state trust lands examined in this report. Indeed, in the Elliott State Forest Planning Process and Southeast New Mexico Working Group, federal law played as significant a legal role as the trust mandate. The Endangered Species Act (ESA) was the impetus for a collaborative planning process in both cases: the Elliott Steering Committee was formed to develop a Habitat Conservation Plan (HCP) for the federally-listed spotted owl, marbled murrelet and Coho salmon while the Southeast New Mexico Working Group was formed to create a Resource Management Plan (RMP) Amendment for the BLM and a conservation plan to prevent the need to federally list the lesser prairie chicken and sand dune lizard. Both collaborative processes consequently had to address ESA constraints.

An external legal sideboard like the ESA can be challenging for a collaborative process, which has to adapt to additional timelines and constraints imposed by the federal law. For instance, in the Elliott State Forest Planning Process, compliance with the HCP regulations prolonged and complicated the collaborative effort. The group had to take the time to ensure that officials at each decision-making level retained their authority to assess the process. According to John Lilly, Assistant Director for Policy and Planning at the Department for State Lands:

The Elliott is a different creature because you are trying to get a federal permit at the same time so you have to sequence all this stuff out. How do you leave decision space for the policymaker – that is the Land Board – in a way that doesn't lock them down before the USFWS has tipped their hand as to what they will accept as an HCP? You've got to leave all that decision space mushy so that you're not taking away your policymaker's prerogatives.²⁰

While federal law can pose a challenge for some collaborative processes, it can serve as a key facilitating factor for others like the Southeast New Mexico Working Group. In that process, the threat of either the prairie chicken or the sand dune lizard being federally listed kept many people at the negotiating table, despite different agendas and difficult issues. According to State Land Office and later U.S. Fish and Wildlife Service wildlife biologist Jennifer Parody, the risk of ESA listing was too great to be ignored.²¹ This distinction between the effect of the ESA in the

Elliott State Forest Planning Process and Southeast New Mexico Working Group may be attributable to the fact that the species were already listed in the former case, whereas federal regulation was still uncertain in the latter case. As such, the Southeast New Mexico Working Group had more flexibility than the Elliott Steering Committee in determining the extent of the ESA legal constraints, which became a significant motivation.

In addition to the ESA, other federal laws can determine the working space in which collaborative planning occurs and can affect the process and outcome. These external constraints include: (1) the Clean Water Act, as seen in the Lake Whatcom Landscape Planning Process, (2) the National Environmental Policy Act (NEPA), as seen in the Elliott State Forest Planning Process and (3) the Federal Lands Policy and Management Act, as seen in the Southeast New Mexico Working Group, Castle Valley Planning Process and Emerald Mountain Planning Process.

Often, external legal constraints can hinder collaboration by imposing requirements that must be fulfilled concurrently with the collaborative process. This situation can lead to inconsistent messages and generate mistrust among participants. In the cases studied for this report, this challenge emerged in the context of state law. Both the Whitefish Neighborhood Planning Process and Lake Whatcom Landscape Planning Process struggled with the simultaneous development of an Environmental Impact Statement (EIS) pursuant to the Montana Environmental Policy Act and State Environmental Policy Act, respectively. In the Whitefish case, these parallel processes resulted in mixed messages from the Department of Natural Resources and Conservation, which fostered confusion and perpetuated mistrust between the Advisory Committee and agency.²² Likewise, participants in the Lake Whatcom case were suspicious of the EIS process, viewing it as a stall tactic or an attempt to weaken the influence of the Interjurisdictional Committee because it was initiated late in the process and after a new, more conservative Commissioner was elected.²³ It also has been said, however, that the Lake Whatcom Landscape Planning Process benefited from an increased degree of transparency because the EIS required public meetings and comment.²⁴

Effect on Outcome

External legal issues can affect the outcome of a collaborative process by constraining implementation. For example, Montana law provides that neighborhood plans are to be advisory tools for the Department of Natural Resources and Conservation and State Land Board rather than regulatory documents.²⁵ Similarly, in Arizona, the Arizona State Land Department is not legally obligated to implement the HAMP or require that state trust land buyers act within the Plan's parameters.²⁶ These legal constraints not only hindered the process in the Whitefish and HAMP cases by limiting the public's decision-making power, but also raise questions about the future implementation of the planning documents. In both cases, many participants remain in wait-and-see mode, watching how implementation efforts unfold in the future.²⁷

EFFECT OF DISCOVERING LEGAL ISSUES DURING COLLABORATION

Legal constraints may exist at the outset of a collaborative process, but that does not guarantee that participants are aware of them. The Castle Valley Planning Process exemplifies how collaboration can be affected by discovering preexisting legal sideboards during the process.

The town of Castle Valley engaged in collaborative planning with the Utah School and Institutional Trust Lands Administration (SITLA) without understanding the legal space in which the process could unfold. Specifically, at the beginning of the process the town was unaware that Utah law requires all local governments to (1) approve planning activities prior to initiating development and (2) maintain updated ordinances.²⁸ Upon learning of these pertinent preexisting constraints, the town grew concerned about potential conflicts of interest and shifted its focus to what it considered more pressing obligations. The town consequently distanced itself from the collaborative process and ultimately refused to sign the final planning agreement.

EFFECT ON PROCESS

Discovering legal constraints while engaged in collaboration can hinder the process. As was the case in the Castle Valley Planning Process, this discovery can force an important stakeholder to abruptly restrict its involvement, which can hurt group dynamics. According to Castle Rock Collaboration (CRC) member Dave Erley, once the town distanced itself from the collaborative process, the atmosphere “became much more tense and sometimes adversarial.”²⁹ The town’s relationships with the community and SITLA also suffered. Some questioned the town’s good faith, while others viewed the ordinance revisions with skepticism, seeing them as a stalling technique more than a necessity.³⁰ Furthermore, communications between the town and SITLA broke down, as the agency believed that the town breached its commitment to collaboration by making the agency go through the new ordinance process.³¹

The mid-process discovery of legal issues can reveal complexities that require reevaluation and even revision of agreements and products. This review involves time and resources and can jeopardize certainty. For example, in the Castle Valley case the town learned late in the process that its records for proving the town’s water rights were deficient and hence not in compliance with Utah law. This realization complicated the planning process because the CRC and SITLA had been developing a planning contract assuming that a developer could use the town’s water. The emergence of this new legal constraint left less room for that assumption.³² Moreover, the town’s realization that the U.S. Environmental Protection Agency had designated Castle Valley’s aquifer as a “sole source aquifer” pursuant to the Safe Drinking Water Act forced late revision of parts of the plan.³³

EFFECT ON OUTCOME

Discovering legal constraints during the collaborative process can influence the final outcome by forcing the group to reevaluate how to achieve its desired end result. This reassessment can result in a comparable, if not better, final outcome. Yet, by choosing a new path midway through the process, the group may also have to sacrifice certainty. These outcome tradeoffs emerged in the Castle Valley Planning Process. As mentioned, the town of Castle Valley declined to sign the

planning contract with SITLA upon learning that it was not in the town’s best legal interest to participate in the collaborative effort.³⁴ The CRC consequently had to look to other options to achieve its trust land conservation goal, ultimately pursuing a land exchange with the BLM. While this avenue may help the group achieve its objective, the future remains unclear. Securing a signed planning contract between the town and SITLA, on the other hand, would have provided all parties with greater certainty.

STRATEGIC USE OF THE LAW TO AFFECT THE PROCESS AND OUTCOME

While the law can pose significant challenges to a collaborative process, the cases reveal that in some situations legal constraints can serve as a key facilitating factor (Table 15-2). Many of the cases consequently involved a strategic use of the law to initiate or influence the process, define issues, create options or shape the final outcome.

Table 15-2: Strategic Use of the Law across the Eight Cases

	Castle Valley	Elliott State Forest	Emerald Mountain	HAMP	Lake Whatcom	Mesa del Sol	SE NM Working Group	Whitefish	Total
Initiate Process					✓				1
Influence Process: 501(c)(3)	✓		✓						2
Influence Process: MOA			✓						1
Influence Process: Legislative Change	✓		✓						2
Influence Process: Legal Action					✓	✓	✓		3
Define Issues					✓				1
Create Options	✓		✓						1
Shape / Realize Outcome				✓	✓			✓	3

INITIATING THE PROCESS

Stakeholders can use the law to define a space for collaborative planning to take place. The Lake Whatcom Landscape Planning Process exemplifies this tactical approach. Unlike the other seven cases examined in this report, the Lake Whatcom Process arose in response to a state legislative mandate for which concerned community members lobbied. The law that created the Lake

Whatcom Landscape Planning Process required the Department of Natural Resources (DNR) to collaborate with a stakeholder group. The legislation also specified minimum stakeholder involvement.³⁵ These legal constraints thus enabled alarmed residents and other stakeholders to participate with the trust land agency in the review of DNR forest management plans within the Lake Whatcom watershed.

Some have questioned, however, whether the Lake Whatcom Landscape Planning Process truly was collaborative because of its legislative mandate. According to Bellingham, Washington representative Bill McCourt, “it wasn’t a group getting together because they all had a common interest. DNR had a gun to their head.”³⁶ The legislative mandate has also been attributed to perpetual mistrust between the DNR and other stakeholders. Yet, these challenges are not unique to the legal circumstances surrounding the Lake Whatcom case. During the Whitefish Neighborhood Planning Process, many within the Department of Natural Resources and Conservation similarly felt forced into the collaborative effort as Whitefish residents petitioned the State Land Board for a more inclusive process. Indeed, Advisory Committee facilitator Janet Cornish has resisted calling the Whitefish process collaborative because she felt that the agency was “strong-armed” out of its role by the Whitefish community.³⁷ Moreover, as discussed in Chapter 19, mistrust between trust land agencies and the public characterized many of the cases examined in this report.

It thus remains unclear from the cases whether a legislatively-mandated collaborative process is a contradiction in terms, or if it simply provides another avenue to collaboratively manage trust lands.

INFLUENCING THE PROCESS

There are a variety of ways in which stakeholders can strategically employ the law to influence a collaborative process. The legal mechanisms used in the cases to sway the process included: (1) incorporation as an Internal Revenue Code (IRC) § 501(c) (3) organization, (2) drafting a Memorandum of Agreement, (3) legislative change and (4) litigation.

Incorporation as an IRC § 501(c) (3) “charitable organization” secures a group tax-exempt status and enables the group to accept contributions in exchange for tax deductions.³⁸ The legal personality acquired through incorporation enables groups to fundraise and thereby gain influence over the decision-making process. Both the Emerald Mountain Partnership and the Castle Rock Collaboration (CRC) secured 501(c) (3) benefits during the Emerald Mountain Planning Process and Castle Valley Planning Process, respectively. The Emerald Mountain Partnership independently incorporated as a charitable organization, whereas the CRC became a branch of the nonprofit group Utah Open Lands to use their 501(c) (3) status. With this fundraising capability, both the Partnership and CRC were able to build some support for their respective efforts. Incorporation as or partnership with a 501(c) (3) organization also probably enabled them to gain some influence over the decision-making process because revenue generation was a key objective in both cases.³⁹ This incorporation also likely enabled the Partnership to enter into contracts such as the Memorandum of Agreement while avoiding any personal liability for individual participants.

Developing a Memorandum of Agreement (MOA) is another way stakeholders can tactically use the law to influence collaborative planning. While not necessarily a formal legal constraint, an MOA is a contractual agreement within which a collaborative process must operate. This instrument can increase the credibility of a party not only because of its contractual nature, but also because it allows for the drafting of a very specific agreement. In the Emerald Mountain Planning Process, the Emerald Mountain Partnership used an MOA to influence the planning effort. Specifically, the Partnership submitted a detailed MOA that provided that the Partnership would purchase the trust land parcel at market value within five years based on a current appraisal. Bidding on the parcel with an MOA was a key facilitating factor for the Emerald Mountain process. It greatly increased the Partnership's influence on decision making by demonstrating to the State Land Board that the group was a serious bidder. The MOA also bought the group time to consider various options and strategies.

Legislative change is a third legal strategy to influence the collaborative process. The Emerald Mountain Planning Process illustrates this approach, as Colorado Governor Roy Romer proposed and was able to pass a ballot initiative to amend the state constitution. "Amendment 16" requires the State Land Board to work with local governments and comply with local land use regulations and plans. By creating a Stewardship Trust, the amendment was misunderstood by some to provide the Partnership with a way to protect trust land parcels in perpetuity. While this perception was mistaken (because the Stewardship Trust in fact holds land parcels for eventual sale), Amendment 16 and its focus on cooperation with local communities nonetheless helped foster collaboration between the Partnership and State Land Board.⁴⁰

Likewise, the town of Castle Valley considered legislative change just prior to the initiation of the Castle Valley Planning Process. Fearing that the trust lands within its municipal limits would be sold and developed, the town proposed amending its zoning ordinance to rezone trust land parcels from one unit per five acres to one unit per 40 acres, which would decrease the allowable density and thereby stymie additional development.⁴¹ This legislative proposal troubled the Utah School and Institutional Trust Lands Administration (SITLA), which had legal objections to the lack of notice provided, as well as the town's authority to engage in trust land rezoning. SITLA also saw the amendment as contrary to the spirit of the pending collaborative process.⁴² Despite this negative reaction, the proposal probably helped motivate the town and SITLA to ultimately come together to collaborate on the proper management of the local trust lands.

Finally, stakeholders can strategically influence the collaborative process by threatening or carrying out legal action. Potential or actual litigation can benefit the process by motivating parties to stay at the table and even realizing substantive objectives. Yet, it also can pose significant challenges, straining relationships and jeopardizing the durability of the group. The Lake Whatcom Landscape Planning Process exemplifies the tradeoffs associated with legal action. In an effort to force the Board of Natural Resources' approval of the final Landscape Plan, Interjurisdictional Committee members threatened to sue the agency. Likewise, the city of Bellingham, Whatcom County and the water district filed a lawsuit to force the Board to adopt the plan. While the lawsuit eventually was dropped because the Board soon approved the plan, this legal recourse motivated the Department of Natural Resources (DNR) to stick with and complete the planning process. On the other hand, the threat of lawsuits also put the DNR on the defensive and perpetuated mistrust between the agency and other stakeholders.

Concurrent with the inception of the Southeast New Mexico Working Group, several environmental groups similarly threatened legal action (in the form of a 60 day notice-with-intention to file Area of Critical Environmental Concern petition) with the BLM. Similar to the Lake Whatcom legal action, the environmental groups agreed to drop the petition until the Working Group had time to work out a plan. While it brought trust land and prairie chicken management issues more to the forefront of agencies' agendas, this notice also left feelings of animosity and mistrust in its wake.

Litigation also played a role in the Mesa del Sol Planning Process, as briefly mentioned earlier. Seeking higher compensation from the early auction of Mesa del Sol property, the University of New Mexico Board of Regents sued Commissioner of Public Lands Jim Baca to block the sale. This strategic use of the law gained the Board a greater percentage of the sale. Moreover, this legal action motivated the State Land Office (SLO) to devise a final development plan that would satisfy the beneficiary. However, the litigation also posed significant challenges for the collaborative process moving forward. It strained relationships, generated negative press for the SLO and created a level of uncertainty within the private sector as to whether Mesa del Sol was a safe investment.

DEFINING THE ISSUES

Collaborative planning participants can turn to the law to define issues and thereby enable the process to move forward. The Lake Whatcom Landscape Planning Process illustrates this use of legal constraints. In an effort to prevent further criticism of forest practices and additional logging restrictions in the Lake Whatcom watershed, Commissioner of Public Lands Doug Sutherland sought formal opinions from the Department of Health and Department of Ecology regarding the degree to which Department of Natural Resources (DNR) forestry practices contributed to pollution in the lake. The opinions affirmed the sufficiency of existing state forest rules, including the provisions of the 2000 Lake Whatcom bill, and thereby provided the certainty necessary to focus the Interjurisdictional Committee's energy on other pertinent issues.

Similarly, the citizen members of the Interjurisdictional Committee sought legal clarification via an Attorney General opinion when the group became bogged down in a debate over the appropriate relationship between the DNR and Committee. The opinion held that the Committee was to have an advisory role, which clarified the process boundaries and enabled the group to focus on more substantive issues.⁴³

CREATING OPTIONS

A fourth trend that emerges from the cases concerns using the law to create options. Ironically, introducing new legal constraints can provide stakeholders with the flexibility to realize their trust land management goals. Both the Castle Valley Planning Process and Emerald Mountain Planning Process used this tactic by initiating a land exchange with the BLM. These potential land exchanges forced the Castle Valley Planning Process group and Emerald Mountain Partnership to work within the boundaries of a federal land agency's mandate, as well as the Federal Lands Policy and Management Act and corresponding regulations, which guide BLM land exchanges.⁴⁴ For the Castle Rock Collaboration (CRC) and School and Institutional Trust

Lands Administration, the land exchange provided a way to complete the planning effort, since the town of Castle Valley had distanced itself from the original planning contract. Many predict that this proposal will enable all participants to achieve their original goals, as explained by CRC leader Laura Kamala: “I’m very grateful that everything we did evolved into this wonderful opportunity for the land exchange ... that it went in that direction.”⁴⁵

Whereas the CRC pursued the BLM land exchange on its own initiative, a local BLM employee first suggested the option to the Emerald Mountain Partnership. Nevertheless, upon learning of this option, the Partnership proactively petitioned the State Land Board for its “blessing.”⁴⁶ This land exchange proposal and accompanying legal constraints triggered fervent opposition from some residents outside of Steamboat Springs who did not want to lose nearby BLM lands. Most participants, however, share the enthusiasm of Castle Valley participants – they think the exchange will be a creative way to achieve both the multiple-use management vision for the Emerald Mountain parcel and State Land Board’s revenue goals.⁴⁷

SHAPING OR REALIZING THE OUTCOME

Finally, participants in collaborative planning on state trust lands often create or need to create legal constraints to shape or realize the outcome. For example, legal action continues in the Lake Whatcom case, as Skagit County and the Mount Baker School District filed suit against the Department of Natural Resources (DNR) challenging the legality of the Lake Whatcom Landscape Plan. The pending lawsuit alleges that the original state legislation, which mandated the formation of the Interjurisdictional Committee, as well as the DNR’s Landscape Plan, benefited the local community at the expense of trust beneficiaries elsewhere in the state. Time will tell whether the development of these additional legal constraints will influence the final outcome of the planning process. For now, the DNR is moving forward with implementation of the Landscape Plan, enjoys greater community support than before and had its first timber sale approved since the 1999 legislation.

Unlike the Lake Whatcom Landscape Planning Process where litigation threatens future implementation, new legal boundaries need to be defined to realize both the Whitefish Neighborhood Plan and the HAMP. For the Whitefish Neighborhood Plan, a legislative change is needed to explicitly allow the Department of Natural Resources and Conservation (DNRC) to issue conservation easements to third parties like private property owners. Such an amendment is necessary because conservation easements are a key tool identified in the Neighborhood Plan to help the community and DNRC conserve local trust land parcels while still generating money for the trust.⁴⁸ Currently, many argue that state law limits conservation easements to agreements between the DNRC and the Department of Fish, Wildlife and Parks, as well as two specified nonprofits.⁴⁹ The DNRC pushed for this legislation in April 2005, but the bill failed to gain the necessary support. The agency plans to push for similar legislation in the future.⁵⁰

Likewise, to implement the HAMP, the City of Tucson must amend its Land Use Code to establish a Planned Community District zone. This new zoning classification would allow for the implementation of the new planning concepts identified in the HAMP. The City expects to present the new zoning classification to the Mayor and City Council in the spring of 2006 for approval.⁵¹

LEGAL FLEXIBILITY OF STATE TRUST LAND MANAGEMENT

As explored in the previous sections, collaborative planning on state trust lands inevitably implicates a variety of legal issues. Several case study participants mentioned, however, that collaboration is actually easier in the state trust land context than other natural resource contexts because trust land agencies are afforded greater legal flexibility than other state and federal agencies. Indeed, other studies of collaborative environmental problem-solving have found that laws like the Federal Advisory Committee Act (FACA) and the National Environmental Policy Act (NEPA) tend to be inflexible, emphasizing agency control and locking agency and non-agency participants into set methods of participation. These legal constraints consequently can hinder the creativity necessary for collaboration.⁵² Moreover, they can limit who is invited to participate in the process, as was seen in the Elliott State Forest Planning Process in the context of the Endangered Species Act.

For example, former Colorado Land Commissioner and Emerald Mountain Planning Process participant Charles Bedford has said that his agency had much more flexibility than federal agencies in choosing to collaborate with local communities: “State governments have so much more flexibility and leeway, even within the fiduciary mandate. I mean, every time you convene a group on the federal level, you have to go through the FACA process, which ... makes for a very stiff kind of meeting.”⁵³ Utah School and Institutional Trust Lands Administration (SITLA) Assistant Director of Planning and Development and Castle Valley Planning Process participant Ric McBrier agreed and said that SITLA “absolutely” is more flexible and able to collaborate more easily with local communities than federal agencies.⁵⁴ According to McBrier, “if a professional manager [at SITLA] can see that [a collaborative approach] is in the beneficiaries’ best interest ... then theoretically we should be free to do it.”⁵⁵

On the other hand, some participants of the Mesa del Sol process sought additional legal structure, like a NEPA process, to make the public input process easier and more comfortable for public interest groups.⁵⁶ This desire for more clearly defined legal boundaries and organization could stem from the fact that the Mesa del Sol case did not involve an official working group or formal collaborative process.

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